of this rule is sought, it must appear so clear as to be beyond doubt that the error did not and could not have prejudiced the party's rights. In the case before us this is not so clear. The plaintiff, by reason of the error of the court, had never been permitted to introduce the first step in the proof of her case. She had no interest in offering to show anything which might avoid the force of the deed read by defendants. If she could have proved it a forgery it would have done her no good in this suit, because she had failed, under the erroneous ruling of the court, to make out a *prima facie* case for herself. We cannot assume here that she might not have successfully avoided the effect of that deed, if the court had given her a standing in the case which would have made it avail her to do so.

The judgment of the Circuit Court must therefore be REVERSED, and the case remanded, with directions to award

A NEW TRIAL.

LEE *v.* DODGE.

In this case, which was a controversy of fact chiefly, a decree of conveyance of land alleged to have been agreed, by correspondence, to be conveyed, was refused; the court being compelled, from all the circumstances in proof, to think that the only witness who testified that a letter making a proposition of sale had been answered, accepting it, labored under a mistake.

APPEAL from the Circuit Court of the United States for the Northern District of Illinois.

The appellants were the heirs-at-law of G. W. Lee, and, on the strength of the title which they had inherited from him, had obtained in the Circuit Court just named, a judgment in ejectment against Dodge and others for a part of lot 4, block 53, of the city of Chicago. The defendants in that action set up a conveyance from Lee to Lois Cogswell, and showed by sundry mesne conveyances, they were in pos-

session of the lot under that deed. It was, however, proved on the trial, that the deed to Lois Cogswell was left by Lee at his death among his papers, signed and acknowledged, but with a blank space where the name of the grantee should be; and that this was filled up with the name of Lois Cogswell, and delivery of the instrument made without authority, after G. W. Lee's death, by B. T. Lee, his administrator. As both parties claimed title under Lee, the plaintiffs of course had a verdict and judgment, and thereupon the defendants in that suit filed a bill in the same court for an injunction, and for a conveyance of the legal title. The case was thus:

On the 4th May, 1836, Lee, who resided in the West, and was about to start on a tour from New York to Illinois, entered into a written agreement with Jonathan Cogswell, Lois Cogswell (sister to Jonathan), and F. S. Kinney, Esq. (a member of the bar), by which he agreed to invest in real estate ten thousand dollars furnished by the other three parties to the contract, in the proportion of $5000 by Jonathan Cogswell, $3000 by Lois Cogswell, and $2000 by Kinney. Lee agreed to pay to each of his partners one-half the sum advanced, with interest, within three years, and to give his personal attention to the business. The profits and losses were to be shared, one-half by him and the other half by the others. He was at liberty to make purchases to the amount of $40,000 partly on credit. The titles were in the first place to be taken in Lee's name, and he was afterwards to make such conveyances as the state of the venture required.

Lee invested the ten thousand dollars as agreed, getting among other purchases six canal lots in Chicago, which were bought largely on credit. He also purchased for himself about the same time and in the same manner, lot 4, block 53, which was also a canal lot. He seems to have been engaged in various speculations about that time, and shortly after became much indebted and embarrassed. Not being able to pay his partners the half the money they had invested, when the three years elapsed, he confessed to J. Cogswell, for their joint benefit, a judgment for the $5000 and interest

Towards the close of 1841 he availed himself of a privilege allowed by the statute of Illinois, and consolidated his payments on the canal lots; that is to say, he concentrated all the payments which he had made on six lots, upon two and part of another, and thereby paid in full and obtained clear title for these, and relinquished his claim to the others. In doing this he made his own lot 4, block 53, one of those on which payments were consolidated, and thus became debtor to the partnership for about $1500, a little more than one-third the cost of that lot.

On the 26th March, 1842, his health having been for some months broken down, he addressed a letter to Kinney, inclosing one to the Cogswells, dated the 20th of the same month from Mishwaukie, Illinois.

In the letter to Cogswell, he makes a full statement of the transactions concerning the canal lots; says that he is not able to hold any part of the property, and would like to have some arrangement made by which he could give up his interest in all of it, and be released of his debt to them; and adds that he lives at such a distance from the property that other agents can attend to it at less expense than he can.

