CASES DETERMINED

IN THE

SUPREME COURT OF THE UNITED STATES.

JANUARY TERM, 1828.

CLEMENT S. HUNT, Appellant, *v.* CHRISTOPHER RHODES, WILLIAM ENNIS and RICHARD K. RANDOLPH, administrators of LEWIS ROUSMANIERE, deceased, Appellees.

Equity.—Mistake.

It is a principle of equity, that when an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by mistake of the draftsman, either in fact or in law, does not fulfil, or which violates, the manifest intention of the parties to the agreement; equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. p. 13.

The execution of instruments, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and a court of equity will compel a delinquent party to perform his agreement, according to the terms of it, and to the manifest intention of the parties. p. 13.

So, if the mistake exist, not in the instrument which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact; a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought. p. 13.

If an agreement was not founded on a mistake of any material fact, or if it is executed in strict conformity with itself, it would be unprecedented, for a court of equity to decree another security to be given, different from that which has been agreed upon; or to treat the case as if such other security had, in fact, been agreed upon and executed. p. 14.

Courts of equity may compel parties to execute their agreements, but it has no power to make agreements for them.[1] The death of one of the parties, and the consequent inefficiency of the security selected, intended to be valid and complete, but which was not so, will not give the right of interference. p. 14.

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[1] In Oliver *v.* Mutual Commercial Marine Ins. Co., 2 Curt. 298–9, the judge said, "there is a wide distinction between a case where an instrument is what the parties agreed it should be, but its legal effect is unexpected, and a case where an instrument was designed to carry into effect an existing binding agreement, but, by mistake, fails to do so. In the former case, the party never had a right to anything more than he has got; he may be disappointed in finding that what he has acquired was less valuable then he expected, but he acquired all he bar-

*A mistake arising from ignorance of law is not a ground for reforming a deed founded on such mistake; except in some few cases, and those of peculiar character.[2] p. 15.

If the obligee of a joint bond, by two or more, agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences; although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. p. 16.

It seems, that there may be cases in which a court of equity will relieve against mistake, arising from ignorance of law; but where parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security thus selected, a court of equity will not, on the ground of misapprehension, and the insufficiency of the security, in consequence of a subsequent event not foreseen, direct a security of a different character to be given, or decree that to be done, which the parties supposed would have been effected by the instrument, which was finally agreed upon. The court would be much less disposed to interfere, in such a case, in favor of a particular creditor, against the general creditors of an insolvent estate. p. 17.

Hunt *v.* Rousmaniere, 3 Mason 294, affirmed.

Appeal from the Circuit Court of Rhode Island. The appellant filed a bill on the chancery side of the circuit court of the United States for the district of Rhode Island, setting forth, that, in January 1820, Louis Rousmaniere obtained from him two loans of money, amounting, together, to $2150; and at the time the first loan was made, Rousmaniere offered to give, in addition to his notes, a bill of sale, or mortgage, of his interest in the brig Nereus, then at sea, as a collateral security for the repayment of the money. A few days after the delivery of the first note, dated 11th of January 1820, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale, of three-fourths of the Nereus, to himself, or to any other person; and in the event of the loss of the vessel, to collect the money which should become due on a policy, by which the vessel and freight were insured. In the power of attorney, it was recited, that it was given as collateral security for the payment of the notes, and was to be void on their payment; on the failure of which, the plaintiff was to pay the amount and all expenses, and to return the residue to Rousmaniere. On the 21st of March 1821, an additional sum of $700 was loaned, for which a note was taken, and similar power of attorney given, to sell his interest in the schooner Industry; this vessel being also still at sea.

On the 6th of May 1820, Rousmaniere died intestate and insolvent, having paid $200 on account of the notes; and the plaintiff gave notice of his claim to the commissioners of insolvency, appointed under the authority of the insolvent law of Rhode Island. The plaintiff, in his bill, alleged, that, on

*3] the return of the Nereus and Industry, he took *possession of them, and offered the interest of the intestate in them, for sale; and the

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gained for, and there is no ground upon which a court of equity can give him anything more. On the contrary, in the latter case, the party had a complete right, by an existing contract, to something which, by mistake, he has failed to get; and this contract, and the right under it, still subsists, in point of equity; because, though the parties attempted to execute the contract, by mistake, they failed to execute it; and therefore, a court of equity interferes and, upon the footing of an existing contract, unexecuted, proceeds to put the party in that condition to which his contract entitled him; and in this class of cases, I apprehend, it is wholly immaterial, whether the party has failed to obtain that to which he was entitled, through a mistake of fact or of law." And see United States *v.* Ames, 99 U. S. 46.

