13FED.CAS.—30
13FED.CAS.—31
Case No. 7,266
13FED.CAS.—32

# JENKINS v. ELDREDGE et al.

{3 Story, 181.}[1]

Circuit Court, D. Massachusetts. May Term, 1844.

CONVEYANCE—PAROL TRUST—STATUTE OF FRAUDS—NOTICE—EVIDENCE IN EQUITY—SURPRISE—JOINT PURCHASE—FRAUD OF AGENT—INNOCENT PURCHASER—INTENTIONAL IGNORANCE.

1. The plaintiff (J.) purchased at auction from D. a certain lot of land, and on the failure of J. to comply with the terms of the sale, D. entered and took possession, but on application by J. was enjoined in equity from making a sale thereof. A new arrangement was then made, by which D. placed a warranty deed in the hands of P in escrow, agreeing that it should be surrendered to J. on a certain day, provided that by such day J. had complied with certain terms of payment, J. making a deposit of $1000 as forfeit money. J. then proceeded to build on the said land, but failing in his means, was unable to comply with his agreement. D. then threatened to sell the premises, and J. filed a second bill in equity to restrain the sale, and an injunction was granted, and an interlocutory decree was passed, that if J. should perform his agreement before a certain time, the injunction should stand continued, but otherwise should be dismissed. J. failed to perform his agreement, and the bill was accordingly dismissed. In the intermediate time, however, between the decree and the dismissal of the bill, J. having expended large sums on the building and exhausted his resources, applied to E. (the defendant) for his aid to raise money to complete the building and discharge the debts. And it was arranged between them, that an absolute conveyance of the premises should be made by D. to E. which was done, and on the same day J. executed a release of all interest to E. to complete the title, excluding in terms "all claims and demands made by, through, or on account of J., and also excepting any claim or demands arising out of any contract made by or with J.," and admitting that he (J.) had no legal or equitable right in the same. E. then assumed the ostensible ownership of the property, and J. was employed in superintending the erection of the building, and procured securities to assist in raising funds, and procured work to be done on his own account. E. afterwards sold the premises to K., one of the defendants. In this state of things, the present bill was brought by J. against E. and K. setting forth, that at the time of making the absolute conveyance to E., although no paper to such effect was executed, yet that it was understood between E. and J. that the premises were to be held by E. in trust for the benefit of j., and that the conveyance was made absolute solely for the purpose of freeing the premises from all claims by or through J., and that E. was only to receive a remuneration for any services which he might perform, and indemnification for his expenses, and then to reconvey the estate to J., and also that K. was not a bona fide purchaser for a valuable consideration, without notice. It was *held* that the circumstances showed no sufficient motive on the part of J. to induce him to make an absolute and unrestricted conveyance, but that they were perfectly consistent with the parol trust, as set up by the bill.

{Cited in Bentley v. Phelps, Case No. 1,332; Davis v. Tileston, 6 How. (47 U. S.) 120; Alexander v. Rodriguez, Case No. 172; Gaines v. Lizardi, Id. 5,174.}

{Cited in Hinckley v. Hinckley, 79 Me. 323, 9 Atl. 898.}

2. As the decree in the equity suit was not a dismissal upon the merits, it did not constitute an absolute bar to a future suit.

{Cited in Allen v. Blunt Case No. 217.}

3. The release by J., although absolute in its terms, was indispensable to guard the property against J.'s creditors, so as to induce capitalists to advance funds, and therefore was not inconsistent with a parol trust and the evidence was irreconcilable with any other supposition, than that E. was acting throughout as the agent of J.

4. If E., knowing that J. only intended that he should act as agent did, nevertheless, intend to act for his own benefit solely, the concealment of such a design from J. was a fraud in equity.

{Cited in Squires' Appeal, 70 Pa. St. 267; McAnnulty v. McAnnulty, 120 Ill. 34, 11 N. E. 397.}

5. This was a case of parol trust resulting from agency, and resting upon honorary obligations, and as such a court of equity would enforce it

{Cited in Tufts v. Tufts, Case No. 14,233.}

{Cited in Newton v. Taylor, 32 Ohio, 413; Newton v. Fay, 10 Allen, 510.}

6. It is not within the statute of frauds, because, 1st. It is a resulting trust as to the plaintiff, and a trust as to Eldredge merely for his liabilities, compensation, and expenditures. 2d. It is a case of agency. 3d. It is a case of constructive fraud. 4. It is a case of part-performance.

{Distinguished in Tobey v. Leonard, Case No. 14,067. Cited in Manning v. Hayden, Id. 9,043.}

{Cited in Rose v. Hayden, 35 Kan. 110, 10 Pac. 554; McGowan v. McGowan, 14 Gray, 121.}

7. The circumstances did not show that K. was a bona fide purchaser without notice, since even if he had no notice of the actual state of the title and the claim of the plaintiff, he had sufficient notice of the claim and controversy to be put upon inquiry, which was sufficient notice in equity.

[Cited in Perkins v. Currier, Case No. 10,985.]

8. Although the plaintiff may never have been able to comply with his agreement with the defendant, by discharging the incumbrances and remunerating the defendant, yet that furnishes no ground upon which a court of equity can say that the plaintiff's rights are extinguished, though it might furnish a ground to foreclose his rights and order a sale, on application by the defendant

[Cited in Mclntire v. Bowden, 61 Me. 158.]

9. In the courts of equity in this country, evidence as to confessions and statements by the defendant, not charged in the bill, are equally-admissible in equity as at law,—with this qualification, that if one party keep back evidence, which the other might explain, and thereby take Mm by surprise, the court will allow the party to be affected by it to controvert it.

[Cited in Nesmith v. Calvert, Case No. 10,123; Bentley v. Phelps, Case No. 1,331; Conrad v. Griffey, 16 How. (57 U. S.) 47.]

[Cited in Campbell v. Dearborn, 109 Mass. 139.]

10. In cases of a joint purchase, where each purchaser is to have an interest in the purchase in proportion to his advances, parol evidence is admissible to establish the trust, as well as to rebut, control or vary it.

[Cited in Wyman v. Babcock, Case No. 18,113; Babcock v. Wyman, 19 How. (60 U. S.) 299.]

[Cited in Glass v. Hulbert, 102 Mass. 37.]

11. It is a fraud for an agent to avail himself of his confidential relation to drive a bargain, or to create an interest adverse to that of his principal in the transaction, and that fraud creates a trust, even when the agency must be proved only by parol.

[Cited in Boswell v. Cunningham, 32 Fla. 277, 13 South. 357; Fideler v. Norton (Dak.) 30 N. W. 132.]

12. The statute of frauds is never allowed as a protection to frauds, or as a means of seducing the unwary into false confidence to their injury.

[Cited in Cutler v. Babcock, 81 Wis. 206. 51 N. W. 420. Cited in brief in Vallette v. Tedens, 122 Ill. 609, 14 N. E. 53.]

13. The doctrine that the statute of frauds applies to cases of agreements in consideration of marriage, where reliance is placed solely on the honor, word or promise of the party, is restricted to cases of marriage, and does not apply to cases where there has been a part-performance on the other side.

[Cited in Green v. Green, 34 Kan. 744, 10 Pac. 159; Houghton v. Houghton, 14 Ind. 507.]

14. Quere. "Whether the doctrine as to cases of marriage is well-founded.

15. Where the evidence showed that the defendant agreed to reduce the trust to writing, or to keep a private memorandum thereof, it was *held,* that this took it out of the statute, and showed, that it was not a mere subsequent promise, but a part of the original agreement.

[Cited in Slingerland v. Slingerland, 39 Minn. 201, 39 N. W. 148]

16. The doctrine of Taylor v. Luther [Case No. 13,796] affirmed.

17. There is no substantial difference in respect to trusts between the statute of frauds of Massachusetts under the act of 1783, or the Revised Statutes of 1832, and the statute of 29 Car. II.

18. The present bill was brought during the pendency of a suit in the supreme court of the state against both the parties to the present bill, to enforce a claim in respect to these premises; and it was *held,* that as the parties, the objects, and the equities were different, and the relief prayed for proceeded upon different grounds and involved a different decree, that it constituted no bar to the present suit.
19. No purchaser is at liberty to remain intentionally ignorant of facts relating to his purchase within his reach, and then claim protection as an innocent purchaser.

Bill in equity. The bill was as follows: Joseph Jenkins, of New Haven, in the county of New Haven, and state of Connecticut, and a citizen of the state of Connecticut, builder, brings this bill against Charles H. Eldredge, David Kimball, Timothy Gilbert, John L. Munroe, James B. Lord, E. S. Goodnow, Henry Rice, all of Boston, in the county of Suffolk and commonwealth of Massachusetts, citizens of said commonwealth of Massachusetts, gentlemen, the Boston Museum and Gallery of Fine Arts, a corporation established by the law of said commonwealth of Massachusetts, and all the members of which are citizens of said commonwealth of Massachusetts, resident at said Boston.

And thereupon your orator complains and says, that sometime prior to the seventeenth day of April, A. D. 1839, it came to his knowledge, that a certain valuable tract of land was for sale in Boston aforesaid, and hereinafter described, belonging to Elizabeth Deblois; whereupon your orator, having had much experience as a builder, and in forming plans for the improvement of grounds in the said city, so as to render them productive of the highest rents and profits, and being well acquainted, in the course of his profession, with the state of public buildings in the city, and the general wants of the citizens in that respect, bestowed great pains, attention, skill and thought in considering how said property might be rendered most valuable to the purchaser, and to that end, with the like skill and pains, and after many weeks of deliberation, planned and contrived a large and costly building, suited to the wants of the city for a public museum, halls, and other apartments, with a basement consisting of shops and ware-rooms; and spent much time and pains in estimating the probable cost thereof, and providing lessees and occupants of the same; thus creating a scheme, and settling all the details of an enterprise in building, calculated to give to the proprietor a probable net gain of more than fifty thousand dollars; your orator intending to purchase said land for himself, and to erect such building, and to become the proprietor of said property. Pursuant to which design, your orator, on or about the seventeenth day of April, A. D. 1839, purchased of said Deblois said certain parcel

of land situated in Boston; and on the seventh day of May, A. D. 1839, in pursuance and execution of a certain indenture of that date made by him and said Elizabeth touching the purchase of said land and the payment of the consideration therefor, he paid to her the sum of one thousand dollars, being a part of said consideration, and entered into an agreement to pay the residue thereof in the manner and at the times in said indenture specified. That, by virtue of the agreements in said indenture, he entered upon, and took possession of said parcel of land, and proceeded to excavate the same, and afterwards to the erection of a large and costly edifice, and expended in and about said excavation and erection the sum of fifteen thousand dollars of his own proper money, in addition to the sum of one thousand dollars, paid as aforesaid. And your orator further shows, that, after expending said sum of fifteen thousand dollars, the said edifice was not completed, but required still more and larger sums of money to be expended in and upon the same, and your orator had expended all the moneys under his control in and upon the same, and by means of its unfinished condition, was unable to borrow money on the security thereof, and so was unable to comply literally with the terms of said indenture, and, therefore, the said Elizabeth Deblois threatened to sell at auction the said parcel of land and the buildings thereon, which, by the terms of said indenture, were to become the property of said Elizabeth, on failure of your orator to comply with said terms, to the great loss and injury of your orator; and thereupon your orator filed his bill in the supreme judicial court of the commonwealth of Massachusetts, praying for an injunction upon said Elizabeth to restrain her from proceeding in said sale and for relief, and said injunction was granted, and said Elizabeth filed her answer to said bill, and afterwards it was decreed by said supreme judicial court, that if your orator should pay or tender to said Elizabeth on or before the twentieth day of July, A. D. 1840, the sum due under said indenture, and otherwise perform the same, the said injunction should be continued until the hearing, unless said Elizabeth should accept said sum, and all costs, and perform said contract on her part, in which case, the bill was to be dismissed, and if the complainant should omit to make such payment or tender, the said bill should be dismissed with costs. And your orator further shows, that by reason of the payment of said sum of one thousand dollars and of the moneys expended by him in excavating and building upon said land, he was, at the time of the recording of said decree, possessed of and entitled to a large and valuable interest in said land, and entitled to a conveyance thereof in fee simple from said Elizabeth, on his complying with the terms of said decree and of said indenture, and that his right to such conveyance was of great value, to wit, of twenty thousand dollars and upwards. And your orator further shows, that after the passing of said decree, he was greatly desirous to comply therewith, but being in embarrassed circumstances, and unable of his own means and resources to make the tender and payment decreed to be made to said Elizabeth as aforesaid, and to carry on said building to its completion, without other

aid, he communicated his situation fully to said Eldredge, who was connected by marriage with your orator's family, and exhibited and explained to him at large the enterprise in which he was engaged, and the great gains which your orator would derive, if he could raise the means to complete the same, and requested the aid and assistance of said Eldredge to furnish your orator with the requisite moneys for that purpose. And after consultation together, said Eldredge consented to render to your orator the aid and assistance he desired. But as said Eldredge had not the capital for that purpose, and would need the legal title to said property, both to enable him to borrow money and to secure him for his liabilities as the indorser or surety of your orator, and for the compensation to be paid to him for all his trouble in the business, your orator formally, distinctly, and solemnly, agreed with said Eldredge that he, said Eldredge, should receive a conveyance of said land, with the buildings thereon, from said Elizabeth, and should raise money thereon by mortgage, in order to furnish your orator with the means to proceed in the erection and completion of said edifice, and on completion thereof should execute and deliver to your orator a deed of conveyance thereof, your orator agreeing to reimburse to said Eldredge, or save him, said Eldredge, his heirs, executors and administrators harmless, and indemnified from and against all payments, which he or they might be compelled to make, by reason of any such mortgage, and to pay to him or them a suitable compensation for his services in the premises, such indemnity, reimbursement and payment to be secured to said Eldredge by a lien upon said premises.

And the said Eldredge further agreed, that he would make a declaration in writing, specifying the terms, trusts and conditions on which the said property should be held by him, and place the same among his papers, to serve for the disclosure and manifestation of said trusts, terms, and conditions, in the event of his decease, or other like necessity; and in pursuance of said agreement with said Eldredge, your orator, procured to be furnished to him by a personal friend and relation of your orator certain securities, upon and by means of which the said Eldredge borrowed the sum of about six thousand dollars, to be paid by him to said Elizabeth, in

part satisfaction of the consideration money of said purchase, pursuant to the decree aforesaid, and which sum the said Eldredge afterwards repaid, and relieved the securities aforesaid, and returned the same to James W. Jenkins Jr., the person who furnished him therewith, out of moneys received by him upon a mortgage or mortgages of said land; and your orator, by mutual agreement with said Eldredge and said Elizabeth, and for the sole purpose of making his title under her appear to be simple and unqualified, and not with any idea of parting with or surrendering his beneficial interests in said land or purchase, but the more effectually to secure them, permitted the time specified for fulfilment of said decree to pass by, without compliance with its terms, and said Elizabeth, at the special instance and request of your orator, executed and delivered to said Eldredge a deed of said land dated August the 24th, A. D. 1840, a copy whereof is herewith exhibited. And pursuant to the design above mentioned, to place in the said Eldredge such a title as would be above all suspicion by those who were to be applied to to loan money on the security of the said estate, and to enable the said Eldredge to borrow money thereon freely, and thus procure the means to complete the said building, your orator conveyed his interest in said land to said Eldredge, by his deed executed and delivered on the same day, and in which, pursuant to said agreement, he admitted, that he had forfeited all claim against said Elizabeth, a copy of which deed is herewith exhibited. That before the said conveyance was made by the said Elizabeth, Richards, Munn & Co. had a lien on the equitable estate of the plaintiff in the said building; and that the plaintiff and the said Eldredge agreed with the said Richards, Munn & Co. that the latter should release their lien, and that the plaintiff and the said Eldredge should assign to the said Richards, Munn & Co. a claim against the city of Boston, for taking a strip of the said land to widen Bromfield street, amounting to six hundred dollars, or thereabouts; and the plaintiff shows, that this agreement was made after the time for the performance by your orator of the terms of his bargain with the said Elizabeth, fixed and limited by the said decree, had expired, and when, as the said Eldredge now falsely pretends, all the equitable title of your orator, and, as a necessary consequence, all the equitable title of the said Richards,' Munn & Co. claiming under your orator, had expired, and become null, and void, and of no effect. And your orator further shows, that, afterwards, the said Eldredge, at the request of the said Munn, made a deed of the said strip of land to the said city, and the said Munn received the consideration therefor, amounting to the said sum of six hundred dollars. And your orator further shows, that on the 10th September, 1839, he made a mortgage of his said equitable interest to the said Kimball, to secure the sum of one thousand dollars, and the said Eldredge, at the request of your orator, after the expiration of the time limited by the said decree, as aforesaid, for performance by your orator, gave the said Kimball a declaration in writing, to the effect, that he, the said Eldredge, would repay the said sum to the said Kimball, out of the proceeds or rents of the said estate, and your orator prays,

that the declaration, so given, may be produced, and disclosed by the said Kimball, or the said Eldredge, and he charges these facts as evidence, that all your orator's equitable interest in the said premises did not expire and run out, as the said Eldredge now falsely pretends, before the said Eldredge agreed to take the said estate, and when your orator failed to perform the said decree.

And your orator further shows, that at the time when said arrangement was made with said Eldredge, your orator was indebted to sundry persons in divers sums of money for materials furnished in and about the construction of said building, which he was wholly unable to pay, except from out of said land and building, and that one purpose of making said arrangement was the procurement of means of ultimately paying said debts; and that the same was made by consent of said creditors, who made a request in writing to said Elizabeth, that she would make the said conveyance to the said Eldredge; and that the said Eldredge was a party to this arrangement, and well knew and agreed, that this was one of the purposes, for which he was to receive the conveyance. And your orator further alleges, that most of the debts so intended to be provided for, and which your orator would have provided for, if he had received the conveyance to him, which the said Eldredge was bound to make as aforesaid, and sufficient time was given for said purpose, remain unpaid, and are now due, and owing from your orator. And your orator further shows, that, by reason of the premises, at and before the time of his executing and delivering his deed to said Eldredge, he was possessed of and entitled to a large and valuable interest in said land, and that no consideration was paid to him by said Eldredge for the conveyance thereof, and that, by virtue of the premises, a trust was created, and resulted on the part of said Eldredge to hold said land for the use and benefit of your orator. And your orator further shows, that at or after the execution and delivery of the deeds aforesaid, the said Eldredge made a mortgage to said Elizabeth to secure the sum of about fifteen thousand dollars, being a part of the consideration of said purchase made by your orator from said Elizabeth, and borrowed of divers persons other large sums of money, amounting in all to the sum of twenty-five thousand dollars or thereabouts, and gave his promissory notes therefor, payment whereof was secured

by mortgages on said land, a portion of which moneys so obtained, to wit, about the sum of six thousand dollars, being a part of the principal due as the price of said purchase, and the interest due on the whole price, was paid by said Eldredge as aforesaid on account thereof, and the residue or a portion thereof was given to your orator, to be expended in the completion of said building, and was faithfully so expended and appropriated; but whether the whole of the moneys, so procured by said Eldredge, on mortgages upon said land, were paid to your orator, or so expended, your orator does not know, and prays, that said Eldredge may discover, and set forth how the same have been expended and appropriated. And your orator further shows, that the whole, or nearly the whole, considerations for the conveyance made by said Elizabeth to said Eldredge as aforesaid, were the purchase of said land made by your orator, as aforesaid, and the agreement between said Elizabeth and your orator, connected therewith; said sum of six thousand dollars furnished by your orator to said Eldredge to be paid to said Elizabeth, as aforesaid; the erections and improvements theretofore made upon said land by your orator by his own proper labor and at his own proper expense and cost, whereby the value of said land was greatly enhanced; and the mortgage made by said Eldredge to said Elizabeth for the sum of about fifteen thousand dollars as aforesaid. And that no part, or a very small part of, the consideration for said conveyance from said Elizabeth to said Eldredge, was the personal liability or responsibility of said Eldredge for said sum of fifteen thousand dollars, or the note or notes accompanying said mortgage, said Eldredge being a man of very small or no property, and said Elizabeth placing little or no reliance for the payment of said sum upon the personal obligation of said Eldredge. And your orator further shows, that by reason of the premises, because and inasmuch as the consideration for said conveyance from said Deblois to said Eldredge was paid by your orator, and not by said Eldredge, a trust was created and resulted on the part of said Eldredge to hold said land for the use and benefit of your orator.

And your orator further shows, that said Eldredge claims, or has claimed, of your orator payment of the sum of about seven thousand one hundred and fifty-eight dollars, for his services or commissions in the premises, and for commissions and brokerage, which he alleges he has paid in raising the moneys aforesaid, and for interest on a small portion thereof, and for which sum he claims to have a lien upon said land and building. And your orator further shows, that after he had purchased of said Elizabeth the said parcel of land, and before the conveyance thereof to said Eldredge, as aforesaid, your orator had agreed with one Nathaniel Francis to purchase of him a small parcel of land adjoining the premises first above described, for the sum of two hundred dollars, and had proceeded to erect said building, in part thereon, and after the premises were conveyed to said Eldredge, said Francis refused to fulfil said agreement, and demanded the sum of one thousand dollars as the price of said small piece of land, and your orator refused to com-

ply with said demand, and insisted upon the performance of said agreement, and your orator informed said Eldredge of said agreement, and required of him to demand and enforce performance of the same, and the said Eldredge, disregarding the requests and protestation of your orator in the premises, agreed to, and actually did, pay to said Francis the sum of one thousand dollars, as the price or the consideration of the conveyance by said Francis, out of the moneys procured by him on mortgage of said land and building, and received such conveyance from said Francis, and afterwards conveyed the premises purchased of said Francis, in mortgage for the purposes aforesaid.

And your orator further shows, that the said edifice is now completed and is of great value, to wit, the value of one hundred thousand dollars, and of much greater value than all the sums, for which the same is mortgaged, and that by virtue of the premises, your orator was entitled to a conveyance thereof from said Eldredge, with condition, that your orator should reimburse to said Eldredge, or save him and his representatives harmless and indemnified from payment of the several sums of money, for which the same had been mortgaged by him, and appropriated to the payment of the original consideration money of said conveyance from said Elizabeth, and in and about the erection and completion of said edifice. And your orator further shows, that since the said edifice was completed, divers halls and rooms therein have been leased by your orator to various persons, and indentures, or agreements of lease, as to other apartments, have been executed by other persons and the said Eldredge, he acting therein, as your orator contends, as the agent and trustee of your orator, and that divers large sums of money have been received by said Eldredge as and for rents reserved under such agreements and indentures, which said sums of money ought to have been applied to the payment of the moneys borrowed on mortgage of said lands, as aforesaid, or to the payment of the sums of money, due from your orator to him, as aforesaid.

