signees took them subject to every equity in the hands of the original owner. *

Particular mention is not made of the defence that the complainants have an adequate remedy at law, as it is utterly destitute of merit.

DECREE AFFIRMED.

SHEETS *v.* SELDEN.

1. The action of an inferior court as to the terms on which it will allow a complainant to amend a bill in equity to which it has sustained a demurrer, is a matter within the discretion of such court, and not open to examination here on appeal.
2. Where, under a clause of re-entry for non-payment of rent reserved, a landlord sues in ejectment, in Indiana (in which State a judgment in ejectment has the same conclusiveness as common law judgments in other cases), for recovery of his estate, as forfeited, and a verdict is found for him, and judgment given accordingly, the tenant cannot, in another proceeding, deny the validity of the lease, nor his possession, nor his obligation to pay the rents reserved, nor that the instalment of rent demanded was due and unpaid.
3. Where, in a lease of a water-power, the lease provides in a plain way and with a specification of the rates for an abatement of rent for every failure of water, the tenant cannot, on a bill by him to enjoin a writ of possession by the landlord, after a recovery by him at law for forfeiture of the estate for non-payment of rent reserved, set up a counter claim for repairs to the water-channel made necessary by the landlord's gross negligence. He is confined to the remedy specified in the lease; a covenant that a lessor will make repairs not being to be implied.
4. In such a case, before he can ask relief from a forfeiture, he should at least tender the difference between the amount of rents due, and the amount which he could rightly claim by way of reduction for failure of water.

ERROR to the Circuit Court for Indiana.

The State of Indiana, owning a certain canal and its adjacent lands, made *two* leases of its surplus water; the first being made, February, 1839, to one *Yandes* and a certain Sheets (this Sheets being the appellant in this case), and the other made January, 1840, to Sheets alone. Each lease was for the term of thirty years. Certain rents, payable semi-annually, on the first of May and November, were

* Mechanics' Bank *v.* Railroad Co., 13 New York, 599.

reserved; it being provided, that if any rent "should remain unpaid for one month from the time it shall become due," "all the rights and privileges" of the lessees "shall cease and determine, and any authorized agent of the State, or lessee under the State, shall have power to enter upon and take possession of the premises," &c. The leases contained a further provision, that the lessees should not be deprived of the use of the water by any act of the State, or its agents, or by the inadequacy of the supply of water, for more than one month in the aggregate in one year; and that if, for the purposes of repairing the canal, preventing breaches, or making improvements to the canal, or the works connected with it, or the inadequacy of the supply of water, the lessees should be deprived of the use of any portion of the water-power leased, such *deduction* should be made from the rent accruing on such portions of the power as the lessees should be prevented from using, as would bear the same proportion to the yearly rent thereof as the time during which the lessees might have been deprived of its use bears to eleven months. In October, 1840, Sheets became owner of Yandes's interest in the lease of 1839.

The State subsequently sold so much of the canal, land, and water-power as was embraced by the two leases; and one Selden and others, on the 2d of October, 1857, became owners under this sale.

Afterwards (Sheets being in possession, under the leases, and having refused for several years to pay rent), the purchasers formally demanded, on the premises, rents falling due on the first day of May, 1860. The lessee failing to pay them, the purchasers brought, in June, 1860, an ejectment in the Circuit Court for Indiana (in which State the action of ejectment is regulated by statute, and has the same conclusiveness as common law judgments in other cases), to recover the possession of the property, as for forfeiture from non-payment of the rents reserved in the two leases. Verdict and judgment were given in their favor.*

* See 2 Wallace, 177.

Statement of the case.

After five years had elapsed since the commencement of the ejectment, the lessee now filed a bill in equity (the suit below) to enjoin the issuing of a *habere facias* on the judgment in ejectment, and for a redemption of the lands from the forfeiture incurred for non-payment of rent.

