No. 14831

Supreme Court of Illinois

Graham et al

vs.

Holloway

71641 7

IN THE

SUPREME COURT OF ILLINOIS.

THIRD GRAND DIVISION—APRIL TERM, A. D. 1866.

ARCHIBALD Y. GRAHAM and DAVID GRAHAM,

v.

ROBERT HOLLOWAY.

Appeal from Warren.

REJOINDER OF GEORGE P. HARDING,

Attorney for Appellant,

To Reply, &c., of GOUDY & CHANDLER,

Attorneys for Appellee.

Beach & Barnard, 14 South Clark St.

INDEX TO THE ARGUMENT OF GEORGE F. HARDING.

General Statement of Case,.....pages 1 to 5
Statement of Pleadings and Proceedings in *Alexander* v. *Grahams et al.*, ... 6 to 12
Table of Dates of Leading Facts, ... 12
Pleadings in Present Suit,.....13 to 20
Evidence " " 20
Decree " " 20
Did Grahams abandon their judgment at law, and claim in their Cross Bill the lands as purchasers?.....25 to 36
Did Grahams get title by virtue of such claim of title as purchasers?..39 to 44
If Grahams did abandon said judgment, and did claim said land as purchasers, and did thereby get said title, is the appellee entitled to have the judgment declared satisfied?..... 45
The case made by the Bill, what is it?.....17, 18, 22, 23, 24, 25, 46, 47
The true construction of the Cross Bill is, that it is a Bill to enforce the judgment at law, and claim for improvements, *as a vendee's lien*, ...25 to 36
The paragraph of the Cross Bill construed by appellee as a "claim of title to the land as purchasers under said contract," has no reference to the relation of Grahams and Holloway to the lands, but to the relative relations of Grahams and the co-defendants thereto,.....27 to 30
The fair interpretations of the special prayer for a conveyance from Alexander in the event of payment,.....31 to 36

NOTE.—I have prefixed this index to the rejoinder, in order that the Court may be able to examine the argument with more ease.

Their possession was explained by the judgment at law putting an end to said contract..... .90 to 91

By reason of the money expended for improvements, *that possession* of Grahams *was not beneficial but injurious*, and so constituted no objection to rescision in equity..... 91

The judgments of third parties and the litigation by Alexander enforcing his lien, *deprived Grahams of that quiet and repose* in the use and enjoyment of the land *for which they contracted* with appellee 91

The court will not give specific performance unless it is clearly shown to be entirely equitable and right and will run no hazard of doing injustice, "but will do infinitely more wisely in leaving the party to his old remedy by action for damages;" and if there be circumstanees rendering it unjust that the court should act, it will refrain from acting; and much more readily will the court listen to an objection *against* a *vendor*, who is seeking specific performance, because of necessity the vendor *can get complete relief at law"* .....92 to 93

The appellee lost his right to retain the purchase money of Grahams, because he would not perform the contract by which he got possession of that money, viz.: to make to them a title to the land. He lost his right to the land, because he allowed it to be sold for an incumbrance which he was doubly bound to pay. Grahams own the judgment, because they obtained it fairly by reason of the failure of appellee to give them the title for which he had got their money. Grahams own the land, because they bought and paid for it at a fair sale at a public vendue, under the order of a competent tribunal.....94 to 95

The real question, shall the sale of the Master, or the sale of the appellee stand? Do the vigilant and contract-observing appellants, or the negligent and contract-breaking appellee, deserve the favor of the court? *Shall the sanctity of contracts be steadily maintained, or encouragement be given to this loose and dangerous doctrine which allows a person to violate his most solemn engagements, and then to draw the injured party into a controversy concerning the amount and value of the benefits received* 94, 95, 96

fact, but are only *legal propositions and legal inferences* that are *stated in the argument, to be grounded upon admitted and carefully stated facts.*

To question the law laid down, or the soundness of the legal conclusions drawn from conceded facts, is a legitimate line of attack; and the court can readily determine the justice of such criticisms. But after "a defective abstract was filed, and argument made by Mr. Frost;" and after an amended abstract, claiming to be a complete abstract of the record, is prepared and filed by appellee; and after our argument setting out in detail the facts and pleadings; after all this, the learned counsel for the appellee wait more than five months, and replying in this general way, assail the "fairness" of that argument, protest against its statement of facts, assert that "*nothing* less than the whole record is sufficient to inform the court of facts," and without presenting a second amended abstract, and *without making a single issue as to a single fact alleged in the argument*, the learned counsel rest from their labors, saying: "I have endeavored thus far to point out *a few of the errors and misstatements* of Mr. Harding in his voluminous argument. I might continue, but it is unnecessary. *When the case is relieved from sophistry and misstatement* of fact, we will find ourselves returned to the original questions presented in the briefs filed before the argument of Mr. Harding."

Now, in what a predicament is the court and opposing counsel left; the learned counsel have fully disturbed the waters, so far as vague statements will serve to create distrust and doubt; but they leave the subject with scarcely an effort to relieve the court, asking "your honors to refer to the record itself!"

It is unjust to the court, and unjust to counsel, to deal thus in loose and unfounded charges.

To withhold light, and, at the same time, to deny the light we have, is to shroud the whole case in night. It seems impossible,

that counsel of such eminent fairness, with such faith in the justice of their cause, should *intend* to mislead the court and confuse the case; yet, it is submitted, the course taken in this "reply" justly subjects them to the suspicion that they *design* to cloak this case in the darkness they have created.

I.

This bill is a nondescript. It is an anomaly in jurisprudence; so indefinite that it rivals in the number of the different interpretations of which it is susceptible, the colors of the chameleon. But if a case can at all be referred to a head of equity, which is without equity, this bill is at bottom nothing but a bill by which the complainant seeks the specific performance of a contract. Turn it as you will, it amounts to this *or nothing*. True, having a judgment against him for the purchase money, (as the vendor claims), instead of asking that the purchase money be *paid*, the vendor reaches the *same end* by praying that the collection of that judgment be restrained. Having *no title to convey*, he cannot *tender a conveyance* as performance of the contract, but he reaches the same end by alleging that his vendees have got the title by virtue of their contract. He says, his vendees have always had possession; and that upon their receiving a sum they have paid out to save the title, with perhaps covenants of title from him, the contract will have been substantially performed.

The appellee offers to make the deed required by the contract; he offers to clear the title from incumbrances to comply with the contract; and asks that his vendees shall leave the purchase money in his hands. Is not this, if not in form, yet, in substance tantamount to the ordinary relief which a vendor, enforcing specific performance, would ask? He takes the facts as he finds them; insists that the contract is the law that controls them; and asks the court to adjust the equities of the parties, upon the basis that the contract is in part, and should be, altogether, performed.

Yet the learned counsel utterly repudiate such a construction; this bill is anything you please but a bill for specific performance!

The truth is, they do not wish their case tested by the principles that control a court of equity in granting or refusing specific performance of a contract; for, as the argument proves, and the reply tacitly admits, there is no principle upon which they can get the relief they seek.

To see that no other view can be maintained, it is only necessary to look at this reply. On page 8, in the course of an argument intended to show that specific performance is not the object of this bill, after asserting that the vendees had performed the contract on their part by paying the purchase money, and had obtained the bill by discharging the incumbrance, and thus the title was conveyed direct from Alexander to Grahams; the learned counsel says: "so *that part of the* CONTRACT HAS BEEN PERFORMED. All that *remained* to be done between the parties, to COMPLETE THE TRANSACTION *between them*, was for Holloway to refund the money paid to remove the incumbrance and save the title. This the complainant in the bill offered to do, and before the decree was rendered, did do."

Something remained to be done between the parties to *complete the transaction* between them when this bill was filed! What is this conclusion of the learned counsel, but an admission, that the object of the bill was precisely this: to have the court permit the vendor to *complete the contract* and then to declare it performed, and enforce the legal sequence that he should keep the purchase money. On what can he rest such an equity, but upon the broad basis that the contract is alive and he has the right to compel its performance? It is not indeed that the vendees are bound to *do* more than this, viz., withhold their hands from the purchase money; but it is, that he (the vendor) be permitted to remove an incumbrance, and to make the needed conveyance with the appropriate covenants *so as to perform the contract.*

They say it is merely a bill for an injunction to restrain the collection of a judgment fairly obtained, but that has become inequitable by subsequent acts of the judgment creditors. What are these acts? The creditors have bought certain lands of the Master, which they once bought of their debtors! This is all they claim, save that the creditors improperly kept possession of their debtors' lands after their contract was at an end; made some unfair claims in a cross bill; got some unjust provisions in a decree; but neither their unlawful possession, nor the unfair claims, nor the unjust provisions, are shown to have *injured* in any way the debtors, or in any way to have promoted their purchase! But even if they did, what then? Why, the purchase,—the unfair and unjust thing—should be set aside; *the unjust act undone.* The sale which was unjust should be set aside; but not the judgment which was just.

Surely, this is clear, unless it can be shown that, in consequence of an unjust act, judgment creditors can lose their rights to a just judgment, and thereby acquire rights to the land of their debtors.

But this is also still more clear, viz., that no right to cancel the judgment can be predicated upon any other ground, than that the contract, merged in the judgment, was revived by the unjust purchase; and that this contract when fully performed by proper conveyance and payments from the vendors should be declared specifically performed. "Injunction," says Hilliard, "is often applied for in connection with contracts for the sale and purchase of real estate. * * The remedy is more explicitly invoked in connection with the claim for specific performance." Hil. on Inj. 489. "The court," says Sugden, "will enjoin either party not to do anything to the injury of the other." Sugd. V. & P. 289.

Here, the power of the court to restrain by injunction the collection of this judgment is "explicitly *invoked in connection with the claim for specific performance,*" and is based on a just claim for specific performance of the contract of purchase, or it *has* no basis.

II.

But is the appellee better off in the new view his counsel take, that this is a bill to "declare the contract performed?" Surely, it cannot be pretended that, without the payment of this money, and without the offered deed and covenants, the contract was performed!

If so, then a contract can be performed without anything done upon the part of the vendor in performance of his covenant; a contract with mutual and dependent covenants may be performed by the acts of one of the contracting parties alone!

But the appellee charges, that the vendees did not intend to perform said contract, but to "evade the obligations of the decree and secure its benefits, they were guilty of a fraud and a trick," (page 5 appellee's argument); and again he says (see reply page 17) "Will equity allow Grahams to reap the full benfit of the decree and avoid all its burdens by presenting *a sham bidder?*"

This, too, is the substance of the bill (see pages 9 and 10 of record).

But, can a contract be *performed* by the act of a party *who does not intend to perform it?* No doubt, it is true, "that a party is to be *presumed* to do, that which he is bound to do; and that if he has done anything, he has *done it in pursuance of his obligation*," (Lord Brougham, Ch., *Tubbs* v. *Broadwood*, 2 R. & M. 487; but here it is not left to that presumption, but it is charged, conceded, and asserted (as well as proved by our sworn answers), that what the vendees did, was *not intended* to be in performance of their obligation.

III.

But the truth is, the purchase of the Master could not be a performance by the vendor; at most he might claim that thereby his

contract was "satisfied." "The distinction between performance and satisfaction is, that the former is the performance in specie of the agreement; the latter is where the contracting party has done something in lieu of the thing contracted for," (Batten on Spec. Perf., p. 279 et seq. Fry on Spec. Perf., p. 368, note 2). "In the case of satisfaction, that is, something which neither at law nor in equity is an actual performance of the contract, unless it is presumed from circumstances, or proved, that the *intention* was that the benefit should be taken in satisfaction of the obligation, it will not be assumed," (*ib*).

Now, neither Grahams, nor Holloway, nor the Master, did any act which it is either charged or proved, was done with the *intention* of discharging the obligations of the contract of purchase. When did Holloway and Boggess *consent* that the purchase of the Master should be a payment on their account which they would refund? There is no evidence of such consent, nor is it even charged that they did assent to such payment.

But an act can neither be in performance or satisfaction, unless it be first premised that there was an *obligation to do something*, which such act discharges.

Now, it is conceded that the contract was merged or rescinded by the judgment (pp. 10 and 11 reply). The cross bill, the act of one, could not renew the contract against the will of the other party. The court by a decree cannot make a contract for parties, against the will of either. Is it charged or proven that the appellee ever consented to renew the contract? The exact reverse is true; he never consented unless by this bill, and his *co-vendor* has never *consented at all* to the revival or renewal of said contract, nor to the purchase by Lafferty. How is *he* (Mr. Boggess) estopped to-day to deny the validity of that decree and the title under it? Was that act in discharge of that obligation or not; was that contract alive or dead; was that purchase a payment or not; were ALL to be just as complainant willed? Could he seek to

set them all aside, by motion and upon error, and then say that these acts, valueless without, worthless without, shall have a character such as his will and consent can alone give them? What then becomes of that *mutuality*, so essential an element of a contract? Or, if it be replied, that the contract is now mutually binding, what virtue is it in this negligent contract-breaking vendor that entitles him in the eye of a court of equity to bind his antagonist when and how he chooses?

IV.

But in this reply, the learned counsel, apparently unwilling to plant his case upon any definite principle or specific proposition (p. 10), after saying that the judgment was fairly obtained, declares: "But the *events which occurred afterwards* rendered it unjust and inequitable to collect the whole of the judgment." What are these? The appellants appeared in the suit of Alexander, and asserted in and by a cross bill, as well as their answer to the original bill, that they were purchasers of the lands from Holloway and Boggess, and as such were entitled to the title when the balance due Alexander was paid."

Now one sufficient answer to this is, that it is, in fact, untrue that Grahams claimed that they had the rights of purchasers, and as such, were entitled to the title from Alexander. (See pp. 25 to 38 of argument). The cross bill contains no language giving any color for this statement; the paragraph in which Grahams use the language of title, referring obviously to the relations of the judgment creditors to each other and to the land. This is shown both by the paragraph and the whole context. Any other construction is entirely, flagrantly, inconsistent with the rest of the bill.

The language of a pleading, often merely the flourish of the solicitor, should not be interpreted with more strictness and severity than a deed or will, which is the solemn and deliberate act of the party himself.

"The law doth not break the words in pieces; exposition must be upon the whole instrument, *ex antecedentilus et consequentibus*, and according to the reasonable sense and construction of the words. The scope and end of every matter is principally to be considered; and if the scope and end of the matter be satisfied, then is the matter itself and the intent thereof also accomplished. (Plowden 18; 8 East. 8 9). The intention of the parties is not to be collected from a *single word* in a deed, but from the entire context. "The law," says Hobart, "being to judge of any act, deed, or bargain consisting of divers parts containing the will and intent of the parties, all tending to one end, doth judge of the whole, *and gives every part his office* to make up that intent, and doth not break words in pieces," (Hobart 275).

"The most general words of a deed are narrowed and restrained by the apparent object and intent of the parties as collected from other parts of the same deed. (Shep. Touch. 69.)

"If the words of a covenant appear to be contrary to the intent of the covenant which is otherwise evident, such intention must be followed rather than the words." (Domat. vol. 22, xi.)

The most casual examination of the context of this cross bill will show that the intention of the pleader is to claim that the judgment upon the contract of purchase has the force and priority of a specific lien upon the premises.

V.

But the counsel says (p. 13 of reply), that "the cross bill fails to aver the issue and return of an execution *nullą bona*, which is indispensable to the maintenance of a creditors' bill. Again, the dates of the judgment of the other defendants who were creditors of Holloway and Boggess were not given, nor the times when the causes of action on which they were rendered, accrued. The entire

want of these elements proves that the cross bill is not a creditors' bill to enforce a judgment lien."

Now the answer to this is, 1st. This was not a creditors' bill, but a bill to enforce the lien of the judgment at law upon the contract of purchase as having the force of a vendees' lien. For this reason the contract was set out, the possession and improvements and taxes paid under it, the judgment upon it, the insolvency of the debtors which made it necessary to retain possession to preserve the lien. For the same reason is the averment that the lands are worth more than Alexander's claim, in order to show that it is proper to enforce the lien, and improper that Alexander should have the strict foreclosure he asked. Then it is shown that the judgment is in full force and in great part unsatisfied. And next, is averred, in language a little too broad, the superiority of this lien over all other claims but Alexander's claim. Finally comes the prayer asking for a decree, not for the enforcement of the contract which is rescinded and annulled, but for the judgment, and that the land be sold to pay it, and enough being thus applied, NO CLAIM IS MADE FOR THE SURPLUS, which surplus would have been the vendee's had they sought to enforce the contract. Lest the property be strictly foreclosed for Alexander's benefit, or his debt paid and the property escape their lien, they ask a special decree that they shall in such case be preferred.

2d. The learned counsel assumes that these co-defendants were judgment creditors. Where is the proof of this? Alexander describes them just as he describes Grahams—as parties having some claim or interest in the premises. They make no answer, but are either defaulted before the cross bill is filed, or the bill is dismissed as to them after the cross bill is filed, and there is no proof what their interests were; but it is apparent that they either had no interests, or that they did not consider their interests worth defending.

3d. But concede that they were judgment creditors, as complainant in his bill avers; then as they were made parties by Alexander

to his original bill in March, 1861, their judgments were older in date and probably a prior lien to the judgment of Grahams, which was rendered in November, 1861, if that judgment had not the force of a vendee's lien; so that a creditor's bill could not have been maintained at all, and nothing could aid Grahams except to show a higher claim, a lien as vendees; and the true remedy for Grahams to secure their judgment was to show the date of their purchase and of their possession, which fixed the priority of their judgment long prior to their vendor's insolvency, and, probably, long prior to said claims of their co-defendants, if they had older judgments. The sweeping statement that they were entitled to the fee simple title, and said co-defendants had no lien upon the premises, interpreted by the light of the rest of the bill, was a mere allegation of the inferiority and subordination of their liens, and, though technically inaccurate, it was scarcely too broad, when we consider that the property was not worth one-fifth of the sum of the prior liens of Alexander and Grahams, and it was easier, and sufficient, until their rights were asserted, to deny their rights altogether in a single sentence than to show the exact character and dates of their respective liens, if they had any.

VI.

The counsel for the appellee seem to lay *much stress*, in both this reply and in their former argument, upon the statement of the cross bill of the *insolvency* of their judgment debtors and consequent inability to collect said judgment. But as a cross bill to enforce a vendee's lien, this was a most proper, if not necessary allegation, to explain their *continued possession*, and as a strong reason for invoking the assistance of the court in enforcing their rights, lest they should be swept away in the flood of insolvency. But the learned counsel will have it that, "the reason seems to be to furnish an excuse for claiming the land as purchasers, notwithstanding their judgment!" But how weak a subterfuge this, and how worthless, when the same pleading exhibited conclusive evi-

dence, that *against* the claim of being *purchasers* they were forever *barred* by the solemn finding of a court whose aid had been invoked by themselves! And for what purpose should they be looking for an excuse to set up a claim which could only weaken them? If their co-defendant's liens were older than the contract of purchase, they could be no better, but worse off as vendees than as *judgment creditors*, for as judgment creditors they were advanced one step, at least, toward payment, beyond mere contract creditors. Besides, the cross bill shows that their debtors were insolvent *before they sued them*, and that judgment was rendered *after* the Alexander bill was filed; now why should they wish to recede from their position as judgment creditors which they had *just assumed after* the insolvency and *after suit* brought?

VII.

The learned counsel are careless in their statements as to the contents of this cross bill. On page 14, they say "If a sale is made *they pray for the surplus on their judgment.*" They *should have said* that Grahams ask the proceeds of the sale *only so far* as they needed to pay the decree in their favor for said judgment, BUT THAT THEY LAY NO CLAIM TO THE SURPLUS.

VIII.

Grahams, in their sworn answer to this bill, tell us that they never intended by their cross bill to abandon their judgment at law. But the counsel, in their argument (page 2), comments upon the fact that Grahams having allowed default to go against them in November, when they got their judgment, "*for some reason*," at next term, ask the default set aside and to file a cross bill; and the counsel seem to insinuate that this fact is *proof*, in some way, that Grahams *wanted back their purchase money at the time when*

they got their judgment, but afterwards *changed their mind and sought to have the lands again under their contract.*

Now, unfortunately for this theory, the record (page 69) contains what is called and is entitled, the answer of A. Y. Graham to the bill of Alexander. It is sworn to and was filed March 18, 1862. Its contents prove that it was the affidavit on which the default was opened.

After setting out the recovery of the judgment against Holloway and Boggess for their failure to convey certain lands to Grahams, against which Alexander is seeking to enforce a vendor's lien, it proceeds, as follows, viz.: "This affiant further says *that an appeal from the judgment* of the court in said cause *was prayed* by said Holloway and Boggess, *and allowed* by the court; *that in consequence thereof, this affiant and the said David Grahams allowed themselves to be defaulted in this cause, and failed to answer to the complainant's bill* at the last term of this court. This affiant further states, that since the last term of this court, the said Holloway and Boggess have failed to prosecute the appeal so prayed, and *that the said judgment in favor of the said David Graham and this affiant is now in full force and unsatisfied.* This affiant further says, *that in order to enable this affiant and said David Graham to* OBTAIN SATISFACTION OF THE SAID JUDGMENT, IT IS NECESSARY TO HAVE A SPECIFIC LIEN UPON THE LAND *in said complainant's bill described* FOR THE PAYMENT OF SAID JUDGMENT, *subject to said complainant's lien*, and subordinate thereto. He then prays that default be set aside and *leave given to file a cross bill*, "SETTING FORTH THEIR RIGHTS AND EQUITIES HEREIN, *and asking a decree* OF THE COURT GRANTING THE LIEN AFORESAID."

Another paper contained in the record, also entitled an answer of both the Grahams in said cause (pp. 101 to 110), sets forth substantially the same facts, viz., *the judgment upon the contract of purchase*, that part is collected and the balance "*remains in full force and unsatisfied*," makes the judgment an exhibit, and then

says "that having obtained (p. 110) leave to file a cross bill, and intending so to do, PRAY TO BE HEARD THEREIN," &c.

If we had drawn, for the purposes of this cause, these documents, what language could we have used more entirely decisive! They were defaulted and made no defence *till they had a judgment they could set up;* and then they sought, as their interests dictated, to make it *a specific lien* upon the premises, because it had all the force of a vendee's lien, and ensured them the proceeds of the lands after Alexander's claim till it was paid.

But what do the learned and candid counsel mean by saying (p. 10 of the reply), that "the appellants asserted in, and by a cross bill, as well as their *answer to the original bill*, that they were *purchasers* of the lands from Holloway and Boggess, and, as such, were entitled to the title when the balance due Alexander was paid." There is some loose language in the cross bill, but *this answer does not contain a syllable that does not flatly contradict this statement.* They do not give us an abstract of this answer, but say "*its contents are immaterial*" (p. 6 amended abstract). What do they mean? They should use greater care in their statements, and particularly where they themselves have withheld the ready means of testing their accuracy, or some evil-minded person might uncharitably charge them with that want of fairness which they attribute to their opponents. In the mean time, we can do no less than to caution the court against these statements, and ask them to examine the record.

The truth is, this rejoinder would not have been made *except to correct the errors* which have crept with such fatal facility into this reply—this candid reply which contains such solemn warnings and protests against our statements, and yet fails to point out a single mis-statement! This inaccuracy always tells against us, and never against the learned counsel's clients. The true explanation of these errors is no doubt given in the language of their reply, in which

they say, that they "labor under great disadvantage" in making it, because they have not "possession of the record."

IX.

But it is said (p. 11) the court in rendering the Alexander decree, *recognized* the claim of Grahams as purchasers, in allowing them to take the land on payment of Alexander's debt, and allowing their bid above the Alexander debt to be treated as cash.

Now, my first answer is, that, under this bill the appellee cannot maintain his decree upon the ground that it is *res adjudicata*, viz.: that the contract is alive, or was alive when the Alexander decree was rendered. He set out the decree in the bill, but he placed his case not upon the decree, but upon the *acts of Grahams* abandoning the judgment and procuring the title by purchase for the Alexander debt (p. 3 amended abstract).

2d. That it is immaterial what view the court "recognized," or whether it is a fair *inference* from the decree that the court thought the contract of purchase was still in force and ought to be performed.

There is no better settled rule in relation to the effect of a judgment or decree, when offered in evidence, than that laid down in the Duchess of Kingston's case, that such judgment "can be no proof of anything to be inferred by argument from it."

3d. There can be no mistake about what the court found. This the decree tells us, in plain terms, viz.: that Alexander did contract, as stated, with Holloway and Boggess, and that upon said contract there was still due $3,100. This is all the court found, and thereupon made the order for the sale, and gave the options complained of in the event this debt should be paid before the day of sale. (See pp. 40 to 44 of argument).

4th. All the allegations of the cross bill, Holloway and Boggess denied in their answer, except the recovery of said judgment, which they set up as a release of the "alleged agreement." (See pp. 8 and 9 of agreement). No proof was taken in the case, save as to the amount due Alexander, which appears in the Master's report. (See p. 8 of the record).

It is incredible that the court should find, not alone contrary to the evidence, *but* WITHOUT EVIDENCE, *and against the allegations of all parties, and against the* EXPRESS DENIAL OF THE APPELLEE'S ANSWER, that the contract was in force, and that Grahams had the rights of purchasers.

But if it were even PROBABLE that the court intended to recognize Grahams as purchasers and the contract is alive, still no estoppel can be drawn where the proof is less than certain. "Estoppels must be *certain*," says Lord Coke (Co. Litt. 532), "to every intent and not to be taken by argument or inference."

5th. The court could not have believed the contract in force, for then it was improper to leave its performance at Graham's election.

If the contract was alive, then the judgment was dead, and it was absurd to leave it to Graham's option to satisfy it and to take a deed; they should have ordered it satisfied.

If the contract was alive, then Grahams were entitled to the surplus at the sale, why did not the court award it to them?

If the court thought the contract was alive, why did not the court speak of the contract and say so? The court do speak of the Alexander contract, and order it performed; if both were alive, as Grahams were also asking relief, why did not the court treat both complainants alike and make like orders? Why did not the court give Grahams a decree for the return of the purchase money in

the event that the proceeds were insufficient? They were entitled to a decree for their purchase money, and the court would have given them such decree, had it not known that they already had a valid judgment for damages upon said contract.

6th. To the privilege to have their bid taken as cash, the Grahams were clearly entitled by virtue of the position of their judgment as the next lien after the lien of Alexander, hence the order awarding this privilege, is no proof that the court "recognized" the existence of the contract.

7th. The options were clearly for the *benefit of Holloway and Boggess;* proof of this is found in their desire *now* to enforce their terms. Holloway and Boggess were interested in leaving the options open to Grahams, in hope that they might be led to accept, in order to rid themselves of the uncertainties of their position. Grahams did not ask for them, and did not accept them.

8th. This decree is in flat *conflict* with the Alexander decree. *That* gave Grahams the *right* to pay the debt and take a deed, on satisfying their judgment, at any time *before the sale, but gave also the right to purchase. This denies the right to purchase*, and finds that they are *bound at any time to take their money back and give up their judgment.*

9th. The Alexander decree gave Grahams the right to purchase, but affixed *no conditions*, save that they should not take their deed until they had complied with "the further order of the court." Either that further order was made, or it was not. If made, it was made after the decree. If that "further order" was the order confirming the sale to Lafferty as Grahams' agent, then we know that there was no condition attached by it to the liberty to buy at the sale; and surely the appellee is bound to concede, either that this was not Grahams' purchase, and so no "further order" was needed, or that this order of confirmation was the "further order." Either horn of the dilemma is fatal.

If the decree contains any indication of what that further order would be, it is that it *would* NOT *require* Grahams in the event of a purchase at the sale to satisfy his judgment, *for both options* END BEFORE THE SALE, implying that it was not thought proper that their terms should apply *unless accepted prior to the sale.*

How unequal and unjust is the construction, that while *Grahams* could not take on the terms of the option *unless they accepted prior to the sale*, yet they were *bound* at the option of their debtors to take the land on these terms against their will *at any time, at or after the sale?*

They had the right to bid and take a deed upon complying with the further order of the court; and, had they chosen, could then relinquish their purchase, if they were not suited with the further order; or *could, at any rate*, reverse the final order if unjust.

Now, they are told, that however erroneous the decree (the errors, if any, not in their favor, nor made on their asking), they must give up their judgment whether *they will or not*, because they are purchasers, and because they are bound by terms which the decree does not fix, but professes to reserve for a further order.

Such a construction of a decree, is to make of a court of equity, a trap and an engine of oppression.

10th. All the options expired prior to the sale, and were never accepted, and should be disregarded.

The court limited their application to the ninety days intervening between the decree and the sale; and to say that the same terms *are proper* NOW, is to say that the court *erred in the limitation.* Hence, this decree giving the same relief *a year and a half after the sale*, that the former decree thought proper, *if the debtors paid before the sale*, cannot be said to be based upon, or to carry out the former decree. *If that court was right in limiting relief on condition of payment in ninety days*, this court is wrong in *grant-*

ing that relief on like payment after that period. Time is of the essence of a decree; and a party to claim its benefits must comply with the prescribed conditions. Holloway and Boggess give no excuse for neglecting to take advantage of the former decree; and after a sale and the lapse of a year and a half, during which they have sought to reverse that decree, and have not chosen to redeem from the sale made under its terms, ought not to be heard with favor in a court of equity. Even "backwardness is fatal." 26 Ill. 244. The court will not relieve a party who *failed* to perform his contract when he was able, and it was his plain duty to perform it. 25 Wend. 665. Finally, even if the decree of the Court of Chancery declared the contract alive, the judgment of the court of law declared it to be dead, and "an estoppel against an estoppel," says Lord Coke, "setteth the matter at large." (Co. Litt. 62 *b*).

X.

But the learned counsel say, that it is not necessary, in order to give the complainants below the relief desired, to maintain the proposition, that Grahams claimed to be purchasers of the lands from their vendors, and as such entitled to the title; "because it is sufficient to show that Grahams *did succeed, by virtue of their position as purchasers, in holding possession of the lands, and obtaining the title*" (page 10). Again (page 14), they say: "It is sufficient to say, even if we are required to prove more than the bill alleges, that the court, by the decree, recognized Grahams' right to the land when Alexander was either paid by Holloway and Boggess or themselves, and placed them in such a position as to discourage all bidders except Alexander and themselves. If the decree had provided for a sale without redemption to satisfy Alexander only, who can say that the land would not have sold for much more? and the bill of Grahams was to be accepted as cash to the extent of about $13,000 over Alexander's claim, and they were in possession of the land. By reason of this decree, Grahams had an advantage, by

reason of their position as purchasers, which they used by procuring Lafferty to bid off the land for them, in order to obtain for $3,000 what they had bought for $10,000, and then hold the judgment over Holloway and Boggess. This is an act of oppression, that a court of equity will not permit."

We have sufficiently discussed the decree, and know that Grahams' right to take the lands, upon satisfying their judgment, *and Holloway and Boggess' right (if they had any) to make them take them*, expired by the terms of that decree before the sale. How absurd to pretend that these unaccepted options, from which nothing whatever sprung, and from which nothing *could* spring, except the satisfaction of this judgment upon terms so advantageous to Holloway and Boggess; how absurd, we repeat, to pretend that Grahams got any advantage, or have acquired any right, or had at the sale any advantage, *through these dead and exploded privileges!*

What a ground of complaint for the party interested in the land, that the decree did not provide for a sale *without redemption!*

XI.

Grahams' right to have their bid taken as cash was a just right, given them as the creditors to whom the money would go. What pretence could a court have to insist that the money should pass out of the creditor's pocket and into it again through the Master's hands?

XII.

"They were in possession of the land?" yes, indeed; and most *necessary* was that possession to save their lien as vendees, which depended *upon possession.* Here were numerous creditors; the first judgment would have been the first lien, even upon these lands, if surrendered to the debtors, to the exclusion of these ven-

dees who had advanced so much in purchase-money, taxes, and improvements. Where would Grahams' rights have been, had they thus given up the lands, and sought relief against their insolvent vendors, who now parade their insolvency as an *excuse* for not performing their contract?

XIII.

But "Grahams procured Lafferty to bid off the land for them." Certainly; Grahams had the right to buy in the lands. The court gave it to them; and not having the money, how did it injure their debtors, that they procured Lafferty to borrow the money, and bid it in for them? The court gave them the right to bid; and having bid through an agent, the court said the sale was right, and confirmed it.

But it is said, "They were not strangers, and could not bid under the decree as strangers." They *did not* bid as strangers; their friend bid *openly, and the court, having all the facts before them, confirmed the sale.* But Grahams had *not less* but *greater rights*, had they bid *in person.* How can their debtors complain that they did not *use their just privileges*, of which said debtors, without cause, complain?

Grahams were indeed not strangers; they had a vendee's lien, the most meritorious and favored of liens. They had been greatly wronged; their title withheld from them; their purchased property unsaleable in consequence; improvements and other uses checked or rendered hazardous; and when their money was demanded, their vendors had become insolvent, leaving the title incumbered with numerous creditors seeking to enforce their liens, and, to crown all, they were embroiled in litigation. In that very suit, their lands were claimed by a creditor having a prior lien, who demanded a *strict foreclosure!*

Even a trustee, by leave of court, can buy his ward's estate. (1 Hov. on Frauds, 475; and cases cited, pages 86 and 87 of argument.)

But Grahams *did not need leave of court;* they had *ceased to be vendees by the judgment;* their *fiduciary character was now terminated* by the judgment as *well as by the decree itself* (id. 482, &c.). The case of *Chrisman* v. *Miller et al.*, 21 Ill. 435, is in point, and the learned counsel's criticisms fail to shake the analogy.

In the case at bar, as in the case cited, the vendee had the right to buy in the title, *because his vendor's contract, and hence the title, was at an end.*

In the case at bar, this was effected *by the decree of sale merging that contract;* in the case cited, *by the forfeiture of his vendor's contract of purchase.*

In the case at bar, too, the relation of vendee was *terminated by the judgment*, in which the *contract between the parties was merged;* in the case cited, the same result was effected by the *destruction* of their *title. So, by the judgment at law, and by the decree*, dissolving both titles (*the loss of either dissolved their relations as vendees*), Grahams, in the case at bar, just as Miller, in the case cited, "had as much right to purchase as any third person, as a total stranger to the transaction."

XIV.

The learned counsel in opening their reply, said they labored under a great disadvantage in not having possession of the record. We are willing to believe this, and would cite as a proof, that on page 16 they say, in speaking of the Alexander decree, "The court did pass on their rights and claims, and provided, that in case they bid for the land it should be upon certain conditions, and that they should satisfy their judgment after the payment of the sum paid

by them to Alexander. It is immaterial what the relations of the parties were *before the bill of Alexander was filed and the decree rendered.* Rightfully or wrongfully, the court did *consider a relation as existing*, and on that *provided for a new relation.*

"Grahams *did bid*, and thereby they did *accept its provisions.* They put forward Lafferty to bid for them. Will a Court of Equity allow them to do by an agent what is prohibited to be done by them in person? Or in other words, will equity allow Grahams to reap the full benefit of the decree, and avoid all its burdens by presenting a sham bidder. This is the *real question and the only question of merit in this case.*"

Now, when we look at the decree and find *no conditions* annexed to their right to bid, but find instead, *privileges granted* to have their bid taken as cash, reserving only the deed, till they comply with the further order (no doubt to credit the overplus of their bid above the Alexander decree, if any, on their judgment), *and find no such condition*, as the counsel erroneously states, viz., *that they should in that case satisfy their judgment after the payment of the sum paid Alexander*: we are astonished at the delusion under which the counsel are laboring. But no wonder, when they are so mistaken as to think such a provision in this decree, that they subsequently say, "this is the real question and the only question of merit in this case," viz., whether Grahams having bid shall stand up to these conditions and satisfy their judgment. Really, if we were the innocent causes of such a mistake, we should feel to blame; but *our abstract gives this decree in hæc verba, and the counsel must have relied on their own which omits it.* They cannot charge this error to the want of access to the record.

There never was any question of merit in this case, and we are glad now to be able to cite the learned counsel as agreeing with us in that opinion.

We hope the court will not be misled by these mis-statements,

and will not fail to note, THAT NO CONDITION WHATEVER WAS ATTACHED TO GRAHAMS' RIGHT TO BID AT THE SALE.

XV.

But the end of this "reply" forgets the beginning. The counsel in the beginning complain of the privileges given by the decree, and attributed them to the unjust claims of Grahams' cross bill; in the end they complain that Grahams would not accept or use them, but to evade these "advantages" got a third person to become the purchaser—"a sham bidder"—for their benefit!

It is clear that when the Alexander decree was made, and the sale was made and confirmed, the appellee was opposed to it, moving to set aside the decree and orders, and then seeking in this court to reverse the decree. His present theory is a "*new light*" which has lately dawned upon him; *now* we see the decree is *just what he wanted*, and he admits that *without* the very decree and purchase of which he complains, his case would be desperate!

Was he right then, or is he right now?

The truth is he pretends to complain of what Grahams did; but when his complaint is scrutinized, it is found to be a complaint that they refused to do what the decree permitted.

These "options" and "privileges," forsooth, so kindly tendered Grahams as "relief" for their wrongs, made their position so much worse, that they, who, by their judgment at law, had the next lien, and had as good right to bid at the sale as total strangers, could not, *by reason of these valuable rights*, bid on the same terms with others, but only on condition, that at any time they should surrender their judgment and take their money back! they could not *buy* at all, but could only "*pay* off the incumbrance!"

By their cross bill then Grahams gained nothing, but only swept away their own rights! Holloway and Boggess who asked nothing, denied everything, and fought the whole proceeding every foot of the way, got this great affirmative relief!

The bare statement of these propositions are the best refutation of the absurd construction sought to be put upon the cross bill and decree.

XVI.

The counsel very lamely attempt to evade the estoppel, which we have shown that the decree puts upon this litigation. (See pp. 50 to 55 of argument). They say relief could not have been had on motion; that Alexander's and Lafferty's interests forbid that the sale should be set aside; that the parties are different in the present suit; and the subject matter is not the same, because Lafferty has now sold and conveyed. What reason is there that on motion the defendants could not have had the "further order" entered (if they were entitled to it), viz., *that the deed should not be delivered till Grahams cancelled the overplus of their judgment*? But the counsel admits that Holloway could not have this order till he had repaid the sum bid at the sale (p. 17), *then why did he not*, AT ONCE, *repay the money and have the proper order entered? Why did he permit the sale to be confirmed unconditionally as a sale, when it was no sale, but only a payment? When he moved to set aside the sale, why did he not predicate his motion upon the return of the money to Lafferty? He needed no bill for relief*, unless, indeed, the court had, in that case, failed to decide that he was entitled to relief, as in fact the court, as we claim, did fail to decide anything touching the matter.

Neither Alexander nor Lafferty had cause to complain of the satisfaction of the *judgment*, in which neither had any interest.

The payment and conveyance of Lafferty leave the judgment unchanged; and it is the *judgment* that the former decree is said to destroy.

The other parties joined as defendants in the former suit, had no interest in the *judgment;* and if a decree could be made, invalidating that judgment, in a case in which they were parties, what reason exists that such decree could not have been executed by making and enforcing the proper order? What reason is there for a second resort to a Court of Equity, when the former tribunal had jurisdiction of the parties and subject matter, so that in the second case you proceed upon the equities given in the first? In *Moore, et al.* v. *Titman*, 34 Ill. 369, the court held that the right to the homestead was not barred by a decree for the sale of mortgaged premises; but put their decision *expressly upon the ground* that the design of the statute, protecting the wife against the acts of the husband, might otherwise be defeated. But except such exceptional cases, there is no better settled principle than that the judgment of a court of competent jurisdiction shall be final not only as to the subject matter determined, but as to every other, which the parties might litigate in the case, and which they might have had decided." (*Le Guen* v. *Governeur*, 1 Johnson's Cas. 436, and cases cited, pp. 50 to 55 of argument).