And your orator further shows, that by reason of the premises a trust has been created, and has resulted for the benefit of your orator to have the said parcels of land conveyed to him, upon condition of indemnifying said Eldredge for any payment he might make of the several sums of money, for which the same have been mortgaged as aforesaid, and that your orator was entitled

to a reasonable notice of the times of payment of said several sums of money, and to an account from said Eldredge of the sums of money borrowed by him on mortgage of the premises, and expended in and about the purchase of said land and the erection of said edifice, and of the rents received by him, and to a reasonable time to obtain means to meet said payments, and that your orator is indebted to said Eldredge in the various sums of money advanced and loaned by him to your orator, and that the said Eldredge has a lien upon said lands to the amount of such sums of money, and also for the amount of a reasonable and liberal compensation to said Eldredge for his care, labor, and services, in the premises, for the benefit of your orator, and is a mortgagee in equity for those amounts, but has no further interest or estate in said property. And your orator further shows, that said Eldredge cannot, nor ought in equity to be permitted to, set up any claim or title to said land and building against your orator, contrary to the plain intent and agreement of the parties aforesaid to the transactions aforesaid, and your orator at all times relied with implicit confidence upon the supposed good conscience and desire to do equity of said Eldredge, who was confidentially employed by your orator as aforesaid for the interest and benefit of your orator, and also with the understanding that said Eldredge should be reasonably and liberally compensated for his services in the premises, but with no suspicion on the part of your orator, and no intimation on the part of said Eldredge, that said land and building would be applied and appropriated by the said Eldredge to his own proper use and benefit, to the prejudice and exclusion of your orator. And your orator further shows, that, during the whole period of the erection of said building, he had the entire personal charge and control of the work done thereupon, and expended his own time, skill and labor, and a large amount of his own money thereupon, and said Eldredge exercised no charge or control of said work, nor ever pretended that he had the right so to do; but it was mutually understood between your orator and said Eldredge, throughout the whole process of erecting and finishing said building, that your orator was erecting and finishing the same for his own exclusive benefit and not at all for the benefit of said Eldredge, except to enable him to raise money thereupon, perfect the security for money already raised, and indemnify and pay said Eldredge as aforesaid. And your orator well hoped, that after completing said building, and upon paying or securing to be paid to said Eldredge, all the moneys, by him advanced towards the completion of said building, and on indemnifying him against all his liabilities touching the same, and paying or securing to him a reasonable compensation for his care and trouble in the premises, he would have received from said Eldredge a clear title to said property, and have been suffered to enjoy the fruits of his own advances of money and materials, and of his; own great labor, skill, and anxious care and attention in planning said enterprise and conducting the same to a successful conclusion. But your orator further avers, that he has now good reason to believe, and therefore he so distinctly charges the fact to be, that said

Eldredge, upon your orator's first developing to him the great gains, which your orator would probably derive from said enterprise, and showing its practicability, conceived the design of defrauding your orator out of the same, and of abusing the confidence which might be reposed in said Eldredge; and to that end said Eldredge required, that the legal title to said premises should be conveyed to himself, without any declaration of trust in writing to be delivered to your orator, and induced your orator to confide all his rights in the premises in the manner aforesaid, to the honor and conscience of said Eldredge; the said Eldredge solemnly pledging his sacred honor to your orator, that he would faithfully execute the agreement aforesaid, and convey said premises to your orator, upon the terms and conditions hereinbefore set forth. But your orator charges, that at the time of making said agreement, said Eldredge did not intend to perform the same; but that he artfully and fraudulently induced your orator to enter into said agreement, and to execute the same, with intent the more certainly and successfully to defraud and deprive your orator of the fruits of his labor aforesaid, and to appropriate the same to himself; and to that end suffered your orator to go on with the erection of said building as before, under the belief that he was erecting it for himself alone. And your orator further avers, that on this ground also, a trust was created and resulted in equity, on the part of said Eldredge, to hold said premises for the use and benefit of your orator, and your orator has repeatedly requested said Eldredge to perform said trust, by executing and delivering to your orator a deed of the premises, in the manner and upon the terms aforesaid; or by making a written declaration of said trust; which the said Eldredge originally promised but subsequently refused to do.

And your orator further avers, that before he commenced the erection of said building, he explained the plan thereof to said Kimball, and entered into a written agreement with him, to the effect, among other things, that said Kimball should take a lease from your orator of the halls in said building, for the term of ten years, at the rent of five thousand dollars for a year, to the best of your orator's recollection; which agreement, as your orator avers, is in the hands of said Eldredge, and which he prays, that said Eldredge may be required to discover and produce. And that some dispute having arisen between your orator and said Kimball, in

regard to said agreement and lease, after the conveyance aforesaid to said Eldredge, the matter was referred to referees, mutually chosen by your orator and said Kimball, by an agreement, to which said Eldredge was only nominally a party, but your orator avers, that in all things relating to the matter herein articulated and set forth, and at the hearing before said referees, your orator attended and acted as the real party in interest, and as the true owner of said property, the said Eldredge being present and assenting thereto. And your orator further avers, that the said Kimball, pursuant to the original agreement aforesaid, and to the award of said referees, became, and now is in equity the tenant of said halls under your orator for a very large annual rent, namely, the sum of forty-six hundred and fifty dollars, or some other large sum, which rent ought to be paid to your orator.

And your orator further shows, that during the month of August, in the year 1841, and after the said building was completed, your orator, pursuant to his equitable title to the said property, called upon the said Eldredge for an account of all moneys raised, and furnished by him for completing the said building, and of his charges for his personal services in the premises, and thereupon the said Eldredge, not directly denying at that time your orator's right to such an account, prepared one and showed it to your orator, which your orator requires the said Eldredge to produce and discover, and he claimed to insert therein, among other charges, the unjust and excessive charge of five thousand dollars for his personal services, which he afterwards altered to thirty-five hundred dollars, and also the unjust and unfounded charge of thirty-six hundred and fifty-eight dollars, or thereabouts, for brokerage, and some small sum of interest, and pursuant to the fraudulent intent and design of the said Eldredge above mentioned, he absolutely refused to render any such or any account to your orator, or to suffer him to take into his own possession the paper, which he had prepared, containing the said account, but only suffered your orator to look at the same, and soon afterwards, he informed your orator, that if the whole claim was not paid on or before a certain day in September then next, he would, and, in pursuance of his fraudulent intentions aforesaid, he then did advertise the said premises for sale at public auction, without consulting your orator, and against his will. Whereupon your orator filed his bill in equity in the supreme judicial court of Massachusetts against said Eldredge, setting forth his own equitable interest in said premises, and praying relief, and thereupon obtained a writ of injunction against said Eldredge, restraining him from proceeding to make any sale of said premises till the further order of said court. After which proceeding on the part of your orator, a negotiation was commenced between him and said Eldredge, through the intervention of other persons, in which said Eldredge proposed to convey said premises to your orator, upon certain conditions, to be complied with on the part of your orator, including the payment of an unreasonably large sum of money, which said Eldredge insisted should be performed and paid within sixty days from the commencement of the negotiation. To this proposal your orator acceded, under-

standing, that the terms of the agreement were to be reduced to writing, and signed by the parties. But by reason of the delays and evasions of said Eldredge, it was not possible for your orator, by the aid of his counsel, to procure a written memorandum of said terms to be made until about one half of the said period allowed by said Eldredge for performance had expired; nor would said Eldredge sign said paper, although it was signed by your orator. By the terms of this agreement, your orator was bound to pay a large sum of money to said Eldredge, within the short period aforesaid, and on failure thereof, his said bill in equity was to be dismissed. And your orator avers, that said Eldredge did not offer by said agreement to render any account to your orator of his doings or expenditures in regard to said estate, nor of the rents and profits he had received from the same, nor were any means provided for the future settlement of such account; and that the sum demanded by said Eldredge as the condition of said conveyance, the amount of which your orator is not able to recollect, but prays that said Eldredge may be required to discover and set forth, was unreasonably and unjustly and extorsively demanded; but your orator, coerced by the necessities of his situation, and being advised by his counsel, that the dismissal of his said bill would not prejudice his right to file and maintain another, was induced to accept the terms so offered.

And your orator further verily believes, and so charges the fact to be, that said Kimball, during all the period aforesaid, well knew, or had good reason to believe, and did believe, that said Eldredge was merely a trustee of said property, for the ultimate benefit of your orator; that the legal and the equitable title of your orator were by him caused to be apparently vested in said Eldredge in pursuance of their aforesaid agreement, and for the purposes therein expressed; and that said Kimball, notwithstanding the apparent title of said Eldredge, always treated with your orator, during said period, as the real owner of said property. And your orator further believes, and so charges the fact to be, that said Kimball did conspire with said Eldredge to endeavor to prevent your orator from obtaining the money before mentioned, in order to comply with the said conditions demanded by said Eldredge, and to that end did in concert with said Eldredge, aid, and assist him in vilifying and disparaging

your orator, and his equitable title to said premises, and to impugn the justice of his claim to the same; and did request one of the persons; with whom your orator was negotiating for a loan of money for the purpose aforesaid, not to close any arrangement with your orator, but to make the same loan to him the said Kimball, tailing the same estate as security for such loan. And your orator further avers, that by reason of the imputations thus thrown upon him and his equitable title to said property, and upon the general merits of his claim, and of the other hindrances and obstructions thrown in his way by said Eldredge and his confederate said Kimball, your orator was prevented from obtaining the money aforesaid, and from complying with the conditions imposed upon him, as aforesaid, by said Eldredge, and was accordingly obliged to submit to a dismissal of said bill.

And your orator further avers, that immediately upon the dismissal of said bill, said Eldredge advertised said estate and premises to be sold at auction, at a day so early, that your orator thought it would be impracticable for him to procure a suit in equity to be properly instituted, and to obtain a writ of injunction to prevent said sale; whereupon your orator, by advice of counsel, and in no wise intending to abandon his remedy in equity, as in and by this bill he now seeks the same, instituted a suit at common law against said Eldredge, and caused the said premises to be attached therein upon mesne process, in order as well to secure the payment of any sum of money, which might be due to your orator, in case it should be deemed, that his remedy lay at law only and not in equity, as to prevent him from selling the said premises, as he was about to do; and said intended sale was accordingly abandoned by said Eldredge.

But now so it is, may it please your honors, that the said Eldredge, in disregard and violation of the agreement, trust and duty aforesaid, and in pursuance of the fraudulent intentions aforesaid, refused to listen to the requests of your orator, or to deliver to him an account of the moneys received by him upon said land and building, and expended in and about the same or otherwise, and of his other claims in the premises, or to execute a deed thereof to your orator upon the condition aforesaid, or to perform the trusts aforesaid, and wholly refuses to recognise any right, title or interest in your orator in and to said land and building, and has pretended to sell and dispose of the same in manner hereinafter set forth, against the will and consent and express protestation of your orator, and without ever having made to him the conveyance aforesaid, or given him any just or reasonable notice or time or opportunity to procure the means of indemnifying said Eldredge for any payments made by him as aforesaid. All which actings, doings, pretences and refusals are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. And your orator further shows, that said Eldredge, as absolute owner of said land and building, has already received and collected to a large amount the rents of the halls and apartments in the said building; that said rents should and ought to be applied for the benefit of your orator in paying the principal and

interest of said mortgages or otherwise; that said Eldredge has not applied said rents to said purposes, or in any way, for the benefit of your orator, but has appropriated them, as your orator has reason to believe, and intends to appropriate such rents as may hereafter be received by him, to his own exclusive use and benefit; and that said Eldredge is not a man of property, but poor, and is an unsafe depositary of said rents as trustee of the same; said rents and profits, as your orator is informed and believes, amounting annually to the sum of about seven thousand dollars, including the rents due from said Kimball. And your orator shows, that, as he is informed and believes, said Eldredge has subsequently made a deed of conveyance of said premises to said Kimball, and has taken and now holds his promissory notes or other security, for all or a considerable part of the pretended purchase money for the same, and that said Kimball now pretends to be the sole owner of said estate, subject to certain mortgages thereon, as the bona fide purchaser thereof, for valuable consideration. But your orator has good reason to believe, and so charges the fact to be, that said conveyance was collusively and fraudulently made to said Kimball, with the design, between him and said Eldredge, to defraud your orator, and to displace any equitable claim or title which he might have to said estate, and to defeat or embarrass his remedy against the same; and upon the secret trust, understanding and confidence, that if your orator should establish such lien or claim, said Eldredge should deliver up said notes or securities to said Kimball, and should reinstate him in all respects relating to said premises, as he was before said conveyance; or upon some other secret understanding between them, which your orator prays they may severally be required to discover and declare. And your orator further is credibly informed and believes, that said Kimball is not a man of much property, but is an irresponsible person, and an unsafe depositary of the rents and profits accruing from said premises. And your orator further believes, and so charges the fact to be, that said Eldredge has confessed and admitted to some person or persons, to whom he has resorted for legal advice respecting the matters aforesaid, but to whom in particular your

orator is not so informed as to be able to set forth their names, but prays, that the said Eldredge may discover the same,—that he did in fact make the agreement first hereinbefore mentioned, with your orator; and that he has been advised by such person or persons not to commit any thing to writing, or to sign any writing touching the same, in order that said agreement may not be taken out of the statute of frauds. And your orator further charges, that before or at the time of said conveyance from said Eldredge to said Kimball, or before payment of the consideration thereof, if any consideration was paid, which your orator does not admit, said Kimball had full notice, knowledge and information of the actings and doings of said Eldredge, and of your orator in relation to said property, and of the right, title, interest or claim of your orator in or to said land or building, or great reason to suspect, and believe, that your orator had some right, title, interest or claim therein or thereto. All which actings, doings and pretences on the part of said Eldredge and said Kimball, are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises. And your orator further shows, that the mortgages made upon said property by said Eldredge were made to said Provident Institution for Savings, to said Elizabeth Deblois, to said William Hobbs, and to said Merchants' Bank, but the particulars of said mortgages and the sums respectively advanced thereon, your orator is unable fully to set forth, and prays for an account thereof, and that said Eldredge may produce the several mortgage notes or bonds and deeds; and your orator further shows, that all said mortgagees were cognizant of the title and interest of your orator in said land and building, and that the same was held by said Eldredge in trust for your orator, and made their several loans and advances with such knowledge.

The prayer of the bill is, that the said Eldredge and the said Kimball may be firmly enjoined from selling and conveying to any person, other than your orator, the said premises, and from making any alteration in said building, and from cancelling or impairing any lease of any part thereof, made by the agency of your orator, or in pursuance of any contract with him, and may also be firmly enjoined from receiving and collecting the rents now due, or hereafter to become due, from tenants of the several rooms and halls in said building, and that said Kimball, said Boston Museum and Gallery of Fine Arts, said Timothy Gilbert, said John L. Munroe, and James B. Lord, and said E. S. Goodnow and Henry Rice, the tenants as aforesaid, may be firmly enjoined from paying said rents to said Eldredge or to said Kimball, or to any other person, except a receiver to be appointed by this honorable court, and that this honorable court may appoint a receiver, with authority and instructions to take control of said property, to receive and collect said rents as the same shall become due, and apply the same in part to payment of the interest upon said mortgages, and hold the balance thereof subject to the order of this honorable court, and that said deed from said Eldredge to said Kimball may be declared void, and be delivered up to be cancelled, or the said Kimball be perpetually enjoined from claiming by or under

the same, and that said Eldredge and Kimball may be compelled to execute the trusts aforesaid, and that your orator may have such other and further relief in the premises as his case may require and to your honors may seem meet.

The answer of Charles H. Eldredge was as follows:

The defendant, without controverting the facts of the bill, in respect to the purchase by the plaintiff from Elizabeth Deblois, and the subsequent agreement with her, and his taking possession, and his proceeding to excavate, and build, and his subsequent inability to proceed in building, and the entry of the said Elizabeth for non-fulfilment by the plaintiff of his agreement, and the injunction obtained by the plaintiff against the sale of the premises by the said Deblois; but insisting, that the plaintiff is bound to produce, and prove the same, before he shall be allowed to have any advantage thereof in this suit, proceeds as follows:

That, inasmuch as the said complainant had already, at the time of passing of the said decree, failed to comply with the terms of the said indenture, and forfeited all his right under the same, and could not therefore comply therewith,—this defendant denies, that by the payment of the said sum of one thousand dollars, and by the improvements and expenditures in said bill mentioned, made upon said lands, or by reason of any other matter or thing, the said complainant was, or would have been, possessed of a valuable or any other interest in said lands, or entitled to a conveyance thereof on fulfilling the terms of the said decree, in the said bill mentioned, as in the said bill of complaint is alleged. And this defendant further answering, says, that the said complainant did represent to this defendant, that he was in embarrassed circumstances, and unable, of his own means, to make the tender and payment to the said Elizabeth, according to the said decree, or to comply therewith, and to carry on the said building to its completion. But this defendant denies, that it was ever agreed between the said complainant and this defendant, that this defendant should receive from the said Deblois a conveyance of the said property, raise money thereon by mortgage, in order to furnish the said complainant with the means to proceed in the erection and completion

of said building, or furnish the same to the said complainant to be expended in the completion of said building; and on completion thereof, convey the same to the said complainant, the said complainant agreeing to reimburse this defendant, or save him, his heirs, executors and administrators harmless, and indemnified from and against all payments, which he or they might be compelled to make by reason of any such mortgage, and to pay him or them a suitable compensation for his services, such indemnity, reimbursements and payments to be secured to this defendant by a lien upon said premises, or upon condition of the said complainant indemnifying the defendant from said mortgage, and paying him a suitable compensation for his services, or that he ever consented, or agreed, to render to the said complainant any such aid or assistance as in the said bill is alleged, or that any such like agreement was ever made between the said complainant and this defendant, as in the said bill of complaint is alleged, or that any agreement was ever made between the said complainant and this defendant, that this defendant should receive a conveyance of, or take or hold the said lands upon or under any trust or conditions, expressed or implied, for the use or benefit of the said complainant, or so that the said complainant could or might, upon any terms or conditions, or in any event, in law or equity, make any valid claim to any interest therein, or to any conveyance thereof from this defendant; and this defendant says, that the said complainant did disclose and explain to this defendant the details of his said enterprise, and his belief that great gain might be derived there from if it were carried into execution; and at various times, the exact dates whereof this defendant is unable to specify, did apply to this defendant, and make various propositions and requests to this defendant to take and hold said lands for said complainant, declaring his, said complainant's belief, that upon the payment of all the interest, costs and expenses of every kind, in addition to the price originally agreed upon, the said Deblois would consent to make a conveyance of the said land, although, by his failure to perform the terms of said agreement, his legal right and claim thereto had ceased, or words to that effect; but this defendant absolutely declined, and refused to take or hold the said lands under or subject to any condition or trust whatsoever, express or implied, in law or equity. And this defendant says, that at the time of making the said propositions and requests by the said complainant, besides the utter nullity of his claims to, or title under his said agreement with said Elizabeth, by reason of his default as aforesaid, any and every interest in the land and building aforesaid, which the said complainant could claim pretend or allege had been already conveyed to, and was held by others either under the deeds of the complainant himself, or by liens or attachment, as this defendant was then informed and believed, and now verily believes, and was daily liable to other attachments or levies for debts of the complainant, so that even if this defendant had been willing to take and hold the said lands in trust for the said complainant, or to take a conveyance thereof, so as to leave the complainant any title or interest, legal or equitable therein, such title would

have been probably a cause of embarrassment, and loss, and ruin to this defendant, and of no value to the said complainant, unless the actual state thereof had been fraudulently concealed from the creditors of the said complainant, who was notoriously insolvent, and whose pecuniary credit was entirely lost, and the attempt being obviously inadvisable and useless, and would have been probably ruinous to this defendant to complete the said building with the incumbrance of the complainant's debts charged thereon, and with the liability to the attachments, executions and claims of his creditors to be made thereon; that among these conveyances or liens were the following, that is to say, a mortgage of the complainant's whole interest in the premises to one David Kimball, dated Sept. 10, 1839, to secure the payment of one thousand dollars to said Kimball, being, as this defendant is informed and believes, the very same sum borrowed of said Kimball by the said complainant, in May, 1839, to enable the complainant therewith to pay the said sum of one thousand dollars before mentioned, paid by him to the said Deblois, and which sum, with interest, this defendant afterwards paid to said Kimball by deducting the same from the consideration, which the said Kimball agreed to give for the said land and buildings on his purchase thereof, a quitclaim deed, and conveyance by release of the whole premises made and executed, as this defendant is informed and believes, by the said complainant to one Seth Bliss, dated 20th July, 1840, which this defendant now believes to have been given to secure the payment of some large sum of money, due from said complainant to said Bliss, but which deed was in its form, and purported to be an absolute and unconditional conveyance of all the complainant's interest in the said premises, which deed still remains in full force as this defendant is informed and believes, under which the said Bliss now claims, that whatever was or may be the complainant's interest in the said premises, was thereby conveyed to him the said Bliss, and is his property, at least, to the extent of the moneys due from the said complainant to him the said Bliss, to enforce which claim the said Bliss has brought his bill of complaint before the justices of the supreme judicial court of the state of Massachusetts, before whom the same is

now pending against this defendant, and this defendant has been informed and believes, that there were other liens and attachments for various debts of said complainant upon the premises, which would have attached to any interest if he had any interest in the same premises. And this defendant says, that under these circumstances, however requested, and however disposed to benefit the complainant, he could not, when applied to, prudently or safely, or with any prospect of benefit to the complainant, or without probable ruin to this defendant, and therefore would not, and as the complainant well knows, did not take the said premises under or subject to any legal or equitable trust whatsoever. And this defendant denies, that any agreement or understanding whatsoever, except the express agreement and understanding between the said complainant and this defendant, that this defendant should take a title to said property, free from all right or claim on the part of the said complainant, express or implied, in law or equity, (as in the complainant's seventh interrogatory is inquired for,) ever existed, or was made between the said complainant and this defendant, other than the expressions of the motives and designs of this defendant, depending wholly on his own free will and discretion, and pleasure, for the execution thereof, as therewith expressly declared and fully understood, as hereinafter fully and particularly declared and set forth, and every allegation of any other, or different agreement, or understanding, express or implied, in the said complainant's said bill contained, this defendant denies.

