evidence that the money was received under the contract; and it was incumbent on the defendants to establish the contrary by competent proofs.

Upon the whole, the opinion of the court is, that the judgment of the circuit court ought to be affirmed.

Judgment affirmed.

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*420] *WILLIAM C. HOLT and wife, Appellants, *v.* THOMAS and EDMUND ROGERS.

Specific performance.

Construction of a contract for the sale of a tract of land. R. executed a bond to D. conditioned that he would make him a fair and indisputable title to a certain tract of land, on or before the 1st of January 1795; and if no conveyance was then made, that R. would stand indebted to D., in a certain sum of money, being the sum acknowledged to be paid to R. at the time of the contract. No other just interpretation can, under the circumstances, be put upon this language, than that the parties intended, that R. should perfect his title to the land by a patent, and should make a conveyance of an indisputable title to D., on or before the 1st of January 1795; and if not then made, the contract of sale was to be deemed rescinded, and the forty-five pounds purchase-money was to be repaid to D.

In 1799, the heir of the vendor, he having died, obtained a complete title to the land by patent, and the vendee did not die until seven years afterwards; after his death, in 1806, no step was taken by his heirs or devisees, for the purpose of asserting any claim to a performance of the contract for the sale of the land, until 1819; and no suit was commenced until 1823; in the meantime, the property had materially risen in value, from the general improvement and settlement of the country. The objection from the lapse of time, is decisive; courts of equity are not in the habit of entertaining bills for a specific performance, after a considerable lapse of time, unless upon very special circumstances; even where time is not of the essence of the contract, they will not interfere, where there have been long delay and *laches* on the part of the party seeking a specific performance; and especially, will they not interfere, where there has, in the meantime, been a great change of circumstances, and new interests have intervened. In the present case, the bill is brought after a lapse of twenty-nine years.[1]

APPEAL from the Circuit Court of Tennessee. The case, as stated in the opinion of the court, was as follows:

The suit was brought in February 1823, for a specific performance of a contract, made in January 1794, for the sale of land, under the following circumstances. On the 6th of January 1794, John Rogers, of Virginia, executed his bond to James Dickinson, of the same state, in the penal sum of 2000*l.* upon condition, after reciting that Rogers had, on that day, sold
*421] to Dickinson, a tract of land, lying in Kentucky, *containing about 1200 acres, for 120*l.* that if Rogers, his heirs or assigns, shall make, or cause to be made, to Dickinson, or his assigns, a good and lawful deed for the land, when required, then the obligation to be void. On the same day, Dickinson executed to Rogers a counter-bond, in the penal sum of 240*l.*, upon condition, after reciting the sale of the same land to Dickinson, and the receipt by Rogers of 45*l.*, part of the consideration money, "that if Rogers shall, on or before the 1st day of January 1795, make a fair and indisputable title in fee-simple to Dickinson, &c., of the said tract or parcel of land, and Dickinson, after that conveyance being made, shall pay to Rogers the further sum of 75*l.* lawful money; but if no such conveyance of said land shall be made, then the said Rogers stands indebted to the said

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[1] Dorsey *v.* Packwood, 12 How. 126; Harkness *v.* Underhill, 1 Black 316; McNeil *v.* Magee, 5 Mason 244; Bronson *v.* Cahill, 4 McLean 19; Mason *v.* Wallace, Id 77.

Dickinson in the sum of 45*l.* already advanced as mentioned aforesaid, then this obligation to be void, or else to remain in full force and virtue." At the time of this contract of sale, Rogers had no patent for the land; but only a plat and certificate of survey of it, upon a military warrant. Rogers died in April 1794, without children, unmarried and intestate, leaving his father, George Rogers, his heir-at-law, who then lived in Virginia, and afterwards died there, in March 1802, having, by his last will, devised the land in controversy, of which he had obtained a patent in 1799, to his two sons, Edmund Rogers and Thomas Rogers (the defendants), and to his four daughters, to each of them one-sixth part; and constituted his said sons trustees for his four daughters, during their lives, and afterwards for their children, respectively, in fee, with power to sell the same, &c. He also appointed his two sons executors of his will. Dickinson continued to reside in Virginia, until his death, in 1806; and by his last will, he devised his estate to his wife, Mary Dickinson, under whom the plaintiff, Ann Holt claimed, as her daughter and sole heiress at law, the land in controversy.