If the appellee says that the satisfaction of the judgment at law was within the issues, and was determined by the Alexander decree, then it follows that to that decree we must look for the determination of the rights of the parties; and those rights cannot be made the ground of a second suit, between the same parties, so long as that decree remains unreversed. If, through negligence, or carelessness, or ignorance, he failed in that case, when the facts of the sale were all before them, to get an order to have that judgment satisfied, he cannot drag the appellants to another tribunal, and be permitted to repair his mistakes or omissions by recourse to another action. This suit is based upon the ground that Grahams had no right to buy the premises as they did buy them of the Mas-

ter; for if they had a right to buy them, and bought them fairly of the Master, then Holloway cannot say they merely paid off an incumbrance upon his title, and got what he sold them when repaid that incumbrance. Now, Holloway moved to set aside that Master's sale on this very ground, among others, and was overruled. He said Grahams have bought. They can't buy; they can only pay; hence their purchase should be set aside; for it is not a purchase, it is a payment only. This suit is that motion in another shape. The judgment upon that motion is *res adjudicata.* 30 Vt. 114. Holloway cannot be heard to deny that the Master sold the land; that Grahams bought the lands; that the Master's sale was a sale, and a fair and just sale.

The counsel would have the court understand, that we deny the binding force of that decree. They admit that certain errors, which they designate as claimed by us, are well assigned. *They are much mistaken. That decree is binding; and because it is, we claim that they cannot again draw these matters into question. It is the appellee who questioned that decree*, upon motion, and by proceeding before this court. *His new love for it springs from the absurd construction he would put upon it*, seeking to draw within its purview, matter neither in issue, nor touched by evidence; making of it a trap and snare for his creditors. No doubt he is willing to be bound by a decree he cannot reverse, if he can succeed in foisting upon the court an interpretation never dreamed of by court or parties, and contrary at once to the pleadings, the evidence, and to equity.

XVII.

But the counsel says "time is of the essence of the contract only so far as the payment of the purchase-money is concerned," but that the time when the deed is *due from the vendors is not mentioned.* Hence, he points out, as one of the misstatements of the argument, this statement, viz.: that the time of the making and

delivery of the deed by the vendor is made material by the contract; and, therefore, a failure by the vendor to make and deliver the deed at that time, is urged as a fatal objection to his bill.

This contract will be found on pages 96 and 97 of the Record. The vendors sell "in consideration of the payments to be made, and the covenants to be performed by the party of the second part (*the prompt performance of which payments and covenants being a condition precedent*, AND TIME BEING THE ESSENCE OF SAID CONDITION)"; and it is further provided, that "upon the faithful performance," &c., by the vendees, said vendors covenant "that they SHALL AND WILL, WITHOUT DELAY," MAKE AND DELIVER THE DEED. Here is an express agreement making time material. The parties *contract with a view to a prompt performance*, and, on payment, bind the vendor to deliver the deed "*without delay.*"

And the *time of the last payment is expressly made "of the essence of the contract"; and that time is the same for the delivery of the deed: so that the same time which is fixed for both acts by the same contract, is, by the same contract, made material.*

But, in the absence of these express provisions, making the time of the vendors act material, and stipulating for performance "without delay," we are told, that "when the vendee stipulates, that time shall be of the essence in respect of some of the conditions on his part, the courts incline to hold it *essential in respect of others against him.* Vendors so stipulating for the essentiality of time in their favor, "*cannot fairly complain of being strictly held to the conditions themselves.* The plaintiffs' proposition is, that the purchaser shall be held by a cable, and the vendors by a skein of silk." Fry, Sp. Perf. 720, and cases cited. But here we have the express promise that the deed shall be made "*without delay.*"

Nothing, then, can be clearer than that time was of the essence of this contract.

XVIII.

Again (page 6), it is said, that the allegation of the answer of losses, expense, and trouble suffered by Grahams, in consequence of their non-performance, "*is new matter, not responsive* to any statement in the bill, and there is not a *particle of evidence to sustain it.*"

Is this true? Does it not appear that this is the third legal proceeding in which Grahams, *without having been at any time in fault*, have been involved in this contract? Is the cross bill in evidence? The learned counsel, speaking of this very question, says (page 12), that "the pleading and evidence on which it was founded, *were competent evidence* against the appellants to prove the contents." If so, the cross bill, a pleading *verified by affidavit*, in evidence, upon appellee's offer, must be taken together, and is evidence *against* as well as for the appellee. Now, this cross bill shows in *detail* the rendition of the judgment, the efforts to collect the judgment, as well as the taxes and improvements put upon the land. The report of the sale in the same record shows that the land (improvements and all) was sold to pay the appellee's debt. What more evidence is wanted? Again, why are not these statements in the sworn answer of Grahams to the present bill entitled to be treated as *evidence?* What facts are *more responsive to the issue* than that Grahams' possession was not beneficial by reason of improvements; that the subject-matter of the contract had depreciated in value; that the litigation had been unusual and protracted; that a prior incumbrancer had enforced his lien by decree and sale; and that the vendees, in consequence of the default of the vendors, had been unable to sell, to improve, and had sustained costs, expenses, and had been subjected to trouble and annoyance to the injury of their business? The question is, when the appellee pays the money, and makes the proposed covenants, *will Grahams then have had substantially what he contracted to give them?* The complainant *must show in his bill*, that the court can give the relief

asked *without fear of doing injustice.* He has failed to comply with the terms of his contract; he asks the *favor and indulgence* of the court. But then, in such cases, *it should be clear* that the remedies are mutual, and that there has been *no change of circumstances* affecting the character or justice of the contract; that the chance of gain by delay is not all on one side and that of loss all upon the other; * * that he has shown himself *ready* and *prompt* to perform the contract."

2 Story's Eq. Juris. sec. 776.

Hence, these allegations of the answer were in direct response to the substance of the bill: for they proved that the remedies were not mutual; that there had been, during the vendor's default, changes of circumstances affecting the character and justice of the contract; that the chance of gain by the delay was all upon the side of the insolvent vendors, who could perform the contract or not as they chose, but could not be compelled to perform it; and that great losses and anxieties and injuries, by reason solely of the default of said vendors, had resulted to the vendors, so that they would never have made the contract could they have foreseen the consequences.

XIX.

In this connection, the counsel for the appellee says: Holloway brought into court money to *pay all the expenses*, including attorney's fees" (p. 6). The language of the decree, touching this point, is, "that there has been collected on said judgment, *deducting expenses, including the sum of* $115 *attorney's fees*, the sum of $1,221.56." Now, *these are the whole of the expenses and attorney's fees allowed to Grahams*, &c. There is no evidence whatever, that any other expenses or attorney's fees in the other litigations in which they have been embroiled were paid.

How unfair to state, that all Grahams' expenses, including attorney's fees, were paid, with no other foundation for the statement!

We have a certificate of all the evidence on the trial, and *in it is not one syllable on the subject of expenses or attorney's fees.*

The bill charges, and the answers admit, *the receipt of* $1,153.60, *and no more*, upon the judgments. *No evidence was taken upon this matter.* Yet the decree *finds that there has been "collected on said judgment, deducting expenses, including the sum of* $115 *attorney's fees, the sum of* $1,221.56," and this sum, *more than the whole amount collected upon the judgments by* $70, is deducted from the amount Grahams paid Lafferty! So it appears, that, *in fact, not one cent of expenses and attorney's fees, in any suit or proceeding, were allowed Grahams, unless they were charged interest upon the sums they had made by their vigilance as judgment creditors* by redeeming lands which their debtors had allowed to pass redemption, because either unable or unwilling to redeem!

If these vendors had waited a little longer, their contract would have been performed (performed itself) *in the sense of this bill, by their vendees.*

XX.

But the learned counsel are concerned lest the court shall be misled by the proof that the land has depreciated in value, during the vendor's default. They say there is *no evidence* of the depreciation in the record *but the price* for which the land was struck off at the sale. Let us see for a moment if there be not other proof.

The counsel have shown, satisfactorily to themselves, at least (p. 12), that the "decree, pleadings and evidence" in the Alexander case "were competent evidence to prove the contents." Now, in his bill filed in March, 1861, Alexander alleges the fact of *this depreciation*, and says *the land is scant security for his debt*, which was *then about* $2,700. The appellee *answers under oath in March*, 1862, and says *that the land*, WHEN HE BOUGHT IT, WAS

REASONABLY WORTH $6,000, AND WAS NOW WORTH "*but* LITTLE, IF ANY, LESS," and "DENIES THAT IT HAS GREATLY DEPRECIATED IN VALUE." (See record p. 75).

Grahams in their cross bill filed in March, 1862, *also* UNDER OATH, allege "*that said real estate is worth thousands of dollars more than the amount*" of ALEXANDER'S CLAIM. (See our abstract, p. 3).

To this cross bill, Alexander ANSWERS, *again* DENYING THAT THE LAND IS WORTH MORE *than* HIS CLAIM. (Page 121 record).

Here the *creditor* repeats his statements, and the parties to the present suit, *having a common interest to save as much as they could from the land*, BARELY DENY the fact of GREAT depreciation, think the land is worth but LITTLE LESS, IF ANY, THAN IT WAS WHEN IT WAS WORTH $6,000, and is still worth THOUSANDS MORE THAN ALEXANDER'S CLAIM, which was then less than three thousand dollars! Now, who can read these pleadings, and fail to be convinced, that the land had, at least, depreciated in value *to some extent*, when interested parties, in their pleadings, can use no *stronger* terms in denying the great *depreciation charged*, while their creditor, *who once owned the land and knew all about it, asserts that it is not worth half what he sold it for*, and asks a *strict foreclosure*.

But what of the *sale*, at public vendue, to the highest purchaser, after long notice, for $3,100, subsequently confirmed, though confirmation is resisted by this appellee, and after overruling his motion to set it aside, — a motion made for perhaps this very reason, among others, that the property had sold at a sacrifice?

This, the learned counsel says, is *no* evidence of depreciation, because his creditors, having the liens first to be satisfied, were *privileged bidders*, and this "*prevented all competition!*" Why, this reason will apply to every sale where creditors are interested; and yet such sales are everywhere treated as evidence of the value

of the thing sold. It is *not* true, that competition is thereby prevented. But if it were true, in any case, that this operated to unduly depress the property, the court, upon the fact being brought to its notice, would set such sale aside. *Here we know that Holloway sought to set the sale aside, and we know that the fact that Grahams were purchasers was but* ONE *of his reasons.* Who can doubt that if the land was sacrificed,—sold for $3,100 when it was worth $6,000 or $10,000,—that the court would have instantly given him relief? The truth is, this land could not have been sold for a larger sum; it may be doubted whether any one would have bought it *at the purchase price, save Grahams,* or, as did Lafferty, upon their promise of repayment and as an act of friendship. Yet Graham's improvements, costing more than one thousand dollars, went with the land. Judge then what the depreciation would have appeared, if the land had been vacant and unimproved at the sale! This was in August, 1862, the very darkest period of the war; the gloomiest period, too, of financial depression. Gold was still our currency. Grahams paid in gold, or in currency exchangeable into gold; and, by this decree, were to be repaid this money (what they have not paid themselves by saving abandoned property), in paper money, in March, 1864, when gold was selling at a premium of at least sixty per cent.

There is no fact in the case better established by the evidence, than that during the period of the vendor's default, the land has greatly depreciated in value.

XXI.

But the party upon whom the *burthen* is imposed, to *show* that *no change* took place in the value of the property to his vendees' injury during the period of his default, from the consequences of which he asks the court for relief, *how is he to have relief not only without proof, but against proof?*

The exercise of the power he invokes is a matter of discretion, regulated to be sure by well established rules; *but he is bound to* SATISFY THE COURT THAT NO INJUSTICE WILL BE DONE by granting the relief asked; now excluding the evidence derived from the answer in the present suit, the pleadings in the Alexander case, and from the naked fact of a public sale by the Master, *how can the court be satisfied that, in August*, 1862, *at the time of the sale, or in October*, 1863, *when this bill was filed*, the land was fairly worth ten thousand dollars, its agreed value in April, 1857, the date of the contract between the parties, when the appellee has failed to show that he moved to *set aside the Master's sale for this reason*, or that *he has prosecuted his writ of error, with effect, to said decree, or that he has redeemed, or attempted to redeem, from said sale?*

This decree compels Grahams to take the land at a time when it is worth but three thousand dollars, after one thousand dollars of the vendee's money had been added in improvements, in place of land that was worth *when the title was to be made*, ten thousand dollars! *To take the depreciated land in place of the purchase money and interest! And then to have their purchase in August*, 1862, *converted* into a *fresh advance* for their insolvent *vendors to be returned at their election!* And then permits these vendors, a year and half afterwards, *to return the money in a currency which had depreciated sixty per cent!* More than this; to repay one third of the amount in sums collected upon said judgment by *redemptions*, the fruits of the capital and vigilance of the vendees! If this decree shall stand, Holloway has enjoyed, with impunity, not only the profit of his speculation, but the use of the capital and industry of his vendees!

XXII.

The learned counsel admits (p. 5) there is no evidence that the judgment was for the purchase money and interest, but says, "no other damages could be recovered, and the amount rendered is exactly that sum!"

Now, my answer is, that there are two errors in this statement, one of fact, and one of law, viz., 1st, the judgment is not for the amount of the purchase money and interest. The dates and amounts of the payments made upon the contract are shown on pages 96 and 97 of the record; and these sums with interest to the date of the judgment exceed that judgment by more than two hundred dollars. 2d. The measure of damages for the breach of a covenant to convey real estate is usually the value of the land. The damages recoverable vary with the facts of each case.

Gale v. *Dean*, 20 Ill. 320.

But without arguing these propositions, it is enough to reply that the judgment upon a contract to convey lands is not limited to the purchase money and interest (which is by no means, in all cases, the true measure of the damages), but may extend to other damages sustained by reason of the failure to perform the contract. That in this case the judgment upon its face, as set up in the cross bill and in the answer, is *for damages for non-performance of said contract*, and there is no proof whatever that this judgment is, in fact, for the purchase money and interest; and no such proof, if offered, was admissable.

Is it not then clear, that the complainants has failed to prove that this judgment is for the purchase money? If so, is it not clear that such failure is fatal to this decree? What right exists to enjoin the judgment, unless it *is* for the purchase money?

XXIII.

In the *options of the Alexander decree, Grahams were only to satisfy, if they chose, the balance of the judgment yet unpaid*, although they had then collected (*in February*, 1862, *as stated in the cross bill*), NEARLY THREE HUNDRED AND FIFTY DOLLARS; but, in this decree, professing to be based upon the former decree, the appellee *takes credit for even this collection!* On what does this rest?

XXIV.

To the *first three points of this reply*, we have to answer, that we stand by the statements challenged therein, just as we stand by all the statements of the argument challenged in this reply; and *they are, each and all, in exact accord with the truth.*

The vendor must *prove* his title, unless such proof be *waived;* and to take advantage of such waiver, his *bill must* set up the facts, and *charge* that they constitute such waiver.

That he had such title, is not admitted in the answer; and the fact that he charges, and it is proven, that Grahams have bought the title of Alexander, does not make this allegation an *exception* to the ordinary rule. Hence, the authorities cited find here no application.

There is no proof "*that there is no other title or claim of title to the premises*," as stated in this reply. It is true, that the "litigation," *on the part of the* COMPLAINANT, is "*based on the idea* that Alexander owned the land"; but there is no proof that *Grahams admit* that fact, and *they* in no wise base their "litigation" on any such fact. The statement of the answer, that the title to the land failed in consequence of the *vendees failing to pay their vendor*, by no means establishes *that vendor's title*, nor establishes any other fact, save that *the title failed*, and *failed from the cause stated.*

What evidence exists, *that this point* "has *never been raised in either court until this argument presented it?*" If true, is there any limitation that forbids one to raise a fatal objection here for the first time?

How are Grahams "*estopped*" from questioning their vendor's title? The acts creating the estoppel should have been set out and *charged as a waiver of the proof of title* in the bill; but the counsel for the appellee fails *even now* to specify the "*acts*" from which he claims the estoppel springs.

How does this court know that Grahams have obtained the title to this land? What evidence is there, that "Grahams *tenaciously hold*" the title? There is no proof that said *title* was ever *demanded* of them. Holloway does not seek *the land* (*to which, if to anything, he is entitled*); he has never sought *the land*, unless he did so when he moved to set aside the sale; but he now seeks *not* the land, but to hold the *money awarded in this judgment.*

XXV.

To the second point of the reply, we answer, that if it *be immaterial*, as the counsel now replies, that Grahams purchased with full knowledge of the condition of the bill and of the incumbrance, and that the times of payment were fixed to meet and pay off said incumbrances, *why did the appellee charge these facts in his bill* (page 3 of record), and *in his argument* (page 2) *state that these facts were in evidence?*

The learned counsel must be driven to desperate extremities when he is driven to pretend that these facts are *proved*, because "it appears that Grahams were business men of intelligence," or because the times of the purchase-money in one contract just precede the times of payment of the incumbrance in another contract, or because Grahams *failed* "*to set up a purchase without notice*" to the bill of Alexander to enforce his lien, — a lien conceded to be prior in date and prior in right, and being for the purchase-money of the contract of purchase of their vendor himself!

XXVI.

To the third point of the reply, relating to the sale and conveyance, alleged to have been made by Boggess to appellee, we answer, that Boggess is a most *necessary* party to this effort to exchange this land for this judgment. He may not consent to the exchange; he may file a bill asking the lands that Grahams bought

in at the sale, alleging, that they have elected to take their purchase-money, and cannot have the lands also; that they must give up the land on being repaid the money they have advanced to clear off the incumbrances. If an oil well were struck, or a gold mine were found on the lands, this supposed case might prove a reality; for there is far better ground for this relief, should Boggess claim it, than for that claimed by the present bill. If it may be doubted whether the cross bill claims that the contract is alive, and that the vendees should have the land as purchasers; yet, who can doubt that it *does* claim that the *judgment* was alive and in force, and that Grahams asked of the court a decree for that judgment? Whatever doubt there may be as to the decree, one thing is clear; it speaks of the judgment, and not of the contract; it gave Grahams the right to make the exchange, and they failed to accept the proposition. What claims in a court of equity could Grahams now have to make that exchange, when court thought them entitled to such opportunity for ninety days only, and this term had expired without an attempt to embrace it? Then add the other alleged fact, that Grahams did not buy, but Lafferty paid off an incumbrance for them, and the appellee would have the benefit of the estoppels, of the judgment and decree and pleadings *all* in his favor. Then, indeed, he could charge and prove, that Grahams, who have ever been attempting to collect their judgment, were thereby estopped to deny their right to it, and must consequently give up the land on receipt of the amount of the incumbrance.

But now, how can *one* of the vendors ask relief, without *proving* his right to represent his co-vendor, or to be treated as SOLE *owner?* How can he make an *offer* to convey *for that vendor*, without showing that *he has the right to make the offer* by reason of being clothed with the title?

Indeed, should he show this, might it not then prove a fatal objection to his relief, that *he could not give the covenants of said co-vendor*, to which his vendees were also entitled? If an offer to do equity is ever of service, it must be *accompanied with the*

apparent right to make good such offer. How can a *mere offer to convey* serve as a basis for a bill for specific performance?

In *Mason* v. *Richards et al.* 3 Gilman, 32, where a vendor filed a bill for relief against a judgment for damages sustained by failure to convey, and prayed that the defendants should be decreed to accept a deed for the property sold, of which the vendee always had the title (a case entirely in point and conclusive of this), this court held not only that it would not grant the relief, because it would not interfere with the judgment at law, saying: "We will not say that the court may not have such power to grant such relief, under some circumstances," * * but "such relief should be very sparingly exercised, even under strong circumstances"; but the court also said, "THERE IS ANOTHER FATAL OBJECTION TO THE RELIEF PRAYED FOR IN THIS CASE, AND THAT IS, THAT THE COMPLAINANT HAS NOT BROUGHT THE DEED INTO COURT WITH HIS BILL, WHICH SHOULD ALWAYS BE DONE."

XXVII.

As to these three points last discussed, to which the learned counsel gives such prominence in his reply, we have to say, finally, *that they occupy very little space in the argument;* and, conceding that they are well taken, viz., that the appellee had the right to make or tender covenants for Boggess, and that Alexander had the genuine title.

Yet the other objections urged in said argument, which show that the appellee eannot have relief, will *render a consideration of the question involved in these points unnecessary.*

XXVIII.

This bill is difficult to understand upon any theory that seems to be for a moment tenable; but in this reply the learned counsel, *if*

we understand them, now rest their *case entirely upon the Alexander decree.* They expressly say (on page 9), that they do not assume the position imputed to them on page 24 of the argument, viz.: that "Grahams obtained the title to the land by setting up the claim that they were entitled to it by virtue of their contract of purchase of plaintiff," and hence must pay for it according to that contract. True, the counsel, from pages 10 to 15, argues in favor of this very proposition which they here disclaim, but they introduce the discussion by saying that they do not consider it "necessary" in order to give their client the relief asked, "but as this proposition is made by the bill and has been discussed as if it were material, we propose" they say, "to pursue the examination of that question. And on page 14, after saying that it is asserted that he must prove not only that appellants got the title free of incumbrance, when the Alexander debt is discharged, but that they got it through the contract, they set forth the allegation to that effect in the bill, and proceeds to argue that, "even if we are required to prove more than the bill alleges," the decree gave Grahams undue advantages that enabled them to buy in the land for the Alexander debt, and such an act oppression the court will not permit.

What, then, is the proposition on which their case rests? They give, what they no doubt intend to be, an answer to this, on page 10, where they say, "It is sufficient to show that the Grahams *did succeed by virtue of their position as purchasers in holding possession of the lands and obtaining the title.*" This then is the last result of the counsel's reflection! To maintain such a proposition it would be necessary to show that Grahams held possession, and also got title by virtue of a contract that was at an end, for no one can deny that the contract was at an end after the judgment upon it! They held possession and got title then by virtue of "a position" that rightfully they could not take!

The substance of all this is that the Grahams had no right to retain the possession of the land, and that such possession was re-

tained by them as purchasers, and that they managed to get the title through this possession and false claim to be purchasers. Conceding the law as claimed, the ready reply is that already indicated, viz.: This shows that Grahams have no right to the land, but does not show that you have the right to make them take the land and give up the judgment which is clearly theirs.

But we have seen that there is *no valid reason* for claiming that the cross bill was intended to abandon the judgment, or set up the contract as a ground for claiming the land as purchasers; and even conceding that the cross bill were what the plaintiff charges, still we have seen that a *pleading* cannot change the rights of parties and *restore rights* that are relinquished. We have also seen that the decree *could not make a new contract* for the parties, because to do this is not within the power of the court; and we have also seen that this decree gave to Graham as a privilege at the sale only the right to have their bid taken as cash, without *paying* the overplus above the Alexander debt, and that they had the right to this privilege, even as mere contract or judgment creditors, because they had the next lien. But conceding all that is claimed as to the cross bill and as to the decree, yet all that the cross bill and decree could effect, would be to revive the contract.

Starting, then, in April, 1862, with the contract as the measure of our rights, and taking our relations to be only those of purchasers, still the appellee could not maintain this bill. He has been guilty of laches. He has been insolvent. He is but one of our vendors. He has never offered to pay back our advances, and does not show that we ever refused to receive such advances. He has never tendered a deed with proper covenants. He has not shown that he has been ready, prompt, or willing to perform the contract. He was unwilling that we should have title, he resisted the decree, and moved to set aside decree, sale, and Master's report; and then sued out a writ of error from that decree.

But if it were doubtful, considered as a naked question, whether we had right, as vendees, to buy at a judicial sale; what doubt

remains, *when the court gives us the privilege and then confirms our bid as a purchase, and then confirms the title in us?*

But the fact is the contract was not alive; but dead and merged in a judgment. This, the learned counsel do not controvert, if we can understand them at all. Their charge is that we got the land and held the possession by virtue of our position as purchasers. Certainly we took possession as purchasers; and equally true it is that we were compelled to retain this possession to protect our lien as vendees during the period after our judgment in November, 1861, till August, 1862, about eight months. But during a part of this period, that is, till April, the judgment was suspended by the appeal prayed and allowed; and during the whole period Alexander was prosecuting his claim to the land, *and a dozen judgment creditors had such liens thereon that they were made defendants by Alexander. Till our judgment was had and the appeal dismissed, the possession belonged to us;* after this, for the short period from April till August, during the advertisement and prior to the sale, we held possession, in order to protect our lien. Besides, if the property was that of our insolvent debtors, the use of it for this period, if valuable, was only a *set-off* against their debt to us. Indeed, *after the decree*, could the property be said to be that of Holloway and Boggess? Was it not Alexander's, and the contract between them *merged* in it, and the use of the premises *due Alexander, the owner*, and not the debtors, who were not the owners? If it were material, it could be shown, therefore, that we never occupied *their* land an hour, and do not owe them a cent for such occupation, nor have they the least reason to talk of, or challenge our possession of property which was never theirs, and was *never occupied by us a moment (after we had completed by a final judgment, our election to become judgment creditors with a special lien, and ceased to be vendees) except under the pressure of the necessity which their insolvency imposed.*

XXIX.

But on this question of possession it is worth suggesting this further consideration.

The vendee, when he has received a deed, is held evicted by his own purchase of the superior title at a public auction or judicial sale.

Loomis v. *Bedell*, 11 N. H. 74.
Hunt v. *Amidon*, 4 Hill, 449.
Brown v. *Dickerson*, 12 Penn. St. R. 372.

S e also 30 Vt. 114, *Boyd* v. *Bartlett*, where even a decree that an incumbrance is valid is held to be a breach of the covenant against incumbrances.

The vendor by *suffering such sale breaks his covenant of warranty*, and the vendee is thus "in fact, dispossessed so far as that title is concerned. He is still in possession, *but he is under another title*, adverse and paramount to his former one; *and his purchase is equivalent to an entry of the claimant.*" (11 N. H. 74).

So Grahams were evicted by the purchase of Lafferty.

The contrary doctrine laid down in some cases (4 Monroe 297, 4 Dana 92, 3 Dana 323) "proceeds" says Rawle (Rawle on Cor. 294)," upon a misapplication of the familiar principle in equity, that if a mortgagee, executor, trustee, tenant for life, &c., who have a *limited interest*, get an advantage by being in possession or "behind the back of the party interested in the subject, he shall not retain it for his own benefit, but hold it in trust."

Holderidge v. *Gillespie*, 2 John. Ch. 33.
Burham Van Zandt, 7 Barb. S. C. 102.

It may at least be doubted, therefore, whether the sale did not put an end to the contract, even if the contract were alive when the decree was made. But however this may be, certainly when

we find that the decree gave the vendees the right to buy at the sale, it is clear that the vendees could rightfully buy; and an advantage given by a Court of Equity cannot be the "advantage" referred to as inequitable in the cases referred to.

The truth is there is no point of view from which we may look at this case, that does not confirm the opinion with which we started, that the appellee has no equity whatever; and we are struck with astonishment when we consider the pertinacity and apparent confidence of his learned counsel.

XXX.

But in this state, at least, no sanction can be found for the doctrine invoked here that gives equity the right to set aside a judgment which has been fairly obtained at law.

The cases *already cited in the argument* (*Buckmaster* v. *Grundy, et al.*, 3 Gilman 631; *Mason* v. *Richards, et al. id.* 25), are exactly in print.

Buckmaster v. *Grundy et al.*, was a suit in chancery by Buckmaster, the vendor, against the heirs and representatives of his vendee, Grundy, for the purpose of settling the difficulties that had grown out of the contract of purchase, and to get relief against a judgment at law recovered against said vendor by said vendee on said contract. The vendee had failed to pay the purchase-money; and the vendor had obtained a judgment against the vendee for the purchase-money. *The vendor had sustained great loss by the failure of the vendee to perform his contract.* The vendor offered to convey the land, and asked a decree for specific performance of the contract. This court, reversing the decree of the court below, decided that the judgment must be permitted to stand, and refused to decree specific performance of the contract, because the vendee had recovered judgment for the breach of the agreement, and could not have both the land and the damages.

The court say (3 Gilman, 631), Judge CATON delivering the opinion: "I do not think any sufficient reason is shown for going behind this judgment. It does not appear that the judgment was obtained by fraud, or was the result of accident or mistake, such as will authorize the court to go behind that judgment, and investigate the original cause of action on which that judgment was rendered. * * * *Although we may be entirely satisfied, from the evidence, that the judgment was wholly unjust, as was most probably the case, yet the public good requires that there should be certainty and stability in the judgments of the courts; and unless they have been obtained by fraud, or some misfortune has intervened, without the negligence or fault of the party complaining,* NO COURT CAN INQUIRE INTO THEIR CORRECTNESS IN A COLLATERAL PROCEEDING. Such was not the case here, and the judgment must be permitted to stand."

Mason v. *Richards et al.*, 3 Gilman, 25, was also a bill by a vendor to be relieved against a judgment in favor of his vendee, and the court hold to the same general rule, that equity will not interfere with a judgment fairly obtained at law, saying, that if the power to relieve at all exists, "at least it should be very sparingly exercised, even under strong circumstances."

Now, are not these cases entirely in point? Here are no "strong circumstances"; and it is clear, that *all the ills and losses of the appellee are the consequence of his own misconduct and negligence* in failing to pay Alexander, and to make the title to Grahams according to his contracts.

Nor is it true, that the vendees have had substantial enjoyment of the premises; for the lands were vacant prairie, useless except to the prairie wolf, without the improvements added by their labor. They have never had the beneficial use of the premises; because, during the whole period since 1860, they have been harassed by lengthened litigations; their title in doubt; their money gone, apparently beyond recovery; and their rights disputed, now to the

land and now to their money; disputed now by the creditors of their vendors, and now by the insolvent vendors, who could be compelled neither to give them back their purchase-money nor the land sold them.

The appellants have no fears of the result, if their case be understood.

It is said, that this is a hard case, if relief be denied to the appellee. But while it is true, that the appellee has lost, during these transactions; yet, it is equally true, that such loss was caused only by his failure to pay for the land he sold. What has he lost? He has lost nearly four thousand dollars; but if this decree be sustained, he has made four thousand dollars. How has he made t? By putting upon his vendees this land at the original contract price in place of their purchase-money—the depreciated land, in lieu of the purchase-money, increased by interest.

Having inflicted great losses, protracted litigation, doubt, and anxiety upon his creditors, and having fairly sustained, after long indulgence, a loss, incurred solely by his gross negligence, this debtor, never ready, prompt, or willing to perform his contract, asks the aid of a court of equity to metamorphose him from a debtor to a vendor in order to place his own loss upon the back of his creditors.

Equity is often appealed to to right wrongs which the law cannot right; here it is appealed to do a wrong, and undo the right which the law has given.

Unless it *can be made an agent of injustice*, the power of the court of equity cannot be successfully invoked to overrule the just judgment of the court of law.

In the language of Judge Comstock (*Smith* v. *Brady*, 17 N. Y. R. 186), "*In this State, the sanctity of contracts should be steadily maintained, and no encouragement given to the loose and dangerous*

doctrine which allows a person to violate his most solemn engagements, and then to draw the injured party into a controversy concerning the amount and value of the benefit received."

GEORGE F. HARDING,
Att'y for Appellants.

MESSRS. FROST & GLENN,
Of Counsel.

N. B. — The court will find prefixed an index and brief abstract of the original argument, to the reply to which, this is the rejoinder.

IN THE

SUPREME COURT OF ILLINOIS,

THIRD GRAND DIVISION.

April Term, A. D. 1865.

ARCHIBALD Y. GRAHAM AND DAVID GRAHAM, *Appellants*,

v.

ROBERT HOLLOWAY, *Appellee.*

ARGUMENT FOR APPELLANTS.

CHICAGO:
BEACH & BARNARD, PRINTERS, NO. 14 SOUTH CLARK STREET
1865.

SUPREME COURT OF ILLINOIS.

Third Grand Division---April Term, A. D. 1865.

ARCHIBALD Y. GRAHAM, and DANIEL GRAHAM,
v.
ROBERT HOLLOWAY.

APPEAL FROM WARREN.

BRIEF FOR THE APPELLANTS.

This is a suit in Chancery, commenced in October, 1863, by the appellee against the appellants, to restrain the collection of a judgment at law recovered, in November, 1861, by them, against him, for damages which they had sustained by reason of his failure to convey to them the title to certain lands, according to his contract of sale made with them; and to compel them to accept performance of said contract, in place of said judgment.

Time was expressly made of the essence of said contract. The purchase money was fully paid by appellants in April, 1859; and the deed was then due. The land was vacant prairie. The appellants went into possession under the contract, and made large and valuable improvements. The proof does not show how long they continued in possession; nor whether they were in possession during the period *after* said judgment was rendered, and *prior* to the Master's sale hereinafter described; but if they did so continue, such continuance was their privilege and duty in assertion of the lien of said judgment; because said judgment was upon a contract of purchase, and said vendor was insolvent.

Soon after April, 1859, the appellee became insolvent, and this insolvency has never ceased, nor is charged to have ceased; but if evidence were needed that this state of insolvency continued after the recovery of said judgment, it is found in the constant, but ineffectual efforts of appellants to collect said judgment by execution. The appellee's title was claimed under an executory contract of purchase, upon which there was then due a sum which subsequently proved equal to the value of the land.

In March, 1861, the appellee's vendor filed a bill for specific performance of his contract of sale to appellee, making the appellee, and his numerous judgment creditors, and the appellants, defendants. The appellants, after recovering judgment, in November, 1861, filed a cross bill, in March, 1862, giving a narrative of the facts, making said judgment an exhibit, and asking that it be clared a prior lien to all other liens, save to that of the appellee's vendor. This cross bill, framed, perhaps, with a double aspect, as permitted and advised by the eminent Master's of Equity pleading, contained a loose and inaccurate allegation as to the title, but evidently aimed, in harmony with the rest of the bill, to assert merely the priority of the lien of said judgment, as having the force of a vendee's lien; and contained, also, a special prayer for a deed; not from the appellee, but from his vendor; not in right of said contract, but without reference to it; and expressly asked *only in the contingency* that the decree for the amount of said judgment should remain unpaid! The appellee, in his sworn answer to his vendor's bill, and in his answer to the cross bill, expressly denied that the appellants had any interest in said lands; and alleged that their interest by virtue of said contract, had been entirely released and extinguished by said judgment.

The court heard no evidence, and made no finding upon the issues under the cross bill; but, after a decree for the appellee's vendor in the ordinary form, gave the appellants their election to give up their judgment, and take the lands, in case the decree was paid; a privilege they had not asked, for they had never proposed

judgment. The court also gave them the right to but directed the Master not to deliver the deed comply with the further order of the court; but om of what that further order would be. At the nts (whose means were in the appellee's hands, judgment), unable themselves to buy the lands, to borrow the money on his own credit, and buy repay the money, and take the deed; and in eir friend bought the lands at said sale, for the decree.

owledge of these facts, put in evidence by the sisted the confirmation of the sale, on the ground to the appellants, in November, 1862, the court ce, and ordered the Master to deliver the deed.

ed in the bill; nor does it appear to have been made a ground for resisting the confirmation of the blic sale was a fair sale, and for the full value of appellee's vendor, in his bill, charged that the security for his debt, and so the event proved. depreciation is set up by the sworn answer of the present bill. From April, 1857, when they were tnight, first for six thousand dollars, and then for llars, the said lands fell in value, till they were our thousand dollars, in August, 1862!

ce said deed was due, could the appellants have ppellee to perform said contract; for he has ever nd his title unincumbered up to its value.

as never had the unincumbered title; has never, iled, offered to make a deed; has never delared, , when his deed was due, that he intended to make he expressed a willingness to perform said con- e contrary, upon the only occasions, during the

to give up their judgment. The court also gave them the right to bid at the sale; but directed the Master not to deliver the deed until they should comply with the further order of the court; but gave no indication of what that further order would be. At the sale, the appellants (whose means were in the appellee's hands, locked up in said judgment), unable themselves to buy the lands, induced a friend to borrow the money on his own credit, and buy it, promising to repay the money, and take the deed; and in August, 1862, their friend bought the lands at said sale, for the amount of said decree.

With a full knowledge of these facts, put in evidence by the appellee, who resisted the confirmation of the sale, on the ground that it was a sale to the appellants, in November, 1862, the court confirmed the sale, and ordered the Master to deliver the deed.

It is not charged in the bill; nor does it appear to have been questioned, nor made a ground for resisting the confirmation of the sale, that this public sale was a fair sale, and for the full value of the lands. The appellee's vendor, in his bill, charged that the lands were scant security for his debt, and so the event proved. This same fact of depreciation is set up by the sworn answer of the appellants to this present bill. From April, 1857, when they were sold, within a fortnight, first for six thousand dollars, and then for ten thousand dollars, the said lands fell in value, till they were worth less than four thousand dollars, in August, 1862!

At no time since said deed was due, could the appellants have compelled the appellee to perform said contract; for he has ever been insolvent, and his title unincumbered up to its value.

The appellee has never had the unincumbered title; has never, till this bill was filed, offered to make a deed; has never delared, since April, 1859, when his deed was due, that he intended to make a deed; nor has he expressed a willingness to perform said contract; but, on the contrary, upon the only occasions, during the

period since said deed was due, when he is shown to have spoken of said contract, he has denied its existence, and asserted that it *was extinguished by said judgment!*

Nor has the appellee ever attempted to perform said contract; nor has he at any time been able to perform it; nor has he shown any fact (the empty excuses alleged in the bill being neither admitted nor proved) which will serve as a justification or excuse for said non-performance. He alleges that he has been in embarrassed circumstances, and unable to pay for his title; but he does not show that his condition was the result of misfortune. The proof shows that he has been insolvent; but this insolvency is a circumstance which furnishes the stongest reason why he should not now compel the appellants to perform a contract which they could not have compelled him to perform—a circumstance which shows that the contract is without mutuality; for it binds but one party, leaving the other at liberty to perform it, or not, as it should prove to him most advantageous.

After all this lapse of time and successive defaults, four and a half years after the deed was due, two years after said judgment, eighteen months after said decree, fourteen months after said sale, eleven months after the confirmation of said sale, after the lands had fallen to less than a third of their value when the deed was due, this insolvent appellee, who could not have been compelled to execute his part of the contract, demands a specific performance of said contract; asks a court of equity to compel appellants to give up said judgment, in which said contract was merged with his acquiescence, and accept a payment of the money for which they have fairly bought the lands of the court, less what they have collected, by their vigilance, by redemptions upon said judgment of property which the appellee thought not worth saving—a payment which, perhaps, the appellee could not now make, without deducting these fruits of his creditors' vigilance—as a substantial performance of said contract!

The venerable maxim, *vigilantibus non dormientibus jura subveniunt*, which is said to have "peculiar force and pertinence in a case where the specific performance of agreements is sought" (Willard's Eq. Jur., 292); and which upholds good faith and punctuality in dealing, forbids that the appellee should be relieved from the penalty of his gross negligence, and the burden of his losses laid upon the innocent and wronged appellants.

Let us now see, in detail, what are the issues, and the facts as shown in the evidence.

STATEMENT OF FACTS IN EVIDENCE.

On April 9, 1857, the appellee and Henry M. Boggess entered into an agreement in writing with one Perry Alexander by which they bought the premises of said Alexander for six thousand dollars, and agreed to pay one third of said sum in land and the residue in two equal annual installments, with interest.

On April 21, 1857, the said appellee and Boggess entered into an agreement in writing with the said appellants, by which they sold said appellants the premises for ten thousand dollars, payable four thousand dollars on May 28, 1857, four thousand dollars, April 6, 1858, and two thousand dollars on April 6, 1859, with interest. *Time was declared to be of the essence of this contract; and the conveyance was to contain covenants of general warrnts.*

The premises were then vacant prairie. Grahams took possession under their contract and broke the prairie, built a house and other buildings and fenced the land, at the cost of about twelve hundred dollars. Grahams paid the whole of the purchase money according to the terms of the agreement; making the last payment on April 6, 1859, in the notes of said Holloway & Boggess, bought for that purpose, but not at a discount, and with the approbation and consent of said vendors, who then stated that they would make and deliver a good deed in a few days.

Holloway & Boggess now became insolvent, and failed to pay a part of the second installment and all of the last installment upon their own purchase.