The bill alleged that while the ejectment was pending, the lessees tendered to the purchasers $400, as in full for the particular rents, for the non-payment of which the forfeitures were declared, and as in full for interest thereon, and the costs of suit up to that time, and that the same was now brought into court for the purchasers if they would accept it and waive the forfeiture; but it tendered nothing for rents *subsequently* or previously accrued. It sought to avoid such a tender by asserting an equity to set off against all rents a demand for damages on account of alleged breaches of covenants, contained in the leases. As for—

1. Inadequacy in the supply of water, when by the use of proper efforts, an adequate supply might have been furnished.

1. Inadequacy of supply, owing to the culpable negligence and gross carelessness of the purchasers in failing to repair breaches in the canal banks, and to remove obstructions created by the growth of grass in the bottom and sides of the canal, &c., setting up the expense of repairs alleged to have been made by the lessee to render the supply adequate.

3. Not prohibiting lessees under subsequent leases from drawing off needed water from the mill of the original lessee to supply their own.

The claim of reductions of the rents owing to failure of water were from the 2d October, 1852, when the title of the purchasers accrued, to the 1st May, 1865, when the last instalment of rents before the filing of the bill came due, and amounted to $2649. The rents during the same term amounted to $4500.

The lessee alleged as an excuse for not paying the rents on one of the leases, that he had abandoned that lease, and that the purchaser under the State acquiesced, and that the title so became vested in them by reverter, and declined to

redeem that lease from forfeiture. While thus declining to redeem that lease, his bill sought to enjoin the *whole judgment.*

The defendants demurred; and the court sustained the demurrer; giving leave to the complainant to amend his bill on tender of all the rent, with interest on it that had accrued on *both* leases since the bringing of the ejectment, which sums the court found to be, on one lease $4494.50, and on the other $2247.25. The complainant refusing to amend on such terms, judgment was given on the demurrer against him, and he brought the case here.

Mr. Barbour (*a brief of Mr. Morrison being filed*), *for the appellant:*

1. Assuming, as we have the right to assume (the case being on a demurrer), that the facts alleged in the bill of complaint are true, the permission to amend was clogged by an onerous and inequitable condition. The suit in ejectment embraced premises covered by two several and independent leases, executed on different days, and to different parties, one of them to Yandes and the appellant, the other to the appellant alone; and yet the court ruled, that the two, for all the purposes of this suit, were one and indivisible, and that therefore, an ample tender, for the purpose of redeeming either one of them, would be of no avail, unless it should be sufficient to cover the other one also. In this there was error. The appellant had the right to pay the sum demanded for the quarter's rent of the premises held under the first lease, had he elected to do so. And if he had done this, the appellees could have declared no forfeiture as to *that* lease. The demands were separate and distinct acts, for distinct sums. The appellant had the right to save *either* premises, and let the other go, if it pleased him.

Even if the bill of complaint did not show a case that should entirely and fully absolve Sheets from all his obligations under the lease to himself, still its defects, in that regard, cannot affect so fatally the other lease.

2. The bill, as to the lease not surrendered, contains suffi-

cient equity to entitle the appellant to be relieved as to *it*. The court below assumed that the lessees could claim nothing by way of set-off, or recoupment, for any damages or injury sustained by them, consequent upon the failure to supply water, except an *abatement of rents* for such time as they might have been deprived of the specified supply, beyond one month in each year.

The assumption is unwarranted, unless it is shown that the appellee had used some diligence to furnish the requisite supply. But the bill avers and the demurrer admits that the appellant was deprived of the water-power *by the culpable carelessness and gross negligence* of the appellee.

If these averments would not entitle the appellant to damages against the appellee, as well as to an abatement of rents, then the latter would not be liable, had he cut the canal banks, and thereby deprived the appellant eleven months in the year.

The demise of the water-power and the land is equivalent to a covenant that the water *shall be supplied*. No particular words are necessary to constitute a covenant in a lease. It is sufficient if it be such as to show the intention of the party to bind himself to the performance of the matter stipulated for; and when covenants exist they are to be construed according to the apparent intention of the parties, looking to the whole instrument, and to the context, and the reasonable sense and construction of the words; so that a covenant is broken if the intention is not carried out.*

The general rule, that unliquidated damages cannot be set off or recouped in an action at law, is admitted; but the rule does not hold in equity, which is independent of statutes of set-off; and, besides, this being a suit in equity, the court will see to it, that the decision shall settle the mutual rights of the parties, fully and completely.