The suit was brought against the defendants, Edmund and Thomas Rogers, without making the four daughters, or any of them or their representatives, parties. The circuit court dismissed the bill of the complainants, and they prosecuted this appeal.

*The case was submitted to the court on printed arguments, by *Bibb*, for the appellants; and by *Tompkins*, for the appellees. [*422

The arguments for the *appellants* stated, that the defendants, by their answers, exhibit the obligation from Dickinson to Rogers, above recited, and rely on two defences: 1st. "That the obligation from Rogers to Dickinson, and from Dickinson to Rogers, taken together, leaves it entirely optional with said Rogers whether he would convey the land or not; and if he did not convey it, he was then bound to pay 45*l.*" 2d. Length of time. Upon hearing, the circuit court dismissed the bill.

1. As to the first defence set up by the defendants, the counsel for complainant believes it is not tenable. Rogers bound himself, absolutely and unconditionally, to convey the land to Dickinson, at no fixed day, but "when required." The bond of Rogers to Dickinson recites the transaction as a sale, not as a security for money lent. The penalty is 2000*l.*, evidently intended to enforce a conveyance. The bond from Dickinson to Rogers is in the penalty of 240*l.*; the condition recites the transaction as a sale of the land for 120*l.*, and the payment of 45*l.* thereof. It is an obligation upon Dickinson to pay the residue of the purchase-money, on or before the 1st day of January 1795; and there is annexed thereto, as a precedent condition to be performed by Rogers, "the conveyance of a fair and indisputable title in fee-simple." "After that conveyance being made," Dickinson was to pay the residue of the price. If the conveyance was made before the 1st January 1796, yet Dickinson was not bound to pay the balance until that day. Dickinson held Rogers' obligation to convey "when required." But Dickinson had paid part only of the price. And the residue, 75*l.*, was not to be paid until the 1st of January 1795; and not then, unless the conveyance of the land should be then completed; Dickinson was to be secure by a conveyance, before he was bound to pay the balance of the purchase-money. Accordingly, Dickinson executed his

*bond to pay the residue of the purchase-money on the 1st January 1795, subject, however, to the condition that a conveyance of the land to Dickinson should precede the payment of the 75*l.* to Rogers. Rogers could not demand the 75*l.*, before the first of January 1795, nor then, unless he conveyed the land. And although he might not be able then to give a fair and indisputable title, yet, "after that conveyance being made," Dickinson was bound to pay the further sum of 75*l.* to save the penalty of his obligation to Rogers. This seems to be the fair meaning of the condition of Dickinson's bond to Rogers.

Dickinson's evidence of the contract obliged Rogers to convey the land, but no time was limited; Rogers had his whole life, unless hastened by request. But the bond held by Rogers on Dickinson, concurred with the bond held by Dickinson, in reciting a sale of the land; and assisted to hasten Rogers to convey, because he was not entitled to receive the residue of the purchase-money until he did convey. But, according to the defence set up, Dickinson had no right to demand the conveyance; Rogers was not bound to convey; and Dickinson was at his mercy. Rogers might refuse a conveyance, and Dickinson, having paid 45*l.* for the land, had no evidence in his possession, of his right to recover back that sum so paid. Rogers held the evidence of his right to refuse a conveyance, as well as the evidence of Dickinson's right to 45*l.*, in his own possession, in a bond upon which Rogers could maintain a suit, but upon which Dickinson could not. According to this construction, Dickinson held a bond on Rogers for $2000*l.* with condition, reciting the sale of a tract of land, and obliging him to convey; and upon such conveyance made then, this obligation to be void; but Rogers held a paper which likewise recited the sale of the land, and his obligation to convey, but superadded this farther condition to this same bond, "but if no such conveyance of said land shall be made," "then this obligation to be void."

A bond for 100*l.*, with condition that if the obligor did not pay 50*l.* by a given day, the bond to be void, was adjudged to be a repugnant condition, and that the bond was obligatory. *Wells* v. *Tregusan*, 2 Salk. 463.

