BOWN V. WEST

(1846), 1 E. & A. 117 (also reported: 2 U.C.Jur. 675)

Upper Canada Executive Council, Robinson C.J., Jones Ex. C., Macaulay Ex. C., McLean J., Jameson V.-C., 6 April 1846

(On appeal from judgment of Upper Canada Court of Chancery, supra p. 13)

Indian rights--Recision of contract.

Where a party, complaining of fraud in the execution of a contract filed a bill to have it rescinded, and it appeared that after discovering what was alleged as fraud on the part of the vendor the vendee had continued to deal with the property the subject of the contract:

Held, that on that account, if even the fraud had been clearly established, the vendee was not entitled to the relief prayed, and that the same rule must prevail in granting or refusing relief in cases where the title to the lands in question is vested in the Crown, as where the lands have been granted.

Blake and Mr. *Brough*, for appellant.

Mr. *Sullivan* and Mr. *Esten*, for respondent.

The judgment of the court was delivered by

ROBINSON, C.J.--The plaintiff in this cause complains of the defendant having deceived him in the sale of some real property, or rather of the defendant's interest in it; and he prays to have the contract rescinded on the ground of fraud, or that compensation may be made for an alleged deficiency in the quantity of land, which he was led to believe he was acquiring. Enough is disclosed in the case to enable us to see, that the contract between these parties was for the sale of what is commonly called in this country Indian lands, being part of the large tract on the Grand river, in the district of Gore, which the Government of the province of Quebec, before the

division of the province into Upper and Lower Canada, set apart and reserved for the exclusive occupation of the Six Nations of Indians, who at the conclusion of the American rebellion were compelled to abandon their former possessions in the revolted colonies, on account of their adherence to the British Crown.

The government, we know, always made it their care to protect the Indians, so far as they could, in the enjoyment of their property, and to guard them against being imposed upon and dispossessed by the white inhabitants. What particular regulations have been made with this view, was not in evidence in this cause; but we cannot be supposed to be ignorant of the general policy of the government, in regard to the Indians, so far as it has been made manifest from time to time by orders of council and proclamations, of which all people were expected and required to take notice. In the second year of Queen Victoria, a statute was passed, (ch.15,) the object of which was to prevent trespasses upon lands reserved for the Indians; it has no provisions which can affect the case before us. But we know that beside this attempt to restrain people from intruding as trespassers upon Indian lands, the government has always been desirous to deter and prevent white inhabitants from bargaining with the Indians for the purchase of their lands, though their efforts to that end had been very far from effectual. In the case of Doe on the demise of Jackson v . Wilkes,(a) 4 Q.B.O.S. 142. to which his Honour the Vice-Chancellor alluded in his judgment in this cause, the nature of the Indian title or right to this territory upon the Grand river, came under the consideration of the Court of King's Bench, and what was before known to every person conversant with the public acts of the government of Upper Canada at an early day, was in that case proved This large tract of land on the Grand River, extending from the mouth of the river on Lake Erie, to its source, and comprising a breadth of six miles on each side of the river, having been with other lands purchased by the government from its aboriginal inhabitants of the Chippewa nation, was set apart by the government for the exclusive use and occupation of the Six Nations of Indians; and the intention of the government to retain it always for their use and benefit, was formally declared in an instrument signed by General Haldimand, governor in chief of the province of Quebec, in the year 1784 and sealed, not with the great seal of the province, which would have been necessary to constitute it a patent, but with the seal at arms of General Haldimand. The government of Upper Canada, acting not by any means in derogation of the rights of the Six Nations of Indians, but acting on their behalf and for their benefit, and upon a full understanding with them, has disposed from time to time of parcels of this territory in order to raise funds for the support and assistance of the Six Nations. In the ejectment case in the Queen's Bench, which has been referred to, Jackson, the lessor of the plaintiff, was a purchaser of a small piece of this land which had been thus sold for the Indians through the agency of the government, and he claimed under a patent from the Crown, which had been issued to him in 1835, on the completion of his purchase. Wilkes, the defendant being in occupation of that piece of land, (but by what right it did not appear,) endeavored to maintain himself in possession by contending that the patent to Jackson was invalid, by reason that the Crown had divested itself of the legal estate in the land by the instrument made by Governor Haldimand, in 1784, and was therefore not in a condition to make the grant to Jackson in 1835, under which he claimed. The Court of King's Bench decided against the objection, for the reasons given in their judgment, and upheld Jackson's title, considering that the Crown was not divested of the legal estate by the instrument which Governor Haldimand had signed. I am not surprised that it should have appeared to his Honour the Vice-Chancellor to follow, as a consequence of this judgment, that

the interest which Bown, the plaintiff in this suit, represents himself to have bargained for with the assignee of the Indian, Duncan, was not such an interest as can form the foundation for a bill for relief. The truth, no doubt, is, that he and the defendant West were bargaining about lands which, though they have been attempted to be passed from one person to another by various transfers, belonged all the time wholly to the Crown; they were lands which the whole of the Indians in a body could not have alienated, because they had no legal estate in them, and of which any individual Indian could still less pretend a right to alienate any particular part.

