Barry Vs. Coombe

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Appellant : Barry

Respondent : Coombe

Judgement :

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Barry v. Coombe

26 U.S. (1 Pet.) 640

APPEAL FROM THE CIRCUIT COURT

FOR THE COUNTY OF WASHINGTON

SYLLABUS

The, statute of frauds in Maryland requires written evidence of the contract, or a court cannot decree performance. The words of the statute are

"unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing signed by the party to be charged therewith or by some other person by him thereto lawfully authorized."

A note or memorandum in writing of the agreement between the parties is sufficient under the statute of frauds of Maryland, and in order to obtain specific performance in equity, the note in writing must be sufficient to maintain as action at law. The form is not regarded, or the place of signature, provided it be in the handwriting of the party or his agent and furnish evidence of a complete and, practicable agreement. A court of equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c.;

An examination of the cases will show that courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of the contrast was created. It is *written evidence* which the statute requires, and a note or letter, and even, in one case a letter, the object of which was to annul the contract on ground really not unreasonable, was held to bring a case within the provisions of the statute.

Where, in an account stated by the parties in the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in the bill for a specific performance, there was the following credit: *"By my purchase of your half, E.B. wharf and premises this day agreed upon between us, $7,578.63,"* it was held to he a sufficient memorandum in writing under the statute of frauds of Maryland, upon which the court could decree a specific performance of the sale of the estate referred to, other matters appearing in evidence and by the admissions of the defendant in his answer to show the particular property designated by *"your 1/2 E.B. wharf and premises."*

This was an appeal from a decree in equity of the Circuit Court for the County of Washington against Robert Barry the appellant upon a bill filed by Griffith Coombe for the specific execution of a contract for the sale of real estate in the City of

Washington and for the payment of the balance of an account which it was alleged had been settled and agreed upon by the parties.

The material charges in the bill, and which were brought into the consideration of the court by the counsel in argument, were that various transactions, commencing in 1815, had taken place between the complainant and the defendant, who then resided in Baltimore, together with a certain James D. Barry of the City of Washington, as joint proprietors of a tan yard

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in which the business of tanning and selling leather was carried on, in the course of which the concern became largely indebted to the complainant and to other persons for the payment of which securities had been given. Afterwards, in 1821, the partnership between the defendant and James D. Barry, was dissolved and the whole of the stock in trade became the property of the defendant, who afterwards continued the business on his own account.

That about 18 May, 1818, the complainant and the defendant purchased an estate on the Eastern Branch of the Potomac in the City of Washington, upon which were erected a dwelling house, warehouse, and wharf, and which was held by the complainant and the defendant as tenants in common. Large expenditures were made by the complainant for the repairs of the property, and the defendant was considerably indebted to the complainant for his proportion and share of the same.

The bill further charged that about September, 1820, a settlement of all accounts took place between the parties, upon which the defendant was found in arrears and admitted himself to be indebted to the complainant a stated balance of $9,078.33, and for the purpose of liquidating and discharging the balance so due by the defendant a bargain was then concluded for the sale of the defendant's moiety of the said premises on the Eastern Branch so held by them in common, for which the complainant agreed to allow him the price of $7,578.63, to be passed to his credit in account against the stated balance, the balance of $1,500 still remaining due, the defendant agreed to pay with interest in installments, in one,

two, and three years, and to give his promissory notes for the same, in consideration of which agreement on the part of the defendant the complainant agreed to discharge the parties who had been concerned in the tan yard from the debt due to him on account of certain endorsements and to relinquish to the defendant his interest in and lien upon leather which he held. Whereupon *the defendant immediately drew up in his own handwriting a statement of the said settlement, bargain, and agreement* in the form of an account between himself *as debtor and the complainant as creditor, signed at the beginning with the defendant's name in his own handwriting, and at the foot with the complainant's name in his handwriting,* in which written statement are set down the heads of the several accounts upon which the said balance of $9,078.63 was ascertained against the defendant as aforesaid; the credit and deduction of the purchase money, agreed to be allowed the complainant for the defendant's moiety of the said estate and premises on the Eastern Branch, as aforesaid, described in said statement as "your [meaning the defendant's]

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1/2 E.B. [meaning Eastern Branch] wharf and premises" and expressly stated as purchased by the complainant on the day of the date of said paper, with an express reference to the said agreement between the complainant and the defendant, and lastly the said balance of $1,500, remaining due after deducting the credit for the said purchase money as aforesaid, payable by installments as aforesaid.

