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.

Carroll v. Peake.

Error to the Circuit Court for the District of Columbia. In the court below, the defendant in error instituted a suit against the plaintiff in error, to recover damages arising out of alleged breaches of an agreement, in the nature of a lease, dated 18th of December 1819. The declaration stated the agreement; and the damages claimed were as an indemnity for expenses incurred by the plaintiff, under the agreement, for losses of profits, and for not turning out the tenant who was in possession of the property, when the agreement was made.

To support the issue on his part, the plaintiff offered to read in evidence to the jury, the following copy of a paper (the original of *which was signed by Joshua Peake), and which was admitted to be wholly in the handwriting of the plaintiff in error: [*19

"I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary's county, for which I oblige myself to pay, on the first day of January 1821, for one year, from the 1st of January 1820, six hundred dollars ($600), and to pay all taxes on the same, independent of the above rent; and also I oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises. Witness my hand, this 18th day of December 1819.

"It is agreed, that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same on the tax-bill, receipted, out of the rent.

(Signed) Joshua Peake."

"Witness—William Dudley Digges."

To the admission of this paper, by the court, the counsel for the plaintiff objected, but the court allowed it to be read by the jury, upon which, they tendered a bill of exceptions; and by writ of error, the cause was brought before this court; and was argued by *Key* and *Coxe*, for the plaintiff in error; and by *Jones*, for the defendant.

For the *plaintiff* in error, it was said: 1. That the declaration sets forth the agreement of lease, that the possession of the property was to be given, the expenses to which the lessee was exposed; and that the plaintiff in error did not perform any of the acts necessary to turn out the tenant, who was in possession of the land when the lease was to commence. The declaration should have averred a readiness on the part of the lessee to comply with his contract, as to time and place. *Savary* v. *Goe*, 3 W. C. C. 140. The proper day to deliver possession, was the day on which the lease was to commence; and the declaration should have averred, that the lessee was at the place in person, or by attorney, at that time, to receive it. Instead of this, the breach is laid, if anywhere, in the county of Washington, and the property described in the lease, is in the county of St. Mary's; nor is it averred, that, by the lease, the plaintiff in error was bound to turn out the person in possession, although damages are claimed for not doing this.

2. The party who gives a lease, is not bound to turn the prior tenant out of possession. The lessor has, by the lease, parted with the control of the property; and the lessee should proceed, under the law of Maryland, to obtain the possession; but if it was the duty of the lessor to obtain the possession *for the lessee, the lessee should have required this of him; and his non-compliance with the demand should have been averred. [*20

3. The paper admitted in evidence, was a copy ; and the copy of a deed is not evidence, unless the original be destroyed or lost. It is not said, the paper was a true copy ; and the original, if in possession of Peake, might have been produced; or, if in the possession of the plaintiff in error, might have been called for.

Jones, for the defendant in error, contended : 1. That, by the operation of the statute of *jeofails*, the verdict of the jury had cured all the defects of the declaration, if any existed ; and that the declaration contained every necessary statement and averment for the plaintiff's case. When the condition in an agreement is precedent, special performance must be set out and averred ; and when a tender is pleaded, it is necessary to set forth minutely, everything of time and place. In this case, it was not required to declare specially.

2. The act of assembly of Maryland gives to the landlord only, and not to the lessee, a right to proceed for possession, against persons "holding over."

3. The "copy" of the paper, which copy was wholly in the handwriting of the plaintiff in error, and who must have kept the original paper, was primary, and not secondary evidence, *quoad* the matters in controversy. It was evidence against the lessor, and was in the nature of a counterpart of the agreement ; and necessary to charge the lessor, who had not signed the lease, and who, it must be presumed, retained the possession of it.

Trimble, Justice, delivered the opinion of the court.—This is a writ of error to a judgment of the circuit court for the district of Columbia, held in the county of Washington.

