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as confided to him by the articles for the government of the navy. On the contrary, as has been shown, all his acts within the limits of the discretion given to him are to be regarded as *primâ facie* right till the opposite party disprove this presumption.

The judgment below must therefore be reversed, and a *venire de novo* awarded, and the new trial be governed by the principles here decided.

HUGH M. PATTON, ADMINISTRATOR, AND HUGH M. PATTON AND OTHERS, HEIRS OF ROBERT PATTON, DECEASED, APPELLANTS, v. JAMES TAYLOR, ADMINISTRATOR, AND JAMES TAYLOR, JOHN W. TIBBATS AND ANN W. HIS WIFE, GEORGE T. WILLIAMSON AND JANE M. HIS WIFE, AND HORATIO T. HARRIS AND KETURAH L. HIS WIFE, HEIRS OF JAMES TAYLOR, DECEASED.

A bill in chancery filed by the purchaser of land against his vendor, to restrain the collection of the purchase-money, upon the two grounds of want of title in the vendor and his subsequent insolvency, without charging fraud or misrepresentation, cannot be sustained.

Relief will not be given on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue in the pleadings.¹

¹ DISTINGUISHED. *Fehrle et ux. v. Turner*, 77 Ind., 535. CITED. *Baker et al. v. Nachtrieb*, 19 How., 130; and see post, *159 n; *Hart v. Hannibal &c. R. R. Co.*, 65 Mo., 509; *Blanks v. Walker*, 54 Ala., 117; *Chapman v. Lee*, 55 Id., 616; *Harding v. Commercial Loan Co.*, 84 Ill., 251; *Jones v. Fulghum*, 3 Tenn. Ch., 193; *Strong v. Waddell*, 56 Ala., 471; *Wyatt v. Garlington*, Id., 576; *Dietz v. Mock*, 47 Iowa, 451; *Tobin v. Bell*, 61 Ala., 125; *Oakes v. Buckley*, 49 Wis., 592; *Ryerson v. Willis*, 81 N. Y., 277, 280. A general allegation of fraud and duress will not suffice. *Sullivan v. Sullivan*, 21 Law Rep., 531.

It is an established rule in equity, that when the vendor of lands has not the power to make a title, the vendee may, before the time of performance, enjoin the payment of the purchase-money, until the ability to comply with the agreement is shown; but then the court will give a reason-

able time to procure the title, if it appears probable that it may be procured. *Galloway v. Finley et al.*, 12 Pet., 264. Compare *Buford v. Guthrie*, 14 Bush (Ky.), 690; *Schilling v. Short*, 15 W. Va., 780.

But except in special cases, a vendee in possession cannot, at law or in equity, contest the payment of the purchase-money by showing an alleged defect of title; he must rely on the covenants, if any there are, in his deed. *Wanzer v. Truly*, 17 How., 585. But where fraud and insolvency on the part of the vendor are shown, the vendee may resist payment by cross-bill, setting forth the defects of title, and charging the fraud and insolvency. *Leird v. Abernathy*, 10 Heisk. (Tenn.), 626; or he may have an injunction against the collection of the unpaid balance of the purchase-money. *Houston v. Hurley*, 2 Del. Ch., 247. The purchaser cannot recover back the price paid, or resist its payment, so

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It was error in the court below to reject the testimony of an attorney upon the ground of his being security for costs, when the party for whom he was security had already obtained a judgment against his adversary, and also upon the ground of his being interested, when, as a mere naked trustee, he held certain notes only for the purpose of paying the money over to his clients, when recovered.

*THIS was an appeal from the Circuit Court of the
 *133] United States for the District of Kentucky, sitting as a court of equity.

Patton was a citizen of Virginia, and Taylor of Kentucky.

On the 30th of January, 1818, Taylor addressed a letter, dated Frankfort, Kentucky, to Patton, in Virginia, in which he gave an account of certain other lands, and then proceeded as follows:—

“I shall go from this to Lexington, to the court which commences this week, and do what I think right. I think your price too high for your land for me to make much, if any, profit from it; but must conclude to take it at five thousand dollars, for the two tracts of 1000 acres each, payable one half in one year from the time you send me the deed, and the other half in two years from that time; I mean the two tracts entered and surveyed in the name of Thos. Gaskins; It appears to have been patented in the name of Hicks & Campbell; you can have the deed made out, as I suppose you have the patents, and I suppose the chain of title, which it will be necessary to forward, also to be recorded here, if it is not done; I shall expect a general war-

long as he retains possession of the land. *Long v. Saunders*, 88 Ill., 147; *Summerall v. Graham*, 62 Ga., 729; *Haynes v. White*, 55 Cal., 38; *Pershing v. Canfield*, 70 Mo., 140; *Tarleton v. Daily*, 55 Tex., 92; *Cartwright v. Culver*, 74 Mo., 179. But see *McLaren v. Irvin*, 63 Ga., 275. The doctrine that a purchaser who has paid the price, and who has not been disturbed in his possession, cannot demand the restitution of the price, has no application to a contract entered into in error produced by the fraud of the vendor. *Formento v. Robert*, 27 La. Ann., 489.

When the covenants have been actually broken, and the grantor is insolvent, a court of equity may restrain him from proceeding to collect the whole amount of the purchase-money, and may offset the damages occasioned by the breach of the covenants of seizin or warranty against such unpaid per-

chase-money. *Woodruff v. Bunce*, 9 Paige (N. Y.), 443.

In Alabama, a court of equity will rescind the contract at the suit of a vendee who contracted for a good title, and who has abandoned the possession on the discovery of want of title in his vendor; although the proof shows only a mistake on the part of the vendor in his assertions of title, without fraudulent misrepresentations, and although the vendee might have a remedy by action at law for deceit, or on his covenant of warranty. *Baptiste v. Peters*, 51 Ala., 158. Such also is the rule in Tennessee. *Puckett v. Draper*, 58 Tenn., 395; *Saint v. Taylor*, 12 Heisk., 488; *Johnson v. Siesfield*, 6 Baxt., 41. S. P. *McManus v. Cook*, 59 Ga., 485. So, also, where the purchaser has been evicted by paramount title. *Adams v. Kibler*, 7 So. Car., 47.

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ranty deed, expressing more or less as to the mode of authenticating the deed; our mutual friend, Col. Mercer, can give you information if you should be at loss, as he has conveyed to me several times. The land lies in the Virginia military district, and in the county of Hopkins. I presume you will have no objection to making the conveyance, and taking my bonds; and indeed this shall oblige me to consider the contract binding on me, as above stated, on receiving the deed as aforesaid for the said land, payable as aforesaid.

"If you want any security, or a mortgage, say so."

The letter then proceeded to speak of other matters. It may be proper to remark, that it was contended in the argument, that, in transcribing and printing, an error had occurred in the punctuation. The words "if it is not done" belonged, it was said, to the words which follow them, viz. "I shall expect," &c., which, it was argued, would materially change the meaning.

On the 13th of July, 1818, Patton replied, by a letter from which the following is an extract:—

"Fredericksburg, 13th July, 1818.

"GEN. JAMES TAYLOR:—

"Dear Sir,—I am favored with yours of the 22d of June, and not less surprised than you seem to be about the 2,000 acres of land, in name of Thomas Gaskins, offered you, the 17th of March last year, at 15s. per acre; and, in yours of the 5th of July, you advise me to take \$4,000, as the *134 lands in that quarter were generally of an inferior quality, and could not rise in value. In that month I wrote to you that I would not take less than 15s. per acre; to this letter, though one was requested, I never had any reply, nor did you ever say you would accept my offer, until the 30th of January, six months after the last offer was made, for the letter of the 18th of December was only putting you in mind of the offer made in July. This letter, I will candidly acknowledge, I did not remember having written, not having kept any copy. There is something in the extended delay of your answer which I do not like, nor do I think it right; but I am anxious to avoid all misunderstanding, and, during my whole life, have never stood on trifles. You may, therefore, have the land at 17s. per acre, one half payable in twelve months from the time my offer was renewed, and the remainder twelve months afterwards. Your own bonds will be considered as sufficient security for the amount. By this decision I am placed in an awkward situation with the

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young man with whom I made a conditional contract, and who has not, as I am informed of, returned from that county.