The statement of the account, alleged to have been so drawn up, was as follows:

"Washington, 27 Sept., 1820"

Robert Barry To G. Coombe Dr.

To amount of J.D. Barry's notes taken up by me, and

secured by him in tan yard stock, and leather, per

bill dated 27 Dec., 1819 . . . . . $4,209.00

Interest on do. to this day -- 9 Mos. 184.40

--------- $4,393.40

To bill of leather sent you in June, 1819. . . . . $2,846.50

Interest to this date -- 15 Mos. 216.65

--------- 3,063.15

To balance due on tan yard books (E.E). 284.25

To cart of hay for tan yard. 37.37

To balance due for supplies to tan yard, per

account furnished by you 152.64 474.26

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To 1/2 expenses of repairs on house and wharf,

E. branch. 1,145.49 $7,930.81

Interest, 9 mos. 51.52 1,197.01

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Cr. $9,127.82

By 1/2 rent and wharfage, &c.;, of sundries, to

this day on E.B. wharf 49.19

$9,078.63

By my purchase of your 1/2 E.B. wharf and premises,

this day agreed on between us 7,578.63

Balance due G. Coombe, fifteen hundred dollars $1,500.00

Payable in one, two and three years, with interest.

[Signed] G. COOMBE

The bill charged that this paper, each party having a copy, was, for the purposes of mutual security, delivered to Daniel Carroll, Esq. of Duddington, who was a creditor of the partnership.

It was further alleged that the complainant went on to do and perform all that he had assumed and undertaken under

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the agreement and settlement, that he took possession of the premises on the Eastern Branch, and has laid out and expended large sums of money in the repairs and improvements thereof, and that although he has repeatedly made efforts to obtain from the defendant a conveyance of the property so agreed to be conveyed to him by the defendant, it has not been made.

The bill then prays the specific relief to which the complainant alleges himself entitled in equity under the contract, and the benefit of such a recovery as he might have at law by attachment or otherwise for the debt due to him as stated in the account.

Among the documents contained in the record is the following letter from the complainant to the defendant, and which by the affidavit of John P. Ingle, was proved to have been delivered to the defendant on 5 April, 1822.

"Washington City, March 26, 1822"

"Mr. ROBERT BARRY."

Sir -- It is now time that I should have your final answer whether you will execute the contract made between us in presence of Mr. Carroll for the conveyance of your moiety of the house, wharf, and premises on the Eastern Branch and for the payment and security of the balance due me in money. For this purpose I have authorized Mr. John P. Ingle to call on you in my name and receive your conveyance, a form of which he will present you, which you will please execute and acknowledge in due form, so as to make it effectual here. Please also pay to Mr. Ingle the installment of $500 due in September last, with interest from 27 September, 1820. Please also to execute and deliver to Mr. Ingle your two notes for the other installments, drafts of which he will present you.

"I also require of you the surrender of J. D. Barry's draft, endorsed by me for $1,000, which had been discounted in the Bank of Washington, and which you promised to take up and release me from. I must notify you that if you persist in refusing to comply with the terms of your contract according to your pledged faith in presence of the respectable witness above mentioned, I shall hold you accountable in money for the whole balance due me according to our settlement, and shall merely hold the house, wharf, &c.;, which you were to have conveyed to me as collateral security for the entire balance ascertained by that settlement and for the expenses since laid out in repairs and improvements of the same, under the faith of your contract."