Mr. T. A. Hendricks, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a case in equity. The appellant filed his bill to

* Comyns' Digest, title "Covenant," E.

enjoin the execution of a judgment in ejectment. The defendants demurred, and the demurrer was sustained.

The court gave leave to amend upon terms which the appellant declined to accept. A decree was thereupon entered that the bill should be dismissed, and for costs. This appeal brings the case here for review.

With the leave to amend we have nothing to do. The terms imposed were within the discretion of the court, and are not open to examination in this proceeding.

The only question before us is, whether the Circuit Court erred in sustaining the demurrer and dismissing the case. The bill is very voluminous. We will consider the points to which our attention has been called, so far as is necessary to the proper determination of the rights of the parties.

The recovery was had in the action of ejectment, upon the ground of forfeiture for the non-payment of the rents reserved in two leases.

Both courts of law and of equity have power to give relief in cases of this kind. Courts of law give it upon motion, which may be made before or after judgment. If after judgment, it must be made before the execution is executed. The rent due, with interest and costs, must be paid. Upon this being done, a final stay of proceedings is ordered.*

The first British statute upon the subject was the 4th George II, ch. 28. The practice is now regulated by the 15 and 16 Victoria, ch. 76.

Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interest, and costs must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of equity proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that

* Tidd's Prac., 3 Amer. Ed. 1234; Phillips *v.* Doelittle, 8 Modern, 345; Smith *v.* Parks, 10 Id. 383; Atkins *v.* Chilson, 11 Metcalf, 115.

the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign. Lord Eldon limited the relief to cases where the lease required the payment of a specific sum of money. The authorities going beyond this he held to be unsound, and declined to follow them. Speaking of *Wadman* v. *Calcraft*,* he said the Master of the Rolls in that case held, "that, though against ejectment for non-payment of rent the court would relieve upon a principle long acknowledged in this court, but utterly without foundation, it would not relieve where the right of the landlord accrued, not by non-payment of rent, but by the non-performance of covenants which might be compensated in damages."† Such is now the settled English rule upon the subject.‡ In *Bracebridge* v. *Buckley*,§ Baron Wood, in a dissenting opinion, made an earnest and able assault upon this doctrine. The question may be regarded as yet unsettled in the jurisprudence of this country.‖

Lord Redesdale held that where there were unsettled accounts between the landlord and tenant, which could not be properly taken at law, the payment or tender of money on account of the rent might be deferred until the rights of the parties were settled by the decree of the court, but that where the accounts were not of this character, equity would not intervene.¶

* 10 Vesey, 68. † Hill *v.* Barclay, 18 Vesey, 63.

‡ 2 Story's Eq., §§ 1315, 1316; Davis *v.* West, 12 Vesey, 475; Reynolds *v.* Pitt, 19 Vesey, 134; Gregory *v.* Wilson, 10 English Law and Equity, 138; Eaton *v.* Lyon, 3 Vesey, 690; Hill *v.* Barclay, 16 Id. 402.

§ 2 Price, 200. ‖ 2 Story's Eq., §§ 1315, 1316, and notes.

¶ O'Mahony *v.* Dickson, 2 Schoales & Lefroy, 400; O'Connor *v.* Spaight, 1 Id. 305.

The recovery in ejectment is an important feature in the case before us. In Indiana the action is regulated by statute, and the judgment has the same conclusiveness and effect as common law judgments in other cases. The judgment against the appellant established the validity of the leases, that he was in possession, his obligation to pay the rents reserved, and that the instalments demanded were due and unsatisfied. He is estopped from denying these facts, and from setting up anything in this case to the contrary.

In the case of the *Trustees of the Wabash and Erie Canal* v. *Brett*,* the trustees had leased so much of the surplus water of the canal as might be necessary for the purposes specified. The right was reserved, upon paying for the mill to be built by the lessee, to resume the use of the water leased whenever it might be necessary for navigation, or whenever its use for hydraulic purposes should be found to interfere with the navigation of the canal. It was averred that the trustees had abandoned that part of the canal, and suffered it to go to decay, so that the water-power was destroyed, and the plaintiff's mill rendered valueless. The court held that there was no implied covenant to keep the canal in repair, that the express provision for compensation in one case excluded the implication of such right in all others, and that the plaintiff was without remedy. This case, like the one under consideration, was decided upon a demurrer by the defendants.

