

*OCTOBER TERM, 1800.

Present—PATERSON, Justice, and PETERS, District Judge.

HOLLINGSWORTH *v.* FRY.*Construction.—Time in equity.*

The great rule of interpretation, with respect to deeds and contracts, is, to put such a construction upon them, as will effectuate the intention of the parties, if such intent be consistent with the principles of law.¹

Equity will not interfere in favor of one who has been guilty of gross *laches*; a complainant must use legal diligence in the enforcement of his rights.

When the time of payment of the consideration-money mentioned in an agreement is made a substantial and not a mere formal circumstance, it enters into the essence of the contract; and a failure to pay at the day, will not be relieved against in equity.²

IN EQUITY. The bill, after setting forth a variety of transactions between the parties, relative to a tract of land, mills and mill-race, in Dauphin county, stated, that on the trial of a writ of partition for the premises, they consented to withdraw a juror, and entered into the following agreement, dated the 19th of November 1790 :

“It is mutually agreed, that judgment shall be entered for the defendant, on the day in bank, on the 3d of January next, unless the said plaintiff, or Robert Ralston, his assignee, shall, previous thereto, by such good and unexceptionable sureties, in such sum, and in such manner, as shall be approved of by the honorable judges of this court, engage for, and secure, the payment of one moiety of all moneys which the defendant hath advanced or expended, or shall appear to be reasonably entitled to, for or by reason of his improvement of the lands in question, or for any matter relative thereto, or of any other lands held in common or jointly between the said parties, within six months from the said 3d day of January next. But in case such unexceptionable security shall be given, and a question shall arise as to the *quantum* of the moneys to which the defendant shall be entitled, then John Kean, Joshua Elder and John Carson, gentlemen, or any two of them, shall determine the said sum, on full hearing of the said parties, their witnesses and proofs. And in case of a full conformity thereto, *and the money being *346] fully paid and discharged as aforesaid, within the said period of six months, and not otherwise, that then judgment shall be entered in this action, not only for the lands in the declaration mentioned, but of all lands and mills held jointly or in common between them the said parties, by virtue of any article between them, or between them and John Fisher, made. But if the moneys so due shall not be paid and discharged, within the said period, the defendant shall hold the said lands free and discharged from the claims of the said plaintiff, and all persons claiming under him; and judgment shall in such case be entered for him in this action.”

It also appeared, from the pleadings and exhibits, that the bond re-

¹ Bradley *v.* Steam-packet Co. 13 Pet. 89.

² Garnett *v.* Macon, 2 Brock. 185; Stinson *v.* Dousman, 20 How. 461; Longworth *v.* Taylor, 1 McLean 395; s. c., 14 Pet. 172; Mason *v.*

Wallace, 3 McLean 148; Lester *v.* McDowell, 18 Penn. St. 91; Patchen *v.* Lumborn, 31 Id. 314; Chew *v.* Phillippi, 32 Id. 205; Waters *v.* Waters, Id. 307.

Hollingsworth v. Fry.

quired by the agreement, was duly executed on the part of the plaintiff ; that the referees undertook the business of the reference ; and that on the 13th of April 1791, the following report was filed :

" We, the referees, &c., report, that after hearing the parties, their allegations and witnesses, and investigating their accounts and vouchers, we are of opinion, that George Fry is reasonably entitled to the sum of 3646*l.* 6*s.* 2*½d.* specie ; that being the one moiety or half part of his expenditures on the lands, mills and their appurtenances in question, after giving John Hollingsworth credit for the money by him expended on the same lands."

It also appeared, that the plaintiff filed a number of exceptions, which the supreme court, after argument, overruled, on the 2d of July 1791, and gave judgment on the report ; and that on the 26th of September 1796, the complainant sent his son, to tender to the defendant the amount of the report in his favor ; which the defendant refused to accept.

Upon these general premises, the bill proceeded to complain, that the defendant had appeared in the supreme court, by his counsel, on the 2d of July 1791, alleging the exceptions to the report to be untrue, whereas, the complainant averred that they were true ; that although notice had been given to produce books and accounts, none were produced on the hearing in court ; that the conduct of the referees was improper in various particulars ; that the books, accounts and statements laid by the defendant before the referees, were untrue and fraudulent ; that the defendant suppressed several material documents which he alone possessed ; and that the value of a moiety of the property in dispute was at least 10,000*l.* The bill concluded with a prayer for a perpetual injunction against all proceedings on the judgment ; for a discovery and account ; for a partition of the premises ; and for general relief.