And this defendant says, that although there was no such agreement, as by said complainant alleged, and although he, this defendant, always refused to take, or hold, any conveyance or title, excepting an absolute and unconditional estate in the premises free from any trust whatsoever; nevertheless, he freely admits, that one of his motives in purchasing the said estate, from the said Deblois, and taking the conveyance thereof from her, herein stated, was, besides the hope of profit and benefit to himself, a desire also to benefit the complainant's family, and with them, the complainant himself, and that this defendant then believed, that if the said building should be completed, in the manner projected, it might yield some pecuniary profit, and that it was his design, and intention, if, in the end, the same should be found to exceed in value the amount of all his payments, expenses and liabilities therefor, and such reasonable profit to himself, as he should in his own discretion think right, and also the amount of certain debts then, and before, and now due, to this defendant, from the said complainant, and also from a member of his family, then to give to the said complainant, or to his family, an opportunity to purchase the same for the amount of all his, this defendant's, payments, expenses, and liabilities therefor, and other claims aforesaid. And this defendant freely also admits, that he did, after the expiration of the time fixed by said decree, and not before, state his motive and design aforesaid in conversation with the said complainant, both before, and after his, this defendant's, receiving the conveyance from the said Elizabeth herein stated, but this de-

fendant expressly declares, that while thus having and expressing such motive and design, it was therewith also distinctly declared by this defendant to the complainant, and by the said complainant at all times well known and understood, that no agreement whatever in any way binding upon this defendant, either at law or in equity, existed or was made or should be made, or was intended to be made by this defendant, or between him and the said complainant; nor was this defendant to be in any way, or by any means, a trustee for the complainant in respect of the premises, but that, on the contrary, the said land and estate was, and was to be, the property of this defendant, absolutely, and unconditionally, with the right of disposal thereof, and of the proceeds thereof, at his own discretion and freewill and pleasure, in such way as he should think fit; all which this defendant says was often and expressly declared to the said complainant, and as often and expressly admitted and assented to by said complainant, and that said declarations and admissions were so full, clear, and explicit, that no possibility of mistake or misapprehension, could or in fact did exist, or remain on the part of the said complainant. And this defendant says, that he purchased of the said Deblois, for the sum of twenty-one thousand and eight dollars and thirty-six cents, the said parcel of land, and paid her therefor five thousand eight hundred and eighty-one dollars and thirty-six cents, in cash, of his own proper money, and gave her his own promissory note, and a mortgage of the premises for the remainder of the purchase money, that is to say, fifteen thousand one hundred and twenty-seven dollars, and received from the said Deblois her deed thereof, duly executed to this defendant, dated 24th August, 1840, by which deed of the said Deblois, by her made and executed to this defendant, she conveyed the said premises to this defendant, to have and to hold to him, his heirs and assigns, to his and their use and behoof forever, with covenant of warranty in the common form, excepting only, that to the covenant against all incumbrances there are added these words, "excepting from this covenant any incumbrances made or suffered by Joseph Jenkins upon the described premises," and to the warranty against the claims and demands of all persons these words, "excepting any claim or demand arising out of any contract made by or with said Jenkins," as by the said original

deed in the possession of this defendant, and ready to be exhibited, will at large appear, and to which, for greater certainty, this defendant begs leave to refer, a true copy whereof is herewith filed. And afterwards, on the same sheet of paper with the said deed of the said Elizabeth, the said complainant made and executed to this defendant his own deed of release and quitclaim to this defendant of all the premises, also dated the same twenty-fourth day of August, but delivered to this defendant and recorded with the deed of the said Deblois on the said twenty-fifth day of August, which this defendant is ready to produce, and to which he begs leave, for greater certainty, to refer; a true copy whereof is herewith filed; which deed purported expressly and unconditionally to release and convey unto this defendant all the complainant's right, title and interest whatsoever in the premises, to have and to hold the same to this defendant, his heirs and assigns forever, free and discharged of and from all claims and demands by, through or under said complainant, and by which said deed this complainant did admit, that he had not complied with the conditions contained in a contract for a conveyance of the lands described in the said deed from said Deblois, and that the said complainant had no legal or equitable right in or upon the same. And this defendant says, that the only consideration paid for the conveyance of the said Deblois aforesaid was the money, note and mortgage aforesaid, given to the said Deblois, under which said deed of said Deblois, so as aforesaid accompanied with the release of the said complainant, this defendant entered, and since has held the same premises as his absolute estate in fee simple to himself, his heirs and assigns, to his and their sole use and behoof, until the conveyance thereof by this defendant to David Kimball herein mentioned.

And this defendant further answering says, that he never did agree with the said complainant, that he, this defendant, would make any written declaration or memorandum of any trust or condition, as in the said bill of complaint set forth, or any other declaration, or memorandum, of any trust, or condition, or agreement, whatsoever, touching the premises. And this defendant says, that it was always before, and at the time of, and since the receiving of the said conveyances from the said Deblois by this defendant, expressly declared to the said complainant, and assented to by the said complainant, that nothing whatsoever should be written even upon the subject of this defendant's intentions and designs aforesaid, and that the reason thereof was also repeatedly stated to the said complainant, that is to say, that this defendant might not, by any such statement, incur any risk of affecting his own absolute title to the said estate and property, even by such a statement of his intentions, which might be misconstrued, inasmuch as he intended to retain the absolute title and disposal thereof, and to insure to himself the power and discretion of doing therewith as he might think right and best, or words to that effect, it being well understood and agreed between the said complainant and this defendant at all times, that nothing was to be done or agreed, whereby any express, implied or resulting trust in law or equity should

or could be created or arise for the benefit of the said complainant, and this defendant denies the making of any expressions to any person whatsoever of any intention or purpose to make any writing whatsoever upon the subject, excepting only, that at some time after the receiving the conveyance from the said Deblois herein mentioned, and when and after the whole title and estate in the said lands was absolutely and unconditionally in the said defendant, Joseph Jenkins, Junior, a son of the said complainant, once said to this defendant, that he ought to make some writing, declaring his intentions in regard to said estate, as he might die before the matter was ended, and in that case his heirs could not know and carry out his intentions, or something to that effect, to which this defendant answered, that he should not do so, and added that it had been expressly declared by him to the said complainant from the beginning, and fully understood, that there was to be no writing whatever, and for the express reason, that this defendant would have his title absolute and unincumbered with any trust or condition whatsoever in law or equity; to which the said son of the said complainant replied, that his request was not, that any paper should be delivered to any one, but simply that this defendant would place such a writing among his own private papers, that in case of his death, his heirs might be able to do with the estate, what he, at his own free will and pleasure, would do, if living, for the benefit of the said complainant and his family, or something to that effect; to which this defendant, the same then seeming to him expedient, replied, that he would make some deed of trust to be placed among his papers to provide for such contingency. And this defendant says, that he intended at that time, and believes he was from the conversation that was had clearly understood to intend, by the expression deed of trust, only a paper writing expressive of his designs and intentions, as herein set forth, and no other or different writing. But after said conversation, this defendant, reconsidering the whole matter, thought it inexpedient to make any writing whatsoever, and did not make any such writing, having from the beginning declared his intention to do nothing, which could even by bare possibility be construed as admitting or creating any title to, or interest in, or claim in any way to or upon the said lands and building in the complainant. And this defendant says, that the aforesaid conversation, the purport and meaning whereof,

prelims nearly as this defendant can now recollect, as set forth, was a mere informal and accidental conversation with a third person, and not in the presence or hearing of the said complainant, and that the declaration by this defendant of his purpose to make such a writing was a mere gratuitous expression of his then present disposition, which he had a clear right to reconsider, and fulfil, or modify, and wholly abandon, at his own discretion, the circumstances and situation of the property, and of the said complainant obviously requiring, and justifying special caution, as to every such matter on the part of this defendant

And this defendant says, that the complainant never furnished or procured to be furnished to this defendant the sum of six thousand dollars, or any other sum to be paid to the said Deblois towards the consideration money of any purchase, or so far as this defendant knows or believes, procured to be furnished and securities upon or by means whereof this defendant borrowed or obtained the sum of six thousand dollars or any other sum to be paid to the said Deblois in part satisfaction of any consideration money, of any purchase, as is alleged in the complainant's said bill, but this defendant says, that James W. Jenkins, Junior, in said bill mentioned, did deliver to this defendant upon his, this defendant's own responsibility, certain promissory notes and bills of exchange, to the amount in the whole of about six thousand dollars, as near as this defendant can recollect, to the end, that this defendant by pledging the same, might, if he should think fit, raise money to pay the consideration money, which this defendant might give to the said Deblois for his proposed purchase of said land, and this defendant says, that he never made use of or pledged the said promissory notes and bills of exchange, or raised any money by means thereof, to pay the said consideration money, or any part thereof, but that he returned the same to the said James W. Jenkins, Jr., and denies that he used such securities and afterwards returned and repaid the same by or out of moneys raised by mortgage or otherwise as is alleged in said bill of complaint.

And this defendant further answering, says, that he did agree to take a deed from said Elizabeth of said property, in order to give him an unqualified title under her, but not to save any rights of the said complainant, nor for the purposes in the said bill alleged. And this defendant further answering, says, that the time mentioned in the said decree for the compliance therewith by the complainant was not allowed to expire, without any compliance with its terms, for the purpose mentioned in the said bill, or for any purpose by agreement between the complainant and this defendant, or between the complainant, said Deblois and this defendant; but this defendant says, that the said time had expired before this defendant made any agreement to take a deed from the said Elizabeth of the said property, and this defendant was informed and believes, that the only reason why the said time was allowed to expire was, that the said complainant, by reason of his pecuniary embarrassments, was unable to comply with the terms thereof. And this defendant

further answering, says, that the said Elizabeth did convey the said property to this defendant, as herein mentioned, but not in pursuance of, or according to any such agreement or purpose, as in said bill is mentioned. And this defendant further answering, says, that the said complainant did acknowledge, that he had forfeited all claim against said Deblois, and consent, that this defendant should take the said deed and conveyance from the said Elizabeth, and did make his release and quitclaim to this defendant, as herein mentioned, in order, that this defendant thereby might have, as the said deeds purported, an unqualified and absolute title to the said land and building, to have and to hold the same to him, his heirs and assigns, to his and their use and behoof, and not under or in pursuance of any such agreement, or for or with any such design or purpose of saving or securing any right or interest, legal or equitable, of said complainant as in the said bill of complaint is alleged, but on the contrary, for the very purpose of surrendering all the complainant's claims in or to the premises, and preventing any legal or equitable right, title or interest, express or implied, from arising, existing or resulting, or being insisted upon by or for, or on behalf of the said complainant, in or to or out of the premises in any event whatsoever; as it was clearly, explicitly, and fully understood and agreed to by said complainant, at the time of the making of the said deeds, that the title to said estate in this defendant was to be clear, full, perfect, and absolute.

And this defendant, further answering, says, that he believes, that at the time of the conveyance to this defendant made by the said Deblois, and at the time of the making of the deed of said complainant to this defendant, the said complainant was indebted to divers other persons besides Richards, Munn & Co., and said Kimball herein mentioned, for materials furnished in and upon the said building, and money borrowed, but which he could not pay from the said lands or building, inasmuch as he had, before that time, ceased to have any interest, either at law, or in equity, in or to the same, and which he as this defendant believes was unable by any other means under his control to pay. And this defendant further answering, denies, that the payment of such debts, or the procurement of means therefor, was the declared, or as far as this defendant knows and believes, the real object or purpose, or one of the objects or purposes of the said conveyances, or either of them, or of any arrangement

in relation thereto with this defendant, as alleged in the complainant's said bill of complaint, except so far as the same might have depended on or have been entertained, by reason of the expressions of the motives and designs of this defendant, depending wholly on his own will, discretion, and pleasure for the execution thereof, therewith explicitly declared and fully understood, as herein fully and particularly stated and set forth. And this defendant further answering says, that he does not know, but has been informed and believes, that several of the creditors of said complainant, some of whom had furnished such materials, and some of whom had loaned the said complain ant money, did request in writing the said Elizabeth to convey to the said defendant the said lands, or express their assent, that such conveyance should be made, but what was the particular tenor of said requests or assents, this defendant has not been informed, and cannot set forth as to his belief. And this defendant says, that the fact of his taking the estate and property aforesaid, as herein stated, absolutely and unconditionally, without any title or interest in the said complainant, excepting such benefit as this defendant might, of his own will and pleasure, allow him, was in no respect a secret arrangement, but, as this defendant believes was commonly known, and also to the creditors of the said complainant, and that the same was in fact, approved by creditors, as affording the only hope of any benefit from the premises, depending wholly upon the free will and pleasure of this defendant, as herein particularly set forth. And this defendant, further answering, denies, that such request or assent was given or made, pursuant to any arrangement to pay the debts of said complainant from said land and building, or that any such debts were intended to be provided for as in said bill is alleged, or that he, this defendant, was a party to any such arrangement, or that he had any notice of any such purpose, or agreed to receive, or hold, or that he was to receive a conveyance for any such purpose, as is in said bill alleged, or that this defendant was or is bound to make any conveyance to said complainant as in said bill is alleged.

And this defendant further answering, denies, that at the time when the said complainant made the acknowledgment and release under seal to this defendant herein mentioned, the said complainant had any valuable or other interest whatever in the premises. But this defendant at the time was advised to take such acknowledgment and release, in order to remove all grounds for any pretence of claim of the complainant thereafter to any interest in the premises. And this defendant further answering, says, that no pecuniary consideration was paid, or agreed to be paid, by this defendant for the said release, but that, as far as he knows and believes, the inducement and consideration of the said complainant for making said release and acknowledgment was the hope and expectation, that this defendant might derive such advantage from the premises as to be willing to give the complainant some benefit therefrom, at his discretion, as herein mentioned. And this defendant denies, that the said complainant had any valuable interest, or other legal

or equitable interest in the said premises, to convey to this defendant; and denies, that any trust was created or resulted on the part of this defendant, for the benefit of this complainant. And this defendant further answering, says, that upon the making of the conveyance of the said Deblois to him herein mentioned, he made and executed a mortgage to the said Deblois of the premises for fifteen thousand one hundred and twenty-seven dollars, as aforesaid, and other mortgages thereafter, to a large amount, at different times; and that there is now due upon the mortgages, made by this defendant upon the premises, forty thousand one hundred and twenty-seven dollars, and interest, and mortgages to the amount of fifteen thousand dollars, heretofore made, have been paid by this defendant. And this defendant further answering, says, that the greater part of the moneys raised upon mortgages, excepting the moneys paid to said Deblois, was delivered to said complainant to pay sundry persons for material and work upon said building, done and furnished after the conveyance to this defendant; but this defendant does not admit, that the said moneys have been faithfully applied by said complainant; and the amount so applied, is peculiarly within the knowledge of said complainant, and if it be material in this case, this defendant insists that the said complainant ought to be required to make proof thereof; and with the greater part of the residue of said moneys this defendant paid some of the moneys due on mortgages on said building, and for debts contracted in the completion of said building; but this defendant insists and submits, that these are matters which concern his own affairs merely, and that he is not bound to set them forth. And this defendant further answering, says, that the only consideration, agreed by this defendant to be paid to the said Deblois, for the conveyance from the said Deblois to the said defendant, was twenty-one thousand and eight dollars and thirty-six cents, fifty-eight hundred and eighty-one dollars and thirty-six cents thereof in cash, and the residue to be secured by a mortgage on the premises, as aforesaid. And this defendant says, as before, that the complainant did not furnish the sum of six thousand dollars, or any other sum, as a part of that consideration, and that the erections and improvements mentioned in said bill of complaint were no part thereof, unless by enhancing the value of the premises, and thus serving as an inducement to said Deblois

to take said mortgage, they might have been or may he so considered, but that the said complainant had paid the said Deblois, as this defendant has been informed and believes, the sum of one thousand dollars, as set forth in the said indenture, which, as this defendant is informed and believes, he borrowed of David Kimball herein mentioned, and which said sum of one thousand dollars and interest, being eleven hundred and seventy-five dollars, this defendant, at the time of the said purchase, assumed upon certain conditions, as hereinafter mentioned, to pay, and afterwards paid to the said Kimball, by deducting that amount from the consideration which he, said Kimball, agreed to give for the said premises on his purchase thereof, and who pretended to have a claim upon the premises, by virtue of a mortgage, therefor made by said complainant, as aforesaid, to secure the same, of all his pretended interest in the premises. And this defendant denies, that any part of the consideration of his purchase aforesaid was paid by said complainant, or that any trust resulted from any such payment.

And this defendant further answering, says, that he does not claim, nor ever has claimed from the said complainant payment of the sum, or about the sum, of seven thousand one hundred and fifty-eight dollars, or any other sum, for this defendant's services, commissions and brokerage, paid in raising any moneys, or for interest on any moneys, or any other account, as agent of the complainant, as the defendant has never acted as the agent of the said complainant in the purchasing the said lands or completing the said building, but has done the same entirely on his own account, and the complainant has, for this defendant, superintended the completion of the said work. But this defendant says, that after the completion of the said building, being willing to benefit the said complainant, and in accordance with his intentions, depending upon his own free will and pleasure, before expressed, this defendant did offer to sell or convey the said lands and building to said complainant at a certain sum, which would give to this defendant a profit of thirty-five hundred dollars only, after payment of the debt of said complainant and the debt of a member of his family, and which profit of thirty-five hundred dollars was a small and an inadequate profit for the great care, risk, perplexity and trouble, caused and created to this defendant by the purchase and completion of said building, and in making the estimate of the cost of said building, commissions, brokerage and interest, which this defendant had paid, were taken into the account of the cost of the building, as properly constituting a part thereof. And this defendant further answering, says, that being at that time the absolute owner of the said lands and building subject to mortgages which he had made thereof, he did not, nor does claim to have any such lien thereon as in the said bill of complaint is alleged. And this defendant further answering, saith, that the said building is now completed, as far as it is, at present, intended to complete the same, but is not of the value of one hundred thousand dollars, as this defendant believes, but, as this defendant believes, of the value of sixty-two thousand dollars; this defendant having sold the

same for a consideration, which, as agreed upon, was nominally sixty-two thousand five hundred dollars; but a part of said consideration being paid in specific articles, the whole of the consideration paid and secured was not of greater value than sixty-two thousand dollars, which he believes to be the real value of said land and building, but the consideration expressed in the deed was fifty-five thousand dollars. And this defendant further answering, denies, that the said complainant is entitled to any conveyance thereof upon the conditions mentioned in said bill, or upon any conditions whatever; or to any account of the value thereof, or of the doings or transactions of this defendant in relation thereto. And this defendant says, that the said complainant has never tendered to this defendant, nor has been able, as this defendant claims, to tender to this defendant, any indemnity for a reimbursement of the moneys, which this defendant has paid for, and raised and expended upon the said lands, and building, and interest thereon, or a reasonable sum for the labor, care and responsibility of this defendant in the purchase and completion of the premises.

And this defendant, further, answering, says, that he has refused, and does refuse to convey the said lands and building to the said complainant on the conditions in the said bill of complaint set forth, or to make any declaration of any such trust as is therein set forth; inasmuch as this defendant until the sale by this defendant aforesaid, was the absolute proprietor thereof, subject to the mortgages aforesaid, and claims, and was entitled to hold the same, and has, since the purchase thereof, claimed to hold the same in fee simple, subject to the said mortgages, and not charged with any other condition or trust whatsoever. And this defendant says, that he never intended or designed to make any such conveyance or declaration of trust as in the said bill is mentioned, or other than is herein mentioned in that behalf. And this defendant further answering says, that after the completion of the said building, as aforesaid, two rooms in the said building were leased by the said complainant wrongfully, without the knowledge or consent of this defendant, to certain persons. And the said complainant wrongfully received of such persons part of the rent therefor in advance. And when these facts came to the knowledge

of this defendant, he notified the said persons, to whom such leases had been made, that he was owner of the said building, and that they must remain there as tenants of this defendant, or quit the premises; whereupon they agreed to hold as tenants of this defendant. And this defendant denies, that the said complainant has made any other leases of any part of the premises, with or to the knowledge or assent of this defendant, excepting certain leases at will for this defendant, which he has confirmed. And this defendant says, that he has never been the agent or trustee of the complainant in any thing touching the purchase or completion of the said lands and buildings, or the leasing thereof, but has leased the same in his own behalf, and for his own account, and has expended the rents, as far as they have been received, in and about said building, and submits, that he is not bound to render any account thereof to the said complainant. And this defendant denies, that any trust has been created, or resulted for the benefit of the complainant, to have the said parcels of land, or either of them, conveyed to him upon the condition of indemnifying the said defendant for any payment of the several sums of money, for which the same have been mortgaged; or that the complainant was entitled to a reasonable or any notice of the times of payment of the said several sums of money, or to an account of the sums of money borrowed by this defendant on mortgage of the premises, and expended in and about the purchase of the said lands, or the erection of the said edifice, or of the rents received by him; or that the said complainant is indebted to this defendant for any of those sums; or that any of those sums were advanced or loaned to said complainant; or that the defendant rendered, or that the complainant is indebted to this defendant for any services in the premises for the benefit of the complainant; or that this defendant is or ever was a mortgagee in equity of the premises; but that, until the sale thereof to said Kimball, he, after his purchases of said Deblois and said Francis, ever was the sole and absolute proprietor thereof, subject to the mortgages made by him, and to no other condition or trust whatsoever, and may well in equity, as well as at law, set up a good claim and title to said land and building against the said complainant, and that, in so doing, be does not act contrary to, or in breach of any interest or agreement of the parties to the transactions relative thereto; and this claim of this defendant so to hold the premises, is entirely consistent with good conscience and a desire to do equity on the part of this defendant

And this defendant further answering, denies, that he was confidentially or otherwise employed by the said complainant, as in his said bill alleged, for the interest and benefit of said complainant in relation to the said lands and property, or with any understanding that this defendant for any services to be rendered for said complainant, as in the said bill of complaint is alleged, and denies it to be true, that he ever held forth to the complainant, or that there was any reason, or that he gave the complainant any reason to trust or believe, that he was so acting, or considered himself so employed, or that there was no reason for

suspicion on the part of the said complainant, or no intimation by this defendant, that this defendant would appropriate said land and property to his own use and benefit, to the exclusion of the said complainant, and says, on the contrary, that this defendant expressly declared to the said complainant, and gave him fully to understand that he, this defendant would not take a conveyance of the said land and property to any use and trust for the said complainant, and that he should take the conveyance thereof from the said Deblois, and from said Francis, to his, this defendant's, own use, and that of his heirs and assigns, absolutely and subject to no other use and trust whatsoever, express or implied, and that the said complainant well knew, before and at the time of the conveyance aforesaid, from the said Deblois and from said Francis to this defendant, the intention and purpose of this defendant in that regard, and assented thereto, relying on the good will and pleasure of this defendant to benefit the complainant's family, and the complainant himself, knowing and at all times fully understanding, that the defendant should have and did have a perfect and absolute title to said estate, and that the complainant's sole and only reliance was upon the good will and disposition of the defendant as aforesaid, which good will this defendant has ever evinced to said complainant by offering at sundry times, when proprietor of said estate, to sell to said complainant at a reasonable profit, as is herein set forth. And this defendant further answering saith, that he denies, that the said complainant had any cause or reason to, or did believe or trust, that this defendant would use his utmost or any endeavors in relation to said property, or the raising money thereupon for the completion of the said edifice, with any view to the benefit and advantage of said complainant as the ultimate proprietor thereof, as in the said bill is alleged, or otherwise than is herein set forth. And this defendant further answering, denies, that he ever held forth to the said complainant, or gave him to understand that this defendant was using his utmost, or any endeavors for the benefit of the said complainant, as the ultimate proprietor of the said land and building, as in the said bill of complaint is alleged, or otherwise than is herein stated, and says that this defendant has not, or ever had, or made any claim upon said complainant for services of said complainant, nor has the said complainant tendered or offered to pay to this defendant any thing as or for any services of

this defendant; but since the completion of the said building, this defendant has offered to sell and convey the said lands and building to the said complainant for a sum, which, after all that this defendant has paid for and expended upon the premises, and the debt of the said complainant, and of a member of his family to this defendant, would give to this defendant the inadequate profit of thirty-five hundred dollars for all his labor, responsibility, risk and trouble in the premises, but the said complainant, as this defendant believes, then was, and at all times since has been, and now is, wholly unable to raise and pay that amount therefor. And this defendant says, that from the pecuniary embarrassments of the said complainant ever since this defendant purchased said property, he believes that he has not been ready or able to compensate and reward this defendant largely and liberally for any such services, if this defendant had had or made any such claim for services aforesaid as in the said bill is alleged, and whether the said complainant was willing so to compensate or reward this defendant, this defendant does not know and has not been informed, except by the allegations of the said complainant.