"Respectfully, your obedient servant,"

"GRIFFITH COOMBE"

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The defendant, Robert Barry, denies in his answer the liabilities to which, by the bill of the complainant, he is said to have been under as connected with the tan yard and the concern with James D. Barry, and, after stating other matters not necessary to be inserted, admits, in the language of the answer, that in the year 1820, he had a conversation with the complainant about settling their accounts,

"including the debt alleged to have been secured by the pretended bill of sale aforesaid, *and the complainant then proposed to purchase from this defendant, his undivided moiety of the lots* and wharf aforesaid, and that the amount of purchase money should be considered as a payment to the complainant, in part of the amount *which he then alleged* was owing to him; *and the defendant, at the request of the complainant,* who alleged the badness of his handwriting as an excuse for making that request, *copied from a written memorandum furnished by the complainant,* the statement of the account referred to, in which the defendant's name was written by him only for the purpose of stating him as debtor to the complainant, in *compliance with his request, not as signing any contract or agreement.* And that the said statement so written by him, at the instance and request of the complainant, being signed by him, was delivered to this defendant *for the purpose of considering whether, after due examination, he would assent to the terms therein proposed, and was not deposited in the hands of Daniel Carroll, as the complainant alleges. For this defendant declares that he did not then assent* to the correctness *of the several charges and estimates in the said statement, although he expressed his willingness to sell his undivided moiety of the said wharf and premises for the price proposed by the complainant, if this defendant should be satisfied, on examination, that he would actually receive a compensation fully equal in value to the said price, and therefore the said statement was delivered to this defendant for the purpose of examination and consideration as aforesaid, and has always since been and now is in the possession of this defendant,* and in reference to the said verbal agreement, and explanatory of the condition on which this defendant was willing to carry the same into effect, this defendant, a few *days after* he received the said statement, having discovered a *part of the representations made to him* as aforesaid to be incorrect, wrote a letter to the complainant representing *the said conditions* so far as they were affected by the discovery then made, a copy of which letter this defendant herewith exhibits, which he prays may be received as a part of this his answer; which letter was, as this defendant believes, delivered to the complainant and was read by him, and is probably in his possession or in his power to produce, and this defendant prays that the said original letter may be here produced. The answer also states

that upon subsequent examination, the account which was made out and in which was the entry of 'E. B. wharf, &c.;' had been found erroneous in many particulars."

The answer submits to the decision of the court whether the account set forth in the complainant's bill, is "an agreement, such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed and prayed by the complainant."

The letter referred to in the defendant's answer, is as follows:

"Baltimore, 7 October, 1820"

"MR. GRIFFITH COOMBE,"

"Sir: Having agreed to sell you my undivided half interest in the Eastern Branch wharf and premises at Washington, lately deeded to you and to me by James D. Barry, I hereby bind myself to give you a good and sufficient conveyance of all my right and title in law and equity for the same as soon as you send me or that I receive the stock of leather now working out at the tan yard (the same being a part of the consideration for my right to said property) or otherwise place the proceeds thereof at my disposal as far as you have or can or shall have the right or power to do or cause to be done, agreeably to the inventory lately given me by Mr. Edmund Rice, of said stock and materials, which inventory must embrace a quantity of finished leather, amounting to about $806, removed by him to his brother William's store; and as this lien to you is blended with a lien to others, I further engage on receipt of said stock of leather, to provide likewise for the lien held thereon by Mr. Daniel Carroll, of Dud. for about $1,800, and also for the payment of a lien on said stock of leather to secure the amount of a note due to Edmund Rice or endorsed by him at the Patriotic Bank for about $1,200, and in other respects to settle for any balance I may owe you on the account you have furnished me agreeable to the principles of equity and justice."

"I remain, &c.;, yours, respectfully."

"P.S. The effect of the paper signed by you and deposited with Mr. Carroll will, of course, remain suspended subject to its conditions for the purpose of carrying the foregoing into effect, and which will by me be complied with in good faith."