On March 6, 1861, Alexander filed a bill in Chancery, in the Warren Circuit Court, claiming a vendor's lien for the unpaid purchase money, and that the land had so depreciated in value that it was not worth more than the balance due, and prayed a decree for payment against Holloway & Boggess, and that the sum due him, about three thousand dollars, be declared a lien, and enforced by said foreclosure of sale. Grahams and thirteen other judgment creditors of Holloway & Boggess, were made co-defendants with said Holloway & Boggess.

In March, 1861, said Grahams, in said court, commenced an action of covenant against said Holloway & Boggess on their contract for the purchase of said land, to recover damages for their non-performance in failing to convey the land, and such proceedings were had, that Grahams, on November 22, 1861, recovered judgment for $12,670.59. This judgment was for the damages for which the action was brought: it is not in evidence that it was for the amount of the purchase money. At the same term, default was entered against Grahams in the Chancery suit of Alexander; but at the next term of court, in March, 1862, the default was set aside, and a cross bill filed by them against all other parties in said suit. In the cross bill, Grahams set out all the facts above narrated in detail; that the judgment was rendered for the non-performance of the contract for the purchase of the land, and was "still remaining in force and unpaid; that no appeal bond has been filed or appeal taken in said cause; that said judgement never has been reversed, and that Exhibit (D), thereto attached, was a copy thereof, and was therewith filed and made a part of said cross bill; that said Holloway and Boggess then were, and had been ever since and before the commencement of their said suit, insolvent; and that the balance of said judgment, nor no part thereof, could be made from them or either of them."

Grahams also set out in detail, the amount and value of the improvements made by them upon the premises, and the taxes paid; and also that the lands were worth thousands of dollars more than Alexander's claim.

A paragraph is next devoted to the statement of the respective rights of the other co-defendants, and judgment creditors, and themselves to the premises; and in language, general and inaccurate, their claim to precedence is insisted upon. This part of the cross bill is termed the "nub" of the bill by the appellee's counsel, and is referred to to show that the relation Grahams claimed to Holloway & Boggess was that of vendees, (forgetting that their relation had already been set out as that of judgment debtors and creditors) because the language used to express the precedence of their rights in the premises over those of the judgment creditors is, that "they are entitled to the title;" a *non sequitur* at best, for the pleader does not show how they are entitled; and a casual examination will show that this language is only a flourish of the pleader,—a strong mode of asserting the precedence of their lien,—for it *was practically true* that the judgment creditors who should wait until Alexander and the Grahams were paid out of the proceeds of this land, had no interest worth guarding in the premises.

The prayer of the cross bill is for a decree in both actions, "as if they were one," in favor of Alexander, and against Holloway & Boggess, for the unpaid purchase money, "*and in favor of your orators for the amount which may be due and unpaid to your orators of the judgment, aforesaid, of your orators against them*; deferring the operation, lien, and effect of *so much of said decree as is in favor of your orators* until that portion thereof in favor of said Alexander is paid and satisfied; and that said decree be so *made a lien on said real estate for the payment theerof*, in the manner aforesaid." The cross bill then prays that the Chancellor, "*if consistent with the views of the equities in the premises*," give to said Holloway & Boggess "*a long day to pay and satisfy said decree*," and "to your orators in which to pay and satisfy *so much*

thereof as may be in favor of said Alexander;" and that in case of the payment of the amount due Alexander, "that said Alexander be required to convey to your orators or their assigns, said real estate *with such covenants as your Honor may direct*, conveying to them the right, title, and interest of said Alexander and the other defendants of said bill." "That *in case no such payment is made*," the land be sold to satisfy the decree, and the *proceeds of such sale applied*:—1st, to pay costs; 2nd, "*so much* of the decree as may be in favor of Alexander;" 3rd, "*to the payment of so much of said decree as may be in favor of your orators;*" 4th, "*and the remainder thereof, after the making of such payments, if any, be disposed of by such decree.*"

To the original bill, Holloway answered *under oath*, on March 27, 1862, and *denied that any of the other defendants*, except himself, *had, at the filing of the answer, any interest in the premises.* He admitted that *Grahams had an interest by purchase*, from Holloway & Boggess, at the filing of the bill, but averred that *since that time that interest had terminated by the result of a suit* brought by Grahams against Holloway & Boggess to recover the purchase money and interest thereon, paid thereon by Grahams to Holloway & Boggess. Boggess adopted the answer of Holloway and made oath thereto.

To the cross bill, Holloway answered on April 4, 1862, and expressly *denied the contract for the sale of the land to Grahams, the payments by them of the taxes and of the purchase money;* but admitted that Holloway & Boggess, having failed to convey said lands to said Grahams, that Grahams had recovered *judgment on said "alleged agreement," as stated, and that no appeal has been taken from said judgment, nor has it been reversed, "but is in full force and unpaid, except"* a sum collected by redemptions, the amount of which he cannot state; denies the insolvency of Holloway & Boggess; denies that Grahams have made improvements as claimed; denies *that Grahams took possession of the lands under said contract;* and denies the existence of the alleged agreement in the following language, viz:—

"He denies that the said Archibald Y. Graham and David Graham are entitled to the title to said real estate, subject only to whatever claim the said Alexander may have thereto for the remainder of the purchase money thereof; but claims that the said Archibald Y. Graham and David Graham *have released and waived whatever claim they might have had under and by virtue of their alleged agreement, by bringing the said suit in covenant on said agreement, as aforesaid, and that they have now no claim whatever to said real estate.*"

In a subsequent paragraph the answer again states: "This defendant denies that the said Archibald Y. Graham, David Graham, nor either, or any of them, *have any claim or lien whatever* to said real estate, or to any part thereof."

On the same day, the court rendered a decree on the motion of the complainant Alexander, taking default against all the defendants who had not answered, and referred the case to the Master in Chancery, to examine the proofs, and report.

On the same day the Master reported that he had computed the amount due on the contracts mentioned in the *original bill*, and found the principal and interest to be $3,101.49.

On the 5th April, 1862, the cause was heard on the original bill, the answers thereto, the cross bill and answers thereto, and several replications to the answers, and the report of the Master in Chancery —*no other proof* being offered; and a decree was rendered.

The decree recites that the court found from the pleadings and Master's report, that Perry Alexander did contract with said Holloway & Boggess to sell them the premises, and upon said contract there remained due and unpaid the sum of $3,600.49, and then proceeds as follows:

"It is therefore ordered and decreed by the court, that said Holloway & Boggess shall, within ninety (90) days from the date of this decree, pay to said complainant, the said sum of money so

found due him upon said contract, with interest at the rate of six per cent. per annum from date, together with the costs of this suit, and that in default thereof, the Master in Chancery be required to sell said land at public vendue to the highest and best bidder, for cash, after advertising the time and place of sale, at least twenty days before such time of said sale, in the Monmouth Review, and thereupon said Master in Chancery shall make a good and sufficient deed to the purchaser or purchasers thereof, conveying all the title which said complainant has in said land, and all the equity of redemption which said defendants, or either of them, may have in said land, and all claim which they may have therein, and with the proceeds of such sale, the said Master shall first pay the said complainant the said sum of money so found due him, as aforesaid, together with the interest and the costs of this suit. And it is further ordered, that if said Grahams become the purchasers at such sale, that the Master shall bring the deed into court to be delivered to them upon complying with the further order of this court in the premises, and if any other person or persons should become the purchasers, then the residue of the money is to be brought into this court to be appropriated under the order of this court, and *Provided further*, that the bid of said Grahams at the sale be made and given, and received by the Master, over and above ssid complainants debt and costs of this suit, as cash; and *Provided further*, that if said Holloway & Boggess shall pay said complainant said debt and interest, before the expiration of said ninety days, and the sale of said premises by the Master, and the costs, said complainant shall convey to said Grahams, within sixty days thereafter, according to the terms of said contract; and *Provided further*, that said Grahams shall first satisfy said judgment against Holloway & Boggess. Or, *it is further provided*, that said Grahams may pay said complainant his debt, interest and costs, and thereupon said complainant shall make a deed, as aforesaid, to them, and deliver the same, provided the said Grahams first enter satisfaction of all such judgment, save the amount he may have paid Alexander, as aforesaid, for his debt, interest and costs he may have paid in the premises.

And it is further ordered and decreed by the court, that in case the said Grahams should refuse to accept the residue of the money to be obtained from the sale of said land as aforesaid, with the conditions and provisions in this decree mentioned, then the Master in Chancery is ordered, after paying said complainant as aforesaid, and the costs herein, to bring the residue of the money into court to be appropriated according to equity and justice, at the next term of this court."

On the 14th Nov., 1862, the Master in Chancery filed his repert that he had advertised and sold the premises to William Lafferty, on the 1st of August, for $3,271.70, and had executed and delivered a deed to him, that he had from the proceeds paid the costs, $109.20, and to complainant, his debt and interest, $3,162.50.

At the same term Holloway moved to set aside the sale, the decree for sale, and the Master's report; but the court overruled the motions, and the court ordered a decree confirming the sale and deed, and also ordering Alexander, with his wife, to convey the premises to William Lafferty, in accordance with the contract between Alexander and Holloway & Boggess.

Upon the hearing of the motion to set aside the sale, Lafferty was sworn and testified substantially as he did on the hearing in this case, except that he stated then in addition, that he still held the land, and that Grahams had not repaid the money paid at the sale, and for this he had no other security than the land. One of the grounds of the motion was, that the sale was in reality a sale to Grahams, for whom Lafferty was merely agent.

On the 9th day of December, 1862, Alexander and his wife executed and delivered a warranty deed, conveying the premises to Lafferty.

On the 27th of March, 1862, a decree was entered confirming the deed last named.

On March 10, 1866, Lafferty at the request of Grahams, and on receipt from Robert Moir of $3,636.35, conveyed the land to Moir. Moir advanced the money for Grahams and agreed to hold the title till said money was repaid to him by Grahams.

Grahams, during all this time, were still collecting their judgment by redemptions from sales of other lands of said Holloway & Boggess. On February 21st, 1862, they collected $337 by redemptions, and on January 1st, 1863, they collected $802.88, and on August 17th, 1863, $12.87.

Holloway & Boggess sued out, and caused to be served, a writ of error from this court, to reverse the decree obtained against them in said chancery suit, but when, or why, this writ was sued out, or what was done with it after service, does not appear.*

*DATES.

1857, April 9th, Contract of sale by Alexander to Holloway & Boggess.
1857, April 21st, Contract of sale by Holloway & Boggess to Grahams.
Time not in evidence, Possession taken and improvements made by Grahams.
1859, April 6th, Time expires for making deed to Grahams.
1859, April 9th, Time expires for making deed to Holloway & Boggesss.
Time not in evidence, Holloway & Boggess become insolvent.
1861, March 6th, Suit in chancery by Alexander.
1861, March, Action at law by Grahams.
1861, November 21st, Judgment at law in favor of Grahams.
1862, February 21st, First collection on judgment by Grahams.
1862, March 27th, Sworn answer to Alexander's bill, by Holloway & Boggess, denying Grahams' interest under contract.
1862, March 28th, Cross bill filed by Grahams.
1862, April 5th, Holloway's answer to cross bill, denying contract and setting up judgment as a release of "alleged contract."
1862, April 5th, Decree in Alexander suit.
1862, August 1st, Master's sale under Alexander decree.
1862, November 6th, Master's report of sale filed.
1862, November 14th, Sale confirmed.
1863, January 1st, Second collection on judgment by Grahams.
1863, March 10th, Lafferty conveys to Moir.
1863, March 27th, Alexander's deed to Lafferty confirmed by court.
1863, April Term, Writ of error to reverse Alexander decree sued out by Holloway.
1863, August 17th, Third collection on judgment by Grahams.
1863, October 6th, Present bill filed.

THE PLEADINGS.

This bill was filed October 6th, 1863. It contains a narrative of the greater part of the facts above set out, but makes, also, certain other statements of alleged facts *which are not in evidence.*

The bill alleges that "on the 9th day of April, A. D. 1857, one Perry Alexander * * was seized in fee" of the premises. The answer neither admits nor denies this allegation, and the only allusions to the subject of title are found in the following passages of the answer, to wit.: "They admit that said Holloway & Boggess failed to make the payments on said contract with Alexander, *and the title, in consequence thereof, failed and was lost to said Grahams.*" * * "*They admit, that in consequence of the failure of title aforesaid, and the inability on the part of said Holloway & Boggess to convey any title to said Grahams,* they commenced the suit and recovered the judgment" aforesaid. * * "Said defendants say, *that said land was bid off and sold under said decree,* to William Lafferty." No parol evidence was introduced touching this question, nor other evidence, unless found in the "papers and records in the case of *Perry Alexander* v. *Robert Holloway*" *et al.* Now the decree of sale does not find that Alexander was seized of the title; but merely that he contracted to sell Holloway & Boggess the land, by a contract on which there remained due the sum declared a lien, and for which the sale was decreed. The orders of confirmation merely confirm the sale and deeds by the Master and Alexander, but do not refer to the title.

The next of this class of unsupported allegations is found on page 3 of the record, viz.: "That said Grahams *had full knowledge of the condition of the title, and that your orator and said Boggess had no other right to said land than such as was derived by the contract with said Alexander, and that there was the sum of four thousand dollars to be paid thereon*" before they would be entitled to the legal title from Alexander, and that "*the times for the payments by the Grahams were fixed expressly to enable*" their vendors "*to pay the sums due*" *Alexander.*

In Grahams' answer is a simple admission of the execution of their contract with complainant, and of his contract with Alexander, but of their knowledge of the condition of the title at the time of the purchase, nothing is said having any bearing upon the matter. Upon this subject the parol and written evidence are alike silent; even the pleadings in the suit of Alexander, which are not offered as admissions by the respective parties, but merely as part of the record, and could not therefore be justly treated as evidence, (even if competent, which may well be doubted,) are equally silent.

Another of the same class of allegations is found on the same page of the record, viz.:

That Grahams, "when the last payment from said Grahams became due, instead of paying the same in money, so as to enable" their vendors "to pay the balance due Alexander," purchased the promissory notes "of said vendors," from third parties in the market, at a discount, and claimed payment of them as an offset to the sum due on said contract, and your orator and Boggess were compelled to accede to said demand and receive said notes, by means whereof they were deprived of the expected funds to pay Alexander, and, having become embarrassed, were unable to obtain it from any other source, and therefore were unable to pay the sum due said Alexander, or to procure the title from him, or convey it to said Grahams."

On page 18 of the record, the answer of Grahams expressly denies this allegation, and avers that they were applied to to buy the notes and paid for them "in full, dollar for dollar," but "that before the purchase thereof, they waited on said Holloway & Boggess to have them accept the same on said contract, and they *expressed an entire willingness to take them on said indebtedness against said Grahams, and said they were the same to them as cash, and they would make to them a good and sufficient deed of said premises in a few days.*"

No attempt is made to support this allegation by the introduction of evidence touching the matter. The insolvency of Holloway & Boggess, two years after the deed was due Grahams, is indeed fully made out, for it is shown by the inability of their creditors to collect their debts, even by judgments and executions; but there is nothing to show that they were insolvent or embarrassed, or unable to pay Alexander, or "unable to procure the title from him," at the time in question, when they took their paper of Grahams on the last payment. On the contrary, it is admitted that they received from Grahams four thousand dollars in May 1857, and four thousand dollars in April, 1858, double the sum needed to pay off Alexander; nor had they the right to expect to pay Alexander his last payment with money received from Grahams' last payment, because they had no right to the latter till they were prepared to give to Grahams the title which they must first get of Alexander.

The next allegation of this class is the averment in the bill, to be found on page 4 of the record, "that Henry M. Boggess *sold and conveyed*, on the 25th day of October, A. D. 1860, all his interest in said land, and the money due thereon, to your orator."

To this Grahams answer, "said defendants know nothing as to the sale and transfer by said Boggess to said Holloway." (Page 18 of Record.)

There is no evidence touching this matter. Boggess is made defendant, and the bill is taken for "confessed as to said Boggess," but this merely touches *his* right to complain of the decree, but in no way supports the allegation, if material to the relief of the complainant. On page 11 of the record will be found the following passage from said bill, viz.: "Your orator is willing, and hereby offers, on behalf of himself and said Henry M. Boggess, to execute a warranty deed, or covenants of title, as required by their said agreement with said Grahams, to them or such persons as the court may direct," and the proof of the above averment that the complainant is the owner of Boggess' interest in the premises, is

clearly material, to show that he has the right to make such offer, and the power to make the deed he assumes to offer.

The next allegation of the bill, (or rather recital, for it is not in fact an allegation,) neither admitted in the evidence nor supported by the proof, is to be found in the paragraph on page 5 of the record, viz:

That the judgment recovered by Grahams, in the action of covenant, "brought to recover damages for the non-performance of" said vendor's "agreement in failing to convey said land," was "for the sum of $12,670.59 damages, being the full amount paid on said contract, with interest—with costs."

There is nothing anywhere to show that this judgment was *for the purchase money only*, or *for the purchase money at all*, or that it was not in fact for damages which may have been incurred by the gross laches of said vendors, and the loss of the sale of the land, or for other causes. We have nothing but the record which discloses the form of action, the cause of action, and the amount of the judgment for the damages sustained by said vendors' breach of their covenant to convey the title.

The next allegation of the bill, which is unsupported, indeed, disproved, by the proof, is found on page 6 of the record, viz.:— "The said Grahams filed a cross bill praying that your orator and Boggess be decreed to pay Alexander, and Alexander to convey the land to them." The cross bill must speak for itself, but that this was the object of the cross bill is expressly denied in the answer. What this cross bill really seeks will be fully discussed later; here it is enough to say, that this is a singularly incorrect statement of the prayer of that cross bill, not only in its omissions of the prayers for a decree for the amount uncollected of the judgment, and a sale to pay the same, but in its distorted statement of the special prayer which asked that in case the part of the decree in favor of Alexander was paid, thus leaving unpaid Grahams'

portion of that decree for their judgment, "by any person or persons, that Alexander should convey to them with such covenants as the court should direct;" a special prayer evidently intended to *secure and protect, not to give up or abandon, that part of the decree* in favor of said Grahams, for the amount due upon their judgment.

The next allegation of the bill, *to which we now desire to call attention, as belonging* to the class unsupported or disproved by the evidence, is found on page 10 of the record, viz.:

"Your orator avers that the said Archibald Y. Graham and David Graham, notwithstanding their election to resort to an action at law to recover damages, yet, after the recovery of said judgment, they also determined to abandon said judgment and claim the land, as they did by their said cross bill, and have since obtained the same with a perfect title, free and clear of all incumbrances, upon the payment of the sum due to the said Perry Alexander, as aforesaid."

To this allegation Grahams, in their sworn answer, on pages 18 and 20 of the record, say:

"*They deny that said cross bill was a bill for specific performance of their contract with said Holloway & Boggess, but, on the contrary, aver that it was a bill filed to enforce the collection of their said judgment at law, by procuring an order or decree directing an application of the surplus moneys raised on the sale of said land upon the judgment at law, and upon which premises, having issued execution on said judgment, they had a lien by virtue thereof.* * * AND SAID DEFENDANTS FURTHER SAY THAT THEY NEVER OCCUPIED BUT ONE AND THE SAME POSITION IN REFERENCE TO THEIR SAID JUDGMENT AT LAW, AFTER THEY RECOVERED THE SAME, AND THAT WAS TO ENFORCE THE COLLECTION THEREOF BY THE MOST CONVENIENT MEANS IN THEIR POWER, BOTH AT LAW AND BY A BILL IN EQUITY."

It is conceded that the construction and proper interpretation of the cross bill, like that of any other written instrument, must, in great part, if not wholly, be governed by the terms and language

of the instrument itself; but where the terms or language are obscure, ambiguous or doubtful, or the instrument is referred to as evidence of the intentions of the party, the sworn statement of that intention, by the party themselves, is fairly entitled to consideration.

The allegation in the bill, which we are now considering to see whether it is supported by the evidence, contains the complainants' view of the effect of the cross bill and the purchase, and is in fact the proposition of law and fact on which his case rests. The effect of the cross bill, and the right of Grahams to buy of the Master, without giving up their judgment, will be discussed hereafter, and it will then be seen that neither the cross bill nor the purchase at the Master's sale by Grahams, tend to support this allegation.

The other allegations in the bill consist chiefly in a narrative of the facts already set out; and the bill closes with the prayer that the judgment may be declared satisfied upon the payment of the amount paid by or to Lafferty, less the sums collected upon the judgment.

Grahams answer under oath on January 11, 1860. They admit the execution of the contracts made with them and made with Alexander, respectively, by Holloway & Boggess, and that Holloway & Boggess failed to pay Alexander, and the title, in consequence, was lost to them, and aver that they have fully paid up Holloway & Boggess, and that they went into possession under their contract; they deny that they bought the paper of Holloway & Boggess at a discount and compelled Holloway & Boggess to take it in payment for their land and so disappointed and embarrassed Holloway & Boggess; but aver that before they bought the paper, for which they paid dollar for dollar, they got the consent of Holloway & Boggess, and that Holloway & Boggess expressed an entire willingness to take the paper in payment, and stated that they should have a good deed for the land from Holloway & Boggess in a few days. They admit that they recovered the judgment, and the

collections as charged in the bill; the filing of the bill by Alexander, of the cross bill by themselves, and the final decree; but deny that the cross bill was for a specific performance of their contract with Holloway & Boggess, but aver that it was filed to enforce the collection of their judgment at law against the land, and against Holloway & Boggess, by a decree directing the application of the surplus money received at the sale upon it, and aver that "*they never occupied but one and the same position in reference to their said judgment at law, after they recovered the same, and that was to enforce the collection of the same.* "That the decree rendered in the Chancery suit was not in accordance with the prayer of the cross bill, inasmuch as the relief granted in said decree to said Grahams was clogged with such conditions and provisos, in favor of said Holloway & Boggess, as to greatly impair, if not to destroy, the main benefit and object which said Grahams sought to secure by their said cross bill. They aver "that they never acted under said decree, nor took the benefit thereof, and, on the contrary, abandoned all effort to come in under said decree, or avail themselves of its provisions, which by the terms of said decree it was optional with said Grahams whether they would accept and act upon or not." They admit that the land was bid off and sold Lafferty, and that they induced him to buy under an understanding that he should let them have it upon being repaid his money, and a compensation for his trouble; but aver that he paid his own money at the sale; and it was not advanced as a loan; and the land was conveyed by Lafferty to Moir, at their request, upon being repaid according to their understanding.

They admit the motion of Holloway to set aside the sale, and aver that the ground was, that the sale was in fact to them, and insist that the decree overruling his motion and confirming the sale estops Holloway from claiming any interest in the land or disputing the title of Lafferty as that of a purchaser at the sale. They then aver that the premises have greatly depreciated in value since they were entitled to a deed; *that in consequence of the failure to get the title, they have lost the sale of the land at an*

advanced price upon its present value, and have been put to great trouble and expense in purchasing said property, and in having valuable improvements made on it, and have suffered damage and expense and loss of time to their general business, in the interruption thereof, while occupied in attempting to save the property and improvements, and insist that it would be grossly unjust to make them cancel their judgment upon receiving a small part of it, after such losses and delays.

At March term, 1864, A. Y. Graham filed an amended answer, also under oath, in which he states in greater detail his agreement with Lafferty & Moir, and the sum paid to Lafferty; admits that the Grahams are endeavoring to collect the judgment, and have collected about twelve hundred dollars, and that they are, and were, in possession of the lands *when and ever since the bill was filed.* Both answers are by agreement treated as the unsworn answer of David Graham and Robert Moir.

THE EVIDENCE.

At the hearing, Lafferty testifies to the facts in regard to his purchase as stated by Grahams; and *that he gave the same testimony at the hearing of Holloway's motion at the October term*, 1863, *in the Chancery case of Alexander to set aside the sale, with merely the addition*, that he then stated as was then true, *that he held the land, and had no other security than the land, for his money, which Grahams had not then repaid him.* The value of the improvements made by Grahams upon the land was admitted to be correctly stated in the said cross bill. The papers and records of the Chancery suit of Alexander were given in evidence; and it was shown that Holloway & Boggess took an appeal, or sued out a writ of error from said decree, which was served; and that said decree was "entered by consent," and drawn by the solicitor for Alexander "so as to conform to the opinion of the court as expounded after the decision was made."

THE DECREE.

And upon this testimony and these proofs, bill, answer, amended answer and replications, the case was brought to a hearing at the March term, 1864, and the court found "that there is *equitably due*, from said Holloway" to said Grahams, $2,803.45 "on the contract and judgment described in said bill of complaint," as follows: "that there has been collected on said judgment" $1,221.56, "and that there has been paid into court $2,803.45," making in all, $4,025.01, "being the same amount, with interest and expenses, *which said Grahams have been obliged to pay in order to secure the title* to the premises described in the bill in this cause, and which sum this court decrees *to be all the portion of said judgment which, under the former decree*, said complainants are *equitably entitled to collect*, and as to the residue of said judgment, said defendants are enjoined from collecting the same."

I. THIS BILL HAS NO EQUITY UPON ITS FACE.

The allegation of the bill already quoted, found on page 10 of the record, "that Grahams, after the recovery of said judgment, determined to abandon said judgment and claim the land, as they did, by their said cross bill and have since obtained the same with a perfect title," may be regarded as the gist of the bill, and a statement of the complainant's theory of this case made in his bill; as the proposition of law and fact on which his case therein made is to rest; and as his legal interpretation of the facts set out in the narrative of which all the remainder of his bill, with trifling exceptions, consists. The cross bill and the purchase at the Master's sale are the two acts by which it is claimed that Grahams have satisfied their judgment.

The abandonment was a voluntary act according to the bill; there is no release of the judgment for a consideration; no agreement to give up or relinquish the judgment for a valuable consideration, charged in the bill. The regularity and justice of the

judgment are not questioned but conceded, indeed are above question; a court of chancery, had its aid been invoked at the rendition of the judgment, must have granted, substantially, the same relief. The judgment is not a relief or an estray; nor a wild animal, in whom no one can have property that can be recognized apart from the possession, and so be abandoned again. After the filing of the cross bill, the record of the judgment remained unsatisfied; for otherwise it could not have been afterwards enforced by execution; else the complainant need not file this bill. The judgment is legally subsisting, and has been since that alleged abandonment enforced, and was being enforced when this bill was filed. *Hinc illae lachrymae.* It seems clear, therefore, that no equity can spring from a voluntary abandonment of the judgment by Grahams.

But let us look at the other facts of the group condensed in this sentence, and out of which it is conceded all the complainants' equity springs. Grahams, after recovering their judgment, "determined to abandon it and claim the land, as they did, by their cross bill, and have since obtained the title to the land." It is not charged that they did any wrong or injustice to Holloway by "claiming the land;" and "abandoning the judgment" was surely no wrong of which the judgment debtor could complain: but if they did this wrong, is not the complainant's equity to have the *statu quo* restored? to be given again his land? Whence comes his equity to confirm the wrong? If it be the privilege of the injured party to confirm the transfer of title, is not the true and settled rule that the alternative for his election shall then be the privilege to take the value of the property wrongfully taken? Whence, then, springs his equity to have the *judgment satisfied*; even if that judgment was conceded to be, (not as in fact for damages,) for the purchase money under a former contract of purchase? Is not this to say that the contract price is the *true measure of the value* of the property; and is it not in evidence that, at the time of the unlawful taking of the title, the land had so depreciated that it was fairly sold at an unchallenged public sale for a third of

that amount? But clearly it is not on this principle—the principle that the injured party may confirm an iniquitous transaction by which he has been defrauded, and take the value of the property unjustly taken—that this complainant proceeds. The bill does not even charge that the claim set up in the cross bill was *untrue;* the facts set out in the bill do *not* show that Grahams had not then the title; *there is nothing in all this record to show where the title to this land ever was or now is.*

But conceding, as we must, in discussing the equity shown by the bill, that that title was in Alexander; and, hence, Grahams' alleged claim of title was false; what then? The bill fails to show that the complainant *lost the land by that false claim*; or that Grahams *gained the land by that false claim.*

In juxtaposition to this, is the statement "that Grahams have since obtained title to the land;" but the bill shows that this was by purchase of the Master, and that the court, having all the facts before him, touching Grahams' interest in the purchase, confirmed the sale. The bill, therefore, shows on its face that the sale was rightful; that Grahams' purchase at the sale was rightful; and all parties, including this complainant, are estopped to deny the justice and regularity of that sale and purchase, by the order and decree of the court in that suit. If Grahams, then, rightfully obtained the title, what matters it what was said or claimed in their cross bill?

The statements of the cross bill are not offered as evidence in the nature of admissions that Grahams owned the title, and had no judgment. The contrary of each statement—the truth—is shown in the bill. No ill result, nor the loss of the land, is shown to spring from the alleged statements. The land is shown to have been justly and regularly sold at public vendue, at a fair price, to the highest bidder, and the proceeds applied to pay the purchase money which this complainant had agreed to pay for the land. The bill, then, amounts to this: that Grahams made, in a cross bill,

false statements of their relations to the judgment, and to the land —abandoning and disclaiming what they did own, and claiming what they did not own; and that afterwards, but not in consequence of these falsehoods, they fairly obtained the title to the land.

A false statement entails upon the utterer of such falsehood no penalty, or forfeiture of right or property unless it be also shown that some loss has been sustained by an innocent party, in consequence of such statement. (See the doctrine in regard to estoppels *in pais*, *Freeman* v. *Cooke*, 3 Ex. Ch. Rep., 664; if authority be needed to establish a proposition so self-evidently just. Hence, we conclude that, since the complainant fails to show that he has sustained any loss in consequence of the alleged false statements contained in the cross bill, that this bill, which places the complain ant's equity upon the ground of these alleged false statements, and the subsequent purchase of the title to complainant's land, shown to be a rightful purchase by the bill itself, has no equity upon its face.

But, perhaps, the appellee's answer to the argument presented to show that his bill shows no equity on its face will be, that his equity springs from the facts set out in the bill, of which, said allegation is but a rough abbreviation; that these facts show that Grahams abandoned their judgment by their cross bill, because they *obtained the title to the land by setting up the claim that they were entitled to it by virtue of their contract of purchase of plaintiff;* and, that, having got the title through the claim that they owned the land by that contract; and thus, having received the fruits of that contract, said Grahams are now estopped to deny that that the contract has been substantially performed by plaintiff; and are, therefore, in equity, bound to pay for the land, according to that contract, and hence, must satisfy the judgment recovered against their vendors, for the failure to give them the title they have now got. This theory of the plaintiff's case (which seems to be the theory of the brief filed in his behalf in this court), may also be stated in a slightly different form, thus, viz: that, by the contract of purchase, Grahams have obtained the land; and, as by the judgment, they

are adjudged the purchase money, they now have both land and money; hence, since they cannot have both, the must give up the money, and keep the land, according to their contract, which will then have been substantially performed by the plaintiff, when he pays the sum they have paid, to clear off the Alexander incumbrances.

But, to support this argument, it is clear that the appellee must be able to answer in the affirmative, the three following questions, viz:

1st. Did the appellants abandon said judgment at law, and claim in their cross bill, the title to said lands, as purchasers, by said contract with appellee?

2d. Did the appellants obtain the title to this land, by said claim of title derived through said contract?

3d. Is the satisfaction of said judgment at law, the proper relief to which appellee is entitled, in consequence of the act of appellants in obtaining said title to said lands, by said claim of title derived under said contract?

Should either of these questions be answered in the negative, the appellee's right to relief, as predicated upon this theory, at least, fails.

Let us, then, consider the first question: Did the appellants abandon said judgment at law, and claim, in their cross bill, the title to said lands, as purchasers, by said contract with appellee?

After the usual and formal statement of the pleadings and prior proceedings in the case, the cross bill gives a history of the transactions of the parties, relating to the lands which were the subject matter of the suit, commencing with the making of the contract, and then following with the payment of the purchase money and taxes by Grahams, the failure of Holloway & Boggess to make the conveyance, the suit at law for the damages occasioned by this

failure, and the judgment in which said suit resulted. Of this judgment, the pleading avers that, it "is in full force, and unpaid, save as to the sum of $338," made thereupon by redeeming said debtor's real estate; "that no appeal bond has been filed, nor appeal taken" in said cause; that said judgment never has been reversed, and that Exhibit (D) is a copy thereof, and is herewith filed and made a part of this cross bill; that said Holloway and Boggess "*are, and have been ever since before* the commencement of said suit, insolvent," and the balance of the judgment cannot be made from them. The cross bill then devotes a paragraph to a statement of the amount and value of the improvements made by said Grahams on said lands, showing that value to be nearly $1,200; and next, contains the following paragraph, which, on account of the importance given it by the appellee, is given in full, viz:

"That your orators are entitled to the fee simple title to said real estate, subject to whatever claim said Alexander may have thereon for the remainder of the purchase money thereof, aforesaid, and no others. Your orators deny that said State of Illinois, Elisha Eldred, Anson Eldred, Uri Balcom, Seth Smith, William U. Dodge, James F. Owens, Joseph Holton, Jonathan Black, Thomas Ridgely, Elijah C. Babcock, John Babcock and Theodore Poehler, or either, or any of them, or said State of Illinois, have any claim or lien whatever on said real estate, or any part thereof."

Next follows the prayer, which is, first, that a decree be made in both suits as one, and in favor of Grahams, for the balance of said judgment at law, and that it be declared a lien upon said lands; that a long day be given to Holloway & Boggess to pay said decree, and to Grahams, to pay so much thereof as may be in favor of Alexander. Then comes the special prayer, upon which appellee lays so much stress, which is as follows, viz: "* and that in case of such payment, within such time so to be fixed, of the amount that may be so due said Alexander, and such costs in the premises as the court shall direct, by any person or persons, that said Alexander, by the decree of this honorable court, be required, within

a time thereafter to be fixed by the court, to convey to your orators or their assigns, said real estate, with such covenants as your Honor may direct, conveying to them the right, title, and interest of said Alexander, and the other defendants to said bill, than your orators".

The cross bill then concludes with the prayer that, in case "no such payment" is made, the lands may be sold, and the proceeds applied to pay: 1st. The costs. 2d. "So much of the decree" as may be in favor of Alexander. 3d. "*So much of the decree as may be made in favor of*" *said Grahams.* 4th. *The remainder to be disposed of by the court.*

It cannot be denied that all of this cross bill (save the paragraph and special prayer above quoted, which do not occupy one-tenth of its space,) is devoted to the enforcement of the judgment at law, whose history is there given; which is shown to be unreversed, and in full force, and unsatisfied, and is made an exhibit and a part of the cross bill, and for which a decree is asked, declaring it a lien on said lands.

To the paragraph above quoted, called "the nub of the bill", by the learned counsel for the appellee, and appealed to by him to show that Grahams intended to abandon the said judgment, and claim said land, as purchasers under said contract of sale, this interpretation cannot be given, without a violation of the settled principles governing the judicial construction of written instruments.

First. It is a fundamental and most useful rule of such construction to examine the context. Upon examining the context, it will appear that, in the rest of the bill, the pleader has, in detail, and most carefully, given a narrative of the facts, making Grahams judgment creditors of said Holloway & Boggess, by virtue of a judgment at law, in which said contract was extinguished. Hence it is incredible to suppose, that they here intended to claim said lands, under a contract which the bill itself showed was at an end.

Second. The language is *not* that they claim the title under said contract. They do not say *how* they became entitled. If inference were admissable, the last source of title to which it would be just or logical to refer the origin of this claim, would be the said contract, which the pleading itself shows was extinguished and merged in said judgment. What right has the appellee to say that Grahams' claimed the lands as "purchasers"? They did not say so; and who shall add to their language? Who shall add to this paragraph, so as to make it conflict with the clear and unmistakeable terms of the remainder of the cross bill, with the law, with justice, with all the prior and all the subsequent acts of the complainants, and to the defeat of their interests?

"The old maxim, '*ex antecedentibus et consequentibus, fit optima interpretatio*,' is a sound rule in the construction of instruments. "To magnify words of contingency by the narrow and microscopic view which excludes the fair operation of the context, is not consistent with established principles of construction, or likely to produce other than an erroneous result."

Browne v. *Browne,* 23 Sm. & G., 591.

Third. Said judgment, because recovered upon said contract of purchase, had the force of a vendee's lien for the purchase money. That lien was superior to the liens of the other co-defendants, although senior judgment creditors; and gave to Grahams the right to the proceeds of said lands, after Alexander was paid, to the extent of said judgment.

If any part of the judgment should remain unpaid, Grahams had the right to collect it of said debtors.

What motive could lead Grahams to give up this overplus? Not the insolvency of said debtors; for this was the case when they got their judgment. Nor would it be a good reason, to throw away said right to collect said overplus, even if that right were valueless.

If the proceeds of the sale should exceed the judgment, then, indeed, the contract would give Grahams that surplus. But what

hope of this when the lands had fallen in value, and three months later, at a public sale approved by the court, sold for barely enough to pay Alexander?

What reason to attribute such hope to Grahams, whose lien for improvements, taxes, and the balance of said judgment, exceeded the value of said lands, as ascertained by said sale, by the sum of fourteen thousand dollars? But what shall be said when we find that, in their prayer, Grahams ask for the satisfaction of said judgment only? That they do not ask for, but leave to others, this possible surplus. Hence, it is clear, that to impute to Grahams the intention to set up the claim to these lands under said contract, giving up said judgment, is to charge them with intending to do themselves an injury. It is fair to presume that Grahams knew and sought to advance their interests. Therefore, the court, in the absence of other controlling principles, should adopt that interpretation of said cross bill which best accords with the interests, and hence with the presumed intentions, of Grahams.

Fourth. Said contract was extinguished by said judgment, and Grahams were estopped, by the solemn finding of the court, to allege that said contract was in force.

Even with the consent of their debtors, how could Grahams revive said dead contract to the injury of said judgment creditors, who were next in right, and entitled to have any surplus of the value of the lands, after Grahams were paid?

Were Grahams and their counsel ignorant of the law? The legal presumption is, that they knew their rights; that they knew they were entitled to be paid their judgment, but were not entitled to the lands, nor to the surplus of their value above said judgment. Hence, the court will be slow to give any interpretation to said cross bill which imputes to Grahams an intention to obtain an unjust advantage, by exchanging their real situation of judgment creditors for that of vendees.

Fifth. This paragraph has no reference to the relation of Grahams to their debtors. To that, nearly the whole of the preceding part of the pleading is devoted. That relation has been very fully and carefully shown to be that of judgment creditors, by virtue of a judgment upon a contract of purchase, which is in full force, unreversed, and in great part unsatisfied. But there are defendants, other than said debtors, who are also creditors. What are their relative rights to the subject matter in litigation? These rights are not elsewhere touched upon; and to them this paragraph is devoted. Here they say, in substance, that their rights are subject to Alexander's, "and to no others;" and that said creditors, whom they name, have no interests in the premises.

Now, is it of any consequence to their debtors in what language this is stated? Can loose or inaccurate terms—claims too broad—made without any reference to said debtors, be tortured into the expression of an intention to abandon the relation of creditors, and assume the relation of vendees, which they had solemnly relinquished, and to which they were forbidden by so many considerations?

This is the language put into the mouths of Grahams by their solicitors, defining their legal relations to other creditors, touching said lands; stating, not a matter of fact, but a proposition of law. In using the terms "fee simple title," instead of those proper to express the relative priority of liens, Grahams' counsel were simply guilty of a verbal inaccuracy, for which, if this decree stands, their clients are to lose important rights! A claim a little too broad for scrupulous legal nicety,—a legal proposition put in the mouths of clients by their solicitors—is to show the intention of said clients to abandon the judgment, to enforce which is the object of the pleading!

But this paragraph contains a statement of the relations of Grahams and their fellow creditors to said property of their debtors, which, while it is legally false when literally interpreted, is found to be *substantially true*, when the facts are considered.

It is in effect to say: "Alexander is to be first paid; next, we are to be paid. The lands are not worth half our claims. Hence, you, who come after us, will get nothing; and you have no interests here."

We conclude, then, that this paragraph, fairly interpreted, does not show that Grahams claimed the title to said lands, as purchasers under said contract with appellee.

