

12379

No. _____

Supreme Court of Illinois

Hopkins.

VS.

Davis, et al.

71641  7

Closing argument by Leconte Vol^r

It will be observed at once that the time allotted to me, is but a brief portion of the space elapsed since the stipulations of September. I received Mr. Ballingall's argument on the 16th inst. The first entire week since has been lost by me by sickness, and in private health I commence the argument which by stipulation must be in by the first of February. I allude to this as my excuse for overlooking many considerations, and for the continued study of brevity.

The first objection made to the decree is lapse of time. To this objection I apprehend it is sufficient for me to answer that the bill and the evidence show continued payment on the part of Vanlebeu - continued assertion of his rights - continued acknowledgement of those rights by Davis, continued tender of the purchase money, and continued adverse possession of the land. Why should Vanlebeu be allowed to take legal steps for the enforcement of this contract, when Davis was continually promising fulfilment and alleging plausible excuses for delay.

The second objection is that Hopkins is attempting to enforce this contract by the testimony of his vendors. I confess myself unable to see the objection to the evidence of Vanlebeu and wife or William Vanlebeu, if the attempt was done to enforce it by their testimony

which I contend it is not. I know of no
rule for the exclusion of evidence except
for the allegation of interest or moral turpitude.
If these witnesses are either of them interested
in the result of the suit, the defendants' counsel
has wholly failed to show wherein. As to turpitude,
there is no such pretence. I understand the
rule to be that no one is to be presumed
interested. The party seeking to exclude them
must show their interest. But in this case
the complainant has affirmatively disproved
their interest by showing and proving his deeds of
quitclaim. He has also taken care to remove the
last possibility of interest by quitclaim. Release.
The fact that they are parties to the record will
not avail in chancery unless interested. Their
answer admitting the allegations of the bill
to be true does not prove any interest that I can
perceive. The argument that Warbleton had
the legal interest in those accounts and was
therefore interested, is neither supported by the
pleadings or proofs. The bill alleges that
those accounts were agreed by Davis to be
received in payment of the land. Warbleton
and his wife admit those allegations to be
true. It was then as much a payment
technically as though it had all been paid
in gold. But if Warbleton and wife by
reason of those accounts had an interest,
which way was it? Undoubtedly on the
side of Davis, as by withdrawing the accounts
from the payment for the land they might
collect them from Davis. This is then an
interest if it be one which the complainant

This release is
not as to the deed
of June 1848
as to the house described
in that deed
which includes
those in the deed
December 1848.

had a right to waive as being against himself. If competent, are they not strongly supported? Why their continued adverse possession, for such a number of years living in sight of Davis? Why did Davis say to William Vaulelue that his mother should have the land when she got her money? Why did he sleep on his rights? demanding no rent - and taking no steps to drive him out of possession? Why did Davis, the moment the first bill was disempowered, convey away the land to Howe, a relative - at less than its value, and take Howe's notes without converting them into money? if not from fear of the title derived from Vaulelue? I understand the rule to be that when testimony has been given, it is to be believed unless it is contradicted or contrary to our common and ordinary sense. From the fact, then, that Vaulelue and his wife are competent witnesses, that their evidence is rational and consistent with the facts proved to exist, and consistent with itself, I start out with the confidence that their testimony is not only competent, ^{but} entirely worthy of credit. I have said this much in the outset as being nearly all the comment which I intend to make upon the effort of defendants' counsel to raise doubt upon the testimony. It is true, as is said by defendants' counsel and will be seen by your Honor, that a very great number of questions entirely irrelevant were propounded by defendants' counsel; and the depositions swelled to a useless length, requiring nearly three weeks to take them

testimony, which should have been taken in
these days, and the defendant's argument
declares what was so adroitly managed as
never to have been before apparent, that the
defendant's counsel was striving at every
great shrewdness to entrap the witnesses. I
apprehend few efforts were ever made
which proved more barren of results. It is
true he did succeed in propounding
interrogatories when the memory of the witnesses
were indistinct, but he admits, these
were upon immaterial matters. The court
will observe also, what I apprehend is unprecedented
in the taking of depositions, that after an important
interrogatory has been propounded on the part of the
complainant in different instances, the defendant
has deemed it his best manner of shrewdness
to interpose a few preliminary interrogatories,
devised and undoubtedly intended to distract
and divert the witness from the direct interrogatory
and confuse his memory as well as his manner
of answer. Such will be perceived to have been
the case with Israel P. Knebleve, when he says
"We had no contract," for the court will perceive
that he immediately proceeded to detail the
substance of a contract, showing he had
some other object in his mind to which he
intended the remark to apply. It is very true,
the day was not long enough to finish the
examination, and because the explanation
of that remark could not be called for
till the next day the defendant's counsel
seems to suppose that such answer was

the result of some peculiar intermediate training. I do not think it would have been very important, if that explanation had never been asked, as I think it would have been apparent to any mind that the remark was the holding on of the mind of the witness to the preliminary interrogatory about a contract in writing, and the witness the next day on being asked his meaning explained it in that way. His mind had for the moment discriminated between the ordinary agreement and what he technically supposed to be "a contract" a writing he could hold in his hand. Out of this remark, a vast amount of capital is endeavoring to be made, and that capital is entirely due to his shrewdness in preliminary examination. I apprehend that in taking depositions when interrogatories are propounded in writing it is the right of the party calling the witness to have any question he may choose to ask, propounded and answered without interruption from the opposite party, the opposite party having the right to introduce any objections to the testimony in his cross-interrogations. In this position, the Master in Chancery disagreed with us, and great effort is now made by the defendants counsel to avail himself of his advantages.

I suppose the depositions will not be judged by rules more strict than testimony given orally by a witness upon the stand, and your Honor has had too much experience in trials to expect on any occasion, the whole testimony you wish to elicit in answer

to a single question. A mind thoroughly trained and methodized and fully instructed as to every fact which it was material to prove, knowing the whole issues, and striving to give its whole knowledge in answer to a single interrogatory, might arrive at such a result. But even such a mind would be quite likely in the embarrassment of his new position as a witness to overlook something. I have no doubt your Honor has on many occasions experienced the difficulty, ~~as~~ as counsel, with all the energy that can be summoned in aid of one side of a case, of remembering all the material questions you desired to ask, and if your Honor has not, after the conclusion of a trial been mortified by the remembrance that some important fact was forgotten by counsel till too late to be available, your experience has been vastly more fortunate than mine. I apprehend it is not unjust to expect the same amount of fallibility from a witness, and every day's experience proves that it exists. Can we expect it to be less so in depositions than on the stand? In these depositions the rule was adopted of putting down every word dropped by the witness in the precise language in which it was uttered. In open court a great many expressions with which witnesses interlard are wholly overlooked and the substance only is taken into account.

