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being simply told at the custom-house, when he asked for a permit, that he must call again, it appears he stated, on his examination in the district court, that when he applied for a permit, on the 3d of November, he was told at the custom-house, that "they wished to examine the goods before they were delivered;" and that although he did not see Mr. Toler until Monday, he communicated to his clerk, Mr. Crane, what had passed, who, doubtless gave the same information to his principal, which will account for the solicitude which he discovered, so early on Monday morning, to enter the goods which had been omitted in the entry of Mr. Ash. There are other circumstances in this case, that are not here noticed, which render the explanation given by Mr. Toler, to say the least, extremely questionable.

The court cannot dismiss this cause, without expressing its surprise, that more than ten years have elapsed since the filing of the libel in the district court. As all the witnesses who have been examined since the appeal, reside in the city in which the cause was tried, they might, and ought, to have been examined in that court, and if their testimony had there been reduced to writing, and used in the circuit court, a final decision might have been had many years ago, and before the insolvencies which it is suggested have happened, and have rendered the further prosecution of these proceedings of little or no importance to the parties.

\*528] \*The decree of the circuit court is reversed, and the sentence of condemnation pronounced by the district court affirmed.

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*Specific performance.*

The general rule is, that time is not of the essence of a contract of sale; and a failure on the part of the purchaser, or vendor, to perform his contract, on the stipulated day, does not, of itself, deprive him of his right to a specific performance, when he is able to comply with his part of the engagement.

But circumstances may be so changed, that the object of the party can no longer be accomplished, and he cannot be placed in the same situation as if the contract had been performed in due time; in such a case, a court of equity will leave the parties to their remedy at law.

Part performance will, under some circumstances, induce the court to relieve.

But where a considerable length of time has elapsed, where the party demanding a specific performance has failed to perform his part of the contract, and the demand is made after a great change in the title and the value of the land, and there is a want of reciprocity in the obligations of the respective parties, a court of equity will not interfere.<sup>1</sup>

APPEAL from the Circuit Court of Kentucky.

This cause was argued by *B. Hardin*, for the appellant, citing 1 Fonbl. Eq. 227; 9 Ves. 415; 2 P. Wms. 243; 4 Bro. C. C. 329, 469, 391; 1 Ves. jr. 221; 1 Atk. 12; and by *Sergeant*, for the respondents, citing Sugd. Vend. 246; 5 Ves. 720, note; 1 Ves. jr. 450; 9 Cranch 456; 8 Ibid. 471.

\*529] \*March 14th, 1821. MARSHALL, Ch. J., delivered the opinion of the court.—This is an appeal from a decree of the circuit court for the

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<sup>1</sup> Taylor v. Longworth, 14 Pet. 172; Ahl v. Johnson, 20 How. 511; Harkness v. Underhill, 1 Black 316.

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district of Kentucky, dismissing a bill brought by the appellant against the heirs of Michael Gratz, for the specific performance of a contract.

Michael Gratz, who resided in Philadelphia, had purchased from John Craig, of Kentucky, a tract of land containing, by the survey, 1000 acres, for which no patent had then issued. Subsequent to this purchase, the patent issued in the name of Craig, who sold a part of the land to Keyser, and a suit had been brought in the federal court of Kentucky by Gratz, against Craig and Keyser, to compel a conveyance of the land. Michael Gratz had, in the meantime, sold 824 acres, part of this tract, to Robert Barr. While the suit against Craig and Keyser was depending, Walter Brashier, the plaintiff, who resides in Kentucky, came to Philadelphia on business, and on the 2d day of March, in the year 1807, purchased the residue of the land from Gratz. Brashier had married the daughter of Robert Barr.