"The land patents are in the name of Thomas Gaskins, for whose services the land was rendered, were by him conveyed to William Forbes, and by him to Hicks & Campbell, of whom I received and will give you a deed, with a warranty, as soon as you reply to this letter. I hope Willis's representatives will not buy, and you are at liberty to take any lot you think best, but I will not take 15s. for any part of it."

On the 3d of September, 1818, Patton and wife executed a deed in fee simple to Taylor for the land in question, with a covenant for further assurances and a general warranty.

The bonds for the purchase-money appear to have been previously executed, and were as follows, viz.:—

"I, James Taylor, of the county of Campbell, and State of Kentucky, do oblige myself, my heirs and administrators, to pay to Robert Patton, of the town of Fredericksburg, and State of Virginia, the sum of \$2,500, in current money, on the 30th day of January, 1819, as witness my hand and seal, this 5th day of August, 1818. JAMES TAYLOR.

"Witness: PHILIP H. JONES."

On which there were the following receipts, to wit:—

Receipt for \$600.

"July 1st, 1817, received from James Taylor the sum of six hundred dollars of the within. HUGH M. PATTON."

*135] *By direction of Hugh M. Patton, agent of Robert Patton, the within note is credited with \$450, as due January 30, 1819; and I this day received from James Taylor three hundred and seventy-three and eighty-two hundredths dollars, November 19, 1819.

\$373 $\frac{82}{100}$.

T. F. TALBOTT,
Attorney for Robert Patton."

"I, James Taylor, of the county of Campbell, and State of Kentucky, do oblige myself, my heirs and administrators, to pay Robert Patton, his heirs or assigns, of the town of Fredericksburg, and State of Virginia, the sum of \$2,500, in cur-

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rent money, on the 30th January, 1820, as witness my hand and seal, this 1st day of July, 1818.

JAMES TAYLOR. [SEAL.]”

On which there was the following assignment, to wit:—

Assignment.

“For value received, I assign the within bond to Theo. F. Talbott.

ROBERT PATTON,

By H. M. Patton, his Att’y in fact.

“July 1st, 1819.”

In May, 1819, Hugh M. Patton, the son and agent of Robert Patton, went to Kentucky, and there executed the assignment above mentioned to Talbott, as security for a debt due by Robert Patton, and for the collection of which Talbott was the attorney.

On the 23d of October, 1819, Taylor addressed to Patton the following letter:—

“Newport, October 23d, 1819.

“Sir,—At the time you forwarded me the deed for the land I bought of you in the county of Hopkins, patented to Thos. Gaskins, you sent me nothing to show how the title had passed to you. The land is listed on the auditor’s books for taxes in the name of Thomas Southcombe, and for a number of years I have paid the taxes in his name for you. When your son, Hugh M. Patton, your agent, was here, I inquired of him how you derived your title from Southcombe, and whether he had a regular conveyance from Gaskins. He told me that you had some kind of transfer from Southcombe for all his debts, lands, &c., but did not seem to know much about it, but promised me, immediately on his getting home, to inform you of my uneasiness and doubts whether the chain of title was perfect, and to notify me, and indeed to request of you to send me a copy of the different conveyances, or, if they were in this county, to inform me [*136 where they could be found. I have not *had a line from either of you since his return. I also consider myself very badly treated on another score. Your son had drawn a bill for \$300, in favor of Talbott, of Lexington, on which he procured Mr. Talbott to be indorser; and, to indemnify him for doing so, he had lodged with him my bond to you for the first payment of the said land. Your son wished to get the bond released, and requested of me to give Mr. Talbott a

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guarantee that the bill should be duly honored. This I did not hesitate to do. A few weeks ago I received a notification from the F. and M. Bank of Lexington, that the bill, although accepted by you, had been returned to the bank protested for non-payment; and I am called on by Mr. Talbott to take up the bill, and relieve him. I made every exertion in my power, when your son was here, to aid him in discharging a debt due here, which was in the hands of Mr. Talbott for collection, and was largely in advance for your taxes in this State and Ohio. The times, as to a good circulating medium, are truly embarrassing; but, had I been sure the title to the land sold me had been secure, I could have made sales to have met the payments, or nearly so; but I have been deterred from selling one acre, although offered the specie funds for a considerable purchase. Taking the whole transaction together, I must confess it is not such as I expected from Mr. Robert Patton of Fredericksburg. If there had been any little defect in the title to this land, which can be removed, and I had been notified of it and had it explained, I should not have been disposed to throw difficulties in the way, if there was a prospect to have any difficulty removed. When I go up, I shall have the records examined, and, if no chain of title can be found, I shall refuse to pay any more money till these difficulties are removed. I am sure you cannot think I am acting incorrectly in the course I am about to pursue. I am, Sir, your obedient servant,

JAMES TAYLOR.

“ROBERT PATTON, ESQ.”

On the 29th of February, 1820, Taylor addressed to Patton the following letter:—

“Washington City, February 29, 1820.

“ROBERT PATTON, ESQ.:—

“Sir,—I wrote you from Newport, Ky., last fall, requesting information whether the conveyances had been regular from the original patentee, Thos. Gaskins, for the two thousand acres of land sold me by you, lying in Hopkins county, on the waters of Pogue’s Creek, and which I understood you purchased of Thos. Southcombe, to which letter I am without
 *137] an answer, and at which I confess I am much surprised. I *examined the records at Frankfort, Ky., and it appears to me the conveyances are regular down to Southcombe; and, if you have a proper conveyance from him (Southcombe), all will be right, I think. I assure you I wish you and myself to arrange our business in the most amicable manner;

but you must be sensible into what difficulties I was thrown by not receiving the wished-for information, which was promised me by your son and agent, Hugh M. Patton, Esq., and then requested of you in my letter aforesaid, addressed to you specially on the subject, and particularly when I was compelled to take up your said son's bill for 300 and odd dollars, which I had, at the request of your said son, guaranteed should be paid by you, which you failed to do, and which I had to pay, to exonerate Theo. F. Talbott, in the F. and M. Bank of Lexington. The true state of this business I did not understand till after I had paid the bill, and I do not think said Talbott treated either yourself or myself with fairness; as he afterwards informed me he was authorized to redraw, but which he told me he had no idea of doing, to make himself responsible. Under all these embarrassments, I informed you I could not think of selling the land, until I was assured the legal title was in you before you sold to me. Will you be good enough to give my agent, Philip H. Jones, the necessary information, and, if you have them, the proper conveyance from Thos. Southcombe to you for the said tract of land; and, if not, to send me the document, or an authenticated copy of it, under which you claim the said tract of land. I am, very respectfully, Sir, your obedient servant,

JAMES TAYLOR."

On the 20th of June, 1820, Patton addressed the following letter to Taylor, which closed the correspondence:—

"Fredericksburg, 20th June, 1820.

"GEN. JAMES TAYLOR:—

"Dear Sir,—Hearing of your being in Washington in the spring, and calculating on a certainty of seeing you in this place, I was greatly disappointed at not having had some conversation with you during your stay, or previous to your departure from the city. By a letter just received from Mr. Talbott, covering a duplicate of one of yours to him of the 1st instant, wherein you say you will resist the payment of the bonds assigned Talbott by my son, when in Kentucky. This information has surprised and astonished me much. And surely, my dear Sir, you will not persist in this course, but, on mature consideration, pay the amount. When I sold you these 2,000 acres of land, Southcombe had long been dead; hence, as his agent, which you know I was, I could not make *a deed as such, but I did what you required. [*138 I made you a deed in my own name, with a general warranty, and no objection was made to this conveyance until

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the money was required. I sent you the original patents by Murdock Cooper, of your State, and I now subjoin a short history of this land. Your 2,000 acres, together with 1,500 more, were granted Col. Gaskins for military services, by him sold to William Forbes, by Forbes sold to Robert Campbell, of Richmond (once Hicks & Campbell), and by Robert Campbell and Ann, his wife, conveyed to Thomas Southcombe; which last deed is in my possession. All Southcombe's matters have been settled long ago, when this land was rated at \$2, and paid for by me. And there is not a human being has a shadow of claim to this land but myself; and I have secured it to you by my conveyance. We have long been acquainted; we have long been friends. You have acted as my agent much to my satisfaction; and I ever reposed the fullest confidence in your honor and integrity. Under these circumstances, it would give me great pain if any misunderstanding should arise between us; and I cannot help thinking that, on due consideration, you will change your course, and pay the bonds assigned Talbott, which was done under very peculiar circumstances, and may have placed that gentleman in a very disagreeable situation respecting them. I am, dear Sir, your most obedient servant,

ROBERT PATTON."