In the argument of dependants' counsel in relation to the testimony of Israel P. Kableman as to the contract - his answer to

the first interrogatory about the contract (Interrogatory 66) and also to the several interrogatories which follow, it is contended that the complainant has not proved a contract by parol as alleged by the bill. In those interrogatories Vanbleve shows that he first applied to Davis and "asked him" if he could deed for me, the lands now in suit. He told me he could not - his money was all gone: but he turned around to some clerk in an adjoining office, to take the number down that Mr. Vanbleve wanted deeded." I do not contend that this alone amounted to a contract, but it was introductory. It was well understood to be a loan applied for by Vanbleve to be obtained on the security of his claims. The taking the title in the name of Davis was a machinery for the security. He told Vanbleve "his money was all gone," but in saying this, the very act of taking the number of the land "Mr. Vanbleve wanted deeded" was an indication to Vanbleve that he would look further about the money. At the next interview, the first salutation from Davis was "I can deed that land for you." He commenced bidding saying "he was bidding purposely for Mr. Vanbleve." Vanbleve was then attending to the business of securing his home. This Davis knew. Davis knew the manner of doing business at that time and the conversations are to be construed with reference to the circumstances. Davis promised to give Vanbleve a bond for a deed. Whether this promise was before, or during the bidding does not distinctly appear nor do I think it material. It was part of the same transaction.

and shows what Davis understood to be the meaning of these conversations. But this is not all of that contract. Interrogatory 76 calls out a very material portion. The whole answer to that interrogatory is so pertinent that I take the labor of transcribing it. "He said he would do it on as good terms as Dr. Foster would and he had asked me on what terms Dr. Foster would deed it for me. I told him that the Doctor was to deed it for me at 25 per cent, and he told me that he would deed it for me for the same, the whole of it and I said agree with him so to do." Now, let ^{me} ask, what material portion of the contract is left unproved? Then are the terms—the descriptions of the land had been taken by Davis from the clerk, and Vanblanen stopped Foster from bidding by telling ^{him} he had got Davis to enter his whole claim for him.

Mr. Ballingoll argues a variance between the allegations and proofs because the bill says 20 per cent and the answer to this interrogatory says 25 per cent. I suppose in a bill for specific performance, we are only required to prove the material allegations, substantially as laid. There is a discrepancy in amount between this conversation and the subsequent one at Vanblanen's house, where 20 per cent is mentioned corresponding with the bill, but as either amount is more than Davis could legally enforce and is less than he has been actually paid I apprehend the variance cannot be

regarded as material. Nor is any issue taken by Davis on the amount per cent he was to pay. A common count in assumpsit charging interest at 25 per cent would undoubtedly be supported by proof of interest at twenty and I cannot think a bill in chancery is required to be any more precise than a declaration in assumpsit. In every point of light it seems to me that there can be nothing in that ground of objection. If there were any thing, I apprehend that from the subsequent conversation at Vanburen's house, the court would be justified in supposing Vanburen had misrecalled as to the amount per cent to be charged in the conversation in Chicago. If there were any objection on this score, and our ^{proofs} showed equity in every other particular, undoubtedly the court would permit an amendment of the bill still, which I do not think is necessary.

But to return to that contract, for one moment as a loan. Vanburen says in his answer to the 7th interrogatory, he said "he would deed it for me for the same (as Dr. Foster) the whole of it, and I did agree with him so to do." Suppose Davis had been dissatisfied with his security on the land, and had sued Vanburen in an action of assumpsit for money paid to his use after tendering him a deed for the land, can there be the slightest doubt that Davis could recover against him on the above testimony. Davis paid for Vanburen's land at his special instance and request. Could he not recover back from Vanburen

the money paid with interest? And if
he could was the contract any thing
else than a contract of loan? And to
follow this up, if it was a contract of
loan, was not the money that paid for
the land Kaulaene's money? If it was, is
not a resulting trust a consequence of
necessity? I can see but one answer to all
these inquiries. Even Chief Justice Davis requires
this construction of the testimony. Otherwise a more
dishonest man walks not in the open face of
day. There can be no other excuse for his
standing between Kaulaene and Dr. Foster
and getting his title. If he did not get it
through such a contract of loan, he got it
by the most foul deceit and misrepresentation.
There can be no other excuse for his afterwards
receiving Kaulaene's services and his money
and telling him it is as easy a way as he can
pay for his land. I have clearly shown by the
cases quoted in the opening argument that similar
facts have been frequently decided to raise a
resulting trust not within the operation of
the statute. I have not quoted all the cases,
nor even a considerable share of them - nor have
I had access to books to enable me to quote
others. I know there are numerous cases
in which the statute of frauds has been held
to stand in the way of specific performance,
but I have not yet met with one but
what there was a clear and marked distinction
between that and this, nor have I supposed
those cases I have quoted to be isolated cases

conflicting with the general train of decisions. On the contrary I regard them to be the law governing the action of Chancery. The ground of fraud, I think is just as clearly shown to constitute a trust by operation of law, and on this ground I do not propose to enlarge upon what was said in my previous argument.

I would endeavor to abbreviate the labor of your Honor by looking into and pointing to some additional authorities on some of the points raised but the limited time, my own health and the severe indisposition ^{of my family} under such labor impossible, and I hope this may be taken as an apology for what may seem to have been left undone. The same reasons preclude the possibility of my following the defendants counsel through the devious round of technicalities which he has pursued in applying the evidence to the case. I allude to the depositions as a whole. I think they strongly support a sufficient number of the material allegations of the bill to entitle the complainant to relief.