But what of the special prayer for a conveyance from Alexander? In this bill it is alleged that "Grahams filed a cross bill praying that your orator and Boggess be decreed to pay Alexander, and Alexander to convey the land to them," * and in the brief of the counsel for appellee, filed in this court, after quoting the entire prayer of the cross bill, it is said, "This prayer, it will be remarked, is not only in the alternative, but with an apparent fear that the complainant lose something for the want of asking, the solicitor made it varied enough to cover any possible view the court might take. The decree shows what view the court did take, and the relief granted is in conformity to one brance of the prayer of the cross bill." By this "branch of the prayer," the complainant thought fit to describe the cross bill, and this "branch" it is to which his counsel refers, to show that the prayer of the cross bill is "in the alternative," * "to cover any possible view the court might take," and "in conformity to" said "branch of the prayer of the cross bill" is the "relief granted" by the court, as shown the decree. These references show the stress laid upon said special prayer by said appellee.

But the prayer of the cross bill is that a decree be rendered for the sum due Alexander and for the judgment in favor of Grahams, and be declared a lien upon said lands. Then comes the special prayer, asking that Alexander shall convey to Grahams, in case the part of the decree in favor of Alexander is paid by any persons, by the debtors, or by Grahams, who ask to be allowed to pay it.

Said conveyance is asked *only in the contingency named*, the payment of a part of the decree, leaving the portion due Grahams

unpaid. Hence it is shown that the allegation in this present bill is untrue which sets forth said conveyance as the object sought by the said cross bill, that object being therein clearly stated to be, a decree for said judgment as a lien upon said lands. Equally mistaken is the statement of the appellee's counsel, that said prayer is "in the alternative," that is, that the conveyance is asked in the event that a decree for the judgment should be refused. *On the contrary, said conveyance is asked in addition to said decree*, and in aid of said decree, and only in the contingency that the part of said decree for said judgment is left unpaid. Grahams had the right to vary their prayer "to cover any possible view the court might take," *but did not vary said prayer so as to provide for such view, refusing a decree for said judgment.* That they asked absolutely and never varied from it, nor presented an alternative, nor were visited apparently by any doubt that they were entitled to receive such relief. They did not propose to give up said decree for said judgment, but asked a sale, if the whole decree remained unpaid, making, however, no claim to the proceeds of such sale beyond the amount of said judgment. Nor is it true, as will be seen more fully hereafter, that the court made a decree in which is shown "what view" of the equities of said parties the learned Judge took, or that the "relief granted is in conformity to" said branch of the prayer of said cross bill. *Certain privileges were left to Grahams' acceptance*, leaving them free to accept or reject them. One of these privileges was the right to receive a deed from Alexander, upon his being paid, and so far only resembled this prayer. But said conveyance was to be given *upon condition* that Grahams should first satisfy said judgment, and so far was *in direct opposition to said prayer*, in which a decree was asked enforcing said judgment, and the special request for said conveyance was made in the event said decree was unpaid, *as a sequel to, in addition to, and in aid of said decree.*

Neither is it true that Grahams ask, in this special prayer, that to which the contract could entitle them. They ask a deed from Alexander, not from Holloway & Boggess, their late vendors; they ask a deed "with covenants such as your honor may direct,"

not as stipulated in said contract, "a deed with covenants of warranty." They ask a deed in the event that part of said decree for said judgment remains unpaid; in addition to said decree, and by way of securing and enforcing its collection; they ask the deed to secure the judgment, and by the contract they could have but the deed alone, and could not have the judgment, which was predicated upon the death of the contract.

But if it were true, that the same relief was asked in the prayer to which Grahams would be entitled by said contract, what would that prove? That they abandoned the judgment for which they asked a decree and a sale, if unpaid? When one prayer is in opposition to another, can your opponent appeal to the latter to show that the former is abandoned, and then turn round and defeat the latter prayer on the merits?

What is to be found in the prayer, to show that Grahams proposed to take said deed in satisfaction of said decree for their judgment? They do not say they ask to make such exchange, and to make it is against their interest; to take one dollar in any event theirs for each four dollars of the judgment, which they might reasonably hope to collect! Such exchange is against the law governing their rights, against the interests and rights of said judgment creditors having the next lien on said lands and a right to any possible surplus; against the legal rights, if not the interests, of Holloway & Boggess.

True, Grahams could not have the lands for nothing, and collect the judgment beside. But what was to prevent their solicitors from framing a prayer asking for more than his clients were entitled to? And where is the law, affixing as a penalty that such prayer or claim is to be made, at such risk to his clients as to bind them to every logical consequence, as proof of an intention to give up and abandon all other rights and interests with which such prayer or claim, if well founded, were inconsistent? If such be a fair test, it must prove a test equally new and trying to illogical solicitors or ignorant clients. It is to say, "you cannot have *this*, for in such a pleading you claimed *that* and asked the *other* thing;

now you cannot have them all, and hence you must be denied the former, and must take the latter, because you claimed and asked it, and must be presumed to have intended to abandon every inconsistent right."

Assume the fact to be, that Grahams' only interest in said lands was the lien of said judgment, and their only right to enforce that lien. They asked more,—something in a stated contingency to which they were not entitled. On what principle or authority is it, that such prayer shall be held to show an intention to take this and give up that? To take this, to which they had no right, and to give up that, to which they were entitled? Why is it, that a prayer for a deed proves that Grahams intended to abandon said judgment and set up said contract? and why does not the prayer for a decree for said judgment, *equally prove that Grahams intended to abandon said conveyance and contract, and enforce said judgment?*

Grahams had no right to the lands *without* paying for them; but they had, also, no right to the lands *upon* paying for them. They had no right to them by said contract; and no other right to said lands, outside said contract, is shown. By what principle, then, is it shown that to pray for a deed from Alexander is to assert the contract with Holloway? *Prima facie* we are at liberty to say that we claim the land by any source of title whatever, and who can say more, than that our right to a deed from Alexander, in the contingency named, is not apparent? By what principle of logic is such prayer held to assert an extinguished contract as the source of title, rather than any other possible source of title, of which indeed it could only be said, there is no proof, but that it is proved to be at an end?

But what did Grahams intend by said prayer for a deed from Alexander?

We answer, that we are not bound to show that the prayer is sensible, or legal, or proper. It is enough, that to ask for such deed is not to abandon said judgment, nor set up said contract.

If an explanation is sought of Grahams' ideas in asking said deed, it may perhaps be found in one of several reasons, viz.:

First; the deed was asked from a vague fear lest the title might slip back into said insolvent debtors' hands and evade the lien of said judgment, should the court leave Grahams to their relief at law; and they sought in this way to be permitted to hold the lands as trustees, with a view to apply the proceeds when said judgment should be legally or equitably enforced.

Second; the contingency, upon which the deed is asked, is in case of payment of the part of the decree in favor of Alexander, for which they asked a long day to be given, expecting to pay the same (the insolvency of said appellee and Boggess, making a payment by them improbable); and they hoped to get the land for said sum, in case the court was inclined to grant the prayer of Alexander, for a strict foreclosure, on the ground that the land was barely worth his debt; believing that they, who had made said improvements, and paid said taxes, and advanced, and perhaps lost their money in a vain attempt at purchase, had a better claim to the land, upon the proposed terms, than a stranger.

Third; in Section 60, Vol. 1, Story's Eq. Plead., it is said, "the court will grant such relief only as the case stated will justify, and will not ordinarily be so indulgent as to permit a bill framed for one purpose to answer another, especially if the defendant may be surprised or prejudiced thereby." Hence, it is further said that it is nothing unusual "to *frame a bill with a double aspect*, so that if the court should decide against him in one view of the case, it may yet afford him assistance in another. The prayer of the bill demands a good deal of consideration and attention; and an accurate specification of the matters to be decreed requires great discernment and experience, to foresee all the exigencies which may arise in the progress of a suit which may require new relief."

The solicitor, who drew this cross bill, may have followed the advice of this eminent jurist, framing this cross bill "with a

double aspect," and making this prayer to meet "one view of the case," in which the court might afford his clients assistance.

But it is clear that it does not lie with the adversary of Grahams to give them such relief as he elects; but it is the province of the court to give or refuse relief, according to the rules of equity. Here it should be remembered that the appellee, in his answer to said cross bill, denied Grahams' claims to relief, asserting that they had no interest in the premises, and the court, it will be seen, made no decision and gave no relief touching the question in controversy.

Is not this answer evidence, as an admission, that said contract was dead, and said judgment in force, after the cross bill was filed? Clearly the appellee did not then concede to the cross bill the effect which he now charges to it; but, in clear and emphatic terms, declared the contract "released and waived," and that Grahams must look to their judgment as the measure of their rights. On what principle can he now be permitted to deny the truth of these solemn and explicit statements?

These statements of the appellee are just and true, in harmony with the law and the facts. The construction sought to be put upon some expressions in the cross bill, make it speak a language inconsistent with the tenor of the instrument, and in conflict with the law and the facts. The answer is later in date; clearer in terms. Which shall give the law to this case, if pleadings are to give it, the cross bill or the answer? Surely the law and the answer should prevail. Surely nothing short of clear and explicit language, renouncing their rights, will serve to convince the unprejudiced mind that Grahams intended to leave the path of law and justice where it was also that of interest!

The cross bill cannot be used as evidence of an abandonment of said judgment by Grahams.

The sound rule is stated by Lord KENYON thus:

"A bill in chancery is never admitted in evidence further than to show that such a bill did exist ; and that certain facts were in issue between the parties, and in order to let in the answer or depositions of witnesses."

Doe. d., *Bowerman* v. *Sybourne*,
7, T. R., 2.

See the elaborate opinion of Parke B., in Boleau & Rutlin 3, Ex., 665, announcing the judgment of the court, in which this rule is shown to be supported both by sound principle and the weight of authority.

In Gresley's Ev. in Eq., page 426, the learned writer gives the following reasons for said rule ;—"bills in equity are notoriously filled with fictitious matter." "Neither is it" "to be allowed to be used against the plaintiff, the assertor of these false allegations, because it has been found by experience that, under the present system of pleading, no process is so efficacious as alleging, in eventually eliciting the truth. The court looks on these allegations as the mere suggestions of counsel, and connives at statements and charges, being made for the sole purpose of putting questions founded upon them to the defendant."

The language of this cross bill, upon which the appellee founds his charge, viz ; the claim of title, and the prayer for special relief, is clearly "mere pleader's matter," and the "suggestions of counsel," in which the appellants took no part, and of which they probably had no knowledge. To the appellee's bill, based upon this general language, the proper answer is found in the words of Lord Chancellor Hart, who said, on refusing to allow a bill to be read in evidence ; "the court never reads a bill as evidence of the plaintiff's knowledge of a fact. It is mere pleader's matter. The statements of a bill are not more than the flourish of a draughtsman."

The language relied on to prove that the judgment was abandoned, and claim of title set up under the extinguished contract, is loose and general. The language in which the judgment is set out,

and the contract shown to be at an end, is plain and free from doubt. The former, too, is unmistakably the language of the solicitor, setting out the legal claims of his clients.

To this language the appellee seeks to give a construction which shall conflict with the clear and unmistakable terms of the remainder of the bill, and deprive Grahams of important rights. It is an effect analogous to the effect of an estoppel; why should not the principles of the law of estoppel be applied? A statement in a deed to operate as an estoppel, must be certain, precise, particular, and not merely general. The rule is thus expressed in Roll's Ab. Tit. Estoppel, P., 1 and 7, speaking of a bond; "if the condition contains *a generality to be done*, the party shall not be estopped to say there was no such thing. But in all cases where the condition of a bond has reference to a particular thing, the obligor shall be estopped to say there is no such thing." To the same effect is the doctrine of *Salter* v. *Kidder*, 1, Show, 51, where Lord HOLT says, that a general recital is not an estoppel, though a recital of a particular fact is. Tested by this rule, the loose claim of title and prayer for a deed made by counsel, in an instrument bearing no weight as evidence, cease to merit consideration.

The judgment could not be legally "abandoned" by a pleading. It must be released by a proper instrument, or by an agreement upon a valuable consideration.

5 Bac. Ab. 662, Release A. 1.
Rogers v. *Payne*, 2 Wils., 376.
1, S. and R.; 316.

There was no consideration for the alleged "abandonment;" and on a *nudum pactum*, there is no more remedy in equity than at law. No consideration is mentioned in the present bill; none in the cross bill is stated; no valuable consideration is pretended to have passed to Grahams for said judgment. The title obtained to said lands, at said sale, was no consideration; for it was struck off to them as the highest, and best bidders; they bought on the same terms offered to strangers.

II. We come next to consider the question: "did the appellants obtain the title to said lands, by said claim of title, derived through said contract?"

To this question, it is difficult to see upon what facts an affirmative answer can be predicated.

The Master in Chancery sold the lsnds at public vendue, under the direction of the court, to Lafferty, and the court confirmed the sale, and ordered the Master to convey the lands to Lafferty. Lafferty made the highest bid for the lands, and paid the said Master for them the amount of said bid, in cash, and took his deed. Thus the title of Alexander to said lands was vested in Lafferty.

If this title of Alexander be conceded to be the true title, and this sale be conceded to be a sale to Grahams, it follows that Grahams obtained the title by, and under the direction of the court, as the highest and best purchasers at a public sale of the court, ordered by said decree.

It is not charged in the present bill, nor intimated or argued in appellee's brief; nor is there color to say, that Grahams bought at a less price, or on better terms, or became the purchasers, in consequence of said alleged claim of title. But the sale was ordered by the decree; the whole question, then, is resolved into this; was the said decree obtained by said alleged claim of title, setting up said extinguished contract?

Let us look first at the pleadings in the suit, subsequent to the cross bill.

The answer of Holloway, adopted by Boggess, made under oath, to the original bill, expressly denies that Grahams have any interest in said lands, and asserts that the interest which Grahams had by purchase from respondent, when the bill was filed, had since that time "*terminated, by the result of said suit,*" upon said contract of purchase. To the cross bill, the answer of said Holloway

& Boggess is even more explicit, denying that said contract ever existed, and that Grahams' rights, under the "alleged agreement," had been "*released and waived, by bringing the said suit in covenant, on said agreement, as aforesaid, and that they now have no claim whatever to said real estate.*" Is not this answer of the appellee a clear admission that the judgment was not then abandoned, nor the contract in force? Grahams filed a general replication. What then were the issues formed upon the cross bill?

Conceding that the cross bill claimed the title by said contract, the issues were; whether said contract ever existed? whether said contract was ever performed by Grahams? whether said contract was in force, or extinguished by said judgment?

Now, what was the evidence offered by Grahams to support the issues upon their part? what to oppose them by Holloway & Boggess?

The case was referred to the Master in Chancery, upon motion of Alexander, to take proofs and report. The Master reported the amount due Alexander, upon his contract mentioned in the original bill, but reported no other evidence. When the case was heard, no proof was offered.

What then could the court find? In the absence of evidence, the issues upon the cross bill must be found for the defendants; and should the court find at all, that finding could only be, that said contract never existed!

But perhaps it may be said, the decree was entered by consent, and so the pleadings, issues, and evidence afford no guide to the probable finding. Mr. Glenn testifies to his "impression, that the decree was entered by consent," but says: having not paid much attention to the case, he knows nothing of any consent being given, or of any agreement, save that "it was to be drawn so as to conform to the opinion of the court, as expounded." There is no other evidence upon the subject; and hence, nothing in the record

proves that the decree was entered by consent; but, on the contrary, it is shown, that as usual it was drawn in conformity to the finding of the court.

But what the decree finds, the decree itself must show; for it is a record, importing absolute verity, and nothing can be heard to impeach, or add to, or substract from, such record.

What then did said decree find? Two things only, viz.: that "Alexander did contract" to sell Holloway & Boggess said lands; and that "there remains due and unpaid" thereon, to Alexander, thirty-one hundred dollars.

The decree recites that the court has examined the bill of complaint, and the cross bill, answers, "and proofs taken before the Master in Chancery," and then finds said facts relating only to Alexander, but make no finding whatever upon the issues raised upon the cross bill of Grahams.

The remainder of the decree contains the orders of the court upon said facts. First comes the usual order, that Holloway & Boggess shall pay Alexander the sum found due him, and on their default, that the Master shall sell said lands to the highest and best bidder, at public vendue, for cash, after proper advertisement; that the Master shall convey the lands to the purchaser, free from all claims, and shall pay, from the proceeds of the sale, to Alexander the sum due to him; but shall bring into court the residue to be appropriated under its order, if Grahams do not become the purchasers.

So far, there is nothing to show that Grahams have any interests, or are entitled to any relief, in the premises.

But the next order is, that the Master shall receive as cash the bid of Grahams, above Alexander's debt, but if they become purchasers, he "shall bring the deed into court to be delivered to them upon complying the further order of the court in the premises."

It needs no argument to show that, so far, the decree contains nothing to prove that the court was of opinion that Grahams had a title to the land, or to its proceeds, derived through said contract. They are given the privilege to have their bid, beyond the sum due Alexander, taken as cash. But to this they would be entitled by virtue of their judgment being the next lien after the lien of Alexander.

They are not given the right to the residue of the proceeds of the sale, after paying Alexander, nor to the Master's deed, but both are reserved for a further order. Hence, to that order we must look, if we would learn the views of the court as to the terms upon which Grahams were entitled to said "residue," or to said deed. If their alleged claim to the title of the lands, by virtue of said contract, was acknowledged by the court, then they were entitled to said "residue." Why did not the court award it? By said contract, if in force, they were surely entitled to said deed, upon their bid above Alexander's debt. Why did the court reserve the deed for a further order?

The reason is obvious. The court, having no evidence in the premises, postponed the making of any final order touching the equities of said parties, until properly advised, and until such order should be found necessary.

We have now examined all the provisions of the decree, relative to the sale, and do not find anything to show that the sale was the result of Grahams' alleged claim of title under said contract, nor even to show that the court entertained the view that the rights of said Grahams, in the premises, were the rights of vendees under a living contract.

But let us look at the remaining provisions of the decree. There are two further provisions, but neither relate to said sale. They are provisions in case there should be no sale, but a payment of Alexander's claim, and each give Grahams their election to satisfy their judgment and take the land. It will not be pretended that

these clauses of the decree prove that the court ordered the sale by reason of Grahams' said claim of title. Neither do they prove that the court entertained the "view" that the contract was in force. If the court held the contract in force, clearly it was improper to leave its performance at Grahams' election. If the contract was alive, then the judgment was dead, and hence it was at once unnecessary and absurd to provide that Grahams might enter satisfaction of said judgment if they chose. Is conceivable that the court should leave it to the parties' choice to perform a contract they were bound to perform? No; on the contrary, the decree proves that the view the court took of the equities of these parties was not that the contract was alive and to be enforced, and the judgment was dead and abandoned, and to be satisfied, but that the judgment was alive, and could not be destroyed without the consent of Grahams. That view is precisely the reverse of that which the court is asked in this case to take, viz.: not that the appellee could force the lands upon the appellants at the contract price, but that the appellants might take the lands at that price, if they chose.

Neither is it at all material that the court erred (which we by no means concede,) in making these provisions. The equity of said decree cannot be questioned in this collateral proceeding. But the substance of such complaint is gone when it is seen that said provisions were, in fact, for the benefit of Holloway & Boggess, who could not be injured by permitting their creditors to take said lands upon condition of satisfying four dollars of debt for every dollar of property taken.

It is a settled principle of the law, that the judgment of a court is not evidence "of any matter to be inferred by argument from the judgment."

Duchess of Kingston's case, A. D. 1776.
2 Smith's Lead. Cas., Ch. Est.

Hence it is immaterial to consider upon what grounds the court gave Grahams the right to take Alexander's deed. The decree

settles as a fixed fact, that it was equitable for Grahams to take the deed, in the contingency therein stated. The decree does not find that a contract exists between the parties. Who shall be heard to say, that the court held the contract alive, because of said options? Both parties are precluded from again litigating the same matter which has once been decided; but they are bound by the precise adjudication, and not by the legal grounds of that adjudication. "Although the adjudication is certain, the grounds are not so," and it is well observed by Starkie, (Treatise on Ev., 1st vol. 202,) "that a particular ground can never be inferred and relied upon, especially where its effect is to be conclusive.

Jackson v. *Wood*, 3 Wend. 27.

To the same effect is the language of Vice Chancellor BRUCE, in *Barns* v. *Jackson*, B. & Coll., C. C. 585, * * "the rule against re-agitating matter adjudicated, is subject generally to this restriction, that however essential the establishment of particular facts may be to the soundness of a judicial decision, however it may proceed on them as established, and however conclusive and binding the decision may be to the immediate and direct object, these facts are not at all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate object of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object."

Hence we conclude that this decree contains nothing to show that the court took the alleged "view," that the rights of Grahams sprung from said contract of purchase. It is also clear, that, whatever "view" the court entertained on this subject, the order of sale was not made in consquence of Grahams' claim of title or prayer for a deed from Alexander, nor on account of their cross bill, at all, but solely on account of the debt due from appellee to said Alexander, to enforce whose collection the original bill was filed, and for which the decree, according to its terms, was rendered.

The third question remains, viz: Is the satisfaction of said judgment, the proper relief to which said appellee is entitled, in consequence of the act of the appellants in obtaining said title by said claim of title under said contract?

The substance of appellee's complaint is, that his property has been wrongfully taken by appellants. It is well settled that in such cases the injured party has a choice of remedies.

Kitchen v. *Campbell*, 2 Wm. Blk, 830.

He may sue for and recover the value of the property in assumpsit; or he may sue for the return of his property in the appropriate action.

Here the appellee has a like election. But the contract price will be treated as the true value, only in the absence of other evidence of that value. Now it is in evidence that the present value of the property is but a fourth of said price. On what ground then can the appellee ask that the judgment shall be satisfied, even were it conceded that said judgment had been rendered for the purchase money?

Thus we find after a careful analysis of the pleadings and evidence that it is untrue, that Grahams abandoned their judgment and claimed the lands under said contract by said cross bill. That it is untrue that they obtained said lands by said claim; and that the satisfaction of said judgment is not the relief to which the appellee would be entitled, were it true that Grahams had so obtained the title.

What then remains of this case?

On page 2 of the appellee's brief, he says: After speaking of the suit in covenant, and the recovery of said judgment; "So far, the proceedings were in the ordinary course of business, and strictly in accordance with law and equity, and if Alexander had taken the ordinary decree for the judgment of the money due him,

with an order to sell the land; and if Grahams had issued execution to collect their judgment at law, and filed a creditors bill, leaving Alexander to sell under his decree, *the suit at bar would not be in existence.*"

So then it appears, that, but for said cross bill and said decree, —but for these vague claims in the cross bill,—these privileges to bid at the sale, and options to take Alexander's deed upon satisfying their judgment, " the suit at bar would not be in existence !" How strange that empty claims, barren privileges, and unaccepted options, out of which nothing, (save this suit), has sprung of good or ill to the parties, should revolutionise their legal rights ! How strange that this decree should bind Grahams to satisfy their judgment, when by its terms, to satisfy said judgment or not, is left to their free choice ! How potent are these dead unexercised rights ! The privilege to bid at the sale was a right to which, as judgment creditors Grahams were entitled. For the options Grahams did not ask; for they never proposed to satisfy their judgment. But from these options, only beneficial to Holloway & Boggess if accepted, (enabling them to pay their debts at twenty-five cents upon the dollar), is to spring a loss to Grahams of their judgment. If this decree shall stand, let it serve as a fresh illustration of the wisdom of the old precept, " *Timeo Danaos dona ferentes.*"

Thus far we have considered this case as made by appellee's bill, in which, as in his solicitor's brief, his right to relief is grounded upon the alleged abandonment of said judgment and claim to said lands, by said cross bill, and the subsequent purchase thereof by appellants. If his interpretation of the cross bill is unsound, or if the court shall hold that a judgment cannot be abandoned or a contract revived or created by the language of a pleading of one of the parties, then it should seem that the appellee must fail. The appellee cannot rely upon the facts for any other purpose, *e. g.*, to show that the said contract has been specifically or substantially performed, a fact that he does not allege in his bill. Lord Chancel-

lor HART in *Fitzgerald* v. *O'Flaherty*, 1 Malloy R. 350, thus lays down the rule: "The general rule is that all evidence intended to be relied on at the hearing, should be grounded on some allegation, distinctly put on record of fact, which it is calculated to support."

But the appellee may contend that his bill is substantially for specific performance, that his allegations in regard to the judgment were merely to answer an objection, based upon such judgment, that Grahams having always been in possession of the land since the contract was made, and now having obtained the title, although through another channel, have thus substantially enjoyed the benefits of the contract; and should therefore, upon being repaid what that title has cost them, give up the judgment obtained for a breach of the contract, which has now been substantially performed. Let us therefore test this claim by the principles of the law, relating to the specific performances of contracts.

I. The appellee is barred from maintaining an action for a specific performance of said contract of purchase, by the judgment of November 21st, 1861, rendered for the non-performance thereof.

The rule on this subject is thus laid down by Mr. Sugden:

"Where the purchaser has paid any part of the purchase money, and the seller does not complete his assessment, so that the contract is totally unexecuted, the purchaser may affirm the agreement by bringing an action for the non-performance of it, or he may elect to disaffirm the agreement, *ab initio*, and may bring an action for money, had and received to his use."

Sugden on Vendors, vol 1, p. 300, and cases cited.

"If a purchaser receive damages in an action for breach of the agreement, he cannot bring a second action, or resort to any other means to enforce the contract. The first action alleges the grievances to be the loss sustained by breach of the contract, and that is deemed an election to take the remedy sought," *ib.* p. 299 s. 35.

Grahams brought their action in March, 1861, to recover damages for the non-performance of said contract by said appellee; and thereby chose their remedy. The judgment, recovered in that action, is a bar to an action by either party to enforce said contract, for it was then merged and extinguished in said judgment.

The doctrine is thus laid down in vol. 1, Bourier's Just., p. 325, sec. 6. "A final judgment in favor of the obligor against the obligee, in a suit founded on the obligation, when rendered by a competent tribunal, has the effect to extinguish the obligation, whether such judgment be obtained on the ground of nullity, or fraud, or any other cause whatever; for it is a maxim that *res. adjudicata*, or the decision of a legal or equitable issue, is a complete bar to any further action; *res adjudicata facit ex albo, nigrum, ex nigro album, ex curvo, rectum, ex recto curvum.*"

In *Buckmaster* v. *Grundy*, 3 Gil., 262, the principle here invoked is thus stated: "* * after having recovered damages at law for the breach of a contract, it could not be insisted in equity that there should be specific performance."

In *Herrington* v. *Hubbard*, 1 Scam., 571, it is laid down that, "even the bringing of an action for the purchase money is a disaffirmance; and precludes the purchaser from asking a specific performance."

In *Mason* v. *Richards et al.*, 3 Gil., 31, where Mason, the vendor, having allowed judgment to go against him on his contract, asked for a specific performance of the contract of the court, it was refused, the court saying, the judgment "put an end to the contract; it cannot be revived, and specific performance enforced."

II. The appellee acquiesced in said judgment. In his solicitor's brief, after speaking of this judgment, he says: "So far, the proceedings were in the ordinary course of business, and strictly in accordance with law and equity. * *" Nor does he, in his bill, challenge its regularity or justice.

In his answers, in the Alexander suit, to the original bill and cross bill he expressly sets up said judgment, as "in force," and as having put an end to the appellants' interest, under said contract, in said lands. Nay, more, he expressly denied that said contract was ever made or performed by Grahams, in his answer to the cross bill. The court failed to give appellants a decree for said judgment, as a lien upon said lands. If appellee had admitted the truth, and had not denied the contract, such a decree as appellants asked must have been granted.

We maintain that the appellee is estopped by this answer, and by the decree, its consequence, to set up in this suit that contract, or to deny the binding force of that judgment.

In *Wills* v. *Kimm*, 2 Grant's Cas., 60, the sound rule is thus laid down: "that where a man alleges a fact in a court of justice for his advantage, he shall not be allowed to contradict it afterwards. It is against good morals to permit such double dealing in the administration of justice." * * "By defeating the latter remedy on the ground that the plaintiff was entitled to the former, the defendant below is estopped from objecting to the *ca. sa.* A plea in abatement giving a better writ, estops the defendant from objecting to the second writ issued in conformity to his pleading. *Pleading an erroneous judgment in bar of an action, estops the party from afterwards reversing it on error.*"

In *Carlisle et al.* v. *Foster*, 10 Ohio, 203, the answer of an executor, alleging the existence of a release by him, was held equivalent to such release; for the court say: it "is part of the record;" * * "and this record will, therefore, forever operate to estop him from denying it."

The appellee has had the benefit of this judgment, and cannot now be permitted to deny or impeach it. He has denied the existence of said contract, and ought now to be estopped to assert its existence, or ask its performance.

"A party cannot compel the specific performance of a contract he has once repudiated."

Clement et al. v. *Evans*, 13 Ills., 94.

See the following cases where parties setting up awards, &c., to the defeat of certain suits, were held estopped in subsequent suits, to deny their existence and validity, the court refusing "to sanction such inconsistency."

St'pp v. *Washington Hall Co.*, 5 Black., 17 and 478.
Ogden v. *Rowley*, 15 Ind., 43.
3 Black., 478.
2 B. Mon., 257.
2 Sumn., 589.

III. But we maintain that the decrees, and especially the final decree, confirming the sale, in Alexander's suit, form a legal and equitable bar to the present suit. The court had jurisdiction of the case; the parties were before the court; the facts were before court; the subject matter of this suit—the judgment—was the subject matter of that suit. The cross bill; the decree of sale; the sale itself; the facts, showing that it was a sale to Grahams, were all before the court. What right, then, has this appellee to drag the appellants before a new tribunal? What excuse or reason does he give to show, why he did not ask and get relief in the former suit?

He moved to set aside the decree for the sale, and to set aside the sale; and, to support his motion, proved that Grahams were, in fact, the purchasers. Why did he not ask the court to order appellants to satisfy their judgment?

The security of Lafferty could not be thus impaired; for the lands, (not the judgment,) were the security for his loan. In the progress of that suit, the acts were done by Grahams, which, the appellee claims, gave him title to have the judgment satisfied. The measure

of his injuries was complete when Grahams bought the lands for the Alexander. If that purchase was, in fact, the payment of an incumbrance, why did he lie by and permit it to be treated as a sale—to be confirmed as a sale? He knew that Grahams did not hold their judgment satisfied; for they collected eight hundred dollars by execution thereon, on January 1, 1863, and the final order confirming the deed of Alexander to Lafferty, was not made till the ensuing March. That final order should have embodied this decree, and have settled upon a lasting basis, the equities of all parties. If the court was of opinion that, by reason of the cross bill and the sale, Grahams had lost the right to enforce their judgment, except as to the sum paid the Master, how is it that the court failed to say so; but said, instead, with a full knowledge of all the facts now before this court, nothing more than that the deed to said lands be confirmed to Lafferty, as a purchaser at said sale? If the court was of opinion that Grahams could not buy, but could only pay off an incumbrance, why did the court treat them in all respects as purchasers, having a right and title to the lands, as such?

Through accident, inadvertence, or neglect, the court might have omitted to make the proper decree, and this, too, would have been fatal to the appellee; but why should they make an improper decreee, treating Grahams as purchasers, confirming the title in them, as purchasers, without condition, when the truth was, that Grahams were not purchasers of the court, but of Holloway & Boggess.

The court in the Alexander suit had before them the same parties, the same subject matter, and the same evidence we have in the suit at bar. Grahams in that case prayed relief; in this Holloway. The sole difference, is the difference in the relief asked. The former court had full jurisdiction of the case; had the right to make the decree asked in this case, and it was the duty of the court to have given Holloway in that case, the relief here asked, if the Judge thought it was his right upon the facts. It made no difference that Holloway did not in that case ask relief. Grahams set out all the facts and asked such relief as the court thought proper. There was a decree of sale, and a sale to Grahams; what right had Grahams

to bid, if they could only pay? What right to take the title as purchasers from the court, if they were not, but were purchasers from appellee? It was not necessary for appellee to file a cross bill to protect his interests; they were fully before the court by the bill and cross bill.

It is a most salutary principle that the plaintiff cannot have a second investigation of the same original matter, which has once passed into *rem adjudicatain*,"

Marsh v. *Pier*, 4 Rawle 278.
Ld. C. J. DeGrey, Duchess of Kingston's case.
Dalton v. *Bentley*, 15 Ill., 420.

"Where a subject in controversy has been once settled by the judgment of a competent tribunal, it never ought to be permitted to be made the ground of a second suit between the same parties, or those claiming under them, as long as the judgment in the first suit remains unreversed. The peace of community is a great desideratum, and nothing ought to be tolerated that would disturb it unnecessarily."

Per Kennedy, J., *Marsh* v. *Pier*, *i.b.*

Nor can the appellee escape the consequences of this principle by setting up his negligence or carelessness, or ignorance; for he cannot be permitted to repair his mistakes or omissions by recourse to another action.

2 Smiths, L. C., 667.

It is "against the policy of the law," * * "to permit a defendant to recover in a second suit for a cause of action for which he might have recovered in the first," and "it is unjust," * * "because it would harrass a defendant," * * and expose him to double costs."

Wilson's Exr. v. *Hamilton's Adm'rs*, 9, S. & R. 424.

In *Le Guen* v. *Governeur*, 1 Johnson's case, 436. RADCLIFT, J., says: "The general principal that the judgment ordered of a court possessing competent jurisdiction shall be final, as to the subject matter thereby determined, is admitted on both sides, and can admit of no doubt. *The principle however extends further. It is not only final as to the matter determined, but as to every other matter which the parties might litigate in the cause, and which they might have had decided.*"

The effect of the decree depends, in great part, upon the matter in dispute, and upon the form of the decree. If the facts were before a competent tribunal, and that tribunal rendered a decree, fixing the legal status of the subject matter, it is immaterial whether the decree *professes* to pass on the merits or not. It is enough that it is a final adjudication upon the case; and a general decree for the defendant, just as a general judgment, *is a decree upon the merits* and bars and privies.

Dixon v. *Sinclair*, 4 Vt. 354.
Morgan v. *Plumb*, 9 Wend, 287.
Young et. al. v. *Black*, 9 Cranch, 567.

It was the right of the parties to have an adjustment of their respective equities, so as to do complete justice between them, in respect to the subject matter of the litigation.

Terrill v. *De Witt*, 20 Texas, 260.

This decree had all the authority and binding force of a judgment in *rem*; for it was "an adjudication upon the status of a particular subject matter, by a tribunal having competent authority."

Lord v. *Chadbourne*, 42 Maine, 443.
Fourniquet et al. v. *Perkins*, 7, How. 760.

It fixed the relations of parties to said lands. Grahams became the owners by purchase from the court. The appellee's rights in the lands ceased, having been sold to pay his debts; the lien of Alexander upon them was discharged; and Grahams took them, freed from all claims of the parties or privies. The court made no decree

recognising the appellee's pretended equities, because the court did not find that such equities existed. Grahams had their judgment at law; and the court gave them the power to protect themselves, if the lands were worth more than the incumbrance. Holloway & Boggess were indebted to Grahams to the amount of said judgment for damage sustained through said broken contract; and it was right that they should pay it. Grahams had done them no wrong by making the highest bid at the sale; their property was thus applied to pay their debts. How could an equity to satisfy said judgment, spring from a fair purchase for a full price ?

This was the opinion of the court. Hence, the final order was a simple decree of confirmation just as if any third party had been the purchaser.

The appellee is barred from maintaining this suit by the final order in the former suit.

The case furnishes a fair application of "the just and necessary principle, that you shall not bring the same cause of action twice to a final determination.

Smith v. *Sherwood*, 4 Conn. 250.

This suit, in fact, amounts to an application for a rehearing of the motion to set aside the sale. That motion was based upon the fact that Grahams were the purchasers and could not buy, without satisfying their judgment. The form then taken was to resist the confirmation of the sale. The present hope of that motion in this case, in which it is sought to change that purchase into a payment, so that Grahams shall be denied the character and right given to them by the former order confirming the sale. A different relief is asked, but it is predicated, upon the same grounds, and the same evidence. It would be unjust to grant the relief now sought; for it would operate as a trick and a fraud upon Grahams. When the appellee found himself wronged, he had his election to retake his property, or to take its value. This motion was an election to retake the property, and that election was completed when the

motion was tried. He cannot now ask its value by this proceeding. His remedy, if he has any, is to reverse the final order in the first suit. One tribunal is enough for the same parties and the same subject matter.

The appellee neglected to seek relief in the former suit, and to reverse the decree, failing to give him relief. For "when there has been a suit between the trustee and the *cestui que* trust, in which they might have brought forward any claim against the trustee in respect of his consent of the trust, and they have suffered the decree to be made, without advancing any claim, they cannot be permitted to commence any subsequent proceedings against the trustee for a breach of trust."

Hill on Trustees, 529.
Guidici v. *Kenton*, 6 Beav. 517.

In *Buonaparte* v. *Camden & Amboy R. R. Co.* 1 Bald. Cir. Co. R. 218, the court say, * * "In all cases where the matter of the controversy has already been decided by a court of competent jurisdiction, * * or where it might have been made available in that court, as a matter of claim or defence in a suit pending in that court," the exercise of the power of the court by injunction, which is most delicate, should not be awarded. "For it has been truly said not to be the practice of the courts of equity to assume jurisdiction in favor of parties, who, having an opportunity of asserting their title in another court where the matter has been properly the subject of adjudication, have either missed that opportunity, or have not thought proper to bring that title forward." In sec. 896, Story's Eq., Juris, referring to this principle, it is said: "The general reasoning, upon which this doctrine is maintained, is the common maxim, that courts of equity, like courts of law, require due and reasonable diligence from all parties in suits, and that it is sound policy to suppress mulitiplicity of suits." The same principle was enforced, in Marquis of *Breadalbane* v. *Chandos*, 2 M. & C. 733, which was a motion to discharge an order for an injunction to restrain Chandos from taking advantage of a judgment of the court of sessions in Scotland, see also *O'Gilvie* v.

Herne, 13 Ves. 563, in which a decree pro. conf. upon a bill by solicitors against a client to obtain the benefit of certain securities, was held a bar to a bill by the client against the solicitors for an account. The court say the decree could not be impeached collaterally; the effect might be "two inconsistent decrees in opposition to each other," and the proper remedy was declared to be by a bill of review.

IV. But will a court of equity relieve the appellee from the consequences of said judgment?

If Grahams had filed a bill for a rescission of said contract in November, 1861, a court of equity would have declared the contract rescinded. Their said vendors had merely a contract for the title from Alexander, and were indebted thereupon for sums so large, and so long over due, that said Alexander had filed a bill against Grahams, and said vendors, and their judgment creditors, to enforce his lien upon said lands, declaring that such lands were scant security for his debt!

The appellee and Boggess were then insolvent; and so covered with judgments, that thirteen judgment creditors were made defendants to Alexander's bill! Their deed to Grahams had been due for more than two years, and that it would ever be made, seemed hopeless. If Grahams had filed a bill for specific performance, it would have been dismissed; their vendees could not be made to give what they had not, the unincumbered title to the lands; but, instead, the court would have ordered a return of the purchase money, and the monies expended for taxes, and lasting improvements.

In *Hunt* v. *Fox, et al.*, 5 B., Mon., 532, the court held that, where the vendor's title was incumbered by a claim for dower, and no effort was made by the vendor to clear up the incumbrance, and perfect his title, the vendee was entitled, as a matter of course, to a decree for rescission.

Courts of equity will not interfere with judgments at law, fairly obtained.

The jurisdiction of the court of law, appealed to by Grahams, in March, 1861, was complete over the matter of said contract; and under the circumstances, a court of equity must have given substantially the same relief, rescission of said contract, and a decree for their payment of the purchase money.

In Story's Eq. Juris., 1573, it is said:

"In matters where the jurisdiction of the courts of law and equity are equally concurrent, the jurisdiction of the court of law is conclusive upon courts of equity."