This was undoubtedly the fact, looking merely at the actual state of the legal title, and without considering the proclamations which are known to have been issued from time to time by the government, forbidding people from presuming to purchase what it was declared the Indians had no right to sell; and which proclamations though they might not be allowed to affect the legal rights of the parties, might perhaps be found entitled to weight in considering a claim to equitable relief. If the government had been determined rigidly to prevent all trafficking with the Indians for the lands which they were allowed to occupy, they could perhaps not have taken any measure more effectual and expedient for that purpose, than by procuring a legislative provision, that no right or interest which any party should pretend to acquire by any such transfer, should be made the subject of any suit or remedy in courts of law or equity. But in the absence of any such enactment, I think we cannot go the length of holding that no equity could grow out of the dealing which the parties in this suit have had, and for this reason only, that the lands, respecting which the plaintiff says he was bargaining, belonged at the time to the Crown; and we are the more unable to refuse to go into the case upon that ground, when we find it relied upon as a part of the plaintiff's case, and not denied, and when indeed every one knows the fact to be, that the government, in proceeding as they have done, to sell portions of this Indian tract for the benefit of the Indians, have in general made it their rule to protect the white men whom they find in possession of portions of the lands under purchases or agreements with the Indians, to this extent that they reserve to them a right of preemption in the lands which they have occupied and improved. This may in some cases, according to the extent and value of the land occupied , be a very substantial interest, and such as a court of equity could hardly refuse to acknowledge when they are applied to with a view to obtaining a remedy against positive fraud. These dealings in this country respecting land of which the legal estate is still in the Crown, or of which the Crown has divested itself after it had become the subject of contracts and agreements between individuals, are very likely to give rise to peculiar equities, which the courts here may have to decide upon without the aid of cases adjudged in England upon the same points. The case of Boulton v. Jeffrey, (a) Ante page 111.which was determined by this court last year, in appeal from the Court of Chancery, is one of that description; and it seems to have presented itself to the Vice-Chancellor as material to be considered in connexion with the case now before us. But an examination of the grounds on which that case was decided, which were fully stated in giving judgment, will shew, I think, that we cannot derive much aid from it in deciding the present. What seems to have struck his Honour the Vice-Chancellor as a point in that case which might apply in this, was, that the Court of Appeal objected to entertaining alleged equities as arising out of transactions between individuals respecting lands, the legal estate in which was at the time wholly in the Crown; but that was not exactly the ground. There the king, while he owned the estate, had leased it for a term of years; and the lessee had sublet a small portion of the land, and had assigned his interest in it, respecting which small portion of the lot there had been several

transactions; and afterwards, when the term had expired, and the Crown sold the whole lot to a purchaser, who in regard to any real or supposed right of renewal represented the lessee of the whole lot, the person who held the temporary interest in the small portion under the first lessee, set up a right to be allowed to acquire the fee in that small portion by purchase, to the exclusion of the purchaser of the whole lot. The government took the claims of the parties into their consideration, and on their view of what was reasonable, declined to separate the small portion of the lot from the other on the sale, and made their patent for the whole lot to the person claiming under the original lessee. It appeared to the court, that it would be unreasonable in itself, and would tend to unsettle titles to a degree very unjust and prejudicial, if after the government, in such cases, had decided upon the claims of parties, and had issued their patent upon their view of what each had a right to expect from them, the parties who had been urging their claims before the government, should afterwards be allowed to go behind the patent, and attack each other upon equities growing out of their contracts antecedent to its issuing.

This was one consideration of several on which the case of *Boulton v.Jeffrey* was decided. To what extent it would be right to maintain that principle, it was not necessary to determine, because the court independently of it, and upon the facts shown by the parties, was of opinion that the plaintiff did not make out a claim to such a decree as he prayed for; and besides, that case did not, as regards any consideration of this kind, resemble the present, where the Crown has made no patent to either of the contending parties, or to anyone, and when other facts on which the bill is founded have not, as it appears, been decided upon by the government, or in any manner brought under their notice. It will be found on examining the case of *Boulton v. Jeffrey*, that the Court of Appeal did not lay down a principle so broad, as that there could not be a suit in law or equity growing out of a contract between parties, respecting an interest in lands which at the time were legally vested in the Crown. Questions of this kind are amongst the most important from local circumstances, that can arise in our courts. It is of great consequence, that we should be as consistent as possible in the view we take of them, and this can be best insured by endeavoring to keep the way clear as we proceed. Upon the merits of the case before us, after the best consideration which I have been able to give to the pleadings and evidence, I coincide in the opinion of the Vice-Chancellor, that he could not properly do otherwise than dismiss the bill.

The plaintiff's statements in his bill amount in substance to this: first, that the defendant, in the early part of September, 1843, agreed to sell him, for £265, *all the estate, right, title, interest, and possession of him the defendant*, of and in a certain one hundred and thirty-four acres of land in the township of Brantford, which are described by metes and bounds in the bill. Secondly, that in pursuance of this agreement, the defendant did, on the 14th of September, 1843, execute a writing under his hand and seal, by which he granted, bargained, sold, &c., to the plaintiff, his heirs and assigns, all the right, title, claim possession, and demand whatsoever of him the defendant, in and to certain deeds of assignment therein specified, which deeds are described in the instrument executed by the defendant, viz.: "of and in *the annexed assignment or quit-claim from John McDonald to the said Abraham Bradley, and from the said Abraham Bradley to Alden Baker West."* Thirdly, that when defendant agreed (as plaintiff states) "to sell to him all his estate, right, title, interest and possession of and in the one hundred and thirty-four acres described in the bill," and (as I understand the plaintiff's statement) before the deed of the 11th of

September, 1843, was executed, he, the defendant, represented himself as having a leasehold, or some valuable and transferable estate of and in the one hundred and thirty-four acres described in the bill, and as being entitled to the possession, and being in fact in possession thereof. Fourthly, that the plaintiff paid £112 10s. on account of the purchase money before and at the time of the bargain, and gave his note at seven days' sight for the residue of the £265, agreed to be paid by him as the purchase money. Fifthly, that the purchase having been thus far completed, the plaintiff's agent in the transaction, *Robert R. Bown*, after the execution of the assignment of the 14th of September, 1843, went with the defendant to view the premises, and receive possession. That he then received possession of a tavern, situated on the said tract, which was occupied by a tenant of the defendant; and that the plaintiff believed that the possession so given to him of the tavern, was given as possession of the whole one hundred and thirty-four acres. Sixthly, that some days after this, the plaintiff was informed by one *Hanson*, the tenant of the defendant, and then for the first time learned, that the defendant had only an interest in thirty acres of the one hundred and thirty- four, and had been in possession of no more. Seventhly, that £112 10s., paid by the plaintiff, is more than those premises are worth, of which he obtained possession. Plaintiff charges that the defendant, when he agreed to sell him the property, well knew that he had no valuable interest in the whole one hundred and thirty-four acres, and that he neither had, nor was entitled to have, possession of more than thirty acres; that he induced the plaintiff to enter into the agreement by misrepresentations and suppression of the truth of matters within his own knowledge; and that he, the plaintiff, has in fact received no consideration for the promissory note which the defendant holds for the unpaid portion of the purchase money; and he prays to have the contract rescinded, and the note ordered to be delivered up to him; or that compensation may, if he elects it, be decreed by an abatement in price.