And this defendant says, that in all things relative to the purchase of the said lands and buildings, and the completion of the said buildings, and the disposal of the premises, he has acted with good faith and fidelity, without violating any agreement he ever made with the said complainant, or failing to discharge any duty, which this defendant ever owed to said complainant, as will appear by his acts set forth in this his answer. And this defendant further answering, says, that during the erection of said building, after this defendant purchased the same, the said complainant superintended the same, and had the principal charge of the work done thereon, and expended time, skill and labor thereon for this defendant, and not as having any interest, legal or equitable, therein, but only in the hope and expectation, that this defendant might derive such advantage therefrom as to be willing to give such chance of pre-emption to the complainant on such terms, that the complainant or his family might be benefited greatly by the purchase thereof, or that this defendant might otherwise dispose thereof, so that this defendant might, after reserving a reasonable profit to himself at his own discretion, pay the remainder to the complainant or his family (which chance of preemption this defendant has always offered to said complainant, as aforesaid, until the conveyance to said Kimball, and has twice advertised the said estate for sale at auction, with the purpose of paying over such remainder if there should be any, so far as he was not enjoined therefrom on the bill of Seth Bliss aforesaid, but which sales have been prevented by the complainant.) But this defendant denies, as far as this defendant knows, has been informed, and believes, that the said complainant expended any of his own proper moneys in completing the said building after this defendant purchased the same; and when the building was nearly completed, the said complainant made and presented his bill for his services therein, from Aug. 25, 1840, to January 8, 1841, wherein he charged this defendant 1150 dollars for services in the

erection of the building for this defendant, and offered to assign his claim aforesaid, as superintendent, to a creditor of the said complainant, for security for the moneys due or owing to said creditor. But this defendant denies, that it is true, as in said bill of complaint is alleged, that this defendant did have or exercise no control over said work, and never pretended that he had a right so to do; but this defendant says, that on the contrary, at all times when it was necessary so to do, he insisted upon his right to control the said work, as the sole proprietor of the said building, and this defendant says, that on one occasion, in consequence of the misconduct of said complainant in misapplying moneys, which this defendant delivered to him, to be paid to the workmen upon and persons furnishing materials for said building, he, this defendant, threatened to dismiss the said complainant from his employment, as superintendent of the said building, and gave him notice to that effect, and thereupon the said complainant expressly acknowledged this defendant to be the sole owner of the said lands and building, and to have the sole right to control the work thereon, and promised this defendant, that he would honestly apply such moneys in future in payment of the labor and materials for the said building, and account with this defendant for all his doings therein, and upon this condition, this defendant consented to withdraw his notice aforesaid, and to retain the said complainant as the superintendent of the said work.

And this defendant, denies, that it was mutually understood between the said complainant and this defendant through the whole or any part of the process of erecting and finishing the said building, after this defendant had taken a conveyance thereof, that said complainant was erecting and finishing the same for his exclusive benefit, or not at all for the benefit of this defendant, except to enable him to raise moneys thereupon, perfect the security for money already raised, and indemnify and pay the said defendant, as in his said bill is alleged, or that the complainant was or was induced by this defendant to believe, or did believe, that the complainant was acting for his own benefit alone, and erecting a fortune for himself and his family, and not for the benefit of this defendant or any other person: unless from any reliance of the complainant on the good will and pleasure of this defendant

to benefit him and his family, it might be so considered by the said complainant. And this defendant denies, that upon any development by the said complainant of any gains which might be derived from the enterprise in the said bill mentioned, or upon showing its practicability, or at any other time or occasion this defendant conceived any design of defrauding this said complainant out of any gain or profit to be derived therefrom, or of abusing any confidence, which the said complainant might repose in this defendant, or that for any such end or purpose, this defendant required or proposed, that the legal title to said premises should be conveyed to himself without any declaration of trust in writing, to be delivered to the said complainant, or induced the said complainant to confide any rights in the premises to the honor and conscience of this defendant in the manner or for the purpose mentioned in said bill, or that he artfully or fraudulently induced the complainant to enter into or execute any agreement, or attempted to defraud and deprive the said complainant of the fruits of his labor, or to appropriate the same to himself, or to that end suffered the said complainant to go on with the erection of the said building under the belief, that he was erecting it for himself alone, or under any misapprehension in relation thereto, or meditated or practised any fraud whatever upon said complainant. But on the contrary thereof, at the time of the purchase and conveyance to this defendant of the said premises, the said complainant had no legal or equitable right or interest in the premises, as he well understood and admitted, and it was equally well understood and agreed by him with this defendant, that he should not have or claim at any time any legal or equitable interest whatever in the premises, and that the said defendant should hold and dispose of the premises at his own free will and pleasure, without any legal or equitable obligation to account therefor to said complainant. And this defendant denies, that he ever made, or promised, or pledged his honor to execute any agreement with or to the said complainant, to convey the premises to the said complainant upon the terms and conditions in the said bill set forth. And this defendant says as before, that he could not have taken a conveyance of the premises, under the then existing circumstances, upon any such trust as is alleged in the said bill, without subjecting himself to great danger of embarrassment and ruin. And this defendant denies, that any trust was created or resulted in equity on the part of this defendant, to hold said premises for the use and benefit of the said complainant, by reason of any thing done or agreed by or on the part of this defendant and the said complainant, or between this defendant and the said complainant.

And this defendant says, that he never promised the said complainant to make any written declaration of any trust, as in the said bill is alleged, but on the contrary says, that it was expressly agreed between this defendant and said complainant, that there should be no trust created touching the premises, but that this defendant should have a clear, perfect and absolute title in fee simple to said estate, unincumbered by any title, claim or interest of the complainant whatsoever. And this defendant further answering says, that

he has exhibited to the said complainant a memorandum of the moneys expended by this defendant in relation to said building, but this defendant has refused, and does insist, that he is not bound to render any account to the said complainant, of the moneys received and expended as aforesaid. And this defendant says, that he has refused to convey the property to the complainant, except as herein set forth, and to recognize any trust for or title in said complainant, as none did ever exist since the conveyance of the said estate to this defendant and this defendant insists, that he is not bound to set forth to what specific purposes he has applied the sums of money by him raised, by mortgage upon said property, as the same concerns himself and his affairs only, and not the said complainant. And this defendant further answering says, that he has advertised the said estate for sale, and has since sold the same, after having offered it, as aforesaid, to the said complainant, and allowed him the space of about four months, a time named by said complainant as a reasonable and sufficient time, to purchase the same on the terms aforesaid, with the full knowledge and assent on the part of the said complainant, that if he did not, in that time, purchase the same on the said terms, this defendant should and would sell the same at auction or to some other person, as this defendant had a right to do; and the said defendant says, that the said complainant was not then, nor has, at any time since, been able or ready to purchase the same on the terms aforesaid, and this defendant says, that he does not recollect or believe, that the said complainant protested against the sale of the premises in any other way than by filing his bill for an injunction to restrain the same. And this defendant further answering says, that while he was owner of the said estate and until he sold the same, he did claim to receive and did receive the rents thereof, so far as they have been paid, excepting so far as they were wrongfully received by the said complainant as aforesaid, as this defendant had a right to do. And this defendant further answering says, that he insists, that he is not bound to render any account of the said rents to the said complainant, or to disclose to him what he has done with the same, or the intentions of this defendant in respect to the disposal thereof, and denies, that the said rents

should or ought to be applied to the benefit of the said complainant. And this defendant insists, that he is not bound to set forth the amount or nature of his property, but deems himself sufficiently responsible to meet and comply with all the engagements, which he has made. And this defendant says, that he has no precise knowledge of the amount of the property of said Kimball, but believes him to be a man of considerable property and able to meet his engagements.

And this defendant further answering says, that he did, on the first day of March, in the year of our Lord one thousand eight hundred and forty-two, convey by deed of warranty, with release of dower of the wife of this defendant, the said land and buildings to said David Kimball, bona fide for a valuable and adequate consideration, which this defendant insists that he is not bound to set forth, it being a matter, in which the said complainant is no wise legally or equitably concerned, and this defendant nevertheless says, that the consideration, which was agreed upon, was nominally sixty-two thousand five hundred dollars, but a part thereof being in specific articles, the whole of the consideration paid and secured was not of greater value than sixty-two thousand dollars. And this defendant, further answering, denies, that the said Kimball took the said conveyance under any express or tacit agreement or understanding with this defendant to aid and assist him in perfecting a title to the premises, or disposing of them for this defendant's profit or advantage, or in order to preclude said complainant from asserting and establishing any pretended equitable interest in or title to the said land or building, or under any other agreement express or implied, than such as is contained in the said deed to the said Kimball, and says, that he has before stated the whole and true amount of the consideration as nearly as he can estimate the same, and says, that part of the consideration was paid in specific articles delivered to this defendant and part by cancelling the obligation of this defendant to said Kimball to pay the sum of one thousand dollars and interest as aforesaid, and the remainder over and above the mortgages, which mortgages said Kimball was to pay, and the amount of which is included in the consideration, was in negotiable promissory notes made by said Kimball payable to his own order and endorsed by him and delivered to this defendant, some of which have been negotiated payable at different times, some of which were secured by mortgage of the premises, and some by mortgage of other property, some of which notes have been paid, and all of which have been paid that have become due, and respecting all which notes there was no understanding or agreement between the said Kimball and this defendant other than appears on the face thereof, excepting an agreement to indemnify the said Kimball against the attachments made of the premises, as aforesaid, as the property of this defendant by the said complainant, by allowing a deduction from two of the said notes to the amount, if any, for which any execution, which might issue in the said suit, might be levied upon the premises in due form of law, which said agreement was in concise terms, as this defen-

dant believes, entered on the back of the said two notes, but since the termination of said suit, other notes of like tenor have been given in substitution of these notes without such endorsement. And this defendant insists, that he is not bound to give a more particular or any statement of the manner in which the said consideration has been paid or secured to be paid, or who has held the said promissory notes since they were given. And this defendant denies, that the said conveyance to said Kimball was collusively or fraudulently made, or was made with any design between him and the said defendant to defraud the said complainant, or to displace any equitable claim or title, which the said complainant might have to said estate, or to defeat or embarrass any remedy he might have against the same, or upon any secret trust, understanding or confidence, that if the complainant should establish any lien or claim thereon said defendant should deliver up said notes or securities to said Kimball, or reinstate him in all or any respect as he was before the said conveyance, or upon any other secret trust or confidence between them.

And this defendant further answering says, that he is informed and believes, that before or at the time of the said conveyance to said Kimball, and before the payment and negotiation of said notes, as aforesaid, the said Kimball had notice of the dealings of said complainant and this defendant relative to said property, but had no notice of any right, title or interest at law or in equity, of said complainant, in or to the said land and building, existing at that time. And this defendant says, that he believes the said Kimball had, at that time, no notice or reason to believe, that the said complainant claimed to have any interest in the premises, although he had probably notice, that said complainant had previously made some claim in respect thereof by his filing the bill in equity herein mentioned against this defendant, which had then been dismissed. And the said Kimball, as this defendant believes, not only from this circumstance, but because the said complainant had afterwards brought his action at law, and attached the said premises as the property of this defendant, which action was then pending, had good reason to believe, that the said complainant had abandoned all claim and pretence of claim to any title or interest, legal or equitable, in the premises, other than such as might have been required

by the said attachment which was provided for as aforesaid. And this defendant, further answering, denies, that as far as he knows, or has been informed or believes, the said Kimball did, during all or any part of the period in the said bill in that behalf mentioned, know or have any reason to believe, that this defendant was merely a trustee of said property for the ultimate benefit of said complainant, or that the legal or equitable title of the said complainant was caused to be apparently vested in this defendant, in pursuance of any such agreement, or for any such purpose as in the said bill is alleged, or that the said Kimball, during the said period in the said bill mentioned, treated with the said complainant as the real owner of the said property. And this defendant, further answering, saith, that, he is informed and believes, that the said complainant did make an agreement with the said Kimball for the rent of the halls of the said building, before the same had been erected, and before this defendant received from the said Deblois a conveyance thereof, and this defendant says, that he believes the same to be in the hands of the said Kimball, but this defendant is advised and believes, that the said agreement became null and of no effect whatever, by reason of the inability and failure of the said complainant to erect the said building or comply with the terms of his agreement with said Deblois so as to obtain any title to the premises.

And this defendant further answering, says that he did attempt to sell the said estate at auction, as he had a right to do, but not in pursuance of any fraudulent intent or purpose, when a temporary injunction from proceeding therein upon the prayer of the said complainant in his bill in equity filed in the supreme judicial court of Massachusetts, was granted without any notice or hearing of this defendant. And this defendant further answering, says, that after he had put in his answer to the said bill, which he then and still believes to be a complete defence thereto, and a notice of an intended motion to dissolve the injunction had been given to said complainant, and the counsel of this defendant was about to move the same before the said court, a negotiation was proposed by or on the part of said complainant, and was commenced between the said complainant and this defendant, through the intervention of other persons, which resulted in a stipulation, filed in the said cause, that unless the complainant should, within sixty days from the twenty-second day of November then last, fulfil all the conditions therein mentioned, the complainant's said bill should be dismissed with costs for this defendant, one of which conditions was, that the said complainant should pay to this defendant a certain sum of money, which this defendant denies to be unreasonable, or unjustly or extorsively demanded, and perform certain other things within sixty days from the twenty-second day of November, 1841, the time when these terms were and this defendant believes agreed upon, and this defendant says, that a portion of the sixty days expired, but how much this defendant does not recollect, before the said stipulation was signed by the said complainant and filed in the said cause, but this defendant denies, that the said complainant

was hindered therein by reason of any delay or evasion of this defendant. And this defendant knows of no time spent in any endeavors of said complainant to have the same reduced to writing;—and that the terms of said stipulation were settled in the said twenty-second day of November, and fully understood by the complainant and his counsel, and the delay in reducing the same to a technical form was, in no respect, from any doubt as to the substantial part thereof, nor was the complainant any way hindered from performing said terms by such delay, and this defendant says, that it was never agreed, that this defendant should subscribe the same, but on the contrary thereof, that it was fully understood by the said complainant, that this defendant should not be required, and he never was required to subscribe the same. And this defendant further answering denies, that there ever was any conspiracy between him and said Kimball to prevent the said complainant from obtaining the said money in order to comply with the conditions of said stipulation; or that the said Kimball did act in concert with this defendant or assist him in vilifying or disparaging the said complainant, or any pretended equitable title of the said complainant in the premises, or to impugn any just claim of the said complainant thereto, with any such intent or purpose as in the said bill is alleged. But this defendant has, at all, times, denied, and still denies, and insists, that the said complainant, after the purchase thereof by this defendant, had any equitable title or just claim in or to the premises. And this defendant further answering, denies, that he did, or the said Kimball, with the knowledge or assent of this defendant, or in pursuance of any concert with this defendant, did request any person, with whom the said complainant was negotiating for a loan, not to, close any arrangement with the complainant aforesaid, but to make the same loan to said Kimball, and take the same estate as security for such loan. And this defendant further answering, denies, that by reason of any imputations thrown upon the said complainant, or his pretended equitable title to the said property, or the general merits of his pretended claim, or by any other hindrances or obstructions thrown by this defendant, or said Kimball, acting in concert or confederacy with this defendant, in the way of the said complainant, he was prevented from obtaining the said money and complying

with the conditions of said stipulations, and thus obliged to submit to a dismissal of his said bill, as in the complainant's present bill is alleged.

And this defendant further answering, says, that after the dismissal of the said bill of complaint filed in the said supreme judicial court, he did advertise the premises for sale at auction in about twelve days, which, this defendant submits, would have given the complainant sufficient time to prepare and file a bill in equity, if he had then thought he had an equitable interest in the premises. And he says, that this attempt to sell was at that time abandoned, in consequence of the attachment of the premises as the property of this defendant upon a writ in a certain suit at law, brought by said complainant against this defendant, wherein the said complainant declared against this defendant upon certain pretended promises therein alleged to have been broken, and among other things a certain alleged promise to pay for work and labor alleged to have been done by the said complainant for this defendant to the alleged damage of the complainant of fifty thousand dollars, in which suit such proceedings were had that some time afterwards the said complainant became nonsuit. And this defendant says the said complainant had no claim against this defendant, except a pretended claim in respect to said property and the erection of said buildings, and the moneys work, labor and materials sued for in said writ, this defendant believes and therefore avers were moneys work, labor and materials, pretended by said complainant to have been furnished by him in the erection of said building, and thus by said claims and the attachment of said premises as the property of this defendant, this defendant submits, that the said complainant did abandon any and all pretended claim and remedy in equity, which he now sets up and seeks in this his present bill. And this defendant says that the reason he abandoned the attempt to sell the said estate at auction was, that a cloud was, as he thought, east upon the title by the attachment aforesaid, whereby the chance of an advantageous sale at auction was diminished.

And this defendant further answering, denies, that he has ever confessed or admitted to any legal or other adviser or person whatever, that he made any such agreement with said complainant, as in the said present bill of complaint is set forth relating to said land, nor has been advised by any one not to commit such agreement to writing, or sign any writing touching the same, as no such agreement was ever made, nor any agreement, which, if reduced to writing, would entitle the complainant to any interest in the premises. But this defendant says, that he, never intending to take or hold the said lands under or subject to any condition or trust whatsoever, and at the same time having the motive and design herein mentioned, if he should think fit and not otherwise, to benefit the family of the said complainant, the complainant himself did, before agreeing to make the purchase aforesaid, advise with a certain person learned in the law, whether it would under the circumstances be safe for this defendant to make such purchase, and take such absolute title with a full understanding, that it was to be subject to no trust, express or implied, while

this defendant had and expressed verbally such motive and design to benefit the family of the said complainant and the said complainant himself, if under the circumstances as they might turn out this defendant should think fit. And at the same time this defendant was advised, that he would be safe in so doing, he was advised also, that it would be better to commit nothing to writing touching the same. And this defendant further answering says, that in the month of June, and not August 1841, according to his best recollection, the said complainant did, as this defendant believes, ask this defendant to exhibit to him some statement of the cost of the said building, to this defendant, with reference to the arrangement and proposed purchase of April or May hereinafter stated. The particulars of which request this defendant, for want of recollection, cannot more particularly set forth, except that it was not pursuant to any equitable title then claimed to said property in said complainant or with any intent or purpose then expressed of calling on this defendant to account to him said complainant, as trustee or agent, but to enable him, said complainant, to determine what the price, for which this defendant had proposed to sell to said complainant, would amount to, adding 3500 dollars profit to this defendant to the cost and the debt due from said complainant and from a member of his family to this defendant. And this defendant did, in consequence thereof, and to show the said complainant, that the price, at which he proposed to convey the premises to said complainant was reasonable, but not admitting, and with no belief, that this defendant was bound to render an account to said complainant of his doings in the premises, made some memoranda on a sheet of paper, which are still in his possession, of the moneys expended, and the cost and expenses of the said building incurred by this defendant, and did exhibit the same to the said complainant, but not by way of rendering or intending to render to said complainant an account as trustee or agent or otherwise, nor was he as such required to render any account, which paper writing was headed "memoranda of cost of building on Tremont street." And this defendant says, that the sum of three thousand five hundred dollars was not, nor was any other sum put down therein as a charge for his this defendant's personal services, as agent, or trustee, or otherwise,

prelimor was there any charge for personal services or commissions of this defendant as agent, or trustee, or otherwise, put down in said memoranda, but this defendant, after consulting with his friends, did think that he ought, for his care, labor, trouble and responsibility, to have, as profit, the sum of five thousand dollars, and so verbally stated to said complainant, but at his request reduced the sum to three thousand five hundred dollars. And this defendant says there were items of brokerage and interest and commissions in said memoranda, but none but such as had been bona fide paid by this defendant in raising moneys, and for moneys raised to enable him to complete the said building, and this defendant insists, that he is not bound to set the same forth, or to furnish any copy thereof, and denies, that he has ever exhibited any such account to the said complainant touching the premises as in said bill is alleged.

