correctness of which, we do not entertain a doubt. There is no error in the record of the circuit court, and the judgment is affirmed, with six per cent. interest and costs.

Judgment affirmed.

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*311] *John W. King and others, Appellants, *v.* James Hamilton, James Stricker and Frances his wife, Hezekiah Fulkse, Abraham Hancy and John Hopkins, Appellees.

Specific performance.

The complainants, in the circuit court of Ohio, filed a bill to enforce the specific performance of a contract; the bill stated, that there was a surplus of several hundred acres, and by actual measurement, it was found to be 876 acres (the patent having been granted for 1533 1-3 acres), beyond the quantity mentioned in the contract.

It is a fact of general notoriety, that the surveys and patents for lands within the Virginia military district, contain a greater quantity of land than is specified in the grants; parties, when entering into a contract for the purchase of a tract of land in that district, and referring to the patent for a description, of course, expect that the quantity would exceed the specified number of acres; but so large an excess as in the present case, can hardly be presumed to have been within the expectation of either party; and admitting that a strict legal interpretation of a contract would entitle the purchaser to the surplus, whatever it might be, it by no means follows, that a court of chancery will, in all cases, lend its aid to enforce a specific performance of such a contract. p. 321.

The powers of a court of chancery to enforce a specific execution of contracts, are very valuable and important; for in many cases, where the remedy at law for damages is not lost, complete justice cannot be done, without a specific execution; and it has been almost as much a matter of course, for a court of equity to decree a specific execution of a contract for the purchase of lands, where in its nature and circumstances it is unobjectionable, as it is to give damages at law, where an action will lie for a breach of the contract; but this power is to be exercised under the sound discretion of the court, with an eye to the substantial justice of the case. p. 328.

When a party comes into a court of chancery seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity; when a contract is hard and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it.[1] p. 328.

It is a settled rule, in a bill for specific performance of a contract, to allow a defendant to show that it is unreasonable, or unconscientious, or founded in mistake, or other circumstances leading satisfactorily to the conclusion, that the granting of the prayer of the bill would be inequitable and unjust; gross negligence on the part of the complainant has great weight in cases of this kind; a party, to entitle himself to the aid of a court of chancery for a specific execution of a contract, should show himself ready and desirous to perform his part. p. 328.

If this large surplus of 876 acres in a patent for 1533 1-3 acres should be taken as included in the original purchase, it might well be considered a case of gross inadequacy of price. p. 329.

*312] *When there was so great a surplus of land in the patent, beyond that which it called for, nominally, as that it could hardly be presumed to have been within the view of either of the parties to the contract of sale; the court decreed a conveyance of the surplus, the vendee to pay for the same at the average rate per acre, with interest, which the consideration-money mentioned in the contract bore to the quantity of land named in the same. p. 330.

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[1] Whether specific performance of a contract for the sale of land will be decreed, depends upon the equity and justice of all the circumstances of the case; a case may occur, where the agreement is perfectly good and binding upon both parties, and not the slightest decree of blame attaches to the purchaser, and yet specific performance will be denied, and the parties left to their remedy in damages. Henderson *v.* Hays, 2 Watts 148; Freetly *v.* Barnhart, 51 Penn. St. 279; Weise's Appeal, 72 Id. 351. It is of grace, and not of right. Pennock *v.* Freeman, 1 Watts 401. And see Margraf *v.* Muir, 57 N. Y. 155.

King v. Hamilton.

APPEAL from the Circuit Court of Ohio. In the circuit court for the district of Ohio, James Hamilton, James Stricker and Frances his wife, late Frances Hamilton, heirs-at-law of Alexander Hamilton and others, grantees of Alexander Hamilton, filed a bill for a specific performance of a contract entered into between Elisha King, the father of John W. King, one of the appellants, and Alexander Hamilton, on the 8th of February 1815, for the sale of certain lands in the state of Ohio, within the Virginia military district, between the Little Miami and the Scioto river. The contract was in the following terms:

"I this day sell to Alexander Hamilton all my lands lying on the Miami river, in the state of Ohio, 1533⅓ acres, as by patent in my name; also, 333⅓ taken off the lands patented in the name of Sackville King, of 1000 acres. This land of 333⅓ acres, taken from S. King's, is to be done adjoining to the entry of E. King's of 1533⅓. He, the said Hamilton, is bound to pay to Elisha King, for this land, 946*l.* 16*s.* of current money of Virginia, in three annual payments, beginning December 25th, 1805; then to pay 315*l.* 12*s.* Also, in the years of 1806 and 1807, on each Christmas day, or before, to make the full payments, as is above. The manner and agreement made by us is in payment as tenders: the said Hamilton takes to this country horses, to be sold at twelve months' credit, taking bond and good security, which bonds is lawful tenders from year to year; and on these tenders being made, the said King is bound to give to the said Hamilton good titles to the said lands. We do bind ourselves, our heirs, executors, administrators, firmly, by these *presents, in the penalty of two thousand pounds, in this our bargain. Given under our hands and seals." [*313