[2] United States Bank *v.* Daniel, 12 Pet. 55–6. And see United States *v.* Price, 9 How. 92; Snell *v.* Insurance Co., 98 U. S. 90.

defendants having forbidden the sale, this bill was brought to compel them to join in it.

To this bill, the defendants demurred ; and their demurrer was sustained in the circuit court ; but leave was given to the plaintiff to amend. An amended bill was then filed, in which it was stated, that it was expressly agreed between the parties, that Rousmaniere was to give specific security on the Nereus and Industry, and that he offered to execute a mortgage on them. Counsel was consulted on the subject, who advised that the power of attorney, which was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their return to port. These securities were, it was alleged, executed, with a full belief that they would, and with intention that they should, give to the plaintiff, as full and perfect a security, as would be given by a mortgage.

The defendants having also demurred to the amended bill, the circuit court decided in favor of the demurrer, and dismissed the bill ; and an appeal was entered to this court. At the February session 1823, this court considered that the appellant might be entitled to the relief prayed for in equity, but the respondents were permitted to withdraw their demurrer, and to file an answer in the court below. (8 Wheat. 174.) The answer of the defendants admitted the loans of money, and the delivery of the promissory notes, and that but $200 were paid, before the death of the intestate. The execution of the powers of attorney was also admitted, but it was denied that possession of the vessels was taken by the appellant ; and they alleged their resistance of the attempt to take possession of them. The answer also asserted ignorance of any agreement for a specific lien on the vessels, except that imported by the language of the powers of attorney ; that they had heard and believed, that the appellant meant to be concerned, as a partner, in a voyage of one of the vessels, which was relinquished, and that afterwards he offered to loan the money on security ; upon which, the intestate offered to give a mortgage, but the appellant preferred taking the powers of attorney, to avoid inconvenience, and took the powers of attorney, by advice of counsel. The answer also stated, that a bill of sale of the vessels, dated the day before the death of the intestate, by which the vessels were intended to be conveyed to one Bateman, and which the respondents stated, they had heard and believed, was intended to be executed on the evening of that day. The answer also alleged the insolvency of Rousmaniere, and that it existed a long time before his death; which they asserted must have been known to the appellant, and that the intestate resorted to improper modes to keep up his credit. [*4

The evidence taken in the case, consisted of the deposition of Mr. Hazard, the counsel who drew the papers, and in which he stated, that they were intended by both parties to have the effect of a specific lien or mortgage, and he advised them, they would have that effect ; and also the deposition of Mr. Merchant, to show that the appellant admitted, that the motive by which he was induced to make the loan, was to compensate Rousmaniere for the disappointment sustained by his not uniting with him in a voyage of one of his vessels ; and, accordingly, an agreement was made, by which the appellant was to let Rousmaniere have a sum of money, and that

he was to give a bill of sale of a certain vessel; but that afterwards he refused to take the same, on account of the inconvenience and difficulties which might attend the same; and that he had consulted with Mr. Hazard, upon the subject, who told him, that he could or would draw an irrevocable power of attorney to sell, which would do as well, or words to that effect; and which was accordingly done.

The circuit court pronounce a decree, declaring, that the appellant had no specific lien or security upon either of the vessels, and no equity to be relieved respecting them, and dismissing the bill, with costs; from which decree, an appeal was entered to this court.

On the part of the appellants, it was contended, that the decree ought to be reversed, and a decree entered for the appellant. That the answers to the bill did not respond to the only material facts in the cause; it being fully proved, that the powers of attorney were intended to have the effect of a specific lien, the appellant was entitled to the relief he sought, upon the principles laid down in the former decisions of this court.

The cause was argued by *Kimball* and *Webster*, for the appellant; and by *Wirt*, Attorney-General, and *Robbins*, for the appellees.

For the *appellant*:—The court, in concluding their opinion in the former case between these parties, as reported in 8 Wheat. 174, use this language, "We find no case which we think precisely in point, and are unwilling, where the effect of the instrument, the power of attorney, is acknowledged to have been entirely misunderstood by both parties, to say that a court of equity will not grant relief." In the opinion of the court, the plaintiff having been, in equity, entitled to the relief he prayed for, the principal question now is, one of fact.

*5] *It is insisted, that no essential averment in the bill is contradicted by the answer. The only real difference between them, relates to the possession of the vessels. It is not denied, that it was the express agreement and deliberate intention of the parties, that the plaintiffs should have a specific security; the defendants only say they are ignorant of this fact. The testimony of the plaintiff, then, is sufficient to entitle him to a decree, unless the defendants have introduced other facts, that are clearly inconsistent with it.