And this defendant says, that Richards, Munn and Co. did claim to have a lien upon the premises, by reason of a contract for materials furnished by them to said complainant before this defendant's purchase of the premises, to be used in the said building, which contract was, as this defendant believes, recorded, according to the law respecting such liens; and the same was released and discharged under an agreement, that this defendant should give the said Richards, Munn and Co. or to the said Munn this defendant's note of hand for four hundred and fifty dollars, and that an assignment of a claim for damages, for the taking of a certain strip or parcel of land, taken by the city of Boston to widen Bromfield street, should be made to Richards, Munn and Co. or to said Munn. And this defendant believes, that some release or other act was done by the said complainant, but what precisely this defendant does not know, and cannot set forth. And this defendant says, that afterwards he paid the said note and gave a deed of the said land to the said city of Boston, and Richards, Munn and Co. or said Munn received the money paid by the city therefor. And this defendant says, that the said Kimball did claim a lien upon the said premises by mortgage for one thousand dollars as herein before set forth, and the claim aforesaid was released at the time of the purchase of the said estate by this defendant, in consideration of an agreement of this defendant before the purchase, in case he should purchase, to pay said Kimball the said sum of one thousand dollars and interest, from the first moneys, that might accrue from the rents of said estate after paying the expense and interest that might accrue in procuring the necessary advance of money for erecting the said building upon said estate, and in case of a sale thereof before rents had accrued as before stated to pay that amount from the proceeds of sale, should there be a sufficient surplus after paying the money advanced and all expenses; but this defendant was not to be considered in any way liable to pay, except he was enabled to do so from the sources above mentioned, which sum of one thousand dollars and interest this defendant did pay as herein before stated—which said agreement this defendant produces and files in this cause for the usual purposes. And this defendant says, that the arrangement

and agreement aforesaid, in regard to the pretended claim and lien of Richards, Munn & Co. and said Kimball, was made by this defendant, not as the agent, or trustee, for the said complainant, or as acknowledging that he had any interest therein, as the said complainant then well knew, nor because this defendant believed, that the said Richards, Munn & Company or the said Kimball had any real or legal lien on the premises. But this defendant says, as they had a colorable or pretended claim or lien, which might be a cloud upon this defendant's title and embarrass him in raising money upon said estate to complete said building, these arrangements to extinguish and remove the same seemed expedient and advisable to this defendant, for his own interest, and the said complainant aided this defendant herein, not as having any legal or equitable interest in the premises, but in the hope and expectation, that this defendant might see fit, of his own free will and pleasure, to benefit the said complainant, as herein before stated. And this defendant says, that these matters are no evidence that the said complainant's equitable interest in the said premises had not expired and run out, when this defendant agreed to take said estate and after the said complainant failed to perform the said decree, as in said bill alleged.

And now, inasmuch as various charges of fraud, conspiracy, extortion, breach of trust and the like, are in the complainant's bill, most falsely and slanderously made against this defendant, apparently with the sole intent of injuring his good name, this defendant, in justification of himself and of his acts, would summarily repeat and solemnly declare; that, as before stated, when he purchased said estate, it was his intent, if the same should be found of greater value than the amount of his expenditures, claims and reasonable profit, as aforesaid, to offer, at such time and terms as he might deem best, to the complainant or his family, an opportunity to purchase the same for the amount aforesaid; that the possession of an absolute and indefeasible title, free from any and every trust in law or equity, was the only condition, on which he would purchase said estate, and that, under the advice of his counsel, he took the conveyances thereof to perfect in himself such a title; that every title or color of title, or claim in law or equity, on the part of the complainant, was expressly disavowed and guarded against, and with special care, as the existence of

any interest in the complainant would, on account of his notorious insolvency, have put at ruinous hazard the whole investment of this defendant; that after said purchase, in times of peculiar difficulty, and under great embarrassments in the procuring of the necessary funds, he caused the building to be erected as aforesaid; that after its completion, as the complainant professed to believe that it was of immense value, far exceeding any estimate thereof made by this defendant, this defendant repeatedly offered to the complainant himself the privilege of purchasing the same for the amount of the actual expenditures, claims, interest, and a reasonable profit as aforesaid; which amount the complainant assented to, and was fixed as the price, after some discussions as to the sum added as profit; that the only reason known to this defendant, why the complainant did not purchase said estate for such price, was his utter want of means and credit, and the refusal of others, to whom he applied to make advances to him, on his security or the security of the estate if purchased by him; that, to make the purchase more easy to the complainant, this defendant offered to extend the time of payment of parts of the purchase money, and also to allow his own name to remain on parts of the outstanding liabilities; that after giving to the complainant such opportunities, and after having waited the whole time asked for by the complainant himself, and after having notified him long previously of his intent so to do, unless the purchase was made by him, he at length, in September last, advertised the same for sale at auction, which sale the complainant prevented by the injunction obtained as aforesaid; that although, as he was advised by his counsel, the injunction would at the hearing be at once dissolved, he afterward, in November, gave to the complainant another opportunity for sixty days to purchase the estate on terms as liberal, and assented to by the complainant himself, having added thereto only the actual further expenditures and costs; that after the dismissal of the complainant's bill under the stipulation aforesaid, this defendant again, in February last, advertised the estate for sale at auction; which sale the complainant again prevented by attachment on a writ; that, when so advertising said estate for sale at the times aforesaid, it was the intent of this defendant by such sale to ascertain and obtain the full value of the estate; that it was his purpose, notwithstanding all the vexatious proceedings of the complainant, if the same should sell for a sum exceeding the amount of his expenditures and claims as aforesaid and a fair profit, to give to the complainant or his family the whole net surplus of the proceeds, unless restrained by the proceedings under the bill of the said Bliss pending as aforesaid; that by these various proceedings and stratagems of the complainant, done in gross violation of good faith and of his own positive agreements, a public sale was rendered impossible; that the object of the complainant, as this defendant believes, was thereby to compel this defendant to continue to hold said estate till the complainant could, by some change of times or some lucky accident, procure the purchase money, hoping, that this defendant would, however reviled or injured by him, renew the offer to himself or his family; that this defendant was

absolutely unable to continue to hold said estate, for the whole cost of which (excepting a very small sum furnished from his own means) he was indebted to others, the payment of a large portion of which debt was due and urgently demanded and extension of time refused; that in this state of things, with these large debts, the times hard beyond example, the estate of very uncertain value and liable to depreciation, the title injured by the pretensions of the complainant and incumbered by his malicious attachment, he had but one way to relieve himself from the risk of utter bankruptcy and ruin, to wit, by selling the estate at private-sale to one, who from his situation, as lessee could be induced to give its full value; that he therefore sold it, while under such attachment, to David Kimball as aforesaid, for the highest price which he could obtain for the same, a price which he believed and still believes to have been its full value; that afterwards, when the attachment was dissolved by the dismissal of the suit at law, the proceedings now pending were openly threatened by the complainant; that therefore, while the complainant assumes such a position and urges such claims, this defendant, as to all the proceeds of such sale received or to be received, and the disposition, which he may make thereof, holds himself accountable only to his own sense of right, claiming a full and absolute discretion therein, intending in this, as in all his conduct, to deal honorably towards the complainant as towards others, but denying his right to compel an account thereof in any court whatsoever.

And this defendant sets forth,—in answer to the several averments of contracts, agreements, promises and trusts concerning the premises with, to or for the benefit of said complainant, in the said bill contained, and to so much of the said bill, as sets forth any pretended contract, agreement, trust or confidence between the said complainant and the defendant, or as seeks any relief or discovery of this defendant of or concerning any pretended contract, agreement, trust or confidence between this defendant and the complainant touching the said lands mentioned in said bill or any part thereof—the statute of frauds, as enacted in the laws of the commonwealth of Massachusetts, by the first section of the seventy-fourth chapter, and the third section of the fifty-ninth chapter, of the Revised Statutes. And this defendant

says, that neither he, not any person by him lawfully authorized thereto, did ever make or sign any note or memorandum in writing, or any writing whatsoever, of or containing any such contract, promise, or agreement, or grant or declaration, or any contract, promise or agreement, or grant or declaration whatsoever, with, to or for the benefit of the said complainant, touching the said lands, or creating any estate or interest therein, or creating or declaring any trust respecting the same, in or for the benefit of the said complainant, and this defendant insists upon the said statutes and claims the same benefit therefrom, as if he had pleaded the same. And this defendant says, that the said complainant, after the completion of the said building, so far as it has been, or is intended at present to be completed, did file his bill in equity in the supreme judicial court of the commonwealth of Massachusetts against this defendant, one Elizabeth Deblois, William Hobbs, the Provident Institution for Savings in Boston, and the president, directors and company of the Merchants' Bank, as the said complainant in his said bill of complaint has alleged, wherein the said complainant stated himself to have the same pretended equitable interest in the premises he now claims, and insisted upon similar pretended trusts for his benefit, and made the same claims against the defendant which he now makes, and complained of the same pretended wrong and injury whereof he now complains, and prayed, that they might full, true and perfect answers make to the premises in said former bill alleged, and that the said Eldredge might be enjoined from selling and conveying to any other person than the said complainant the said premises, and might be compelled to execute the trusts in said former bill set forth, and that the said complainant might have such other and further relief in the premises therein alleged, as his case might require and to the said court might seem meet; that this defendant appeared to the said suit and put in his answer to the said bill of complaint, stating among other things. In effect, as he now does, that this defendant took an absolute estate in the premises from said Deblois and subject to no trust for the complainant, and denying, that said complainant had any interest whatever in the premises, and thereupon, with the aid and advice of his counsel, the said complainant did agree and stipulate, and file his said stipulation and agreement in the said cause under his hand, that unless he should within sixty days fulfil all the said conditions therein mentioned, the said bill should be dismissed with costs for the defendant. And afterwards, it appearing to the court, that the terms of the said stipulation had not been performed by the said complainant on motion of the counsel for the defendant, it was ordered and decreed, that the said former bill be dismissed with costs for the defendant as by the said former bill, answer stipulation and decree on the files of the said court remaining, to which this defendant for greater certainty craves leave to refer.

And this defendant denies, that the terms of the said stipulation were first proposed by this defendant, and says, that they were voluntarily proposed by the said complainant as herein before stated, and denies, that it was agreed between this defendant and said

complainant, that this defendant should prepare or sign the same, or that there was any delay or evasion on the part of this defendant in regard to the reducing the same to writing, or any other delay or hindrance than such as he believes to have been unnecessarily caused or created by said complainant, or that the amount required to be paid by the terms of the said stipulation was unreasonably, unjustly or extorsively demanded by this defendant, as in the said bill is alleged, or that this defendant, or any one, with the knowledge or assent of, or in pursuance of any concert or conspiracy with this defendant, ever said or insinuated, or did any thing, with any intent or purpose of in any way obstructing, or hindering, or preventing, the said complainant from complying with the terms of the said stipulation, or that he was so hindered, obstructed, or prevented by any thing said, or insinuated, or done by this defendant, or that the said stipulation was procured to be made or enticed into on the part of the said complainant, or that the said complainant was delayed, hindered, obstructed or prevented in or from complying with the terms thereof by this defendant or any one acting for or in concert with him, or by any unfair or undue means used, as far as this defendant knows, is informed, and believes, by any person whatsoever, and this defendant avers, that the said bill, now exhibited against this defendant, is for the same matter as the said bill before exhibited, and this defendant insists upon the same proceedings and decree in said former suit as a complete bar to the present suit of the said complainant, and prays that he may have the same benefit therefrom as if he had formally pleaded the same.

And this defendant says, that Seth Bliss herein before mentioned, to whom the said complainant by his deed bearing date the twentieth day of July, A. D. 1840, conveyed all his pretended right, title and interest and estate in the said lands and buildings as herein before mentioned, on or about the sixth day of September, in the year of our Lord 1841, exhibited his bill in equity before the justices of the supreme judicial court of the state of Massachusetts against this defendant, and the said complainant insisting upon the said conveyance, and stating, as is therein stated, and praying, that this defendant might be decreed to render a full and true account of the amount paid and advanced by him for the purchase of the said estate, and for the erection and

completion of the edifice, and of the liabilities he had come under, and which were outstanding on account thereof, and to convey said estate to the said Bliss, on payment being made to him, this defendant, of the amount of moneys, which he had so paid and advanced, and for his services, care and responsibility in the management of the same, and being indemnified against his said outstanding liabilities, or to sell and dispose of said estate, under the direction of the said supreme judicial court, and after reimbursing himself the amount of all moneys so paid and advanced and for his services, care and responsibility aforesaid, and indemnifying himself against his said liabilities, then outstanding, from the proceeds of such sale, to pay from the surplus of such proceeds a certain amount of moneys claimed by the said Bliss in his said bill to be payable to himself therefrom as in said bill particularly set forth; and further praying, that he the said Bliss might have such further and other relief in the premises as the nature of his case might require and as might be agreeable to equity; and further specially praying, that the said justices of the said supreme judicial court would grant unto the said Bliss their writ of injunction restraining this defendant from selling or conveying the estate to any person other than the said Bliss, unless by a sale thereof he should realize such sum as should be sufficient to repay him, this defendant, the amount of all his advances and liabilities as aforesaid, and for his care, services and responsibility, and also a surplus sufficient to pay to the said Bliss the whole amount of moneys so as aforesaid claimed by him in his said bill, and enjoining this defendant, in case of such sale, that he should retain from such surplus the amount of said moneys so claimed by said Bliss, and not to pay over the same to any person other than the said Bliss, until the further order of the said court in the premises; and further praying, that a writ of subpoena should issue to this defendant, and the complainant, requiring them to appear in said court and answer and abide the order and decree thereof in the premises; all as in said bill more particularly set forth. Whereupon, to wit, on the same sixth day of September last, such writ of subpoena, as prayed for by the said Bliss, was issued from said court unto this defendant, and the complainant, and on the same day duly served on this defendant, and as this defendant is informed and believes, at the same time, or soon after, and long before the filing of the present bill, on the complainant, who then was (if he is not now) a citizen and resident within this state—and on the same sixth day of September, a writ of injunction was granted by said court as prayed for by the said Bliss in the said bill against the defendant and the complainant, enjoining in manner and form as prayed for; which injunction was afterwards, to wit, on the seventh day of the same September, so far modified by order of said court, as to allow this defendant to sell said estate at public auction, on complying with certain conditions; the said injunction in all other respects to stand confirmed until the further order of the court; which injunction remains still in full force, and has never been dissolved; unto which bill of the said Bliss so filed as aforesaid, this defendant appeared in said court, long before the filing of the

present bill of the complainant; and the complainant either hath appeared, or was held to appear by the said subpoena long before the filing of his present bill of complaint; whether he hath, in fact, appeared, this defendant knoweth not. Which bill of the said Bliss against this defendant and the complainant is still pending in the said supreme judicial court of the commonwealth of Massachusetts for the county of Suffolk, unto which this defendant and the complainant are and were, before and at the time of the filing of the present bill, and ever since, held to answer, and are and were before, and at the time of the filing of the present bill, and ever since, enjoined by the said writ of injunction, as therein set forth. And this defendant avers, that the said bill of the said Bliss, so pending, as aforesaid, in the said court against this defendant and the complainant, is for and concerning the same premises as the present bill of complaint, that the said court have full jurisdiction in equity over all the said parties and premises, and that this defendant and complainant are thereby absolutely withdrawn and restrained by law, and under heavy penalties, from submitting themselves to or acting under the decrees of any other court, made in compliance with the prayer of the complainant's present bill of complaint. And this defendant sets forth, and insists upon these matters also as a complete bar to the complainant's present bill of complaint, and he prays, that he may have the same benefit thereof, under the rule of this court, as if he had formally pleaded the same in bar to the said bill. And as to all the matters in the said bill of complaint, which this defendant has omitted or declined to answer, or has only partially answered, and which by the rules of this court in chancery, he is not bound to answer, this defendant, insisting upon and claiming the benefit of said rules, and in no wise waiving his rights by any partial answer, prays, that he may have the same advantage of the said rules, as if he had pleaded or demurred to the matters aforesaid.

The answer of David Kimball was as follows:

David Kimball, one of the defendants, also put in an answer, denying the rights of the said complainant, and stating, that, after refusing to take a lease of the premises from the complainant, he hired the same of Eldredge,

prelimot as agent, or trustee for the complainant, but as owner thereof. That lie does not know, or believe, that the said Eldredge was confidentially employed by the said defendant in relation to the said property, but that the said complainant did absolutely release all his rights to the said property to the said Eldredge, and that he cannot now set up any right against the said defendant as a bona fide purchaser, without notice. That this defendant had not, nor has any reason to believe, that the said complainant had, or has, any legal or equitable interest in the premises, after the purchase of the said Eldredge from the said Deblois, but at the same time, this defendant has been informed and believes, that in the purchase and erection of the said building, the said Eldredge did expect, that the complainant would be benefited thereby, and that it was the expectation of said Eldredge, that said complainant would ultimately be the owner of the said lands and buildings, provided he, the said complainant, could repay to said Eldredge what moneys he had expended in completing the same, and relieve him from all the liabilities he had incurred, and a further sum for profit or compensation for labor, care, trouble and responsibility in the premises, or on some such terms, he, the said complainant, relying wholly on the honor of the said Eldredge, and the good feelings he might have towards the complainant in, this regard, and as both parties well understood, as this defendant believes, having no legal or equitable interest in or claim to the premises whatsoever. And this defendant, further answering, says, that the said Eldredge, on the first day of March, 1842, did convey to this defendant bona fide, by deed of warranty, with release of dower of the wife of said Eldredge, the said land and building, the consideration for which conveyance, as agreed upon, was nominally sixty-two thousand five hundred dollars, consisting in part of specific articles, at an estimated value; the whole of the consideration paid and secured might not be of greater value than, but was, at least, of, the value of sixty-two thousand dollars, which was a full and adequate price for the same, and which was bona fide paid and secured, as hereinafter mentioned; but the consideration alleged in the deed was fifty-five thousand dollars.

And this defendant further answering, denies, that he took the said conveyance under any express, or tacit agreement, or understanding with said Eldredge to aid and assist him in perfecting a title to or disposing of the said premises for his said Eldredge's profit or advantage, or in order to preclude the complainant from asserting or establishing any pretended equitable interest in or title to the said land and buildings, or under any other express or tacit agreement or understanding, than is expressed in the said deed, by which said Eldredge conveyed the premises to this defendant; and this defendant says, that he has before stated the whole and true amount of the consideration, as nearly as he can estimate the same, and says that part of the consideration was paid in specific articles delivered to said Eldredge, a part by cancelling said Eldredge's obligation to pay the sum of one thousand dollars and interest borrowed of this defendant by said com-

plainant, and originally secured by mortgage of said complainant of the premises, and the remainder over and above the then existing mortgage, which mortgage the defendant assumed to pay, was secured to be paid by negotiable promissory notes made by this defendant, payable to his own order, and endorsed and delivered to said Eldredge, payable at different times,—some of which were secured by mortgage of the premises, and some by mortgage of other property of this defendant, some of which notes have been paid as they became due,—and all have been paid, which have become due, from the proper moneys of this defendant,—and this defendant has been informed, and believes, part of those, which are still outstanding, have been, and as far as he knows, or has been informed, they all may have been negotiated bona fide, and this defendant does not know, nor has been informed, and cannot set forth, who has held, or does hold the same or any of them, and this defendant says, that no agreement or understanding was ever had, or made between the said Eldredge and this defendant, relative to the said notes or any of them, except what appears upon the face of the said notes, and an agreement endorsed upon two of the said notes, to the effect, that so much if any thing should be deducted from the amount of these two notes as might be necessary to indemnify this defendant for the amount, if any thing, for which any execution, which might issue in said complainant's said suit at common law, might be duly levied on the premises; since the termination of that suit, other notes of like tenor have been given in substitution for these, without said endorsement. And this defendant insists and submits, that he is not bound to give a more particular or any statement of the manner, in which said consideration has been paid or secured to be paid, or who have held or now hold the said promissory notes; and this defendant denies, that the said conveyance was collusively or fraudulently made, or was made with any design between him and said Eldredge to defraud the said complainant, or to displace any equitable claim or title, which the said complainant might have to said estate, or to defeat or embarrass any remedy he might have against the same, or upon any secret trust, understanding or confidence, that if the complainant should establish his lien or claim thereon, said Eldredge should deliver up said notes or securities to this defendant, or reinstate

him in all or any respect as he was before the said conveyance, or upon any other secret trust or confidence between the said Eldredge and this defendant whatsoever.

And this defendant further answering says, that before the conveyance aforesaid from the said Eldredge to this defendant, he had notice of the dealings of the said complainant and of said Eldredge in relation to said property, but this defendant denies, that he had at the time of receiving the said conveyance and paying, so far as it was paid at that time, and securing to be paid, the consideration therefor, in the manner before stated, any notice of any right, title, interest or claim of the said complainant in or to the premises, or any reason to suspect or believe, or did believe, that the said complainant had or claimed to have any right, title or interest in law, or equity, in or to the said property, as in the said bill is alleged; but this defendant had notice, that the said complainant had previously made some claim in respect to the premises, by filing his bill in equity against the Eldredge in the supreme judicial court of Massachusetts, which bill had then been dismissed, and the said complainant had brought his action at law, and attached the said premises as the property of the said Eldredge, which action was then pending; and this defendant had good reason to believe, and did believe, that said complainant had abandoned all claim to any title or interest, legal or equitable, in the premises, other than such as might have been acquired by the said attachment, which was provided for as aforesaid; and this defendant denies, that he did, during all or any part of the period in the said bill, in that behalf mentioned, know, or have any reason to believe, or did believe, that the said Eldredge was merely a trustee of the said property for the ultimate benefit of the said complainant, or that the legal or equitable title of the said complainant were caused to be apparently vested in the said Eldredge, in pursuance of any such purpose, as in the said bill is alleged, and denies that this defendant, during the said period, in the said bill mentioned, or any part thereof, treated with the said complainant as the real owner of the said property. And this defendant, further answering, says, that the said complainant did make the agreement with this defendant for the rent of the halls to be made in said building, before the erection thereof, as in said bill is alleged, which said agreement is in the possession of this defendant, and which he produces, and to which for greater certainty he refers, and a copy of which he herewith files, and which agreement this defendant believes, and so told said complainant, became null and void, and of no effect whatsoever, and has always been so treated by this defendant, by reason of the inability and failure of the said defendant to erect the said building, or comply with the terms of his agreement with the said Deblois in said bill mentioned, so as to obtain any title to the premises.