*424] *The court will not construe two deeds, both of which recite a sale of land, and a contract for a conveyance, in such manner as to make the one repugnant to the other, and avoid the obligation to convey; when both may well stand together, without contradiction, and each have its appropriate effect and use, in affirmance of the sale, and enforcing the stipulations of each party.

On its face, the obligation to Dickinson is plain and unequivocal. It is an obligation for the conveyance, according to the recited sale, of a tract of land. It is free from doubt, and needs no construction. Shall this unequivocal obligation be destroyed by construction of another obligation which recites the same sale, the obligation to convey, the receipt of 45*l.* in part payment for the land, and by an obligation upon the purchaser to pay the residue of the purchase-money to the vendor, after conveyance made in pursuance of this sale? Both obligations can well stand together, and each have its appropriate use. The first to oblige the vendor to convey; the second to oblige the purchaser, after such conveyance, to pay the residue of the purchase-money, part thereof having been paid.

It seems, that Rogers had no option to refuse to convey, after he or his

heirs should obtain a fair title, which the purchaser was willing to accept. But if Rogers could not have obtained a fair title, clear of dispute, whereby Dickinson refused to accept the title, then Rogers would have been liable to refund the money which he had received. Inability for want of title, and wilful refusal to convey with a title, are very different breaches in their nature and their consequences.

2. As to the length of time. It is to be remembered, that this is not a case of adverse hostile possession. It is a suit by the obligee against the heirs and executors of the obligor. The obligor and his heirs and executors, as soon as the title was perfected, held the land in trust, to be conveyed in satisfaction of the contract with the ancestor. There is no statute of limitation to suits on bonds, to operate as a legal bar. But the defence at law, from length of time, is founded on presumption of payment. After twenty years, where no demand has been made, and no interest has been paid during that time, a jury may presume payment or *satisfaction; but the rule as to twenty years is not, in itself, a legal bar. It is a circumstance for the jury to found a presumption upon. The lapse of a shorter time, aided by other circumstances, as that the parties lived near to each other, frequently saw each other, settled other accounts, &c., may be the foundation of a presumption of payment. So, circumstances may repel the presumption. See *Oswell's Executors* v. *Legh*, 1 T. R. 271. [*425

Presumption of payment from lapse of time is a reasonable rule, and may be rebutted by any facts which destroy the reason of the rule. *Dunlop* v. *Ball*, 2 Cranch 184. In that case, the bond was executed in 1783, not sued upon until 1802, after a lapse of twenty-nine years. Yet the presumption of payment was repelled. The breaking out of the war in 1775; its continuance until September 1783; the exceptions of certain periods of time from the statute of limitations, by the laws of Virginia; the obstructions to recovery of the British debts until 1793; were the circumstances relied on to repel the presumption of payment, notwithstanding the lapse of twenty-nine years, without demand or payment of interest. The rule adopted by the supreme court of the United States was, that twenty years must have elapsed, exclusive of the plaintiff's disability; and therefore, reversed the opinion of the circuit court, which did not recognise the circumstances in this case which oppose the presumption, which would have arisen from the length of time which had elapsed since the date of the bond. In *Boltz* v. *Bullman*, 1 Yeates 585, the presumption from length of time was repelled, because, "where the limitation act does not apply, that period shall not be computed in jndging of the legal presumption of payment;" also, that "the bond was in possession of the widow, soon after the death of her first husband, until the death of her second husband," was a consideration to repel the presumption. In *Newman* v. *Newman* (1 Stark. 81), the presumption was rebutted by absence abroad. In *Goldhawk* v. *Duane*, 2 W. C. C. 324, the court adjudged that the residence of the parties in different countries, was a circumstance to repel presumption of payment.

*The rule in chancery is the same as at law; after twenty years, and no interest paid during that time, payment is presumed, "unless something appears to answer that length of time." *Humphreys* v. *Humphreys*, 3 P. Wms. 397. In *Giles* v. *Baremore*, 5 Johns. Ch. 545, the chancellor declares, presumption, from length of time, prevails in equity as at law. [*426

A court of equity makes the presumption on the facts before it, as a jury would be authorized to do, if the evidence was submitted to them.