Admitting the origin of the loan to the intestate, to be such as the appellees say they have heard and believe it to be; this may be reconciled with the alleged intention of the parties, that one should give, and the other receive, a specific security. If the appellant did assign the reasons which the defendants say they have heard and believe, he assigned, for not taking a bill of sale, that circumstance does not contradict the testimony of the plaintiff's witness. A refusal to take a specific legal security, surely, does not necessarily exclude an agreement for a specific equitable security. The fact mentioned in the answer, may import simply a reference to a *legal* right, as those stated by the plaintiff's witness, manifestly do to an *equitable* right. There is, then, no contradiction apparent. As to the bill of sale, found among Rousmaniere's papers, it obviously discloses a design to commit a fraud.

None of the distinct averments contained in the answer, are in opposition to the allegations of the bill; and none of them, with the exception of the

bill of sale, are derived from the personal knowledge of the defendants. The general rule of equity, therefore, that declares the testimony of a single witness against a positive averment of the answer, to be insufficient for a decree in favor of the plaintiff, does not comprehend the present case. It does not apply, where the answer contains no direct denial, nor where the facts stated, are not, or cannot, be within the defendant's own knowledge. But if it did embrace this cause, the answer ought not to prevail against this bill. Where a single witness in support of the bill, is corroborated by circumstances, it is sufficient for a decree in favor of the plaintiff; and this is the fact in this case. *Clark's Ex'rs* v. *Van Riemsdyk*, 9 Cranch 160; *Cooth* v. *Jackson*, 6 Ves. 40; *Heffner* v. *Miller*, 2 Munf. 43; *Walton* v. *Hobbs*, 2 Atk. 19, case 17; *Hart* v. *Ten Eyck*, 2 Johns. Ch. 92.

The power of attorney was a part of plaintiff's security; and a letter of attorney, that is part of a security, is irrevocable. This was so declared, in the former case of *Hunt* v. **Rousmaniere*, also in *Walsh* v. *Whitcomb*, 2 Esp. 565. [*6 L

It has been ruled, that the answer containing the denial, may also contain in itself the circumstances, giving greater credit to a single witness, sufficient for a decree against the defendant. In a case cited by Chancellor KENT, in *Hart* v. *Ten Eyck*, 2 Johns. Ch. 92, the fact mentioned in the answer, that the plaintiff declined taking a bill of sale, from an unwillingness to have his name appear on the vessel's papers, &c., and took, upon advice of counsel, a letter of attorney, in preference, implies, of itself, that a specific security was meditated by the parties; and tends to show, that the plaintiff took the power of attorney, on the recommendation or assurance of his legal adviser, that it would constitute a security as effectual as a bill of sale; insuring the advantages, without producing the inconvenience of that conveyance. The circumstances of the appellant declining to take the bill of sale, for the reasons assigned, and that the powers of attorney were intended to give a specific lien, come in aid of the appellant's witness, and he has also an auxiliary in Merchant's evidence; and the circumstances altogether, establish the fact, that a specific security was designed and agreed upon. It is an elementary principle of equity, that where parties have, by contract, given a right, but have not provided a sufficient remedy, courts of equity will interfere.

Where the remedy is void in law, a court of equity has decreed not only against simple-contract, but against judgment creditors. *Burgh* v. *Francis*, cited in *Finch* v. *Earl of Winchelsea*, 1 P. Wms. 279, and *Taylor* v. *Wheeler*, 2 Vern. 564, ca. 513. But there are no judgment-creditors here, to be affected by a decree in favor of the plaintiff. Mr. Fonblanque, in the first volume of his Treatise upon Equity, suggests, in a note, page 38, whether, in the case of *Burgh* v. *Francis*, the second incumbrancer had not notice of the former incumbrance. But nothing can be collected from the case as reported, in favor of this suggestion; the presumption is entirely the other way. The plaintiff agreed and contracted for a lien on the vessels, and the other creditors of Rousmaniere trusted to his general credit, and are entitled only to what property belonged to him, subject to the lien, which a court of equity would have enforced against Rousmaniere himself.

It was the manifest intention of the parties to create a specific lien. But to accomplish their object, they unhappily adopted an instrument, the legal

effect of which, they misunderstood. It was a mutual mistake, and this
*7] court appear *already to have decided, that, notwithstanding this mistake in law, the plaintiff is entitled to relief. The case is one of an agreement between parties, which has not been performed, an agreement for a specific security for a loan of money; this has been proved by the testimony of one witness, corroborated by circumstances, and not denied in the answer. It is not, therefore, within the influence of the principle, which requires something beyond the testimony of one witness, to sustain the allegations of a bill which are denied in the answer. It is a case of mutual errors, as to the law, and not one where parties have run their risks of the law. It is an agreement to lend money, not on a note, but on the vessels; and if the court would enforce the lien against Rousmaniere, they should do it now, as the creditors are not third persons, but have no other right than he would have if alive.