The residue of the land was estimated by the parties at 302 acres, for which Brashier agreed to give the sum of \$6795, in his negotiable notes, payable in six, twelve and eighteen months. From this sum was, however, deducted \$250, "allowed to the said Walter Brashier, towards the costs and expenses of prosecuting the suits now depending, for the recovery of the lands hereby contracted for, which is accepted \*by the said Walter, [\*530 as a full satisfaction for all costs, trouble and expense which he may be at, in prosecuting the said suits, and which he hereby agrees and undertakes to manage at his own costs and expense. And it is hereby agreed, that a correct and accurate survey shall be made, at the expense of the said Michael, of all the said residue of the above-mentioned tract of land, lying within the limits of the original survey thereof, not sold to the said Robert Barr; and if, upon such survey, it shall be found, that the said residue doth not contain the quantity of 302 acres, then, for every one deficient, the said Michael Gratz, his heirs, executors or administrators, shall pay or allow to the said Walter Brashier, his executors, administrators or assigns, the sum of \$22.50; and if any part of the said residue shall be lost, in all, or any of the said suits now depending, or that may be instituted hereafter, for any part of the said residue, the said Michael Gratz, his heirs, executors or administrators, shall only be liable to refund to him, the said Walter Brashier, his executors, administrators or assigns, the sum of \$11.25, for each and every acre so lost. It being hereby declared, that the said Walter Brashier has purchased the title of the said Michael Gratz, at his own risk and hazard, and so that he shall have no recourse against the said Michael Gratz, for want of, or for any defect in the, title to the said residue, or any part thereof, save only the price of \$11.25 per acre, for every acre which shall be lost as aforesaid. And the said M. G. for himself, his heirs, executors and administrators, \*doth covenant and agree, that he or they [\*531 shall and will, at any time after payment of the notes aforesaid, when thereunto required, by a good and sufficient deed, conveyance or assurance in the law, convey and assure unto the use of him, the said Walter Brashier, his heirs and assigns for ever, all his, the said Michael Gratz's estate, right, title and interest, of and in all the said residue of the above-mentioned tract of land.

Mr. Brashier executed his notes, in conformity with this contract, and returned to Kentucky, where he requested his brother-in-law, Thomas T.

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Barr, to attend to the prosecution of the suits then depending. Mr. Barr resided near the place where the court was held, and Mr. Brashier at the distance of sixty or seventy miles. Mr. Barr immediately employed Mr. Bledsoe, a lawyer of eminence, to assist Mr. Hughes, who had been engaged by Mr. Gratz, and some time afterwards, spoke to Mr. Wickliffe, but did not pay him a fee. No progress, however, seems to have been made in these suits, and the plaintiff failed to pay the fees of the officers of the court, which were demanded and received from Michael Gratz, in the year 1811, and afterwards from his representatives. The notes for the purchase-money were protested for non-payment, and have not been paid.

In 1811, Mr. Brashier came to Philadelphia, when Gratz offered to convey the land, on his paying his notes. Mr. Brashier being unable to pay them, Gratz offered to rescind the contract, which Brashier declining to do, \*532] the question was referred \*to arbitrators, who were of opinion, that the contract was still binding. About this time, Brashier, who had been for some time much embarrassed, appears to have become notoriously insolvent. In the autumn of 1811, Gratz departed this life, and in July 1812, his heirs again offered to convey, on payment of the notes which Brashier had given for the purchase-money. Payment not being made, the heirs of Gratz took the management of the suits again into their own hands, which were prosecuted with vigor, and in 1813, were finally determined by a decree in their favor. About this time, the land rose suddenly to about \$80 or \$100 per acre. After the decision of the cause, and after this rise in the value of the land, Brashier, in November 1813, entered into an agreement with Lewis Saunders, by which he was to convey to Saunders half the land purchased of Gratz, in consideration of Saunders paying, or tendering to the heirs of Gratz, the full amount of the notes he had given for the purchase. Saunders immediately offered his contract to the heirs of Gratz, and requested them, if they were willing to take it, and to indemnify him, to acknowledge a tender of the money, which the contract bound him to tender. They avowed their opinion, that the contract of Michael Gratz with Brashier was of no validity, but consented to take the contract with Saunders, and acknowledged the tender. When in possession of this acknowledgment, Brashier instituted his suit in the court of Kentucky for a specific performance of the contract of the 2d of March 1807. The defendants \*533] removed this suit \*into the circuit court of the United States, where they filed their answer, insisting, that the court ought not to decree a specific performance, because the plaintiff had totally failed to perform his part of the contract, until there was such a change of circumstances as materially to affect the rights of the parties. The circuit court dismissed the bill, and from that decree, the plaintiff has appealed to this court.