On the 7th of July, 1820, Patton brought a suit against Taylor upon the bonds, in the Circuit Court of the United States for Kentucky, and at November term, 1820, obtained judgment by default.

At the same term, viz. November, 1820, Taylor filed his bill on the equity side of the court, reciting the purchase and continuing thus:—

"And at the time of the purchase aforesaid, and the execution of the said promissory notes, your orator entertained no doubt that the said Patton had a good title to the said land, and was enabled to convey the same to your orator; but now, so it is, may it please your honors, your orator has since discovered that the said Patton has no title for the said land from the said Southcombe, who is dead, and whose heirs are unknown to your orator. That the said Patton has nevertheless commenced actions on the said notes, on the common law side of this court. And your orator, being unable to make defence at law, the said Patton has recovered judgments on the said notes. Your orator annexes hereto, as a part of this bill, a letter from the said Patton, acknowledging
 *139] his defective title to *the said land. That your orator has already made sundry payments on account of said

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notes. And he apprehends that the said Patton will proceed to enforce payment of the residue, unless prevented by the interposition of this honorable court, which would be contrary to equity. In tender consideration whereof," &c., &c.

The bill then prayed for an injunction, which was granted.

In December, 1822, Patton filed his answer, admitting he had no legal title to the land, but insisting that he had bought it from Southcombe, and paid him for it on a final settlement of their affairs; that he had a power of attorney from Southcombe to sell it, which he did not act upon, owing to Southcombe's death; that he took possession of the land more than twenty years past, paid the taxes regularly, till he sold to Taylor, who entered and has held the possession ever since, and has sold part of the land; that Taylor was for years his agent to pay taxes on his lands in Kentucky, knew his titles generally, and particularly the defect of the title to this land, and bought relying upon his warranty; and that the possession under him prevented any reasonable apprehension from adverse claims. The answer further alleged, that, having received a payment of part of the first note on the 1st of July, 1819, the defendant thereupon, with the consent and in the presence of Taylor, assigned the notes to T. F. Talbott, to be applied in payment of a debt held by Witherspoon, and relies that the assignment prevents a cancelment of the notes.

At the May term, 1823, Taylor filed an amended bill, charging that the purchase was by letter; that Patton had become insolvent, having been at the time of sale a man of wealth; and exhibiting copies of three letters addressed by him to Patton of the 30th January, 1818, 23d October, 1819, and 29th February, 1820, and calling upon Patton to produce the originals or to admit the copies to be correct, and to show what evidence he had of a conveyance from Southcombe.

Robert Patton having died, Taylor, in November, 1829, filed a bill of revivor against Hugh M. Patton and others, his children and heirs at law, alleging that their ancestor died insolvent and intestate, and that no administration had been granted upon his estate.

The heirs of Robert Patton answered in July, 1844, and stated that they knew nothing of the contract between Taylor and their father; and that they adopted the answer of the latter. Hugh M. Patton stated, that, as the agent of his father, he went to Kentucky to pay off a decree, which had been obtained by Bledsoe's heirs, and assigned to Talbott, an attorney at law, in satisfaction of a debt to Witherspoon and Muirhead; *that he received from Taylor \$600 on the first note, and then drew upon him, in favor of Tal- [*140

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bott, a draft, which he would not accept; and that he afterwards assigned the notes to Talbott, without having heard of any objection by Taylor to the title of the land. And in conclusion, the heirs all say that they cannot exhibit the originals of the letters shown by Taylor; nor have they any testimony, written or other, to show in what manner their father derived his title from Southcombe, other than he states in his answer.

In November, 1844, Hugh M. Patton appeared in the suit as administrator of his father, and adopted the answer already filed as his response in that character.

In May, 1845, the cause came on for hearing, a general replication having been filed.

On the opening of the cause, the complainant moved the court to reject and suppress the deposition of Theodore F. Talbott, taken and filed on the part of the defendants, and when it was offered on their part for proof, objected to its being read, on the ground that the witness was, when he deposed, interested in the event of the suit against him, the complainant, and with the defendants; and, for proof of his ground of objection, relied on the matter stated by the witness himself, in his deposition, and read the bond of the witness, as the surety of the defendants' intestate and ancestor, for costs, in his action at law against the complainant, wherein the judgment herein enjoined was recovered by default; and also read the assignment to the witness of one of the promissory notes of the complainant, the one payable on the 30th of January, 1820, on which the judgment enjoined was rendered in these words:—

“For value received, I assign the within note to Theodore F. Talbott.

ROBERT PATTON,

By Hugh M. Patton, his attorney in fact.

“July 1st, 1819.”

But the decision of the matter not having been insisted on, it was reserved for discussion, with the merits of the cause. Whereupon, the complainant read the depositions of Matthew T. Scott, Patterson Bayne, and James E. Davis, for proof that the witness was not credible, in case of the decision of the court that he is competent to testify. Whereupon the cause progressed, and this matter having been therein fully discussed, and the court now sufficiently advised thereof, it seems to the court that the deposition of Talbott, on the grounds of objections by the complainant, and because the matters stated as facts by the witness, neither of themselves,

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nor in connection *with the other proofs, are in any way material in the cause, ought to be rejected and [*141 disregarded. But in order that, on any revision of the decree which shall be rendered, the defendants may have the benefit of the matters stated in the deposition, if worth to them any thing, and the witness is competent, whilst the complainant has the benefit of his objections to the competency of the witness, or of his proofs to establish that he is not credible, the depositions are all allowed and read, subject to the above objections, and so retained in the record, to be respectively good for what they are worth, or held for naught, according to the law of the case.

On the 13th of May, 1845, the Circuit Court decreed a perpetual injunction against Patton, rescinded the sale and conveyance of the land, and gave directions for placing the parties in the condition they were in at the time of the contract.

From this decree the heirs of Patton appealed to this court.

The cause was argued by *Mr. A. H. Lawrence* and *C. S. Morehead* with whom was *Mr. Badger*, for the appellants, and by *Mr. Loughborough* and *Mr. Underwood*, with whom was *Mr Ewing*, for the appellees.

The argument on the part of the appellants was as follows:—

This is a bill for the rescission of an executed contract for the sale of land, on the ground of defect of title and the insolvency of the vendor. No mistake, no fraud, no misrepresentation being set forth as the grounds of equitable interference; but the facts that the complainant had received a defective title with warranty, not knowing of the defect, and that the warrantor had since become insolvent, are relied on as the reasons for the interposition of a court of equity.

I. The first position which the counsel for the plaintiffs in error take is, that there are not set forth in the original and amended bill sufficient legal grounds to rescind an executed contract; and that, if every allegation therein had been admitted by the defendant, the court could not properly have decreed according to the prayer of the complainant.

II. The second position is, that the important allegations in the bill, though they should in themselves be deemed sufficient in law, have neither been admitted nor sustained by proof.

The first proposition, then, is, that there are not sufficient

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grounds set forth in the bill and its amendment for the rescission of an executed contract, even if all the allegations had been admitted in the answer.

What are those allegations? Why, that the complainant, Taylor, purchased from Patton, the defendant, 2,000 acres of *land for \$5,000, for which he gave two several prom-
 *142] issory notes. That Patton executed a conveyance to complainant for said land, with a covenant of general warranty. That at the time of said purchase, complainant "entertained no doubt that the said Patton had a good title to the said land." That complainant has since discovered that the said Patton has no title to the said land, and that defendant has nevertheless commenced actions on the said notes; and that, at the time of said purchase, defendant was supposed to be a man of opulence, but has since become insolvent. This embraces every material averment of the bill and amendment. A purchase, conveyance with general warranty, defect of title, ignorance on the part of the vendee of such defect, and the insolvency of the vendor, compose the gravamen of the complainant's allegations. There is no charge, either technically or substantially, of fraud, artifice, misrepresentation, or circumvention of any sort, actual or constructive.

In discussing the legal sufficiency of this bill, we leave out of view all of the cases cited in the printed brief on the other side, in which misrepresentation, or fraudulent concealment, or fraud of any kind, formed an element. For the present we take the bill as it is.