Having sufficiently established that the rule in equity and at law is the same; that the presumption from length of time is a reasonable rule, and may be rebutted by circumstances; and having cited examples of rebutting circumstances; the attention of the court is called to the rebutting circumstances which in this case appear fully sufficient to answer and repel the presumption from lapse of time. This bond bears date 6th January 1794. The obligor, John Rogers, died in April 1794, in less than four months after the date of the contract. The obligor, Dickinson, lived in Richmond; the heir of Rogers lived in Caroline, fifty miles off; George Rogers, the heir of John, the obligor, died in Caroline county in 1802, and devised his lands to his two sons, Edmund and Thomas, his executors; his death was in about eight years after the date of the contract. At the time of, and before, and ever after, the death of George Rogers, the father and heir of the obligor John, one of his devisees, Edmund, was a citizen of Kentucky, continually residing there. The devise of the Kentucky lands was to these two sons, and to the survivor; so that Dickinson must have gone to Kentucky to obtain the title. The patent did not issue until the 7th March 1799. The land was in Kentucky; the patent issued in Kentucky to the heir of John Rogers; that heir died in March 1802, in three years after the issuing of the grant from the state. But this patent, although for the same tract sold and described in John Rogers's bond, yet issued to William Marshall for one hundred acres, and to George Rogers for the residue, jointly. But this interest of Marshall was not partitioned until the year 1815. At that time, the defendants were both residents of Kentucky. Dickinson had died in Norfolk, Virginia. Edmund, as before stated, had resided there since 1783.

*427] *In 1819, only four years after the defendants had ability to convey the land, the complainants pursued their claim, and again in May 1829; again in August 1820; and finally, by suit, in February 1823. But between the date of the bond in 1794, and the removal of Thomas Rogers to Kentucky, in 1811, a period short of eighteen years had elapsed; and both parties then lived in different states—the legal representative of Dickinson in Norfolk, Virginia; the legal representatives of John Rogers, in Barren county, Kentucky. No presumption of payment or satisfaction had then arisen, and the removal to Kentucky was by the defendant; the period after 1811, till suit, must be excepted from the twenty years, according to the cases before cited of *Dunlop* v. *Ball*, 2 Cranch 184; *Goldhawk* v. *Duane*, 2 W. C. C. 324; *Newman* v. *Newman*, 1 Stark. 81. When Thomas Rogers, the defendant, devisee and executor, was about to remove in 1811, from Caroline county, Virginia, to Kentucky, he, for safety, as he says, then caused the bond of Dickinson to Rogers to be recorded in Caroline county court. This shows that when this defendant was departing for Kentucky, he was sensible that this transaction was not settled, satisfied or extinguished.

As the obligor, John Rogers, died in less than four months after the date of the obligation, no presumption of payment or satisfaction can arise as having been made by John Rogers; none is pretended. The defendants are possessed of the papers of John Rogers, and exhibit a receipted account, paid by him to Dickinson, the day before the bond for conveyance of the land bears date. And also produce Dickinson's bond for the balance of purchase-

money. No loss of papers is pretended. The contract was on the 6th January 1794, touching the conveyance of a tract of land in Kentucky, then unpatented. John Rogers undertook for himself, and his heirs and executors and administrators, to obtain the patent and make the conveyance to Dickinson, his heirs or assigns. The patent was never obtained until 1799, and then William Marshall was a tenant of one hundred acres of the survey; by the act of Edmund Rogers, the surveyor, brother, and finally one of the executors, devisees and claimants, under the said obligor, and that interest not separated until 1815.

During all this time, George Rogers, the heir of John, and *the executors and devisees of the heir, were in possession of the contract, [*428 fully apprised of it—bound to do the first acts, by procuring the title and tendering a conveyance; and yet never did do the first act towards fulfilling the contract. No satisfaction is pretended. The heirs-at-law of John Rogers, and his representatives, never lived in the neighborhood of Dickinson, or his representatives; never, at any time, did they live nearer than fifty miles, and for a great part of the time, much farther apart; and before twenty years had run, and before the defendants were ready to convey, they were in the state of Kentucky, in Barren county, and the representatives of Dickinson, in Norfolk, Virginia.