The appellant insists, that in equity, time is not of the essence of the contract; that it is in part performed; and that his failure to pay the purchase-money, until December 1813, when the tender was made, is justified by the circumstances of the case.

The rule, that time is not of the essence of a contract, has certainly been recognised in courts of equity; and there can be no doubt, that a failure on the part of a purchaser or vendor, to perform his contract on the stipulated day, does not, of itself, deprive him of his right to demand a specific performance, at a subsequent day, when he shall be able to comply with his

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part of the engagement. It may be in the power of the court to direct compensation for the breach of contract in point of time, and in such case, the object of the parties is effectuated, by carrying it into execution. But the rule is not universal. Circumstances may be so changed, that the object of the party can be no longer accomplished, that he who is injured by the failure of the other contracting party, cannot be placed in the situation in which he would have stood, had the contract been performed. Under such circumstances, it would be iniquitous, to \*decree a specific performance, [\*534 and a court of equity will leave the parties to their remedy at law.

It is true, that he who has been ready to perform, may at any time file his bill in chancery, requiring the other party to perform his contract, or to rescind it; and the court will rescind the contract, if he who has failed cannot, or will not, perform it. But this is not always necessary, and would not be always an adequate remedy. If, then, a bill for a specific performance be brought by a party who is himself in fault, the court will consider all the circumstances of the case, and decree according to those circumstances.

A consideration always entitled to great weight, is, that the contract, though not fully executed, has been in part performed. The plaintiff claims the benefit of this principle, and alleges, that by prosecuting and managing, at his own expense, the suits depending in Kentucky, he has performed that part of the agreement. If this allegation be supported by the fact, it will, undoubtedly, have great influence in the decision of the cause.

The evidence is, that the plaintiff, soon after his return to Kentucky, employed a gentleman of the bar, in addition to the counsel previously engaged by Mr. Gratz, and paid him his fee. It is also in evidence, that finding the business did not advance, he spoke to other counsel; but his application was not accompanied with a fee, and was not much regarded. It appears, that a survey was necessary, and that the deposition of a Mr. William Morton was indispensable \*to the successful termination of [\*535 the cause. Yet the survey was not made, and the deposition of Mr. Morton, though its importance had been communicated to Brashier, was not taken. The fees to the officers of the court were not paid, and Mr. Gratz was required to pay them. From March 1807, when the contract was made, to the autumn of 1811, when Mr. Gratz died, the suit did not advance. The clerk informs us, that during this time, no other step was taken in the cause, than to move for leave to amend the bill and to continue it. The embarrassment of Mr. Brashier's affairs, and his insolvency, added to this experience of his neglect of the cause, were but little calculated to inspire confidence in its future progress, or in his future attention to it. In 1812, the heirs of Mr. Gratz took the management of the business into their own hands. The deposition of Mr. Morton was taken, the survey was made, and in 1813, a decree was obtained in their favor. We think, this cannot be considered as such a performance of his undertaking, "to manage the suits at his own expense," as to entitle him to call on the vendor for an execution of the contract.