The decisions (and we quote, more especially, those in Kentucky) may be reduced to the following heads, as to the rescission of contracts in the absence of fraud:—

1st. Where the contract is executory, the vendee may, under circumstances, obtain a rescission, if the vendor has no title. *Miller v. Long*, 3 A. K. Marsh. (Ky.), 326; *Cummins v. Boyle*, 1 J. J. Marsh. (Ky.), 481; *Gale v. Conn*, 3 Id., 540; *Payne v. Cabell*, 7 Monr. (Ky.), 202; *Waggener v. Waggener*, 3 Id., 556.

2d. Where the contract is executed by conveyance, with warranty of title, there can be no rescission in any case that has not been tainted by fraud. *Simpson v. Hawkins*, 1 Dana (Ky.), 305; 1 J. J. Marsh., 481; *Gale v. Conn*, 3 Id., 540; *Wiley v. Fitzpatrick*, 3 Id., 583; *Campbell v. Whittingham*, 5 Id., 100; 7 Monr., 202; *Thompson v. Jackson*, 3 Rand. (Va.), 504.

3d. There is no relief in equity, by injunction or otherwise, where the contract has been executed by conveyance

with warranty, and the vendee let into possession, unless the warranty has been broken, and an eviction taken place. *Simpson v. Hawkins*, 1 Dana (Ky.), 305, 328; *Rawlins v. Timberlake*, 6 Monr. (Ky.), 232; *Taylor v. Lyon*, 2 Dana, 278; *Luckett v. Triplett's Adm'r*, 2 B. Monr., 40; *Bumpus v. Platner*, 1 Johns. (N. Y.) Ch., 218; *Abbot v. Allen*, 2 Id., 523; *Edwards v. Morris*, 1 Ohio, 532.

*4th. There may be relief in equity of some sort, as by arresting the payment of the purchase-money, or a part thereof, in case of eviction and the insolvency of the warrantor, or the appropriation of the purchase-money to remove an incumbrance, where the warrantor is insolvent and unable to remove it, but not a rescission of the contract. *Morrison's Adm'r v. Beckwith*, 4 Monr. (Ky.), 75; *Rawlins v. Timberlake*, 6 Id., 232; *Simpson v. Hawkins*, 1 Dana (Ky.), 305; 2 Id., 278, 279; 2 B. Monr. (Ky.), 40.

5th. Possession taken generally amounts to a waiver of the ordinary equitable right of objection to the title. *Calcraft v. Roebuck*, 1 Ves., 226; *Burrough v. Oakley*, 3 Swanst., 168; *Fleetwood v. Green*, 15 Ves., 594; *Margravine v. Noel*, 1 Mad., 316; *Burnell v. Brown*, 1 Jac. & W., 173; *Fluyder v. Cocker*, 12 Ves., 26.

II. But suppose we are wrong in this view of the case, still it is contended that the essential allegations in the bill have neither been admitted nor proved; or, in other words, that, upon the pleadings and proof, the complainant was not entitled to the relief sought.

A preliminary inquiry of importance arises as to the admissibility and effect of the letters contained in the record.

The only letters alleged to have passed between Patton and Taylor, which have been so proved as to make them legal evidence against the defendant, are those marked A and B, on pages 32 and 33 of the record. The letter in Patton's name, which is made an exhibit in the case, and is found on page 4 of the record, is not proved to have been written by Patton; and the letters from Taylor, alleged copies of which are filed as exhibits with the amended bill, and are found on pages 8, 9, 10, and 11 of the record, are not proved either to have been written or received. They are, consequently, not evidence in the case. They are not admitted in the answer to the amended bill, and are consequently denied, and are no proof against the defendant, though (being allegations of the complainant) they are evidence in his favor. 2 Dan. Ch. Pr., 974-976; *Young v. Grundy*, 6 Cranch, 51.

If we are right in this, then the complainant's case is

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stripped of every vestige of support from evidence as to the essential allegations of the bill.

But we go further, and assert, that if these letters were all proved, as alleged, the case of the complainant would not be materially changed.

How would the case then stand upon the pleadings and proof? The vital allegation in the bill is, that, at the time of the purchase, complainant "entertained no doubt that Patton *had a good title to said land," but has since dis-
*144] covered that he had none, &c. (Record, p. 3.)

The answer (p. 6) denies the allegation of ignorance of the defect on the part of the complainant, and avers, on the contrary, that he was his (Patton's) agent for many years; well knew the nature of his titles in general, and well knew the title to these 2,000 acres in particular; and was well apprised of the defective link in the chain of title thereto; and accepted a deed with general warranty, relying on the warranty, &c.

Here, then, the parties are at issue. The complainant alleges that he was ignorant of any defect in the defendant's title, and the defendant positively denies that allegation. Has the complainant proved it, even admitting all the letters in the record to be properly in the case? We think that not only has he failed to prove the allegation, but that the evidence in the case fully sustains the denial.

There is not one scintilla of direct evidence that the complainant made this purchase in ignorance of the title. And the only indirect or circumstantial evidence of that fact is, the general presumption that a man would not buy a defective title, knowing it to be so, and the literal construction of a letter of the 13th July, 1818. (Record, p. 32.)

That letter is not (like the others) an exhibit in the case, but is introduced on proof of handwriting. It is relied on in the brief on the other side as the main prop of the complainant's case. An interpretation is given to it entirely different from that which we shall hereafter show properly belongs to it; but take it as the other side understand it, and does it support the allegation in the bill, that Taylor was ignorant of the state of Patton's title? What is their interpretation of it? Why, they make it amount to a misrepresentation by Patton to Taylor respecting the title; they make it amount to an assertion that he (Patton) had a conveyance of the land to himself. Now, suppose the letter does amount to a misrepresentation of the title (which we deny), does that prove Taylor's ignorance of the real state of the title at the time of the purchase? We think not, for two reasons:—

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1st. That there is no logical or legal connection between the falsehood of one party and the belief of the other party in that falsehood. It is a *non sequitur*, as well in law as in morals, that a man must be ignorant of the truth because another man has uttered an untruth in his presence.

2d. Because this letter was written six months after the time when the bargain was concluded by the acceptance of Patton's previous offer.

The amended bill alleges (Record, p. 8) that the complainant *agreed to the purchase by a letter dated 30th January, 1818, and exhibits a copy of the letter; and [*145 yet the brief on the other side asserts that it was the letter of the 13th of July, 1818, which induced Taylor to make the purchase, which Taylor himself says he had made by letter the January previous, and produces the letter to prove it.

It is manifest, then, that the complainant has utterly failed to prove the most important allegation in his bill.

Having thus shown that the complainant's case, as set forth in his bill, is not sufficient in law for the rescission of an executed contract, and that, if it were, it is not supported by requisite proof, we would now ask the attention of the court to a position taken by the other side, in the printed brief, though not disclosed by the pleadings.

It is, that the proof presents a clear case of actual fraud, such as courts of equity have always recognized as sufficient in itself for the setting aside of any contract.

To this view of the case we have several answers, either of which in itself would be sufficient:—

1st. Fraud is not alleged in the bill, either formally or in substance; and, consequently, if it should be proved, cannot be made the ground of a decree. It should have been put in issue by the pleadings. *Vattier v. Hinde*, 7 Pet., 282; *Boone v. Chiles*, 10 Pet., 177; *Bein v. Heath*, 6 How., 241; also, 3 Rand. (Va.), 507; 5 Johns. (N. Y.) Ch., 82, 83; 11 Ves., 239.

2d. There is nothing proved which is a sufficient ground for the cancelling of an executed contract, even admitting all the letters to be properly in the case.

We take the law as it is laid down by this court in *Smith v. Richards*, 3 Pet., 36, adopting the views of Justice Story in 1 Eq. Jur., §§ 200, 202. That a misrepresentation, in order to constitute a fraud relievable in equity, must be of something material, constituting an inducement or motive to the act or omission of the other, and by which he is actually misled to his injury; and it must be of something in which the other party places a known trust and confidence in the

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other, and not equally open to both parties for examination and inquiry.

Let us apply this doctrine to the facts in this case.

The only representation of any sort, as to title on the part of Patton, to be found in the whole record, is the letter of July 13th, 1818.