And this defendant further answering, says, that there was no dispute between the complainant and this defendant, which was referred to referees, touching said agreement or lease; but there was a difference between said Eldredge and the corporation before mentioned, of which the defendant was the treasurer, and a member of a committee, to

hire the premises of said Eldredge for the corporation, respecting the amount, which the said corporation, under the circumstances, ought to pay to said Eldredge for rent of the premises, and said Eldredge and said corporation, by this defendant and one Alfred A. Wellington, a committee for that purpose, agreed to submit the same to the arbitration of certain referees, who, by an agreement between said Eldredge and said corporation, were to take said former agreement with said complainant, as the basis, upon which to decide the rent to be paid by said corporation, and to take into consideration any deviations there might have been made from the said contract, with all other matters and things, that might appertain thereto, and were to decide what, under all the circumstances, should be an equitable, just and proper rent for the said corporation to pay to the said Eldredge, and this defendant says, that this matter was conducted by said Eldredge on his part before the referees, and by this defendant on the part of the said corporation, as the parties solely interested, and the defendant denies, that the said complainant was a party to the said agreement, or with this defendant chose said referees, of that there was a word passed between said complainant and this defendant relative to the selection of the said referees, and this defendant further denies, that the whole matter was conducted by the complainant as the real party, or that he was the real party, or acted as such at the hearing, or that said Eldredge's name was only formally used in said agreement, or that the said complainant appeared before the said referees in any other character than as a witness, or to explain the plans of said building and state, or testify respecting the same, and this defendant denies, that he, this defendant, pursuant to such original agreement in said bill mentioned in that behalf, and the award of said referees, or pursuant to either of them, became, or was or is at law or in equity the tenant of the Halls in said bill mentioned, or either of them, under the said complainant for any rent whatever. And this defendant further answering, says, that he has been informed and believes, that the said Eldredge did advertise the premises for sale at auction, and so far attempt to sell the same as this defendant believed, and still believes he had a right to do, and as this defendant believes, not in pursuance of any fraudulent intent or purpose, as in said bill is alleged, but was temporarily

enjoined from selling the same as in the said bill is mentioned. And this defendant further answering, says, that he has been informed and believes, that after the said injunction was granted, but whether before or after it was removed or not this defendant does not know, some negotiation was opened between the said Eldredge and said complainant, touching or relating to the said lands and buildings, but what was the nature of the said negotiation, or what was agreed upon or whether any thing was agreed upon, this defendant does not know, has not been informed, and cannot set forth as to his belief.

And this defendant says, that the said Eldredge on the first day of March, A. D. 1842, did convey to this defendant, by his deed of warranty of that date, with a release of dower of the wife of said Eldredge, the said land and buildings, the consideration expressed therein being fifty-five thousand dollars, but the true and real consideration being as herein before stated, which was actually and bona fide paid and secured to be paid as herein before stated, and which was a full and adequate consideration for the purchase of the said land and buildings, which said deed duly executed by the said Eldredge and by his wife this defendant produces and refers to for greater certainty. And this defendant says, that at the time of receiving the said deed and conveyance from the said Eldredge, and at the time of paying and securing to be paid the said consideration therefor as aforesaid, he had no notice nor intimation nor reason to suspect or believe, nor did suspect or believe, that the said complainant had or pretended to have any right, title or interest or claim in or to the said premises saving such as he might have acquired by the said attachment; and this defendant insists that he is a bona fide purchaser for a valuable consideration, without notice, and is entitled to protection as such purchaser, and that the said complainant, under the circumstances, ought not to be allowed as against this defendant to set up any claim to any right, title or interest in the said premises; and this defendant not waiving this ground of defence, but insisting thereon, prays that he may have the same benefit therefrom as if he had pleaded the same. And this defendant says, as to the several averments of contracts, agreements, promises and trusts concerning the premises, with, to or for the benefit of said complainant in the said bill contained, and as to so much of the said bill as sets forth any pretended contract, agreement, trust or confidence between the said complainant and the said Eldredge, or as seeks any relief or discovery of this defendant of or concerning any pretended contract, agreement, trust or confidence between said Eldredge and the complainant, touching the said lands mentioned in said bill or any part thereof, says that neither the said Eldredge nor any person by him lawfully authorized thereto, ever made or signed any note or memorandum in writing, or any writing whatsoever of or containing any such contract, promise or agreement, grant or declaration, or any contract, promise or agreement, grant or declaration whatsoever with, to or for the benefit of the said complainant touching the said lands, or creating any estate or interest therein, or creating or declaring any trust respecting the same in or for the benefit of the said com-

plainant as required by the statute of frauds of the commonwealth of Massachusetts. And this defendant insists upon the said statute, and claims the same benefit therefrom as if he had pleaded the same.

B. R. Curtis and S. Greenleaf, for plaintiff.

William H. Gardiner, for defendants.

STORY, Circuit Justice. This cause is one of extraordinary complexity, and no small difficulty, as well in the principles of law involved in it, as in the conflicting and varied details of the evidence. It has been most fully and elaborately argued at the bar; and to discuss it, at large, upon all the topics, embraced in the argument, would require from the court a length and volume of opinion and reasoning, totally inconsistent with its duties to other suitors. What, therefore, I shall endeavor to do, is to bring into view those principles of law, which must form the foundation of the ultimate decree of the court, with such allusions only to the evidence, as may serve to show, what are the conclusions of fact, to which I have arrived, as, on the whole, the best supported, without any effort to reconcile discrepancies, or to explain or dissipate the obscurities, which surround many parts of it. And, after all, I am persuaded, that so far as my own judgment is concerned, it is to the survey of the cause in masses, and not in minute details, that I may hope to expound the grounds of my own opinion, and to enable the parties to take the opinion of the supreme court, upon an appeal in the premises. The bill of the plaintiff and the answer of Eldredge present, in truth, the entire outline of the case, as each party desires to have it to be understood, and supersedes the necessity of any other detailed statement.

The great points in the cause, to which all others are subordinate, and on which all others depend, are, (1) whether Eldredge originally took the property in controversy upon trust for the ultimate benefit of Jenkins, substantially as stated in the bill; and if so, (2) whether that trust is one, which, in point of law, it is competent for this court to direct to be carried into execution.

That there was a trust of some sort between the parties seems to me clear from the whole evidence in the case, including the answer of Eldredge. The latter insists, indeed, that it was a mere honorary understanding, or arrangement, dependent, for its execution,

solely upon his own free will, discretion, and pleasure, and by no means constituting, or intended to constitute, any trust binding in law or in equity, and that Jenkins always so understood it, and agreed to it At the same time, Eldredge admits, that his motive in engaging in the speculation or enterprise was, mainly, with a view to the benefit of Jenkins's family, with some of whom he was nearly connected, after receiving a full remuneration for his own services and advances, if the speculation should turn out to be successful. In furtherance of this view, he states in his answer, "And this defendant denies, that any agreement or understanding whatsoever, except the express agreement and understanding between the said complainant and this defendant, that this defendant should take a title to said property, free from all right or claim on the part of the said complainant, express or implied, in law or equity, (as in the complainant's seventh interrogatory is inquired for,) ever existed, or was made between the said complainant and this defendant, other than the expressions of the motives and designs of this defendant, depending wholly on his own free will, and discretion, and pleasure, for the execution thereof, as therewith expressly declared and fully understood, as hereinafter fully and particularly declared and set forth, and every allegation of any other or different agreement, or understanding, express or implied, in the said complainant's said bill contained, this defendant denies. And this defendant says, that although there was no such agreement, as by said complainant alleged, and although he, this defendant, always refused to take, or hold, any conveyance or title, excepting an absolute and unconditional estate in the premises free from any trust whatsoever; nevertheless, he freely admits, that one of his motives in purchasing the said estate, from the said Deblois, and taking the conveyance thereof from her, herein stated, was, besides the hope of profit and benefit to himself, a desire also to benefit the complainant's family, and with them, the complainant himself, and that this defendant then believed, that if the said building should be completed, in the manner projected, it might yield some pecuniary profit, and that it was his design, and intention, if, in the end, the same should be found to exceed in value the amount of all his payments, expenses and liabilities therefor, and such reasonable profit to himself, as he should in his own discretion think right, and also the amount of certain debts then, and before, and now due, to this defendant, from the said complainant, and also from a member of his family, then to give to the said complainant, or to his family, an opportunity to purchase the same for the amount of all his, this defendant's payments, expenses and liabilities therefor, and other claims aforesaid. And this defendant freely also admits, that he did, after the expiration of the time fixed by said decree, and not before, state his motive and design aforesaid in conversation with the said complainant, both before, and after his, this defendant's, receiving the conveyance from the said Elizabeth herein stated, but this defendant expressly declares, that while thus having and expressing such motive and design, it was therewith also distinctly declared by this defendant to the complainant, and by the said complainant

at all times well known and understood, that no agreement whatever in any way binding upon this defendant, either at law or in equity, existed or was made or should be made, or was intended to be made by this defendant, or between him and the said complainant; nor was this defendant to be in any way, or by any means, a trustee for the complainant in respect of the premises, but that, on the contrary, the said land and estate was, and was to be, the property of this defendant, absolutely, and unconditionally, with the right of disposal thereof, and of the proceeds thereof, at his own discretion and free will and pleasure, in such way as he should think fit; all which this defendant says was often and expressly declared to the said complainant, and as often and expressly admitted and assented to by said complainant, and that said declarations and admissions, were so full, clear, and explicit, that no possibility of mistake or misapprehension, could or in fact did exist, or remain on the part of the said complainant"

On the other hand, Jenkins insists, that, although it was agreed between himself and Eldredge, that there should be no written agreement given or held by Jenkins, which should evidence the nature of the trust between him and Eldredge, yet that it was positively agreed, that Eldredge should hold the property. In trust for him, subject to the agreement between them, the due execution of which required, that Eldredge, in order to raise money to complete the erections on the land, should possess a clear title, which he should be able to convey to the purchaser free from all incumbrances and equities. And that it was a contemporaneous arrangement, that Eldredge should make and keep among his own papers a written declaration of the trust to evidence the same in the event of his decease, or other like necessity. The bill charges, "That as said Eldredge had not the capital for that purpose, and would need the legal title to said property, both to enable him to borrow money to secure him for his liabilities as the indorser or surety of your orator and for the compensation to be paid to him for all his trouble in the business, your orator formally, distinctly, and solemnly, agreed with said Eldredge that he, said Eldredge, should receive a conveyance of said land, with the buildings thereon, from said Elizabeth, and should raise money thereon by mortgage, in order to furnish your orator with the means

to proceed in the erection and completion of said edifice, and on completion thereof should execute and deliver to your orator a deed of conveyance thereof, your orator agreeing to reimburse to said Eldredge, or save him, said Eldredge, his heirs, executors and administrators harmless, and indemnified from and against all payments, which he or they might he compelled to make, by reason of any such mortgage, and to pay to him or them a suitable compensation for his services in the premises, such indemnity, reimbursement and payment to be secured to said Eldredge by a lien upon said premises. And the said Eldredge further agreed, that he would make a declaration in writing, specifying the terms, trusts and conditions on which the said property should be held by him, and place the same among his papers, to serve for the disclosure and manifestation of said trusts, terms, and conditions, in the event of his decease, or other like necessity; and in pursuance of said agreement with said Eldredge, your orator procured to be furnished to him by a personal friend and relation of your orator certain securities, upon and by means of which the said Eldredge borrowed the sum of about six thousand dollars, to be paid by him to said Elizabeth, in part satisfaction of the consideration money of said purchase, pursuant to the decree aforesaid, and which sum the said Eldredge afterwards repaid, and relieved the securities aforesaid, and returned the same to James W. Jenkins Jr., the person who furnished him therewith, out of moneys received by him upon a mortgage or mortgages of said land; and your orator, by mutual agreement with said Eldredge and said Elizabeth, and for the sole purpose of making his title under her appear to be simple and unqualified, and not with any idea of parting with or surrendering his beneficial interests in said land or purchase, but the more effectually to secure them, permitted the time specified for fulfilment of said decree to pass by, without compliance with its terms, and said Elizabeth, at the special instance and request of your orator, executed and delivered to said Eldredge a deed of said land dated August the 24th, A. D. 1840, a copy whereof is herewith exhibited."

The first inquiry, therefore, is whether, taking all the circumstances together, the trust was a mere honorary trust, such as has been stated, possessing no legal or equitable obligation, and resting purely in the good will of Eldredge, to be fulfilled or not by him, according to his mere pleasure, or it was, in fact, a trust to be operative and binding between the parties, and creating, as between them, whatever might be its operation as to third persons, a clear equitable right to have the property transferred from Eldredge to Jenkins, after discharging all the incumbrances and charges, properly attached thereto. This is a question of no inconsiderable difficulty upon the actual posture of the evidence. In order to a just solution of it, it is necessary to look carefully to the situation of the parties, when the negotiation with Eldredge took place, to the objects manifestly in view, to the surrounding circumstances, and to the subsequent transactions of both parties.

What then was the state of things before and subsequent to this period? Jenkins was an experienced builder, perhaps somewhat too much inclined to become a speculating projector. In April, 1839, he purchased at public auction a certain parcel of land at the corner of Tremont and Bromfield streets, in Boston, for $20,169.50, then owned by Miss Deblois, and constituting the premises in controversy. Being unable to comply with the conditions of sale, a new arrangement was made in May following between Jenkins and Miss Deblois, that her warranty deed, conveying the premises to Jenkins, should, upon the execution of that agreement and the payment of $1000 by Jenkins to her, be deposited in the hands of Thomas W. Phillips, Esq. in escrow, and retained by Phillips until the 24th of July following; and if Jenkins, on or before that time, should pay to Deblois the sum of $5042.50, with interest, &c, and should execute a note to Deblois, for $15,127, payable in five years, with interest; &c, and also execute a mortgage of the premises to Deblois, as security for the payment of the note, and also of the taxes assessed on the premises, Phillips was to deliver the deed to Jenkins; otherwise, the contract for the sale of the land was to be terminated and annulled, without prejudice to Deblois's right to claim damages for the non-performance of the contract; and the $1000 was to be forfeited to Deblois. Jenkins paid the $1000. pursuant to the agreement. Jenkins immediately afterwards went into possession of the land, and proceeded to excavate the same, and to begin the erection of a building thereon, and expended a large sum of money thereon, which, in his bill, he alleges to have been about $15,000. His resources being then exhausted, he was unable to comply with his agreement by paying the $5042.50 in July, 1839, as stipulated; and Deblois, pressing payment, threatened to sell the premises at auction. In order to prevent this, Jenkins filed a bill in equity in the supreme court of the state of Massachusetts in May, 1840, to restrain the sale, and for relief, and an injunction was accordingly granted. The answer of Deblois having been put in, it was then agreed by the parties, and accordingly an interlocutory decree was passed on The 22d of June, 1840, that if Jenkins should, on or before the 20th of July, 1840, pay or tender to Deblois the amount due her under the contract of May, 1839, and perform all the other parts of the contract, then the injunction should stand continued to the hearing of the cause, unless Deblois should accept

the same with costs, and perform the said contract on her part; in which event, the hill was to be dismissed; and also to be dismissed, if Jenkins failed to tender and perform, as aforesaid. Jenkins did fail to perform his part of the agreement, and thereupon the bill was dismissed accordingly, on or about the 20th of July, 1840. In the intermediate time between the passing of the decree and the failure to perform it, Jenkins made an application to Eldredge for his aid and assistance to raise money, and otherwise to complete his enterprise. It was thereupon arranged between Jenkins and Eldredge, that the premises should be conveyed by Deblois to Eldredge; and accordingly the same were conveyed to him by her deed dated 24th of August 1840; and Jenkins afterwards, on the same day, in order to make the second title complete in Eldredge, and freeing "it from the exception contained in Deblois's deed, excepting any clause or demand, made by, through, or on account of Joseph Jenkins, and also excepting any claim or demand arising out of any contract, made by, or with said Jenkins," executed a release to Eldredge, by which he admitted in terms, that he had "no legal or equitable right in or to the same." From that time forward, Eldredge continued to be ostensibly, and so far as the second title was concerned, the sole and exclusive owner of the legal and equitable estate in the premises. Jenkins was subsequently employed superintending the erection of the building. The necessary moneys were advanced or provided by Eldredge, generally upon his own credit, but sometimes, as it should seem, through the aid of the credit of some of Jenkins's relatives. And according to the testimony of Jenkins, Jr. his father not only superintended the building after Eldredge had the title, but actually, when Eldredge ceased to advance funds, provided work and materials for the same, on his own account, to the amount of $3244.16.

Now, pausing at the time when Eldredge agreed to enter into the arrangement with Jenkins, which was in successful progress, if not absolutely and definitively completed before the expiration of the time assigned by the decree for the payment of the money, or the dismissal of the bill, what possible motive could there be for Jenkins to enter into it, unless he was to receive ultimately some fixed and certain benefit from it? He had already embarked a considerable sum of money in the enterprise; he had bestowed his skill, time, and labor upon it; he had not only paid money, but he had entered into collateral contracts respecting it, which were obligatory upon him. If then he was about to part, as between himself and Eldredge (for the question might be very different in respect to the rights of third persons), with all his interest in the premises, how should it happen, that not the slightest remuneration or indemnity was provided for him in the negotiation with Eldredge? Was he to sink all that he had expended of time and money, for the benefit of Eldredge, with nothing left but a barren spes recuperandi, resting upon the mere pleasure, and good will, and generosity of Eldredge? Such a supposition, with reference to an embarrassed man, is somewhat startling, especially when we look at the magnitude of the

interest at stake. If there, had been any pretence, that Eldredge entered into an agreement only to remunerate Jenkins out of any surplus, in the event of a successful termination of the enterprise, after all other incumbrances and charges were paid for, there might be some ground to say, that Jenkins, from his sanguine temperament, was content to rely solely on that, as a sort of tabula in naufragio. But Eldredge flatly denies any such agreement, and treats the transaction as a surrender of the whole premises to himself, unclogged with the slightest charge for the benefit of Jenkins. And then again, how did it happen that Jenkins was not only to superintend, but that he did actually superintend the erection of the building after the conveyance to Eldredge, without any agreement or understanding (for none is pretended) for any remuneration or compensation for his future labor and services? It is true that the plaintiff did afterwards make a charge for his services, after disputes had arisen between him and Eldredge; but that claim was never allowed. The manuscript account since produced by order of the court contains no allowance of any such compensation. It is impossible not to feel, that there is, under such circumstances, an intrinsic improbability, which casts a shadow over this part of the case. But, then, it is said, that in reality, at the time of the negotiation with Eldredge, the case, as to Jenkins, was hopeless, and that being without credit, he had, and could have, no reasonable ground to believe, that he could find any means of relief beneficial to himself; and that at the time when the deed was with his consent given by Deblois to Eldredge, the decree in the equity suit had become absolute, and all rights of every nature of Jenkins in the premises has become extinguished.

In the first place, it is by no means clear, that, at the time of giving the deed, the rights of Jenkins were extinguished, as the argument supposes. The decree in the equity suit was a mere dismissal of the suit, by the agreement of the parties, and not a decree of dismissal after a hearing upon the merits. A decree is a good bar to a future suit only when the dismissal is upon the merits. It may, under other circumstances, and especially under circumstances like those of the ease before the court, constitute a material ground, why the court may not, in its discretion, at the hearing, grant any relief upon a second bill; but it is not pleadable as a flat bar to such a second bill.

Besides; why might not a court of equity, upon such second hill, have directed a sale of the estate, allowing Deblois to become a bidder, and, if the estate should sell for more than the purchase money, to decree the surplus to Jenkins?—Certainly there is no insuperable barrier in the doctrines and practice of a court of equity to prevent such a decree. But assuming it were otherwise, still it would by no means follow, that because Jenkins had no legal or equitable right to the premises, Deblois would have conveyed the premises to Eldredge, except at the solicitation of Jenkins, and with a view to benefit the latter; and even this, if in the nature of a good will, was a surrender on the part of Jenkins, of claims valuable to him, although resting in the mere discretion of Deblois.

In the next place, it is manifest that Jenkins was lulled into security by the negotiation with Eldredge, and was thereby induced to make no other efforts to obtain relief, before the time prescribed by the decree had expired, and that he placed implicit reliance, and unlimited confidence, not only in the ability of Eldredge to relieve him, but also in his strong friendship and earnest desire to aid him, and this may well account for the fact, that he suffered the decretal time to expire, without seeking assistance elsewhere, in the firm persuasion, that Deblois would interpose no objection, if he was successful in obtaining aid from any quarter. In this respect, it is plain, that he was not misled, and Deblois waived her strict rights in favor of Eldredge, at the solicitation of Jenkins. It is equally clear, from all the evidence, and from Eldredge's own acknowledgment in his letter of the 5th of August, 1840, that Eldredge was fully persuaded, that the speculation would be a safe and profitable one; and that he should receive an ample remuneration from it for his advances and services, or, to use his own expressive language to Mr. Phillips, that he should "take a good shave out of it." Then, again, it is said, that the deed of release of Jenkins to Eldredge, of the 24th of August, 1840, already alluded to, demonstrates that Jenkins then claimed no legal or equitable title in the premises, and professed to surrender all claim thereto, so that, from the moment of the execution of that instrument, if not before, Eldredge ceased to be a trustee of Jenkins for any purpose whatsoever. But it appears to me, that the conclusion drawn from this transaction does not reach to the extent suggested. It proves no more than what was the original and admitted intent of the parties, to put into Eldredge's hands the whole legal and equitable title to the premises, so far as respected third persons, so that he might be able to raise money thereon to complete the building, and discharge the incumbrances. It was not only not inconsistent, but in entire harmony, with the case set up by the bill. The legal and equitable title was to be in Eldredge, not only for the purposes above stated, but also to guard the property against any attachments and levies by the creditors of Jenkins. Nay, we find some of the creditors soliciting the conveyance to be made to Eldredge by Deblois, for the very reason that they considered it to be for then interest. The ultimate trust in the premises, therefore, (if any was intended), was designedly to be a trust resting mainly in personal confidence,

and dependent upon the good faith of Eldredge, and not to be evidenced by any written acknowledgment, which was accessible to Jenkins. Whether, under such circumstances it is a trust available in equity, is another question, which will hereafter be considered.

There is one other circumstance, upon which some stress has been laid, which may be noticed in this connexion, to which I confess that, under all the circumstances, I attach very little weight. It is the conversation testified to by Moses Kimball, as having taken place between Jenkins and Eldredge on the 6th of January, 1841.—Kimball's memorandum is in these words: "This day, between 11 and 12 o'clock, A. M., I was present at a conversation between Mr. Eldredge and Colonel Jenkins. Mr. Eldredge requested me to pay attention to what he said. He said, that in a letter received from Col. Jenkins that morning, he, Jenkins, stated that he, Eldredge, stood, in his relation to the estate, in the light of mortgagee, and that he then asked of him (the colonel)" whether he retracted what he had said in the letter—after some hesitation, the colonel referred to the letter as stating the matter explicitly, but on being crowded by Mr. E, for a definite answer, he declined to answer either way. Mr. E. then said, that he must cease to be the superintendent of the building. Some other conversation having ensued, Mr. E. asked Jenkins if he wished to deny that the estate belonged to him. Col. J. said no. I consider that your title to it is as good as to the hat on your head. After some further conversation, Mr. Eldredge asked if he was to understand him, Jenkins, to say that he, E., stood in relation to the estate as a mortgagee—Jenkins said no, it would be foolish for me to say so.—Mr. E. then said, that he revoked what he said about superintendency." What is this but the reluctant confession of Jenkins, forced by a stern necessity against his own sense of the truth and justice of the case, as stated in his letter of the same morning, and, as far as the evidence goes, in conformity to what he constantly, if not invariably, maintained as the substance of his arrangement with Eldredge? As a confession, it is worth nothing; as a waiver of rights, previously existing, it is equally insignificant.