For the *appellees*:—The whole of the proceedings, and the decisions of the court below, upon the case, will be found in 2 Mason 244, 8 Wheat. 174, and 3 Mason 294. It is now a question between creditors, and is, whether the court will attach a lien, when none existed? It is a case where a party having rejected a security, now avers, and asks the court to give him the security he refused. The allegations in the bill are denied by the answer, and they are proved by one witness only. This is insufficient, and such evidence is dangerous. *Poole* v. *Cabanes*, 8 T. R. 328.

Upon the question, whether the court will relieve against a mistake in law: In 2 Johns. Ch. 51, 60, this was expressly decided not to be within the power of a court of equity. Taking the fact to be as stated by him, the appellant is not entitled to relief. This court have decided, in this case, that the agreement made by the appellant with Rousmaniere, created no lien upon the vessels in question, though they intended it should, and thought it would create a lien; that Rousmaniere parted with no title; that the plaintiff acquired none in the vessels. The reason why this decision did not finally dispose of this case, was, that the court entertained a doubt, whether this intention to create a lien, which was not, in fact, created, did not constitute a ground of relief in the case. And this case stands now to be argued upon this doubt.

The question is, whether a court of equity can relieve against a mistake made by the parties, in making their contract, not in matter of fact, but in matter of law, and relieve, to the prejudice of a title vested by law in third parties? Whether equity can create a title where none does exist, and destroy a title where one does exist? This is beyond the province and
*8] *power of equity; beyond the legitimate power of a sovereign legislator, and can only be done by that despotic power, which is limited only by its own will. If the parties make their agreement, and make it exactly as they intended, and it creates no title, will the court make the title?

If it should be asked, why a court of equity should relieve against a mistake in matter of fact, and not in matter of law, the reason is obvious. When a mistake of fact is committed by the parties, in making their contract, the mistake is corrected, or supposed to be corrected, and the relief is given according to that corrected statement. Equity, then, does what the

law would have done, had there been no such mistake. The court keeps to its office of merely pronouncing the law upon the fact, as it was understood, and meant to be, between the parties. But when a mistake of the law is made by the parties, in making their contract, if relief is given, it is given, not upon the fact, as understood and meant by the parties, but upon the conception of the parties as to the legal effect of that fact. No mistake is corrected, or supposed to be corrected, that relief might be given according to law; but the mistake is to stand, and the law is to be bent and accommodated to it. Equity is to consider the law not to be what it is, but what the parties conceived it to be, and to decree relief accordingly. It is a principle of jurisprudence, that every one in his acts and contracts, is presumed to be conversant with the law; or, if ignorant, that he is to be made to abide the consequences. This principle is essential, if not to the existence, at least, to the well-being of society. *Lepard* v. *Vernon*, 2 Ves. & B. 51–3.

But suppose, that a mistake of the law was a general ground of relief, would it avail the plaintiff, in this case? Here is only equity on his side; but on the other, there is law and equal equity combined. And it is a settled principle, that a naked equity, is never to prevail against both law and equity. The appellant never having acquired any title to the vessels, by his agreement, nor by any proceedings under it, has only a naked equity. He parted with his money, trusting to his agreement, as constituting a security therefor, upon the vessels; this is his equity. The title of the vessels being Rousmaniere's, to his death, at his death, passed to his legal representatives, who the respondents are; the legal title, then, is in them. His estate being insolvent, is in them as trustees for his general creditors; and being greatly insolvent, they are sufferers as well as the appellant; trusting to his property for their indemnity. In their equity, he shares equally with them, and has received it; but by agreement to be without prejudice to this suit; *but from his equity they are excluded. The court will take notice, that, by the laws of Rhode Island, no priorities or preferences take [*9
place among creditors, in the distribution of intestate estates; whether solvent or insolvent.

A naked equity is never to prevail against equal equity and title combined. The respondents are the creditors, for they hold in trust for the creditors. If, then, it were to be admitted, that, if mistake of the law was a principle of relief, subject to this limitation, that it does not extend, and cannot be extended, to a stranger to the contract in which the mistake was committed; this case does not come within the principle; for it is excluded by this limitation.