See, also,

Gott et al. v. *Carr*, 6 Gill. and J., 313;
1 Eden on Ju. J., Ch. 2, P. 23;
Bloodgood v. *Zeily*, 2 Caine's, Cas. in Er. 124;
Botifeur's Surities v. *Weyman*, 1 McCord's Ch., R. 156;
Kent v. *Ricards*, 3 Mo. Ch., R. 396;
Taylor v. *Gilman*, 25 Vt., 414;
Marine Ins. Co. v. *Hodgson*, 7 Cranch, 332;

as to when chancery will relieve against judgments and suits at law. The general principle is thus laid down, in the case last cited, by MARSHALL, C. J.: "Any fact which clearly proves it to be against conscience to execute a judgment at law, and of which the injured party could not have availed himself in a court of law, or of which he might have availed himself, but was prevented by some fraud, mistake, or accident, unmixed with fault or negligence in the plaintiff or his agents, will authorise an injunction from a court of equity. But the equity of the applicant must be free from doubt."

In *Bateman* v. *Willoe*, 1 Sch., and Lef. 201, Lord Redesdale observed: "There are cases, cognizable at law, and also in equity, of which cognizance cannot be effectually taken at law, and there-

fore, equity does sometimes interfere; so, where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has a nunconscientious advantage at law, which equity will either put out of the way, or restrain him from using; *but, without circumstances of that kind, I do not know* that equity ever does interfere to grant a trial of a matter which has already been discussed in a court of law; a matter capable of being discussed there, and over which the court of law has full jurisdiction."

In *Simpson* v. *Hart*, 1 John's Ch. 17, which was a motion to restrain, by injunction, a judgment at law, to the extent of a set off, already, upon the same facts, fairly refused at law. Chancellor KENT, after a review of the authorities, says: "Where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision a law, *equity can no more re-examine it, than the courts of law, in a similar case, could re-examine a decree of the court of chancery.*"

"Chancery," says Lord BACON, "is made to supply, not to subvert the law.,' Bac. Speech, Works, vol. 4, 488. Fonblanque says (Fon. Eq., B. 1, Ch. 11, P. 3, and Sec. 11.): "But, if the law has determined a matter, with all its circumstances, equity cannot intermeddle." See,

1 Story's Eq. Juris., Sec. 875, 6, 9, and 2 St. Eq. Juris., 1570, 2, 3, and 5;
Note. 5, 1 St. Eq. Juris., Sec. 64;
1 Hov. on Frauds, Introd. P. 12 and 13;
1 Dane's Abr., Ch. 9, Art. 1 and 2;

to the same point; showing that "equity only proceeds, in these cases, upon the ground of suppressing fraud, by not allowing a party to use a mere technical advantage, and, in a manner in which the law never contemplated."

Grahams obtained their judgment at law, fairly and honestly; and its effect was to extinguish the contract of purchase. Both

parties acquiesced in it, and looked to it as the measure of their rights. How can an equity spring out of a dead contract, by which the aid of a court of chancery can be invoked to destroy the judgment, in which, by a solemn finding of a court of competent jurisdiction, said contract was merged?

The case of *Oldham* v. *Woods*, 3 Mon. 47, is in point. This was a bill by a vendor against his vendee, to restrain collection of a judgment, recovered by the vendee, against the vendor, upon a title bond, tendering the deed, and praying tnat the contract be specifically executed. The vendor had a good title. The vendee went into possession under the contract, and continued in possession after the judgment. The vendee had suffered no inconvenience or disturbance by suits or otherwise; and the land had no tdepreciated in value, nor was the vendor insolvent. The court refused to decree specific performance, or grant the injunction, but ordered an account taken, holding that the vendor was entitled to the reasonable rents and profits of the premises, subject to a deduction for lasting and valuable improvements.

The court say: "The first question which presents itself, is, will chancery relieve against a forfeiture of a bend at law, after judgment, when that forfeiture was negligent and voluntary on the part of the complainant, barely because there is no special damage, but a lapse of time only? Cases of relief against judgments at law, under any such circumstances, are rare. True, however, the power of the chancellor, to interfere for proper reasons, and relieve against such judgments, cannot be questioned. *But, we venture to assert as a principle, that, in no case, where the advantage at law has been fairly obtained, and the Chancellor was not before in the possession of the cause, ought relief to be given.*

The legal right of action is as strong as an equitable one can be. The holder of the broken covenant has his election, often, to sue at law, or in equity. If he chooses the former course, and fairly obtains his judgment, we do not admit the power of the Chancellor to take it from him, barely because he did not go into equity.

Such a power would bring into the hands of the chancellor the exclusive jurisdiction of such contracts. The appeal to law, and the right to sue and recover, then would be a shadow only; for the judgment would be perpetually silenced by a decree of the chancellor, and a court of law would barely introduce the subject for the chancellor to act upon. This certainly ought not to be the case, and some peculiar circumstances ought to exist to authorize the chancellor's interposition.

It is insisted, in this case, that there is nothing but the lapse of a few months against which the chancellor is to relieve. If that was all, equity might not attach so much weight to time merely. But there was more,—a vested right at law, ascertained by judgment, which was obtained without fraud, in pursuance of the express stipulations of a written contract.

The subsequent conduct of the complainant has been relied on by the court below. It is in proof that he offered to sell the land, stating that the appellee would make the title, since judgment, and has leased it for a term of years, and since mortgaged it. He might well suppose, as the appellee was struggling in a chancery suit, to compel him to take the title, that he would certainly make one, and that he had better sell, and reach his money that way, and thus end the suit; and this accounts for his proposal to sell.

As to renting or leasing the land, it is true, that by obtaining his judgment, he dissolved the contract, and was bound to restore. But it is equally true that he is entitled to a lien upon the land for his money paid, and cannot be compelled to part with that lien till payment, he accounting for the profits; hence his right to lease the land is unquestionable, notwithstanding the contract is virtually set aside.

As the complainant below prays general relief, we conceive he is entitled, under the statements of his bill, to the reasonable rents and profits of the premises, during the time the appellant has held

them, subject to a deduction for improvements lasting and valuable. This account ought to be taken and continued so long as the appellant *holds his lien on the land by possession*, until a sale is made on proper proceedings instituted for that purpose.

The case of *Craig* v. *Martin*, 399 Marsh. 50, is also equally in point.

This was a bill by a vendor to enjoin his vendee's judgment against him, upon the contract, and to make him take, in lieu thereof, a conveyance of the land. The vendee in this case, too, had been in possession, and had sold out his improvements. The court deny the relief asked, and say, "we have seen no case, either the letter or reason of which, would sanction a decree compelling Martin to surrender his judgment. Nothing fraudulent or delusive is proved against him, nor is it shown that he knew the title was defective when he bought. Martin had elected to sue at law for damages, for a breach of Craig's covenant for a title. He had fairly obtained a judgment. The chancellor should not control this election, and deprive him of his judgment, unless he had procured it unfairly, or had been guilty of fraud or culpable negligence, which occasioned or contributed to the omission of Craig to procure the title for him, or which lulled Craig, without any fault on his part, into security and passiveness * . It is distinguished from those cases in which a vendor applies for a special execution *before the vendee shall have disaffirmed the contract*, and sought redress in a court of law for the breach of it by the vendor, or in which the delay in making title, resulted not from negligence, or the delinquency of the vendee, but from a defect in the title, which rendered it impossible to procure a perfect title before a recovery of damages fairly at law, for a failure to convey againt the day designated in the covenant, and of which defect the vendee had notice when he bought the land."

The court refer, as the representative of the class of cases distinguished, to the case of *Cotton* v. *Ward*, 3 Monroe, 304, in which relief was granted a vendor against a judgment at law obtained by

the vendee. The facts in that case were, that the contract had been executed by the delivery of the deed. The vendee was put in possession, and had, in peace and quiet, enjoyed the possession, without any molestation by suits or otherwise. As soon as the vendor knew his title was objected to, he set about removing the objection *with great diligence.* The court incline to the opinion that his title was not defective, *but good all the time.* The vendee appealed to the chancellor first, asking, in the alternative for specific performance by further assurance, the very relief granted, and upon this the court lay great stress. Meantime the vendor applied to the same tribunal, by cross bill, and asked that his vendee should be compelled to accept the same assurance which his vendee had asked the court to compel him to make.

This cross bill was filed, tendering deed, etc., showing that the objection to the title had been removed by a decree of court, *before the judgment was obtained.* The court, in the opinion, draw a distinction between the cases of executed and executory contracts. They say: "When a contract for the conveyance is merely executory, and a time fixed for the conveyance to be made, if there be a delay beyond that time in completing the title, which has been occasioned by the fault of the vendor, the purchaser will not, in general, be compelled to accept the title." This case shows the extreme limits of the authority of a court of equity to decree specific performance, and compel a vendee to give up his judgment at law. It will be observed that the court of chancery had jurisdiction of the case before the court of law was appealed to by both parties, and the vendee asked the decree given, and continued, after he had judgment, his appeal to the chancellor.

Woodson's Adm'rs v. *Scott*, 1 Dana 470, is another case in which a bill was sustained restraining a judgment upon the contract by a vendee, and compelling him to accept specific performance by conveyance; but, like the last case, this case is strongly in point in support of the principle which denies that relief to the complainant, under the circumstances of the case at bar. In this case the vendor, having the title, tendered the conveyance, and his administrators

filed the bill for specific performance and to restrain proceedings at law, *before the judgment*. Time was not of the essence of the contract. The property had not depreciated in value, nor had the vendee been disturbed by suits, but had ever remained, since the contract, quietly in possession, "without having been prejudiced in any appreciable way."

In *Couchman* v. *Boyd*, 2 Dan., 288, the court sustained a bill by a vendor, to restrain the collection of a judgment at law, recovered by a vendee. The vendor's title was good, and his deed tendered *before the judgment;* but the vendee refused to receive it. The court say:

"The tender was no answer to the action at law; but in equity the rights of the parties were then fixed; and it was not competent for the vendee to absolve himself from this attitude, with its accompanying duties, by any act depending upon his own volition, or of a court at law, at his instance and procurement. *The judgment thereafter procured was in direct violation of his then existing obligations and duties* towards his vendor, if it were to have the effect of releasing him from them. The judgment cannot be successfully relied on, as an advantage fairly and properly obtained, of which equity had no right to deprive him. An advantage that is obtained in violation of our equitable duties towards others, can never be viewed by a court of equity as fairly and properly obtained. On the contrary, to relieve against legal advantages, obtained in derogation of equitable duties, is the broadest and most comprehensive head of equity jurisdiction and power."

The court say, that the only question is, whether permitting judgment to go, altered the attitude of the parties so as to preclude relief; that several cases speak of this, "as an important, if not a controlling circumstance, upon the question of specific performance at the suit of the vendor, and it should in general be so treated." Here, too, the vendee was quietly in possession, and had not been disturbed, and had, before tender, done no act indicative of a determination to rescind the contract!

In *Nesbit et al.* v. *Moore's Heirs*, 9 B. Monroe, 508, a bill was also sustained by the heirs of a vendor, to restrain a judgment upon the contract got by the vendees. Here, too, the vendees had never demanded a deed, or had the land depreciated in value; but they had, ever since the contract, been in undisturbed possession of the premises. The vendor's title, too, was all right, save from an omission to execute the deeds of partition between certain heirs, who were in possession of the lands partitioned; and a suit was pending to correct this, when the action at law was brought by vendees.

The vendor was dead, leaving infant heirs, who were infants when vendees got judgment. "The main question," the court say, "is whether the judgment precluded the plaintiffs from the relief sought; or whether, *notwithstanding the general rule that the Chancellor will not, by enforcing specific execution, relieve against a judgment fairly obtained, on account of failure to convey* the relief granted, was authorized by the circumstances peculiar to this case?"

The vendor was not in default during his life, and a part of his heirs, being infants, could not convey, even had the title been perfect; and the vendee's could have obtained complete title by applying to chancery. "It was, therefore, unfair," say the court, "and indicative of an attempt to get an unfair advantage, to bring an action at law for a rescission of that contract, instead of a suit in chancery for title, when some of the heirs were disabled, by infancy, to comply with the contract of their ancestor. No doubt complainants could have compelled a specific execution of the contract, if they had applied, at any time before the judgment. *As some of them were infants at the time, the judgment cannot be successfully relied on as a legal advantage, fairly and properly obtained*, which has the effect of depriving them of their equitable rights. An advantage that is obtained over infants, cannot be received in a court of chancery, as justly and fairly obtained, or as presenting any obstacle to the enforcement in their favor, of a clear and undoubted equity."

In *Harris* v. *Kidwell*, 7, J. J. Marsh 383, the court refused to enjoin a judgment upon a contract of purchase, recovered by the assignee of the vendee for damages for a failure to convey the title, and refused to order the contract specifically performed, because the vendor had no title when the judgment was obtained, nor for some years later, and the land had greatly depreciated in value.

It will be observed, that in all these cases from the Kentucky reports, the vendee is in no case compelled to give up his judgment where it was fairly obtained before chancery had obtained jurisdiction of the case. After a tender of the title, and against infants, the judgment were held an unconscientious advantage unjustly ob tained; and in the case of the executed contract, (*Cotton* v. *Ward*), the chancellor, who had possession of the case before the court of law, merely granted what the vendee asked. In other cases, the court refused to interfere with the judgment; and in all, the priciple was recognised that a party, having appealed to a court of law, and having fairly obtained a judgment, cannot be compelled to relinquish such judgment.

In the singular case of *Reese* v. *Smith*, 12 Mo. 344, decided by a divided court, one judge out of three dissenting, where a grantee was enjoined, at the suit of the devisee of the grantor, from collecting a judgment recovered upon the covenants in his deed, and compelled to accept performance in lieu of damages; the court recognise the distinction between executory and executed contracts in the following language: "Where a vendee has not received a deed, and sues upon the contract by which he is entitled to one, for the recovery of his purchase money, such suit is a disaffirmance of the contract, and it is in such cases that the authority of a court of equity is rarely exercised. * * The fact that the property has very much depreciated in value, is the strongest circumstance in the case against interference. Had the contract been executory, it would, perhaps, taken in connexion with the lapse of time, been conclusive against the bill."

In *Tucker* v. *Clark*, 2 Sand. Ch. R. 92, a bill by vendor to compel the purchaser to accept an outstanding title, acquired since the conveyance, in lieu of a judgment for damages upon the covenants in the deed, was dismissed, the court holding that it had no right to deprive the purchaser of his right to damages. Of this opinion, Rawle in Cor. for title, p. 103, speaks in terms of Strong approbation, and after a review of the cases, holds that the doctrine therein maintained, is supported by the weight of authority. The leading argument presented by the learned Judge is, that there would be no semblance of mutuality in the contract, when "if they should turn out not to be seized of the title, they (the vendors), might either repay the consideration money, or procure a good title to be conveyed," thus leaving the performance to the choice of the vendor, and relief could not be granted, without the court, making such a contract for the parties, which "they never did make, nor would have made, if any failure of title had been supposed possible when the contract was made.." The same principle is recognised in *Bingham* v. *Weidernax*, 1 Comst. 593, where the court held that the vendee "had a right to rely upon his covenant, and take his remedy by action upon it"; that "equity may compel parties to execute agreements, but has no power to make agreements for them, or to substitute one for another," and hence cannot compel the vendee to accept performance in place of damages.

But this principle has also received the sanction of our own court. In *Mason* v. *Richards, et. al.* 3 Gil., 31, the court refused to compel a vendee to accept specific performance for damages, declaring that the judgment at law put an end to the contract, that it could not be revived, and performance enforced, except under extraordinary circumstances. In this case, too, the property had greatly depreciated in value, and no good reason was shown why the vendor did not make his deed. What power has a court of equity then, to compel Grahams to exchange the obligations of this judgment for those of the extinguished contract?

If this naked question should be answered in the negative, what doubt could there be of the answer, when the facts surrounding the question are added, and the question takes this form, viz: Will a

court of equity compel a vendee, who has never been in default, to accept, in lieu of a judgment for damages fairly and justly obtained against a vendor, and with his acquiescence, the payment of the money expended by the vendee to buy the title at public sale, less what the vendee has been able to collect by redemptions of other property, abandoned by said vendor, upon that judgment, four years after the deed was due, two years after the judgment was rendered, and a year and a half after the lands had been sold at public sale for the vendors debts, during which time the land has depreciated to a third of its former value; and the vendor; has been so insolvent, that he could not be compelled to perform his contract, and having no excuse or reason for his default and laches, indicating no intention to enforce that contract, and showing no willingness and making no effort to perform it during that time, but repudiating the contract, and insisting that it was extinguished in said judgment? Will a court of equity compel the vendees to pay the contract price, in face of an order of the same court, in a prior cause, having jurisdiction of the parties and the subject matter, and having the same evidence, that they should take the lands as purchasers from the court at their value?

V. The insolvency of the appellee and Boggess, unconnected with any other circumstance, is a fatal objection to granting specific performance of said contract, against the will of the vendees, after the lapse of nearly five years. For that circumstance, making it impossible for the vendees to enforce against him specific performance during that period, deprives the contract of mutuality, which is an essential element of a contract, without which specific performance will not be decreed by a court of equity.

In Sec. 634, Fry on Spec. Perf., it is said, that the general insolvency of the plaintiff, so as to show that he is not in a situation to perform the covenants on his part is a valid ground of defence to his application for specific performance, and *New* v. *MacKenzie*, 1 Kee. 474; and *Willingham* v. *Joyce*, 3 Ves. 168, are cited in support of the position.

In Sugden on Vendors, p. 354, it is said, "where the circumstances are such, that the purchase money cannot be paid for a length of time, as if the purchaser die, or became bankrupt before the contract can be carried into effect, and his executors or assignees are not able to get at his assets or effects, the vendor is entitled to have the contract rescinded." In this situation were Grahams ever since April 1859, having a title incumbered for its value, and insolvent vendors only to look to, to remove the incumbrance.

It is well settled, that the insolvency of a proposed tenant is always a weighty objection to a specific performance of an agreement for a lease.

Willingham v. *Joyce*, *ib.*
Buckland v. *Hall*, 8 Ves. 95.
Boardman v. *Martin*, 6 Ves. 467.

In *Vandervronk* v. *Disbrough*, 2 Freem. 99, and *Mayes* v. *Little*, *ib.* 194, it was resolved, that an assignee should not have the benefit of a covenant for renewal of a ldase to a bankrupt. In *Brooks* v. *Hewitt*, 3 Ves. 233, commenting upon the same doctrine, Lord Elden said: "The question, is whether the court will direct a specific performance, notwithstanding the change that has taken place in the circumstances of one of the contracting parties. The court has a discretion in the exercise of which it will do substantial justice. There is *no principle or authority, that the agreement ought to be performed notwithstanding such change.*"

Now the principle of these cases just cited, apply to the case at bar. Since April 1859, when this deed was due, the title of the appellee has been incumbered to its value. During all this period he was insolvent. He could not have been compelled to make the title, for he could not pay for the title. Was it equitable that that contract should stand; that the vendees should be compelled to buy and pay for it over again for their vendor's benefit? That they should be compelled without any fault on their part, to look on and see their property depreciate upon their hands, without any power to protect themselves against the loss? In Fry on Sp. Perf. 733, it is said: "when the contract is in any wise unilateral, as for in-

stance in the case of an option to purchase, a right of renewal, or of any condition, in favor of one party and not of the other, *there any delay is looked at with especial strictness; e.g.* delay in accepting a title, because the vendee can enforce it, whether good or bad."

Allen v. *Hilton*, 1 Fonb. Eq. 432.
Brooke v. *Gairod*, 27 L. J. 61.

Here, Grahams have alone been bound by this one sided contract since the deed was due; if the property rose, the appellee might keep it; if it fell, he could insist upon his vendees paying for it at the contract price.

Brashier v. *Grotz*, 6 Wheat. 539, is a case precisely in point. The vendee was here asking the aid of the court, to enforce a contract of purchase, after a great change had taken place, both as to the title and as to the value of the property, with which he could not have been compelled to comply by reason of insolvency. The court dismiss the bill. MARSHALL, C. J. delivering the opinion, said "Under such circumstances, had a suit in chancery been brought to have the contract rescinded, unless he could pay the purchase money, no court could have hesitated to decree according to the prayer of the bill. No court would allow one party to hold the other bound, while the obligation was not reciprocal; or to hold himself prepared to avail himself of all unfavorable contingencies, without being affected by those which were unfavorable."

In *Alley* v. *Deschamps*, 13 Ves. 225, where, after the lapse of two years, with the vendee in possession, the assignees of a bankrupt, who was the vendee, sought to enforce specific performance of a contract, where the property had greatly risen in value. The bill was dismissed, and Lord Chancellor ERSKINE said: "This court ought not to interfere, unless it is clear that the party will substantially have that for which he contracted. * It would be very dangerous to permit parties to lie by, with a view to see whether the contract will prove a losing or gaining bargain. * * Relief was never given in the extravagant manner which the circumstances of this case would require; that a man, having done

nothing, having broken his contract, may, at any distance of time, claim all the advantage, as if he had fulfilled it. But my judgment proceeds upon a plain principle; that a bill for specific performance of an agreement, will not be endured under such circumstances; nothing further having been done towards performance when the purchaser became bankrupt, nor afterwards, until the premises, by a subsequent event, proved to be much more valuable than they were at the time the contract took place. Where, then, is the equity placing him in the same situation as if he had, in due time, availed himself of the contract?" A case whose circumstances are more exactly parallel to the case at bar, as to the two facts of insolvency of the party seeking performance, and change of value, making it to his advantage to enforce the contract, during a delay occasioned by that party's negligence, would be hard to find.

VI. The great change in the value of the subject matter of the contract, taken place during the delay, in completing the contract, occasioned by the plaintiff, is a sufficient ground of objection to warrant the court in reversing this decree. For this circumstance makes it no longer possible to specifically execute said contract.

In 2 White & Tudor's Lead. Cas. in Eq. p. 301, the settled doctrine on this point is thus laid down: "Equity will not enforce a contract, where there is a change of circumstances of such a nature as to render it inequitable to enforce it. * * A change in value will have great weight, * * where the delay becomes material in its consequences, *the idea of abandonment is justified.* * *" Again, "Time becomes material in equity, where the value of the property has greatly changed." Id. vol 2, p. 34. See Story's Eq. Juris. vol. 2, sec. 102 and note; Sug. on Vend. 495.

The case of *Brashier* v *Gratz*, ib., is here again precisely in point. The court say: "Another circumstance which ought to have great weight is, the change in value of the land. It was purchased at $22.50 per acre. Mr. B. failed to comply, and was unable to comply, with his agreement. More than five years after the last payment had become due, the land suddenly rises to the price of $80

per acre. Then he tenders the purchase money, and demands a specific performance. Had the land fallen in value, he could not have paid the purchase money. This total want of reciprocity, gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the price of the article." Here time was not of the essence of the contract, by its terms, and the court, after so holding, say: * * "the circumstances may be so changed that the object of the contract can no longer be accomplished; that he who is injured by the failure of the other contracting party, cannot be placed in the situation in which he would have stood, had the contract been performed. Under such circumstances it would be iniquitous to decree a specific performance, and a court of equity will leave the parties to their remedy at law." * * * "*This, then,*" says the Chief Justice, in conclusion, "*is a demand for specific performance, after a considerable lapse of time, made by a person who has totally failed to perform his part of the contract; and it is made after a great change, both in the title and in the value of the land, which was the subject of the contract, and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction. In such a case we are of opinion that a court of equity ought to leave the parties to their remedy at law.*"

It needs no comment to show how strikingly applicable is this opinion to the case at bar, in all its circumstances.

In *McKay* v. *Carrington*, 1 McLean 50, Mr. Justice McLean held, that where the value of the property has greatly diminished, and injustice might be done, equity will not decree a specific performance in favor of the vendor. And in 3 McLean, 149, *Mason* v. *Wallace*, the same learned Judge held, that, where the default is connected with a material change in the circumstances of the parties, or in the value of the property, a court of equity will leave the parties to their legal remedy.

VII. Time was made of the essence of the contract.

Hence the failure of the vendors to comply with their contract, by making the deed when due, in April 1859, put an end to the contract.

There is no evidence in the record of any act by Grahams, waiving their right to insist upon the delivery of the title on April 9th, 1859.

It is not shown that they agreed to extend the time for making the deed.

It is not shown that they were then in possession, or that they continued in possession after that time.

But if they did waive their right to insist upon strict performance, that right was revived and enforced by the judgment in which the contract was merged.

A mere notice, given by a party to the contract, to perform within a reasonable time, it is well settled, gives such party the right to rescind such contract, if not performed at the time fixed by such notice.

Parkin v *Thorold*, 16 Beavan 63.

It needs no argument to show, that a judgment upon that contract for non-performance, will have, at least, equal force.

But the judgment also extinguishes the contract. After the recovery of the judgment, there is no contract to waive; the old contract is at an end, and is to be revived, not by slight acts which might serve to waive the provisions of a living contract, but only by the same agreement of the proper parties, upon a sufficient consideration that served originally to create the contract. It is, then, a question, how the judgment shall be discharged, or released, or abandoned; or whether a new contract is made, or the old contract renewed.

It would surely be as hard to abandon a judgment as to abandon a sealed contract, and in Fry on Sp. Perf., 405, the cases will be

ound collected to show, that contracts under seal, cannot be released nor rescinded by a parol agreement. "The court," said Lord ST. LEONARDS, "must be satisfied of the total abandonment of both parties of the contract. The court requires as clear evidence of the waiver as of the existence of the contract itself, and will act on nothing less."

Cariolan v. *Brabazon*, 3 Jon. & Lat. 200.
See also, *Moore* v. *Crofton*, 3 Jon. & Lat. 438.

There is not as much propriety in declaring a judgment abandoned by the loose expressions of a pleading, as by the loose conversations of the parties, upon which, in the latter case, the court refused to decree a waiver of a contract for a lease, saying, "that the abandonment of a contract, according to the law of this court, is a contract in itself."

In *Wentz* v. *DeHooven*, 1 Serg. & R., 312, the question was, whether a party could waive his right to call for a specific performance. The court say he may; but "it must be perfectly clear that no implied waiver, as between the vendor and vendee, can operate to defeat an express lien, unless it is shown, *beyond a doubt*, that such was the intention and purpose of the vendor. Slight circumstances will not do to rely on; and when such a result is to be established by circumstances, they must tend *inevitably* to show that it was the intention of the vendor to abandon his lien." The same doctrine was admitted in *Price* v. *Dyer*, 11 Vesey, 619, but it was said, that a parol waiver could not bar a specific performance, unless it was clearly and distinctly proved. In that case, too, a new contract had been made, which materially changed the stipulations of the first, and yet it was decided that the first was not thereby abandoned.

Now the appellee claims that this judgment is abandoned by some loose language in a pleading, which is held evidence of nothing, save that there was such a pleading, so as to ascertain the issues made. Yet a judgment is a solemn record; and at common law "a release of even a sealed instrument must be made under seal." 5

Bac. Ab. 662, Tit. Rel.; and it may be questioned whether a release of a judgment must not be by an instrument of equal dignity. If, then, a parol agreement to waive specific performance of a contract,—to abandon a contract,—must be "clearly and distinctly proved," by "evidence tending inevitably to show that such was the party's intention," "beyond a doubt," what evidence should be required to show the abandonment of a judgment? Surely, something more than a pleading, which is the weakest species of evidence, perhaps inadmissible as evidence at all!

To follow further the discussion of whether there is any act of waiver, when no contract is left to be waived, is at once useless and absurd.

But, whatever office the judgment performs, while it is alive, it must be conceded that it is fully equal, to rebut any presumption of waiver of the right to insist upon strict performance.

The vendors are, surely, in no better situation by reason of said judgment; hence, having failed to perform the contract, according to its stipulations, they are now barred from enforcing said contract.

"Parties have the right to make time of the essence of their contracts, and a court of equity has no power to enforce it, contrary to the clearly expressed intention of the parties."

Kemp v. *Humphreys*, 13 Ills., 577. This is the settled law of this state, affirmed in repeated decisions. Among many that might be cited, see,

Chrisman v. *Miller*, 21 Ills., 235;
Steele et al. v. *Biggs et al.*, 22 Ills., 685.

Time, in this case, was of the substance of the contract, from the character of the property, lying near a town, and depending for its value upon the ebbs and flows of speculation. It was clearly

material to Grahams; for the property was unsaleable, until they had a title. See,

Lewis v. *Lord Lechmere*, 10 Mod., 503;
2 Eq., Cas. Ab. 689;
Pratt v. *Carroll*, 8 Cranch.., 471;
2 Lead. Cas. in Eq., P. 34.

But we have a right to stand on the letter of the contract; for there is no charge of any act of waiver contained in the bill.

Time was a law imposed upon the parties by their own act; and Grahams, who had the right to insist upon it, might have waived it; but "*this waiver must be charged and proved.*" The defendants had a clear right to contest the case on which the plaintiff claims relief.

Falls v. *Carpenter*, 1 Dev. & Bat. Eq., 259;
Ogilvie v. *Foljambie*, 5 Mer., 52;
Levy v. *Lindo*, Id. 81;
Hatch v. *Cobb*, 4 John, Ch. 559;
Voorhees v. *De Meyer*, 2 Barb. Sup., Ch. R. 45;
Note 3, 3 Parsons 379;
Clive v. *De Beaumont*, 1 De G. & S., 39;
Gaston v. *Franklin*, 2 Id., 561.

Hence, upon the settled doctrine of this court, holding time material, where the parties so stipulate in the contract; the laches of the appellee to convey, upon April 9, 1859, furnishes a complete answer to his claim for specific performance.

VIII. The laches of the appellee and Boggess, continuing during nearly five years, without any sufficient explanation or excuse, forbids that the specifc performance of the contract, even if now possible, should be decreed.

In *Southcomb* v. *the Bishop of Exeter*, 6 Hare., 21, the court say: Whatever the learnings of the court may have been in earlier times, "the tendency of the court in modern cases has been, to

restrict the exercise of its jurisdiction and in enforcing specific performance, to those cases in which the plaintiff has been prompt in seeking his equitable remedy." See, also,

Wigram v. *Jeffreys*, 1 Hare. 348;
Parkin v. *Therold*, 16 Beav. 59;

In *Millward* v. *Thanet*, 5 Ves., 72 Note; 5 Ves. 818, the court say: "Neither party can call upon a court of equity, for specific performance, unless he has shown himself ready, desirous, prompt, and eager." Courts of equity will not enforce stale demands, nor lend their aid to a party who has been guilty of negligence, and who has slept on his rights. See

Sec. 730, Fry on Sp. Perf;
Remington v. *Kelley*, 7 Ohio, 444.

"It must be shown by the party asking for a specific performance," says Judge STORY, (1 Story's Eq., Sec 81,) "that he has been in no default, and that he has taken all proper steps towards performance on his part." In *Lloyd* v. *Collett*, 4 Bro. 467, the vendor had taken no step from the day of sale, for six months, after the expiration of the time at which the contract was to be completed, and the bill was dismissed; Lord LOUGHBOROUGH, saying: "If a given default will not do, what length of time will do? An equity arising out of one's own neglect! It is a singular head of equity." Here, the delay has been nearly five years, and "not a step taken"!

The Lord Chancellor in that case, held that, after default of six months, the vendor was "to be considered as having abandoned his contract;" what shall be said, after default of five years, interspersed with an action at law, and a suit in chancery, each, upon their face, putting an end to the contract!

There is "greater reason, in this country, where the value of real estate is continually fluctuating and uncertain, that a court of

equity should withhold its aid from a party who has been guilty of negligence, than in England, where values are more settled."

Hepburn v. *Auld*, 5 Cranch. 276;
Richmond v. *Gray*, 3 Allen, 31;
Willard's Eq., 292;
Parsons on Cent.

What injustice to these vendees, in this age, when the fluctuations of prices each day, may send up or down their property; when lands are continually changing hands; and business moving with speed in all departments, that their vendees, by their negligence, should lock up, for more than four years, more than ten thousand dollars of their vendees means, and compel them to invest other sums, in saving something from their shipwreck, keeping their funds worse than unemployed, through all this period, invested, against their will, in depreciated property, which they cannot sell, because they cannot get the title!

IX. The delay of the appellee, to enforce the contract, after the judgment was obtained, for two years, is sufficient evidence of an abandonment of the contract; especially, when accompanied by positive repudiations of said contract, and formal allegations that said judgment was in force, and had put an end to said contract.

In Fry on Spec. Perf., Sec. 737, this doctrine is laid down: "Where one party to a contract has given notice to the other, that he will not perform it, acquiescence in this by the other party, by comparatively brief delay, will be a bar; so that in one case, two years delay in filing a bill after such notice, and in another, one years like delay has been held to exclude the intervention of the court."

Heaphy v. *Hill*, 2 S. & S. 29;
Watson v. *Reid*, 1 R. and My., 236;
Parkin v. *Throold*, 16 Beav., 73.

The judgment in November, 1861; the repeated effort to collect that judgment, partially successful, in February, 1862, in January and August, 1863, were each, at least, equivalent to such notice.

"A party cannot compel the specific performance of a contract he has once repudiated."

Clement et al. v. *Evans*, 13 Ills., 94.

X. If the contract had been alive when said cross bill was filed, and when the appellee declared it "was released and waived" by said judgment, surely the delay of the appellee, after the decree and after the sale, and after the confirmation of the sale, extending over a period of more than eighteen months; while Grahams were collecting their judgment, and claiming to own said land as purchasers, was an acquiescence therein, and furnishes sufficient evidence of an abandonment of all rights under that contract.

Fry on Spec. Perf., 737, and cases cited.

In *Parkin* v. *Thorold*, 16 Beav., 59, where the delay in filing a bill to enforce a contract, after notice fixing a time for performance, was barely *two and a half months'*. Sir John Romilly, Master of the Rolls, in an elaborate and most beautiful opinion, held, that this brief delay was not an acquiescence in the abandonment of said contract, and was not such laches as would bar the action. Here the court held the period fixed by the notice, about ten days, was unreasonable, and there were circumstances showing great diligence by the vendor in finding his title papers, and the laches was simply in not being able to produce them, they having been lost; but the case is a strong authority to show that, in all cases where the delay has been considerable, or is without reasonable excuse, the invariable rule of the court of equity is how to leave the parties to their legal remedies.

See, also,

Seton v. *Slade*, 7 Ves., 279.
Harrington v. *Wheeler*, 4 Ves., 686.
3 Allen, 31.
Hepburn v. *Auld*, 5 Cranch, 276:

where the justice and policy of denying aid, by specific performance, to a party guilty of laches, are strongly set out.

XI. The plaintiff, seeking specific performance, must show in his bill, that the court can give the relief asked, without fear of doing injustice. If he has been guilty of delay, he must furnish a reasonable excuse or reason for it, and must show that it has not injured the other party, or that compensation can be readily made for such injury.

In the case at bar, the plaintiff makes no attempt, by evidence, to account for his delay, nor to show that the contract can now be specifically executed, without doing wrong to his alleged vendees. This shows that his bill has no equity on its face.

His allegation, that Grahams had knowledge of the incumbered state of the title, is not proven; but, if true, is of no consequence whilst he was under obligation to make the title good and sufficient.

Pratt et al. v. *Law et al.*, 9 Cranch, 490.

In *May's heirs* v. *Fenten et al.*, 7 J. J. Marsh, 310, a bill to enforce specific execution of a contract for the exchange of lands, the court say: "it was surely incumbent on the appellants, seeking a specific execution, to show that it could be decreed consistently with justice and reciprocity. If this could have been done, it would have been easy for them to show it; and it was peculiarly proper that they should at least have attempted it; wherefore, the equity of the appellees is, in this particular, too questionable to justify a specific execution."

This, too, is the doctrine of this court.

In *Scott* v. *Shepherd*, 3 Gil., 486, the court say: "No rule is better settled than than that a party cannot compel a specific performance of a contract in a court of equity, unless he shows that he himself has specifically performed, or can justly account for the reason of his non-performance."

The doctrine is thus stated in 2 Story's Eq. Juris., sec. 776: "If circumstances of a reasonable nature have disabled the party from

a strict compliance; or if he comes, *recenti facto*, to ask for a specific performance, the suit is treated with indulgence, and generally with favor, by the court. But then, in such cases, it should be clear that the remedies are mutual, and that there has been no change of circumstances affecting the character or justice of the contract; that the chance of gain by delay, is not all on one side, and that of loss all upon the other, * * that he has shown himself ready and prompt to perform the contract."

Note A, 5 Ves., 719.

It will be remembered that no valid excuse for the vendor's laches is given in his bill; and none is in proof. Poverty is shown, but that is no excuse for the non-performance of a contract.

Parry v. *Craig*, 3 Miss., 316.

But, as we have seen, it is, where the title is incumbered, a fresh and substantial ground of objection to enforcing performance.

Brashier v. *Gratz*, *ib.*

Alley v. *Deschamps*, *ib.*

In Willard's Eq. Jur., 292, it is said: "The plaintiff, who seeks for the specific performance of an agreement, must show that he has performed, or offered to perform, on his part, the acts which formed the consideration of the alleged agreement. * * He must show himself ready and desirous to perform on his part."

Here the plaintiff, apparently regardless of the stipulations of his contract, and acting upon the theory so vigorously and justly censured by Chancellor KENT, (*Benedict* v. *Lynch*, 1 John. Chan., 375,) "that a court of equity will almost at any time relieve him from the penalty of his gross negligence," does not give any valid or reasonable excuse for his laches; nor show any desire, or wish, or effort, or even willingness, during the whole period of his laches, to perform his contract.

The authorities show that the burthen of proof is upon him, to show that this contract can now be specifically performed, and without injustice to his vendors. But his vendors have shown, in

all particulars, that the reverse is true of each of the essential facts, which it was incumbent upon him to prove to the satisfaction of the court, to warrant the exercise of the high prerogative of injunction against the judgment of a court of law, and of the extraordinary jurisdiction of the court of chancery in enforcing the specific performance of contracts. The appellee is shown to be utterly regardless of his contract; he has been neither ready, desirous, prompt, eager, or willing to perform it; but, on the contrary, he has never been able to perform it; he has expressly repudiated it; he has never said that he was willing, nor that he intended to perform it, until this bill was filed!

The case at bar has an extraordinary likeness to all the leading cases in which specific performance has been denied by courts of equity; and the reason is obvious; for there is not a circumstance, nor a collection of circumstances, which is a fatal objection to such relief, but will be found in the facts of this case. A fresh illustration of this will be found in the case of *Brown* v. *The Missouri Manufacturing Co.*, 17 How., (S. C.) R. 40, where a bill for specific performance of a contract made by one Thomas was dismissed. It appeared that the notes given for the purchase money of the property were never paid, and the property was sold for the consideration money. The whole case must be examined to see the striking resemblance of the facts to the case at bar.

The court say; "It would be difficult to find any case in which the objections to the specific execution of the contract, are more insuperable than in this case, * * *there is no principle in equity better settled, than that he who asks specific* execution of a contract must show a performance on his part, or that he has offered to perform. Neither of these have been done in this case. * * Their equity appears to have been extinguished by negligence in not paying the consideration money; by the sale of the property by the Sheriff, also under a decree of a court having jurisdiction of the case, and also by a conveyance of the Missouri Iron Company."

In the case at bar, the land was sold for the consideration money; it was sold under the decree of a court having competent jurisdic-

tion; and the money which is the object of this suit, as the land was of that, was ordered returned by the judgment of a court of law to the vendees; and this judgment, by the decree of a court of equity having jurisdiction of parties, and subject matter, and all the facts before it, was recognized as the property of the vendees, which they might give up in exchange for the land, or keep at their own free choice!

XII. The wilful neglect of the appellee and Boggess to perform the contract upon their part, by failing to pay Alexander with the money received from Grahams, and by failing to pay the decree in favor of Alexander, and allowing said land to be sold at public vendee for their debts, while unconscientiously withholding the money received from Grahams without any consideration, would alone serve, as a sufficient reason for a court of equity, to refuse to exercise the special and discretionary power of ordering the specific performance of a contract.

The suit at law, was equivalent to a notice, that unless the vendors speedily obtained and conveyed the title, the contract would be at an end.

The decree, giving the said vendors 90 days, in which to pay Alexander, was also equivalent to a special request, to perform their contract, not only with Alexander, but with Grahams.

That provision directing that Alexander shall convey when he was paid, upon Grahams satisfying their judgment was it not a quasi permission to said vendors to have the contract performed upon doing their duty?