The evidence before the circuit court, consisting of the examinations of Mr. Pleasanton, Mr. Carroll, and others and

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what is contained in the record, are sufficiently stated in the opinion of the Court.

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MR. JUSTICE JOHNSON, delivered the opinion of the Court.:

This appeal brings up for revision a decree of the circuit court of this district by which this appellant has been required to execute, specifically, an agreement for the sale of land. The bill sets up a certain written instrument as a sufficient memorandum in writing, but not relying solely on that, goes on to make out one of those cases in which a court of equity exercises this branch of its jurisdiction in order that the statute of frauds may not be made a cloak for fraud; that is a case of performance on the part of the complainant.

This has caused the question on the right to relief, in a case within the provisions of the statute, to be mixed up with a great deal of extraneous matter which need not have been set out had the claim to relief been confined to the one ground alone.

The memorandum set up is in the form of a stated account, wholly in the handwriting of the appellant, Barry, the defendant below, and acknowledged to be a copy made by him of another, also made out in his handwriting, actually signed by Coombe the appellee, and now in the hands of Barry. So that Barry's name is in the caption, if it may be so called, and Coombe's at the foot of the memorandum. The item of the account which relates to the bargain or agreement for the sale of the land is in these words, letters, and figures. "By my purchase of your 1/2 E.B.

wharf and premises this day as agreed on between us," and the credit is carried out in figures $7,578.66, and deducted from the amount charged to Barry.

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Then follows this memorandum, "Balance due G. Coombe, $1,500, payable in one two and three years with interest. G. COOMBE."

The defense set up in the answer is that the transaction was not final; that it amounted to nothing more than a treaty in progress; that as far as it proceeded, it was obtained by false and fraudulent suggestions on the part of complainant; and that the name of defendant was signed, if signed at all, only to state an account, not to acknowledge a contract, and the answer concludes with submitting to the court whether it be "an agreement such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed, and prayed for by complainant."

It is under these words alone that the protection of the statute of frauds is set up by defendant. But in the view which this Court will take of this subject, it is unnecessary to inquire whether the case required or admitted that it should be more formally pleaded, since we will dispose of the cause under the admission that he has entitled himself by his answer to the full benefit of the statute if the facts of the case would maintain the defense.

And first it is obvious that it would be idle to consider the form and effect of the instrument if the treaty was never brought to a conclusion. On this fact the answer has put the complainant upon proof, and two witnesses have been examined to the point. Mr. Pleasanton the first witness swears that in the year 1820, the defendant showed him a statement of accounts, which he believes was a copy of one exhibited by the complainant, and informed him that he had made a settlement of accounts with complainant, that the account so shown exhibited a balance against the defendant of %500 or $1,500, that it was in Barry's own handwriting, and that he stated, as an inducement to make it, that Coombe had made a sacrifice to obtain it.

The account so shown to Mr. Pleasanton could have been no other than the original of that which Coombe has exhibited, and the facts to which this witness testifies are strongly indicative of a final transaction.

The next witness, Mr. Carroll, is still more positive. He was present at the transaction, and, as he testifies, at the request of both parties, became the depository of several documents relating to it, and on the subject of the conclusive character of the transaction, his language is "that he understood the settlement to be final and absolute."

But there were other facts to which Mr. Carroll was examined, and it is argued that his testimony as to those facts goes to prove that he was mistaken in the view which he took

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of the transactions; that they go to prove that there was something yet to be done before the agreement should be closed. Coombe, it seems, insisted that Barry should give his note for the balance stated and a deed for the property before he left Washington. This Barry resisted, and finally left Washington without doing either, and returned to his home at Baltimore.

It cannot be denied that this does conduce to prove an unfinished treaty, but the inference is repelled by various considerations.

And first, preparing the deed might require time, his business may have pressed for his return home, or he may have wished his own counsel or scrivener to draw up the deed.