*To this bill, the defendant filed a plea and answer : 1st. Plea in bar, a former bill in equity, for the same cause, filed by the complainant, on the 24th of April 1792 ; demurrer to the bill, and joinder in demurrer ; and a decree, in April term 1796, pronouncing the demurrer to be sufficient, and dismissing the bill ; which decree remained unreversed and in full force. 2d. Plea in bar, the judgment of the supreme court of Pennsylvania (a competent tribunal), upon the agreement, reference and report, which judgment remained still in force ; with an averment that the complainant did not, within six months after making or filing the report, nor after the exceptions were overruled (which exceptions contained all the matter alleged in the bill) and the judgment rendered, pay or offer to pay to the defendant, the said sum of 3646*l.* 6*s.* 2*½d.* or any part thereof. 3d. Answer, That the judgment was fairly obtained ; that the defendant did not submit to the referees any books, accounts or statements that were untrue or fraudulent, nor suppress any material documents ; that on the 26th of September 1796, the complainant's son came to him with a bank-bill ; but never before that time ; and that the defendant had been exposed to all intermediate expenses and casualties, &c.

A general replication was filed ; and after argument, the following opinion was delivered, Judge PETERS declining to take a part in the decision :

PATERSON, Justice.—The great rule of interpretation with respect to deeds and contracts, is, to put such a construction upon them, as will effect-

Hollingsworth v. Fry.

tuate the intention of the parties, if such intention be consistent with the principles of law. In the present case, there is no difficulty in coming at the intention, as it is clearly and forcibly expressed in the agreement, and is capable of receiving one construction only. The time of payment is made a substantial, and not a mere formal, circumstance; it enters into the essence of the contract; and therefore, must be observed. (a) The court cannot decree against the legal and express stipulation of the parties themselves. The situation of the parties, the nature of the property, and the speculative spirit of the project, were powerful inducements for drawing up the agreement, in the plainest and strongest terms, so as to leave no doubt as to the intention, and to render the time of performance a cardinal point.

Again, if the agreement would admit of another construction, the complainant, under the circumstances of the case, comes too late to avail himself of it. The door of equity cannot remain open for ever. The complainant did not make a tender of the money, until a lapse of five years after the termination of the time limited by the contract. So far was he from using legal diligence, that he has been guilty of gross delay. (b) In cases of the present kind, equity will not suffer a party to lie by, until the event of *348] the *experiment shall enable him to make his election, with certainty of profit one way, and without loss any way. This mode of procedure is unfair, contrary to natural justice, and in exclusion of mutuality.

There is a strange mixture of legal and equitable powers in the courts of law of this state. This arises from the want of a distinct *forum* to exercise chancery jurisdiction; and therefore, the common-law courts equitize as far as possible. Whether, if relief be proper, the supreme court of this state could have extended it to the complainant, it is unnecessary to determine. Thus

(a) Although it has been intimated in some cases, that time could not be made of the essence of contract, even by a positive stipulation of the parties, there has been no decision to that effect. In other and later cases, it has been admitted, that parties may make time of the essence of the agreement, and whether they have done so must depend on all the circumstances. *McCrelish v. Churchman*, 4 Rawle. 26. The principle seems to be firmly established, that time may be a circumstance of decisive importance, but that it may be waived by the conduct of either party. It is incumbent on a plaintiff, whether at law or in equity, to show that he has used due diligence in the performance of his part of the contract, or that if he has not, his negligence arose from some just cause, or has been acquiesced in; but it is not necessary for the defendant to show any particular inconvenience; it is sufficient, if he has not acquiesced in the negligence of the plaintiff. *Ibid.* In a deed conveying land, and reserving a rent-charge, the grantor covenanted to release and discharge the rent, if the grantee should, within seven years, pay a certain sum; it was held, that after a lapse of eighteen years from the time prescribed, he could not call upon the grantor to perform his covenant. In re *Henry Shoemaker*, 1 Rawle 89. So, where a judgment in ejectment was entered by agreement of the parties, to be released on the payment of a certain sum, on or before a certain day, time was considered the essence of the contract, and the money not having been paid, on or before the day, the judgment became absolute and indefeasible. *Gable v. Hain*, 1 P. & W. 264. See also *Jordan v. Cooper*, 3 S. & R. 564; *Roberts v. Beatty*, 2 P. & W. 63; *Shaw v. Turnpike Co.*, Id. 454. But see *W'son's Adm'rs v. Lewis*, 2 Yeates 467; *Decamp v. Feay*, 5 S. & R. 328.