When this contract was made, Elisha King had a patent for his entry, No. 1548. Sackville King's entry, No. 1549, was held by him, without any title to it; and afterwards, in 1812, Sackville King's whole entry was conveyed by him to another, who now held the same. Alexander Hamilton entered on No. 1548, immediately after his purchase, supposed to be 1533⅓ acres; and, with others holding under him, made valuable improvements on it, and still held possession of the same.

The bill stated, that Hamilton continued to make payments until the 22d June 1809, at which time, he having paid one-half of the purchase-money of the tract estimated at 1533⅓ acres, King made a conveyance to him of 766⅔ acres, supposed to be a conveyance of one-half of the same. The bill charged, that there was a large surplus of several hundred acres, and that this sale was in gross; and insisted on a conveyance of the whole of the lands in No. 1548. The patent to Elisha King for No. 1548, bore date the 10th of March 1804, and was for "a certain tract of land, containing 1533⅓ acres," as by survey bearing date the 13th of April 1792; and set forth the metes and bounds, according to this survey.

The bill claimed an allowance for the loss of 333⅓ acres of Sackville King's entry; and proceeded to state and charge sundry payments since the conveyance of the 22d of June 1809, the last of which was made on the 26th of March 1818. It then admitted, that there was due, at the time of filing the bill, on the tract of 1533⅓ acres (deducting the consideration money expressed in the conveyance for 766⅔ acres, the ratable value of the other tract of 333⅓ acres which was lost and all the subsequent payments), the sum of $1700, *yet to be paid by Hamilton to King on the contract [*314

for the 1533⅓ acre tract; which sum they said they were always ready to pay, since the death of Alexander Hamilton, if they could have procured a fair settlement; and also, that they were informed and believed, that Alexander Hamilton, when he could have a settlement and receive a title, was always ready in his lifetime to make payments. The bill then went on to state a number of improvements made on that part of the land not conveyed by King to Hamilton; which improvements were stated to have been made by Hamilton and the other appellees, claiming by purchase under him. The bill then prayed an injunction to a judgment in ejectment, recovered at June term 1824, for that part of the tract of 1533⅓ acres, not conveyed. It asked a decree for a conveyance, on payment of the balance; and for general relief.

The answer denied that the sale was in gross, and also, that the com plainants were at any time ready to perform the agreement, by the payment of the purchase-money for the tract which was agreed to be sold; and alleged, that the payment of the same was evaded and delayed, although frequent promises of performance were made. To this answer, there was a general replication.

At January term 1826, an agreement was entered into by the parties (which being entered of record, took the place of an interlocutory decree), in order to settle so much of the controversy; that there was then due to King, on the purchase-money and interest, $1896.88, after deducting $566.66 on account of the land sold, included in Sackville King's patent, which, with interest from that time, was all that was to be paid King, if the court decreed that the contract covered the surplus above 1533⅓ acres, in the entry 1548. The times for paying that sum were agreed; and also, that on the payment, deeds should be executed by respondents, covering the whole land, if the *315] *contract was decreed to be in gross, and the injunction be made perpetual against the proceedings in ejectment, &c. This agreement reserved for future decision the single question, whether the contract of sale was a sale in gross, or by the acre, as to the land in the entry No. 1548; and concluded as follows: "To avoid all dispute, it is the express understanding of the parties, that the whole question concerning the said surplus land is reserved for future decision; and all claims for damage respecting failure in the title for the tract of 333⅓ acres of land, in the bill mentioned, are waived."

At July term 1826, the court decreed, that the sale by Elisha King to Alexander Hamilton, was a sale of the whole of the land in No. 1548; and that the defendant, John W. King, should, within two months, convey to the complainants, in fee-simple, with covenants of special warranty, the lands not already conveyed by E. King to Alexander Hamilton; that the complainants, within two months, should pay the balance agreed, with interest; and that each party should pay their own costs, at or before the next term. As to the other defendant, the bill was dismissed generally. From this decree, John W. King appealed to this court.