Joshua Peake brought this action on the case, in that court, upon a special agreement, against Daniel Carroll, who pleaded the general issue ; and upon the trial, a verdict and judgment were rendered for the plaintiff therein. A bill of exceptions was taken by the defendant, in the court below ; which states, that the plaintiff, to support the issue on his part, offered to read in evidence to the jury, the following *copy* of a paper (the execution of the original of which was admitted), signed by Joshua Peake, which copy is admitted to be wholly in the handwriting of the defendant, to wit :

"I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary's county ; for which I oblige myself to pay, on the 1st day of January 1821, for one year, from
*21] the 1st day of January 1820, six *hundred dollars ($600), and to pay all taxes on the same, independent of the above rent ; and also oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises. Witness my hand, this 11th day of December 1819.

"It is agreed, that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same, on the tax-bill, receipted, out of the rent.

Joshua Peake."

"Witness—William Dudley Digges."

Which paper was so offered in evidence, in connection with three letters from defendant to the plaintiff, as a component part of the sum of evi-

dence relied on, to prove the contract as laid in the declaration; which letters are in these words and figures, following, &c. [The letters were mislaid.]

To the reading of which paper, the defendant, by his counsel, objected, as not being competent and legal evidence, to charge the defendant in this case; but the court permitted the said paper to be read in evidence to the jury, &c., to which opinion of the court, the defendant, by his counsel, excepted, &c. The plaintiff, then, further to support the issue on his part offered in evidence to the jury, the said letters, from defendant to plaintiff, and admitted to be in the handwriting of the defendant; as component parts, in connection with the said paper before admitted, of the evidence of the agreement on which this action is founded; to the admission of said letters, as part of said agreement, the defendant, by his counsel, objected; but the court overruled said objection, and permitted said letters to be read to the jury, as part of said agreement; to which opinion of the court, the defendant, by his counsel, excepted. It is insisted by the counsel for the plaintiff in error, that these opinions are erroneous; and that the judgment of the circuit court should, for that cause, be reversed.

The bill of exceptions does not put the objection to the paper offered in evidence, distinctly upon the ground, that being a copy, it could not be used, without timely notice to produce the original. Although some doubt exists, whether the objection ought not to have been placed on that ground, in the court below, in order to make it available here; yet, as the whole argument in this court, has proceeded upon the assumption, that the question is sufficiently raised upon the bill of exceptions, we will so consider it. The principle relied upon is, that a copy cannot be given in evidence, if the original be in the possession of the adverse party; unless timely *previous notice has been given him, to produce it at the trial. This is certainly true, as a general rule. But in examining the numerous adjudged cases to be found in the books. in which this general rule has been asserted and applied, we have been able to find no case like this. They are all cases where the copy offered, had not been made by the party, against whom it was attempted to be used. This is a case in which the execution of the original is distinctly admitted; and the paper called a copy, is admitted to be wholly in the defendant's handwriting. From the nature of the transaction, he was entitled to, and must be presumed to have, the custody of the original. The copy, made out by himself, must be presumed to have come to the plaintiff's possession, by the defendant's own act; and, by making and delivering it to the plaintiff, the defendant consents that it shall be considered genuine and true. We think, that, under such circumstances, this case forms a just exception to the general rule; and that it is not competent for the defendant below, to allege, against his own acts and admissions, that this paper does not, nor may not, contain all the verity and certainty of the original. [*22

So far, we have considered this paper as if it ought to be regarded in the light of a copy. But we think, that is not its true character, as it was presented to the court and jury. We think, that, under the circumstances, and to the purposes for which it was offered, it may fairly be regarded as an original. As relates to Peake's contract to pay rent, &c., it was a copy; but was it a copy, as respects Carroll's agreement to let the farm? If so,

it was a copy, without an original—for the original paper was not signed by Carroll, and contained no contract on his part.