It has also been contended, that by the agreement between the parties, Mr. Gratz was bound to survey the land, and that this was a preliminary step to be taken by him, before he could justly require Mr. Brashier to pay his notes for the purchase-money. Although this could not, at law, be pleaded to

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notes importing an absolute promise to pay money, it will readily be admitted, that if the understanding of the parties had been, that Mr. Gratz should \*536] make \*the survey, and that it should precede the payment of the notes, such understanding would account for the non-payment of the notes, and would place the demand for a specific performance of the contract on very strong ground. But the agreement does not indicate the expectation, that Mr. Gratz should make the survey, although the expense of it would be chargeable to him, and as it might be of advantage to Mr. Brashier, and could be of none to Mr. Gratz, as Mr. Brashier was a resident of Kentucky, and Mr. Gratz, of Philadelphia, the expectation was not unreasonable, that Mr. Brashier would cause it to be made. He might be expected to move in this business, and to require Mr. Gratz to attend to it. His not having done so, is a proof that he did not suppose the survey to be of any consequence, because he did not intend to pay so much of the purchase-money as the survey would show he ought to pay.

But the articles of agreement, far from showing that the survey was to precede the payment of the notes, contain expressions indicating the intention, that their payment was not to depend on the survey. The parties stipulate, that for every acre which the survey shall show the tract to contain less than 302 acres, Gratz "shall pay or allow" to Brashier the sum of \$22.50. That is, shall "pay" him, if the notes shall have been received, shall "allow" to him, if the deficiency shall appear before payment of the notes. Had Mr. Brashier been able and willing to pay his notes as they became due, \*537] he had sufficient motives \*for surveying the land. He had reason to believe, that there would be a deficiency. On his return from Philadelphia, in 1807, Mr. Barr, who lived upon the land, and was acquainted with its boundaries, told him that there could not possibly be the quantity he had purchased. He knew, too, that the land had been actually surveyed in October 1807, by a son of Mr. Gratz, and had reason to believe, that this survey must have disclosed a deficiency. His omission to make any inquiries of Mr. Gratz, or to make a survey, or to demand one, show that his conduct respecting his notes did not depend on a survey. We do not think, then, that Mr. Brashier is justified in withholding the payment of the purchase-money, by the fact that the quantity of land was not ascertained; nor does the evidence support the opinion, that this fact had any influence on his conduct.

The plaintiff also attempts to justify the non-payment of the purchase-money by the inability of Mr. Gratz to make him a title. But this excuse entirely fails him. He knew perfectly the state of the title, and the articles of agreement show that he knew it. They expressly declare, that "the said Walter Brashier has purchased the title of the said Michael Gratz, at his own risk and hazard;" and that if any part of the land be lost, the said Michael "shall only be liable to refund to him the sum of \$11.25 for each acre that may be lost." The contract states that suits were depending for the land, which suits Brashier undertook to manage; and all the testimony in the \*538] cause shows, that he knew those \*suits were brought for the legal title. With this full knowledge, he purchases the title of Gratz, and stipulates that, after the payment of the purchase-money, Gratz shall convey, not the land, or a good and sure title to it, but "all his the said Michael Gratz's

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estate, right, title and interest, of and in all the said residue of the above-mentioned tract of land."

It is then an essential ingredient in this contract, that the purchase-money shall be paid, without waiting for the termination of the cause. Brashier takes the whole risk upon himself, except as to half the price of every acre which may be lost; and he is not to retain even that portion of the purchase; but it is to be "refunded" to him, whenever the loss shall take place. He had, then, no right to withhold the payment of the purchase-money, until the suits should be determined; and any attempt to do so, was a violation of the letter and the spirit of his contract. The state of the title furnishes no sort of apology for this violation. Gratz was able to make the conveyance which he had contracted to make, and which Brashier had contracted to receive; and his want of the legal title furnished no excuse for the non-payment of the purchase-money.

The situation of the parties, and the circumstances in which the property was placed, deserve serious consideration. The contract was made, while a suit for the title was depending, and there is reason to suppose, that this circumstance had some influence on the price of the article. We perceive, that if any part of the land should be lost, one-half the purchase-money \*should be lost by Brashier. While the suits were depending, and the purchase-money unpaid, Brashier became insolvent. Conse- [\*539  
quently, should the land be recovered, it would be the property of Brashier at the stipulated price; should it be lost, Brashier could not pay that portion of the price which he was to pay in the event of loss. Under such circumstances, had a suit in chancery been brought to have the contract rescinded, unless he would pay the purchase-money, no court could have hesitated to decree according to the prayer of the bill. No court could allow one party to hold the other bound, while the obligation was not reciprocal; or to hold himself prepared to avail himself of all favorable contingencies, without being affected by those which were unfavorable.