An effort seems to have been made by the defendants counsel to raise the question of the right of Hopkins to enforce this contract. Hopkins purchased this land of Kaulaene when he was in possession claiming it as his own. By virtue of his possession he had some interest. Whatever that interest was, he had the full and entire conveyance of it by deed. If Kaulaene had a right to the title then Hopkins had a right to the title after the purchase of from Kaulaene

It was a purchase of the land from the person in possession, and to all intents and purposes the purchaser was placed in Van Cleve's previous condition. Whether Van Cleve and wife were competent witnesses is a question of evidence and in no way affects Hopkins' title. Mr. Ballingall says to admit their testimony would be a dangerous precedent, but I can see no other danger in the precedent than that a man who attempts to commit a fraud on another because his agreement cannot be proved, is liable to have his fraud exposed. It may throw a few additional thorns in the pathway of dishonesty. It may shut out the temptation to knavery by depriving the traveller therein of the fruits of his dishonesty. It may fail to do ample justice to the victim of the fraud, but by what principle of law or morals the perpetrator of the fraud can claim immunity from danger by requiring the law to throw the protecting shield around his unconscionable deeds, is beyond my capacity to comprehend. Mr. Ballingall says he discovers from the evidence that the complainant gets property to the value of eighteen hundred dollars for the sum of one hundred, and seems to think it unconscionable to take so much for so small a consideration. Hopkins took the property with Van Cleve's consent, and with a full knowledge of all the circumstances. The fraudulent conduct

of Davis stripped it of any higher value to
Kaukleue. The legal presumption is that he
sold it for the best price he could get.
But why is the conscience of Davis so shocked
at the conduct of Hopkins? Davis defrauded
and deceived him and got the title
in bona fide for a little over two hundred
dollars—got that money, and more too,
back from Kaukleue and still attempts
to keep the land! Hagarth alone could
draw the picture of such a conscientious
man.

Another question raised in the
argument, is not raised in the pleadings
but is now urged with some attempt at
earnestness. It is that one bill having
been demurred to and dismissed bars
this bill, and the only remedy of Hopkins
was to have taken leave to amend that or
had it dismissed without prejudice.
If both bills were alike in all their material
particulars, and the question was one of law
and each bill presented the same question
so that the court could see the former was an
adjudication upon the merits of the case,
and the former recovery had been plead,
I suppose his argument might have
given some difficulty. But as I understand
it a defence of former adjudication must
be specifically set up by way of defence.
It must be regularly plead or as specifically
set up in the answer as any other defence.
Is it so in this case? The bill it is true
sets up the pendency of a former bill

for the
same land and charges that bill as notice to
Howe. Howe denies any knowledge of the
pendency of such bill, and Davis denies that
it was dismissed because no tender was shown
by the bill, and alleges that it was dismissed
because there was no equity in the
bill. Neither party set it up in their answers
as a bar to this bill and therefore, I apprehend
it is no obstacle in the way of a decree.
But if the court should look into the
old bill, it would be seen that it
was between different parties and for only
a portion of the land embraced in this,
and that in point of fact there were
inaccuracies upon the face of it making
it obnoxious to the general demurrer.
The bill itself, shows it was not against
the same defendants - (page 12 of the bill)
shows that the former bill was filed against
Davis alone. Perhaps Howe and his heirs may
be said to claim under Davis, by title
subsequent to the decree. But Vaublanc
and wife are necessary parties and made
parties to the new bill. They were necessary
parties because the bill contemplates an
adjudication upon their account against
Davis. They appear by the bill not to have
been parties to the old one. In
addition to this, the bill shows that the
old bill could not have been for entirely
the same subject matter as it was
filed before the month of April AD 1848, and
the deed given to correct mistakes in
description was given in June 1848.

It is possible that he might have been obtained after the new deed to file supplemented bill and bring in the new matter, but I apprehend the complainant would not be held in a court of conscience to have forfeited his right, because he permitted the old bill to be dismissed, corrected his mistakes and filed a new one. I refer the Court to 1 Barbours ch. pr. pages 125-6-7 in which it is said that when a pending bill is pleaded for the same subject matter, if it appears that the second bill is a better bill, the Court will decree the first one to be dismissed with costs, and the second one to be proceeded with.

"To make the dismissal of a former suit a bar, the new bill must be by the same plaintiff or his representatives, against the same defendant or his representatives," Moffie vs Moffie 1 Johns bk. 4

"The decree in the former cause to be available should have been pleaded or relied upon in the answer as a bar. It was not sufficient that it was read at the hearing. It is a well settled rule in equity, that a plea in bar of a former decree must state so much of the former bill and answer as to show that the same point was then in issue" - Lyon vs Tallmadge 14 Johns. 511

I refer also to 2 Donieles ch. pr. 753-4 All the authorities to which I have turned show that the order dismissing the bill is order

to be a bar must have been the final determination of the court on the merits, whether those merits are presented by the bill or by the evidence. It must be upon the same subject matter and between the same parties. Also 1 Daivill's ch. pr. 671

The defence must be pleaded in bar. In addition to the reasons already given, by way of analogy I refer to the case of The School Trustees v Wright 12 Ill 441 in which it is decided that a lien for purchase money must be specifically pleaded, and the reasons are then given which apply equally to this case why the plea is required. I might add further considerations and further authorities, but it seems to me the above are conclusive. If they are not, however, this record if the defence had been sufficiently plead, does not exhibit any proofs. The record of the previous proceeding has not been given in evidence. There is nothing by which the court can determine that the same points were determined by the previous proceeding.*

The argument of the defendants counsel is not supported by the authority he cites from Wheaton. Heppner & Dundas v Dunlop & Co 1 Wheaton. That was a case of dismissal of a bill upon final hearing. The complainant who was vendor, (and not vendee as in our case) had filed his bill for specific performance of contracts connected with the purchase. The defendants had answered that the court

* Bankr. 118. 19 Barclay & al. 1 Howard & al. 1871. "The answer sets up a disclaimer of a bill filed by the complainant in 1827 against the respondents for the same debt as is brought in the present bill by the complainant. It is not a bill in bar, but a bill in payment, so that however true the answer may be in fact, it cannot be a defence and bar to the bill; it is not responsive to the bill; it sets up distinct affirmative matter of defence, and bar to the bill; the defence must prove, or it can have no effect for either purpose."

had not a good title to the lands he
had agreed to convey as part of the contract,
and the complainant had then set out
his title at length upon the record on
which there was a decree that the plaintiff's
title was insufficient to part of the lands,
and the bill was dismissed. There was
a direct adjudication upon the subject matter
of the suit, and the court say he could
not afterwards perfect his title and come
into court again for a specific performance.
If the opinion of the Supreme Court of the United
States needed any argument from me to sustain
it, I think I could very easily find
reasons in favor of that decision. If the court
on his own showing was not in a condition
to perform on his part at the time when he
alleged the contract ought to be specifically
performed, it may well be that the court will
not allow him after one harassing round
of litigation, to go out of court and make
new preparation and commence again. In
the case now presented, the court has
no evidence before it of the grounds
on which the demurrer was decided, and
the effect of the argument is to ask the court
to decide ^{that} the case was dismissed because
the court decided that the complainant
had no equity. Even the answer does
not allege this, but that it was dismissed
because "there was no equity in the
bill."