In those parts of his answer which the plaintiff has read in evidence, the defendant admits, that about the year 1834, one *William Parker* was in possession of about fifteen or twenty acres of Indian land, being part of the Indian tract near Brantford, with a dwelling house thereon; that he entered into treaty with *Parker* for the purchase of his right and interest in and to these premises; and that in the course of their treaty, Parker produced as evidence of his title to the premises, an assignment from one *Duncombe*, (otherwise, it seems, called *Duncan,*) an Indian, whereby he conveyed to *Parker* all his right, interest, and possession of and in *the said dwelling-house, and the land thereto adjoining*, containing one hundred and twenty-four acres more or less, as surveyed by Mr. *Lewis Burwell,* and including the cleared and improved land which Parker had offered to sell him; and the defendant admits, that he believes the one hundred and thirty-four acres to be the same tract as is described in the plaintiff's bill. That he believed, that by taking an assignment of this deed, which *Parker* held from *Duncan,* and by taking possession of the dwelling-house and cleared land, (which were the immediate objects of his purchase,) he would acquire not only a right to keep possession of the dwelling- house and cleared land, but also a right to enter on the remainder of the surveyed tract of one hundred and thirty-four acres, and to take actual possession by clearing and fencing. That under this impression he gave £125 for the purchase, and took an assignment of *Duncan's* deed, and was put into possession of the dwelling-house and cleared land adjoining, and remained in possession from that time till the sale to *Robert R. Bown,* plaintiff's agent.

This is the account he gives of the origin, nature, and extent of his own title. He then says, that while he was thus in possession he cleared and improved about fifteen or twenty acres more of the tract of one hundred and thirty-four acres, and enclosed the whole cleared land, being about thirty-five acres, and built a tavern thereon with out-houses. That one *Bradley*, while defendant was in possession, held the deed from *Duncan* to *Parker,* and the assignment of it to the defendant, as a security for a debt due to him by the defendant; of which circumstance the defendant informed *Robert R. Bown*, who thereupon advanced him £62 10s., in order to enable him to pay *Bradley* his debt, and take up the deeds, which the defendant had told him must be done before he could *transfer the writings to him*. That the defendant then paid *Bradley*, and got his deeds, including (as the answer says) the deeds from *Duncan* to *Parker*, and from *Parker* to the defendant, (what other deeds besides these there could have been we are left to conjecture, for no other deeds than those two had been hitherto mentioned, either in the answer or the bill.) He says he exhibited these deeds to *Robert R. Bown*, who examined them, and expressed himself perfectly satisfied with them. This is the whole amount of the defendant's admissions read in evidence. On the other hand he denies, in his answer, (folio 27,) that such negotiation as is mentioned in the bill, or any other negotiation than as he the defendant relates, was at any time concluded, "or that the plaintiff agreed to purchase the interest of possession of defendant, or any other estate, interest or possession of or in the premises in the said bill mentioned."

The defendant states, that when the agreement was made, and until after the transfer by him had been actually signed. he knew nothing of any one but *Robert R. Bown* in the transaction, and considered he was dealing with him as principal, and not with the plaintiff, his son. It is possible, therefore, that in the last section of this part of his answer, he may only intend to deny that he made with the *plaintiff* any such agreement as is stated in the bill; but still he does deny in general terms any negotiations about a purchase, except such as he himself sets out; and in folio 24 of his answer, expressly declares, that except as he has stated in his answer, " no agreement was at any time entered into by and between defendant and plaintiff, *nor any agreement by or between any other parties for the sale or the purchase of the premises in the said bill mentioned, or any part thereof;"* so that the answer does in fact deny any agreement by the defendant for sale of the premises, except such an agreement as he himself states; and does therefore deny the allegation in the bill, on which the whole equity was founded, that in September, 1843, he agreed to sell to plaintiff, for £265, " all the estate, right, title, interest, and possession of the defendant of and in the one hundred and thirty-four acres of the land described in the bill ;" unless the agreement, as it is stated in the answer, amounts to that. That depends upon the construction which it is fair to give the words "*premises*," *"premises aforesaid*, '&c., as used in various places between the third and ninth folios of the answer . The point does not seem very clear, and indeeds so far as anything said by the defendant, in these parts of his answer last referred to, could furnish any admission of an agreement not proved by writing, and thus serve to help the plaintiff, were the difficulty created by the statute of Frauds, it is to no purpose to weigh their precise import, because the plaintiff has not made those statements in the answer evidence by reading them. It is only necessary to consider the transfer in connexion with such parts of the answer as refer to them under the saving words," except as aforesaid," with a view to consider what the defendant can be properly said to have denied on his oath, and what the plaintiff is consequently under the necessity of proving by such evidence as the practice in equity requires. Having read over these passages repeatedly, and with attention, I cannot satisfy myself that we