Washington, Justice, delivered the opinion of the court.—This case was before this court in the year 1823, and is reported in 8 Wheat. 174, and was then argued at great length, by the counsel concerned in it. After full consideration, it was decided, that the power of attorney given by Rousmaniere, the intestate, to the appellant, Hunt, authorizing him to make and execute a bill of sale of three-fourths of the Nereus and of the Industry, to himself, or any other person, and in the event of their being lost, to collect the money which should become due under a policy upon them and their freight, was a

naked power, not coupled with an interest, which, though irrevocable by Rousmaniere, in his lifetime, expired on his death.

That this species of security was agreed upon, and given, under a misunderstanding, by the parties, of its legal character, was conceded, in the argument of the cause, by the bar and bench; and the second question, for the consideration of the court, was, whether a court of equity could afford relief in such a case, by directing a new security, of a different character, to be given? or by decreeing that to be done, which the parties supposed would have been effected by the instrument agreed upon? After an examination of the cases, applicable to the general question, it was stated by the chief justice, who delivered the opinion of the court, that none of them asserted the naked principle, that relief could be granted, on the ground of ignorance of law, or decided, that a plain and acknowledged mistake in law, was beyond the reach of a court of equity. The conclusion, to which he came, is expressed in the following terms: "We find no case, which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood, by both parties, to say, that a court of equity is incapable of affording relief." *The decree
*10] was, accordingly, reversed; but the case being one in which creditors were concerned, the court, instead of giving a final decree on the demurrer, in favor of the plaintiff, directed the cause to be remanded, that the circuit court might permit the defendants to withdraw their demurrer, and to answer the bill.

After the cause was returned to that court, the demurrer was withdrawn, and an answer was filed, in which the defendants, after admitting the loans mentioned in the bills, by the plaintiff to their intestate, and the notes given for the same, by the latter, and their non-payment; assert their ignorance of any agreement between the plaintiff and their intestate, that the former should have a specific security, other than the powers of attorney, to sell vessels and to collect the proceeds, or, the amount of the policies, in case they should be lost; but express their belief, that the powers of attorney were selected by the plaintiff, in preference to the other securities, which were offered by the intestate. The answer further states, that the estate of Rousmaniere is greatly insolvent, and had been so before his death; that the plaintiff had exhibited and proved his demand, as stated in his bill, before the commissioners of insolvency, duly appointed upon the estate of Rousmaniere; and that his dividend thereon declared, or to be declared, the defendants were, and would be ready, to pay, according to law.

The principal deposition, taken in the cause, is that of Benjamin Hazard, counsellor at law, who deposes, that he drew the powers of attorney, annexed to the original bill; that on the day the first power was executed, Hunt and Rousmaniere came to his office, when the latter stated, that the former had loaned, or agreed to loan, to him, a sum of money, upon security to be given by him, on his interest in the brig Nereus, and that he was desirous the security should be as ample and available to Hunt, as it could be made; that he wished, and was ready, to give a bill of sale of the property, or a mortgage on it, or any other security, which Mr. Hunt might prefer. Both the parties declared, that they had called upon the witness, to request him to draw the writings, and to obtain his opinion, as to the kind of instrument which would give the most perfect security to the lender. That the deponent

then told the parties, that a bill of sale, or mortgage, would be good security, but that an irrevocable power of attorney, such as was afterwards executed, would be as effectual and good security, as either of the others; and would prevent the necessity of changing the vessel's papers, and of Hunt's taking possession of the vessel, upon her arrival from sea. That the parties then requested him to draw such an *instrument, as, in his opinion, would most effectually and fully secure Mr. Hunt; and that the plaintiff [*11 frequently asked him, whilst he was drawing the power, and after he had finished, and read it to the parties, if he was quiet certain, that the power would be as safe and available to him, as a bill of sale or mortgage, and that upon his assurances that it was, it was then executed. The witness then proceeds to express his opinion, from his knowledge of the parties, and from their declaration at the time, that Rousmaniere would readily have given an absolute bill of sale of the property, or any other security which could have been asked; and that Hunt would not have accepted the one which was afterwards executed, if he had not considered it to be as extensive and perfect a security, in all respects, as an absolute bill of sale; and he adds, more positively, that such was the understanding and agreement of both the parties. It appears, by the testimony of this witness, that he drew the power of attorney concerning the Industry, for securing the second loan made by the plaintiff to Rousmaniere, and that the circumstances attending that transaction, were essentially the same as those which have been stated, in respect to the first loan.