(b) Time, generally speaking, is not essential in equity; but considerable delay, without sufficient reason to account for it, will be considered satisfactory evidence of an abandonment. *Bellas v. Hays*, 5 S. & R. 443.

Thurston v. Koch.

much, however, might and ought to have been done, on the part of the complainant; he ought, when notice was given for him to show cause why judgment should not be entered, to have laid the equity of the case before the judges of that court, who, if they thought proper, might have deferred the entering of judgment, or ordered it to be entered on terms, to wit, to be vacated on payment of the awarded sum, by a limited period. But the complainant, although he had previous notice, did not avail himself of an appeal to the discretion of the court; but suffered judgment to pass against him, without making any objection.

There being no equity in the complainant's case, his bill must be dismissed, with costs.

THURSTON v. KOCH.

Double insurance.

In cases of double insurance, the assured may, at his election, sue either set of underwriters, and recover a full indemnity;¹ and if there be a recovery against one, the others are bound to contribute ratably, in proportion to the amount insured.²

THIS cause came before the court on the following case stated by the counsel, *Condry*, for the plaintiff, and *Ingersoll*, for the defendant.

"On the 13th of October 1796, William I. Vredenburg, of the city of New York, merchant, caused himself to be insured, at the city of New York, in a certain policy of insurance, which was subscribed by the plaintiff, in the sum of \$14,500, upon any kind of goods and merchandise, laden or to be laden on board the brigantine Nancy, Captain King, master, lost or not lost, at and from any port and ports in the West Indies, and at and from thence to New York, and there safely landed, beginning the adventure upon the said goods and merchandises, from the lading thereof on board the said vessel, at the West Indies.

"On the 17th of October 1796, the said William I. Vredenburg, by Jacob Sperry & Co., his agents, caused himself to be insured, at the city of Philadelphia, in a certain other policy of insurance, which was subscribed by the defendant, in the sum of \$1300, with other underwriters, in the whole amounting to \$12,000, upon all kinds of lawful goods and merchandises, lost or not lost, laden or to be laden on *board the said brigantine Nancy, at and from Cape Nichola Mole, to any ports and places [*349 in the West Indies, to trade, at and from either of them, to New York, beginning the adventure from and immediately following the loading thereof on board the said brigantine, at Cape Nichola Mole, and so to continue, until safely landed at any ports and places in the West Indies, and at

¹ *Potter v. Marine Ins. Co.*, 2 Mason 475; *Craig v. Murgatroyd*, 4 Yeates 161. This has since been remedied by the introduction into policies of the clause respecting prior insurances. *Gibson, J.*, in *Peters v. Delaware Ins. Co.*, 5 S. & R. 481. The rule is the same in cases of fire insurance. *Lucas v. Jefferson Ins. Co.*, 6 Cow. 635.

² In this, the court adopted the English rule, contrary to that adopted in this country, that the

other insurers should contribute ratably, and not according to priority of contract. *Stacey v. Franklin Fire Ins. Co.*, 2 W. & S. 542-3, *ROGERS, J.* But to constitute a case of double insurance, there must be the same risk, and for the same person. *Warder v. Horton*, 4 Binn. 529; *Columbian Ins. Co. v. Lynch*, 11 Johns. 233. And see *Peters v. Delaware Ins. Co.*, 5 S. & R. 473; *Wells v. Philadelphia Ins. Co.*, 9 Id. 103; *Sloat v. Royal Ins. Co.*, 49 Penn. St. 14.