can justly understand the defendant as saying anything more in his account of the bargain, as given in his answer from the beginning to the ninth folio, than that he bought from Mr. *Parker* the premises which he occupied, namely, the house and cleared land of which he was in possession, hoping to acquire, by such purchase and subsequent extension of his improvements, an interest in a further part of the one hundred and thirty-four acres, or in the whole of it, through *Duncan's* deed to *Parker*, of which he took an assignment; and when he states in the fifth folio, that he cleared fifteen or twenty acres more, and fenced the whole clearing of thirty-five acres, and built thereon a tavern and out-houses, and directly after states that *Robert R. Bown* came and offered him $1000 for the *premises* aforesaid. I think he means for the premises which he had so described, and which he had reduced to possession, that is, the tavern and cleared land which he could deliver over, and not the unimproved remainder of the one hundred and thirty four acres, which he had merely hoped to add to his possession in proportion as he could clear and improve it; but which unimproved remainder of the tract (as *Burwell* had surveyed it) he does seem to have been quite willing that *Bown* should have the same claim to that he had, that is the claim of making whatever he could of it, under the writings which he was transferring to him. Thus stands the case upon the bill and answer, in regard to the plaintiff's first allegation as to the extent of the interest and property sold to him, but in- dependently of any question on the Statute of Frauds, which it will be necessary hereafter to consider. In regard to the plaintiff's next allegation of what the defendant did actually assure by the deed of 14th September, 1843, there is no question, because the deed is truly set out, and speaks for itself. Then as to the plaintiff's statement, that "defendant represented him- self as having a leasehold or some valuable and transferable estate of *and in the one hundred and thirty-four acres described in the bill, and as being entitled to the possession, and being in fact in possession thereof*," the plaintiff has certainly not read from the answer any admission of that charge and the answer (folios 10, 16 and 23,) negatives such representation, not perhaps in terms so precise as it might have done; though when the defendant in folio twenty-three swears that "*except as aforesaid*," he did not at any time represent himself as having any valuable or transferable, or other estate or interest of or in the tract of land, in the said bill described, (that is the whole of the one hundred and thirty-four acres,) either as being entitled to, or being in fact in the possession thereof; and when there is nothing in the answer acknowledging any such representation, or amounting to it, we cannot say that there is not such a denial of the representation alleged as throws upon the plaintiff the whole burthen of proving it. The statements in the bill, of the defendant having gone after the sale and put plaintiff's agent in possession of the tavern, giving it to him as possession of and for the whole one hundred and thirty-four acres, are clearly and explicitly denied; and as to the charge, which is indispensable to the case as one of fraud, viz., that the defendant well knew, when he made the agreement, that he had no interest in the one hundred and thirty-four acres, and that he neither had, nor was entitled to have, possession of more than thirty acres, he, the defendant, denies that he had ever represented himself to be so entitled, or in possession of the one hundred and thirty- four acres; it was not necessary for him to disclaim any knowledge of his want of interest or title to such possession, for the of relieving himself from a charge of positive misrepresentation; but so far as it might be necessary to relieve himself from the charge of fraudulent concealment of his knowledge of the non- existence of certain facts which he must have known the plaintiff to have believed in, and by which he must have supposed him to have been influenced in making the purchase, it would be material to the defendant to deny the guilty knowledge imputed to him, notwithstanding he had made no direct representation inconsistent with it. The answer does contain such a denial, for the defendant swears (folio 57) that except as he had before stated, he

did not know that he had not any valuable or assignable interest in the whole of the premises in the bill mentioned, or that he neither had in fact, nor was entitled to have, the possession thereof, nor any greater portion than thirty acres or thereabouts What he did know on the subject, is what the deeds disclosed, and what he has before stated as to the condition of the premises. Thus the case appears to stand upon the bill and answer.

Then we have to consider that the plaintiff grounds his claim to relief on an allegation that the defendant agreed to sell him " all his estate, right, title, interest and possession of and in the certain one hundred and thirty-four acres described by metes and bounds in the bill," and he produced the deed made upon the occasion of the sale, which instead of conveying "all the defendant's right," &c., to any particular one hundred and thirty-four acres of land, merely assigns and transfers all the defendant's right, title, claim, possession and demand of, in and to " a certain paper annexed to the deed," which is therein described as an

assignment or quit-claim from one McDonald to Bradley, and from Bradley to the defendant. Assigning all a man's right and interest in a certain tract of land, is a very distinct thing from assigning all his right and title to a certain paper which concerns that land, even supposing the land referred to in the one case, and in the other to be clearly and completely identical.

Besides, the deed from McDonald to Bradley did not assume to convey a title to any land, but only assigned to Bradley his right and claim in a certain sheriff's deed or assignment annexed. McDonald's deed was made on the 12th January, 1842; the sheriff's deed annexed, was made 29th March, 1838, and purported that upon a writ of fi. fa., in which one Barry was plaintiff against this defendant West and one Lodor, defendants, he, the sheriff, had seized as a chattel of Lodor's an unexpired term of twenty-one years, in certain lands specified in an assignment thereunto annexed, dated the 28th July, 1835, from Parker; which assignment one would expect to find was an assignment to Lodor, but it is in fact an assignment to this defendant West, the other debtor in the fi. fa.,who it appears did on the 8th February, 1837, assign to Lodor, by writing endorsed, all his interest in the instrument executed to him by Parker, and the sheriff by his deed assigns to McDonald, for £96, as being purchaser at the sale the residue of the term of twenty-one years assigned by Parker to defendant West;but first created by a deed of the Indian Duncan, made 20th December, 1831, granting a lease for twenty-one years to Parker .

Then, when we come to look at the deed by which Parker assigned to West, and which is the foundation up to that time of all this chain of title, we find it a deed by which Parker assigns to West, not any one hundred and thirty-four acres of land, but "all his improvements in a certain one hundred and thirty-four acres of land described by metes and bounds" in the deed, and which is the same as the plaintiff described in his bill. There seems to be some confusion in the matter, for this deed, instead of being what the sheriff's deed describes it, an assignment of a term of twenty- one years, is a conveyance to hold to West in fee; but in the habendum, as well as in the granting part, the conveyance is confined to the improvements and buildings only. I mean that the deed does not profess and assume to make a title to any thing else, but it does in the conclusion add, that the grantor thereby assigns to West, his heirs and assigns, "all right, title, and interest which he has or can pretend to, to and in the land above described, (that is the one hundred and thirty-four acres), substituting the said West in his full right to, and place in, the premises above described," and concluding thus, "turning and transferring from me to the said West, &c., the said lands and premises with all that has followed or may follow them." It can hardly fail to strike one here, how differently Parker,

from whom this defendant received his title, ventured to deal with the hundred and thirty-four acres generally, and with that part of it which he had cleared and occupied; the latter portion be takes upon himself to convey as people ordinarily convey an estate, but when he speaks of the lands above described, including the one hundred and thirty-four, he ventures only to "turn over his right to West," and puts him in "his place," with "all that may follow them." I mention this as tending to make very probable the defendant's statement, that he had made his agreement with the plaintiff with similar caution to that which had been used in selling out this non- descript title to himself. When Parker made this deed to West, he held a deed dated 10th March, 1834, made by the Indian Duncan to him, assigning