2. As to the notes, giving them made no part of the agreement reduced to writing; the balance stated was to have been paid in one, two, and three years, but it does not express that notes are to be given for it, and he may have had his reasons for declining to give his notes or for taking advice upon it. If there should prove to be errors in the stated accounts, upon more deliberate examination these errors might more conveniently have been adjusted upon the stated balance than upon

notes, which might have found their way into several hands and thus have multiplied litigation.

3. It does not appear from Mr. Carroll's testimony that Barry refused generally to give either deed or notes, but only to give them before he went to Baltimore; on the contrary, he appears to have resented Coombe's seeming to act upon a doubt that he would then execute and send them, and to this Mr. Carroll bears positive testimony when he says "that he understood that the notes and deed were as certainly to be sent on from Baltimore as if executed on that day."

But what is conclusive in this part of the cause is that the transaction was followed up by an act on the part of Barry which no honest man could have done otherwise than in the supposition that it was a finished transaction. It appears that Coombe, together with Mr. Carroll and Mr. Rice, held a mortgage of a quantity of leather to the value of $7,000, given to secure to them certain sums advanced on behalf of one James D. Barry; that the defendant Robert Barry had assumed the debts of James D. Barry, and thereby acquired a resulting use or equity of redemption in this leather. That the sum for which Coombe held his lien on the leather, to-wit, $4,209, was one of the items of account in the exhibit upon which the complainant relies, to obtain a decree for specific performance. But as a balance of $1,500 still remained due to Coombe upon the stated account, the leather was still pledged to him for that amount. This interest Coombe was induced to release to Barry, and which he accordingly did, by an endorsement upon the

instrument of writing by which the lien was created. And Mr. Carroll testifies "that the defendant did receive at the tan yard in Washington, all the leather mentioned in the bill of sale, in consequence of complainant's release."

It is true an attempt was afterwards made in this suit to arrest the leather in the hands of Barry, but it was not on the ground that the treaty was *in fieri* or the release not final, but to subject the leather to the debt which would be due to the complainant if he could not obtain the specific execution of the sale of the wharf as

well as the acknowledged balance. It is obvious, then, that in reducing the leather into possession, Mr. Barry must either have acted fairly on the idea of a finished transaction, or unfairly by entering upon the fruition a fraud practiced to obtain the release.

We will consider him as having acted fairly upon the ground of a treaty final and concluded, to be carried into execution according to its terms. But the Statute of Frauds in Maryland requires written evidence of the contract or a court cannot decree performance. Is this such written evidence of a "contract or sale of lands" as satisfies the exigency of that statute? The words of the statute are

"unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or by some other person by him thereunto lawfully authorized."

A note or memorandum in writing of the agreement, therefore, is sufficient, and there is no question that in order to obtain a specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, nor the place of signature, provided it be in the handwriting of the party or his agent and furnish evidence of a complete and practicable agreement. A court of equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c.;

At first view this would seem to be an anomalous case, but it is only necessary to reduce it to its elements in order to discover that it is one known to the adjudications of courts of equity on this statute. As to the balance stated, it is final and conclusive between these parties, and *insimul computassent,* might be maintained upon it by Coombe for the amount. And in an action by him going to claim the whole amount charged to Barry, it would be good evidence in the hands of Barry to reduce Coombe's demand down to the balance stated.

It is then equivalent to a mutual and reciprocal receipt between these parties; on the one hand, Coombe signs a receipt for the price of the premises in controversy in account with

Barry, and Barry, on the other, signs a receipt to Coombe acknowledging that he has received the price stipulated in full of the purchase money of the same.