In his letter to Kinney he says:

"I inclose a letter upon the subject of the canal lots, and you will see how it stands; but how to manage it without our being together I know not. As I am not able to own the property, and really, in the depressed feeling I am in, am not fit to take care or look after it, I would like them to take all and give up my note, I paying property enough to make them secure. For instance, the property to be all theirs, which is at one-third less than cost now. It will include $2172 of my own property. I will give, besides, the west fractional half of section 19, which ought to go with the east half, now owned by the company, $400. I will also (if they actually ask—it ought not to be required)—give all my school section lots in Chicago, worth $1500 cash now. I feel so much depressed and so unfit to take care of these matters that I will, if the whole matter can be settled, give up this property and have it off my mind, if the whole is asked."

Statement of the case.

This letter Kinney filed and preserved, as he did other letters of Lee; including letters between the date of the proposition and Lee's death. Lee himself, after lingering in disease and embarrassment for some months, died in November, 1842.

What was done by Cogswell or by Kinney in the way of action upon these two letters of Lee was a chief point in issue. The defendants in the bill, who were in possession of the lot and who claimed it under the deed of the administrator, set up that the letter contained a proposition, and that this proposition had been accepted; that so there had been a contract; that the deed from the administrator had been in pursuance of that contract, and that no conveyance ought to be decreed. The complainants, Lee's heirs-at-law, on the other hand, denied that there was any contract; asserting that the letter of the 26th March was not a definite offer, but only a statement of what he, Lee, would be willing to do if the parties could meet personally and so "manage" things; and asserting, moreover, that even such a plan as was suggested had never been responded to or accepted.

The evidence on this last point, as it appeared on the one side and on the other, was thus:

In favor of the idea that it had been accepted. Kinney testified that soon after receiving Lee's two letters, he had different conversations with Jonathan Cogswell and his sister, in which they agreed to accept Lee's offer; and that some six or eight weeks after the letter of Lee was written—he thought in the month of May—he wrote him a letter accepting, on behalf of himself and the Cogswells, the offer of Lee, without exacting the school section lots in Chicago; and he further stated that he thought that he received a letter from Lee acknowledging the receipt of this letter of acceptance. He also stated that he had promised Lee to go to Illinois that summer on this business.

Certain facts were relied on as confirming this testimony; as—

1. That Lee had left at his death a deed (found among his papers after that event) signed and acknowledged, but with

a *blank* space where the name of the grantee should be, and that this deed was with another deed; a deed of the partnership lots.

ii. That there was found among Lee's papers a letter from Cogswell, dated October 18th, 1842; a long letter, detailing the pecuniary troubles of the writer, and expressing his desire to realize from the lands in which he had invested with Lee. He speaks of the lands which were conveyed to his sister, mentions the canal lots, and says if the deed has not been recorded that the name of the grantee should be changed, and they should be conveyed to him, and then directs that the deeds be recorded. But there was no specific mention of lot 4, now in controversy.

iii. Letters of Kinney also were found among Lee's papers, urging the conveyance, and recording of deeds for real estate.

The blank, as to the grantee's name, in the deed from Lee for the lot 4, was, as already mentioned, filled up by Lee's administrator, one B. T. Lee. Kinney, it appeared, went, in June, 1843, to Chicago, and had a full settlement with B. T. Lee, administrator of G. W. Lee, of an individual claim which he had against Lee's estate, and also of that of the partnership. In that settlement he received the deed already mentioned, of the lot in controversy, found among Lee's papers, and by his advice and with his knowledge the blanks in the deed were filled with the name of Lois Cogswell, and delivery made by B. T. Lee. These arrangements, Kinney testified, were made with the purpose of carrying out "the contract," and that B. T. Lee, the administrator, understood things in that way.

On the other hand, the testimony of Mr. Kinney was given twenty years after the date of the alleged transaction.

No letter of acceptance was produced from any source, nor any alleged copy of one.

A letter thus, from Kinney to Lee, dated July, 1842, was found among Lee's papers:

Opinion of the court.

"DEAR FRIEND LEE:

"The last letter I had the pleasure of receiving from you *related to the lands in Chicago*, &c. Dr. and Miss Cogswell had it for a time, and perhaps the former took it with him, as I am not able to find it at present. *I will, therefore, defer saying anything in reply until I find the letter. It is, in fact, a difficult matter to say what is best to be done under the circumstances. . . . Your management of the matter was one great inducement to enter into it, and we might almost as well throw the whole away as attempt to manage it ourselves at this distance.* My main object, however, in addressing you at this time is in regard to taxes, which I wish you to attend to, and see paid, on all the property we are jointly interested in."