We find another deposition in the record, which deserves to be noticed, as it consists of declarations, made by the plaintiff, after the powers of attorney were executed, and may serve, in some measure, to explain the more positive testimony given by Mr. Hazard. This witness, William Merchant, deposes, that after the decease of Rousmaniere, the plaintiff stated to him, and to a Mr. Rhodes, that in consequence of his declining to engage in an enterprise in one of the vessels of Rousmaniere, to which he had at one time consented, and of the complaints of Rousmaniere, on that account, he was induced to offer to Rousmaniere a loan of money. That an agreement was accordingly made, by which he, Hunt, was to let Rousmaniere have a certain sum on loan, and Rousmaniere was to give him a bill of sale of a certain vessel; but that, afterwards, Hunt, reflecting, that if he took that security, he would have to take out papers at the custom-house, in his own name, be subject to give bonds for the vessel, and perhaps, be made liable for breaches of law committed by others, he consulted with Mr. Hazard upon the subject; who told him, that he could, or would, draw an irrevocable power of attorney to sell, which would do as well, and which was accordingly done.

The cause coming on to be heard in the court below, and that court being of opinion, that the plaintiff had no lien or specific security upon these vessels, and no equity to *have such lien or security created, against the general creditors of Rousmaniere, dismissed the bill; [*12 from which decree, the cause has been brought, by appeal, to this court. It must be admitted, that the case, as it is now presented to the court, is not materially variant from that which we formerly had to consider; except in relation to the rights of the general creditors, against the insolvent estate of a deceased debtor, in opposition to the equity which a particular creditor

seeks, by this bill, to set up. The allegations of the bills, filed in this cause, which were, on the former occasion, admitted by the demurrer to be true, are now fully proved, by the testimony taken in the cause.

Before proceeding to state the general question, to which the facts in this case give rise, or the principles of equity which apply to it, it will be necessary, distinctly, to ascertain, what was the real agreement concluded upon between the plaintiff and the intestate, the performance of which, on the part of the latter, was intended to be secured by the powers of attorney? Was it, that Rousmaniere should, in addition to his notes for the money agreed to be loaned to him by the plaintiff, give a specific and available security on the Nereus and the Industry, or was the particular kind of security selected by the parties, and did it constitute a part of the agreement? It is most obvious, from the plaintiff's own statement, in his amended bill, as well as from the depositions appearing in the record, that the agreement was not closed, until the interview between the parties to it, with Mr. Hazard, had taken place. The amended bill states, that the specific security which Rousmaniere offered to give, was a mortgage of the two vessels, for which irrevocable powers of attorney were substituted, by the advice of Mr Hazard, and for reasons, which it would seem, were approved of and acted upon by the plaintiff. From the testimony of Mr. Merchant, it would appear, that the security proposed by Rousmaniere was a bill of sale of the vessels, which the plaintiff declined accepting, for reasons of his own, uninfluenced by any suggestions of Mr. Hazard, who merely proposed the powers of attorney as a substitute for the other forms of security which had been offered by Rousmaniere. The difference between these statements is not very material, since it is apparent, from both of them, that the proposed security, by irrevocable powers of attorney, was selected by the plaintiff, and incorporated into the agreement, by the assent of both the parties. The powers of attorney do not contain, nor do they profess to contain, the agreement of the parties; but was a mere execution of that agreement, so far as it stipulated to give to the plaintiff, a specific security on the two vessels, in the mode selected and approved of by the parties; to *which extent, it was a complete consummation of the agreement. Such was the opinion of this court, upon a former discussion of this cause, in the year 1823, and such is its present opinion. Upon this state of the case, the general question to be decided, is the same now that it formerly was, and is that which has already been stated.

*13]

There are certain principles of equity, applicable to this question, which, as general principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not fulfil, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious: the execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement, be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted, as if one of the parties had refused, altogether, to comply with his engagement; and a court of equity