This is the real purport and effect of the writing in evidence, and had the instrument, signed by the parties, been expressed in these terms, there could not have been a doubt of its sufficiency, 12 Ves.Jr. 466; 9 Ves.Jr. 234. But it is argued that this was not the intent with which the writing was concocted. That it was to state an account, and not to note an agreement for the sale of property, that it was drawn up and signed. An examination of the cases on this subject will show that courts of equity are not particular with regard to the direct and immediate purpose for which the written evidence of a contract was created. *It is written evidence* which the statute requires, and a note or letter, and even in one case a letter the object of which was to annul the contract on a ground really not unreasonable, 1 Atk. 12; 1 Sch. & Lef. 22, has been held to bring a case within the provisions of the statute. But in the present instance, although not the sole object of creating the instrument, it really was an object, and an important one, inasmuch as the balance of account, the immediate object of the stated account, mainly depended upon the item for the sale of these premises. It could not be stated without acknowledging that the one had agreed to sell and the other to purchase these premises at a stated price. On this part of the cause, the case of *Stokes v. Moore* has been cited, 1 Cox 218, and insisted on as furnishing an argument against the sufficiency of the signature of Barry in this cause. But in the case of *Stokes v. Moore,* it must be observed that both the judges who sat on that cause admit that this was not the principal question in the cause, and it was decided upon the ground that the memorandum was proved but to express the entire agreement between the parties. But if considered as authority in this point, it is only necessary to advert to the ground upon which the opinion is expressed "that the name there was not a sufficient signature under the statute" in order to discover that it does not impugn the opinion entertained by this Court in the present cause. The rule there laid down is "that the signature is to have the effect of giving authenticity to the whole instrument," and in this instance we hold it to be in its proper place for that

purpose. If so, the court there further observes "that it does not signify much in what part of the instrument it is to be found."

It remains to examine whether the memorandum is sufficiently full and explicit to admit of a decree for specific performance. The words are, "By my purchase of your 1/2 E.B. wharf and premises, this day, as agreed on between us, $7,578.63." Brief as it is, this memorandum contains a condensed summary of all the

essentials to a complete contract. By the use of the present tense, it speaks of a thing final and concluded. By reference to the date at the head of the account, the use of the words "this day" gives a date to the transaction. By the use of the pronouns "your" and "us," the parties are distinctly introduced. By carrying out the price, the consideration is expressed with absolute precision, and by deducting it from the sum acknowledged due by Barry, the receipt of the consideration is acknowledged; nor is there a single ingredient of a complete contract deficient, unless the description of the property contracted for be insufficient. If that description be fatally ambiguous, it is certainly a sufficient ground to refuse relief. The ambiguity here arises from the use of the capital letters "E.B." in the description of the premises, and if those letters stood alone and unconnected with anything that could give them a definitive signification, there would be much reason to doubt whether the defect would be curable. The words are, "Your 1/2 E.B. wharf and premises," and it is argued that this is one of those ambiguities, generally designated by the epithet "patent," and as such admitting of no explanation from extrinsic evidence.

Sir Francis Bacon, in his elements of common law, *Regula* 23, is the author usually referred to on this distribution of ambiguities into "patent" and "latent," the former appearing on the face of the instrument and not to be removed by extrinsic evidence, but only, in the language of the author, "to be holpen by construction or election," the latter raised by reference to extrinsic circumstances and remediable by the same means. It would perhaps be a more convenient and certainly a more intelligible distribution of the doctrine on this subject if the cases were divided into

positive, relative, and mixed, the positive corresponding to the patent and the relative to the latent ambiguities of the authors who treat of the subject. The mixed would consist of those cases in which, although the ambiguity is suggested on the face of the instrument, the face of the instrument also suggests the medium by which the ambiguity may be removed.

The facts of this case will bring it either within the second or third class -- within the second because, for anything that appears on the face of the instrument, E.B. wharf may be as definitive a description of locality as F Street, and then the ambiguity could only arise if it be shown that the bargainor had more than one house in F Street, like the two manors of Sale, put by several authors.

Perhaps this case belongs more properly to the third class, since the description suggests several circumstances of identity by reference to which the premises in question are distinguishable from all others -- first, it is a wharf; secondly, a wharf

the property of Barry; thirdly, a wharf of which he owns a moiety, and connected with these descriptive circumstances, the letters E.B. became in fact the initials of the name of a place; and the case is analogous to that of a will in which the devisee is designated as my son A., my nephew B.C., or my uncle D.E., in which the circumstance of relationship will let in evidence to fill up the names designated by the initials.