These circumstances are fully sufficient, at law and in equity, to rebut the presumption from lapse of time. It is manifest, that no satisfaction, in land or money, has ever been made to Dickinson, or his representatives, by the obligor or his representatives.

Rogers was bound to do the first acts—to acquire the patent and a fair title, and to tender a conveyance. They took until 1815 to place themselves in a posture to convey a fair and undisputed title. Within due time thereafter, the complainants pursued their rights. The defendants now would take advantage of their own *laches* to defeat the complainants!

The counsel for the appellants insists, that the decree of dismissal was erroneous, in this—1st. That the complainants were entitled to a conveyance of so much of the land as had not been alienated by the defendants, before suit brought; and for satisfaction in money for the part conveyed away. 2d. If the court would not decree the land, yet they ought to have decreed that the sum of 45*l.*, with interest, should be refunded. 3d. That the decree of absolute dismissal was erroneous: it should have been without prejudice to a suit at law upon the bond.

Tompkins, for the appellees.—On the 6th day of January 1794, John Rogers executed his bond in the penalty of 2000*l.*, with condition, to convey to James Dickinson a survey of 1200 acres of land on Drake's Creek, *in Kentucky, when required, for the consideration of 120*l.*; part of [*429 which (45*l.*) is stated in the condition of the obligation to have been paid. At the same time, James Dickinson executed his bond to John Rogers in the penalty of 240*l.*, with a condition annexed, reciting his purchase of the land and the stipulated consideration, and that 45*l.*, part thereof, had been paid, and binding himself to pay 75*l.*, the residue of the price, on the making of the conveyance; but providing, that if the title should not be made on or before the 1st day of January 1795, the obligation should be void, and Rogers should stand indebted to Dickinson in the sum

of 45*l.*, the money advanced. Both these instruments bear the same date, and are attested by the same witnesses.

John Rogers afterwards died at the Eagle tavern, then kept by Dickinson, in Richmond, in April 1794, without children, unmarried and intestate. George Rogers, the father and heir-at-law of John Rogers, had many years resided, and still continued to reside in Caroline country, Virginia, until some time in March 1802; when he departed this life, having first duly made his last will and testament, whereby, among other property, he devised the land in contest to the defendants, Thomas and Edmund Rogers, and his four daughters, to each one equal sixth part; but Thomas and Edmund Rogers are constituted trustees for the four daughters during their lives, and afterwards for their children, respectively, in fee, with power to sell, &c. They are also appointed executors by the testator. James Dickinson removed from Richmond to Norfolk, where he continued to reside until his death, in 1806. Edmund Rogers removed from Virginia to Kentucky in 1783, and never qualified as executor to his father's will. Thomas Rogers removed to the same state in 1811, having resided in Caroline county, Virginia, up to that time.

This suit is prosecuted by William C. Holt and Ann his wife (the said Ann claiming to be heir-at-law of Mary Dickinson, who is alleged to be the devisee of James Dickinson), against Edmund Rogers and Thomas Rogers only, as the devisees of George Rogers, the father and heir-at-law of John Rogers, deceased. *The complainants pray for a decree, compelling *430] Thomas and Edmund Rogers to convey to them the tract of land described in the instruments of writing executed by John Rogers and James Dickinson. This statement comprises the material facts of the case.

Waiving, for the present, all objections for the want of parties, it is, on the part of the defendants, contended, that the complainants have shown no right to relief. The two instruments of writing, simultaneously executed, and forming but one entire contract, should be construed together; and thus considered, the plain meaning of the parties is, that the transaction was to be considered a sale of the land, in case a conveyance of the title should be made by the time stipulated, but not otherwise. In the event of a failure to convey within that time, Rogers was to repay the money received, or rather to discharge the debt which had previously accrued, and Dickinson's bond for the residue of the sum of 120*l.* was to be void. Such are the express terms of that part of the contract which was subscribed by Dickinson. The lapse of time is relied on by the defendants in bar of the complainants' demand, if they ever had any. Dickinson resided in the neighborhood of John Rogers, and his legal representatives, about twelve years after the execution of the contract; during all which time, he seems to have made no complaint of its violation. Thomas Rogers, the only acting executor of his father's will, did not remove to Kentucky, until five years after the death of Dickinson; and still there was no demand made on him, either for the conveyance of the land, or the payment of the money. It was not until the latter part of the year 1819, that any claim whatever was even suggested against the devisees of George Rogers, deceased; and almost thirty years had elapsed between the time of the alleged violation of the contract and the commencement of this suit. It is presumable, that Dickinson himself understood the contract according to the construction now contended for;