Doddridge, for the appellants, contended: 1. That, under the agreement entered into by the parties to the suit, at January term 1826, John W. King reserved to himself the right to urge, as to the surplus land, whatever could have been urged as to the relief claimed for the land not surveyed, as

well as every other separate defence which he had a right to make as to the surplus, independent of the agreement. 2. That no evidence was given in the case, to establish the fact, that the payments made by Hamilton were for the land not conveyed; and that the payments made were to be applied to the land which had been conveyed. So that, for the land not conveyed, nothing had been paid for a period of nineteen years. 3. No possession of the land not conveyed was delivered by King to Hamilton. 4. That the *sale was not a sale in gross; and the sale in gross having been denied in the answer, and no evidence given, the court erred in finding for the appellees. 5. That the appellant ought not to be required in a court of equity to yield the title to so large a surplus, without compensation, and without the clearest proof of the agreement. [*316

The law of Virginia, regulating lands under military grants, declares, that as to the surplus lands in a grant, any one may give the warrantee notice to survey the quantity included in the grant; and if he neglects or refuses to do so, he may, after twelve months, apply to the county court, and have a survey made for himself; and he may then enter the surplus land, and thus become the legal owner of it. This gives the original grantee a right of pre-emption to all the surplus beyond five per cent., which is allowed in every grant. This must be done, during the life of the original grantee, and during the continuance of his title; after a sale, and after a descent cast, the right to the surplus is abandoned by the state to the grantee. In Ohio, there is no court to which an application for a re-survey can be addressed; and therefore, the right to the surplus lands in the Virginia reservation of military lands in that state is complete in the grantee, unless it was so great as to amount to a fraud. The right, therefore, of King to the whole land included in the grant, it being within the Virginia reservation, is complete. At law, it is necessarily so; and this is recognised in *Taylor* v. *Brown*, 5 Cranch 234, 241; and it is so in equity; *Dunlap* v. *Dunlap*, 12 Wheat. 574. The surplus lands are, therefore, to be considered as having passed to Elisha King, as fully as if the whole actual quantity had been stated in the grant.

It is next assumed as a position, that whenever there is an excess or deficiency of quantity of lands sold, and both parties are ignorant of the fact, at the time of the sale, equity will relieve the party aggrieved, by adding to or reducing the purchase-money *pro rata;* and the relief given proceeds *on the ground of mistake. In support of this principle, there have been decisions in the courts of Virginia. 1 Call 301; 2 Hen. & Munf. 244; *Hall* v. *Cunningham*, Ibid. 336. In a note to this case, authorities are referred to for the purpose of showing what relief ought to be granted under certain circumstances. 2 Hen. & Munf. 161, 179, 175, 177; 1 Ibid. 201. These authorities establish: 1. That if the excess be considerable, and the same of a deficiency, and each party is innocent; there should be a dissolution of the whole contract. 2. If the excess or deficiency be small, and there has been no eviction, there should be an addition to or deduction from the gross sum, after the rate of the whole contract. 3. If deeds have been made and possession given, and there has been an eviction of part, compensation should be decreed, according to the value at the time of the eviction. 8 Cranch 371, and note to the same case, p. 375. These cases show, that there is a general rule to give relief, where the excess [*317

exceeds five per cent.; and that this relief will be denied, when the contract was for a gross sum; or where the vendor had perfect knowledge of the land, and the vendee had not, but the vendee took upon himself the risk as to lines and quantity. That courts lean against the establishment of such contracts, having a gaming or immoral tendency. That whatever may be the terms of the written contract, the fact of a sale by the acre or in gross, lies in averment; and consequently, where either of these facts is charged in the bill, as a ground for relief, and the ground is denied in the answer, the answer will prevail, without proof of the fact; and the bill will be dismissed, the answer being responsive to a material charge in the bill. That the words "more or less," and proof that the whole tract was sold, are not, of themselves, sufficient to prevent relief; and there is no adjudged case proceeding on that ground alone.

An examination, with reference to these authorities, of the contract between Elisha King and Hamilton, will abundantly show, that had the *318] whole property sold been *conveyed, and paid for by Hamilton, a discovery of the surplus afterwards, would have entitled the vendor to relief. The situation of the country settled, and the property held by each grantee well known; the relations of the parties to it, Hamilton living on adjoining lands, and King residing at the distance of 600 miles, and ignorant of the practice and including a much larger quantity of land in the survey than the grant called for; are circumstances which should materially operate when the transaction and the claims arising out of it are considered. It is confidently asserted, that the facts of this case will not authorize a court to decree a specific performance of the contract; independent of the principles and the rules of law which have been urged. While it is admitted, that for a forfeiture occasioned by a breach of his contract, the vendor may be the subject of relief in a court of equity in favor of a vendee; it is relied upon, that the vendee must account for his non-performance, by circumstances which will exculpate himself. In this case, the failure of Hamilton to pay for the land according to the contract is fully proved by the whole case. *Picket* v. *Doudall*, 2 Wash. 115.