If this decree of former decree was
even sufficiently plead as to Davis,

which I think it was not, still it was not insisted on at all nor mentioned in the answer of Hours, and therefore can furnish Hours with no shadow of defence.

I do not propose to review the quotations or arguments of the defendant's counsel in relation to the correction of the mistake in the deeds, as I do not understand any of his authorities to decide expressly that a man has not a right to correct his mistakes without having them proved to him in such a manner that a court of chancery would enforce the correction, and until he finds such authorities I must insist upon the right of every honest man to correct mistakes upon principles of common sense.

The next very gracious defence set up is that Hopkins, or Vaulever before him slept on their rights too long. I do not propose to reply to this position at any length. The bill shows a sufficient excuse for delay and the evidence proves it. The accounts proved with their dates will show that Vaulever commenced payment very soon after Davis had entered the land. That from that time he was continually paying. That in one or two gross Mrs. Vaulever went and got the money and tendered and Davis made no objection to the delay, but made excuses for not being able then to make the title and promised to remove

the difficulties, and make a title in a short time, That Vauclene and his wife were from that time continually urging him to make them a deed and receive their money. That they complained that the money was not drawing any interest while the interest on the loan would be running up. Vauclene was holding the paper. If these are not sufficient excuses for the delay, it would require a fertile imagination to find an additional one.

I do not feel called upon to follow the argument in relation to the tender. The purchase money being proved to have been more than paid, it is immaterial whether any tender was ever made of the money. But they called on Davis with more than sufficient money in gold and silver and informed him they had it. He did not wish to see it counted, but told them he could not then make the deed.

This clearly waived a more formal tender. The counsel for the defendants thinks that when Davis proposed to take their money they ought to have paid it to him. They were under no obligation to part with their money till he was prepared to give them a title. But how did Davis propose to take it? - upon the land, but as a loan in hand and mortgage which would have furnished at least circumstantial evidence to contradict the alleged contract. At any rate, it would not strengthen their case. As to all the arguments

and authorities upon the subject of tender the proof makes them wholly immaterial by showing actual payment accepted by Davis of more than the amount.

I fully agree with the counsel for the defendant that the enforcing of specific ^{execution} of contracts is not entirely matter of absolute right - that it is governed by sound discretion and the principles of reason and justice. If such sound discretion and such principles of reason and justice entitle Davis to hold this land from the complainant under the evidence in this case, then I am mistaken in my views of reason and justice.

The next objection is that Hopkins knew before his purchase of the difficulty of acquiring title. This I am not disposed to deny, and if he set up the claim of bona fide purchaser without notice, this might be material. Undoubtedly a knowledge of these facts prevented him from giving a higher price for the land. But he could buy Kaubler's interest. He could not tell when Davis would turn him out. But on the contrary had a right to presume Davis to be an honest man and to expect he would make a conveyance as he told Kaubler he would do. Notice may prevent a man from sitting up an equity growing out of the payment of money, but I apprehend notice does not destroy legal rights.

The defendants counsel next makes an effort to counteract the fact of payment of purchase money by showing that the accounts compose the "neighborhood deal." The interrogatories and answers urn or to the accounts understood between the witness and Davis to have been paid on the land contract. I confess my inability to understand the precise meaning of the counsel in his interrogatories about "neighborhood deal." I can imagine what he meant, and so, perhaps, may your Honor, and after all, we two may imagine very different things, and neither of us imagine what was actually intended. Did he mean the occasional borrowing and lending, or mutual accounts, or that all this dealing, which was wholly on one side was in the neighborhood? And if we had any means of devising his exact meaning, we should have no very strong evidence that the witness did not mistake his meaning. One thing is certain they do not prove the account to have been paid, nor to have been subject to set off's and the court will hardly be willing to presume that they would have overlooked such an important item of evidence if it had existed. I can see no other rational conclusion the court can arrive at than that the accounts and money paid were agreed to be applied on the land and so accepted.

It is true, the court will find among the exhibits in the evidence in the case an agreement produced by Davis, between Davis and Kaulblum about the nuts and William Kaulblum's working lands of Davis, in which Kaulblum agrees to perform all the stipulations of William's agreement. But this agreement does show of itself any and balance due to Davis in the transaction and I suppose the legal presumption is, as the truth is, that that transaction has been settled up between Davis and Kaulblum. The production of that instrument brought to my mind some old maxims, which first opened me that Davis was fully capable of looking out for all his own interests, but I have no disposition to travel out of the record of this case for the purpose of alluding to them. By looking at the agreement with William Kaulblum which Davis has also produced, in his own hand writing, the court will have no difficulty in coming to the conclusion that nothing is left out of this case from Davis' want of competency to manage his own business to the best advantage.