or it does not appear, that he ever made any provision for paying taxes on the the land after, as he had done before, the time of making the deed had expired. Rogers having been unable to convey the title, within the prescribed time, Dickinson was not bound to pay him the additional sum *of 75*l.* His obligation to do this had, in the event provided for, become void, and Rogers was only bound to repay the sum of 45*l.* which he had received—and after the unreasonable delay of the complainants and their ancestor in asserting this claim, without any excuse whatever, for that which is alleged in the bill has been disproved, the legal presumption is, that the debt has been paid. [*431

But if this presumption cannot be maintained, and although the foregoing construction of the contract should be considered incorrect; still, the relief prayed for, ought not to be granted, after such extraordinary delay and negligence on the part of the complainants, and those under whom they claim. They have waited until it would be unreasonable to expect the testimony of living witnesses as to the adjustment of the claim. The land, in the meantime, has increased in value sevenfold, and may have passed into the hands of innocent purchasers; such is alleged to be the fact, as to the share of Edmund Rogers. Under such circumstances, a court of chancery will not interfere, but leave the parties to their remedy at law.

It is further insisted, that the complainants have failed to bring the necessary parties before the court. All persons having an interest in the suit ought to be made parties, either as complainants or defendants. In this case, the four daughters of the testator are each entitled to one-sixth part of the land, during their lives, with remainder to their children respectively in fee; and they cannot be divested of their interest, without giving them an opportunity of asserting their rights. Any decree in this case against Thomas and Edmund Rogers would not, of course, conclude the other devisees who are not defendants; and the court will not entertain a suit, when it is apparent, that, for the want of proper parties, the decree can be of no avail in finally settling the controversy. And although the daughters of George Rogers may have an equitable interest only, it is not the less necessary that they should be made defendants. The *cestui que trust* is a necessary party to a suit in chancery, brought agaist the trustee, concerning the trust property. *Calverley* v. *Phelp*, 6 Madd. Ch. 144. The complainants' bill has, therefore, been properly dismissed by the circuit court, and the decree ought to be affirmed.

*Story, Justice, delivered the opinion of the court. After stating the case, he proceeded:—This is an appeal from a decree of the circuit court of Kentucky district, dismissing the bill in equity, brought by the appellants against the appellees. Three points have been made at the argument by the appellees, either of which, if established, would be fatal to the bill in its present shape; and two of them would be fatal in any shape. The first is, that the contract of sale was not absolute, but terminated by the non-fulfilment of the conditions at the end of the stipulated period: the second is, that the lapse of time is a bar to all equity in the plaintiffs: and the third is, that the proper parties for a decree are not before the court. [*432

In the first place then, was the contract such as it is represented to be

by the appellees? We are of opinion, that taking into view the whole transaction, its proper interpretation is such as their argument supposes. It is true, that the bond of Rogers to Dickinson, taken alone, presents only the common case of a contract for a sale of land, at a specific price, with an undertaking to make a good and lawful deed of the land, when required by the vendee. But the other bond, executed contemporaneously by Dickinson to Rogers, is to be taken into consideration in ascertaining the true nature of the transaction. That bond, however inaccurate in its phraseology, shows, that the real contract between the parties was, that Rogers should make a fair and indisputable title to Dickinson, of the land, on or before the 1st of January 1795; and if no conveyance was then made, then Rogers was to stand indebted to Dickinson in the said sum of 45*l.* Now, we think, that no other just interpretation can, under the circumstance, be put upon this language, than that the parties intended, that Rogers should perfect his title to the land by a patent, and should make a conveyance of an indisputable title to Dickinson, on or before the 1st of January 1795; and if not then made, the contract of sale was to be deemed rescinded, and the 45*l.* purchase-money, was to be repaid to Dickinson. What strengthens this interpretation is, that the 45*l.* was not at the time actually paid, but was merely the amount of an antecedent debt due from Rogers to Dickinson; and the bond of the latter contains no stipulation on his part, to pay *433] *the balance of the purchase-money, except upon a conveyance made within the prescribed period. If the parties had intended the sale to be absolute, the bond of Dickinson would have contained an absolute agreement to pay that balance, as the other bond did an absolute agreement to make a conveyance, when required. We think, too, that the total omission of Dickinson, in his lifetime, to take any step to enforce the sale, furnishes a strong corroboration that he so understood the matter.