In this letter Patton says:—"The land patents are in the name of Thos. Gaskins, for whose services the land was rendered, were by him to Wm. Forbes, and by him to Hicks & Campbell, of whom I received, and will give you a deed, with a warranty, as soon as you reply to this letter."

*146] *On this letter *Mr. Loughborough* relies to make out his proof of fraud; and in it (if anywhere) resides all the misrepresentation to be found in the case.

With regard to this letter, we would first remark, that the character and relation of the parties, and the circumstances of the case, go strongly to show that it never was intended by the writer, and was never understood by him to whom it was written, to convey the idea which a casual reading of it might convey to a stranger. There were relations between these parties which rendered an indistinct allusion as intelligible as a labored explanation. Taylor was the agent of Patton, who, in regard to these lands, was himself the agent of Southcombe, in whose name these lands had for years stood and been taxed, and in whose name Taylor himself had for years paid those taxes. Patton knew that Taylor was aware of Southcombe's title, and yet he sets down and writes to Taylor a letter, which, if it meant what the other side suppose, he well knew Taylor would at once perceive to be false. If the expression "to Hicks & Campbell, of whom I received, and will give you a deed, with a warranty," means that Hicks & Campbell had conveyed this land to him in his own name, why, it was not only a falsehood, but the most idle of all falsehoods, because told to a man who he knew was perfectly aware of the intermediate title of Southcombe. The parties to this transaction were no higglers for a bargain; they were men of character and standing; they were men of sense. The construction, then, which would make a single expression in a hasty letter the ground of so serious an accusation against such a person should be an unavoidable construction. Such is not the case here. There is a plain and fair construction of this expression, which is consistent with the truth and the good faith of Patton. It is the literal meaning of the language. He did receive a deed from Hicks & Campbell, not in his own name, but in the name of his principal, Southcombe; and he means exactly what he means

in the letter found on the 4th page of the record, where he says, "and by Robert Campbell and Anne, his wife, conveyed to Thomas Southcombe; which last deed is in my possession."

If, then, it had been his intention to deceive Taylor, would he not have said that he had a deed from Southcombe, rather than from Hicks & Campbell? How, then, was the matter to be explained? Why, Patton was Southcombe's agent, and Taylor knew it, with a full power of attorney to sell lands. As such agent, he had received a deed for Southcombe; and, as such agent, he then had the power to give a deed. Had Southcombe lived, there would never have been any difficulty. But Southcombe having died, and of course the power of *attorney having died with him, Patton, [147 who had in the mean time bought the lands, and acquired an equitable title thereto, had not procured a legal title.

There can be no doubt that this is the true explanation, from the character of the men and their relation to each other; and there can be no doubt that it was so understood by them at the time, and afterwards, inasmuch as Taylor never once alludes to any misrepresentation in this letter; never speaks of any inconsistency between the letter and Patton's statement of the chain of title in his letter of June 20th, 1820; takes no notice of any misrepresentation, either in his original or amended bill; does not even make this letter an exhibit in the case; and always speaks afterwards of Southcombe's title as a matter well known to him. We think, therefore, that we are justified in asserting that the construction now put by counsel upon that letter was not that which the parties put upon it.

But if an unfavorable construction of this letter is insisted on (as it doubtless will be), then we say that Taylor was not misled or deceived by it. It stated what he knew to be false. It gave a chain of title without embracing Southcombe's title at all, and yet Taylor had the best reason in the world for knowing that Southcombe had until recently, and for years, been the owner of the land in controversy.

Taylor, in his letter dated October 23d, 1819, says,—“The land is listed on the auditor's books for taxes in the name of Thomas Southcombe, and for a number of years I have paid the taxes in his name for you.”

Also, in his letter of February 29th, 1820, he says,—“I wrote you from Newport, Ky., last fall, requesting information whether the conveyances had been regular from the original patentee, Thos. Gaskins, for the two thousand acres of land

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sold me by you, &c., and which I understood you purchased of Thomas Southcombe," &c.

And the deposition of Winston says that, in 1815, "I was requested to visit said lands by General James Taylor, who acted as agent for Robert Patton, of Fredericksburg, Virginia, who was agent for Thomas Southcombe."

Taylor then knew that Patton had not, in his own name, received a deed from Hicks & Campbell, but that, if he had any valid conveyance at all, it must have been from Southcombe.

And further, if the letter of July 13th, 1818, contained a downright misrepresentation, still it did not lead to, nor form any inducement to, the contract sought to be cancelled.

We have already referred to the allegation in the amended bill, commencing as follows:—"Your orator further shows, that the contract for the purchase of the land from the *148] *defendant was made between the parties by letters; your orator agreeing to the purchase by a letter, under date of January 30th, 1818, addressed to the defendant at Fredericksburg." Here, then, the complainant himself avers that he had agreed to the contract six months prior to this letter of July 13th, 1818. Admitting, then, that this letter of July 13th contained a downright falsehood, and admitting that at the time Taylor believed it, still it did not lead to the contract; it did not form an inducement on Taylor's part to that contract, and can therefore have no weight with the court upon the question of rescinding that contract.

But it is further maintained, that Taylor has an indefeasible title, by twenty years' adverse possession.

Taylor received legal possession of the land with his deed, which bears date September 3d, 1818, and has never been disturbed in his possession up to the day of trial.

In an analogous case, *Jarboe v. McAfee's Heirs*, 7 B. Monr. (Ky.), 282, the following language is used:—"In the duration of the possession, it ought to be brought up to the time of trial, and not to be made stop at the commencement of the suit." The possession of the vendee up to that period inures to the benefit of, and goes to strengthen, his vendor's title. See *Voorhies v. White's Heirs*, 2 A. K. Marsh. (Ky.), 28; *Coussmaker v. Sewall*, 2 Sug. App., 336.

The sale of a portion of the land, for the direct tax, and the marshal's deed to McLean, can present no difficulty in the case. It shows on its face that the land was sold as the property of Gaskins, the patentee, when all parties agree, and the record shows, that it was then the property of South-

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combe, entered in his name, and the taxes paid for him by Taylor himself.

If this were not the case, it is not shown that the requisitions of the law were complied with by the marshal, and the law is well settled that no presumption is indulged in favor of such a deed. See *Taylor's Heirs v. Whiting*, 2 B. Monr. (Ky.), 269-272; 9 Cranch, 69; 3 Cond. Rep., 271-274; Id., 395.

In the case of lands sold for the non-payment of taxes, the marshal's deed is not even *prima facie* evidence that the prerequisites of the law have been complied with; but the party claiming under it must show positively that they have been complied with. *Williams v. Peyton*, 4 Wheat., 77.

The case thus far has been discussed without reference to the assignment of the notes upon which the judgment enjoined was obtained, or to the controverted deposition of Talbott.

The deposition of Talbott states that the notes were transferred to him for the benefit of Witherspoon and Muirhead, and that Taylor had notice of and assented to the assignment.

*Is Talbott a competent witness?

1st. He held the notes of Taylor as a mere trustee, [*149 to be applied, when collected, to the extinguishment of a debt due Witherspoon and Muirhead. They were assigned to him for that purpose only. That a trustee is a competent witness, see 1 Stark Ev., 168; 6 Binn. (Pa.), 481; 1 Rand. (Va.), 219; 2 Id., 563; Doug., 139; 4 Burr., 2254; 1 P. Wms., 287, 3 Atk., 604; 13 Mass., 61.

2d. Without any contract whatever, he states that he expected to charge five per cent. commission whenever he should collect the debt of his clients. This has never been held a disqualification of itself alone. An agreement for a sum contingent on success might perhaps affect his competency.

3d. Talbott executed a bond, as surety for Patton, to pay the costs in the action at law against Taylor. The condition of that bond was, that it was to be void if Patton or Talbott should pay "all cost, that may be incurred in said suit, or with which he may become legally chargeable."

The common law suit having been decided in favor of Patton, Talbott did not become legally chargeable with any costs to Taylor; and the result of the present suit cannot, in any manner, change his liability. The costs against Taylor of the action at law may be perpetually enjoined, yet Talbott would be no further bound than if the injunction were dissolved. In either case, his liability on his bond would be precisely the

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same. It is not perceived, therefore, how his having executed this bond can affect his competency as a witness.

But Talbott's credibility has been assailed by depositions of three witnesses.