as Parker afterwards did his buildings and improvements made on the one hundred and thirty-four acres. And this deed is more remarkable, because Duncan covenants only that "he is the true owner of the improvements and buildings, according to the customs of the Indians by his own labour having made the same;" and he therefore takes upon himself to convey the buildings and improvements to Parker in fee, and to give this covenant that he had a right to sell them. But in the same spirit that Parker afterwards acted in assigning to West, he quits claim and surrenders up in addition, all the right and interest (whatever it might be) which he had to the whole described tract of one hundred and thirty- four acres; engaging that if ever the Indians should yield up the land to the King, whereby Parker might have an opportunity to purchase, he would do nothing to oppose his claim, and would not cause or advise any other Indian to make claim to it; but as far as he could, he would protect him in the peaceable possession of it. It does not appear from these papers from what quarter the sheriff could have taken his idea of a term of twenty- one years; but the document printed as exhibit K, explains it. That was a deed made 20th of December, 1831, by Duncan Parker, leasing for a

small annual rent, for twenty-one years, two hundred acres of land described by metes and bounds, which carry the limits on one side "to the farm or land occupied or possessed by the widow Tuttle"--(which is important as shewing that no one, claiming under this deed at least, could suppose he had a right to interfere with Mrs. Tuttle's possession.) In this deed Duncan covenants, that Parker shall enjoy all the premises demised during the term. Of course if the one hundred and thirty-four acres, as described, form part of the tract described in this lease then the deed to Parker, in 1830, from the same person, of all his

interest in the lands, would extinguish the term that was by this deed granted to him; but still as the sheriff did sell the residue of a term only, specifying its commencement and duration, and not all the interest which the debtor had in the land, and sold it under a writ against chattels, which can only operate upon a term, we cannot look upon this plaintiff as being entitled to more under the said assignment of the sheriff's deed than the deed could convey, and nothing more is in fact assigned by defendant's deed to the plaintiff, than the mere "deeds or writings" from McDonald to Bradley and Bradley to West. And admitting that we can by construction understand the assignment of those deeds to be an assignment of the estate and interest conveyed by them, still that interest is nothing but an unexpired term of twenty-one years, and not what the

plaintiff states it to be in his bill, an assignment of all the defendant's title, and interest in the one hundred and thirty-four acres of land; and if when the sheriff's deed is so precise as this is, selling only the residue of a specific limited term, we could extend the effect of the sale and conveyance so as to make it embrace all that the deed from Parker to West could cover, both as to estate and quantity of land, (which I think we could not do,) then we must see what the effect of that deed is; and we find, as I have- already stated, that all that it pretends to convey or assure absolutely is improvements or buildings, and that as to the rest, it merely gives over whatever claim Parker had.

The plaintiff does not complain that he was imposed upon by being drawn in to sign a deed fraudulently made by the defendant, to express something different from what was intended by him; nor does he pray for relief on the ground of mistake. It was the plaintiff who drew the deed which the defendant signed, and the deeds which are referred to in it were in his hands. If under such circumstances he could come for relief against the deed, on the ground of imposition or mistake, he does not come with any case of that kind; but he asks us to look upon him as having purchased one thing, when the deed drawn by himself, and which he

does not com- plain of as being executed under any circumstances of fraud or mistake, in regard to what it contained, shews that he purchased another thing. This then is a plain case of seeking to add to, or alter, a written instrument by parol evidence, not an agreement alleged to be subsequently made by parol, and modifying a prior written agreement; in which case such evidence might be received at least to rebut the plaintiff's equity, when he is praying specific performance; (a) Legal v. Millar, 2 Ves. 299; Pitcairn v. Ogbourne, 2 Ves. 375. but the plaintiff tells us, that the sale, when it was made, was not really the sale of such an interest as the deed imports, but of something more extensive. This is doubly objectionable: it puts forward a parol agreement for an interest in land which the Statute of Frauds requires to be in writing, and puts it forward to overrule the deed which was executed between the parties as the evidence of the transaction, thereby violating a principle of the common law. It is to no purpose to examine whether such a parol agreement has been proved by the witnesses, for such evidence could not legally be admitted. If there had been no deed or writing, then the only question would be, whether the defendant has by his answer admitted a parol agreement such as the plaintiff sets out, and submitted to abide by it, waiving any objection

under the Statute of Frauds. I think we cannot say upon reading the answer, that he has done so; and I take it to be clear that a case of this kind could not be helped by part performance, because it is a part performance in favour of the plaintiff, so far as taking possession goes; and as to the payment of the money by the plaintiff, it is only evidence that there has been an agreement to sell, which the deed itself imports; it is consistent with the deed, and furnishes no excuse for travelling out of it in order to set up by parol evidence a different contract. Otherwise, where a man had paid money upon a purchase of a lot of land, and taken a deed for it, he might, under the pretence of part performance, offer parol evidence, that he had bought two lots instead of one. Indeed I look upon the Statutes of Frauds as being out of the question here, strictly speaking, because there has been not only a writing, but a solemn deed executed in evidence of this transaction; and to that the parties are held, (a) Rich v. Jackson, 4 B.C.C. 514; Le Texier v. The Margrave of Anspach, 5 Ves. 334, 328; Lockwood v. Ewer, 2 Atk. 303; Meres v. Ansell, 3 Wills 275; Lord Irnham v. Child, I B. C. C. 92; Hare v. Sherwood, I Ves. 2 41; Frewen v. Relfe, 2 B.C.C. 219. so that the question is not whether there should not have been a writing, but whether when there has been a writing, it can be passed by and rendered of no avail to the defendant, by setting up a parol agreement different in its terms, as having been made before or at the time of the deed being executed; and this without any allegation of fraud or mistake in the wording of the deed. If there had been no writing between the parties, and the only difficulty had been that presented by the Statute of Frauds, we should then have had to keep in view