Here, not to speak of that gross breach of faith and trust, the failure to pay to Alexander, on the 9th of April, 1858, enough of the four thousand dollars received of Grahams on the 6th of the same month, and agreed sacredly, according to said bill, to be so applied in the original contract; here are two distinct and explicit requests, and solemn notices, disregarded by said vendors. What is the legal

consequence? The answer is found in the sound principle, that a court of equity will not relieve a party against the consequences of his willful neglect.

This doctrine is elaborated and applied in *Hill* v. *Barclay*, 18 Vesey, 59, by Lord Chanc. EDEN. After commenting upon the principle of compensation, upon which a court of equity grant specific performance, "upon the notion that it places them, as near as can be, in the same situation as if the contract had been with the utmost precision specifically performed," the court say: "yet the result of experience is that where a man who has contracted to sell an estate, is placed in this situation, that he cannot know whether he is to receive the price when it ought to be paid, the very circumstance that the condition is not performed, at the time stipulated, may prove his ruin, notwithstanding all the court can offer as compensation. * * The distinction goes not only to the question, whether it is clear compensation can be made, but also to another very material consideration, whether the non-payment of money, or the waste, *are willful or not.* There may be cases, where morally speaking, a court of equity would give relief with much less reluctance than in another sort of case; when, for instance, the landlord has offered to overlook the past negligence, on condition that the repairs should be done within three months; if the tenant refused, upon what ground, having willfully refused and violated his covenants, would he desire a court of equity to place him in exactly the same situation, as if he had performed them? * * The doctrine I have repeatedly stated is all wrong, if it is to be taken that relief is to be given in case of a willful breach of covenant. * * The lessor did make the requisition; expressly signifying, if they were not done in that time, he would avail himself of his legal right. Not one step was done in compliance with such requisition. Am I then to speculate, under such circumstances, and determine that it is so clear, that the repairs, if done in future, will be equally or more beneficial, hat all the compact between them should be undone? My opinion is, that this is more than is authorized by any decision." To the same point see,

De Scarlett v *Dennell*, 2 Vents. 352.
Hill v. *Barclay*, 18 Ves. 63.
Bracebridge v. *Buckley*, 2 Price, Eq. 200.
Reynolds v *Pitt*, 19 Ves. 141.
White v. *Warner*, 2 Mer. 460.

When the appellee himself is found, denying under oath the existence of the contract, and claiming that it is merged in a judgment; when he is guilty of successive and repeated defaults; when he neglects to take the steps necessary to enable him to perform it, by removing the incumbrance, although ordered by the court, and given "a long day" to that end; shall he now be heard to ask the aid of a court of equity, to put him in the position which he refused to take, and give him the same advantages as if, instead of repudiating, he had performed his contract?

Such a decree is not warranted "by any decision."

XIII. It is necessary for the appellee to show that the title of Alexander was the true and genuine title to said lands; for, unless he shows that his vendees have received the consideration, he is not entitled to have the contract declared performed.

This fact is neither admitted nor denied in the answer, nor is it proved; and there is nothing to take it out of the general rule that, "where matter is neither affirmed or denied in the answer, it must be sustained by proofs."

De Wolf v. *Long*, 2 Gil., 679.

The "proving of the vendor's title" * * is "an ordinary equity, which the court is particularly careful to enforce, on the plain principle, that a plaintiff, seeking to compel a purchaser to accept an estate, is bound to submit his title to such scrutiny as satisfies the court that the defendant may safely part with his money." * * "The inclination of the court is in favor of the

vendee; and a vendor, claiming to be excepted from the general rule, is required clearly to establish a case of exception."

Burroughs v. *Oakley*, 3 Swanst, 167.
Southcomb v. *The Bishop of Exeter*, 6 Hare, 214.

It is not enough that the title is not questioned, or is apparently taken for granted. The rule should be adhered to more closely in this case, for the reason that the appellants stipulated in said contract for the security of a "deed, with covenants of warranty," and the appellee seeks the benefit of that contract without making the stipulated conveyance.

Even if Grahams had waived their right, as purchasers, in a suit against them for specific performance, to have the vendor's title proved, Holloway cannot have the benefit of such waiver, because he has not expressly alleged the fact of waiver in his bill.

Cline v. *De Beaumont*, 1 De G. & S., 397 and 557.
Gaston v. *Franklin*, 2 *id.*

In Note 3, 3 Parson's Cont., 379, these cases are cited to support this rule;

* * * "It has been held that a vendor cannot have the benefit of such waiver, unless the fact of waiver is expressly put in issue by the bill. It is not sufficient that facts are stated upon the bill amounting to evidence of waiver, *but the fact of waiver must be directly alleged.*"

But there is no fact of waiver in evidence. The mere fact of taking possession does not operate as a waiver of the vendee's right to call for the vendor's title.

Simpson v. *Ladd*. 4 De G., McN. & G., 665.

This question is discussed by GIBSON, C. J., in a very able opinion in the case of *Gains* v. *Renshaw*, 2 Barr, 35, announcing the judgment of the court, that the defendant, although in possession,

could resist the payment of the purchase money until the vendor exhibited a good title. The court say:

"It would be the vendor's duty to apprise the vendee of his inability, *restore whatever had been received*, and demand possession."

The true rule is laid down by Sir Thomas PLUMER, M. R., in *Cox* v. *Allingham*, Jac., 337, thus:

"It must be a *very explicit and unqualified admission, to dispense with the production of that which constitutes the foundation of a suit. Nothing short of that would do, even if that would do.*"

2 Dan. Ch. Pr., 975.

The decree, in the suit of Alexander, does not find that the title to the lands was in Alexander; nor do the orders of confirmation do more than simply confirm the conveyances made by the Master, and by Alexander.

Hence, in the absence of proof of the genuineness of the title of Alexander, this decree cannot stand.

XIV. The title of Alexander is now lawfully in Grahams, not acquired through the contract from appellee; and, therefore, Holloway cannot perform his contract.

Grahams had a right to buy the lands of the court.

The relation of vendors and vendees had terminated, by the failure of the vendors to convey. The contract of Alexander, with appellee, was extinguished in the decree. The case of *Chrisman* v. *Miller et al.*, 21 Ill., 235, is precisely in point. Miller, although in possession, and still a vendee, under a living contract, the court held, had a right to buy the real title to the land of his vendor, after his vendor's contract was at an end. "When the rights of the parties under the contract ceased, the relations resulting from that right ceased also. Thenceforth all of the parties

ceased to have any interest in the land, legal or equitable, and Miller had as much right to purchase as any third person—as a total stranger to the transaction."

In Hovenon on Frauds, 475, it is said: "Where the reality of a third person's title has been judicially determined, ** though the *cestui que* trust be an infant, ** the trustee, or guardian of the infant, may buy in the title of such third person, and this shall not be taken in trust for the infant." Lesley's Case, 2 Freem., 52; *Cowles* v. *Throckmorton*, Ib. The principle is that the fiduciary character was now terminated, for want of an object. Id. 482.

But, by the *judgment*, Grahams had "evidently and honestly removed themselves from the character of trustees; and, in such cases, their purchase will be sustained." Hov., on Frauds, 480.

Again, Grahams had the right to bid, given them by the court; and, even if they were then vendees, they have the right to hold the lands, as purchasers, freed from any trust.

For, it is said, a "trustee may buy even an infant's estate, by leave of court." 1 Hov. on Frauds, 475. See, also,

Galloway v. *Finley et al.*, 12 Peter's, 26.

Surely, Grahams have no less rights in the premises, when they buy through an agent, and are indebted to the kindness of a friend, who racked his credit to enable them to make the purchase. But this is *res adjudicata;* for this the court *must have found*, when the order for confirmation was made.

How then can Holloway perform his contract? His title has been sold to pay his debts; how can he give it to Grahams, in satisfaction of the contract? He cannot give them what they now rightfully have; nor can he be heard to allege that they were agents for him, in the purchase, in the face of the order of the court, giving them the right to buy for themselves, or the order that confirmed the title in their agent, as purchaser, as

against him, and all parties and privies. By said contract, Grahams have not received the title; but they have it from a purchase by leave of court. What justice is there in the appellee's claim, that his vendees should pay him for what they have not received of him, and he has not given them?

XV. Grahams had a right to retain possession of the premises, and such possession was no obstacle, or objection, to the exercise of their right to rescind said contract.

For, the vendors were insolvent; and *Duncan* v. *Jeter*, 5 Ala. 604, is a direct authority, that, in such case, "the vendee is authorized to retain the land as an indemnity."

In *McCampbell* v. *McCampbell*, 5 Littell 98, which was a suit in chancery to enforce specific performance of a parol contract for the sale of lands, of which the plaintiff was in possession, the court say: "it is well settled, that a purchaser has a lien for his money advanced in payment for an estate, which he cannot keep, as well as for his ameliorations made thereon, when he supposed it to be his own;" and the court held, that his possession was no objection, to the decree for rescission, but that it was improper that he should be decreed to *remain in possession till repaid for his improvements*; that the court should have ordered the lands sold.

In *Oldham* v. *Woods*, 3 Mon. 47, which was a bill filed to set aside a judgment against a vendor, and for specific performance of the contract, the court dismissed the bill, holding that the circumstance that the vendee had remained in possession, only made it proper to direct an account to be made up of the rents against his improvements.

Upon the same principle, in *Higby* v. *Whittaker*, *et al.*, 8 Ohio 20, which was a suit for the rescission of a contract for the sale of real estate, by the vendor, it was held, that "retaining the purchase money was no objection to rescission, where the vendee was in possession, and indebted for rents and profits; and that an account and

set-off should be made." It was enough that the intention to rescind was expressed by some act. In the present case, the intention to rescind was well exhibited by the solemn judgment, in covenant, obtained at the suit of the vendee, extinguishing the contract, followed by earnest and continued efforts to enforce and collect said judgment.

The case of *Bryan* v. *Lafftus*, 1 Rob. Va. 12, is precisely in point. The court held that, where the vendee has performed so much of his part of the contract as to entitle him to a conveyance, and the vendor and his heirs have for six years neglected to make title to the land to the vendee, until the circumstances respecting the property have materially changed, *specific performance of the contract will not be enforced against the vendee, though he has never surrendered possession.* This, it will be noted, is a case by no means so strong as the case at bar. For, in the latter, the vendees have extinguished the contract, *and their possession, without title, coutinued but from November* 1861, *till August* 1862, and during that period they were collecting their judgment, and, after March, engaged in enforcing their lien. Hence their possession is explained; for it was not in assertion of the contract, but of their lien as vendees, who had advanced the purchase money, under a contract merged in a judgment.

Grahams had a lien, as vendees, upon said lands for the purchase money, and for the money expended thereon for improvements and taxes, under said contract, and had a right to retain possession till said lien was enforced.

"If the purchase money, or part of it, has been pai dprematurely before a conveyance, the vendee will have a lien upon the estate in the hands of the vendor, even, it seems, although he may have taken a security for his money." *Burgess* v. *Wheat*, 1 Eden 211; *Lacon* v. *Martin*, 3 Atk. 1; *Oxenham* v. *Esdaile*, 2 Y. & J. 493, 34; and J. 262; but not where the contract is illegal, *Ewing* v. *Osbaldistone*, 2 My. & Cr. 88; *McCampbell* v. *McCampbell*, *ib.*

The same principle is asserted by Sir Thomas CLARKE, M. R., in *Burgess* v. *Wheat*, 1 W. Black. 1510. Lord ELDON cited the doctrine in the latter case, with approval, calling it a "very sensible doctrine." *Marchett* v. *Summers*. 15 Ves. 345 and 353. In *Finch* v. *The Earl of Winchelsea*, 1 P. Will. 278, Lord Chan. COWPER said: "Articles made for a valuable consideration, and the money paid, will, in equity, bind the estate, and prevail against any judgment creditor, mesne between the articles and the conveyance." See, also, *Oxenham* v. *Esdale*, 3 Ex. 262; *Ludlow* v. *Grayall*, 11 Price 58.

In *Jett et al.* v. *Locke*, 5 J. J. Marsh. 592, the court held that the vendee had a lien upon the lands purchased for the purchase money, upon the rescission of the contract, and that it was *not proper that he should be ordered to give up the possession until said lien was discharged.* See, also to the same point,

Maderas' Heirs v. *Hopkins*, 12 B. Mon. 600.
Lowry v. *Cox's Ex'rs et al.*, 2 Dana 469.
Oldham v. *Woods*, 3 Mon. 47.
Craig v. *Marshall*, 3 J. J. Marsh. 50.
McCampbell v. *McCampbell*, *ib.*

The true rule is, that thepossession of land is properly referred to an assertion of the right or title of the occupant. If he is in possession under a contract of purchase, and has not indicated his intention to rescind such contract, his possession, is properly referred to the contract, if not otherwise explained, and is an assertion of its continued existence, which, in the absence of other controlling equities, will give the vendor the right, to enforce performance of such contract. This is the doctrine enforced in *Gehr* v. *Hagerman*, 26 Ill., 441, where the vendee's use, and enjoyment of the land as his own, without in any way evincing his intention to rescind the contract, was held, "unexplained," to bar said vendee from rescinding his contract of purchase. But when the vendee has clearly indicated his intention to rescind the contract, is no obstacle or objection to his rescinding the contract.

In *Southcomb* v. *The Bishop of Exeter*, 6 Hare, 214, a bill by vendors to enforce specific performance of a contract of sale of lands, it was urged, that the Bishop, having more or less acquired possession in consequence of his contract as vendee, could not retain that possession, and at the same time contend that the contract was void, but that he ought to have given up the possession; but the court say, that he was not bound to take that course, since he had taken sufficient steps to insist upon his right to rescind the contract.

The truth is, this occupation, by reason of the money expended for improvements, was not beneficial, but injurious, to Grahams. They were not responsible for the use and occupation in any event; they never would have entered, had not the appellee pretended that he could give them a title; and he should not be permitted to make this, a ground of lachs.

See to this point,

Little v. *Pearson*, Pick 7, 301.
Hearne v. *Tomlin*, Peake's N. P. 192.
Newcomb v. *Brackett*, 16 Mass. 161.
Eames v. *Savage*, 14 Mass. 425.

Grahams had not that use and enjoyment of the lands, to which they were entitled as purchasers. Numerous judgments must have been liens on the land; for we find thirteen judgment creditors made defendants by Alexander. Alexander had an incumbrance from the first; and the existence of that incumbrance was a breach of the contract; and the commencement of Alexander's suit was a disturbance of the possession, and was ground for an action. Rawle on Cov. 152 and 188; Sug. Vend. Vol. 2, 812. Grahams had the right during all this period to rescind the contract; and could not have been compelled to perform. Rawle 188. How can occupants, who, as prudent men, dare not improve, and who cannot sell, but must wait the result of protracted and repeated suits in all the courts, and are busied to get their purchase money again by redeeming tneir vendor's property, and are defending suits that threaten to sweep away their security; how can they be said to

have substantially, according to the terms of a contract to sell them the title, the use and enjoyment of the premises?

What a mere mockery of justice it would be, to make them now as vendees, take, at thrice the value, the title to the depreciated lands, which they already own as purchasers from the court, and call the contract "specifically performed?"

It is well settled, "that the giving of specific performance is a matter of discretion; not an arbitrary, capricious discretion; but regulated upon grounds that will make it judicial." Ld. ELDON in

White v. *Duncan*, 7 Ves.. 35.
Willard's Eq. Jur., 295.

"The contract must be, in the nature and circumstances of it, unobjectionable." Sir Wm. GRANT, in

Hall v. *Warren*, 9 Ves., 608.

The court "interferes only, where, by so doing, it can do more complete justice than can be done in an action;" "but * * if there be circumstances rendering it unjust that the court should act, it will refrain from acting, *and much more readily will the court listen to an objection against a vendor, who is seekivg specific performance, because, of necessity, the vendor can get complete relief at law.*"

Webb v. *Directors Lond. & Ports. R. R.*, 1 Degex. McN. & Gor., 531.

Here the vendor applies, and applies after his vendees have appealed to the law, and after express acquiescence in the judgment of the court of law. Is it not just that this court should leave the matter where the court of law left it? Is there any assurance that a decree here rendered will not make, of the machinery of this court, an instrument of injustice? Is there any satisfactory evidence that it will afford more complete justice than the courts of law would afford?

This application is not a matter of right; but the court will exercise a sound and reasonable discretion, and will never grant relief thus sought, *unless it is entirely equitable and right*, and will work no injustice to the adverse party.

This contract has long remained suspended and in doubt, and the uncertainty must have occasioned serious anxiety, as it has great detriment (see their answer,) to the vendees. Is it just, that this vendor, whose default and negligence has occasioned all this mischief, should now be aided by a court of equity to force his depreciated property upon the vendees at the contract price?

Surely the court, to use the language of Lord REDESDALE, (*Harnett* v. *Fielding*, 2 Sch. & Lef., 554,) "will not run the hazard of doing injustice, but will do infinitely more wisely in leaving the party to his old remedy by action for damages."

The judgment at law is just; it is for the return of money unconscientiously obtained; for it was obtained without consideration. If he seeks deliverance from that, the way is easy; he may deliver himself from the hands of justice, as other, more worthy, creditors have done, by complying with its demands, and "paying the money."

Lloyd v. *Collett*, *ib.*

But the appellees counsel proposes to test the soundness of the conclusions of law reached in this case, by comparing them with the conclusions to be drawn from the "highest principles of morality and justice." He says: "The transactions between the parties commenced by a sale of lands by the appellee to the appellants, for $10,000, and the appellants propose to close them by taking the lands, and the $10,000, leaving the appellee without either money or land.

* * If Grahams can maintain their position, they will get the land, which they purchased and paid $1000 for, by paying $2000, interest, and costs to Alexander, in all a little over $3000; and, on

the other hand, Holloway will be out of pocket his two first payments to Alexander, over $4000, and have neither land nor money. ** Will equity allow such a result?"

To this answer;—"*When the transactions between the parties commenced,*" *the appellee had neither the money nor the land.* He had not then the appellants ten thousand dollars, and he should not have them now, and would not have them now, if he would obey, either the judgment of the court, or the dictates of conscience; but would return the money he has unconscientiously obtained.

He had not the land; for the legal title was in Alexander; and the equitable title he had bought, but a few days before he sold it to the appellants, and it was then incumbered for the purchase money, in a sum, that subsequently proved to be its full value.

He has not now the land; and he ought not to have the land; for it belongs now to the appellants, to whom it was sold by the court, at a fair sale, for a full price, and the proceeds applied to pay the appellee's debt, the said purchase money. What principle, or principles of "morality and justice" will give the appellee, either the appellants' money, or the appellants' land?

He lost his right to the money, because he would not keep his contract, by which he got it, viz; to make a title to the land. He lost his right to the land, because he would not keep his contract, by which he was to get it, viz.; to pay fer it. He has, to-day, neither the money nor the land, because he did not do as he agreed; and should this court of equity leave him as it finds him, morality, justice, and law, will say, it is right.

The court sold this land for three thousand dollars. Shall this sale stand? Or, shall the old sale of 1857 stand? Shall Grahams loose seven thousand dollars, or, Holloway four thousand? If he had kept his contracts, neither need have lost; the land might have been re-sold without loss. The rule of law and of right is plain. The fault is his, and his should be the loss.

If the old sale should stand, after all his broken bargains, neglects, defaults, and legal strife, Holloway will save his old profit of a fortnight, and make four thousand dollars at the expense of his innocent, and much wronged vendees; Surely the money would burn his pocket, and sear his conscience! And the record of that decree—what a lasting triumph to contract breakers, and how brilliant a proof, that a contract is as well broken as kept!

The learned counsel for the appellee says: "We approach the argument of this case with some embarrassment, because the decree of the court below, seems so manifestly just, that it is difficult to see how the learned counsel for the appellants can ask this court to reverse it. We are almost led to vague suspicions that our minds are laboring under some error, but having turned the facts presented by the record in every way, we can see, nothing, but an effort of the appellants to gain an unfair advantage by a supposed legal advantage. More, the record shows a resort to tricks for the purpose of retaining the land purchased, and collecting back the purchase money with interest."

To this, we have to say; we leave "the argument of this case with some embarrassments" because the decree of the court below, entered, as we understand, *pro forma*, for the purpose of having the case heard in this court, and not at all a reflexion of the opinions of the able and learned Judge, now a member of this Honorable Bench, as to the principles which should govern a court of equity in the premises, seems so manifestly unjust, and in conflict with all the principles established, and precedents furnished, by every one of the cases in the books, touching the questions involved, that we feel unwilling that your Honors should believe, that we are ignorant that our clients are entitled to have this decree reversed, upon the plainest and most elementary principles, and desire to have the length, to which we have pushed this argument, attributed to an excess of caution, rather an opinion that it was necessary.

We cannot confess to any "vague suspicions that our minds are laboring under some error," but having "turned over the facts presented by the record, in every way" that our ingenuity can place them, we can see, nothing, but an effort of the appellee, after having fought off his debts and his contracts, until at last he is in the hands of justice, to have the court, under pretence of enforcing an abandoned and extinguished contract, release him from the just consequences of his defaults, place his losses upon the shoulders of his innocent vendors, and pay off his debts in their real estate at 25 cents on the dollar. "More, the record shows a resort to tricks," to accomplish his unjust purposes; for he seeks to take advantage of the errors and mistakes of his innocent vendees and debtors, in
[60] their anxious efforts shield themselves from further loss in the suits in which his default have involved them, and with brazen effrontery, bases his prayer for relief in equity, upon the slips in pleading of their solicitors!

GEO. F. HARDING,
Solicitor for Appellants.

T. G. FROST, Esq.,
JOHN J. GLENN, Esq., } *Of Counsel.*

SUPREME COURT, APRIL TERM, A. D. 1865.

ARCHIBALD Y. GRAHAM and DAVID GRAHAM, *et al.*
vs.
ROBERT HOLLOWAY.

ABSTRACT OF RECORD.

G. F. HARDING and T. G. FROST and J. J. GLENN for Archibald Y. Graham and David Graham.

This was a bill filed by Robert Holloway against Archibald Y. Graham, David Graham, Henry M. Boggess and Robert Moir, to enjoin the collection and compel the cancellation of a certain judgment rendered in favor of said Grahams against said Robert Holloway and Henry M. Boggess for $12,670 59-100, on the 22d day of November, A. D. 1861, in the Circuit Court of Warren County, for the non-performance of an agreement made by said Holloway and Boggess with said Grahams for the sale to said Grahams of the north-east quarter of section six, and ninety-six acres off the west side of the north-west quarter of section five, in township ten north, range two west of the fourth principal meridian in Warren County, Ills., on the ground that, subsequent to the rendition of said judgment, said Grahams, through purchase at a Master's sale under a decree in favor of Perry Alexander against said Holloway & Boggess, of foreclosure and sale of all the right and title of said Holloway & Boggess in said land, procured a good and perfect title to said premises; and that said Holloway & Boggess ought in equity to be charged with and compelled to pay only so much of said judgment as would be sufficient to cover the expense incurred and money paid by said Grahams in procuring said title; it being claimed in said bill that said Grahams had abandoned said judgment and elected by their cross bill filed in the case of Perry Alexander against said Holloway & Boggess and others, to seek a specific performance of the contract, for the breach of which they recovered said judgment, on account of the inability of said Holloway & Boggess to convey a title.

The bill of said Perry Alexander was filed on the sixth day of March, A. D. 1861, and was in the nature of a bill to enforce a vendors lien, and prayed for a decree of sale of said premises, for the payment of the balance due from said Holloway & Boggess to said Alexander, on the contract of sale of said premises, given for the conveyance of said premises by said Alexander to said Holloway & Boggess. Said Grahams and other judgment creditors of Holloway & Boggess are also made parties to said bill. On the 28th day of March, A. D. 1862, said Grahams answered said bill, and also filed a cross bill in said suit against said Alexander and Holloway & Boggess.

On the fifth day of April, A. D. 1862, a final decree, on a final hearing on the bill and answers thereto and cross bill and answers thereto, replications and report of the Master in Chancery was made by the Court, and under said decree said premises were sold to William Laferty, and on the coming in of the Master's report exceptions were taken by Holloway & Boggess, and a motion made to set aside the sale, on the ground that the purchase, though nominally by Laferty, was in fact a purchase by the Grahams in the name of Laferty. Witnesses were examined and the case investigated by the Court, and a decree of confirmation of the sale and deed was made by the Court on the 27th day of March, A. D. 1863.

On the sixth day of October, A. D. 1863, the bill in this case was filed. The answers of the defendants, the Grahams, was filed on the 11th day of January, A. D. 1864, and their amended answer on the 30th of March, A. D. 1864.

Upon final hearing and on the fifth day of April, A. D. 1864, a final decree was made by the Court, granting the prayer of the bill and directing a satisfaction of the judgment to be entered, on payment by Holloway & Boggess of the sum of $2803.45, being the amount found by the Court to have been paid out and incurred by said Grahams in order to procure and perfect the title of said premises, after deducting the amount collected on said judgment. At the same term said defendants, said Grahams, prayed an appeal from said decree, and on the 28th day of May, A. D. 1864, the appeal bond was duly filed and approved.

The cross bill of said Grahams in the original suit of Perry Alexander against said Holloway & Boggess and others, the decree rendered in that suit, the answer of said Grahams in the case from the decree in which this appeal was taken and amendment thereto, together with the certificate of evidence, except the documentary proof, and records therein referred to, and the final decree of the Court are herein set forth at large, and are as follows, viz:

STATE OF ILLINOIS, } March Term, A. D. 1862, of the Circuit Court of said County.
COUNTY OF WARREN. }

To the Honorable Charles B. Lawrence, Judge of said Court in Chancery sitting:

Your orators, Archibald Y. Graham of said county, and David Graham of that of Henderson, in said State, respectfully represents, that 6th day of March, A.D. 1861, Perry Alexander of the county of Adams, in the State aforesaid, commenced in this Court a suit in Chancery, which he termed a Vendor's Lien, against Robert Holloway, Henry M. Boggess, partners in trade in the firm name of Holloway & Boggess, Elisha Eldred, Anson Eldred, Uri Balcom, Seth Smith, William M. Dodge, James F. Owen, Joseph Holton, Jonathan Black, Thomas Ridgley, Elijah C. Babcock, John Babcock, Theodore Poehler, the State of Illinois, and then in the Clerk's office of said Court filed his bill therefor. That all the proceedings that have been had in this Court in said cause were as follows, to wit:

That 6th day of March, A. D. 1861, summons was duly issued in said cause against said defendants. That on the 8th day of said month, said summons was duly returned served on said John Babcock, Henry M. Boggess, Seth Smith, Elijah C. Babcock, John Babcock, Robert Holloway, and Archibald Y. Graham and Joseph Holton; and that said Elisha Eldred, Anson Eldred, James F. Owen, Jonathan Black, Thomas Ridgley,

Theodore Poehler, David Graham and William M. Dodge could not be found in said county of Warren. That 29th day of August, A. D. 1861, an alias summons was duly issued in said cause, directed to the Sheriff of said Henderson county, and on the 2d day of September thereafter returned by the Sheriff last aforesaid served upon said David Graham, and that the other of said defendants, naming them, could not be found in said Henderson county.

At the March term hereof and on 25th day of such month, leave was given said Holloway & Boggess by the evening of Monday thereafter to answer said bill. On 6th day of April thereafter, and at term last aforesaid leave was asked and given to the Sheriff to amend his return. Demurer was filed by said Holloway & Boggess to said bill. An order of publication as to non-residents was made. Alias summons was issued to the counties of Cook, Peoria, Henderson and Sangamon, and the cause was continued to the next term of this Court, which was the ensuing October term thereof.

At said October term and on 23d day of November thereafter, a default was taken against said Joseph Holton, John Babcock, Elijah C. Babcock, Seth Smith and your orators, and the case was then taken under advisement, to be decided as of that term.

At this, the March term hereof and on the 17th day of such month, a motion was made, and on the 19th thereof allowed, to set aside the default entered against your orators at the last term hereof, and for leave to answer said bill and file a cross one hereon by Tuesday morning thereafter.

That March, 6th day, A. D. 1861, E. A. Paine made before the Clerk of the Circuit Court of said county an affidavit that said Jonathan Black and James F. Owens were non-residents of said State, which was then filed by the Clerk of said Court in the Clerk's office thereof. That notice of the pendency of said suit to said Owens and Black was duly published in The Monmouth Atlas, a weekly newspaper then and ever since then published in said Monmouth and said county of Warren, four weeks successively, the first of such publications bearing date August 23, 1861, and the last thereof on 23d September thereafter, a copy of which notice and certificate of the publisher thereof of such publications is herewith filed, marked exhibit (E) and made part of this cross bill. All of which fully appears from the records of this Court of the proceedings had in said cause.

That said suit was brought to obtain a decree against said Holloway & Boggess for the sum of Twenty-seven Hundred and Fifty Dollars principal and interest, a balance which said Alexander by his said bill claimed to be due to him from said Holloway & Boggess on a contract of sale and extension thereof in writing made and entered into between them in the name of said Perry Alexander and the firm name of said Holloway & Boggess, the first thereof on the 9th day of April, A. D. 1857, and the latter on the 20th day of July, A. D. 1859, for the sale by said Alexander to said Holloway & Boggess of the north-east quarter of section six, containing one hundred and fifty-four acres more or less, and ninety-six acres more or less of the west side of the north-west quarter of section five, in townsh.p ten north of range two west and the county aforesaid, on the terms and conditions in said contract and the extension thereof stated, copies of which are herewith filed, marked respectively exhibits (A) and (B) and made part of this bill. And to obtain a first and exclusive lien on said real estate for the payment of the amount aforesaid with the interest that might accrue thereon and for such of said Alexander's costs as might accrue in his said suit.

That said bill prays as follows, to wit: "That the said Robert Holloway, Henry M. Boggess, State of Illinois, Elisha Eldred, Anson Eldred, Uri Balcom, Seth Smith, William M. Dodge, James F. Owens, Joseph Holton, Jonathan Black, Thomas Ridgley, Elijah C. Babcock, John Babcock, Theodore Poehler, Archibald Y. Graham and David Graham may be made parties defendants to this your orators bill, and that a proper summons may be duly issued out of this Honorable Court under the seal thereof against them, and that they and each of them may be required full, true and perfect answers to make to this bill, and to each and every allegation thereof as fully and specially as if specially interrogated thereto hereby, expressly waiving such answers of said Archibald Y. Graham and David Graham, being under oath, and requiring that their, and each of their answers be without oath, and that the amount which may be due and unpaid to your orators of the purchase money aforesaid, together with the interest accrued thereon, may be properly ascertained, and that the same may be decreed to be a lien upon the real estate aforesaid, and that all of the right, title and interest of said defendants or either of them, of, in and to said real estate and premises or any part thereof may be decreed to be subject to such lien of your orator; and your orator also prays that said Robert Holloway and Henry M. Boggess may be decreed to pay the amount thus found to be due and owing to your orator within a short day, to be named in such decree, together with the legal interest thereon from the date of such decree until paid, and also to pay the costs of this suit; and that in case default be made in such payment or any part thereof, your orator prays that either all the right, title and interest of said defendants and each of them of, in and to the same and every part thereof may be sold to satisfy said debt and interest thereon together with the costs of this suit as to your honor shall seem most equitable; and that your orator may have such other and further relief in the premises as shall seem equitable and proper, and as in duty bound your orator will ever pray," &c.

Your orators represent that on the 21st day of April, A. D. 1857, they purchased of said Holloway & Boggess the real estate aforesaid, and agreed to give them therefor the sum of Ten Thousand Dollars on the terms and conditions of the article of agreement of such purchase then in writing made between them by said Holloway and Boggess in their said firm name of Holloway & Boggess, and by your orator, Archibald Y. Graham in the name of A. Y. Graham, and by your orator, David Graham, by and through Archibald Y. Graham, his agent, who executed it by signing the name of said David Graham thereto, as principal thereto, and his own thereto as such agent of said David Graham, signing his name thereto as such agent of said David Graham in the name of A. Y. Graham. That a copy of such article of agreement is herewith filed, marked exhibit (C) and made part of this cross bill.

That your orators have paid said Holloway and Boggess the purchase money of the purchase last aforesaid and in full and discharge on their part of such agreement in writing as follows, to wit: "On 28th day of May, A. D. 1858, Four Thousand Dollars. On 19th day of April, A. D. 1858, Four Thousand Three Hundred and Sixty Dollars. And on 7th day of April, A. D. 1859, Two Thousand One Hundred and Seven Dollars and Fifty Cents, which was in full discharge of such agreement in writing on the part of your orators as said Holloway & Boggess then in their receipt therefor in writing acknowledged, which said receipt together with the receipts for the two previous payments aforesaid made by your orators was made on the back of such agreement in writing, a copy of all three of which is a part of said exhibit (C) and made part of this cross bill.

That your orators have paid taxes that were due the State of Illinois and said county of Warren as follows on said real estate, to wit: On 8th day of March, A. D. 1858, Twenty-eight Dollars and Six and one-half Cents. On 25th day of July, A. D. 1859, Twenty-four Dollars and Sixty-nine Cents. On 23d day of June, A. D. 1860, Twenty-three Dollars and Thirty-six Cents, and on 22d day of June, A. D. 1861, Twenty-one Dollars and Seventy-six Cents.

That said Holloway & Boggess, nor either of them ever had any interest in said real estate, or any part thereof, only what they derived from the purchase thereof from said Alexander, which was made on the terms and conditions stated in the article of agreement in writing thereof first aforesaid, for Six Thousand Dollars, on or about 7th day of April, A. D. 1857, and as your orators are informed and believe yet owe said Alexander thereon over Two Thousand Dollars.

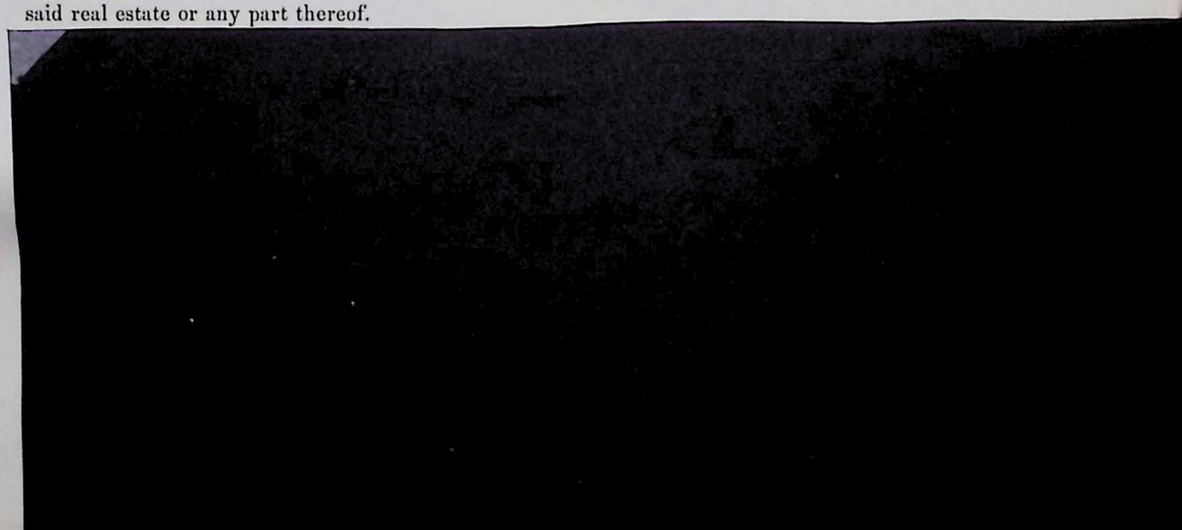
That said Holloway and Boggess having failed to convey said real estate, or any part thereof, to your orators in accordance with their agreement in writing aforesaid made with your orators, or in any way, your orators to the March term A. D. 1861, of said court, on the written agreement last aforesaid, commenced an action of covenant against said Holloway and Boggess for the non-performance upon their part of the covenants therein to have been by them performed; and that such proceedings were thereupon had.

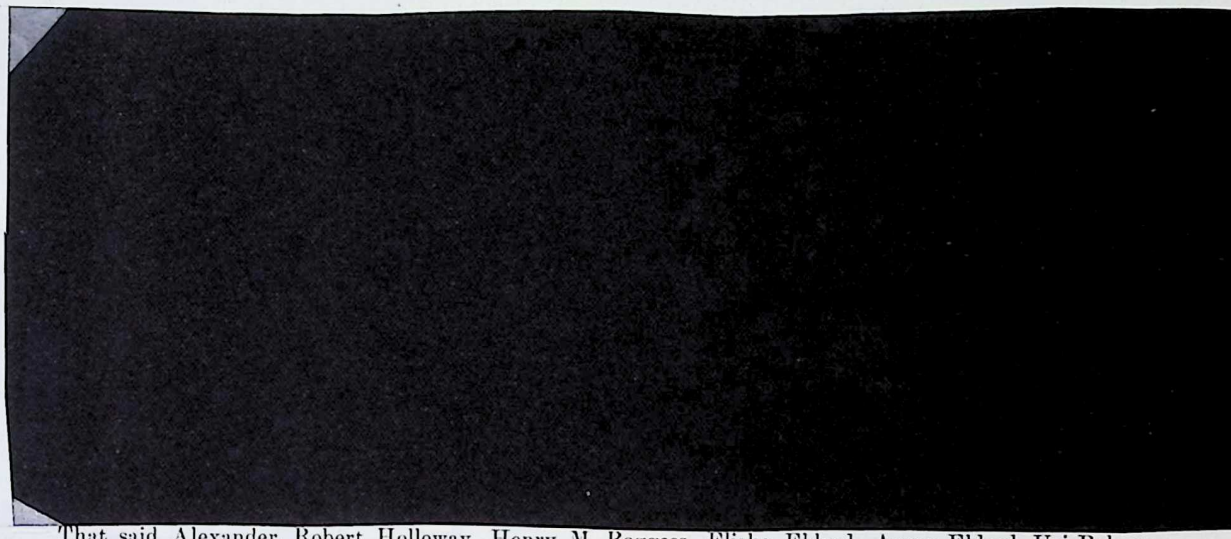
That at the October term, A. D. 1861, of said Circuit Court, your orators, by the consideration of such court on the 22d day of November, A D. 1861, recovered a judgment against said Holloway and Boggess for the sum of Twelve Thousand Six Hundred and Seventy and Fifty-nine one-hundredth Dollars, and costs of suit, for the non-performance of the covenants aforesaid to have been performed by said Holloway and Boggess, all which fully appears from the proceedings and records thereof still remaining in full force and unpaid, save as to the sum of Three Hundred and Thirty-seven Dollars and Eighty-five cents, which your orators as judgment creditors of said Holloway & Boggess made thereupon by process of redeeming real estate of said Holloway and Boggess which had been before then sold by the Sheriff of the county first aforesaid by virtue of an execution against them. That no appeal bond has been filed, nor appeal taken in said cause. That said judgment never has been reversed, and that exhibit (D) is a copy thereof, and is herewith filed and made a part of this cross bill.

That said Holloway and Boggess, as your orators are informed and believe, are and have been ever since before the commencement of their said suit insolvent, and that the balance of said judgment, nor no part thereof, can be made from them, or either of them.

That your orators have made on said real estate the following named improvements at the times and at the costs hereinafter mentioned, to wit: The breaking of two hundred and fifty acres of prairie, at a cost of two dollars per acre; the erection of a house, at a cost of one hundred and twenty-five dollars; and a stable, at a cost of twenty dollars, in the year one thousand eight hundred and sixty. The making of six hundred and twenty rods of fence, at a cost of four hundred and ninety-six dollars; and the erection of a corn crib, at a cost of thirty dollars, in A. D. 1861. Making the sum of eleven hundred and seventy-one dollars paid by your orators for improvements made by them on said real estate. That said real estate is worth thousands of dollars more than the amount of the alleged claim aforesaid of said Alexander against said Holloway and Boggess. That your orators under and by virtue of the contract first aforesaid on or about 1st day of March. A. D. 1860, took actual possession of said real estate, by commencing the erection thereon of the house aforesaid, and that said house was finished during that month.