Mr. Brashier, then, if he did not execute his part of the contract with punctuality, ought to have executed it, before a great change of circumstances took place; before the doubts which hung over the title, and under which he had purchased, were dissipated. That he did not do so, and was unable to do so, that in the event of an unfavorable termination of the suits he would be totally unable to comply with his contract, weakens very much the claim to a specific performance, which he sets up after the removal of the difficulties which attended the title.

Another circumstance which ought to have great weight, is the change in the value of the land. It was purchased at \$22.50 per acre. Mr. Brashier failed to comply, and was unable to comply with his engagements. More than five years \*after the last payment had become due, the land suddenly rises to the price of \$80 per acre. Then he tenders the [\*540  
purchase-money, and demands a specific performance. Had the land fallen in value, he could not have paid the purchase-money. This total want of reciprocity gives increased influence to the objections to a specific performance, which are furnished by this great alteration in the value of the article.

Both parties have sought to avail themselves of the transaction with Mr. Saunders, by whom the purchase-money was tendered, in December 1813. The defendants say, that Brashier was still unable to comply with his con-

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tract, and that the tender was made, in consequence of an arrangement by which Saunders was to advance the whole purchase-money, and to receive half the land. But it was unimportant to them, whose money was tendered, or how it was obtained. Of this circumstance, therefore, they cannot avail themselves. The plaintiff insists, that the contract between the defendants and Saunders was a fraud on him, because he had a right to consider Saunders as his friend and agent. But the tender of the purchase-money was the only service he was to expect from Saunders, and this service has been performed. He is precisely in the same situation, as if the contract between Saunders and the defendants had never been made.

It has been also contended, that the concealment of the survey made by Joseph Gratz, in October 1807, and the demand of the whole amount of his \*541] \*notes, after a knowledge of the deficiency in the quantity of land, were fraudulent on the part of the defendants. Mr. Brashier knew that the survey had been made, and had reason to believe, that it disclosed a deficiency in the quantity of land. He has sustained no injury, by the omission to make a full communication to him. It is certainly true, that after the knowledge of this deficiency, Mr. Gratz, in his lifetime, and his heirs, since his decease, ought not to have demanded the full amount of his notes. The court, therefore, allows them no advantage from their repeated offers to convey, on receiving the whole amount of the notes; but considers the case as if no such offers had ever been made.

This, then, is a demand for a specific performance, after a considerable lapse of time, made by a person who has failed totally to perform his part of the contract; and it is made, after a great change, both in the title, and in the value, of that which was the subject of the contract; and by a person who could not have been compelled to execute his part of it, had circumstances taken an unfavorable direction. In such a case, we are of opinion, that a court of equity ought to leave the parties to their remedy at law.

Decree affirmed.

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*Division of opinion.*

A division of the judges of the circuit court, on a motion for a new trial, in a civil or a criminal case, is not such a division of opinion as is to be certified to this court for its decision, under the 6th section of the judiciary act of 1802, c. 291.

This was an indictment in the Circuit Court of South Carolina, against Lewis Daniel, charging him with having knowledge of the actual commission of the crime of wilful murder, committed on the high sea, by John Furlong; and with unlawfully, wickedly and maliciously, concealing the same, &c.

The indictment set forth, at large, the indictment and conviction of John Furlong, for wilful murder on the high seas, and then charged Lewis Daniel with the knowledge and concealment of that murder, and with not having disclosed the same, in the words of the act of congress. The prisoner was tried on the plea of not guilty. It was proved, that some of the persons present on board, when the principal felony was committed, had, in conversation, stated the fact of the murder to the defendant, who advised