the distinction established by many decisions, between receiving parol evidence of a contract respecting an interest in land for the purpose of rebutting an equity, upon which a plaintiff is seeking to obtain a decree of specific performance, or is praying for any other interposition of a court of equity, in order to change the situations in which the parties would stand at law; and the receiving parol evidence as the foundation of a plaintiff's case, when he desires the active interposition of the court in his favour, to enforce the performance of an alleged agreement respecting lands, such as can only be proved by a writing, and of

which he has no written evidence. In the latter class of cases, the courts feel bound to acknowledge the obligation of the statute, because it applies directly and in terms; in the former they have felt themselves at liberty to say that the Statutes of Frauds does not direct that every agreement in writing respecting lands shall be enforced in equity, whether it be just or unjust; but only that no person shall be charged either at law or in equity upon any agreement, respecting lands, which is not in writing; and wherever there is parol evidence, which satisfies the court that the plaintiff is desiring to enforce an agreement against the honesty

of the case, they decline lending him their assistance, leaving him to prosecute his legal rights as he can. Here, I think, the plaintiff fails in the very foundation of his case, for he charges an agreement respecting lands, which he does not shew by legal evidence, and while it is shewn on the contrary by writing, that the agreement which was made was essentially different. It is not material to consider whether the charge in the bill of the plaintiff being induced to enter into the alleged agreement by a fraudulent misrepresentation, or concealment of facts, is supported by proof; because, if no such agreement, as the plaintiff alleges, can be legally held to have been entered into, it becomes idle to enquire about the inducements to do that which was not done. In point of fact, however, I do not see that there is satisfactory evidence of such misrepresentation or concealment as is alleged respecting the defendant's title to, and possession of, the one hundred and thirty acres. The bill does not charge that the defendant said he had seventy acres cleared, but only describes the tract as having in fact that proportion cleared; and as no such representation is in issue, the evidence of witnesses on that point signifies nothing; and besides, it is not proved how much of the land is cleared. Looking at all the evidence, if the case turned upon a proof of such a fraudulent misrepresentation or concealment as is alleged, I cannot say that I should feel satisfied with the proof of it, so as to feel warranted in making the fraud charged the ground of a decree. For such a purpose the evidence should be clear and conclusive; for fraud is not to be imputed to a man upon probabilities, or slight surmises, or upon a nice balancing of evidence.

There is a good deal in the accounts given by some of the witnesses, to throw suspicion on the defendant's conduct in this transaction. After reading the evidence, I am not satisfied that it was perfectly upright, and that he was open and candid, but it would not be enough to have doubts on that point; we should see some clear misrepresentation or some undoubted suppression of a material fact. Now here, as to the defendants representing that he had some valuable interest in the whole one hundred and thirty acres, there can be no reasonable doubt upon Bradley's evidence, nor indeed without it, that the elder Mr. Bown, who made the bargain, knew perfectly well what was the nature of the defendant's interest in these Indian lands, if it could be called an interest; there is nothing to fasten upon

the defendant a precise allegation that the whole one hundred and thirty acres was held by him under the same circumstances, and with the same strength of claim from actual occupancy, so that he could transfer as good a claim in every part of it as he could in the cleared land. Mr. Bown's evidence, and Mr. Walter Bown's evidence, prove nothing more on this point than what is very probable, that he spoke of his deeds as covering one hundred and thirty acres, and so they did. The deeds were in the hands of the agent, and open to the inspection of the plaintiff; they explained the nature of the case fully. Mr. Bown expressed him- self satisfied with them, and drew himself the deed, after reading them, which the defendant signed. I do not see what room there would be for the application of the doctrine of caveat emptor in any case, if the purchaser with such deeds as those before him, and declaring him- self satisfied with them, could complain afterwards, upon any thing that is here shewn by the plaintiff, of the interest not being such as he expected. In point of fact, for all that is proved, the legal interest is the

same in one part of the estate as in another; and so far as actual cultivation and occupancy was necessary to strengthen what was a mere claim to the indulgent consideration of the government, the plaintiff and his agent or his agent at least, must well have known that the one hundred and thirty acres were not all occupied and improved; they lived near the property, saw it often, had every opportunity of viewing it, and they had its exact boundaries expressed in writing. As to the alleged misrepresentation by the defendant, that he was entitled to the possession, and was in fact in possession of the whole one hundred and thirty acres, it certainly is not proved that he made any such statement; and if by possession he meant actual visible enjoyment and use of the land, it would have been absurd in him to have made such a statement, for the parties with whom he was contracting knew that the fact was otherwise. Indeed, in the argument, the equity of the plaintiff's case was rested rather upon an imputed fraudulent suppression of the fact, that another person or other persons were in possession of parts of the one hundred and thirty acres adversely to the defendant's claim, than upon any actual misrepresentation made on that point. But as weak a part as any of the plaintiff's case, and perhaps the weakest, is that we are not shewn, nor is it even stated by the plaintiff

in his bill, what other person was in possession of any definite portion of the one hundred and thirty-four acres, excluding him from that portion, nor the right or claim of such person to possession, nor whether he persisted in keeping the plaintiff out, nor whether he had the power to do so, nor whether the plaintiff had found that in consequence of such possession his claim to pre-emption in such portion of the land would not be recognized by the government, nor what disadvantage he had suffered or was likely to suffer by reason of the possession of any person. The plaintiff says he for the first time learned from Han- son, that