will, in the exercise of its acknowledge jurisdiction, afford relief in the one case, as well as in the other, by compelling the delinquent pary fully to perform his agreement, according to the terms of it, and to the manifest intention of the parties. So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief, according to the nature of the particular case in which it is sought. Whether these principles, or either of them, apply to the present case, must, of course, depend upon the real character of the agreement under consideration. If it has been correctly stated, it follows, that the instrument, by means of which the specific security was to be given, was selected by the parties to the agreement, or rather by the plaintiff; Rousmaniere having proposed to give a mortage or bill of sale of the vessels, which the plaintiff, after consideration, and advice of counsel, thought proper to reject, for reasons which were entirely satisfactory to himself. That the form of the instrument, so chosen by the plaintiff, and prepared by the person who drew it, conforms not, in every respect, to the one agreed upon, is not even asserted in the bill, or in the argument of counsel. The avowed object of the plaintiff was, to obtain a valid security, but in such a manner, as that the legal interest in the property should remain with *Rousmaniere, so that the plaintiff might be under no necessity [*14
to take out papers at the custom-house, in his own name, and might not be subject to give bonds for the vessels, or to liabilities for breaches of law, committed by those who were intrusted with the management of them. That the general intention of the parties was, to provide a security, as effectual as a mortgage of the vessels would be, can admit of no doubt; and if such had been their agreement, the insufficiency of the instruments to effect that object, which were afterwards prepared, would have furnished a ground for the interposition of a court of equity, which the representatives of Rousmaniere could not easily have resisted. But the plantiff was not satisfied to leave the kind of security which he was willing to receive, undetermined; having finally made up his mind, by the advice of his counsel, not to accept of a mortgage, or bill of sale, in nature of a mortgage. He thought it safest, therefore, to designate the instrument; and having deliberately done so, it met the view of both parties, and was as completely incorporated into their agreement, as were the notes of hand for the sum intended to be secured. In coming to this determination, it is not pretended, that the plaintiff was misled by ignorance of any fact, connected with the agreement which he was about to conclude. If, then, the agreement was not founded in a mistake of any material fact, and if it was executed in strict conformity with itself; we think it would be unprecedented, for a court of equity to decree another security to be given, not only different from that which had been agreed upon, but one which had been deliberately considered and rejected by the party now asking for relief; or to treat the case, as if such other security had in fact been agreed upon and executed. Had Rousmaniere, after receiving the money agreed to be loaned to him, refused to give an irrevocable power of attorney, but offered to execute a mortgage of the vessels, no court of equity could have compelled the plaintiff to accept the security so offered. Or, if he had totally refused to execute the agreement, and the plaintiff had filed his bill, praying that the defendant might be compelled to execute a

mortgage, instead of an irrevocable power of attorney ; could that court have granted the relief specifically asked for? We think not. Equity may compel parties to perform their agreements, when fairly entered into, according to their terms ; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society ; the latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences.

*15] *If the court could not have compelled the plaintiff to accept, or Rousmaniere to execute, any other instrument than the one which had been agreed upon between them, the case is in no respect altered, by the death of the latter, and the consequent inefficiency of the particular security which had been selected ; the objection to the relief asked for, being in both cases the same, namely, that the court can only enforce the performance of an agreement, according to its terms, and to the intention of the parties ; and cannot force upon them a different agreement. That the intention of the parties to this agreement, was frustrated, by the happening of an event, not thought of, probably, by them, or by the counsel who was consulted upon the occasion, is manifest. The kind of security which was chosen, would have been equally effectual, for the purpose intended, with a mortgage, had Rousmaniere lived until the power had been executed; and it may, therefore, admit of some doubt, at least, whether the loss of the intended security is to be attributed to a want of foresight, in the parties, or to a mistake of the counsel, in respect to a matter of law. The case will, however, be considered in the latter point of view.

The question, then, is, ought the court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake ; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters.

The strongest case which was cited and relied upon by the appellant's counsel, was that of *Lansdowne* v. *Lansdowne*, reported in Moseley. Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the court might well be supported, upon a principle not involved in the question we are examining. The subject which the court had to decide, arose out of a dispute between an heir-at-law, and a younger member of the family, who was entitled to an estate descended ; and this question the parties agreed to submit to arbitration. The award being against the heir-at-law, he executed a deed in compliance with it, but was relieved against it, on the principle, that he was ignorant of his title. If the decision of the court proceeded upon the ground, that the plaintiff was ignorant of the fact that he was the eldest son, it was clearly a case proper for relief, upon a principle which has already been considered. If the mistake was of his legal rights, as heir-at-law, it is not going too far, to presume,

*16] that the opinion of the court *may have been founded upon the belief, that the heir-at-law was imposed upon by some unfair representations of his better-informed opponent ; or that his ignorance of a legal principle, so universally understood by all, where the right of primogeniture forms a part of the law of descents, demonstrated a degree of mental imbecility, which might well entitle him to relief. He acted, besides, under the pres-

sure of an award, which was manifestly repugnant to law, and for aught that is stated in this case, this may have appeared upon the face of it. But if this case must be considered as an exception from the general rule which has been mentioned; the circumstances attending it, do not entitle it, were it otherwise objectionable, to be respected as an authority, but in cases which it closely resembles.