I take no issue with the authorities quoted by defendants counsel in relation to adverse possession, but so far as the right of Hove is concerned it is clearly proved and comes up to the requirements of the most rigid rules. Hove's deed as charged in the bill and admitted in both the

answers, was executed on the 4th May
1848. By the lease to Durrell which is an
exhibit - by the evidence of Vaublanc and
wife, of Dr. Durrell and J. W. Durrell, his
possession is proved to be adverse by the
most positive testimony possible. The lease
even certifies the covenants on the part of
Durrell that he will ^{not} underlet nor assign the
lease, nor permit any persons to reside on the
premises but his own family - that he will
keep possession of the premises and at the
end of the term deliver up possession to
Hopkins. If these provisions are not sufficient
indication to any person that the possession
is adverse it is strengthened by Hopkins's
covenants to keep Durrell harmless for
holding the possession. It is true the lease does
not mention all the lands afterwards sold to
Howe, by express description, as the lease was
made before the error in description was
discovered, but I apprehend for the purpose
of notice the clause, following the description
is amply sufficient. "Being the same farm
and premises heretofore occupied by Israel
P. Vaublanc." This lease is dated the first of
April 1848, whether it was executed a few
days before, ~~at~~ that time Durrell went in
and the first day of April was fixed for the
purpose of commencing and concluding the
term or whether that is the actual date that
the tenancy commenced, is immaterial as
either date was more than a month
before Howe's deed and Durrell was ~~at~~ the
date of that the tenant of Hopkins under

a lease showing most conclusively the adverse character of Hopkins' claim. In Pitman vs Gaty 5 Ell. 189 the court say "The principal question on the trial was whether Mallows was the tenant of the defendant. If such tenant, his possession was constructive notice to the attaching creditors of the defendant's unregistered deed." In the argument of the case of Pitman vs Gaty is a number of authorities to which I have not turned, being satisfied that the authorities to which I referred in the opening are sufficient upon the subject of adverse possession and notices. I have seen nothing in the argument of defendant's counsel changing my views in relation to the fact of How's being a bona fide purchaser even if he had no notice. A bona fide purchaser is only protected in equity because he has been innocently on his part led into acts to his serious prejudice unless he can have the protection of the court of Chancery. By an arbitrary rule the court of conscience estops a party from enforcing a legal right because the party would otherwise be injured without his own fault. But if he does not show that he has suffered or must inevitably suffer some injury, he cannot invoke this strong exercise of chancery power. Every word of How's answer may be true, and he never suffered any injury. Davis sells land to a family complexion and

takes promissory notes for payment, negotiable if you please. It is not shown that they have ever been negotiated or paid. If they were over due and in Davis' hands, he could neither collect them himself nor enable another person to do so by assignment. The taking a promissory note does not even pay a book account. It is only evidence of indebtedness. It did not pay for the land, so long as those notes remained in Davis' hands, and if Davis sold the land in violation of his trust, Howr could immediately plead want of consideration. Howr does not, therefore by his answer, make himself a bona fide purchaser. Neither is it sufficiently set up by the answer. I deny that the rule is that it must be set up as fully and specifically as the interrogatory, as claimed in the argument for the defence. The authorities to which I referred all show, that it is a defence to be pleaded or insisted upon specifically, without regard to the interrogatory. If it depended on the interrogatory, the complainant might defeat the defence by avoiding any interrogatory to which such a defence would be responsive. As to the statute of frauds, I submit that it is a legitimate consequence of the doctrine of waiver that Howr must himself set it up or he will be taken to have waived it. It is a principle of pleading in equity which is, I believe without exception that each party must stand or fall by his own pleading.

As to Peter W. J. & G. Ref. says 210-11-12 - Bona fide purchaser - the question of an allegation of bona fide purchaser in so specifically set out that the satisfaction of the court is that case is sufficiently instructed by the power of attorney attached to Howr's answer, of the same date of the deed. Howr makes every misapprehension of all the facts before him, Davis was carrying out of all the equities and notice to him was notice to Davis, which must be taken to be upon any money paid.

If Davis' pleading can help Howe, then Davis' admissions in pleading must bind him. If Howe is made a party dependent, he is supposed to be cognizant of his own defence. As is said in a case I have mentioned, if he had set up the statute of frauds, the complainant would have been at liberty to amend his bill and show the reasons and circumstances that precluded its operation as to Howe. After having elected to waive it, how can he now claim any advantage from it? He may very well have said, as an honest man would say to his codefendant, "If you have sold me land under these fraudulent circumstances, I will not be a party to the fraud by thrusting in the statute, I will find my remedy by refusing payment of my note and looking to the covenants of the deed." As to Howe's being protected by Davis' plea, let us see how it would be, if Davis had not been made a party, and we had set up and proved a verbal contract such as to entitle us to specific performance as against Davis and full notice to Howe? Could Howe then have insisted on the statute without having pleaded it? Could he have said "if you had sued Davis, he would have pleaded it, and I am entitled to the benefit of all he could have pleaded? What the courts say about waiving the statute applies to all such cases. If this reasoning is true, and I cannot doubt it, then the claim as to Howe stands independently of the statute, and the verbal promises hold

as to the amount conveyed to him whether they were made before or after the land sale. Not being required to be evidenced by writing they will be specifically executed, if the court is satisfied those lands have been paid for, and if not the court will ascertain the amount still due and fix a time in which it may be paid. The obtaining the money and the holding the same a long time at the request of Davis are considerations sufficient to support the promises made long after the land sale. It is urged by defendant's counsel, that the terms of the agreement were not sufficiently expressed at Vaublanc's house. This was immediately after the land sale, and the conversation then between Davis and Vaublanc, must be taken with reference to the agreement at the land sale. That agreement was the price the land was bid off at and interest. If the interest was then agreed to be 25 per cent. that was modified at the house by the agreement that it should be but 20. The time of payment was also agreed upon. There grew, with the right to pay at a shorter date. It is hard to imagine any other ingredients which could be added to that contract to make it more specific or certain, unless it should be to reduce it to technical form by writing. The statute of Francis bring out of the way, as to Hovey, I can see no obstacle in the way of the specific execution of the

contract as to so much as was conveyed
to Howe. Davis' setting up the statute may
be available to himself so far as he still
retains the title, but having conveyed a
portion of the lands and parted with his
entire interest in them, he has no right nor
power to plead or answer for his vendee,
and his vendee cannot be affected by
his pleading. His vendee would not be even
affected by his admissions after the conveyance.
His right to act as to such lands ceases
with the delivery of his conveyance, and leaves
Howe to set up his own pleadings and answers,
in such manner as he deems most to his advantage.
In Maher vs. O'Hara 4 Gill 429 the
court say "Like any other pleading nothing
is to be presumed in favor of the answer."
In Donnell, ch. pr. 834-5- "If the defendant
deny a fact he must traverse it directly
and not by way of negative purport; thus
if a fact be laid to be done with
divers circumstances, the defendant may
not traverse it literally as laid down in the
bill, but he must traverse the point of substance,
if a man be charged to have ~~been~~ done a
thing on such a day or in such a place
he must not deny that he did modo et
forma, for that implies that in some sort
he did it. So if he be charged with the
receipt of 100 l. he must traverse that he
both received 100 l. or any part thereof, and
if he has received any part he must set
for the the part." A bill charged a sale

on credit. The answer admitted it, "but not without taking security therefor." As there was a negative pregnant, and defendant had answered no further, the court decided that he must state the security, and add all the particulars concerning it. Robinson vs Woodgate. 3 Edw. 422

"The defendant must not answer the charges merely literally but he must confess or traverse the substance of each charge positively and with certainty. Particular and precise charges must be answered particularly and positively and not in a general manner, even though the general answer may amount to a full denial of the charge". Woods vs Mossell 1 Johns. Ch 103.