defendant had only been in possession of thirty acres; that he ascertained, afterwards, that that information was correct; but that is no positive and direct affirmation that any other person was in possession of any particular part of the land; and for all that is stated in the bill, and even for all that is proved, there may be in fact no other person in possession of any considerable portion of the land upon such a claim as the government would prefer to that which the defendant had held; or the plaintiff might, for all that he has stated or proved, find no one resolved to con- test the possession with him in any part of the one hundred and thirty acres, if he were to go forward and assert his right. Surely the plaintiff should have charged and proved not merely that the defendant had not been in possession of all the one hundred and thirty acres, but that some other person to his knowledge was in actual possession, or had a better title of a certain part, which he maintained to the prejudice of the plaintiff. And yet if the plaintiff had made out a prima facie case of misrepresentation by his bill and evidence, Mr. Burwell's evidence, it appears to me, must destroy it, unless we take upon ourselves to discredit him, or unless we treat his testimony as inadmissible; for he swears distinctly that before the bargain was concluded he made the plaintiff's agent fully aware of the very facts which he now complains of, (so far indeed as he can be properly said to complain of any specific grievance,) and that the agent admitted to him that the defendant had made him acquainted with it all before. Of course if his evidence is admitted and believed, it would make an end of the case upon the broad merits, and independently of all legal and technical objections. With regard to rejecting Mr. Burwell's account as incredible, I see nothing which would have justified the Vice-Chancellor in doing so. He knew perfectly well the nature of such matters as he was speaking of; he had been employed by both parties in the course of these transactions, and he is not shewn to be connected with either, or to have any interest whatever on either side. It would certainly be strange if a court were to rescind the contract between these parties on the ground of fraud, in the face of all his clear and direct testimony under oath, showing that no such ground existed. How could the court arbitrarily look upon him as unworthy of belief, merely because the agent denies his statement, when no attempt was made to impeach his character. If the story he tells were hard to be believed, from its extreme improbability, that would furnish a ground; but we can surely have no difficulty in thinking it possible that the plaintiff would, with a full knowledge of all that he now

complains of, make the bargain that he has made, when we find it proved that after all he is receiving an annual rent of £37 10s., for the tavern and thirty-five acres, of which he was put in possession, and for which (if he made good no claim to any more land) he will pay £265. A purchase that yields more than fourteen per cent. interest on the cost, certainly raises on the face of it no evidence of a fraud upon the purchaser. We can very readily believe that the plaintiff, or any one, would willingly consent to close the bargain on the understanding that he was to he clearly in the possession of the tavern and thirty-five acres of inclosed land, and to take his chance (as the very deeds placed before him clearly shewed he must do) of getting the rest of the one hundred and thirty-four acres; and it is remarkable, that while no witness gives any certain account of there being any more of the one hundred and thirty-four acres cleared and occupied than that which the defendant held, and which he delivered over into the plaintiff's possession, the defendant swears distinctly and positively that there is none. But it is contended that Mr. Burwell's evidence of his conversation with the plaintiff's agent, before the bargain was concluded, is not receivable. He was a witness for the defendant. The plaintiff relies on his evidence for the purpose of establishing that the defendant not been in possession of all the one hundred and thirty-four acres, and that some one else had been long occupying a part. What he did say on that point is not satisfactory, and could not prevail alone over the distinct denial in the answer, that there was any improvement beyond the defendant's thirty-five acres; but I do not see that the plaintiff could be allowed to use his evidence for establishing that fact, and at the same time object that he could not be a witness at all, because he had not been called to speak to anything that was put in issue by the pleadings, But surely this part of Mr. Burwell's evidence does bear distinctly upon the main point in issue, viz., the alleged fraudulent misrepresentation; for if it be true that the agent, before he completed the purchase, acknowledged that the defendant had informed him accurately of the condition of the property, what becomes of the fraudulent misrepresentation or concealment by which he charges he was imposed upon ? It is hardly worth while to go minutely into these questions, for the plaintiff's case is in my opinion so wholly unsustainable, and on several distinct grounds, that it is unimportant to dispose of every doubtful point. If the plaintiff could have proved by legal evi- dence, and had proved such a contract as he stated, and that the defendant had fraudulently misrepresented or concealed some specific facts; and if the true state of these facts had been stated in his bill, and proved by evidence; and if he had shewn that the fraud of which he complained was such in its effects that he could not have under his contract that which he was entitled to expect--still there would remain not merely the consideration, that for all that appeared he had made an exceedingly good bargain, and had got more than the worth of his money, but this more material consideration, that after he had discovered the true state of things according to his own admissions, so far from repudiating the con- tract on the ground of fraud, he has acted upon it, as if it were valid, has leased the property through his agent, and has received rent upon his lease, and at this moment uses and enjoys it as his own, not even shewing that he had before done what

he could to abandon it. We could not possibly hold that there is no consideration for the note which he has given, while he thus retains the possession of his purchase, and has done so for more than two years, receiving lent from a tenant, to whom he has made a lease since his knowledge of the alleged fraud. Upon this point I refer to the very strong case of Campbell v. Fleming, et al., (a) I AD. & Ell. 40. In that case the plaintiff had purchased some shares in a mining company, upon representations contained in printed advertisements, and which were grossly fraudulent, and the whole scheme was a deception; but after discovering the fraud he nevertheless disposed of some of the shares so as to realize a considerable sum of money. After he had done this, he discovered for the first time a new feature in the fraud, viz., that an outlay on the mines, which the vendors had stated to him amounted to £35,000, had not in fact amounted to

£5000. In consequence of this he brought an action to recover back his money, his counsel contending that as it was clear the transaction was a fraud abinitio, no contract could arise upon it; and that even admitting that he plaintiff could waive the fraud and adopt it as an existing contract, yet he was entitled to repudiate it on discovering a fraud of which he was before ignorant, and which he therefore could not be held to have waived. He was nonsuited at the trial, and the court all concurred in the propriety of the nonsuit. Littledale, J., said, no doubt there was at the first a gross fraud on the plaintiff, but after he had learned that an imposition had been practiced upon him, he ought to have made his claim; instead of doing so, he goes on dealing with the shares. Parke, J., says, " after the plaintiff knowing of the fraud, had elected to treat the transaction as a contract, he lost his right of rescinding it." The fact of the discovery of a new fraud was a strong one, which does not exist in this case; but the court were unanimous in holding, that even that could not overcome the fact of the plaintiff having acted on the contract as valid, after discovering that he had been imposed upon. ,Patterson, J., meets the whole case in very explicit terms, and I think what he says applies with irresistible force to this plaintiff: " No contract," he says, "can arise out of a fraud, and an action brought upon a supposed contract which is shewn to have arisen from fraud, may be resisted. In this case the