The counsel for the appellants also contended, that the operation and just construction of the transactions between the parties were, that the payments made were to be applied to the portion of the land which had been conveyed; and that this was considered a performance of the contract, so far as the purchaser was entitled to the same. He also contended, that the object of the complainant was not only to be relieved from a forfeiture, but also to ask the specific execution of a contract, certainly made under a mistake, and by which hard and unconscionable terms will be imposed on the appellant. Courts of equity are not bound to decree a specific performance in all cases; they do so only at their discretion; and they will withhold such a decree, where the terms would be hard, although no fraud should be proved. 1 Wash. 270.

*319] **J. C. Wright*, for the appellees.—In 1805, the whole tract was sold by Elisha King to Hamilton, referring to the patent by number and quantity. Hamilton took possession of the land under the contract, and improved it; and in 1809, a deed was made for one-half of 1533⅓ acres. Before the deed was made, there had been no survey; but an estimate of

the quantity was made by the parties. In 1818, Elisha King conveyed the remaining half to John W. King, according to a survey then made; and thus he took the legal estate, subject to the agreement with Hamilton, to which he had been a witness. He stands thus in the relations of his father; and the estate held by him is subject to the equities of the appellees, as he had full notice of this contract. He does not stand as an innocent purchaser, and entitled to favor; but if his purchase was made to the injury of the rights of Hamilton, he is to be considered as an intruder. When he received the conveyance, more than half of the purchase-money had been paid; or was paid before the suit. Those who purchased from Hamilton have improved the part so acquired; and these improvements are out of the 766⅔ acres conveyed by King. All the questions in the case, except that of the right to the surplus land, have been settled by the agreement of 1826. The appellees, upon that question, contend that the sale was in gross. The court will go behind the deed executed by Elisha King for part of the land, to ascertain what was the intention of the parties. 1 Call 301.

It is denied, that the rule laid down by the counsel for the appellant, as to surplus, exists. The principles which have been established are, that when a sale is made by metes and bounds; by general terms; where the whole thing is sold, as in this case, the land is described as held under a patent; and for a sum specified in amount, and not *pro rata* as to quantity; it is a sale in gross: and the purchaser takes all the land within the boundaries. 12 Wheat. 574; *Powell* v. *Clark*, 5 Mass. 355; 1 Caines 493; 2 Johns. 37; *Vowles* v. *Craig*, 8 Cranch 374; Sugden *on Vendors 200; 2 Bibb 451; 1 Madd. Ch. 74, 76, 77; 1 Call 301. [*320

What is the contract? "I this day sell to Alexander Hamilton all my lands lying on the Miami river, in the state of Ohio, 1533⅓ acres, as by patent in my name." The case admits, that the patent referred to was the one obtained on survey No. 1548; and the survey sets forth the metes and bounds of the tract within which is now the whole claim of the appellees. The contract is, therefore, one for the whole land, not by quantity, but by patent; and "all" the lands of the vendor are sold.

Thompson, Justice, delivered the opinion of the court.—This case comes up on appeal from the circuit court of the United States for the seventh circuit, in the district of Ohio. The bill, in the court below, was filed for the purpose of obtaining the specific execution of a contract entered into between Elisha King, the father of John W. King, and Alexander Hamilton, the father of James Hamilton; and also to enjoin all further proceedings at law on a judgment in an action of ejectment, obtained by John W. King for the recovery of possession of a part of the land alleged to have been comprised within the contract.

The answer to this bill is very inartificially drawn; but no exceptions were taken to it, and the general replication put in. No proofs were taken upon the principal matters in dispute; but the cause came on to a hearing upon the bill and answer, and exhibits, and the agreement which had been entered into between the counsel for the parties in the progress of the cause. This agreement puts at rest many of the questions that might otherwise have arisen, and reduces the subject of dispute to the single inquiry respecting what is called by the parties the surplus land: and this involves the

inquiries; first, whether this surplus is embraced in the original contract? and if so, then, secondly, whether, under the circumstances of the case, the complainants in the court below have not lost their right to call upon a court of equity to enforce a specific performance of that contract?

*321] *The contract signed by Elisha King and Alexander Hamilton bears date on the 8th of February, 1805, and is as follows: "I this day sell to Alexander Hamilton all my lands lying on the Miami river, in the state of Ohio, 1533⅓ acres, as by patent in my name; also, 333⅓ acres, taken off the lands patented in the name of Sackville King, adjoining to that entry of Elisha King of 1533⅓ acres. He, the said Hamilton, is bound to pay to Elisha King, for this land, 946*l.* 16*s.*, current money of Virginia, in three payments, beginning December 25, 1805; then to pay 115*l.* 12*s.* Also, in the year 1806 and 1807, each Christmas day, or before, to make the full payments, as is above. The manner and agreement made by us is in payments as tenders: the said Hamilton takes to this country horses, to be sold at twelve months' credit, taking bond and good security, which bond is lawful tenders from year to year; and, on these tenders being made, the said King is bound to give to said Hamilton good title to said lands," &c.