I have interposed these authorities and considerations at this point, because they did not happen to be at hand when writing upon that particular branch, and I have no time to copy. I hope this apology will stand in the place of many bungling oversights and repetitions. Test the answer of Howe by these authorities. "He must not answer that he did not modo et forma, for that implies that in some sort he did it." Howe says there was no understanding Davis was to have the land back "except as a purchaser." He says he did not mean, calculate or understand he was to hold the said land forever. Does not this conversation most strongly imply that there was an agreement

of the defendant answerer, especially the allegation of the wife will be taken as admitted
3 Annals of Cr. Sec. 267 and authorities therein cited - shows no difference between 269
of Sec. 7 Ann. 382. He is available in Rule 4 v. v. Howard 87

that in the future I was to have the land back as a purchaser? Is this answer free from evasion direct and to the point as required for the defence of a bona fide purchaser? These and foregoing suggestions are all I propose to make in reply to the argument of defendant's counsel from page 107 to 116.

In page 123 of Dft's argument is the inquiry - "What does the complainant mean by misrepresenting a case that does not in one iota bear out his position?" My answer is, it was occasioned by a mere misrecollection at the moment of the cases. The similarity of the cases in some particulars made me quote the wrong one. The case to which I should have quoted was Finucane vs Reamy et al. when it was decided that an agreement to sign a written instrument which the party was prevented by death from doing, was sufficient to authorize a specific performance. I mean on 65-69. In this case the Chancellor said "An acknowledged exception to the statute is when the agreement is intended to be reduced to writing according to the statute, but is prevented by the fraud of one of the parties. And so I apprehend the rule would be when as in this case the contract was written out and one of the parties promised to sign it, but was prevented by inevitable accident" &c. In the case I quoted the execution was prevented by death, but there were additional equities for the enforcement

of specific executions.

Mr. Ballingale contends that Boyd vs M^r
Leam / Lohus ch. is not similar to the
case under consideration. As I said before,
I can see no point of difference. The
land was about to be forfeited for nonpay-
ment of purchase money. The defendant in
that case denied the loan on oath, (which
is not in this case) and the deed was taken
in the name of the lender. It was a loan
for several years. M^r Leam permitted Boyd
to remain in possession for years. What else
is "entering your land for you" as we understand
it in this country than a loan of money?
Vaubleue says he agreed to pay interest and
Doris promised him a bond for a deed.
In either case the claim was about to
be forfeited, and the improvements ~~and~~
land were the security.

I have now made all the reply
I design to do to the defendants
argument, in relation to the doctrine
of a resulting trust. I apprehend the
ingredients are not wanting to constitute
it a trust by operation of law which
was never intended to be embraced by
the statute of frauds, and I think
all the authorities show that ~~Howe~~
cannot have the benefit of the statute
for want of pleading it or insisting
on it in his answer. Perhaps, however
before leaving this branch I ought to reply
more directly to the argument of Mr. Ballingale
in which he calls for the evidence of fraud on
the part of Doris, in the original transaction. That

evidence, as I contend consists in the fact of his agreeing to enter the land for Naubelene, and preventing Foster from doing so, while on page 2^d of Davis' answer he says "this defendant always intended the lands should be purchased at the land sales for the use and benefit of Charles Davis" &c In other parts of the answer (page 1st) Davis declares the land was a part of his original claim, and on page 2^d declares he had conveyed that claim to Charles Davis for money loaned. The subsequent conduct is all in harmony with that original design of fraud. He had made the Statute of Frauds, undoubtedly. He always pertinaciously refused to sign any writing. In the channel he was navigating he knew of but one danger in the law, which was in written evidence. He must keep the neighborhood quiet for a time by promises, by hiring Naubelene and allowing him to live peaceably on the premises. The original fraud then, I contend was in agreeing to perform a trust which he did not intend to perform, and thus induce Naubelene to intrust his interests in his hands. "Whenever a declaration of trust has been procured by fraud and deceit, or whenever the creation of a trust has afforded itself as a means of frustrating fraudulent contrivance, and affording substantial justice to the victim of another's artifice, courts of equity have not supposed the letter ^{of the statute} to embarrass the relief, and protect what it was framed to prevent." Roberts on Frauds, 102. I do not think I can make any better commentary on the above state of facts than is made in the above short paragraph.

I propose now to turn my attention for a short time to another branch of the case, and submit the whole to the decision of your Honor. Whether or not the facts show a resulting trust, in this case, I think there cannot be the least question they are sufficient to take the case out of the operation of the statute. Whatever view your Honor may take of the alleged variance between the allegations and proofs respecting the rate of interest, if I am correct in my conclusions that question is entirely immaterial. If Vaubleve and his wife are competent witnesses against which the defendants counsel has not been able to produce a single authority - if their testimony is reasonable and consistent, about which I apprehend your Honor will have very little question, then a contract has been proved for the land in controversy. It will not do now, as on a question of a resulting trust to "strike from the record all evidence of a contract," but the purpose is to place on the record the evidence of such a contract as Equity is bound to enforce. We are not now bound to go back to the first contract in relation to these lands, and carry out the conditions of that, although, for the purpose of description and the amount paid it is necessary to go to that as a portion. I need not repeat what I have heretofore said in relation to the contract in Vaubleve's house having relation to that in Chicago, but both witnesses agree that the interests

was then agreed to be at the rate of twenty per cent, and that precisely corresponds with the allegations of the bill. These two conversations taken together, and the subsequent ones, supported as they were by acts and payments of Vaulelene, it is submitted conclusively, ~~estop~~ stop Davis from now interposing the statute of frauds. "It is enough that the court can ascertain the terms of the contract with reasonable certainty from the whole evidence." Rhodes v. Rhodes, 3 Sandford 279-281.