That the deed for the *partnership property*—found after Lee's death among his papers with the deed having the grantee's name in blank, for this canal lot 4, block 53, in controversy—was *fully executed* and only needed delivery.

As to B. T. Lee, the administrator's, understanding that a contract existed when Kinney went to Chicago, in June, 1843, and had a full settlement with him there, B. T. Lee himself testified that he had never at that time heard of a contract, and that none was spoken of during the settlement. Two full memoranda of agreement, showing the terms of settlement, relating the one to a personal claim of Kinney's against the estate, the other to the joint claim of Cogswell and himself, made no reference to any existing contract.

Mr. Justice MILLER (stating the case) delivered the opinion of the court.

The conveyance of the legal title which is asked for by the bill filed in this suit is claimed on the ground of a contract, alleged to have been made in his lifetime by G. W. Lee; and the only question in the case is as to the truth of this allegation, which is fully denied by the defendants in the court below, who are appellants here.

It is claimed by complainants that the contract was made by letters; Lee proposing the terms in a letter written by

him from Kishwaukee, Illinois, which were accepted by a letter written by Kinney, at New York, where he resided. The letter, or rather the two letters, supposed to contain the offer of Lee are produced, and are admitted to be in his handwriting; but the letter of acceptance, if there was one, is not produced, nor any copy of it; and the fact that such a letter was ever written depends upon the testimony of Kinney and certain circumstances supposed to corroborate his statement.

The counsel for the appellants denies that what is written in this letter was intended as an offer which Lee expected the other party to act on definitely; but rather as a suggestion of what he was willing to do if they could get together. The opening expression of the letter certainly does point strongly to a personal interview as essential in the writer's view to a final arrangement. Still the terms offered are so definite, the property which he was to convey, and the consideration which he was to receive, namely, the note in which he had confessed judgment, were all so fully set forth, that we think if an unconditional acceptance in writing can be made out, it constitutes a contract, which should be specifically enforced in a court of chancery.

We have already stated that the proof of this acceptance rests mainly on the testimony of Kinney, who states that he is very confident that some six or eight weeks after the letter of Lee was written—he thinks in the month of May—he wrote him a letter accepting, in behalf of himself and the Cogswells, the offer of Lee, without exacting the school-section lots in Chicago. He further states that he thinks he received a letter from Lee acknowledging the receipt of this letter of acceptance.

Let us look now, for a moment, at certain matters which are urged upon us, strongly confirming this statement of Kinney.

1. The fact which we have already mentioned, that a deed for this lot was left, signed and acknowledged, with a blank space for the name of the grantee, by G. W. Lee among his papers at his death, with another deed of the partnership

lots which was fully executed and only needed delivery, is one of them.

It is to be remarked, however, as to the deed for the partnership lots, that Lee had previously conveyed the partnership property whenever requested by the other partners, and letters are in the record from them urging him to do this as to the canal lots. From his embarrassed condition, it was also his moral duty to make this conveyance to save the property, to those who were entitled to it, from the grasp of his individual creditors. This sufficiently explains the existence of that deed. But the fact that the deed for his own lot had no grantee in it, implies that his purpose with regard to it was not the same as with reference to the other. He might have kept such a deed in readiness, if Kinney should come out West, as he had written he would, and should then be willing to accept his proposition and satisfy the judgment against him. Or he may have been expecting a favorable answer from Kinney, and wished to be ready if he received it. At all events, conceding his willingness to make the contract, we do not think that any very strong presumption arises that his proposition had been accepted—which is the point to be established—from this paper in the form of a deed, but without a delivery, and with no directions left on either of these points.

2. A letter from Jonathan Cogswell to Lee, found among Lee's papers, dated October 18th, 1842,* is much relied on as showing that the contract had been concluded.

The counsel for the appellees assumes that what is there written is written of the lot in controversy. But as we have already seen that the lots which were undoubtedly partnership property were to be conveyed for safety to some other member of the company by Lee, and as there are letters from them urging him to do this, all that Cogswell says in that letter is fully applicable to the partnership lots. At least, it might just as well have been written, and is as easily understood, if no thought had ever been entertained of conveying the lot which belonged exclusively to Lee.

* *Supra*, top of p. 812.

3. Other letters of Kinney urging the conveyance and recording of deeds for real estate are produced, as showing the understanding that Lee was to convey this lot, but the answer is as in the case of the letter of Cogswell, that they do not mention this lot, and all that is said in them is fully explicable on the hypothesis that they refer exclusively to partnership lots.