That your orators are entitled to the fee simple title to said real estate, subject only to whatever claim said Alexander may have thereon for the remainder of the purchase money thereof aforesaid, and no others. Your orators deny that said State of Illinois, Elisha Eldred, Anson Eldred, Uri Balcom, Seth Smith, William M. Dodge, James F. Owens, Joseph Holton, Jonathan Black, Thomas Ridgley, Elijah C. Babcock, John Babcock, and Theodore Poehler, or either or any of them, or said State of Illinois, have any claim or lien whatever on said real estate or any part thereof.





That said Alexander, Robert Holloway, Henry M. Boggess, Elisha Eldred, Anson Eldred, Uri Balcom, William M. Dodge, James F. Owens, Jonathan Black, Thomas Ridgley, Theodore Poehler, and State of Illinois be made defendants to this cross bill, and that they be required separately to answer this cross bill as fully and particularly in every respect as if specially interrogated as to every part thereof. Your orators waive the oath of said defendants to their respective answers. And as in duty bound will ever pray, &c.

ARCHIBALD Y. GRAHAM,
DAVID GRAHAM.

By their Solicitors, HARRIS & GLENN.

STATE OF ILLINOIS, }
COUNTY OF WARREN. } I, Archibald Y. Graham, after first being duly sworn, upon oath state on behalf of David Graham and myself, that we are the complainants to the foregoing bill, and that the same is true so far as stated upon the knowlege of such complainants, and that he believes the remainder thereof to be so.

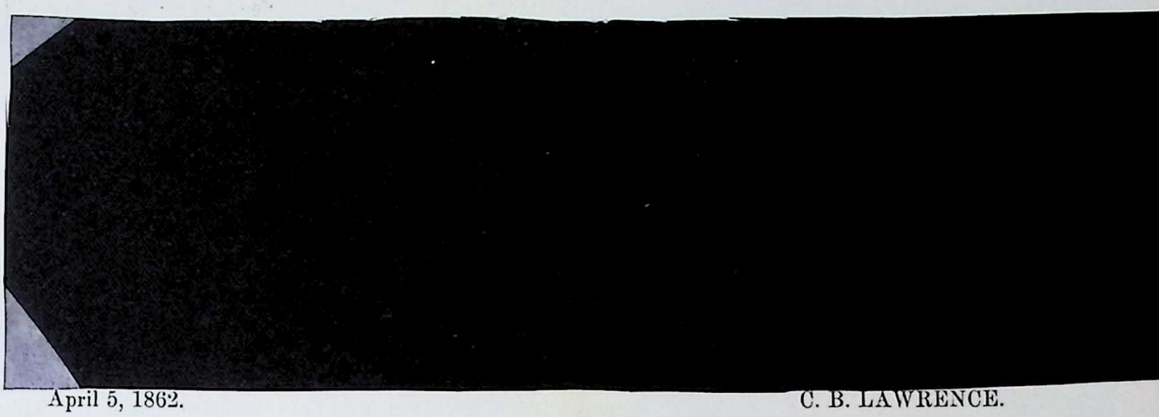
Subscribed and sworn to before me this 27th day of March, A. D. 1862. WM. LAFERTY, Clerk.

A. Y. GRAHAM.

STATE OF ILLINOIS,
WARREN CIRCUIT COURT, MARCH TERM, A. D. 1862.

PERRY ALEXANDER,
vs.
ROBERT HOLLOWAY, HENRY M. BOGGESS, JOHN BABCOCK, SETH SMITH, ELIJAH C. BABCOCK, ARCHIBALD Y. GRAHAM, DAVID GRAHAM, JOSEPH HOLTON, JONATHAN BLACK, JAMES F. OWENS. } In Chancery.

And now at this time this cause coming on to be heard upon the coming in of the report of the Master in Chancery, and the Court having examined the bill of said complaint, and the answers of said Archibald Y. Graham and David Graham, and said Holloway & Boggess, a part of said defendants thereto, and the replications of said plaintiffs to each thereof, and on the cross bill of said Archibald Y. Graham and David Graham filed herein against said Alexander, Holloway, Boggess, Elisha Eldred, Anson Eldred, Uri Balcom, Dodge, Owens, Black, Ridgley, Poehler, and the State of Illinois, as defendants thereto, and on the answers of said Holloway & Boggess and Alexander thereto, and on replications of said David Graham and A. Y. Graham to the answers last aforesaid, as well as his proofs taken before the Master in Chancery, and it appearing to the satisfaction of the Court that said Perry Alexander did contract with said Robert Holloway and Henry M. Boggess to sell them the north-east quarter of section six, containing one hundred and fifty-four acres more or less, and ninety-six acres more or less off of the west side of the north-west quarter of section five, all in township ten north of range two west in said county of Warren and State of Illinois; upon which said contract there remains due and unpaid the sum of thirty-one hundred dollars and forty-nine cents, being the principal and interest still owing said complainant upon the contract of the sale of said land, as aforesaid, from them.



April 5, 1862. C. B. LAWRENCE.

STATE OF ILLINOIS, WARREN COUNTY, ss.
WARREN CIRCUIT COURT, MARCH TERM, 1864.

ROBERT HOLLOWAY,
vs.
ARCHIBALD Y. GRAHAM, *et. al.* } In Chancery.

Be it remembered, that on the day of A. D. 1864, this cause came on for trial, and the following was the evidence, and the whole thereof, given on said trial:

William Laferty, being called by complainants and duly sworn, testified that Archibald Y. Graham came to me a day or two before the Master's sale of this land, and wanted I should buy this land. I told him I had not the money to do it. He said I could borrow it of the Bank. I went there and found I could get it on four months time. Graham said he would take up the note when it came due. Then I was to deed it to him or some one else for him, I don't recollect which. He was to take up the note and I was to convey the land. I got the money from the Bank. I took up the note sometime before it came due, about the first of November. It became due the 1st of December. Some time afterwards Graham asked me what I would take to deed it to Robert Moir. I made out a statement and gave it to him. I think the figures I gave him were $3636 15-100. I got the money from Moir and deeded to him. Graham delivered me the package of money. Moir wrote me about it, and I sent the deed to him. This package came from him, Moir, and a letter was from him in the inside with the money.

On cross examination, witness testified: The deed was dated March 10th, A. D. 1863. The sum of money paid was the sum named in the deed. I took up the note myself. I know the land is fenced; it was fenced when I bought it. Never noticed the fence particularly.

Here plaintiff introduced all the papers and records in the case of Perry Alexander vs. Robert Holloway, Henry M. Boggess, Archibald Y. Graham, et. al., commenced on or about the 6th day of March, A. D. 1861. [Here the Clerk will insert all the papers in said case.]

John J. Glenn being called by complainants and duly sworn testified: Harris and myself were attorneys for the Grahams in case of Perry Alexander vs. Holloway et. al. My impression is that the decree in the case of Perry Alexander vs. Holloway, et. al., was entered by consent. Holloway & Boggess, or Jameson, their counsel, it was not by consent. I do not remember that I consented to the decree. [To which evidence plaintiff's counsel objected.]

On his cross examination witness testified: They, Holloway & Boggess, took an appeal from this decree to the Supreme Court. There was a writ of error. I think Kirkpatrick told me it was taken to the Supreme Court. I heard it talked of. I know of no other agreement about the decree, only in drawing it, after the decision of the court was made. It was to be drawn so as to conform to the opinion of the court as expounded. Harris had the main charge of this matter. I did not give it much attention. I cannot say to what extent Harris consented, and to what extent he did not. Mr. Kirkpatrick, the counsel for Alexander, drafted the decree.

C. Jameson being duly sworn testified and said: I have no personal knowledge as to the appeal, only I made out a copy of the record for Holloway & Boggess. It was made out with a view to the Supreme Court. I was counsel for Holloway & Boggess.

Laferty re-called as a witness for defendants testified: I think there was a writ of error sent me.

D. C. Riggs being called by defendants and being duly sworn testified and said: I was Sheriff, and served the process or writ of error. I think the case went to the Supreme Court.

Chauncey Hardin being called by defendants and being duly sworn testified and said: There are improvements on the premises. [Here insert the amount agreed on for improvements in the decree in the case of Alexander vs. Holloway, et. al.]

The defendants re-called said John J. Glenn, who further testified that when the complainant, Holloway, made his motion in the said cause of Perry Alexander vs. Robert Holloway, et. al., to set aside the sale of the land to William Laferty, that Laferty was called by him, and was sworn and testified as to why he purchased the land, the complainant, Holloway, claiming that it was purchased for the Grahams.

The defendants also re-called William Laferty, who further testified that when Holloway, the complainant, made his motion in the Circuit Court in the case of Perry Alexander vs. Robert Holloway, et. al., to set aside the sale to witness, that he then testified to the court upon the hearing of such motion substantially as he had

done upon the trial of this cause, and upon cross examination stated that in addition to what he stated to-day he testified upon the hearing of that motion that he still held the land, that he had paid the bank his notes, that Graham had not paid the notes or re-paid him, and that he had no other security than the land.

C. B. LAWRENCE.

It is hereby agreed by the parties to this suit that the above is a correct certificate of the evidence introduced upon the trial of said cause, and that the same may be filed any time before the record is made up for the Supreme Court.

A. G. KIRKPATRICK, for Holloway.
THOS. G. FROST and JOHN J. GLENN, Atty's for Def's.

STATE OF ILLINOIS, } ss.
KNOX COUNTY, }

WARREN COUNTY CIRCUIT COURT.

ROBERT HOLLOWAY,
vs.
ARCHIBALD Y. GRAHAM, DAVID GRAHAM, ROBERT MOIR, HENRY M. BOGGESS. } In Chancery.

The joint and several answers of Archibald Y. Graham, David Graham and Robert Moir.

These defendants now and at all times hereafter, saving and reserving to themselves and each of them, all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties or other imperfections in the said complainants bill of complaint contained, for answer thereunto or unto so much and such parts thereof as these defendants are advised, is or are material or necessary for them to make answer unto—these defendants, answering, say

That they admit the execution of the contract from said Perry Alexander unto Holloway & Boggess, and also the contract from said Holloway & Boggess to said Archibald Y. Graham, and David Graham, set forth in said bill. They admit that said Holloway & Boggess failed to make the payments on said contract with Alexander and the title in consequence thereof failed and was lost to said Grahams, notwithstanding said Grahams, as they admit, insist and aver that they duly paid up in full the amount of said contract between said Grahams and said Holloway & Boggess, and went into possession under said contract. Said defendants know nothing as to the sale and transfer by said Boggess to said Holloway, and the said defendants deny that the said Grahams bought up or purchased the promissory notes of the said Holloway & Boggess, from third parties, in the market, at a discount, and compelled the said Holloway & Boggess to take them on the last deferred payment of the said Grahams to the said Holloway & Boggess, and thereby disappointed and embarrassed the said Holloway & Boggess; and they aver the truth to be that the said Grahams paid the amount of said notes and indebtedness against said Holloway & Boggess, in full, dollar for dollar, to the assignors thereof, and that they did not purchase the same at a discount. And when application was made to said Grahams to purchase said notes, before the purchase thereof, they waited on said Holloway & Boggess to have them accept the same on said contract and they expressed an entire willingness to take them on said indebtedness against said Grahams, an said they were the same to them as cash, and they were perfectly willing to have them applied on said claim against said Grahams, and stated to the said Grahams they would make, execute, and deliver to them a good and sufficient deed of conveyance of said premises mentioned in said contract, in a few days.

They admit that in consequence of the failure of title aforesaid, and the inability on the part of said Holloway and Boggess to convey any title to said Grahams, that they commenced the suit and recovered the judgment against the said Holloway & Boggess in said bill set forth, on the 22nd November, A. D. 1861, for the sum of twelve thousand six hundred and seventy dollars and fifty-nine cents ($12670.59).

They admit the several payments charged in said bill to have been paid on said judgment, and charged therein, to be, in the aggregate, the sum of eleven hundred and fifty-three dollars and sixty cents ($1153.60).

They admit the filing of the bill by said Perry Alexander against said Holloway and Boggess and said Grahams, to secure the payment of the balance due said Alexander and to foreclose the rights, title and interest of said Holloway & Boggess and said Grahams in said land, also the filing of a cross bill by said Grahams who were also defendants in said suit, and a final decree rendered therein, but they deny that said cross bill filed by said Grahams, was a bill for a specific performance of their contract with said Holloway & Boggess; but, on the contrary, aver that it was a bill filed to enforce the collection of their said judgment at law against said Holloway & Boggess by procuring an order and decree of the Court, directing an application of the surplus moneys raised on the sale of said land under said decree in favor of said Perry Alexander, upon the judgment at law in favor of said Grahams aforesaid, against said Holloway & Boggess, and upon which premises, having issued execution on said judgment they had a lien by virtue thereof. But said defendants refer to said original bill and cross bill and decree and papers and files in said chancery suit and pray that the same may be taken as a part of their said answer, to the end that the legal effect of said bills, papers and decree may be seen and determined by the court, and the true construction thereof thus ascertained, rather than by the inferences and conclusions sought to be drawn therefrom by said complainant in his said bill in this case.

And said defendants further say that they never occupied but one and the same position in reference to their said judgment at law after they recovered the same, and that was to enforce the collection thereof by the most convenient means in their power, both at law and by a bill in equity. That the decree which was rendered in said chancery suit was not a decree in accordance with the prayer of said cross bill, inasmuch as the relief granted in said decree to said Grahams was clogged with such conditions and provisos in favor of said Holloway & Boggess as to greatly impair if not destroy the main benefit and object which said Grahams sought to secure by their said cross bill.

And said defendants say that they never acted under said decree, nor took the benefit thereof, and on the contrary, abandoned all effort to come in under said decree or avail themselves of its provisions, which by terms of said decree it was optional with said Grahams whether they would accept and act upon or not.

Said defendants say that said land was bid off and sold under said decree to William Laferty, in said bill mentioned, in his own name individually, and that he paid the money on said sale. A though they admit that they induced said Laferty to purchase said land but deny that the money paid on said sale was advanced by said Laferty as a loan. They admit that after said sale they purchased said land of said Laferty and paid him therefor in full, and that at their request said land was conveyed by said Laferty to Robert Moir, although the legal title to said land has never been conveyed to or vested in said Grahams.

And said defendants further say that on the 14th day of November, A.D. 1862, the Master in Chancery filed his report of sale of said premises to William Laferty aforesaid, and of having executed and delivered to him a deed, as stated in said complainant's bill herein, that at the same term said Holloway & Boggess moved the court to set aside said sale, and said decree for sale and said Master's report amongst other things, upon the ground that said sale was in reality indirectly a sale to said Grahams, and the purchase of said premises was made on said sale by said Grahams through said Laferty, as their agent, that said cause came on to be heard upon said report of said Master and said motion to set aside the same, and evidence was taken on behalf of Holloway & Boggess to sustain said motion and to show that said Grahams were the purchasers in fact of said premises through said Laferty as their agent, and thereupon and after hearing said evidence said motion was overruled by the court and a decree made confirming said sale and said deed, and directing said Alexander and his wife to convey said premises to said Laferty, which deed from Alexander and wife was on the 9th of December, A. D. 1862, duly executed to said Laferty, and on the 27th of March, 1863, a decree was made in said cause confirming said deed, whereby said defendants insist and aver that said Holloway and Boggess became and are estopped from questioning the title of said Laferty to said land, and from insisting that the sale was only made to him as agent of said Grahams; and said defendants insist that said decree is final and conclusive between the parties hereto and cannot be properly controverted nor the questions therein decided again brought in question in this suit.

And said defendants further say, that at the time said Grahams having paid in full the amount of their said contract with Holloway & Boggess were entitled to a deed of said premises from said Holloway & Boggess, conveying a good and sufficient title thereto. Said premises were of great value and much greater than at the time of the filing of the bill in this suit. And that the value of said premises has very greatly depreciated since said Grahams were entitled to said deed as aforesaid, and in consequence of the failure to convey a title to said Grahams they have lost the opportunity of selling said property at an advanced price from what they could now obtain, and suffered great damage by the depreciation of said premises, and been put to great trouble and expense in purchasing said property and in saving valuable improvements which they have made thereon, and which improvements exceed in value the sum of one thousand dollars, and have suffered damage and expense and loss of time to their general business in the interruption thereof while occupied in attempting to save the property aforesaid and the improvements thereon; and that it would be grossly inequitable and unjust to compel said defendants, said Grahams, after such loss, expense, damage and depreciation of said property to take said premises upon the conditions asked for in said bill, and to compel them to discharge their said judgment upon receiving from said complainant a small portion thereof, and utterly unjust for the court to grant the relief prayed for in said bill, especially after having been kept out of the use of their said money advanced upon the said contract for a long space of time, and having as yet been unable to collect back but a small portion thereof.

And these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged. In short, without this: that there is any other matter, cause or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied is true to the knowledge or belief of these defendants. All which matters and things these defendants are ready and willing to aver, maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

J. J. GLENN and T. G. FROST, Sols. and Counsels for Defendants. A. Y. GRAHAM.

STATE OF ILLINOIS, } ss.
WARREN COUNTY. }

Archibald Y. Graham, being first duly sworn, deposes and says that the matters and things set forth in the foregoing answer are true, except as to those facts stated upon information and belief, which said facts they believe to be true. A. Y. GRAHAM.

Subscribed and sworn to before me this 11th day of January, A. D. 1864. WM. LAFERTY, Clerk.

STATE OF ILLINOIS, WARREN COUNTY,
WARREN CIRCUIT COURT, MARCH TERM, A. D. 1864.

ROBERT HOLLOWAY,
vs.
ARCHIBALD Y. GRAHAM, *et. al.*

The said Archibald Y. Graham and David Graham come and for amendment of their said answer filed herein, by leave of court had and obtained, state unto your Honor:

That it is true that said William Laferty bid in the said land, at the said sale at the request of the said respondents, with an understanding with the said respondents that he should hold the title to said lands till the amount of said bid of said Laferty, with interest at twelve per cent, together with proper compensation for his services in buying in said lands and receiving and recording the proper deeds, which said compensation was left unsettled, should be paid by said respondents to him. That said Robert Moir, at the request of said respondents, did advance and pay to said Laferty, on the day of March, A. D. 1863, the sum of thirty-six hundred and thirty-six 15-100 dollars, in payment of the amount of money paid by said Laferty, at said

sale, on said bid, together with said proper compensation and interest, and took from said Laferty a deed for said lands, with the understanding with your respondents that said Moir should hold said title to said lands till the said sum so paid over by him should be paid to him by respondents, when he should convey said lands to respondents.

Your respondents deny that said Laferty bought, or said Moir holds, said lands for your respondents, except as from the above stated arrangement and understanding shall result; and denies that they made any arrangement or understanding with said Laferty or said Moir in regard to said matters, except as hereinbefore stated.

Your respondents admit that they desire, and are now proceeding to collect said judgment described in said bill. Your respondents admit that they are, and when said bill was filed were in possession of said lands, and have been in the possession thereof ever since that time.

Your respondents deny that any other sums have been received or collected by them upon their said judgment than the sum of eleven hundred and fifty-three and 60-100 dollars, already stated to have been paid in said answer, but which was in point of fact collected as stated in said complainant's bill.

FROST & GLENN & HARDING, for Respondents. A. Y. GRAHAM.

STATE OF ILLINOIS, } WARREN CIRCUIT COURT, MARCH TERM, A. D. 1864.
WARREN COUNTY. } Archibald Y. Graham, being first duly sworn, says that the matters contained in the above amendment to said answer of said respondents are true in substance and fact.

Subscribed and sworn to before me this 30th March, } A. Y. GRAHAM.
A. D. 1864. WM. LAFERTY, Clerk. }

STATE OF ILLINOIS, WARREN COUNTY, ss. }
IN CIRCUIT COURT OF THE MARCH TERM, A. D. 1864. }

ROBERT HOLLOWAY,
vs.
ARCHIBALD Y. GRAHAM, DAVID GRAHAM, ROBERT MOIR and HENRY M. BOGGESS. } Chancery.

And now at this time this cause coming to be heard, and it appearing to the court that all of said defendants have been duly served with process, and it further appearing that the said Henry M. Boggess has not answered, and he being three times solemnly called comes not nor any one for him, but makes default herein. It is therefore ordered and decreed by the Court that the said bill of complaint be taken for confessed as to said Boggess. And it being stipulated by the parties that the answer and amended answer of Archibald Y. Graham shall stand as the unsworn answers of said David Graham and Robert Moir, and that the replications filed herein shall be considered as replications to such unsworn answers. And now this cause being brought to a hearing on the bill, answer, amended answer, replications and proofs

197

Supreme Court, 3d Division.

April Term, 1865.

ARCHIBALD Y. GRAHAM,
DAVID GRAHAM, *et. al.*

vs.

ROBERT HOLLOWAY.

Atlas Print, Monmouth.

1865

Filed April 7, 1865
L. Leland
Clk.

Supreme Court of Illinois
April Term 1865.
Third Grand Division

Alexander J. Graham &
David Graham
v. Appeal from Warren —
111 Robert Hallowell

Abstract from April Term 1865.

The appellee having filed his reply to the appellants' argument filed herein in November last by Geo. P. Harding, within a few days past, and appellant desiring further time to rejoin thereto, the appellee herein by Alfson Gondy & Chandler his attys agree & consent to such further time being given by the Court, not to exceed thirty days.

Gondy & Chandler

Grant & Harding
for appellants

Graham et al. v. Holloway

111

195

Application for further time to argue by appellant.

Consented to by appellee.

Filed April 4. 1885

L. Leland Clerk

State of Illinois---Third Grand Division.

ARCHIBALD Y. GRAHAM AND DAVID GRAHAM,
vs.
ROBERT HOLLOWAY.

APPEAL FROM WARREN.

SUPREME COURT, APRIL TERM, 1865.

ARGUMENT FOR APPELLEE.

May it Please your Honors:

We approach the argument of this case with some embarrassment, because the decree of the court below seems so manifestly just, that it is difficult to see how the learned counsel for the appellants can ask this court to reverse it. We are almost led to vague suspicions that our own minds are laboring under some error, but having turned the facts presented by the record in every way, we can see nothing but an effort of the appellants to gain an unfair advantage by a supposed legal advantage. More, the record shows a resort to tricks for the purpose of retaining the land purchased, and collecting back the purchase-money, with interest. The transactions between the parties commenced by a sale of lands by the appellee to the appellants for $10,000, and the appellants propose to close them by taking the lands, *and* the $10,000, with interest, leaving the appellee without either money or land.

Will equity allow such a result? The law properly understood and honestly expounded will always determine the rights of parties according to the highest principles of morality and justice. Whenever the judgment of the court conflicts with these principles, it is usually sufficient evidence that an error has been committed, and on the contrary, when the conclusions adjust the claims of parties in harmony with morality and justice, it is the highest evidence that the law of the case has been properly applied.

"The occasions on which an injunction may be used to stay proceedings at law are almost infinite in their nature and circumstances. In general, it may be stated, that in all cases, where by accident, or mistake, or fraud, or *otherwise*, a party has an *unfair advantage* in proceeding in a court of law, which must necessarily make that court an instrument of injustice, and it is therefore against conscience that he should use that advantage; a court of equity will interfere, and restrain him from using that advantage, which he has thus improperly gained; and it will also generally proceed to administer all the relief, which the particular case requires, whether it be by a partial or total restraint of such proceedings."

Story's Equity Jurisprudence, Sec. 885.

STATEMENT OF FACTS.

With a single exception, the answer admits every material allegation in the bill, and more briefly stated, the facts shown by the record are as follows:

On the 9th of April, 1857, Alexander sold two tracts of land to Holloway and Boggess for $6,000; of which one-third was paid, and the balance was to be paid in two equal installments, with interest in one and two years. Alexander retained the legal title as security, and a contract was executed. On the 21st of the same month, Holloway and Boggess sold the lands to the two Grahams for $10,000, to be paid in installments, and which were afterwards paid in full. Graham had, at the time of the purchase, actual knowledge of the claim that their vendors had, and that the legal title was vested in Alexander as security for the unpaid part of his purchase money; but they relied on the covenants of Holloway and Boggess, and their ability to secure the legal title.

Grahams took immediate possession, built a house, and made improvements, and have remained in actual possession, enjoying the rents and profits ever since.

Boggess, on the 25th of October, 1860, conveyed his interest to Holloway, who assumed his liability.

The installments to Alexander were paid, except the last, and Holloway and Boggess, having become insolvent, they were unable to make payment and secure the title to convey to Grahams. A result of this failure, was, that at the March Term, 1861, of the Warren Circuit Court, two suits were commenced against Holloway and Boggess; one by Alexander, in Chancery, to enforce payment of the balance due him through his vendor's lien, and the other, an action of covenant by Grahams to recover back the money and interest paid by them. The action at law was tried first, and a judgment rendered for $12,670.59. So far, the proceedings were in the ordinary course of business, and strictly in accordance with law and equity, and if Alexander had taken the ordinary decree for the payment of the money due him, with an order to sell the land; and if Grahams had issued execution to collect their judgment at law, and resorted to a creditor's bill, leaving Alexander to sell under his decree, the suit at bar would not be in existence.

When the Grahams took their judgment at law, they elected to abandon the land, and they ought to have surrended possession. They intended and expected to take back the money with interest, and to collect it from the general goods and lands of Holloway and Boggess, and did not claim any specific lien. They suffered a default to be taken against them by Alexander at the same term at which they recovered the judgment at law.

But, for some reason, at the next term, the Grahams appeared, and, on their motion, the deffault was set aside with leave to answer and file a cross bill. The answer and bill were filed.

The appellants' attorneys seem to think that the appellee avers in his bill that this cross bill was for a specific performance of the contract, and to compel a conveyance of the land to them. The learned counsel then avers that the cross bill was, in fact, to collect the judgment at law by the sale of the land, and the application of the amount left, after satisfying Alexander, to said judgment. The counsel seems to think

the intent of the parties, by the cross bill, is to settle this case. On these points the learned counsel seems to rest his hope that the claim below may be reversed.

We therefore call particular attention to the facts touching that point.

The averment in the bill is as follows:

"Your orator avers that the said Archibald Y. Graham and David Graham, notwithstanding their election to resort to an action at law to recover damages, yet after the recovery of said judgment, they also determined to abandon said judgment and claim the land as they did by their said cross bill, and have since obtained the same with a perfect title, free and clear of all incumbrance upon the payment of the sum due to said Perry Alexander, as aforesaid." *Record, p.* 10.

The cross bill sets forth that Holloway and Boggess are insolvent, and the judgment at law could not be collected from them, that the Grahams had made valuable improvements, and the land, with the improvements, were worth thousands of dollars more than Alexander's claim, and then avers, as the *nub* of the bill, as follows: "That your orators are entitled to the fee simple title to said real estate, subject only to whatever claim said Alexander may have thereon for the remainder of the purchase money thereof aforesaid, and no other." In further support of the same idea, they then deny that the other defendants, subsequent judgment creditors to them, had any lien or claim on the premises. *Record, p.* 89.

The prayer of the cross bill is as follows:

"That your orators pray that this their cross action may be adjudicated in the said complainant's said suit, and that a decree may be rendered in both as if they were one; and that a decree be rendered in both thereof in favor of said Alexander, and against said Holloway and Boggess, for the amount which may be due and unpaid to him of the purchase money of their purchase aforesaid of him, together with such costs in the premises as your Honor may deem equitable; and in favor of your orators for the amount which may be due and unpaid to your orators for the judgment aforesaid of your orators against them, and such costs, if any, as your Honor may deem equitable, deferring the operation, lien and effect of so much of said decree as is in favor of your orators, until that portion thereof in favor of said Alexander is paid and satisfied; and that said decree be so made a lien on said real estate for the payment thereof in the manner aforesaid. That your Honor, if consistent with his views of the equities in the premises, give to said Holloway and Boggess a long day, if not such an one as is, in which to pay and satisfy said decree, and to your orators in which to pay and satisfy so much thereof as may be in favor of said Alexander; and that in case of such payment within such time, so as to be fixed, of the amount that may be so due said Alexander, and such costs in the premises as the Court shall direct, by any person or persons, that said Alexander, by the decree of this honorable Court, be required within a time thereafter, to be fixed by the Court, to convey to your orators or their assigns said real estate, with such covenants as your Honor may direct, conveying to them the right, title and interest of said Alexander and the other defendants to said bill, than your orators, thereto; and that in case of the failure of said Alexander so to convey, within such time thereafter, that the then County Judge of said County of Warren be, by such decree, required to so convey said real estate to your orators, within a further time, to be in such decree named therefor. That in case, only, no such payment is made on

such decree, as that last aforesaid, within the time so limited therefor, as aforesaid, that such real estate, or so much thereof as may be necessary to satisfy said decree, be sold under the direction of this honorable Court for the satisfaction of such decree, and that the proceeds of such sale be applied as follows, to wit: 1st. To the payment of such costs as may be directed by said decree to be paid. 2d. To the payment of so much of such decree as may be made in favor of said Alexander, together with so much interest as may have then accrued thereon, and so much costs in the premises as may be directed by such decree. 3d. To the payment of so much of said decree as may be made in favor of your orators, together with so much interest as may have accrued thereon, and so much costs in the premises as may be directed in such decree, if any. 4th. And the remainder thereof, after the making of such payments, if any, be disposed of by such decree.

That your orators have such other and further relief in the premises as to your Honor may seem equitable and proper."

This prayer, it will be remarked, is not only in the alternative, but with an apparent fear that the complainant lose something for the want of asking, the solicitor made it varied enough to cover any possible view the Court might take.

The decree shows what view the Court did take, and the relief granted is in conformity to one branch of the prayer of the cross bill.

The decree first ordered Holloway and Boggess to pay Alexander the sum due him within ninety days, and in default directed a sale, and payment from the purchase money. So far as the Grahams were concerned, the Court, by the decree, allowed them to become purchasers, and their bid above complainant's debt to be accepted as cash; but, provided that in case they became purchasers, the deed was to be brought into Court to be delivered on complying with the further order of the Court, and in case any other person become purchasers, the money above complainant's debt was to be brought into Court for further order.

So far the decree recognized the right of Grahams to relief, but the particular kind was not determined; that was reserved.

But the court contemplated the contingency which might arise, by a payment of Alexander's debt by Holloway and Boggess, or by a payment by the Grahams, and required Alexander to convey to Grahams, when they satisfied the judgment against Holloway and Boggess, except such sum as they might pay to Alexander.

There can be no misunderstanding this case. Grahams first concluded that they would prefer the return of their money to retaining the land, and, after obtaining judgment, discovering that Holloway and Boggess were insolvent, they concluded that their only safety was in claiming the land as purchasers, and thus obtain precedence over other creditors, except Alexander. There was no assertion of a lien by virtue of a senior judgment, but the claim as purchaser is expressly set up. The court took that view of the case and rendered a decree manifestly correct, unless there was an error in favor of Grahams. It is a matter of some doubt, whether Grahams, after having elected to proceed at law for their money, could ask relief in equity, but they cannot complain of such an error.

At this point of the proceedings, Grahams seem to have conceived the idea of speculation by obtaining the land and holding their judgment. They procured Lafferty to

purchase the land for them at the sale, upon a promise to refund the money with twelve per cent. interest and compensation for his trouble. The land was sold for the exact sum due Alexander. The master reported the sale, and Holloway moved to set aside, because it was an evasion of the decree. The motion was properly overruled, because if it was true that the purchase was Grahams, then the motion ought to have been to compel Grahams to satisfy all of the judgment except the sum paid Alexander, and thus carried out the decree, and for the further reason, that Lafferty had advanced the money on the security of the land, and until he was paid he was entitled to the title as such security.

Lafferty was afterwards paid in full according to his contract, and he conveyed to Moir, at Grahams' request, who holds the title for them. The Grahams have always held possession, and enjoyed the rents and profits.

Notwithstanding these facts, Grahams persisted in an effort to collect their judgment for the whole sum and realized several hundred dollars, when this bill was filed.

If Grahams can maintain their position, they will get the land which they purchased and paid $10,000 for, by paying $2,000 and interest and costs to Alexander, in all a little over $3,000; and on the other hand, Holloway will be out of pocket his two first payments to Alexander, over $4,000, and have neither land nor money. While if the decree below is sustained, Alexander receives this purchase-money, Holloway his price, and Grahams take the land at the sum they purchased at, and have meanwhile enjoyed possession of the land. There is no loss to Alexander or Grahams, and the only loss to Holloway is the payment of costs suffered by a failure arising from his misfortunes.

This statement is all the argument we need make for the appellee. But there are two points made by the attorneys for the appellants, to which we call attention.

I.

It is insisted that Grahams did not avail themselves of the terms of the decree in the Alexander case, by personally bidding at the sale, and that they had a right to obtain another person to bid for them, and secure the land at the same time they received the benefit of the decree. Such a proposition is emphatically "sticking in the bark." The decree does not contemplate a bid in person. The court was endeavoring to place all the parties where the least injury would be done, and when Grahams tried to evade the obligations of the decree and secure its benefits, they were guilty of a fraud and a trick.

But it is entirely immaterial whether the purchase by Lafferty was a purchase by the Grahams, under the terms of the decree, or not. In this case, we are to deal with the equities of the parties, and when it is ascertained that Grahams have the land for which they contracted, at the price agreed on, with its profits from the date of purchase, it is of no consequence whether they get the title in the exact channel contemplated by the decree, or not.

The Grahams are not strangers, and could not act as persons having no relation to the other parties in the suit.

II.

It is claimed that the questions involved in this suit are *res adjudicata*, by the decision of the court in refusing to set aside the sale to Lafferty.

As already remarked, the reasons for that decision ceased to exist, by the payment of the money to Lafferty, and his conveyance to Grahams trustee, before this bill was filed.

The evidence heard by the court on that motion, if any, is not preserved by the record. Lafferty testifies to the different position he occupied. If it was a sale to Grahams, that was no reason for setting it aside, but a reason for its confirmation. And then, the cause of action arose, as set out in this bill.

There is no effort to affect Lafferty or his rights. He had none, and had no interest when this bill was filed. Moir held the title for Grahams, who were the owners, and they only are made the parties.

We desire, in conclusion, to call attention to the abstract furnished by appellants, as being entirely insufficient to enable the court to understand the record, and, as not in compliance with the rule, for the want of reference to pages of the record, and ask that the expense of the abstract furnished by the appellee be taxed against the appellants.

GOUDY & CHANDLER,
Appellee's Attorneys.

197 - 160

Archibald G. Graham
et al

vs

Robert Hallowell

Argument for Appellee

Filed May 10. 1871

D. Reed Cl.

SUPREME COURT.

April Term, A. D., 1865.

Archibald T. Graham and David Graham, vs. Appellants. Robert Holloway, Appellee.	Brief and Points of T. G. Frost, Att'y for Appellants.

The appellants seek to set aside the final decree in this case granting a perpetual injunction against the collection of the judgment recovered by Archibald Y. Graham and David Graham against Robert Holloway and Henry M. Boggess, for the purchase money of certain land sold by said Holloway and Boggess to said Grahams, and which said Grahams lost by reason of the failure of title, and Holloway and Boggess' inability to convey, on the ground that the facts proved did not warrant the injunction, or bring the case within any of those classes of cases in which a Court of Equity is authorized to interpose its jurisdiction to control the judgment of a Court of Law. The decree of a Court of Chancery or the judgment of a Court of Law is absolutely conclusive upon the parties as to all matters in controversy in the case, and the party in whose favor it is rendered, has as absolute a right to its full and complete enforcement as he has to institute the suit to enforce his rights in the first instnace.

It is the mere mockery of justice, where a man's rights have been fully and fairly adjudicated, and a decision on a final hearing has been rendered in his favor, to defeat all the benefit and advantage of his judgment by enjoining its collection.

Nevertheless, it is doubtless true, that a court of Equity has the power—and it may become its duty, to restrain the enforcement and collection of a judgment at law. But it is insisted on the part of the appellants:

That this extraordinary jurisdiction occasionally exercised by Courts of Equity, though embracing a vast number of cases, rests on certain well defined and simple principles, which must exist in every case before this jurisdiction can be properly asserted; and it is never an exercise of mere arbitrary power, subject to no limit or regulation, except such as the mere caprice, or general notion of right or justice the Court may tolerate, unrestrained by those clearly defined and well established rules which prevail as well in Courts of Equity as in Courts of Law.

The cases where the interposition of a Court of Equity may properly be invoked, to restrain by injunction proceedings in suits at law, may be properly divided into two general classes of cases, to one of which, the case at bar must belong, if the decree in this case can be sustained at all, viz:

The first class embraces those cases, when, owing to unavoidable accident, fraud, or the peculiarly restricted character of mere legal remedies, the party asking the relief has been deprived of the benefit of a meritorious defence, and might lose his substantial rights, unless Equity afforded relief.

Nothing of this kind is alleged in the bill; nor is there any ground in the allegations or proof, to bring the case within this class of cases. The judgment was duly and regularly obtained, the parties having been duly brought before the Court. No fraud, surprise, accident or technical rule of law having intervened to prevent a full defense being interposed.

The second class embraces those cases, where, though the judgment was originally properly and correctly obtained, such facts have occurred since its rendition, as make it obviously inequitable and unjust that the judgment should be enforced. Payment or Release of the judgment would present such a case; or it would arise when, though the judgment was not released or paid, it has become, by the acts of the parties, virtually satisfied; or if not satisfied a valid agreement has been entered into, which, if specifically enforced, would amount to a satisfaction of the judgment; or when such arrangements have been entered into, or obligations incurred, by and between the parties, as are necessarily inconsistent with a right to longer hold or enforce the judgment.

The question then arises whether anything has occurred since the rendition of the judgmet, or contract has been made, or obligation assumed by the Grahams inconsistent with the right to collect this judgment. The appellants insist that nothing of the kind has transpired. The Appellees on the contrary insist that, in Equity, the Grahams lost their right to enforce the balance of this judgment, over and above the amount paid by them to procure the title of the land,

from the real owner. For the ground and reason of this claim, we must look to the allegations of the bill. If the evidence fails to sustain them, decree in favor of the appellee, is erroneous and should be reversed.

The charge in the bill is, that the Grahams having an election of remedies, viz: the right to recover damages, in an action at law for the non performance of the contract, and the recovering back of the purchase money, or to a decree in Equity for the specific enforcement of the contract; and after having obtained judgment for damages in an action at Law on account of Holloway and Boggess's failure to convey the title, waived the same, and elected to file a cross bill in the case of Alexander vs Holloway and Boggess and others, asking in effect the specific performance of the contract, and obtained a decree granting substantially, on conditions, the prayer of the cross bill.

The evidence, including the Records and proceedings in the Perry Alexander case, utterly fails to sustain these allegations of the bill.

In the first place the recovery of the judgment at law, put an end to the contract between the parties, and was of itself such an election of remedies by the Grahams, as rendered it utterly impossible, after that, for them to sustain a bill for the specific performance of the contract.

1 Scam, Rep., 573, Herrington vs Hubbard.

2d The cross bill filed by them was in no sense a bill for the specific performance of the contract, nor was there anything in the bill inconsistent with the right of the Grahams to enforce their judgment. It was in fact not only an affirmance on their part of the judgment at Law, but a bill filed for the express purpose of enforcing the collection of the judgment, by the aid of a Court of Equity, seeking to reach the proceeds of the sale of the property of Holloway and Boggess, on which the judgment was a legal lien, but which was about to be swept away by the enforcement of the prior specific lien of Perry Alexander for the balance of the purchase money due him from Holloway and Boggess. It was in the nature of a creditor's bill.

Any other judgment creditor, who chose to come in, had the same right and would have been entitled to the same protection, if demanded. In fact, when the lien of a junior judgment is cut off by a sale under a senior judgment, the legal lien of the junior judgment becomes transformed in Equity, into an Equitable lien upon the surplus of the proceeds of the sale above the amount necessary to pay the first judgment.