"The vendee's entry with the vendors consent and the making of valuable improvements will be such part performance as will entitle the vendee to a specific execution." Parkhurst v. Portland 14 Soles 15

The case of Shirley v. Spencer 4 Gill, 583 is similar to this in some respects. Spencer was in possession at the time of Shirley's purchase of the general government. Spencer paid Shirley nothing but personal services, and was wholly in default to Shirley seventy dollars, which was not paid up at the time of the decree.

From Vol 1 of Leading Cases in Equity edited by Hor and Wallace p 569 I make the following quotation. "And though of the foregoing cases some connect the making of improvements and other the payment of the purchase money with the entry into possession yet it is certain that neither of these circumstances is necessary; and possession, though it is strengthened by payment or improvements is, alone, sufficient to constitute part per-

possession. Delivery of possession or entry into possession with consent of the vendor under the contract and in pursuance of it will entitle the vendor to specific performance of a parcel contract, and the reason is said to be that if the contract were avoided he would become liable as a trespasser." Easton vs Whitaker 18 Conn. 222-229. Tilton vs Tilton

9 N.H. 386-390 Allen's estate 1 Wally & Seng. 383-386 Pugh vs Wood 3 do 56-61

Johnson vs Glancy 4 Blackf. 94-98

Same book p 561. "But admission into possession having unequivocal reference to the contract has always been considered an act of performance. The acknowledged possession of a stranger in the land of another is not applicable except on the supposition of an agreement and has therefore constantly been received as evidence of an antecedent contract, and as sufficient to authorise an inquiry into the terms, the court regarding what has been done as a consequence of contract or tenure. Morphett vs Lord Whitworth.

181 Earl of Mylesford case 2 Stra. 783.

Loxon vs Martin 3 Atk. 1 Mills vs Stradling 3 Ves. 381 Brown vs Bator 4 Ves. 91 Gregory vs Mighell 18 Ves. 328

In the argument of Mr. Ballingale it is said Vaublanc and wife are not supported. I apprehend the presumption arising from long continued possession, on the authority of the above cases affords them some support. Davis on page 7 of his answer admits that Vaublanc died inside on the premises until some time in 1848

by his sufferance. Dr. Sewell and L. B. Judson
prove the same. He does not allege that they
resided there as his tenants, but he says "this
defendant and the said Charles believing that
nothing could be gained by an attempt to
dispossess them by an action at law, they
being wholly impossible in pecuniary matters."
Then there is what the courts regard as one strong
indication of a contract, continued possession,
not only clearly proved but admitted by the
defendant Davis.

In Willis vs Stradling 3 Ves. 382 - Lord
Loughborough says "the laying out of money
by the tenant continuing in possession if it was
part of the contract that money should be laid
out is very strong to take it out of the statute."
Munday vs Soliffe 5 My & Cr. 167 Sutherland vs
Briggs 1 Hare 26.

The making of improvements as all the
cases agree will take a case out of the statute.
Vaulelens proves the making of these to the amount
of three hundred dollars, if we suppose he
made as fast as they would naturally go out
of repair. He did breaking, built fences
and stables, and at one time when he was
about to make some improvements on the
house, he mentioned the matter to Davis
and asked for a hand, as he did not
want to be spending his money without
something to show for his land. Davis tells
him his work is as good as his hand, to go
on and make his improvements and
he shall have his land. Vaulelens then

went on and made his improvements. While Vanblen is not, perhaps, so directly supported in his testimony in relation to the improvements, yet they were of such a character that Davis could easily have contradicted him if his testimony had been untrue.

Payment of the purchase money has been held in nearly all the American cases a strong circumstance to aid in taking a case out of the statute, though, perhaps, standing alone it might not have such effect, though cases are not wanting where that fact alone has been held to prevent the operation of the statute. This, I contend, is proved to have been done in this case, to the full extent. By a hurried computation I make the purchase money on the whole lands \$332. Interest I compute one year and a half 29.88 at six per cent which makes \$361.88. Vanblen in his testimony makes about \$600 he understood was to apply on the land contract. The trouble with his testimony evidently is that when called on by Davis, he did not always take the precaution to say "if I do this it must apply on the land," but whenever he did speak about it Davis would say it was as easy a way as he could pay for his land. By this means he has got about \$600. out of Vanblen. When asked (Interrogatory 103) if he had any account understood between him and Davis to have been applied on the land, he says he has about \$300. He is then asked for the items of the account he expected or understood

at the time would be applied on the land contract, and in reply he gives the items and the papers from which he refreshes his memory, are among the exhibits with the testimony. They have the appearance of age and no one would doubt they were kept along as he ~~swears~~ ^{swears} they were. Is Naubene supported in his testimony? Let us look at the answer of Davis. On page 7 he says. "And that after said lands were purchased at the land sale, the said Naubene was in the habit of working for this defendant on said farm & early until he left in 1848" Many of the items of account are for labor, and the evidence fails to prove that any of it has ever been paid for. It will be recollected that these accounts are charged in the bill, and the answer alleges that they were paid for, so that the issue was fairly made and the way open for Davis to have proved payment if he had ever paid them. Not having proved any payment, is it not the conclusion of law that so much as has been proved is still unpaid? It is true the whole account has not been proved to have been accepted by Davis on the land contract. Naubene says about \$300 of it has been so accepted - the balance he understood ^{or expected} was to apply; but he does not remember any agreement of Davis to that effect. If the account is correct of \$361.88 for purchase money, there would be \$61.88 not actually agreed by Davis to apply on the land contract.