The bill states, that there is a surplus of several hundred acres, beyond the specific quantity mentioned in the contract. The answer alleges, that from actual survey, the patent is found to contain 2409½ acres; which will leave a surplus of 876 acres; a quantity equal to more than one-half of the whole number of acres mentioned in the contract.

It may perhaps be assumed as a fact of general notoriety, that the surveys and patents for lands lying within the Virginia military district, contain a greater quantity of land than is specified in the grant; and that parties would, of course, when entering into a contract for the purchase of a tract of land, and referring to the patent for a description, expect, that the quantity would exceed the specified number of acres. But so large an excess as in the present case can hardly be presumed to have been within

*322] the expectation of either party; and admitting that a strict legal *interpretation of a contract would entitle the purchaser to the surplus, whatever it might be, it by no means follows, that a court of chancery will, in all cases, lend its aid to enforce a specific performance of such a contract.

The agreement entered into by the counsel which has been hitherto, and which will be more particularly noticed hereafter, puts an end to all questions respecting the land, to the extent of 1533⅓ acres. Otherwise, it might well be questioned, whether the complainants in the court below could compel a conveyance for any more than has already been conveyed under the contract.

In 1809, a conveyance was given for 766⅔ acres; the full consideration for which, after deducting $566.66, for defect of title in Elisha King to the 333⅓ acres of land included in Sackville King's patent, had not been paid when the bill was filed.

If the rights of these parties were to be governed, and determined, solely by the question, whether the contract covers the surplus land, we should have no difficulty in coming to the conclusion that it does. There is nothing upon the face of the contract, from which it can be satisfactorily inferred, that it was intended to be a sale by the acre. The language of the contract on the part of King is, "I this day sell to Alexander Hamilton,

all my lands lying on the Miami river, in the state of Ohio, 1533⅓ acres, as by patent in my name." Had it been intended a sale by the acre, the language would doubtless have been, 1533⅓ acres of, or a part of, my lands, &c.; instead of which, it is "all my lands, as by patent in my name." Reference is made to the patent for a description of the land, and to ascertain the subject-matter of the contract. And whatever would pass under the patent to King, would be included in the sale to Hamilton. The number of acres is mentioned in reference to what appears by the patent (1533⅓ *acres, as by patent in my name), and not as designating the precise quantity sold. But admitting the contract covers the surplus land; [*323 it is contended on the part of the appellants, that a court of equity will not, under the circumstances of this case, enforce a specific performance of the contract. It is insisted, however, on the part of the appellees, that all equitable considerations are precluded by the agreement entered into by the counsel, which has been referred to; and that the question is narrowed down to the single inquiry, whether the surplus land is included in the original contract of 1805. If such is the construction to be given to this agreement, the question has already been answered. It becomes, therefore, very material to examine, whether this is the fair and reasonable interpretation of the agreement. It is as follows:

1. "It is agreed, that the complainants are, at this time, January 6th, 1826, indebted to the said John W. King, one of the defendants above named, for the balance of the purchase-money, including up to the date aforesaid the interest, $1896.88, for the 1533⅓ acres mentioned in the said bill or complaint. This amount, it is agreed between the parties, by their counsel, is now due to the said John W. King; after deducting from the gross sum agreed to be paid by the ancestor of the plaintiffs to the ancestor of the defendants, which will appear by contract, $566.66, for the 333⅓ acres patented to Sackville King, mentioned in the contract; to which the defendants, or their ancestor, never had title. The sum of $1896.88 is the whole amount due the said John W. King for the 1533⅓ acres of land, the number of entry 1548, as mentioned in said bill; and it is hereby expressly understood between the parties, by their counsel, that the sum last mentioned, if it should be decreed by the court hereafter, or by the parties agreed to, that the surplus lands lying within entry 1548, is covered by the contract before referred to, for *the gross sum named; the said sum, [*324 with interest from this time until it is paid, is the whole amount due the defendant, John W. King, upon said land contract; but it is hereby agreed between the parties, by counsel, that the question whether the said contract covers the surplus in said entry No. 1548, shall be reserved for future decision and determination; and whether the purchase for the sum mentioned in said contract does not entitle the complainants to the surplus land said to be contained in said No. 1548: and it is hereby agreed by the parties, that the complainants shall now pay to the clerk for the said defendants or counsel, $730, part and parcel of the said sum of $1896.88, before admitted to be due; and that the said complainant shall pay the balance by the next term of this court, or within a reasonable time afterwards. And it is further agreed by the parties, by their counsel, that the said John W. King, and the other defendants do join, if it appear necessary, shall execute to the complainants a good deed, with covenants of general warranty, for