plaintiff has paid the money, and now demands it back, on the ground of the money having been paid on a void transaction; to entitle him to do so, he should at the time of discovering the fraud have elected to repudiate the whole transaction. Instead of doing so, he deals with that for which he now says he never legally contracted. Long after this, as he alleges, he discovers a new incident in the fraud. This can

only be considered as strengthening the evidence of the original fraud, and it cannot revive the right of repudiation which has been once waived." It is impossible that we could treat as a repudiation of the whole contract, the arrangement which the plaintiff alleges, but has not sufficiently proved, that he was in

treaty with the defendant's agent for converting the purchase into a transaction of a loan, which would have given the plaintiff

about ú35 a year for the interest of £112 10s., a proposition which the defendant swears was not made to him, and which according to what the plaintiff has shewn, was not professed to be grounded on any repudiation of the former contract as fraudulent. The evidence of the plaintiff having leased to one Leonard by the year, the tavern thirty-five acres, is given by Robert R. Bown himself, the plaintiff's witness and agent; and it is evidence that must, I think, be admissible under the pleadings upon that part in this case which charges that in consequence of the fraud practiced the plaintiff has no consideration for the note given by him. There were some points discussed in the argument connected with the evidence which I have not entered into, but I have carefully considered all the evidence. It is in some points inconsistent, and it is in general very inconclusive; the facts upon which it would be necessary that the court should be precisely informed, are not brought out; and in my opinion it is not in any one essential point so satisfactory upon the merits as to have warrant- ed a decree in the plaintiff's favour, if there had been no legal difficulties in the way occasioned by the rules of evidence. The principles which govern the administration of equity in

cases of fraud, were correctly and forcibly stated by Mr. Blake on the part of the plaintiff, and were not contended against by the defendant. The question turns, as is commonly the case, upon their application to the facts. The position cannot be denied, that a person inveigled into a contract by a fraudulent misrepresentation is entitled to have it rescinded, and that although a vendor may not commit himself by any positive representation, yet his suppression of concealment of material facts within his

knowledge is equally a fraud, and will equally invalidate the contract; but except in very plain cases, questions may arise depending upon the subject matter of the contract, the spirit in which the representation was made, as for instance, whether the seller was merely in general terms commending his article, as dealers commonly do in the course of their trade; whether the defect which has been discovered, was latent or patent, and if patent, whether the buyer had fair opportunity to inspect for himself, so that he could be treated as purchasing upon his own judgment; or whether he so clearly relied upon the statements of the seller, as to have acted wholly on that confidence, and so to have saved himself from the application of the maxim "caveat emptor." In the case before us, besides discussing these points, it was thought essential to the plaintiff's case to urge, that if the defendant were found by the evidence to have made assertions to

the plaintiff respecting the extent of his possession, such assertions though made after the contract was completed might supply evidence of deception before the contract, by affording a reasonable presumption of what the defendant had undertaken to convey; and further, that conversations preliminary to the contract might furnish good evidence of what the sale made afterwards was intended to transfer; and that a willful suppression of material facts hearing upon the value of the estate, in the course of such preliminary negotiations, would invalidate the contract, not on the ground of fraud intrinsic in the contract, but

fraud extrinsic in the inducements which led to the contract. Admitting that the authorities cited on these points would justify us in carrying these positions to the full extent contended for, and even in the case of a contract carried into execution by a deed executed between the parties under all the circumstances found here, still I consider that this consequence only would follow, that the plaintiff was in a situation to shew a good case for equitable relief, by stating the contract truly as it stands in the deed; that is, that he had bought from the defendant "the assignment or quit-clam from McDonald to Bradley, and from Bradley

to defendant ;" in other words, the paper title transferred under the sheriff's sale; (let that be what it might;) that he had been led to buy such right or claim by the defendant's assurance that he was in actual possession of the one

hundred and thirty-four acres; that the fact was, that at the time of such purchase made by him one----was in actual possession of a certain part, to wit,-----acres of the said one hundred and thirty-four acres, to the exclusion of the said defendant, and claiming adversely to him; and that although the defendant well knew that fact, yet he fraudulently concealed it from the plaintiff, and so induced him to make the purchase in ignorance of the truth. Instead of this, however, he stated the contract (which we can only take from the deed) untruly, by asserting that he agreed to buy from the defendant all his estate, right, interest, and possession of and in the land, &c. If the Vice-Chancellor had thought fit to direct an issue at law, in order to ascertain what the defendant actually did sell, I conceive that the deed, and that alone, could have been legally received as evidence upon that point; and the rule applies equally in equity, when the deed was executed deliberately, and was even drawn by the vendee or his agent, with the prior titles in his hand, shewing what interest it was that the vendor could pretend to convey; and when no fraud is charged in the wording or execution of the deed itself, a court of law would undoubtedly say:-- " We cannot hear verbal accounts from witnesses of what passed before the making of the deed, as to what one meant to buy or the other meant to sell; they may have had various intentions and various degrees of information as to their respective claims and expectations at different stages of the negotiations; but what they did at last settle down in, and what the one actually bought and the other sold, we can only learn from the deed; otherwise there would be no use or safety in written instruments." And it certainly is my impression that a plaintiff resting his case at law upon the assertion of such a contract, as the plaintiff has stated in the commencement of this bill, must on the production of the deed be nonsuited, for there can be no two things more distinct than selling all a man's right to or under a certain paper title regarding a term of twenty-one years in one hundred and thirty-four acres of land, and selling all a man's right, title, and possession the same land.

To be sure, the fact may be, that the vendor may have no other right than under the paper title referred to, and in that ease the transfer, as the deed states, would assign in effect all his right: but how that fact was we are not to conjecture or assume, and cannot learn it from parol evidence, in order to make the deed speak a wholly different language from what it does speak. I revert to this point in the case which I have before noticed, because it is in my opinion an objection lying at the foundation of this case, which could not be got over, and which, as well as several of the other difficulties in the plaintiff's way, applies as much against the making a decree on the principle of compensation, as against a rescinding of the contract.

In my opinion the judgment of his honour the Vice- Chancellor should be affirmed, and the appeal dismissed with costs.

The other members of the court concurring.

Judgment below affirmed, and the appeal dismissed with costs.