But in the next place, if this difficulty could be (as we think it cannot be) surmounted, the objection from the lapse of time is equally decisive. Courts of equity are not in the habit of entertaining bills for a specific performance, after a considerable lapse of time, unless upon very special circumstances. Even where time is not of the essence of the contract, they will not interfere, where there has been long delay and *laches* on the part of the party seeking a specific performance. And especially, will they not interfere, where there has, in the meantime, been a great change of circumstances, and new interests have intervened. In the present case, the bill is brought after a lapse of 29 years. It is true, that the vendor died within the year, and that he had not, at the time of the contract, a complete title to the land; but a complete title was afterwards obtained by his father, who was his heir, in the year 1799; and Dickinson did not die until seven years afterwards. During the period of eleven years after Dickinson had a perfect right (if ever) to demand a strict performance of the contract, he never took a single step to assert his right, or to compel performance. After his death in 1806, no step was taken by his heirs or devisees, for the purpose of asserting any claim, until 1819; and no suit was commenced until 1823. The manner in which this delay is accounted for in the bill, is wholly unsatisfactory. The grounds stated are, the distance of the parties from each other, their intervening deaths, the difficulty of ascertaining who were the heirs, and the residence of the latter in a different state. But any

reasonable diligence would have enabled Dickinson and his legal representatives to have ascertained who the heirs of Rogers were. His father and heir resided in the same state with Dickinson, for many years; and the acting executor under the will of the father did not remove into Kentucky until several years after the probate of the *will. There is, therefore, [*434 no ground, upon which the gross *laches* or indifference of the parties can be reasonably excused. And such a long silence does, as we have already intimated, justly lead to the conclusion of a consciousness, that the right, if any, was exceedingly doubtful. In the meantime, the property has materially risen in value, from the general improvement and settlement of the country, and this furnishes an additional reason for not disturbing the existing rights of property. This view of the case renders it unnecessary to consider the other point, as to the non-joinder of proper parties.

The bill contains no alternative prayer for a return of the 45*l.*, if specific performance should not be decreed; and, under the circumstances, we are of opinion, that it ought not to be decreed, under this bill, upon the prayer for general relief, it not being a case specially made by the bill. The decree of the court below will, therefore, be affirmed. As the general dismissal of the bill will not, in our judgment, under the circumstances, operate as a bar to future proceedings at law, to recover the 45*l.*, if an action be otherwise maintainable, we do not think it necessary to dismiss the bill, without prejudice, thereby throwing the burden of the costs of the reversal upon the defendant. The plaintiff may, therefore, well be left to his legal remedy, such as it is, for any indemnification under the contract. Decree affirmed.

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 Kentucky, and was argued by counsel: On consideration whereof, it is ordered, adjudged and decreed by this court, that the decree of the said circuit court in this cause be and the same is hereby affirmed, with costs.

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*Eliza Brown, Appellant, *v.* Frances Swann and others. [*435

Practice.

An appeal was taken at the December term 1832 of the circuit court for the district of Columbia, to the January term 1833 of this court; but the appeal was not entered to that term, but was entered to January term 1834. The case being called for argument, the defendant asked for a continuance, which was granted.

In this case, the appeal was taken at the December term 1832 of the circuit court of the district of Columbia to the supreme court. The appeal was not entered to the next term of the court, but was entered at January term 1834. The cause being called on for argument, the defendant asked for a continuance, which was resisted by the appellant.

Marshall, Ch. J., said:—Though the case is not within any rule of this court, yet the court are of opinion, that as the appellant did not enter the appeal at the proper term, the other side ought not to be compelled peremptorily to go on with the cause at this term.