We do not perceive, then, that these circumstances add much support to the testimony of Kinney. Of this, it is to be remarked, that it is delivered twenty years after the date of the supposed letter of acceptance, that he does not pretend to be precise as to the date of it, within several weeks, and still less is he positive as to its language. He speaks, as we are satisfied, with candor, but with a want of certainty which is commendable, in reference to matters occurring so long ago of which he has no memorandum in writing. He says that some little time after receiving Lee's letters he had conversations, at different times, with Jonathan and Lois Cogswell, in which they agreed to accept Lee's offer, and he feels pretty sure he wrote to that effect to Lee. If we recall the fact, that Lee says he did not see how the matter could be arranged without a personal interview, and connect this with Kinney's statement that he had promised Lee to come out to Illinois that summer on that business, we can see how easily Kinney, having agreed with the Cogswells as to the terms of settlement, and having resolved to go out to Illinois and close it up, may, in recalling the transaction after twenty years, have been so impressed with his conviction that it was all satisfactorily arranged before Lee's death, as to feel confident that he had communicated to Lee the resolution, which had only been arrived at in the minds of himself and the Cogswells.

Many circumstances, not easily reconciled with the existence of such a letter, confirm this view of the matter. No such letter of acceptance was found among the papers of G. W. Lee. The force of this fact is rendered much stronger by the circumstance that among his papers several letters were found, from Kinney and Cogswell, bearing

dates between the date of his proposition and that of his death.

Kinney was a lawyer, and knew the necessity of preserving some evidence of his acceptance of the proposition, if it was one on which he ever expected to rely, yet he produces no copy of this letter of acceptance. Nor does he produce the letter from Lee acknowledging the receipt of that letter, although he found carefully filed away the letters in which Lee makes the proposition. These letters contain a full statement of the canal-lots transaction; thus showing that when importance was attached to letters they were preserved. Several other letters of Lee to Kinney are produced, but none recognizing the existence of this contract.

Kinney swears that the arrangements made when he went to Chicago, in June, 1843, and had a settlement with B. T. Lee, the administrator, were made with a view of carrying out the contract, which we are considering, and that B. T. Lee so understood it. B. T. Lee swears that he had never then heard of such a contract, and that no mention was made of it during his negotiation with Kinney. It is fortunate, in this conflict of recollections, that Kinney produces two memorandums of agreement made at the time, embracing the terms of settlements made by him with B. T. Lee, and signed by them; one having reference to his individual claim against Lee's estate, and the other to the claim of himself and the Cogswells. These are full; and a careful examination of them discloses nothing which, by the remotest implication, can be held to refer to an agreement made by Lee in his lifetime. Yet, as Kinney must, as a lawyer, have known that B. T. Lee was largely exceeding his powers as an administrator, nothing would have been more natural than a reference to a contract, which would have supplied this defect of power, if any such contract had been known to exist. Not only is there no allusion to a former agreement, but the one made at this time varies materially from the one set up in this suit; and this variance is to the prejudice of the parties interested in Lee's estate. The superior value of these writings as evidence, over the

recollections of Mr. Kinney, after twenty years from the time of the transaction, is apparent to every legal mind.

There is another piece of written testimony to which the same remark is applicable, and which we think is of itself almost conclusive that Kinney is mistaken in his recollection as to a written acceptance of Lee's proposition. It is the letter written by him to Lee, dated July 1st, 1842. [His Honor here quoted the letter on p. 813, beginning "Dear Friend Lee."] It is to be remembered that Kinney swears that he thinks it was in May, or early in June of that year, that he wrote to Lee accepting his proposition. And if it was accepted at all, it is reasonable to suppose that it was done within three months from the time the offer was made.

The letter referred to in this letter of Kinney, as received from Lee, was undoubtedly the one containing Lee's proposition. The language of Kinney's letter is wholly inconsistent with the idea that Lee's proposition had been accepted. On the contrary, it states an objection to it in the loss of his services, equivalent to throwing away the whole sum invested. Yet this letter was written three months after they had probably received that proposition, and one month after the time when Kinney says it was accepted.

Under all the circumstances, in proof before us, we are compelled to conclude that Kinney labored under a mistake when he testified that the proposition of Lee had been accepted in writing. This fact is a vital one in the case of complainants, and having failed to establish it, they must fail in their suit.

Decree reversed with costs, and the case remanded with directions to enter a decree

DISMISSING THE BILL.