There is a class of cases which, it has been supposed, forms an exception from this general rule, but which will be found, upon examination, to come within the one which was first stated. The cases alluded to, are those in which equity has afforded relief against the representatives of a deceased obligor, in a joint bond, given for money lent to both the obligors, although such rep-representatives were discharged at law. The principle upon which these cases manifestly proceed, is, that the money being lent to both, the law raises a promise in both to pay, and equity considers the security of the bond as being intended, by the parties, to be co-extensive with this implied contract by both to pay the debt. To effect this intention, the bond should have been made joint and several; and the mistake in the form, by which it is made joint, is not in the agreement of the parties, but in the execution of it by the draftsman. The cases in which the general rule has been adhered to, are, many of them, of a character which strongly test the principle upon which the rule itself is founded. Two or three only need be referred to. If the obligee, in a joint bond, by two or more, agree with one of the obligors, to relieve him from his obligation, and does accordingly execute a release, by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. So, in the case of *Worrall* v. *Jacob*, 3 Meriv. 271, where a person having a power of appointment and revocation, and, under a mistaken supposition, that a deed might be altered or revoked, although no power of revocation had been reserved, executed the power of appointment, without reserving a power of revocation; the court refused to relieve against the mistake. The case of *Lord Irnham* v. *Child*, 1 Bro. C. C. 92, is a very strong one in support of the general rule, and closely *resembles the present, in most of the material circumstances attending it. The object of the suit was to set up a clause containing a [*17
power of redemption, in a deed granting an annuity, which, it was said, had been agreed upon by the parties, but which, after deliberation, was excluded by consent, from a mistaken opinion, that it would render the contract usurious. The court, notwithstanding the omission manifestly proceeded upon a misapprehension of the parties as to the law, refused to relieve, by establishing the rejected clause.

It is not the intention of the court, in the case now under consideration, to lay it down, that there may not be case in which a court of equity will relieve against a plain mistake, arising from ignorance of law. But we mean to say, that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a court of equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security, of a different character, to be given, or

decree that to be done, which the parties supposed would have been effected by the instrument which was finally agreed upon.

If the court would not interfere in such a case, generally, much less would it do so in favor of one creditor, against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself. This is not a bill asking for a specific performance of an agreement to execute a valid deed for securing a debt; in which case, the party asking relief, would be entitled to a specific lien; and the court would consider the debtor as a trustee for the creditor, of the property on which the security was agreed to be given. The agreement has been fully executed, and the only complaint is, that the agreement itself was founded upon a misapprehension of the law, and the prayer is to be relieved against the consequences of such mistake. If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff, would, we think, be sufficient to induce the court to leave the parties where the law has placed them. The decree is to be affirmed, with costs.

Decree affirmed.

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*18] *Daniel Carroll, of Dudington, Plaintiff in error, *v.* Joshua Peake, Defendant in error.

Evidence.—Pleading.

When a party to an agreement, signed by the other contracting party, had delivered to such party a copy of the agreement, in his own handwriting, but not signed by him, and from the nature of the instrument, it was fairly to be presumed, the original was in his custody, notice to produce the original paper, in order to give the copy in evidence, is not necessary:[1] such a copy, when offered to charge the party by whom the same was made, and who, by the tenor of the agreement, was to perform certain acts therein stated, may be considered, not as a copy, but as an original, in relation to the obligations of the party giving the copy, and be so given in evidence. p. 22.

Where letters, a part of the evidence in the court below, have become lost or mislaid, everything is to be presumed to have been contained in them, to support the opinion of the court, in relation to their contents; and the party who denies that the letters authorized the decision of the court upon them, must show, by evidence, their contents. p. 22.

Surplusage in pleading, does not, in any case, vitiate, after verdict. p. 23.

In a declaration, upon an agreement by way of lease, by which the lessor stipulated to let a farm, from the 1st of January 1820, to remove the former tenant, and that the lessee should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of breaches was, that, although specially requested, on the said 1st of January, the defendant refused, and neglected, to turn out the former tenant, who then was, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff: this assignment is sufficient. p. 23.

It is sufficient, that the averment should state the plaintiff's readiness and offer, and his request, on the first day of January, generally, and not at the last convenient hour of that day; and if an avertment of a personal demand is made, it need not have been on the land. p. 24.

The strict doctrines relative to averments in pleading, have been applied to special pleas in bar, of tender, and some others, of a peculiar character and depending upon their own particular reasons. p. 24.

Declarations containing general averments of readiness and request, have been held sufficient, especially after verdict, unless in very peculiar cases. p. 24.

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[1] Where the form of action, or the pleadings, give the party notice to be prepared to produce a writing if necessary, no other notice to produce is requisite. Harden *v.* Kretzinger, 17 Johns. 293; Story *v.* Patten, 3 Wend. 486; Hammond *v.* Hopping, 13 Id. 505; Hotchkiss *v.* Mosher, 48 N. Y. 478.