the land which the complainants shall be entitled to under the contract aforesaid, immediately upon the payment of the purchase-money. It is further agreed by the parties, by their counsel, that the complainants shall pay the cost in the action of ejectment brought in this court for the lands named in the bill, and the costs of this suit; to abide the decision of this court thereon. It is further agreed by the parties, by their counsel, that upon the payment of the whole of the purchase-money which may be due the defendants for said land, then and in that case, the injunction to be made perpetual. And to avoid all dispute, it is the express understanding of the parties, that the whole question concerning the said surplus land is reserved for future decision; and that all claims for damages, respecting the failure in the title for the tract of 333⅓ acres of land, are waived."

This agreement is somewhat obscurely worded, and its construction not without difficulty. Doubts have been entertained by the court, whether the appellants have not thereby precluded themselves from resisting a specific *performance of the contract, on the equitable grounds that might otherwise be set up. We have, however, come to the conclusion, that the appellants, as to the surplus land, have reserved to themselves the right to set up whatever could have been urged against the relief sought, as to all the land not conveyed, as if the agreement had not been entered into. And that as to the surplus land, the case is open, and to be considered entirely independent of the agreement.

*325]

Some of the leading objects of the agreement appear to have been, to settle and fix the amount of payments that had been made, and the deduction to be allowed on account of the failure of title to the land patented to Sackville King; and to ascertain the balance due, which was found to be $1896.88, and which by the terms of the agreement is declared to be the whole amount due for the 1533⅓ acres: thereby implying, that the consideration agreed to be paid, was for that quantity of land; and that as to that quantity, no further dispute existed; but at the same providing, that if the court should decree that the surplus land was covered by the contract, that balance should be deemed the full consideration for the whole. And then adds, "but it is hereby agreed, that the question whether the said contract covers the surplus land shall be reserved for future decision and determination." If this had been the only question intended to be reserved, the agreement would have stopped here; there is no ambiguity thus far, nor any necessity for putting the same question in a different shape. But the argument goes on, "and whether the purchase for the sum mentioned in the contract does not entitle the complainants to the surplus land said to be contained in No. 1548." There would appear to be two distinct questions reserved for future determination. 1. Whether the contract covers the surplus land? and if so, secondly, whether the complainants are now entitled to it, by virtue of their original purchase? If this view of the agreement be correct, the second question reserved must have been intended to leave open all objections to the claims for the surplus lands. If, however, *the agreement had stopped here, there might have been serious doubts, whether the question reserved was not, whether the contract covered the surplus land. But the concluding clause in the agreement seems to have been added, to remove all doubts upon the question. "And to avoid all dispute, it is the express understanding of the parties that the

*326]

whole question concerning the said surplus land is reserved for future decision." If the only question reserved was, whether the contract covered the surplus land, there was no necessity or fitness in this last provision. That question had been explicitly and in terms reserved; and to superadd to it, that the whole question concerning the surplus was reserved, will admit of no other reasonable construction, than that as it respected such surplus, the case was to stand as if the agreement had not been made.

This being the construction given by the court to this agreement of the counsel, it remains to inquire, whether the complainants in the court below made out a case, which, according to the rules which prevail in courts of equity, entitled them to a specific execution of the contract as to the surplus land. This part of the case has not been much pressed upon the court, and it is difficult to perceive on what grounds it can be sustained. To have enforced a specific execution of this contract would, at any time and under any circumstances, have been granting a strict legal right against the substantial justice and equity of the case. To show this, it is only necessary to state some of the leading facts in this case. The contract bears date in the year 1805, and by it all the payments for the land were to be completed in December 1807, on which the title was to have been given. Payment only of a part of the purchase-money, and not even to one-half the amount, had been made, when the bill was filed. No remedy at law, therefore, ever did exist. The purchaser never was in a situation when he could aver performance of the contract on his part. It is very evident, that no consideration whatever has been given for this surplus land. The price was, doubtless, estimated by the parties upon the specific number of acres (although the *sale was not by the acre), and which at that time was probably supposed to be nearly the quantity of land covered by the patent to King. This, however, turns out to be otherwise. The surplus is very large, amounting to more than one-half the number of acres mentioned in the contract. There are no grounds for charging either party with any knowledge of this fact. King manifestly could not have known it, or it would not have been entirely overlooked in the sale. And Hamilton ought not to be charged with a knowledge of it, without satisfactory evidence; as it would be imputing to him a gross fraud. It is, therefore, a case of mutual mistake, or ignorance of an important fact, in relation to the subject-matter of the contract; and that contract still executory, and now sought to be enforced as to lands for which no consideration has been paid. It is, therefore, a case in which the parties ought to be left to their strict legal rights. [*327