Without dwelling further upon these general considerations, I must say, that upon the fullest survey of the general evidence in its details, as well as in its general structure,

it does appear to me, that it is utterly irreconcilable with any other supposition than the existence of the confidential relation of principal and agent between Jenkins and Eldredge throughout this whole transaction, from its inception to its close. I do not say, that all the statements and circumstances are perfectly reconcilable with each other. There are conflicting and contradictory statements, and opposing testimony. Still it does appear to me, that, taking the mass of the oral evidence, supported as it is to a considerable extent by written evidence, the court can safely arrive at no other conclusion than that, which I have indicated. I am fully aware of the strong denials contained in Eldredge's answer, and of the just weight, which is to be allowed to such an answer. Still it must be weighed against other opposing evidence and circumstances; and I may add, that much which is contained in this answer, inevitably leads to the conclusion, that Eldredge had always present in his mind, that he was not acting alone for his own exclusive interest, but that the interest of Jenkins was also to be consulted and sustained, and was involved in his acts. On the other hand, it is beyond doubt, that Jenkins always considered, that his interest was mainly to be consulted and sustained throughout, and, after all other charges were paid, that the residue of the proceeds of the speculation was to be his. Eldredge could not but know this; and if he concealed from Jenkins, that he had no such intention, but meant to act solely and exclusively for his own interest, such a concealment would, in the contemplation of a court of equity, constitute a meditated fraud upon Jenkins. The letter alluded to in this conversation, although in Eldredge's possession, has not been produced by him. It might throw great light upon the subject.

I will now proceed to suggest some of the reasons, which lead me to maintain, that there was an intentional secret parol trust, behind and beyond, but in concordance with the written documents conveying the title, upon which Jenkins and Eldredge originally acted as the basis of their arrangements, and which was never waived or extinguished.

In the first place, let us see how Eldredge states the matter in another part of his answer, not heretofore referred to. He says, "That he never did agree with the said complainant, that he, this defendant, would make any written declaration or memorandum of any trust or condition, as in the said bill of complaint set forth, or any other declaration, or memorandum, of any trust, or condition, or agreement, whatsoever, touching the premises. And this defendant says, that it was always before, and at the time of, and since the receiving of the said conveyances from the said Deblois by this defendant, expressly declared to the said complainant, and assented to by the said complainant, that nothing whatsoever should be written, even upon the subject of this defendant's intentions and designs aforesaid, and that the reason thereof was also repeatedly stated to the said complainant, that is to say, that this defendant might not, by any such statement, incur any risk of affecting his own absolute title to the said estate and property, even by such a statement of his intentions, which might be misconstrued, inasmuch as he intended to retain

the also lute title and disposal thereof, and to insure to himself the power and discretion of doing therewith as he might think right and best, or words to that effect, it being well understood and agreed between the said complainant and this defendant at all times, that nothing was to be done, or agreed, whereby any express, implied or resulting trust in law or equity should or could be created or arise for the benefit of the said complainant, and this defendant denies the making of any expressions to any person whatsoever of any intention or purpose to make any writing whatsoever upon the subject, excepting only, that at some time after the receiving the conveyance from the said Deblois herein mentioned, and when and after the whole title and estate in the said lands were absolutely and unconditionally in the said defendant Joseph Jenkins, Junior, a son of the said complainant, once said to this defendant, that he ought to make some writing, declaring his intentions in regard to said estate, as he might die before the matter was ended, and in that case, his heirs could not know and carry out his intentions, or something to that effect, to which this defendant answered, that he should not do so, and added that it had been expressly declared by him to the said complainant from the beginning, and fully understood, that there was to be no writing whatever, and for the express reason, that this defendant would have his title absolute and unincumbered with any trust or condition whatsoever in law or equity; to which the said son of the said complainant replied, that his request was not, that any paper should be delivered to any one, but simply that this defendant would place such a writing among his own private papers, that in case of his death, his heirs might be able to do with the estate, what he, at his own free will and pleasure, would do, if living, for the benefit of the said complainant and his family, or something to that effect; to which this defendant, the same then seeming to him expedient, replied, that he would make some deed of trust to be placed among his papers to provide for such contingency. And this defendant says, that he intended at that time, and believes he was, from the conversation that was had, clearly understood to intend, by the expression deed of trust, only a paper in writing expressive of his designs and intentions as herein set forth and no other or different

writing. But after said conversation, this defendant, reconsidering the whole matter thought it inexpedient to make any writing whatsoever, and did not make any such writing, having from the beginning declared his intention to do nothing which could even by bare possibility be construed as admitting or creating any title to, or interest in, or claim in any way to or upon the said lands and building in the complainant"

Now I would remark, that this statement is in its character somewhat extraordinary. It denies, indeed, that he, Eldredge, ever intended, by any written memorandum, to fetter his complete legal and equitable title in the premises, with any trust; and yet it does admit, that he did tell Jenkins, Jr., that he would make a deed of trust, and place it among his own papers, to provide for the contingency of his death. Why should he do this, if he was not conscious that, in fact, all the parties in interest understood, that such a trust was intended to be operative; but at the same time it was to be such as would not interfere with the unconditional power to dispose of the premises to third persons? Eldredge admits that he never did execute any such deed; but he does not pretend, that he ever communicated this change of intention either to the father or the son. Why this concealment? But this statement is directly contradicted, in its most important features, by Jenkins, Jr., in his testimony. Speaking of the negotiation between Jenkins (the father), and Eldredge, he says: "There were a number of interviews at my office for this purpose, and finally my father, in presence of J. W. Jenkins, Junior, and myself, proposed to Eldredge that he should take the title of the estate and mortgage it for the necessary amount, and upon the completion of the building convey it to my father. Eldredge had often said that he could raise the money if he could have the title in his own hands. Eldredge accepted the proposal and agreed to raise the funds necessary to the completion of the building and the payment of Miss Deblois on short time, if not otherwise obtained—then obtain a permanent loan covering all the liabilities of the estate, and deed the estate to my father subject to the incumbrances. My father agreed for this service to secure a handsome compensation to Eldredge by a subsequent mortgage of the estate, and to include in that compensation a mortgage which Eldredge had for about $2000 on a farm in Barre. This Eldredge agreed to distinctly." Again he says: "It was agreed that Eldredge should have as perfect a paper-title as could be made, so that he could raise money on the estate expeditiously, and also that he might not be subjected to any trustee process." And again: "It was agreed that no bond should be given by Eldredge, but that he should make a memorandum or declaration of trust, which he was to keep among his own papers. This agreement was made before Eldredge took the title." But, what bears more precisely on the point under consideration, again he says: "After the deed had been made to Eldredge, I was told by some of my friends that Eldredge talked to them in a manner different from his manner of talking to me with regard to this matter, and they thought my father should be put on his guard. In consequence of these remarks. I asked Eldredge the next time that he came

into my office if he had written the declaration of trust which had been agreed upon, and which was to be kept by him among his own papers. He replied, that he had not, and that my father had required no bond from him, but had trusted entirely to his life and his honor, and that he would carry out the agreement at all hazards. I said, that it was perfectly apparent, that my father had trusted to his honor, but that it was understood and agreed at the time of the negotiation, that a declaration of trust was to be made, which he might keep among his own papers, so that in the event of his death the very object of the whole negotiation might not be frustrated; he then said he had no objection to making such a declaration, and would do so immediately." Now, the importance of this testimony cannot be overlooked. But it is said, that it is not credible testimony, and various and minute objections, assailing its credibility, have been relied on at the argument. Certainly, standing alone, however credible, it would not be sufficient to impeach or outweigh the answer.

But it does not stand alone. It is confirmed in its leading points, the existence of the trust, by the testimony of Mr. Hilliard, who was the counsel of Jenkins. He says: "I have knowledge of such an agreement; my knowledge was obtained from declarations of Eldredge, and conversations, which I have had with him, and conversations, which I have heard between him, and Jenkins; at the time when this agreement was entered into, Eldredge was in my office every day, and this subject was frequently and freely discussed, and talked over between us; the agreement, as I understand it, was this, that Eldredge should take a conveyance of the estate from Miss Deblois, and that, by a mortgage of the property, together with his own personal security, he should raise a sufficient sum of money to complete the building, and that, after the completion of the building, he should convey the estate to Jenkins, subject to such mortgages as he might have put upon it for the purpose of raising the money, and that he should receive a mortgage subsequent to those last mentioned to secure his own compensation for his services; and that a mortgage of a certain farm in Barre, belonging to Col. Jenkins, which he held at that time for prior indebtedness, should be given up, and that

amount should be secured in addition to this compensation for services by this subsequent mortgage. I hired an office in Brazer's building about the middle of May, 1840, and I was sick and confined to my house about a fortnight after that, so that I was not at my office until about the first of June, and it was soon after that period that these plans were first disclosed to me by Eldredge and Jenkins. I can say confidently, that it was certainly within a month after, that I knew of the arrangement between Eldredge and Jenkins. Eldredge once inquired of me what in my opinion would be the effect of allowing a certain decree of the supreme court in relation to this property to expire; whether in that event, if he should afterwards take a deed from Miss Deblois, it would give him such an absolute, indefeasible title that he would be subjected to no trouble and embarrassment from the creditors of Col. Jenkins; whether I expressed any opinion on that subject or not, I don't remember. I have had many conversations with Mr. Eldredge during that period; he has often stated to me that he held the estate in trust for the benefit of Colonel Jenkins; he has often spoken of it in terms as Col. Jenkins's property; he stated to me that he was acting merely as an agent, and that he meant to be well paid for his services. I recollect his asking me at one time how much I thought he ought to receive for his services; he said he thought the estate would be a fortune to Col. Jenkins; he never said any thing to the effect that he was under no obligations to convey the estate to Col. Jenkins, or that it was all to depend on his free will and pleasure, and nothing to that import" James W. Jenkins, also, who stood in a peculiarly confidential relation to the parties, is equally explicit. He says in his testimony: "During these interviews with Eldredge, he said, that he could get a deed of the estate, if I would furnish him with the means. At one time it was proposed and agreed to, that I should furnish Eldredge with negotiable paper, upon which he might raise $5000, or enough to pay the instalment to Miss Deblois. It was also agreed, that Mr. Eldredge should take a deed of the estate from Miss Deblois, and hold it for the purpose of raising more money to enable Colonel Jenkins to complete the buildings. The paper, which I furnished, was returned to me, as not being known in this market Mr. Eldredge, at the time that this paper was returned, stated to me, that if I could furnish the colonel with other paper, not too long, and good, that it could be done, no doubt, and advised me to do so, and assured me, that I should be perfectly safe in so doing. Accordingly, the next time, that I came to the city, I met Mr. Eldredge and Colonel Jenkins, and finally before I left I gave Mr. Eldredge other paper, for the purpose of saving the estate to Colonel Jenkins. It was agreed, that this paper should be used as collateral security, for Eldredge to raise the money upon. It was sent back in a few weeks to me. After all other plans for raising the money had fallen through, Mr. Eldredge said, that if the title was in him, he could raise the money to complete the work, but he said all along, that he had no means, in himself, of raising the money in order to get the title. During these negotiations there were frequent meetings between Eldredge, Jenkins and

myself, at the office of Hilliard and Jenkins in State street, to talk over the general objects of this business. The agreement there made was, that Mr. Eldredge should take the deed from Deblois, and raise the money to complete the building. Joseph Jenkins, Jr. was generally present at these meetings, and Hilliard sometimes." Again he says: "There was an unqualified bargain for Mr. Eldredge to take the estate without paying any consideration whatever, except for the land, and for the purpose of its being completed for the benefit of Col. Jenkins—of the details by which that agreement was arrived at, I cannot state, as I was not present at all the interviews. I never was present at any interview, when it was arranged, if it ever was arranged, in what manner the estate should be reconveyed to Col. Jenkins." And again: "In the early part of this matter, Mr. Eldredge said, that he would take this property into his hands as desired, and enable the colonel to complete the building, but that he would not be legally bound in the matter, and that they must trust to his life and honor. I never heard any thing said between the parties in the early part of this transaction about the property being sold." There is much more in the testimony of the same witness to the same effect, and it is corroborated in its main bearing by the letter of Eldredge, addressed to him under the date of August 5, 1840, explained by the accompanying circumstances stated in his testimony. Mr. Phillips's testimony, as far as it goes, supports the same conclusion, and shows his understanding, that in taking the deed from Deblois, he was acting as Jenkins's friend, and with a view to benefit his family and creditors, and that the most he expected from his agency was "to take a good shave out of it," (the estate). Mr. Bliss also states: "I have had several conversations, at different times, with Mr. Eldredge, since the conveyance of the estate to him, in which he always refused to give me any legal security on the estate, and also refused to accept Col. Jenkins's order for the amount which he owed me. I always understood from him that he held the estate in trust, not legally, but honorably. I don't know that he used the word 'trust,' but he always gave me to understand, that all he expected was, that he should be paid for his expenditures upon the estate, and also to receive compensation for his services. At first he told me, that he should charge

$5000 for his services, and that afterwards in a proposed settlement with Col. Jenkins, he had agreed to take 3500 dollars. He once offered to convey the estate to me, if I would pay his claim, and get the consent of Col. Jenkins. These conversations took place, I think, on the first half of the year 1841. My impression is very strong, that the offer to convey to me, subject to Jenkins's consent, was made soon after the building was occupied. I cannot undertake to be very confident about the time, but I am very positive as to the fact." The letter of Eldredge to J. W. Jenkins, of May 1, 1841, I cannot but view as showing, that Eldredge, upon the proposal of a reference between himself and the plaintiff of this property, did not treat it as his own sole concern; but that he held it, in fact, upon some honorary understanding, that he was to receive a large compensation for his agency therein. He there says: "The fact is, my friend, that I am resolved to play this game out frankly, fairly and honestly, yielding no right and doing no wrong, and am prepared to make a proper and formal reference when the terms and men are agreed upon, but I shall not swerve an inch from the position that I have taken, viz. that I shall be paid $5000 beside all expenses, or if they do not like that, I will refer the whole matter, and in case I do refer it, shall expect you to appear before the referees as a witness. There is one thing certain, that if that property should ever become fairly mine, the family will be better off than they would be were it in the colonel's hands."

There is, too, a letter, written by the plaintiff to Eldredge, under date of December 16, 1840, which is important, at least to show what was the plaintiff's understanding of his rights in the property, and, if what Jenkins, Jr. states of the occasion of writing it be true, it furnishes very cogent, if not irresistible evidence, that the whole transaction was a mere agency of Eldredge for plaintiff. He says (and it is in answer to a cross interrogatory of Eldredge): "Sometime in May or June, 1839, my father agreed to purchase of Mr. Francis a gore of land at the easterly end of the Deblois land between Bromfield street and Montgomery Place, the consideration for which was to be $200: Shortly after, Mr. Francis called at my office, and told me, that the deed was ready. I knew nothing of the situation of the matter, till after my father had discontinued the work on the building, and had erected on this gore of land the easterly wall to the height of about thirty feet. I understood, when Eldredge took the deed, that this consideration money had not been paid to Mr. Francis, and that he declined giving the deed upon the terms agreed upon, but required that he should have $250, and that the chimneys of his dwelling-house should be carried up to the height of the walls to be erected by my father. I understood also, afterwards, that Francis had raised his demand to $1000. Eldredge then came to me and told me these facts, and that he wished to secure the deed of that gore of land, and that he intended to pay this $1000, but that he wished my father would write him a letter protesting strongly against such a bargain, in order, that the whole responsibility should be thrown upon Eldredge, so that when the estate should be conveyed to my father, he

might recover from Francis the difference between $1000 and the original consideration. My father wrote such a letter, a copy of which I annex to this deposition Getter marked A). The letter was delivered by me to Eldredge in person." What says the letter? "Now, sir, you are aware that the ultimate interest in this matter and in the building, which I am erecting on the Deblois estate, is mine. The property is mine virtually, subject only to the payment of such amount as you shall have paid and incurred on that account when you shall convey the property to me: Therefore I do hereby protest against your compliance with the last proposition of said Francis, viz., to pay him $1000—or indeed any sum above the $250—which you originally stipulated to pay him. I shall hold Mr. Francis to the bargain which he made with me last year, notwithstanding any transactions you may have with him—unless perhaps. I might submit to the proposition to which you assented and upon which we have acted in the erection of said building. You will understand that whatever you pay the said Francis for said gore of land above the $250, which you have agreed to pay, you must do at your own risk and not with any right to charge the same to me in the adjustment of the affairs of said building." No written reply ever appears to have been made to this letter; and Eldredge in his answer dryly admits, that the protest was made, but that he told the plaintiff, that it was a matter, which concerned himself only, and that he should pay Francis the $1000.

Another not unimportant circumstance, which, I agree, might, standing alone, admit of being deemed a mere offer to reconvey, as owner, independent of any agency, requires to be noticed, because it stands well with the supposition of an agency, although not decisive of it. It is the negotiation and rendering of an account of expenditures on the building by Eldredge to the plaintiff, of which J. W. Jenkins gives the following account "I was present at an interview between Colonel Jenkins and Eldredge at the Merchants' Bank, sometime in the summer of 1841, which was the interview, which was brought about by me. Mr. Eldredge exhibited in figures and memorandums the amount of the expenditures on the building, and the colonel's indebtment to him. Colonel Jenkins objected to the amount, as Mr. Eldredge had included in it a charge of $5000 for his services, which was not stated as

commissions, and had also included in it a further charge of some 3500 or 3600 dollars, for brokerage. They talked a long time about these charges, Colonel Jenkins offering one thousand dollars, and Eldredge claiming five thousand dollars; and finally it was agreed, that Mr. Eldredge should be paid 3500 dollars. This was the time before spoken of, when it was agreed, that a mortgage on the premises should be given for this charge and other indebtedness of Jenkins to Eldredge. The charge of brokerage was assented to by Mr. Jenkins, if Mr. Eldredge said that he had paid it. After the interview spoken of in the last answer, and after Colonel Jenkins had obtained an injunction against Mr. Eldredge to prevent him from selling the estate, I had an interview with Mr. Eldredge and Joseph Jenkins, Jr. at the Museum Building, at which Mr. Eldredge agreed, that he would do all he could to aid the colonel in getting money to redeem the estate out of his hands, by representing it to capitalists as good security. Mr. Eldredge has, since that interview, told me, that he never believed, that Colonel Jenkins would be able to raise the money. Eldredge, afterwards, I think, got the injunction taken off, and afterwards advertised the estate, as I believe, and told me at that time, that if Colonel Jenkins made another attempt to stop the sale, he would put the deed in his pocket and keep it there, and also, that if he had been allowed to sell it, he should have made over the surplus proceeds for the benefit of Colonel Jenkins's family, and that it would have been better for them to have had it sold."

There is yet another circumstance, that demonstrates, that the plaintiff still retained an interest in the premises, notwithstanding the conveyance to Eldredge; and that is, his procuring securities from J. W. Jenkins, his relative, to aid in the operations of Eldredge. This is not denied; and yet it seems to me wholly irreconcilable with the notion, that, immediately upon that conveyance, the plaintiff was cut adrift from all interest and connexion with the property. These securities were ultimately returned; but what use was made of them in the intermediate time is not satisfactorily explained, nor perhaps is it very material; for it is manifest, that they were received by Eldredge to aid his operations, and were procured by the solicitations of the plaintiff.

These are some of the main circumstances relied on in the evidence to establish the case made by the bill, and denied by the answer of Eldredge. The question is, whether they do not overcome the denials of the answer? The evidence has been assailed with great ability, and sifted with minute and scrupulous diligence, to shake its credibility, and to impugn the conclusions to be drawn from it. There is very little direct evidence in support of the answer, as indeed, from the nature of the case, little could be expected. The release of the plaintiff, I have already adverted to. It is not only not inconsistent with the trusts set up by the bill, but it was manifestly indispensable to be made, in order to induce capitalists to advance the funds necessary to complete the building. The conversation stated by Moses Kimball, has been also adverted to; and it is, as I have already suggested,

a confession coming from the plaintiff by an inexorable necessity. The bill in equity, filed by the plaintiff against Eldredge in the state court, in September, 1841, and the answer thereto, and the stipulations agreed between the parties upon that occasion, do not seem to me, so far as the present question is concerned, to affect the posture of the case. They do not materially shift the ground of the present bill. Nor do the circumstances of the reference between Eldredge and David Kimball, or the statements of Mr. Fiske, throw any new and important lights on the matter.

I do not go over the particulars, in respect to the credibility of the testimony, which has been so powerfully pressed, and the improbabilities of the asserted trust, so ingeniously insisted on. I can only say, that, after weighing the whole matter, my judgment is, that the trust, such as it is, is sufficiently established by the evidence to overcome the denials of the answer. But here we are met by an objection—that much of the evidence stands upon confessions and statements, made by Eldredge, and testified to by the witnesses, which are not charged in the bill, so as to let them in as proper evidence. And in support of this objection, among other cases, Hughes v. Garner, 2 Younge & C. Exch. 328; Graham v. Oliver, 3 Beav. 124; Earle v. Pickin, 1 Buss. & M. 547; and especially Attwood v. Small, 6 Clarke & F. 360,—are cited. I had occasion in the case of Smith v. Burnham [Case No. 13,018] fully to consider this whole matter; and I remain of the opinion then expressed, that there is no difference, and ought to be no difference, in cases of this sort between the rules of a court of law, and those of a court of equity, as to the admission of such evidence. Its admissibility may, however, be properly subject, under particular circumstances, to this qualification, (which Lord Cottenham is said to have supported), that if one party should keep back evidence, which the other might explain, and thereby take him by surprise, the court will give no effect to such evidence, without first giving the party, to be affected by it, an opportunity of controverting it. This course may be a fit one in cases, where, otherwise, gross injustice may be done. But I consider it as a matter resting in the sound discretion of the court, and not strictly a rule of evidence. But whatever may be the rule of evidence in England on this point, it is not so in America; and our practice in equity causes, where the evidence is generally open to both parties, rarely can justify, if, indeed, it ever

should require, the introduction of such a rule. Mr. Vice Chancellor Wigram, in Malcolm v. Scott, 3 Hare, 39, 63, seems to me to have viewed the rule very much under the same aspect as I do. See, also, Story, Eq. Pl. (3d Ed., 1844) § 265a, and note. But, at all events, the practice is entirely settled in this court, and I, for one, feel not the slightest inclination to depart from it, be the rule in England as it may be.