13 Wen., Rep. 488.
11 Paige Ch. Rep. 129, 131.
4 do do 503.

Whatever property Holloway and Boggess had, the Grahams had a right, by a sale under execution, or by the order of a Court of Chancery in aid of the execution, to apply towards satisfaction of their judgment; and it is an absurdity to call their cross bill a bill to enforce the specific performance of the contract of purchase. It was simply a bill asking a Court of Chancery to aid them to enforce and collect their judgment. It is true the bill alludes also to the expenses incurred in the improvements put on said premises by said Grahams, as entitling them to additional consideration at the hands of a Court of Equity. But that does not materially change the character of the cross bill, or the attitude or relation of the parties.

3d. But it is claimed that by the terms of the decree rendered in the Perry Alexander case, to which the Grahams are parties, and by which they are bound, if the Grahams became purchasers they were bound to cancel the balance of the judgement over and above the amount they were obliged to pay in cash on their bid in order to satisfy Alexander's claim; and that though, not nominally the purchases, the Grahams were purchasers in fact, and so became bound to do just what the decree in this case requires them to do. However unjust or unreasonable the decree in the Alexander case may have been, it is doubtless obligatory on all parties until reversed; but the question still remains to be decided as to what is the true construction and meaning of the decree. It is submitted on the part of the appellants, that it was manifestly optional, under this decree, with the Grahams, to come in under it and claim the benefit of the decree as purchasers, or not, just as they saw fit. They were not obliged to become purchasers *nolens volens*.

In case they became purchasers, they were entitled to have their bid over and above the amount necessary to pay Alexander's claim, applied on the judgement. They need not have accepted this privilege, but they had a perfect right, relinquishing this privilege, to procure any other parties they saw fit, to become purchasers. They violated no law, nor did they in any respect evade the terms of the decree by so doing.

By being purchasers, the decree obviously meant, being publicly and openly purchasers in their own name so as to secure the preference given them over other purchasers, and so as, therefore, to subject them to the corresponding liabili-

ty imposed by the decree. By procuring another party to become the purchasers, they lost this privilege, and at the same time became free from the liability attached to a bid in their own name.

They committed no wrong, and did injustice to no one, by this proceeding.

They placed themselves in the same position as all the rest of the world, having no more rights or liabilities in the premises. Again this whole matter, so far as all these parties are concerned, is *res judicata*. Exception was taken to the master's report of sale, and to the sale itself, and to the giving of a deed to Lafferty, the purchaser, on the ground that the sale was in fact though not in form, a sale to the Grahams, and should not be confirmed as a sale to Lafferty.

After hearing the evidence on the subject the motion to set aside the sale and deed, was overruled, and the sale and deed to Lafferty were confirmed. The title by the deed under the decree became absolutely vested in Lafferty, and as a necessary legal consequence, he had a right to sell and dispose of the property as he pleased; and the court had no right to destroy the alienability of the title in the hands of Lafferty. The decree not only unjustly affects the Grahams' rights to purchase, but also Lafferty's rights to sell, who had a perfect right to do what he pleased with his own property and to sell and convey the title to whomsoever he choose.

But finally; it may be insisted that independent of the precise ground on which the bill places the right of the complainant to relief, there is an obvious equity in compelling the Grahams to relinquish a judgment recovered by them on account of the failure of a title with which they have finally become invested for a sum much less than the amount of the judgment, at all events to the extent of the balance over and above the amount they have been compelled to pay, in order to procure the title. This position may seem plausible, but it is utterly unsound. When Holloway and Boggess failed to fulfill their contract, and the Grahams sued and recovered judgment for the purchase money they had paid for a title which they never got, the contract to both parties was *forever at an end.* Neither had any more rights under it as against the other. Neither had any right to enforce its specific performance, but each held the same relation to the other as though no contract had ever been made. Holloway and Boggess had received the money of the Grahams without consideration or on a consideration that had failed, and the Grahams had recovered judgment for the amount of their advances. Had the property after this increased tenfold, the

Grahams could not get it, or compel from Holloway and Boggess the title to the Grahams, though Holloway and Boggess should in some way become vested with the title, and be able to convey. The rise of the property would go to Holloway and Boggess. If, then, the Grahams could not enforce the title from Holloway and Boggess if the property rose in value, how can they be compelled two or three years after this failure of title, and abrogation of the contract to take the land back after an immense depreciation in value, at the original contract price, and be virtually compelled to pay the money to Holloway and Boggess, or which is precisely the same thing to apply it on the judgment against them. To do this, is to give to parties who have utterly failed to comply with their contract, and after it has been abandoned in consequence of their failure all the benefit and advantage of the contract, and at the same *time*, to compel the innocent parties not only to lose all the advantages of the contract, but at the same time to subject them to all its liabilities. Where is the justice or equity of such a doctrine? Had the Grahams received the title when they were entitled to it, they might perhaps have resold at a great advance. All this benefit they have lost by the wrongful act of the other parties, and yet years after the contract is at an end they are compelled to pay the very parties who have occasioned them all the loss and the only parties who are to blame in the matter, the full original contract price of the land, which at the time of the decree could not perhaps have been sold for half its original price. Nor is a defendant in a chancery suit bound to meet every conceivable or imaginable case which on a given state of facts, might constitute the foundation of a bill in equity. He is only bound to meet the allegations in the bill as actually framed. When these are not proved the case fails, and without a new bill or an amendment to the original one the complainant is not entitled to prevail. The complainant in this case utterly failed to prove the allegations in his bill, and to present a case which under the evidence entitled him to the relief prayed for; and therefore the decree should be set aside.

T. G. FROST, Att'y for Appellee.

197-100

Graham
v
Holloway
Appts. Briefs

Filed Apl. 21. 1865
Leland
Clk.

Appeal from the Circuit Court of Warren County; the Hon. Charles B. Lawrence, Judge, presiding.

This was a suit in chancery instituted in the court below, in the year 1863, by Robert Holloway against Archibald Y. Graham, David Graham, Henry M. Boggess and Robert Muir.

RECORD.

1 The bill sets forth that on the 9th day of April, 1857, Perry Alexander was seized in fee of N. E. 6 and 96 acres off west side N. W. 5, 10 N. 2 W. of 4th Principal Meridian, and on that day sold the same to the complainant and Henry M. Boggess, partners under the name of Holloway & Boggess, for $6,000, of which $2,000 was paid down, and the balance was to be paid in two equal installments, with six per cent. interest, in one and two years, and on the payment thereof Alexander was to convey by warranty deed; that they paid on the 21st April, 1858,
2 $2,019.40 on the the first installment, leaving $104.60 due thereon; that Alexander, on 20th July, 1859, extended payment of last installment until 1st September, 1860, upon consideration that ten per cent. should be paid thereon from 9th April, 1859.

The bill shows that Holloway & Boggess sold the land on the 21st April, 1857, to Archibald Y. Graham and David Graham, for $10,000, of which $4,000 was to be paid 28th May, 1857, $4,000 6th April, 1858,

and $2,000 6th April, 1859, with six per cent. interest, and upon payment the land was to be conveyed by Holloway & Boggess by warranty deed; that the times of payment were fixed expressly to enable the vendors to use the money in paying Alexander, and that the contract was in writing; that the Grahams had full knowledge of the condition of the title, and that Holloway & Boggess had no other right to the land than such as was derived from Alexander by contract, and that there was $4,000 with interest to be paid before Holloway & Boggess could obtain the title to convey. Grahams took actual possession, and have remained in possession ever since.

The bill shows that Grahams paid the two first payments in money, and from the second Holloway & Boggess paid Alexander the second installment; and when the last sum became due Grahams purchased the paper of Holloway & Boggess at a discount and claimed payment as an offset to the amount due on the contract, which they were compelled to yield to, and were thus deprived of the funds to pay the balance to Alexander, and having become embarrassed were unable to obtain it from any other source, or to procure the title from him to convey to Grahams.

The bill shows that Boggess, on the 25th October, 1860, sold and conveyed all his interest in the land and money due thereon to Holloway, who assumed his liability, so that Boggess, as between himself and complainant, had no further interest.

The bill further shows that Grahams commenced an action of covenant against Holloway & Boggess on the contract to recover damages for non-performance in failing to convey the land, and such proceedings were had that Grahams recovered on the 22d November, 1861, $12,670.59, being the full amount paid on the contract, with interest and costs, and since they have collected $337.85, 21st February, 1862; $802.88, 1st January, 1863; $12.87, 17th August, 1863.

337.85
802.86
12.87
153.60
11

[redacted] and it was answered by Holloway, Boggess and Grahams, and a cross bill was filed by Grahams praying that Holloway & Boggess be decreed to pay Alexander, and that Alexander convey the land to them, which was answered by Alexander, Holloway and Boggess. On 5th April,

1862, the cause was heard on the original bill and answers, the cross bill and answers, the replications, and the report of the master in chancery, and a decree was rendered.

The bill then sets forth the decree which is to be found in the abstract prepared by appellants, p. 4.

The bill shows that the master in chancery, on the 14th November, 1862, filed his report, stating that he had sold the land to William Lafferty, on the 1st August, for $3,271.70, had executed a deed, and from the proceeds paid $109.20 costs, and to the complainant $3,162.50, his debt and interest.

The bill shows that on filing the report Holloway moved to set aside the sale and master's report, but the Court overruled the motions and ordered Alexander to convey to Lafferty, in accordance with the contract between him and Holloway & Boggess.

The bill shows that Alexander and wife, on 9th December, 1862, conveyed, by warranty deed to Lafferty, and on the 27th March, 1863, the deed was confirmed by decree.

The files and records are made a part of the bill.

The bill further sets forth that Lafferty bid off the land for and at the request of said Grahams, and in pursuance of an arrangement made before said sale between them, that Lafferty was to bid off the property and take a deed therefor in his own name; that he was to advance the money as a loan to said Grahams, and whenever the same was repaid, with ten per cent. interest by Grahams, Lafferty was to convey the property to them or to such other person as they should order.

The bill then avers that since the making of the deeds to Lafferty and before the filing of the bill, Grahams paid to Lafferty the sum of money advanced by him, with interest; and Lafferty, at the request of Grahams, conveyed the same to Robert Moir, who held the same for the use and benefit of Grahams, who are the real owners, and who are in the actual possession of the premises.

The bill shows, that notwithstanding the election of Grahams to resort to an action at law to recover damages, yet after the recovery, they determined to abandon said judgment and claim the land as they did by their cross bill, and they have since obtained the same with a perfect title, free and clear of all incumbrances, upon the payment of the sum due to said Alexander, as aforesaid.

The bill avers that, since the Grahams have so obtained the land and title, they have been and are attempting to collect the judgment, and have succeeded in collecting, by process of law, $1,153.60, at times set out in the bill.

11 The complainant offers for himself and Boggess to execute a warranty deed or covenants of title as required by their agreement with Grahams, and he offers to pay the balance after applying the sums collected on the judgment at law that may be necessary to pay the said Grahams in full for the sum paid by Lafferty, with interest, or the sum paid by Grahams to Lafferty, with interest, as the Court might decree.

The bill makes Archibald Y. Graham, David Graham, Robert Moir, and Henry M. Boggess defendants, and calls for answers under oath, and prays an account and a decree, that on paymet to Grahams of the sum so paid to Lafferty or Alexander, less the sums collected on the judgment, be in full satisfaction of said judgment rendered in their favor, against the complainant, and that they be restrained from collecting the ballance of said judgment, and for general relief.

Archibald Y. Graham, David Graham, and Robert Moir filed a joint and several answer on the 11th day of January, 1864, in which they
17 admitted the contract between Alexander and Holloway & Boggess, and also the contract between Holloway & Boggess and Grahams as set forth in the bill, that Holloway & Boggess failed to pay Alexander in full, but aver that the Grahams performed their contract, and admitted that they went into possession under said contract.

18 The answer denies the purchase of notes on Holloway & Boggess at a discount, and that they forced an application thereof in payment of the last installment, and thereby embarased Holloway & Boggess; but avers that they first obtained consent from Holloway & Boggess to receive the notes and then purchased them.

The answer admits the recovery of a judgment by Grahams against Holloway & Boggess, for non-performance of their contract, on the 22d November, 1861, for $12,670.59, and the payment of the several sums as charged in the bill.

19 The answer admits the commencement of the suit by Alexander, against Holloway & Boggess, Graham and others, and the proceedings had thereunder, as set forth in the bill, except that they deny that the cross bill sought a specific performance of their contract with Holloway & Boggess; and aver that the prayer of the cross bill was to enforce and collect their

judgment at law, by an application of the money arising from a sale of
20 the land left after the satisfaction of Alexander, they having a lien on the land by law, for the satisfaction of the judgment. They refer to the bill, answers, &c., as a part of the answer, and aver that the decree was not in accordance with the prayer of the cross bill, and that they never acted under the decree or took the benefit thereof.

21 The answer avers that Lafferty bid off the land in his own name, and paid the money; but admits that the Grahams induced Lafferty to purchase the land, but denies that the money was a loan. The answer admits that they purchased the land of Lafferty, and paid him therefor, and at their request, Lafferty conveyed the land to Moir.

[*Note.*—The amended answer varies from this statement, and admits the allegation of the bill.]

The answer avers that, when the master reported the sale to Lafferty, Holloway & Boggess moved to set aside the sale on the ground that it was
22 indirectly a sale to Grahams, through Lafferty, as their agent; that evidence was heard thereon, and the same was overruled; and the answer claims such decision and proceeding is a bar to any question on the such sale to Lafferty.

24 The answer is verified by the oath of A. Y. Graham, and stood as the unsworn answer of David Graham and Robert Moir.

27 On the 30th March, 1864, the Grahams filed an amended answer, and therein admit that Lafferty bid in the lands, at the request of themselves, with an understanding that he should hold the title until the amount of the bid, with twelve per cent. interest, together with proper compensation for his services in buying in said land, and receiving and recording the proper deeds should be paid; that said Moir, at their request, in March, 1862, advanced to Lafferty $3,636.15 in payment of the amount of money paid by Lafferty at said sale, and for Lafferty's compensation and interest, and took from Lafferty a deed, with the understanding with Grahams that Moir should hold the title until the sum advanced should be paid, when he should convey to Grahams.

28 The amended answer admits that they are proceeding to collect the judgments described in the bill.

The amended answer admits they were and are in possession of the land.

This answer is also verified by the oath of A. Y. Graham, and stood as the unsworn answer of David Graham and Robert Moir.

29 A replication to the answer and amended answer was filed April 2, 1864.

The cause was heard before Hon. C. B. Lawrence, Circuit Judge, upon the bill, answers, replication and evidence. A default was taken against
31 Boggess, and a stipulation made that the answer and amended answer, subscribed and verified by A. Y. Graham, should stand as the unsworn answer of David Graham and Robert Moir. The Court found that there was equitably due from Holloway to the Grahams $2,803.45 on the contract and judgment described in the bill, and that the original amount due would be $4,025.01, of which there had been collected $1,221.56,
32 including $115 attorney fees, and the said sum of $2,803.45 being then paid into court, the Court ordered and decreed that the Grahams be perpetually restrained from collecting said judgment and that they enter satisfaction thereof. The complainant was required to pay all costs prior to that term, and the defendants the balance.

The decree is printed in full on the last page of appellants' abstract.

38 The certificate of evidence shows that on the hearing, that the complainant read in evidence all the papers and record in the case of Perry Alexander vs. Robert Holloway, Henry M. Boggess, Archibald Y. Graham, David Graham and others.

40 The bill in that case corresponds to the allegations of the bill in this case, and appears in the record from pages 40—64 and no question arising thereon it is omitted.

77 The answer of Holloway & Boggess to Alexander's bill, is to be found in the record, pages 71—78.

78 The Grahams filed a cross bill to Alexander's bill, which is found in the record, pages 78—100, and is printed at large in appellants' abstract, pages 1—4 and it is claimed by appellants to be material.

101 The answer of Grahams to Alexander's bill is found in the record, pages 101—110. Its contents are immaterial.

111 The answers of Holloway, Boggess and Alexander to the cross bill of Grahams are found in the record, pages 111—121, but they are immaterial in this case.

121 Replications of Grahams to answers to cross bill.

126 The final decree on the hearing of Alexandar's case is found in record, pages 126—129, and is printed in full in appellants' abstract, page 4, and this is material in this case.

129 Report of master of sale to Lafferty, and decree of confirmation.
134

William Lafferty, John J. Glenn, C. Jameson, D. C. Riggs and Chauncey Hardin were then sworn and testified as witnesses. Their evidence is preserved by the certificate and is found in the record, pages 38, 145, 146, and is printed in full on page 5 of appellants' abstract.

This abstract is prepared as an amended abstract under the rules of the Court, by appellee's attorneys, because the abstract filed by the attorneys for appellants is not in compliance with the rules of the Court, and the appellee moves that the appellants be charged with the cost of the same.

GOUDY & CHANDLER,
Attorneys for Appellee.

Graham

vs

Holloway –

Amended Abstract

Filed May 10. 1865 –

L Leland Clk

Sept 19. 1862

[illegible] Notes 75.00

Oct 2 1863 int. 7.00

Sept 14th 1864 " 7.00

Oct 13. 1865 " 7.00

$97.00

Oct 19th 1865

By Cash 82.50

" Postage in 15.00

$97.50

79

154

54

Archibald J. Graham et al
vs
Robert Holloway
Appeal from Warren

William C. Gondy being sworn says that he is the attorney for the Defendant and Appellee in this case, that he joined in error on the 6th day of April inst and at the same time the attorneys for the Appellants agreed to send to the deponent a copy of the Abstract as soon as it was printed, that deponent left on the same day for his residence in Chicago and did not return until the 26th inst, that he has never received a copy of the Abstract and on his arrival found a paper purporting to be an abstract was filed on the 7th inst, which he has seen and read for the first time on the said 26th inst.

This Deponent further says that he intended to be present when this case was called on the 25th inst, but was in Chicago & was accidentally left by the cars at the Depot in Chicago, and there

fore did not arrive until after the case had been submitted by the attorneys for Appellant & taken on call.

The Deponent states that the paper purporting to be an Abstract is not an Abstract of the Record but is rather an argumentative Statement of the Appellants case, and the same does not furnish the pages of the record referred to & is not in compliance with the rules of this Court, and in the opinion of the deponent it is impossible to form an intelligent opinion or idea of the facts in record material for a decision of the case. There is no Statement whatever of the allegations of the Bill or answers.

The Deponent states that it is impossible to furnish a correct abstract as he may do under the rules within less than ten days & the Appellee is anxious to submit the cause at the present term & does not desire a continuance.

The Appelee therefore moves

that his attorney be allowed ten days to file a correct abstract and an argument.

W. C. Goudy

197—160

Archibald J. Graham et al

vs

Robert Holloway

Affidavit.

Filed May 10 1865

L. Leland

Clerk

SUPREME COURT.

April Term, A. D., 1865.

Archibald T. Graham and David Graham, Appellants. vs. Robert Holloway, Appellee.

Brief and Points of

T. G. Frost, Att'y for Appellants.

The appellants seek to set aside the final decree in this case granting a perpetual injunction against the collection of the judgment recovered by Archibald Y. Graham and David Graham against Robert Holloway and Henry M. Boggess, for the purchase money of certain land sold by said Holloway and Boggess to said Grahams, and which said Grahams lost by reason of the failure of title, and Holloway and Boggess' inability to convey, on the ground that the facts proved did not warrant the injunction, or bring the case within any of those classes of cases in which a Court of Equity is authorized to interpose its jurisdiction to control the judgment of a Court of Law. The decree of a Court of Chancery or the judgment of a Court of Law is absolutely conclusive upon the parties as to all matters in controversy in the case, and the party in whose favor it is rendered, has as absolute a right to its full and complete enforcement as he has to institute the suit to enforce his rights in the first instnace.

It is the mere mockery of justice, where a man's rights have been fully and fairly adjudicated, and a decision on a final hearing has been rendered in his favor, to defeat all the benefit and advantage of his judgment by enjoining its collection.

Nevertheless, it is doubtless true, that a court of Equity has the power—and it may become its duty, to restrain the enforcement and collection of a judgment at law. But it is insisted on the part of the appellants:

That this extraordinary jurisdiction occasionally exercised by Courts of Equity, though embracing a vast number of cases, rests on certain well defined and simple principles, which must exist in every case before this jurisdiction can be properly asserted; and it is never an exercise of mere arbitrary power, subject to no limit or regulation, except such as the mere caprice, or general notion of right or justice the Court may tolerate, unrestrained by those clearly defined and well established rules which prevail as well in Courts of Equity as in Courts of Law.

The cases where the interposition of a Court of Equity may properly be invoked, to restrain by injunction proceedings in suits at law, may be properly divided into two general classes of cases, to one of which, the case at bar must belong, if the decree in this case can be sustained at all, viz:

The first class embraces those cases, when, owing to unavoidable accident, fraud, or the peculiarly restricted character of mere legal remedies, the party asking the relief has been deprived of the benefit of a meritorious defence, and might lose his substantial rights, unless Equity afforded relief.

Nothing of this kind is alleged in the bill; nor is there any ground in the allegations or proof, to bring the case within this class of cases. The judgment was duly and regularly obtained, the parties having been duly brought before the Court. No fraud, surprise, accident or technical rule of law having intervened to prevent a full defense being interposed.

The second class embraces those cases, where, though the judgment was originally properly and correctly obtained, such facts have occurred since its rendition, as make it obviously inequitable and unjust that the judgment should be enforced. Payment or Release of the judgment would present such a case; or it would arise when, though the judgment was not released or paid, it has become, by the acts of the parties, virtually satisfied; or if not satisfied a valid agreement has been entered into, which, it specifically enforced, would amount to a satisfaction of the judgment; or when such arrangements have been entered into, or obligations incurred, by and between the parties, as are necessarily inconsistent with a right to longer hold or enforce the judgment.

The question then arises whether anything has occurred since the rendition of the judgmet, or contract has been made, or obligation assumed by the Grahams inconsistent with the right to collect this judgment. The appellants insist that nothing of the kind has transpired. The Appellees on the contrary insist that, in Equity, the Grahams lost their right to enforce the balance of this judgment, over and above the amount paid by them to procure the title of the land,

from the real owner. For the ground and reason of this claim, we must look to the allegations of the bill. If the evidence fails to sustain them, decree in favor of the appellee, is erroneous and should be reversed.

The charge in the bill is, that the Grahams having an election of remedies, viz: the right to recover damages, in an action at law for the non performance of the contract, and the recovering back of the purchase money, or to a decree in Equity for the specific enforcement of the contract; and after having obtained judgment for damages in an action at Law on account of Holloway and Boggess's failure to convey the title, waived the same, and elected to file a cross bill in the case of Alexander vs Holloway and Boggess and others, asking in effect the specific performance of the contract, and obtained a decree granting substantially, on conditions, the prayer of the cross bill.

The evidence, including the Records and proceedings in the Perry Alexander case, utterly fails to sustain these allegations of the bill.

In the first place the recovery of the judgment at law, put an end to the contract between the parties, and was of itself such an election of remedies by the Grahams, as rendered it utterly impossible, after that, for them to sustain a bill for the specific performance of the contract.

1 Scam, Rep., 573, Herrington vs Hubbard.

2d The cross bill filed by them was in no sense a bill for the specific performance of the contract, nor was there anything in the bill inconsistent with the right of the Grahams to enforce their judgment. It was in fact not only an affirmance on their part of the judgment at Law, but a bill filed for the express purpose of enforcing the collection of the judgment, by the aid of a Court of Equity, seeking to reach the proceeds of the sale of the property of Holloway and Boggess, on which the judgment was a legal lien, but which was about to be swept away by the enforcement of the prior specific lien of Perry Alexander for the balance of the purchase money due him from Holloway and Boggess. It was in the nature of a creditor's bill.

Any other judgment creditor, who chose to come in, had the same right and would have been entitled to the same protection, if demanded. In fact, when the lien of a junior judgment is cut off by a sale under a senior judgment, the legal lien of the junior judgment becomes transformed in Equity, into an Equitable lien upon the surplus of the proceeds of the sale above the amount necessary to pay the first judgment.

13 Wen., Rep. 488.
11 Paige Ch. Rep. 129, 131.
4 do do 503.

Whatever property Holloway and Boggess had, the Grahams had a right, by a sale under execution, or by the order of a Court of Chancery in aid of the execution, to apply towards satisfaction of their judgment; and it is an absurdity to call their cross bill a bill to enforce the specific performance of the contract of purchase. It was simply a bill asking a Court of Chancery to aid them to enforce and collect their judgment. It is true the bill alludes also to the expenses incurred in the improvements put on said premises by said Grahams, as entitling them to additional consideration at the hands of a Court of Equity. But that does not materially change the character of the cross bill, or the attitude or relation of the parties.

3d. But it is claimed that by the terms of the decree rendered in the Perry Alexander case, to which the Grahams are parties, and by which they are bound, if the Grahams became purchasers they were bound to cancel the balance of the judgement over and above the amount they were obliged to pay in cash on their bid in order to satisfy Alexander's claim; and that though, not nominally the purchases, the Grahams were purchasers in fact, and so became bound to do just what the decree in this case requires them to do. However unjust or unreasonable the decree in the Alexander case may have been, it is doubtless obligatory on all parties until reversed; but the question still remains to be decided as to what is the true construction and meaning of the decree. It is submitted on the part of the appellants, that it was manifestly optional, under this decree, with the Grahams, to come in under it and claim the benefit of the decree as purchasers, or not, just as they saw fit. They were not obliged to become purchasers *nolens volens*.

In case they became purchasers, they were entitled to have their bid over and above the amount necessary to pay Alexander's claim, applied on the judgement. They need not have accepted this privilege, but they had a perfect right, relinquishing this privilege, to procure any other parties they saw fit, to become purchasers. They violated no law, nor did they in any respect evade the terms of the decree by so doing.

By being purchasers, the decree obviously meant, being publicly and openly purchasers in their own name so as to secure the preference given them over other purchasers, and so as, therefore, to subject them to the corresponding liabili-

ty imposed by the decree. By procuring another party to become the purchasers, they lost this privilege, and at the same time became free from the liability attached to a bid in their own name.

They committed no wrong, and did injustice to no one, by this proceeding.

They placed themselves in the same position as all the rest of the world, having no more rights or liabilities in the premises. Again this whole matter, so far as all these parties are concerned, is *res judicata*. Exception was taken to the master's report of sale, and to the sale itself, and to the giving of a deed to Lafferty, the purchaser, on the ground that the sale was in fact though not in form, a sale to the Grahams, and should not be confirmed as a sale to Lafferty.

After hearing the evidence on the subject the motion to set aside the sale and deed, was overruled, and the sale and deed to Lafferty were confirmed. The title by the deed under the decree became absolutely vested in Lafferty, and as a necessary legal consequence, he had a right to sell and dispose of the property as he pleased; and the court had no right to destroy the alienability of the title in the hands of Lafferty. The decree not only unjustly affects the Grahams' rights to purchase, but also Lafferty's rights to sell, who had a perfect right to do what he pleased with his own property and to sell and convey the title to whomsoever he choose.

But finally; it may be insisted that independent of the precise ground on which the bill places the right of the complainant to relief, there is an obvious equity in compelling the Grahams to relinquish a judgment recovered by them on account of the failure of a title with which they have finally become invested for a sum much less than the amount of the judgment, at all events to the extent of the balance over and above the amount they have been compelled to pay, in order to procure the title. This position may seem plausible, but it is utterly unsound. When Holloway and Boggess failed to fulfill their contract, and the Grahams sued and recovered judgment for the purchase money they had paid for a title which they never got, the contract to both parties was *forever at an end.* Neither had any more rights under it as against the other. Neither had any right to enforce its specific performance, but each held the same relation to the other as though no contract had ever been made. Holloway and Boggess had received the money of the Grahams without consideration or on a consideration that had failed, and the Grahams had recovered judgment for the amount of their advances. Had the property after this increased tenfold, the

Grahams could not get it, or compel from Holloway and Boggess the title to the Grahams, though Holloway and Boggess should in some way become vested with the title, and be able to convey. The rise of the property would go to Holloway and Boggess. If, then, the Grahams could not enforce the title from Holloway and Boggess if the property rose in value, how can they be compelled two or three years after this failure of title, and abrogation of the contract to take the land back after an immense depreciation in value, at the original contract price, and be virtually compelled to pay the money to Holloway and Boggess, or which is precisely the same thing to apply it on the judgment against them. To do this, is to give to parties who have utterly failed to comply with their contract, and after it has been abandoned in consequence of their failure all the benefit and advantage of the contract, and at the same *time*, to compel the innocent parties not only to lose all the advantages of the contract, but at the same time to subject them to all its liabilities. Where is the justice or equity of such a doctrine? Had the Grahams received the title when they were entitled to it, they might perhaps have resold at a great advance. All this benefit they have lost by the wrongful act of the other parties, and yet years after the contract is at an end they are compelled to pay the very parties who have occasioned them all the loss and the only parties who are to blame in the matter, the full original contract price of the land, which at the time of the decree could not perhaps have been sold for half its original price. Nor is a defendant in a chancery suit bound to meet every conceivable or imaginable case which on a given state of facts, might constitute the foundation of a bill in equity. He is only bound to meet the allegations in the bill as actually framed. When these are not proved the case fails, and without a new bill or an amendment to the original one the complainant is not entitled to prevail. The complainant in this case utterly failed to prove the allegations in his bill, and to present a case which under the evidence entitled him to the relief prayed for; and therefore the decree should be set aside.

T. G. FROST, Att'y for Appellee.

197 160
175
Bedstead
25
Holloway

195

SUPREME COURT.

April Term, A. D., 1865.

Archibald T. Graham and David Graham, vs. Robert Holloway, Appellee.	Brief and Points of T. G. Frost, Att'y for Appellants.

The appellants seek to set aside the final decree in this case granting a perpetual injunction against the collection of the judgment recovered by Archibald Y. Graham and David Graham against Robert Holloway and Henry M. Boggess, for the purchase money of certain land sold by said Holloway and Boggess to said Grahams, and which said Grahams lost by reason of the failure of title, and Holloway and Boggess' inability to convey, on the ground that the facts proved did not warrant the injunction, or bring the case within any of those classes of cases in which a Court of Equity is authorized to interpose its jurisdiction to control the judgment of a Court of Law. The decree of a Court of Chancery or the judgment of a Court of Law is absolutely conclusive upon the parties as to all matters in controversy in the case, and the party in whose favor it is rendered, has as absolute a right to its full and complete enforcement as he has to institute the suit to enforce his rights in the first instnace.

It is the mere mockery of justice, where a man's rights have been fully and fairly adjudicated, and a decision on a final hearing has been rendered in his favor, to defeat all the benefit and advantage of his judgment by enjoining its collection.

Nevertheless, it is doubtless true, that a court of Equity has the power—and it may become its duty, to restrain the enforcement and collection of a judgment at law. But it is insisted on the part of the appellants:

That this extraordinary jurisdiction occasionally exercised by Courts of Equity, though embracing a vast number of cases, rests on certain well defined and simple principles, which must exist in every case before this jurisdiction can be properly asserted; and it is never an exercise of mere arbitrary power, subject to no limit or regulation, except such as the mere caprice, or general notion of right or justice the Court may tolerate, unrestrained by those clearly defined and well established rules which prevail as well in Courts of Equity as in Courts of Law.

The cases where the interposition of a Court of Equity may properly be invoked, to restrain by injunction proceedings in suits at law, may be properly divided into two general classes of cases, to one of which, the case at bar must belong, if the decree in this case can be sustained at all, viz:

The first class embraces those cases, when, owing to unavoidable accident, fraud, or the peculiarly restricted character of mere legal remedies, the party asking the relief has been deprived of the benefit of a meritorious defence, and might lose his substantial rights, unless Equity afforded relief.

Nothing of this kind is alleged in the bill; nor is there any ground in the allegations or proof, to bring the case within this class of cases. The judgment was duly and regularly obtained, the parties having been duly brought before the Court. No fraud, surprise, accident or technical rule of law having intervened to prevent a full defense being interposed.

The second class embraces those cases, where, though the judgment was originally properly and correctly obtained, such facts have occurred since its rendition, as make it obviously inequitable and unjust that the judgment should be enforced. Payment or Release of the judgment would present such a case; or it would arise when, though the judgment was not released or paid, it has become, by the acts of the parties, virtually satisfied; or if not satisfied a valid agreement has been entered into, which, if specifically enforced, would amount to a satisfaction of the judgment; or when such arrangements have been entered into, or obligations incurred, by and between the parties, as are necessarily inconsistent with a right to longer hold or enforce the judgment.

The question then arises whether anything has occurred since the rendition of the judgmet, or contract has been made, or obligation assumed by the Grahams inconsistent with the right to collect this judgment. The appellants insist that nothing of the kind has transpired. The Appellees on the contrary insist that, in Equity, the Grahams lost their right to enforce the balance of this judgment, over and above the amount paid by them to procure the title of the land,

from the real owner. For the ground and reason of this claim, we must look to the allegations of the bill. If the evidence fails to sustain them, decree in favor of the appellee, is erroneous and should be reversed.

The charge in the bill is, that the Grahams having an election of remedies, viz: the right to recover damages, in an action at law for the non performance of the contract, and the recovering back of the purchase money, or to a decree in Equity for the specific enforcement of the contract; and after having obtained judgment for damages in an action at Law on account of Holloway and Boggess's failure to convey the title, waived the same, and elected to file a cross bill in the case of Alexander vs Holloway and Boggess and others, asking in effect the specific performance of the contract, and obtained a decree granting substantially, on conditions, the prayer of the cross bill.

The evidence, including the Records and proceedings in the Perry Alexander case, utterly fails to sustain these allegations of the bill.

In the first place the recovery of the judgment at law, put an end to the contract between the parties, and was of itself such an election of remedies by the Grahams, as rendered it utterly impossible, after that, for them to sustain a bill for the specific performance of the contract.

1 Scam, Rep., 573, Herrington vs Hubbard.

2d The cross bill filed by them was in no sense a bill for the specific performance of the contract, nor was there anything in the bill inconsistent with the right of the Grahams to enforce their judgment. It was in fact not only an affirmance on their part of the judgment at Law, but a bill filed for the express purpose of enforcing the collection of the judgment, by the aid of a Court of Equity, seeking to reach the proceeds of the sale of the property of Holloway and Boggess, on which the judgment was a legal lien, but which was about to be swept away by the enforcement of the prior specific lien of Perry Alexander for the balance of the purchase money due him from Holloway and Boggess. It was in the nature of a creditor's bill.

Any other judgment creditor, who chose to come in, had the same right and would have been entitled to the same protection, if demanded. In fact, when the lien of a junior judgment is cut off by a sale under a senior judgment, the legal lien of the junior judgment becomes transformed in Equity, into an Equitable lien upon the surplus of the proceeds of the sale above the amount necessary to pay the first judgment.

13 Wen., Rep. 488.
11 Paige Ch. Rep. 129, 131.
4 do do 503.

Whatever property Holloway and Boggess had, the Grahams had a right, by a sale under execution, or by the order of a Court of Chancery in aid of the execution, to apply towards satisfaction of their judgment; and it is an absurdity to call their cross bill a bill to enforce the specific performance of the contract of purchase. It was simply a bill asking a Court of Chancery to aid them to enforce and collect their judgment. It is true the bill alludes also to the expenses incurred in the improvements put on said premises by said Grahams, as entitling them to additional consideration at the hands of a Court of Equity. But that does not materially change the character of the cross bill, or the attitude or relation of the parties.

3d. But it is claimed that by the terms of the decree rendered in the Perry Alexander case, to which the Grahams are parties, and by which they are bound, if the Grahams became purchasers they were bound to cancel the balance of the judgement over and above the amount they were obliged to pay in cash on their bid in order to satisfy Alexander's claim; and that though, not nominally the purchases, the Grahams were purchasers in fact, and so became bound to do just what the decree in this case requires them to do. However unjust or unreasonable the decree in the Alexander case may have been, it is doubtless obligatory on all parties until reversed; but the question still remains to be decided as to what is the true construction and meaning of the decree. It is submitted on the part of the appellants, that it was manifestly optional, under this decree, with the Grahams, to come in under it and claim the benefit of the decree as purchasers, or not, just as they saw fit. They were not obliged to become purchasers *nolens volens*.

In case they became purchasers, they were entitled to have their bid over and above the amount necessary to pay Alexander's claim, applied on the judgement. They need not have accepted this privilege, but they had a perfect right, relinquishing this privilege, to procure any other parties they saw fit, to become purchasers. They violated no law, nor did they in any respect evade the terms of the decree by so doing.

By being purchasers, the decree obviously meant, being publicly and openly purchasers in their own name so as to secure the preference given them over other purchasers, and so as, therefore, to subject them to the corresponding liabili-

ty imposed by the decree. By procuring another party to become the purchasers, they lost this privilege, and at the same time became free from the liability attached to a bid in their own name.

They committed no wrong, and did injustice to no one, by this proceeding.

They placed themselves in the same position as all the rest of the world, having no more rights or liabilities in the premises. Again this whole matter, so far as all these parties are concerned, is *res judicata*. Exception was taken to the master's report of sale, and to the sale itself, and to the giving of a deed to Lafferty, the purchaser, on the ground that the sale was in fact though not in form, a sale to the Grahams, and should not be confirmed as a sale to Lafferty.

After hearing the evidence on the subject the motion to set aside the sale and deed, was overruled, and the sale and deed to Lafferty were confirmed. The title by the deed under the decree became absolutely vested in Lafferty, and as a necessary legal consequence, he had a right to sell and dispose of the property as he pleased; and the court had no right to destroy the alienability of the title in the hands of Lafferty. The decree not only unjustly affects the Grahams' rights to purchase, but also Lafferty's rights to sell, who had a perfect right to do what he pleased with his own property and to sell and convey the title to whomsoever he choose.

But finally; it may be insisted that independent of the precise ground on which the bill places the right of the complainant to relief, there is an obvious equity in compelling the Grahams to relinquish a judgment recovered by them on account of the failure of a title with which they have finally become invested for a sum much less than the amount of the judgment, at all events to the extent of the balance, over and above the amount they have been compelled to pay, in order to procure the title. This position may seem plausible, but it is utterly unsound. When Holloway and Boggess failed to fulfill their contract, and the Grahams sued and recovered judgment for the purchase money they had paid for a title which they never got, the contract to both parties was *forever at an end.* Neither had any more rights under it as against the other. Neither had any right to enforce its specific performance, but each held the same relation to the other as though no contract had ever been made. Holloway and Boggess had received the money of the Grahams without consideration or on a consideration that had failed, and the Grahams had recovered judgment for the amount of their advances. Had the property after this increased tenfold, the

Grahams could not get it, or compel from Holloway and Boggess the title to the Grahams, though Holloway and Boggess should in some way become vested with the title, and be able to convey. The rise of the property would go to Holloway and Boggess. If, then, the Grahams could not enforce the title from Holloway and Boggess if the property rose in value, how can they be compelled two or three years after this failure of title, and abrogation of the contract to take the land back after an immense depreciation in value, at the original contract price, and be virtually compelled to pay the money to Holloway and Boggess, or which is precisely the same thing to apply it on the judgment against them. To do this, is to give to parties who have utterly failed to comply with their contract, and after it has been abandoned in consequence of their failure all the benefit and advantage of the contract, and at the same *time*, to compel the innocent parties not only to lose all the advantages of the contract, but at the same time to subject them to all its liabilities. Where is the justice or equity of such a doctrine? Had the Grahams received the title when they were entitled to it, they might perhaps have resold at a great advance. All this benefit they have lost by the wrongful act of the other parties, and yet years after the contract is at an end they are compelled to pay the very parties who have occasioned them all the loss and the only parties who are to blame in the matter, the full original contract price of the land, which at the time of the decree could not perhaps have been sold for half its original price. Nor is a defendant in a chancery suit bound to meet every conceivable or imaginable case which on a given state of facts, might constitute the foundation of a bill in equity. He is only bound to meet the allegations in the bill as actually framed. When these are not proved the case fails, and without a new bill or an amendment to the original one the complainant is not entitled to prevail. The complainant in this case utterly failed to prove the allegations in his bill, and to present a case which under the evidence entitled him to the relief prayed for; and therefore the decree should be set aside.

T. G. FROST, Att'y for Appellee.

197 — 160

Graham

v.

Holloway

14931