Objection might be taken to the kind of evidence given to impeach the character of Talbott. But, allowing its admissibility for that purpose, we say that the testimony of Talbott is corroborated in its material statements. The answer of Hugh M. Patton, so far as it goes, corroborates Talbott's deposition.

Talbott's statement, also, that a receipt for \$ 1,500 was written on the wrong note, which note was afterwards destroyed, and a new one written and dated on that day, is corroborated by the fact, that one of the notes in the record is dated as he says.

The case, as the counsel for the appellants conceive, stands thus. The complainant in the court below files a bill in which he alleges that he had purchased from the defendant 2,000 acres of land, and that he had received a deed, with a warranty, supposing the title of his vendor to be good. He alleges the subsequent insolvency of the vendor, the failure of the title, and prays that the contract may be annulled

*150] The defendant *denies the allegation of the complainant's ignorance of the state of the title, which puts the complainant to the proof of the fact. For proof he offers copies of letters from himself to the defendant, which are not admitted by the answer, nor shown to have been ever received, and are therefore not evidence in the case. He also offers, upon proof of handwriting, a letter written and dated six months after the time when he himself alleges the contract to have been concluded, in proof of his ignorance of the state of the title at the conclusion of the contract, and of fraudulent misrepresentation on the part of the defendant. This constitutes the substance of the complainant's case.

For the appellants it is insisted, that whatever equity there is in the bill is sworn away by the answer; that the evidence offered, so far as it is admissible, is not pertinent to the point in issue, namely, the ignorance of complainant of the defect in title, or, if pertinent, does not establish that fact; and that as to the alleged fraudulent misrepresentation, (even if it amounted to such,) inasmuch as it was not put in issue by the pleadings, did not mislead the complainant to his injury, was long subsequent to the date of the contract, and therefore formed no inducement to it, and was upon a subject equally open to both parties, it was consequently not suffi-

cient in law or equity to establish that fraud upon which an executed contract will be rescinded.

The argument on the part of the appellees was as follows:—

I. Before noticing the principal questions in the cause, the counsel for Taylor will ask the attention of the court to the objections, sustained by the Circuit Court, to the competency of Talbott as a witness.

1. His deposition states, that, as attorney for Witherspoon and Muirhead, he had obtained judgments against West, who assigned to him eight tenths of a decree of Bledsoe's heirs against Patton, which he took as a security, and for the use of Witherspoon and Muirhead. That H. M. Patton, on his visit to Kentucky, in 1819, drew bills on his father, by which the means were raised to obtain the remaining two tenths of the decree; and assigned to him, and placed in his hands, the two notes of Taylor, to be collected and applied in payment of the decree.

Talbott, then, was the agent and attorney of Witherspoon and Muirhead for the collection of their claim against Patton on the decree, and he was the trustee of Patton to collect the amount due from Taylor, and apply it in discharge of the decree. He says the notes were assigned to him. They were assignable by the law of Kentucky, and the assignee has the *legal right of action. The assignment of one of the [*151 notes appears in the record.

Assuming his statement to be true, had he not such an interest in the subject as disqualified him? He holds and legally owns the debt which Taylor seeks to enjoin. He should have sued at law in his own name as assignee; and his use of the name of Patton as plaintiff was in some sense a fraud, to give the Circuit Court jurisdiction, or perhaps designed to enable him to be a witness. Had Taylor appeared in the action at law, he might have successfully pleaded the assignment to Talbott in bar. *Neyfong v. Wells*, Hard. (Ky.), 562.

May an assignee, by suing in the name of his assignor, make himself a competent witness? That he cannot was decided in *Gallagher v. Milligan*, 3 Pa., 178; *McKinley v. McGregor*, 3 Whart. (Pa.), 399. Talbott, the assignee, suing in the name of Patton, might have been attached for the costs. *Ontario Bank v. Worthington*, 12 Wend. (N. Y.), 597.

2. But Talbott was not a trustee merely. He had a material interest to be promoted by the success of the party in

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whose behalf he testified. He says Patton and West are insolvent. Then the debt due to Witherspoon and Muirhead can only be made out of Taylor. True, the witness says he has no interest in the suit or its event, other than the compensation he may be entitled to for his services; and that he has no conditional or contingent fee depending on the recovery. Yet, on cross-examination, it appears that, if he had received the money, he would have charged a commission on it of five per cent., and he yet expects to charge it when the money is collected. Such commission is not unreasonable; and doubtless, if Talbott had received the money, he would have been permitted to retain it. Neither West nor Patton himself could interpose between him and Taylor, or the marshal, and prevent his receiving the debt, nor would there be any necessity for a prior engagement to enable Talbott to retain the commission. Then does not the witness testify in the view that, if the party producing him succeeds, he will get a fund out of which to retain a commission, and that, if he fails, it will be lost? A witness so situated was held incompetent, in *Maryland v. Jefferson*, 2 Pick. (Mass.), 240; *New York Slate Co. v. Osgood*, 11 Mass., 60.

3. Talbott gave bond, as the surety of Patton, to pay the costs of the action at law against Taylor. He was thereby rendered incompetent in that case. *Chadwick v. Upton*, 3 Pick. (Mass.), 442; *Jones v. Savage*, 6 Wend. (N. Y.), 658; *Miller v. Henshaw*, 4 Dana (Ky.), 333; *Jack v. Carneal*, 2 A. K. Marsh. (Ky.), 518; *Brandigee v. Hale*, 13 Johns. (N. Y.), 125.

*152] *The ultimate liability for these costs depends upon the result of this suit. If Taylor fails, he will have to pay all the costs at law. If he succeeds, Talbott will have to pay all that portion of them provided for in the bond. He has therefore the same disqualifying interest in this cause that he would have had in the action at law. He will gain or lose by the direct operation of the decree.

II. But if Talbott can be heard as a witness, the attention of the court is asked to the depositions of Davis, Bayne, and Scott, which discredit him.

III. The equity of Taylor cannot be affected by a transfer made without his knowledge.

IV. But suppose Taylor was present at, or assented to, the assignment, is he thereby precluded from asserting his equity?

V. The copies of Patton's letters are evidence.

(The argument upon these preliminary points is omitted.)

VI. We will now proceed to the questions arising upon the merits.

In the first place, it will be observed that the treaty for the sale, and the sale itself, were wholly by letters between Taylor, at Newport, Kentucky, and Patton, in Fredericksburg, Virginia. That between these parties there existed friendship, and an honorable confidence, and that Taylor was the agent to pay taxes on Patton's lands in Kentucky.

The land which was the subject of the sale is in Hopkins county, Ky., 200 miles from Taylor's residence. Taylor had never seen it prior to the purchase, nor has he since, so far as appears in the case.

The sale was first proposed by Patton.

(The argument here reviewed the letters.)

The tenor of these letters leaves no room to doubt that Taylor was not hunting for objections to get clear of the contract, but the contrary; though he had lost sales by not getting the title, he still desired to complete the bargain, and to perform it on his part.

At last, on the 20th of June, 1820, Patton by letter confessed that he had no title, and falsified the representation in his letter of July 13th, 1818. He stated that Southcombe was the proprietor of the land by regular deeds from the grantee, that he was Southcombe's agent, and had a power of attorney to sell the land, which died with Southcombe, and that he had settled Southcombe's matters, and allowed him \$2 per acre for the land.

The letter does not make a case upon which Patton could in equity obtain the title. It does not state, nor does it anywhere appear in the cause, that he had any writing from *Southcombe, or that he had in fact paid him for the [*153 land. There is no proof on this point, neither has Patton or his heirs endeavoured to get the title from Southcombe.

VII. There is, then, in this case every fact necessary to entitle Taylor to the relief which the Circuit Court gave to him. He placed confidence in the statements of Patton. Patton knew that Taylor was about to purchase trusting to his assurance, and the most material point, of fact not opinion, inducing the purchase, the title of the vendor, was falsely represented by Patton. Taylor had no means of knowing the truth, and Patton knew he had not, and knew also that, if he had, the confidence reposed in him would prevent a pursuit of them. It does seem that if there can be such a misrepresentation as will avoid a sale of land, it is the one in this case, and, however honest in his intent Patton may have been, from the belief, (if he cherished it,) that the heirs of Southcombe would not claim the land, his representation to

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Taylor that he had the title, being untrue, and necessarily known by him to be so, amounts to that actual fraud which all the authorities concur in stating to be sufficient to avoid the sale. 1 Story, Eq., §§ 200-202; *Neville v. Wilkinson*, 1 Bro. Ch., 546; *Fulton v. Roosevelt*, 5 Johns. (N. Y.) Ch., 174.