The result, therefore, at which my mind has arrived, is this: Before the time had expired under, the agreement with Deblois, the plaintiff entered into an agreement with Eldredge, which was so far completed and fixed, as that each party acted upon it as if definitively settled, that he should become and act as the agent of the plaintiff in the premises; that Deblois should convey the legal title to Eldredge, and that in his favor Jenkins should surrender his equitable title to the same against Deblois, and should consent to her conveyance to Eldredge. That at this time it was known to all the parties, that the plaintiff had expended a large sum upon the premises, amounting to about $15, 000. That the object of the arrangement with Eldredge was to clothe him with the whole legal and equitable title in the premises, in order to enable him to raise funds to complete the building, to discharge the debts due to the creditors thereon, and to secure to himself an ample compensation, as agent, for his services and risks in the undertaking. That after he was remunerated for these expenses and charges, Eldredge was to reconvey the premises to the plaintiff, and that, as between them, the same were to be deemed held upon a parol trust, obligatory and conclusive between the parties. That, upon the faith of this arrangement, the conveyance was made by Deblois to Eldredge, and the release or order by the plaintiff, to Eldredge. That the whole of the subsequent acts of the plaintiff in superintending the building, and in attending to the concerns thereof, were done by him, as the ultimate beneficial owner thereof, and that Eldredge was but a compensated agent, and not the true owner. That the subsequent disputes and controversies between the plaintiff and Eldredge have not changed or extinguished the original state of things under this arrangement. That, whatever anomalies appear in the acts and observations of the parties, at different times, were the result of this ambiguous character of the arrangement, looking one way, so far as documents spoke, and designed by the parties to have, as between themselves, a very different operation; and that the subsequent struggles were just such as might be presumed to arise from the diminished confidence and credit which each of the parties placed in the integrity and good faith of the other.

Such, it appears to me, is the true character of the present case, as it may be gathered from the whole evidence in the case. It is, under this aspect, a case of trust, resulting from agency, resting in parol, and intended between the parties to depend upon honorary obligations; but still to be strictly fulfilled. In this view of the case, is it a trust, which a court of equity will enforce, or is it one, which merely rests in the good will and pleasure of Eldredge to perform or not, and is, otherwise, incapable of being executed? It strikes me,

that it is a trust of a somewhat novel and extraordinary character, and not exactly arranging itself under any description of trusts, which are usually discussed in the elementary works, or judicial authorities. It possesses mixed ingredients, and has peculiarities, which never before have fallen under my observation. The main ground of objection against it is, that it falls within the category of the statute of frauds. It is essentially a trust, by a parol agreement, respecting an interest in lands.

It is contended on the part of the plaintiff that the case is taken out of the statute, (1) because it is a case of a resulting trust; (2) because it is a case of agency, and fully established; (3) because Eldredge has been guilty of fraud in his conduct and operations; (4) because it is a case for specific performance, the plaintiff having partly performed his part of the agreement, and not being now in a condition to be reinstated in all his former rights. Of course, all these grounds are contested on the other side. My own opinion is, that the case is not to be considered as one standing purely or singly upon either of these grounds, but as embracing ingredients of all of them. Let us look at the case under these several aspects.

In the first place, as to the resulting trust. I agree to the argument, that a resulting trust can only properly arise, by the consent of the parties. But the question here is, whether the circumstances do not demonstrate such a case of consent. The main objection relied on against it seems to be, that the agreement was to vest the whole legal and equitable title in Eldredge. Certainly it was so; but that was not the whole agreement. The agreement was, that it should vest in Eldredge sub modo, so that he might execute all the objects, and raise funds to complete the building. To do this, and to enable him to give a perfect title to capitalists for their advances, he was to have the whole legal and equitable title in himself; and as against such persons making advances, it is clear, that the plaintiff had no rights whatsoever. But as between himself and Eldredge, the conveyance was a mere security for the advances and expenditures of Eldredge, and a compensation for his services; and then the residue, after the discharge of these claims, was for the plaintiff. At the time, when the agreement with Eldredge was made, the plaintiff had a clear equity in the premises

against Deblois. He suffered it to expire under the decree, relying upon the agreement of Eldredge, and the willingness of Deblois,—considering the advances he had made, and services he had performed on the estate,—not to take any advantage of it; a confidence which was, in respect to Deblois, well founded and established in the event All the parties treated it, at that time, as a case, where the plaintiff was the real beneficiary, and entitled, if not to an equitable title, strictly so called, yet as entitled to a sort of prescriptive right Now. I am not called upon to say, that at the time when Deblois, in consequence of the arrangements with Eldredge, conveyed the premises to him, the plaintiff had entirely lost his equity in the premises, as against Deblois. I entertain great doubts, whether, looking to all the circumstances, it was so. But what I do say is, that, at that very time, the plaintiff had expended a large sum of money on the premises; that Deblois never could have conveyed the same to Eldredge, without the plaintiff's express solicitation and consent; and that Eldredge was in no just sense a purchaser for his own sole account, giving a full value for the premises, but bought with a full knowledge of the enhanced value by the expenditures of the plaintiff, and for the purpose of giving the benefit of such expenditures as a resulting trust between the plaintiff and himself in the premises. In this respect, it approaches very nearly to the case of a joint purchase, where each purchaser is to have an interest in the purchase, in proportion to his advances. Now in such cases, parol evidence is clearly admissible to establish the trust, as well as to rebut, control, or vary it. It appears to me, that it may well be treated as a mixed case; quoad the plaintiff, as a resulting trust pro tanto,—and quoad Eldredge, as a trust pro tanto for his liabilities, expenditures, and compensation. In the view which I take of the matter, it was a resulting trust ab initio, in the intention of both parties, from the moment of the agreement and conveyance, and not a subsequent understanding. But here we are met with the objection, that no parol trust can be set up in opposition to the written documents; and that the conveyance of Deblois and the release of the plaintiff are inconsistent with any such trust. The answer has been already, in fact, given to this objection, by showing, that the trust is not inconsistent with the documents, or purposes for which they were given; but is in harmony with the res gestae. But the court is pressed with authorities on this point, which certainly are of a cogent nature. One of them is Bartlett v. Piekersgill, 1 Eden, 515, 1 Cox, 15, 4 East, 577, note. But that is distinguishable as to the present point, although bearing on the point of agency, for all the consideration did not move from Eldredge for this purchase, in my view of the evidence, as it did in that case from the agent. The case of Leman v. Whitley, 4 Russ. 423, is far more difficult to answer. There the parol evidence to raise a trust was rejected, that evidence being offered to show, that a son conveyed to his father nominally as a purchaser for £400, but really as a trustee, in order that the father, who was in better credit than the son, might raise money upon it by way of mortgage for the benefit of the son; and the master of the rolls (Sir John

Leach) held, that the case was within the statute of frauds, and that it must upon the documents be treated as a purchase. That case is not quatuor pedibus with the present. But still it has a very strong, not to say stern bearing on it. I confess, that I have never felt satisfied with that decision, and should have great difficulty in following it, even if there were no authorities, which seemed fairly to present grounds for doubt. See 2 Story, Eq. Jur. § 1199, note. Lees v. Nuttall, 1 Russ. & M. 53, which will presently be cited for another purpose, looks the other way. Carter v. Palmer, 11 Bligh, N. R. 397, 418, 419, in the house of lords, although distinguishable in its circumstances, does certainly establish a principle, letting in parol evidence to establish a trust in a ease of agency. But a very strong case is Morris v. Nixon, 1 How. [42 U. S.] 118, where a trust was actually enforced upon parol evidence by the supreme court of the United States, in contradiction to the answer of the defendant, and to the conveyance and documents passed between the parties; and in many particulars, it approaches very near to the present, for it grew out of an agency as to the premises. Cripps v. Jee, 4 Brown, Ch. 472, is equally strong to the same purpose. There was, indeed, slight written evidence leading to the conclusion, that there was a trust in that case, contrary to the written evidence (as there is in the present case); but the main evidence to show, that the conveyance, although absolute in form, was, in fact, a conveyance in trust to discharge incumbrances, with a resulting trust of the surplus for the grantor, was parol evidence;. and upon the parol evidence the court established the trust. Indeed, the transaction in that case is in many respects the counterpart of the present.

In the next place, as to the agency. It appears to me, that here a confidential relation of principal and agent did exist; and that being once shown, it disables the party from insisting upon the objection, that the trust is void, as being by parol. The very confidential relation of principal and agent has been treated, as for this purpose, a case sui generis. It is deemed a fraud for an agent to avail himself of his confidential relation to drive a bargain, or create an interest adverse to that of his principal in the transaction; and that fraud creates a trusty even where the agency itself may be, nay,

must be proved only by parol. Bartlett v. Pickersgill, 1 Eden, 515, 1 Cox, 15, 4 East, 577, note, and Leman v. Whitley, 4 Russ. 423, are, I admit, against this doctrine,—not wholly, but to a limited extent; for the latter case excludes a case of fraud. But then Lees v. Nuttall, 1 Russ. & M. 53, expressly decides, that if an agent employed to purchase an estate, purchase for himself and on his own account, he becomes a trustee for the principal. In that case the whole agency and trust was made out by parol, and the purchase was from a third person. Carter v. Palmer, 11 Bligh, N. R. 397, 418, 419, goes the full length of the same proposition.

In the next place, as to the asserted fraud. If, as the argument of the plaintiff supposes, Eldredge originally engaged in the undertaking with a meditated design to mislead the confidence of the plaintiff, and, by practising upon his credulity, and want of caution, to get the title to the property into his own hands, and then to convert it into the means of oppressively using it for his own advantage and interest, I should have no doubt, that the case would be out of the reach of the statute of frauds; for the rule in equity always has been, that the statute is not to be allowed as a protection of fraud, or as the means of seducing the unwary into false confidence, whereby their intentions are thwarted, or their interests are betrayed. There are many authorities in the books turning directly upon this point. See cases cited in 1 Story, Eq. Jur. §§ 252, 230, 768, 1265. In Montacute v. Maxwell 1 P. Wms. 618, 620, which was a bill for the execution of a parol agreement for a settlement upon the wife, of her property for her separate use, the statute of frauds being set up by a plea, that it was an agreement in consideration of marriage, which the statute expressly required to be in writing, and signed by the party, the lord chancellor (Parker) said: "In cases of fraud, equity would relieve even against the words of the statute; but where there is no fraud, only relying upon the honor, word, or promise of the defendant, the statute making those promises void, equity will not interfere." The case is reported in several other books. Finch, Prec. 526; 1 Eq. Cas. Abr. 19, pl. 4; 1 Strange, 236. By the report in 1 Strange, 236, it appears, that although the plea was, at first, allowed, yet upon the plaintiff's amending her bill, alleging some other circumstances resting mainly in parol, the plea was ordered to stand for an answer. The case itself seems originally to have stood upon a peculiar ground, that marriage is not a part performance to take the case out of the statute; contrary to the common rule in other cases within the statute; and has been so understood by subsequent judges. See Dundas v. Dutens, 1 Ves. Jr. 196, 199, 2 Cox, 235; Redding v. Wilkes, 3 Brown, Ch. 400, 401; Taylor v. Beech. 1 Ves. Sr. 297, 298. In its general language, the case affirms the doctrine, that fraud takes the case out of the statute, even in cases of agreements in consideration of marriage. The other language, that it is otherwise where there is no fraud, but reliance is solely placed upon the honor, word, or promise of the party, must be limited to cases of marriage; and certainly is inapplicable to cases, where there has been a part performance or execution of the agreement on the

other side. Indeed, the whole doctrine, even in relation to agreements on marriage, does not stand upon any clear and satisfactory ground; for if a man promises, upon his marriage, to make a settlement upon his intended wife, and she is, by a fatal confidence in his good faith and integrity, induced to celebrate the marriage before the settlement is executed, and he designedly misleads her, not intending at the time to perform his agreement—it seems to me as arrant a fraud as could be perpetrated upon an innocent and unsuspecting woman. I doubt the whole foundation of the doctrine, as not distinguishable from other cases, which courts of equity are accustomed to extract from the grasp of the statute of frauds. It is not, however, necessary to consider, what should be the true rule in such a case; the present is not one of that nature; but stands upon very different grounds. I think, moreover, that there is one ingredient in the present case, which gives it a marked character, which is often relied on in cases of agreements on marriage, that Eldredge did agree to reduce the trust to writing, and to keep a private memorandum thereof in his own possession, as evidence, in case of his death or other accident. I do not accede to the statement, that this was a mere subsequent promise, long after the execution of the conveyances, as his answer imports; but if was a part of his original agreement, and upon the faith of which the arrangement was completed. He never did comply with that part of the agreement. He admits, that he never made any such memorandum. If he had made one, it might have swept away the whole of his present defence. I should not incline, however, to impute to Eldredge any such original premeditated intention of fraud as the argument of the plaintiff supposes, unless driven to it by the most cogent circumstances of necessity. And it does not seem to me necessary, in this case, to go to such a length. In my judgment, the result is the same, although the original design of Eldredge was perfectly fair, and honorable, if he has since deviated from his duty, and attempted to absolve himself from the obligations of the trust, such as he knew the plaintiff believed it to be, and constantly acted upon; because, in point of law, it would be a breach of trust, involving a constructive fraud, such as a court of equity ought to relieve. Mr. Chancellor Kent, in his excellent Commentaries (volume 4, 5th Ed., p. 143), has

laid down a doctrine broad enough to cover the present case. He says: "A deed absolute upon the face of it, and though registered as a deed, will be valid and effectual as a mortgage as between the parties, if it was intended by them to be merely a security for a debt. And this would be the case, though the defeasance was by an agreement resting in parol; for parol evidence is admissible to show, that an absolute deed was intended as a mortgage, and that the defeasance had been omitted or destroyed by fraud or mistake." In the case of Taylor v. Luther [Case No. 13,796], I had occasion to carry the doctrine one step farther, and to say, that "it is the same, if it be omitted by design, upon mutual confidence between the parties'; for the violation of such an agreement would be a fraud of the most flagrant kind, originating in an open breach of trust, against conscience, and justice." And this is fully supported by the case of Morris v. Nixon, 1 How. [42 U. S.] 118.

In the next place, as to the ground of a part performance on the part of the plaintiff. From what has been already suggested, there seems to me strong ground to support this suggestion. The plaintiff did, at the time of the conveyance to Eldredge, surrender up his present rights, or just expectations, under the contract with Deblois; hesuffered his equity to expire, and he agreed to give up to Eldredge all claims, which he might have to the premises; and consented to a direct conveyance thereof to Eldredge. He did more; he surrendered up all remuneration for his past advances and services; and also all remuneration for his future services, except so far, as ultimately, after satisfying all other claims, there might remain a surplus of value of the property to indemnify him. It has been suggested, that he had, at the time, no claim upon Deblois for those advances, or services, or improvement of the property. I doubt, if, in equity, that doctrine is maintainable, if the value in the hands of Deblois had been greatly enhanced thereby. But upon this, to which allusion has been before made, I do not dwell. But I do put it, that none of these acts would have been done; and, above all, the release to Eldredge by the plaintiff would never have been executed, but upon the faith, that the trust was to exist for the plaintiff's benefit, and the release was a part execution of the agreement between him and Eldredge. And here I cannot but remark, that the very exception in the deed of Deblois to Eldredge, (a most fit and proper exception, under the circumstances, and upon which the release was designed to operate) "excepting any claim or demand made by, through, or on account of Joseph Jenkins, and also excepting any claim or demand, arising out of any contract made by or with said Jenkins,"—shows clearly, that all the parties understood, that Jenkins then had or claimed some right or title in the premises, and that the extinguishment of it was essential to the security of purchasers. So that, upon the ground of part performance, there is much in the case to take the case out of the reach of the statute. In concluding my remarks on this head, I wish to add, that my opinion has proceeded upon the ground, that there is no substantial difference between the statute of frauds of Massachusetts, either under the act of 1783, c. 37, § 3, or the Revised Statutes of 1835,

c. 59, § 30, and the statute of 29 Car. II. c. 3, on the subject of trusts; and such is the conclusion, to which I have arrived, upon the examination of these statutes.

It remains for me to notice several other objections, which have been pressed upon the attention of the court. In the first place, the lapse of time, and the omission of Jenkins to institute the present suit at an earlier period. Taking all the circumstances of the case, there does not appear to me to be any ground whatsoever for this objection. The whole controversy has been continually kept alive by a constant course of adverse operations or claims. Then, again, it is said, that the plaintiff has never, up to the time of the commencement of the present suit, been able to comply with the terms of the agreement, as he states it, from his total want of means and credit, to discharge the charges and incumbrances thereon. This is probably true. But still it furnishes no ground, upon which a court of equity can say, that his rights are extinguished, although it might furnish a ground, why a court of equity, upon the application of Eldredge, might be called upon to interfere to foreclose his rights, or to order a sale of the property, to discharge the charges and incumbrances thereon; if not done within a reasonable time.

In the next place, the proceedings in the bill in equity of Jenkins v. Eldredge [unreported], filed in the supreme court of the state in September, 1841, is relied on as a bar to the present suit. There was a stipulation in that case, that unless the plaintiff should, within sixty days from the 22nd of November, 1841, fulfil all the conditions stated therein, his bill should be dismissed with costs for the defendant (Eldredge.) The conditions were not complied with, and accordingly, on the 24th of January, 1842, the bill was dismissed. Now it is difficult to perceive how the dismissal of that suit, under all the circumstances, can be held as a strict technical bar to the present. It was not a dismissal after any hearing upon the merits; the stipulation was signed by Jenkins alone, and was not mutual in its operation. It contains no agreement, that the dismissal shall be final, as upon the merits of the matters contained in the bill. There is, also, much reason to suppose from the decision in the case Gould v. Gould, 5 Mete. (Mass.) 274, that the supreme court of the state would, upon a hearing, have held the

case not to the within its jurisdiction, as embracing matters of constructive trust and fraud. But upon this, it is not necessary to express any definitive opinion, since the decree does not purport to be a decree upon the merits; and unless it were so, or the parties expressly agreed to give it that effect, it would not be a bar. The only possible manner, in which it can be permitted to bear upon the present case, would be as a reason addressed to the discretion of the court, why, after such shifting and protracted litigation, it should not interfere, and prolong the controversy. But there are circumstances in the case, which would prevent the court, as a court of equity, from pressing severely upon the plaintiff. He was a broken down man,—broken in credit, and driven, if one may so say, to desperate expedients, to seize upon any plank in the shipwreck of his hopes. Eldredge, too, it seems, had promised to aid him in his endeavors to perform the stipulation; but so far from keeping his promises on this head, if the evidence is believed, he seriously obstructed him in his efforts to obtain pecuniary aid.

In the next place, as to the pendency of the bill in equity, of Bliss v. Jenkins [unreported], in the state court, before and at the time when the present suit was brought; it appears to me in nowise to amount to a bar, in any just sense. The parties are not the same; the bills have different objects; different equities are involved in them; and the relief prayed for proceeds upon different grounds, and must, or may, involve different decrees. Moor v. Welsh Copper Co., 1 Eq. Cas. Abr. 39. The only case apparently bearing on the point is entirely distinguishable in its character; for the plaintiff in the first suit, after the suit was brought for certain stock, and while it was pending, had sold a part of the shares of the stock in controversy to the plaintiff in the second suit, who brought the latter suit against the same defendant, to enforce his claim to the same shares; and it was to this latter suit that the plea was put in. The plea was held bad, because not well pleaded in its structure, though the court thought it might, if well pleaded, have been sustained as a bar to the second suit. Story, Eq. Pl. §§ 737, 738. I see no reason to be dissatisfied with this decision. It proceeded upon the plain ground, that a plaintiff should not, any more than a defendant, be allowed pendente lite to create a new interest in the suit, which should displace the rights of the defendant. It does not appear that Jenkins has ever appeared to answer in the suit of Bliss, and, indeed, Eldredge, in his answer, says, that he knoweth not, that he has appeared. The injunction granted in that suit, is against Eldredge only; and for aught that appears, Jenkins is not at all bound by that suit; and the mere fact, that Bliss has brought a suit against him, claiming an adverse interest, does not compel Jenkins to abandon a suit brought to enforce his own rights against Eldredge. What may hereafter be fit and proper to be done touching the suit of Bliss, in order to protect his interest, and to save Eldredge from a double responsibility, is a matter which may, in a further stage of the present suit, require the consideration of the court. At present, I do not intermeddle with the inquiry.

There are many other circumstances in the case, upon which the parties have relied, and which might furnish matter for comment, if this opinion had not been protracted to an unusual length. It cannot, however, be necessary to dwell on them; for they do not materially change the complexion of those considerations, which have been already suggested.

In respect to the case of the defendant, Kimball, the whole merits turn upon this, whether he is a bona fide purchaser for a valuable consideration, without notice. I am clearly of opinion that he is not such a purchaser, and, therefore, he must, share the fate of Eldredge in respect to the bill. If he had not full notice of the actual state of the title, and the claim of the plaintiff to the premises, at (the time of his purchase,—which I very much incline to think he had.—he had sufficient notice of the claim and controversy, to be put upon inquiry; and, in a court of equity, no purchaser is at liberty to shut his eyes, and to remain voluntarily in ignorance of facts within his reach, and then claim protection as an innocent purchaser. Even his own answer leaves him with strong presumption, that he was content to purchase with all the infirmities which might attach Jo the title, and to take his chance of success in common with Eldredge.

These are all the remarks which I deem necessary to make in the case. I have deliberated upon it with much solicitude and care; and the parties have now the result of my best judgment. That judgment, however, is not, I have the consolation to know, final; and the supreme court, upon an appeal, can correct any errors into which I may have fallen. This is the last case which, if I could have had my choice, I should ever have desired to have entertained in this court. It is, at every turn, surrounded with difficulties and obscurities from which I would have gladly sought deliverance. But courts of justice must act upon cases, as the parties choose to present them, and their duty is not to shrink from uninviting labors, but to survey, and, if practicable, to master the intricacies. "Hic labor extremus, longarum haec meta viarum." I shall, therefore, declare, that the plaintiff is entitled to relief according to his bill, upon the ground of the defendant, Eldredge, being an agent and trustee of the plaintiff in the premises; and I shall refer it to a master, to ascertain and report to the court, what is due to Eldredge for his advances, disbursements, expenditures, and compensation in the premises. The master

is to be at liberty to examine both parties upon oath, as to any matters within the scope of the inquiries before him, and to require the production of all vouchers and documents in the possession of either of them, to aid him in the proper inquiries. I shall reserve all other orders in the premises until the coming in of the master's report.

{See Cases Nos. 7,267—7,269.}

[1] {Reported by William W. Story, Esq.}