The bill alleges, that Hamilton, in his lifetime, made valuable improvements on that part of the land not included in his deed of 1809. When these improvements were made, does not appear. The contract is silent as to the time when the purchaser was entitled to the possession, and the bill does not allege that possession was taken, or the improvements made, with the assent of King; and the answer expressly denies, that King put Hamilton in possession of any part of the land, except that for which the deed was given in 1809, and alleges that the possession of any other part was without authority, and unlawful. In 1818, John W. King, one of the appellants, became the purchaser of all the lands not included in the deed of 1809. He was, it is true, a purchaser with notice of the con-

tract between his father and Hamilton, but he also had notice of all the circumstances with respect to his failure in making payment; and that he had not, at that time, made payment even for the land which had been conveyed to him; and no further payments had been made, when this bill was filed, nor any disposition shown on the part of the appellees to perform the contract on their part; and the bill in this case was not filed, until nearly seven
*328] years from that time, *and not until a judgment in ejectment had been obtained, to recover possession of the land not covered by the deed of 1809. All the payments made upon this purchase might well be applied to the land which had already been conveyed; and were it not for the agreement entered into by the counsel, the complainants in the court below would have had no equitable grounds for asking a specific execution of the contract for any portion of the 1533⅓ acres not included in the deed of 1809. But that agreement has put an end to all questions in relation to the residue of the 1533⅓ acres; leaving the case open, as we understand it, to all objections to a specific execution of the contract as to the surplus land, to the same extent as if the agreement had not been entered into.

Did this case, then, thus made out in the court below, entitle the complainants to a specific execution of the contract as to the surplus land? We think it did not, according to the well-settled rules of courts of equity on this subject. This branch of the powers of the court of chancery is very valuable and important. For in many cases, even where the remedy at law for damages is not lost, complete justice cannot be done, without a specific execution; and it has become almost as much a matter of course, for a court of equity to decree a specific execution of a contract for the purchase of lands, where in its nature and circumstances it is unobjectionable, as it is to give damages at law, where an action will lie for a breach of the contract. But this power is to be exercised under the sound judicial discretion of the court, with an eye to the substantial justice of the case.[1] When a party comes into a court of chancery, seeking equity, he is bound to do justice, and not ask the court to become the instrument of iniquity. Where a contract is hard, and destitute of all equity, the court will leave parties to their remedy at law; and if that has been lost by negligence, they must abide by it. It is a settled rule, therefore, to allow a defendant in a bill for a specific performance of a contract to show that it is unreasonable or unconscientious,
*329] or founded *in mistake, or other circumstances, leading satisfactorily to the conclusion, that granting the prayer of the bill would be inequitable and unjust. Gross negligence on the part of the complainant, has great weight in cases of this kind. A party, to entitle himself to the aid of a court of chancery for the specific execution of a contract, should show himself ready and desirous to perform on his part. These are familiar and well-settled rules in courts of chancery, and have a strong bearing upon this case. If this contract had been carried into execution, by giving a conveyance for the land, a court of chancery would not have given relief to the other party. But the contract is still executory; and the complainants, after the lapse of twenty years, seek for the specific execution of a contract which has not been performed on their part, and the execution of which would be manifestly unjust and unequitable. If this large surplus of 876

[1] McNeil *v.* Magee, 5 Mason 244.

acres should be taken as included in the original purchase, it might well be considered a case of gross inadequacy of price.

So far, therefore, as the immediate rights of the complainants are involved, no equitable claim has been sustained, for a specified execution of the contract for the surplus land. It is, however, alleged in the bill, that sales have taken place, and valuable improvements made upon parts of the land not covered by the deed of 1809. This is not denied in the answer, although it is alleged, that such improvements were made without the assent of King. No proofs have been taken with respect to these improvements; their value and extent are left altogether uncertain. But the rights of third persons, who may be *bonâ fide* purchasers under Hamilton's supposed title, may be materially affected by dismissing the bill as to the surplus land. Some diversity of opinion has existed among us, as to the final decree, on account of those improvements. We have, however, come to the conclusion, that the complainants in the court below shall have a decree for the surplus land, at the average rate or price which the consideration mentioned in the contract bears to 1866⅔ acres, *the number of acres specified in the purchase; [*330
together with the interest thereon, from the 25th of December 1807, being the time at which all the payments were to have been completed, according to the contract. The decree of the circuit court must be so modified. It should have required payment of the consideration-money, before the conveyance was to be given. Such are the terms of the original contract, and also of the agreement of the 6th of January 1826.