This court has rescinded sales of land made upon misrepresentation of title by the vendor. In *Boyce's Ex'or v. Grundy*, 3 Pet., 210, a sale of land was set aside, at the instance of the vendee, on the ground of misrepresentation of title and quality, leading to the purchase; and the court overruled the objection, too, that the powers of the Circuit Court sitting in chancery were, under the sixteenth section of the Judiciary Act, incompetent to afford relief to the vendee, after judgment at law against him for the purchase-money.

The case of the gold mine, *Smith v. Richards*, 13 Pet., 26, applies and enforces the principle, that a misrepresentation, whether fraudulent or by mistake, is a sufficient ground in equity to set aside any conveyance.

VIII. This is the case of a purchase by a vendee who confided in a material and fraudulent misrepresentation of his title by the vendor, and who did not discover the fraud until after the conveyance had been made, and after the vendor had become insolvent; and who, on these grounds, asks that he shall not be compelled to pay for what he has not obtained, and cannot obtain.

Shall he be told that he must rely solely on the insolvent vendor's warranty?

If the purchaser has dealt with his eyes open, and with a knowledge of the facts,—has obtained and yet peaceably *154] enjoys *the possession,—he may have no right to anticipate his legal remedy upon the warranty to which he has fairly trusted. But it would be unjust to throw a party upon a warranty in a case where, from the fraud of the other party, he did not think he should ever have need to rest upon it. To hold him bound in such a case would be to make, not to enforce, a contract. The simple principle is, that the vendor shall not object to the claim of the vendee that which would not have existed but for his own fraud. Accordingly, it is held that, where there was fraud in the sale of land, the vendee may have relief in chancery, before eviction or disturbance. Butler's note (332) to Co. Litt., 384; *Edwards v. McLeay*, Coop. Cas., 308.

In Kentucky it has always been held that a fraudulent misrepresentation or concealment by the vendor respecting his title will entitle the vendee to relief in chancery, though he has a warranty.

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In *Breckinridge v. Moore*, 3 B. Monr. (Ky.), 635, the purchaser was relieved, on the ground of a misrepresentation by the vendor of his title. The rule laid down was, that the vendor was bound to disclose the defects in his title.

In the late case of *Vance v. House's Heirs*, 5 B. Monr. (Ky.), the settled doctrine of the court is stated to be, that the vendee in possession, and with a warranty, may have relief upon either of the grounds of fraud, insolvency, or non-residence of the vendor. No rescission was made in that case, because neither of these facts existed, and the vendee did not appear to be in any danger of losing the land.

So in *Simpson v. Hawkins*, 1 Dana (Ky.), 303, the court recognized the rule, that for fraud the vendee may claim a rescission. The majority of the court in that case refused to rescind, because there was no fraud; and the defect in the title was merely technical,—such as might never injure the vendee, and such as, from the facts of that case, he was presumed to have known.

In this case, Taylor did not live in the county in which the land was, nor had he ever been there. The taxes had been paid on the land at the seat of government, as Southcombe's. Patton assured him he had a chain of title and conveyances complete to himself. He had no opportunity of knowing that this was untrue. Patton knew this, and that as to the title Taylor would, as he did, repose upon his statements. Patton's title, if he had one, would not necessarily appear upon record, in the county in which the land was, even if Taylor had visited it. The record of a deed is not necessary to its operation; the title passes by the delivery of the instrument, though creditors and purchasers may assail it, if not recorded. All *that Patton said in his letter of July, 1818, to Taylor [*155 may have been true, and yet no traces of the deed to him have been found on record in the county; and so, on the other hand, if Taylor had searched the records and found no deed to Patton, it would not thence follow that the latter had stated an untruth. He was the agent of Patton, and between persons standing in the relation of principal and agent, the rules of equity require in their dealings the utmost degree of good faith. Story, Eq. Jur., 224, and the cases there cited. It is obvious from the correspondence, that Patton knew the full extent of the confidence which Taylor yielded to his assertions.

But Taylor agreed to take the deed with the chain of Patton's title. He expected both. The letters prove beyond doubt, that Taylor looked to receive the chain of title with the deed. It was not sent, nor was Taylor informed where

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he could find it on record. But the deed which was sent contained a covenant that Patton would do any thing further necessary to confirm the land to Taylor,—that he would furnish the conveyances under which he held and sold. Taylor applied for these repeatedly by letters, and through H. M. Patton. They were never furnished, and neither Patton nor his heirs ever took any steps to get the title from the heirs of Southcombe.

But it would not be a sufficient answer, even if true in fact, that Taylor might, by inquiry, have discovered the misrepresentation. Equity will not tolerate a party to say to his vendee, “Though I have told you a falsehood as to the title, believing which, you bought the land, still you ought not to have believed me; you should have suspected, not confided.” It would be a strange rule of equity, that would permit fraud to escape on such a ground. True it is said, in some cases, that the assertion of a falsehood as to the quality of a thing which is present at the sale, and which the vendee sees or may see is false, shall give him no claim. And this because the law justly supposes he trusted to his own senses rather than to the statements of the other. But the principle does not apply where the thing sold is at a distance, and much less does it apply to statements about title.

And a misrepresentation of the title, though it be on record, is a fraud that will entitle the vendee to a rescission, even if he has a warranty, and is in possession. *Young v. Hopkins*, 6 Monr. (Ky.), 23. In this case the court said,—“It is in effect assumed by the court below that, the title-deeds being matter of record, Young was bound to look into them, and must be presumed to have seen them, as he took a deed for the lot. If this is to excuse from the effect of false representations with *regard to title, it would obviate the consequences of fraud in nearly all landed controversies, as all our titles are matters of record. Indeed, men prudent and cautious will examine them before they purchase, as the title papers are the safest guide. But we know that, in many cases, the credulous and confiding dealers do not do so, but act on seeing how the possession is held, and the representations of the vendor. If these representations are false, the maker of them is, in such case, responsible.”

And in *Campbell v. Whittingham*, 2 J. J. Marsh. (Ky.), 100, the court said,—“Had the nature of Campbell’s title to the lot purchased by Whittingham and Peters been fraudulently concealed, or had he made fraudulent representations on that subject, by which the purchasers were seduced into the contract, and induced to accept an insufficient title, it would

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have presented a clear case for rescission, notwithstanding the title and the encumbrances on the lot might have been matters of record; for it does not present a satisfactory defence to an allegation of fraud in the sale of land as to the title, to show that the conveyance had been recorded, whereby the vendee might, with proper diligence, have discovered the defect complained of, and respecting which the fraud was practised." In this case, the vendee was in possession under a deed with covenants of seizin and of warranty, and the rescission was because of the failure of the vendor to disclose an encumbrance existing by matter of record, in the county in which the parties and the land were. These are the principles of the law applicable to sales of land, in the State from which this cause came.

The principle of equity is happily expressed by the late chief justice of this court, in the case of *Garnett v. Macon*, 2 Brock., 250, in these words:—"Although I am entirely satisfied that there is no moral taint in this transaction, that the omission to give notice of Campbell's debt was not concealment to which blame, in a moral point of view, can be attached; yet a court of equity considers the vendor as responsible for the title he sells, and as bound to inform himself of its defects. The purchaser in making a contract may be excused for relying on the assurance of the vendor, implied in the transaction itself, that he can perform his agreement."

IX. It is shown on all sides that Patton, who was esteemed wealthy when the sale was made, became hopelessly insolvent, and so died. This fact has always been held sufficient to enjoin the collection of the purchase-money where there is a defect of title, even in cases free from fraud. The purchaser who is in danger of losing his land shall not be thrown upon the warranty of an insolvent vendor. *Simpson v. Hawkins*, 1 *Dana (Ky.), 303. The attention of the [*157 court is asked to the remark upon this point of Judge Nicholas, at page 318.

In *Morrison's Adm'r v. Beckwith*, 4 Monr. (Ky.), 73, the vendor's insolvency was made the ground of an injunction.