The paper was offered in evidence, in connection with the three letters from the defendant to the plaintiff, as a component part of the evidence, to prove the defendant's agreement to let the farm to the plaintiff, and the terms of that agreement. The clerk certifies, that the letters referred to, are not on file in the cause, and they are not transcribed into the record. In their absence, if there be a supposable case, in which they, and the paper called a copy, were legitimate evidence, regarding that paper, as an original, and not as a mere copy, it must be so regarded. We are bound to presume everything in favor of the correctness of the decision of the court below, until the contrary appears. If the letters, which are admitted to be in the defendant's handwriting, were relevant to the matter in controversy (and in their absence, that must be presumed), no doubt can exist, of their being competent and legitimate evidence, to prove the contract sued on, so far as they spoke on that subject. It has been already remarked, that the
*23] paper called a copy, was *admitted to be in the defendant's handwriting, and that it must have come to the plaintiff's hands, by the defendant's act. Let it be supposed, then, that having copied, in his own hand, Peake's agreement to pay rent, &c., he had inclosed that paper in one of those letters, and referring to it, the letter had stated, that he (Carroll) agreed to let and lease the farm to Peake, upon terms expressed in the inclosed paper. It is plain, that, in the case supposed, the inclosed paper, although it might be a mere copy, as respected Peake's part of the contract, yet, as respected the contract on Carroll's part, would be truly an original document, by adoption and incorporation with the letter, as much as the letter itself; it would be a part of the letter. We do not say, the paper was thus inclosed, and referred to, in the letters, or either of them; but it might have been, for ought that appears; and that is enough. Upon the principle assumed as correct, that the opinion of the court below must be regarded as sound, until its incorrectness is made to appear, the plaintiff in error cannot prevail; unless he can show, in the absence of the letters, that no case could have existed, they being present, in which the paper objected to, could be considered in the light of an original document. The case first shows, that such a case might have existed, and have been proved, upon the trial. It is, by no means, a strange supposition, to presume that such was the aspect of the case; for it is perfectly consistent with a known and familiar manner of transacting business, where the parties reside, at a distance, or where, for other causes, the mode of contracting by correspondence, is resorted to.

It is objected, that the declaration shows no cause of action; and it is insisted, the judgment shall be reversed, for that cause. The declaration is very loosely drawn, and a great deal of matter is crowded into it, which is impertinent, or, at most, only in aggravation of damages. But surplusage in pleadings, does not vitiate, in any case, after verdict; and wholly disregarding the impertinent and irrelevant matter, the declaration contains enough to support the action. The declaration, in substance, alleges, that the defendant below agreed to rent, and to farm let, to the plaintiff, the farm, for one year from the 1st of January 1820, and agreed to remove the former tenant, and that the plaintiff should have the possession and occu-

pancy of the farm, from the 1st of January aforesaid, free from the let, hindrance or disturbance of any one. The declaration then proceeds to aver, that on the said first of January 1820, at the county aforesaid, the plaintiff was ready and willing, and offered to the said Daniel (the defendant) to take possession of the said land and farm, and to rent and occupy the same, &c., and afterwards assigns breaches (*inter alia*) in this, that *although specially requested so to do, on the said 1st day of January 1820, [*24 the defendant refused and neglected to turn out the tenant, who then was, and had been, in the possession and occupancy of the said land and farm, and to deliver the possession thereof to the said Joshua.

The specific objections, urged in argument, are, that the plaintiff should have averred his readiness and offer, and his request; not on the 1st day of January, generally, but at the last convenient hour of that day; and that instead of charging a personal demand, it ought to have been averred to have been made on the land. It must occur to every one, that an offer and request upon the land, in the absence of the defendant, would be a very idle and useless ceremony, and that an offer and request to him, personally, was much better calculated to enable him to perform his duty, and fulfil his agreement. We cannot admit that it was necessary the offer and request should be made, at the last convenient hour of the day. The strict doctrines contended for, have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons; but there is no analogy between them and this case. In declarations, general averments of readiness and request, on the day, have always been held sufficient, especially, after verdict.

We are of opinion, there is no error in the judgment and proceedings the circuit court, and the same is affirmed, with damages and costs.

Judgment affirmed.