The decree of the circuit court as to John W. King, must accordingly be reversed, and affirmed as to the other defendants in the court below; and the cause sent back, with instructions to cause a survey to be made, to ascertain the number of acres contained in the patent; and that, on payment of the balance and interest due, according to the settlement made on the 6th of January 1826, and also a further sum for the surplus land above 1533⅓, according as the quantity shall be found on actual survey, at the same average rate or price as in the original contract, with the interest therefor from the 25th day of December 1807; then the said John W. King to be required to make and execute a good and sufficient deed of conveyance in fee-simple to the complainants in the court below, for all the lands contained in the patent to Elisha King mentioned in the pleadings, and which have not been already conveyed by the deed of Elisha King, bearing date the 22d of June 1809. The money to be paid and the deed executed, at such time as the circuit court shall direct. The injunction to be continued for such time, and under such modification, as shall be judged necessary by the circuit court for the purpose of carrying this decree into effect.

This cause came on to be heard, on the transcript of the record from the circuit court of the United States for the district of Ohio, and was argued by counsel: On consideration whereof, it is decreed and adjudged by this court, that the judgment of the said circuit court in this cause be and the same is hereby reversed as to John W. King; and that *the said judg- [*331
ment in this cause be and the same is hereby affirmed as to the other defendants in the court below. And it is further ordered and adjudged by this court, that the cause be and the same is hereby remanded to the said circuit court, with instructions to cause a survey to be made, to ascertain

the number of acres contained in the patent; and that on payment of the balance and interest due, according to the settlement made on January 6th, in the year of our Lord 1826, and also a further sum for the surplus land above 15331 acres, according as the quantity shall be found on actual survey, at the same average rate or price, as in the original contract, with the interest therefor from the 25th of December 1807; then the said John W. King to be required to make and execute a good and sufficient deed of conveyance, in fee-simple, to the complainants in the court below, for all the lands contained in the patent to Elisha King, mentioned in the pleadings, and which have not been already conveyed by the deed of Elisha King, bearing date the 22d of June 1809. The money to be paid and the deed executed at such time as the said circuit court shall direct. The injunction to be continued for such time, and under such modification, as shall be judged necessary by the circuit court for the purpose of carrying this decree into effect.

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*332] *William T. Galt and others, Appellants, *v.* James Galloway, Jr., and others, Appellees.

Land-law of Ohio.

The possession of a warrant has always been considered, at the land-office in Ohio, sufficient authority to make locations under it; letters of attorney were seldom, if ever, given to locators; because they were deemed unnecessary. p. 339.

An entry could only be made in the name of the person to whom the warrant was issued or assigned; so that the locator could acquire no title in his own name, except by a regular assignment. p. 339.

When an entry is surveyed, its boundaries are designated, and nothing can be more reasonable and just, than that these shall limit the claim of the locator; to permit him to vary his lines, so as to affect injuriously the rights of others, subsequently acquired, would be manifestly in opposition to every principle of justice. p. 340.

Since locations were made in the Virginia military district in Ohio, it has been the practice of locators, at pleasure, to withdraw their warrants, both before and after surveys were executed; this practice is shown by the records of the land-office, and is known to all who are conversant with these titles.

The withdrawal is always entered on the margin of the original entry, as a notice to subsequent locators; and no reason is necessary to be alleged, as a justification of the act. If the first entry be defective in its calls, or if a more advantageous location can be made, the entry is generally withdrawn. This change cannot be made to the injury of the rights of others; and the public interest is not affected by it; the land from which the warrant is withdrawn is left vacant for subsequent locators; and the warrant is laid elsewhere, on the same number of unimproved lands. p. 341.

As the records of the land-office are of great importance to the country, and are kept under the official sanction of the government, their contents must always be considered, and they are always received in courts of justice, as evidence of the facts stated. p. 342.

Under the peculiar system of the Virginia land-law, as it has been settled in Kentucky, and in the Virginia military district in Ohio, by usages adapted to the circumstances of the country, many principles have been established, which are unknown to the common law; a long course of adjudications has fixed these principles, and they are considered as the settled rules by which these military titles are to be governed. p. 343.

An entry, or the withdrawal of an entry, is, in fact, made by the principal surveyor, at the instance of the person who controls the warrant; it is not to be presumed, that this officer would place upon his records any statement which affected the rights of others, at the instance of an individual who had no authority to act in the case; the facts, therefore, proved by the records, must be received as *primâ facie* evidence of the right of the person at whose instance