And where relief by injunction has been refused to the vendee (as in the cases in 7 Monr. (Ky.), 198; 3 J. J. Marsh. (Ky.), 584; 2 B. Monr. (Ky.), 40), it was upon the ground that insolvency was not proved as alleged, not in fact existing. In all these and other cases, the rule in case of insolvency was recognized.

(The rest of the argument is omitted.)

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Mr. Justice NELSON delivered the opinion of the court.

This is an appeal from the Circuit Court of the United States held in and for the District of Kentucky, by the district judge.

Taylor, the complainant below, filed a bill against Robert Patton, the intestate and ancestor of the defendants, praying relief against two judgments recovered against him at law, upon securities given for the purchase-money of two thousand acres of land situate in the State of Kentucky, and sold and conveyed by the latter to the former. The bill was filed at the November term, in the year 1820; and the suit has been pending ever since. The sale and conveyance of the land took place September 3d, 1818, the consideration being \$5,000, payable one half on the 30th of January, 1819, and the other in one year thereafter. The deed contained covenants for further assurance, and of warranty, and the grantee entered into possession of the premises, and has held it ever since.

The only allegations in the bill upon which the complainant relied for staying the collection of the judgments, and setting aside the sale and conveyance, are, that the said Patton had no title to the land at the time of the purchase, nor since; and that he had become insolvent, and possessed no personal responsibility.

The defendant admits, in his answer, that he had no legal title, and that it was, at the time, in the heirs of one Thomas Southcombe, but insists that he had purchased the land of Southcombe, had paid for it, and had been in the peaceable possession of the same, and paid the taxes thereon, for more than twenty years, and until the time of the sale; and that the complainant well knew the nature and condition of the title at the time of the purchase, and the taking of the deed.

The answer also sets up an assignment of the securities taken for the purchase-money, from the defendant to Wither-
spoon and Muirhead, in payment of a decree in chancery which they held against him; that it was made in the presence, and with the knowledge and consent, of the complain-
*158] ant, and that *the suits were brought, and the judgments in question recovered, by them and for their benefit.

On the death of Robert Patton, the complainant revived the suit against his heirs and personal representatives, on the 13th of November, 1829. The answer to this bill, which relies mainly upon the facts set forth in the previous answer of Patton, was put in and filed in July, 1844.

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The cause was heard on the pleadings and proofs on the 13th of May, 1845, and thereupon it was adjudged and decreed by the court, that the contract entered into between the complainant and Robert Patton, for the purchase and sale of the land for the sum of \$5,000, as set forth in the bill and admitted in the answer, be rescinded and annulled; that the judgments recovered at law for the purchase-money be perpetually enjoined; and that the deed of the 3d of September, 1818, be cancelled and held for naught.

The decree then provides for the repayment by the heirs of Patton of such portions of the purchase-money as had been paid by Taylor, after deducting the rents and profits which he may have received from the premises, over and above expenditures for necessary repairs and improvements; and on such repayment, the possession is ordered to be delivered up to the heirs, and a reconveyance to be made by the complainant to them, with a covenant against his own acts affecting the title; and also providing that the heirs shall hold the lands in trust for the benefit of Witherspoon and Muirhead, the assignees and owners of the judgments at law.

The cause is then referred to the master, to take and state an account of the rents and profits, improvements, &c., upon the principles settled, and to report to the court.

There is some evidence in the case tending to prove that the defendant, Robert Patton, represented to the complainant during the negotiation between them for the sale and purchase of the lands in question, that he held at the time the legal title; and that the complainant had reason to believe that he would be invested with it by the conveyance of the 3d of September, 1818.

The circumstances, however, that Taylor was, at the time, and for several years before had been, the general agent of Patton in Kentucky to take charge of his lands in that State, including the premises in question, to pay the taxes, and negotiate sales to purchasers, lead to the conclusion, that he must himself have had some knowledge of the title, and that he was willing to risk it, on receiving a warranty deed from Patton, who was supposed to be a man of wealth. Where the truth of this matter lies, it is not material to inquire; for no such *question is made on the pleadings, or was [*159 involved at the hearing. It is not surprising, therefore, that the proofs in respect to it to be found on the record are vague and unsatisfactory; as, probably, the attention of neither party was particularly drawn to it. Indeed, it could not consistently have been, as the charge of fraud or misrep-

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resentation is not to be found in the bill as originally drawn, nor in the amended bill filed some two years and a half afterwards. Nor is it made in the bill of revivor, which was filed as late as November, 1829.

The relief prayed for is put, both in the original and amended bills, entirely upon the defect of legal title in Patton at the time of the conveyance, and in connection with this, his subsequent insolvency; and unless this ground alone is sufficient to sustain it, the decree of the court below cannot be upheld. And that it is not, we need only refer to the authorities on the subject. *Bumpus v. Platner*, 1 Johns. (N.Y.) Ch., 213-218; *Abbot v. Allen*, 2 Id., 519, *Gouverneur v. Elmen-dorf*, 5 Id., 79; *Simpson v. Hawkins*, 1 Dana (Ky.), 305, 308, 312; *James v. McKernon*, 6 Johns. (N. Y.), 543.

These cases will show that a purchaser, in the undisturbed possession of the land, will not be relieved against the payment of the purchase-money on the mere ground of defect of title, there being no fraud or misrepresentation; and that, in such a case, he must seek his remedy at law on the covenants in his deed. That if there is no fraud, and no covenants to secure the title, he is without remedy; as the vendor, selling in good faith, is not responsible for the goodness of his title, beyond the extent of his covenants in the deed. And further, that relief will not be afforded, even on the ground of fraud, unless it be made a distinct allegation in the bill, so that it may be put in issue by the pleadings.¹

It follows that the court below erred, and that the decree should be reversed, and the bill dismissed.

There is another point in the case in respect to which we think the court also erred, and which we will for a moment notice, namely, the rejection of the deposition of Talbott offered in evidence by the defendants below. The deposition tended to prove that the notes given for the purchase-money had been assigned and transferred by Patton to Witherspoon and Muirhead, his creditors, with the knowledge and assent of Taylor, in consideration of which the creditors agreed to postpone the payment of the demand against Patton. Talbott was rejected on the ground of interest, as it appeared upon the face of his own deposition,—1. as surety for Patton in the suit at law; and 2. as assignee of the notes for the benefit of Witherspoon and Muirhead.

In answer to the first ground, it is sufficient to say, that

¹ FOLLOWED. *Refield et al. v. 8 Otto*, 60. CITED. *Van Rensselaer Woodfolk*, 22 How., 328; *Noonan v. v. Kearney*, 11 How., 322. *Lee*, 2 Black, 508; *Peters v. Bowman*,

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*judgments had been recovered by default in the suits at law in favor of Patton. And to the second, that, [*160 according to the deposition, Talbott had no interest whatever in the result of the suit. He held the notes as a naked trustee, the proceeds of which, when collected, were to be applied to the payment of the debt of Witherspoon and Muirhead, his clients. He had no charge upon the fund, by any agreement or understanding with Patton, or his clients, for costs or commissions, as attorney or otherwise, that would make him an interested witness. There was no foundation, therefore, for the exclusion of his evidence. But it is unnecessary to pursue this inquiry, as the ground already stated sufficiently disposes of the case.

Decree below reversed, and bill dismissed, with costs.

ORDER.

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 now here ordered and decreed by this court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed, with costs, and that this cause be and the same is hereby remanded to the said Circuit Court, with directions to dismiss the bill of complainant, with costs.

EDWARD P. FOURNIQUET AND HARRIET JANE FOURNIQUET,
HIS WIFE, APPELLANTS, v. JOHN PERKINS.¹

The jurisdiction of courts of probate in Louisiana is confined to cases which seek an account and settlement of effects presumed to be held by the representative of a succession. It has not jurisdiction over cases of alleged fraud or waste, or embezzlement of the estate.

The District Courts are courts of general civil jurisdiction.²

Hence, where a petition was filed in the Court of Probate against an administrator, praying that he might account and also be held liable for maladministration and spoliation, it was proper to transfer the case for trial to the District Court.

The judgment in the District Court, being generally for the defendant, must be supposed to cover the whole case, and not to have rested upon only a branch of it, viz., a release which was pleaded by the defendant.

¹ Further decisions, 14 How., 313; 16 Id., 82.

² See *White v. Cannon*, 6 Wall., 443-450; *Dow v. Johnson*, 10 Otto, 182.