The tendency of modern decisions is not to imply covenants which might and ought to have been expressed, if intended.† A covenant is never implied that the lessor will make any repairs.‡ The tenant cannot make repairs at the expense of the landlord, unless by special agreement.§ If a demised house be burned down by accident, the rent does

* 25 Indiana, 410.

† Aspdin *v.* Austin, 5 Q. B. 671; Pilkington *v.* Scott, 15 Meeson & Welsby, 657.

‡ Pomfret *v.* Ricroft, 1 Williams Saunders, 321, 322, note 1; Kellenberger *v.* Foresman, 13 Indiana, 475.

§ Mumford *v.* Brown, 6 Cowen, 475.

not cease. The lessee continues liable as if the accident had not occurred.* If in such a case the landlord receives insurance-money, the tenant has no equity to have it applied to rebuilding, or to restrain the landlord from suing for the rent until the structure is restored.†

The *Trustees of the Wabash and Erie Canal* v. *Brett* is an authority strikingly apposite in this case. In the leases set out in the bill, as in the lease in that case, the parties provided but one remedy for a failure of water. That is, an abatement of the rent in proportion to the extent and time of the deficiency. The contract gives none other. Beyond this it is silent upon the subject. This court cannot interpolate what the contract does not contain. We can only apply the law to the facts as we find them. The appellant is entitled to the remedy specified. *Expressum facit cessare tacitum.* Neither a court of equity nor a court of law can aid him to any greater extent.

This sweeps from the case the claims set up in the bill by the appellant for offset, repairs, recoupment, and damages, leaving to be considered only the claim for a reduction of the rents in the manner stipulated by the parties.

The appellant avers that he abandoned the premises covered by the second lease, that the appellees acquiesced, and that his title thus became vested in them by reverter. This is repelled by the verdict and judgment in the action of ejectment.

He insists that, according to the provision referred to in the leases, he is entitled to a reduction of the rents specifically demanded before the commencement of the action of ejectment. The plaintiffs could not have recovered without proving to the satisfaction of the jury that the exact amount demanded was due. Any failure in this respect would have been fatal to the action. Then was the time for the appellant to assert and prove this claim. He cannot do it now. The judgment is conclusive.

* Moffat *v.* Smith, 4 New York, 126.

† Leeds *v.* Cheetham, 1 Simons, 146; Loft *v.* Dennis, 1 Ellis & Ellis, 474.

Syllabus.

The bill claims reductions of the rents for failure of water from the second of October, 1857, when the title of the defendants accrued, down to the first of May, 1865, when the last instalments, before the filing of the bill, became due, amounting in the aggregate to $2649. The rents, during the same period, amounted to a much larger sum. Conceding the appellant's demand to be correct, he should at least have tendered payment of the difference between these two amounts, and interest, before bringing his bill. In not alleging that he had done so the bill is fatally defective.

A case is not presented upon which a court of equity, according to the settled principles of its jurisprudence, is authorized to interpose. The spirit manifested by the appellant throughout the litigation between the parties, as disclosed by the bill, is not persuasive to such a tribunal to lend him its aid. We think the demurrer was well taken. The decree of the Circuit Court is

AFFIRMED.

PAYNE *v.* HOOK.

1. The equity jurisdiction and remedies conferred by the Constitution and statutes of the United States cannot be limited or restrained by State legislation, and are uniform throughout the different States of the Union. Hence the Circuit Court for any district embracing a particular State, will have jurisdiction of an equity proceeding against an administrator (if according to the received principles of equity a case for equitable relief is stated), notwithstanding that by a peculiar structure of the State probate system such a proceeding could not be maintained in any court of the State.
2. In a bill in equity in the Circuit Court, by one distributee of an intestate's estate against an administrator, it is not indispensable that such distributee make the other distributees parties, if the court is able to proceed to a decree, either through a reference to a master or some other proper way, to do justice to the parties before it without injury to absent parties equally interested.
3. The sureties of an administrator on his official bond may properly be joined with him in an equity proceeding for an erroneous and fraudulent administration of the estate by him, and where, if a balance should be found against the administrator, those sureties would be liable.