In fact the cases on this point have gone much further, and without committing ourselves on the correctness of the following two, it will be found by referring to them, such evidence has been let in to supply names in cases where the identification was by no means as circumstantial as the present.

In the case of *Price v. Page,* 4 Ves.Jr. 68, the entire Christian name was supplied on parol evidence without any initial, Price the son of Price being the only designation. In the case of *Abbot v. Massie,* 3 Ves.Jr., the devise was to A.G. and Mrs. G., and evidence ordered to be received to identify the legatees.

If ever extrinsic evidence may be admitted to carry out the initials of a name, it is impossible that a case can occur to furnish evidence more full or unexceptionable in its character than the present. The bill alleges that the letters "E.B." mean Eastern Branch, and the defendant not only admits in his answer that the treaty had relation to his moiety of a wharf and premises on the Eastern Branch of the Potomac, but voluntarily, although *altero intentii,* introduces a letter from himself to complainant in which it is explicitly acknowledged. "Having agreed to sell you my individual half-interest in the Eastern Branch wharf and premises," is his language in the letter. Besides which, the original deed is spread upon the record, by which it appears that the defendant held a moiety, as tenant in common with the plaintiff, of a wharf and premises on the Eastern Branch of the Potomac river, which is well known in common parlance as the Eastern Branch, without the addition of "Potomac" or "River." We are therefore of opinion that the ambiguity is fully removed, and legally, since it is by reference to a medium of explanation suggested on the face of the memorandum, and on evidence which, while it neither adds to, detracts from, nor varies the note in writing, supplies every exigency of the statute of frauds.

The only remaining question arises on the effects of Coombe's letter of 26 March, 1822, which the defendant insists amounted to a relinquishment of the contract of sale, and this appears to some of the Court to present the greatest difficulty in the cause. For it cannot be denied that the letter is not confined in its import to a demand of a fulfillment of the contract. It does not intimate an intention to enforce the contract

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but, on the contrary, concludes with a declaration that if Barry does not comply with this contract on his part, the complainant will hold himself exonerated and will resort to his original money contract as it stood prior to their entering into the contract for the sale of the premises.

Nothing, therefore, but the equivocal conduct of Barry on the receipt of that letter as proved in the deposition of Ingle deprives him of the benefit of this defense. To

have availed himself of it, he should have adopted the alternative offered him, and as the only unequivocal proof of it should have tendered to Coombe the amount justly due to him after extracting that item from the account. This he did not do, and it was too late after the bill filed to claim the benefit of a right thus gone by -- at least without paying unto Coombe the amount which would have been due to Coombe upon a mutual relinquishment of the bargain.

As to the ground of misrepresentation and fraudulent concealment, we have not thought it necessary to say more than that there is not the least evidence to support the charge set up in the answer.

Nor is it necessary to examine the case on the ground of part performance, since this Court is fully satisfied on the sufficiency of the memorandum in writing to sustain the decree so far as it requires Barry to make title to the moiety of the wharf, lot, and premises.

With regard to that part of the decree which relates to the payment of the balance of the stated account, and perpetuates the injunction not to remove certain property beyond the jurisdiction of the court until that balance be paid, we are induced to consider all objections to be waived.

Yet we mean not to express any doubts of its correctness, since the defendant has no where put his defense upon the ground of the remedy at law, but on the contrary, by his answer he impeaches the conclusiveness of the stated account and raises an issue in equity, upon the fairness and correctness of several items which, if expunged, would leave a balance in his favor.

This defense he has failed to sustain by proof, and the court, on that ground alone, independent of its connection with the principal subject of the bill, might legally decree payment of the stated balance and the means of enforcing payment.

Decree affirmed with costs and cause remitted for final proceedings.