As to that amount, it will be a question for the court to determine whether it is not the reasonable presumption that Davis intended to apply it on the land contract. Whether the remark of Davis frequently made that it was as easy a way as Nauvolum could pay for his land, does not fully justify such presumption? Suppose the contract proved by Nauvolum for the purchase of the land in Chicago had been sued on by Davis, for money paid to Nauvolum's use. Nauvolum could undoubtedly have set off these accounts against the claim. What real ground, then, is there for the distinction when Nauvolum has offered the money and Davis would not receive it? It is but charity to Davis to suppose he did not receive the money because he supposed he had got his pay already. It is a general rule in equity that having taken jurisdiction the court will hold it till justice is done to all parties. It would be a departure from this rule to decree a payment of the \$61. and send Nauvolum to a court of law to collect that amount. In the absence of all designation of a payment, the legal presumption is that it is made in the satisfaction of a debt if one exists. Is it not so here? especially when one party so understood it, and the other has never dissented from it. I cannot see any equitable ground on which any other construction can be given to the conduct

of the parties. I can see no way in which such an application of the account could do injustice, while the whole doctrine of setoff first grew out of courts of equity. If, however, I am mistaken in this view, and the court should be of opinion that no man could be applied to the purchase money than the three hundred dollars, which was expressly agreed to be applied, then the bill shows a readiness and willingness to pay any balance the court may still find unpaid of the purchase money to such person and at such time as the court shall decree. There can be no question that the bill and the evidence and the answers all show a sufficient reason for not paying into court. The complainant could not ascertain either the amount he ought to pay, nor the person to whom it should be paid. He made all the effort he could in that direction. He sent Davis a copy of Kaulben's account, and requested a copy of Davis'. He informed Davis that it was important he should know the condition of the accounts for the purpose of instituting proceedings to obtain his title. Davis saw fit to return him no answer and he could ascertain no further as to the amount. The controversy to Horner, which was undoubtedly occasioned by the sending of that account made it uncertain to whom he ought to tender or pay money, if any, was due. While I am satisfied that equity will, under our evidence consider the whole purchase money paid, yet if the court should differ with

me in opinion, yet I think enough is shown to entitle us to a decree of specific performance on the payment within reasonable time of what the court shall believe still unpaid. I have thus far treated this branch of the question as purchase money, but I am not satisfied, where there is a loan of money but there is room for a sound distinction. It is true, in either case the court would not decree specific execution till the amount was discharged, but if the court shall be of opinion that the first transaction amounted to a loan, why is not that loan as much subject to a set off of accounts accruing as any other debt. It certainly would be at law, and can it be contended that Chancery, the originator of the equitable doctrine of set off will be more vigorous than a court of law? Without enlarging upon this branch, it is submitted to the judgment of the court.

But whether the evidence in this case proves payment or part payment, I am satisfied it is immaterial so far as the statute of frauds is concerned. Many of the cases lay down the principle that possession and part payment are sufficient. That seems to be the doctrine of the case of Spencer vs Shirley. In Therkston vs King & Henry & Seaman ¹⁸¹⁸ the court say "delivery of possession and part performance will take the case out of the statute."

In Roberts on Frowds p. 153 "It appears to be well settled that payment of money in part of the purchase, is a part performance

to take a case out of the statute."

I do not feel called upon to run through all the cases in relation to payment as being part performance. I find many cases which say that payment of a part or the whole is not sufficient alone, because the party can be so easily put in statu quo by refunding the money. But I find no case in which payment of part of the purchase money on the contract, and possession in pursuance of it have not been held to take the case out of the statute. The cases all agree that a serious prejudice to the vendor, so that it be a fraud upon him, when he has been induced by such ~~prejudice~~ contract to suffer such prejudice, will take the case out of the statute. Vaublene swears that he would never have left his own work continually at Davis' demand if it had not been for the sake of paying for his land. That it was a great prejudice to him and he told Davis so. Davis, being notified of such prejudice, replied it was as easy a way as he could pay for his land. In addition to this, he induces Mrs Vaublene, in poor health to take a journey of 1400 or 1500 miles to get the money by the strong opinionance that they should then have their title. Hard times poor health and great distance, render this journey and the procurement of the money the work of nearly a year. A chancellor will readily see that no court of law could ever give adequate compensation for these serious prejudices suffered. It was part performance of the contract, induced by the contract,

and no remedy is left but specific Executions. The prejudice produced by these services and this journey seem to be doubly onerous, when we take into consideration the circumstances of the parties. Davis says in his answer that Paulkne was totally irresponsible, so much so that he did not deem it worth while to even go to the expense of turning him out of possession. Of all others, these should have been the last persons upon whom Davis should have thrown such onerous losses and injuries.

As a moral contract, taken out of the statute of frauds by unequivocal acts of performance, I think the evidence makes the case clear and unquestionable.

Having excited the regret of my friend Ballingale that I should have used language personally disrespectful to Davis, I have re-perused my opening argument in a careful search of those rough and offensive expressions which he feared would jar so heavily on the ear of a very courteous judge. But on the re-perusal, I have failed to find any expressions not fully justified by the evidence in the case. Fraud, deceit, and misrepresentation are the terms which the books apply to just such conduct as is here proved against Davis. They are the names given to such conduct by the most dignified and most "courteous" judges of ancient and modern times. A man may stand "erect" and "on his feet," with such evidences pending over his head and

name, and may appeal to the "courtesy" of a court when he does not desire to face its justice. But I apprehend he has no right to demand that the English language should be blotted out to save his conduct from receiving its proper name. Nor has he, when such acts are proved upon him, a right to demand of us that we shall select soft and unmeaning terms lest we should offend his "erect and fearless" dignity. And I can hardly refrain from saying to my friend Ballingall that his client will never be able to stand "erect" if he endeavors to creep under the statute for the prevention of frauds, with the load of actual fraud which the evidence heaps upon his shoulders.

I submit this argument with very many apologies. Did not circumstances render it impossible, I would gladly systematize by copying. I would enlarge in some things and would abbreviate in many. I submit it only by way of suggestion, being quite certain that I have not done full justice to many of the points, if any. I am not unmindful that it is my duty rather to lighten than increase the labors of the judges. This duty I have no disposition to evade, but I am satisfied I have not very well performed it. The circumstances mentioned are my apology. I gave a copy of the opening argument to Mr. Ballingall in October, some time before I was bound to do so by stipulation, and requested an early reply.

I received his argument on the 16th of January,
the last day allowed him by stipulation.
Its great length and the circumstances mentioned
excuse my apology for the imperfections of this.
By stipulation I am bound to send it to the
Judge by the first of February. Not having
time to copy, I request as a favor that Judge
Selouin will preserve this argument, which I may
desire to refer to hereafter.

The case is now submitted.

Solict 30 Jan'y 1854

S. W. Randall
Counsellor at Law

Closing argument

Samuel B. Hopkins

vs
William W. Davis et al.

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1854

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