(CHANCERY, ENGLAND.)

PHILIP WESTERN WOOD - - - *Appellant*; 1820.

JOSHUA ROWE - - - - - - - *Respondent.* WOOD *v.* ROWE.

A BILL being filed against two parties praying accounts and relief against both; after one of the defendants had put in an answer, an agreement is made between the plaintiff and the two defendants by their agent, who is also interested as a party to the agreement, containing various provisions as to the transactions of mortgage and partnership in mines, which were the subject of the bill, besides other matters of agreement; and providing that "all proceedings in law "and equity shall cease between the plaintiff and the "two defendants." This agreement, that all proceedings, &c. shall cease, &c. cannot be pleaded in bar to the whole suit by the defendant who has not answered.

Such a plea may operate to displace the equitable relief sought by the bill, so far as it regards the party who pleads, but as a bar to the whole suit it cannot be pleaded.

Such a plea is, in effect, a plea of one part of the agreement in bar of the whole suit, which is inadmissible.

The object of a plea to a bill in equity is to reduce the subject matter of litigation to a single point, and to avoid the expense which would be incurred by entering into all the subject matter of the dispute, which is not effected by a plea of an agreement, making provisions as to the subjects of the suit in a way which the decree in the cause could not effect.

Courts of equity cannot decree the performance of one part of an agreement, leaving the other parts unperformed.

If an agreement be made subsequent to the filing of a bill between the parties to the suit and other parties, for the purpose of putting an end to the proceedings in the suit, and other purposes, it cannot be pleaded in bar to the bill by one of the parties. If it could be so pleaded, it must contain averments that the conditions of the agreement have been performed, or

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from circumstances could not be performed; and that the other parties not joining in the plea are ready to perform the agreement; and events by which the agreement is affected ought also to be noticed in the averments. But *semb.* that in such a case the court not having the power to compel the performance of the agreement on the plea, a bill must be filed for the purpose, including all the parties, and all the subjects of the agreement.

It lies upon the party seeking the performance to take the steps necessary to enforce it, and not upon the other party bound by the agreement, being plaintiff in the original suit, to intercept the effect of the agreement by filing a supplemental bill.

An executory agreement is a cause of action, and cannot be pleaded in bar to another cause of action.

Such an agreement is totally different from a release under seal, but considered as in the nature of a release, it could only be applied to such part of the relief sought by the bill as relates to the questions at issue between the plaintiff and the party who proposes to have the benefit of the agreement by way of plea. It could not be pleaded in bar to the whole relief; for the cause must, at all events, proceed as to the relief sought against the other parties.

Such a plea, containing no averments, that all the parties to the agreement are ready to perform it, is not only insufficient for want of proper averments, but could not be made a good plea by any amendment; because it is not a proper subject of plea, but a mere right of action, and cannot be a bar to another suit instituted by the party against whom the right of action is claimed, especially where a long time has elapsed between the date of the agreement and the pleading of it.

Semb. That affidavits (filed upon interlocutory proceedings) are to be considered as matters of record, and that the facts disclosed by affidavits so filed may be viewed by the court in deciding upon the validity of a plea.—*Quære.*

THE Respondent Joshua Rowe, in 1816, filed a bill in Chancery against the Appellant Mat-

thew Wood, and Sir A. O. Molesworth, stating transactions between the Respondent and Matthew Wood, and deeds and instruments whereby an interest in mines, called Great and Little Crinnis, Campdown and Appletree, vested in the Respondent for terms of years, and a judgment in the court of Common Pleas entered up against the Respondent for the sum of 20,000*l.* were assigned to Matthew Wood, by way of security for the payment to him of monies due and to become due to him from the Respondent; and stating also, contracts entered into by Matthew Wood for the purchase of $\frac{2}{6}\frac{0}{4}$th shares, and by the Appellant of $\frac{4}{6}\frac{4}{4}$th shares in the mines; and further stating an indenture bearing date the 16th of December 1814, made between the Respondent of the one part and Matthew Wood of the other part, reciting an agreement between the parties thereto as to the taking and adjusting of the accounts relative to the mines, by which indenture the $\frac{2}{6}\frac{0}{4}$th shares in the mines were assigned by the respondent to Matthew Wood; and further stating an indenture of the same date, made between the Respondent of the one part and the Appellant of the other part, to the same purport and effect, *mutatis mutandis*, as the first mentioned indenture, whereby the $\frac{4}{6}\frac{4}{4}$th shares in the mines were assigned by the Respondent to the Appellant.

The bill further stated that Matthew Wood executed a power of attorney to Benjamin Wood, authorizing him to take possession of the mines, as the agent and for the benefit of Matthew Wood; and that in pursuance of the power, Benjamin Wood, in March 1815, entered into possession of

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the mines, as the agent of Matthew Wood, and had ever since been and then was in possession, and had ever since worked, and then worked the mines. The bill further stated, that the Respondent from time to time, after the month of November 1812, transmitted to Matthew Wood blank bills of exchange, upon stamps, sufficient to warrant the drawing of 50,000*l.* at least, that the same were all signed by the Respondent, either in the character of acceptor or drawer; that Matthew Wood had (as the Respondent believed) filled up the blank bills, and negociated or disposed of several of them, in some way, for his own use; and that since the month of March 1815, when Benjamin Wood took possession of the mines, Matthew Wood had carried on the business under the firm of the Crinnis Mine Company, and had issued bills of exchange in the name of the Crinnis Mine Company.

The bill further stated, that Matthew Wood had caused the complainant's effects to be seized in execution for the sum of 8,948*l.* 11*s.* 4*d.* and that such execution was taken out on the judgment for 20,000*l.* The bill charged, that in a certain account made out by Matthew Wood, of the dealings between him and the Respondent, there were divers errors and improper charges, and in particular that the Respondent was therein debited with the sum of 9,470*l.*, though in fact the same was money paid by Matthew Wood for purchases on his own account; and further charged, that Sir A. O. Molesworth, the then sheriff of the county of Cornwall, intended forthwith to proceed to a sale of the Respondent's effects seized in execution.

The bill prayed that an account might be taken of the several dealings and transactions in the bill mentioned; and that the balance due thereon from Matthew Wood to the Respondent might be ascertained and paid, he being ready to pay what, if any thing, might be found due from him upon taking the account; and that either the Appellant and Matthew Wood might be declared to be partners with the Respondent in the mines, and that an account might be taken of all the profits of the mines received by the Appellant and Matthew Wood, or either of them, &c. and that the Respondent might have credit in taking the account for his share of the profits, and for what was due and unpaid for the Appellant's and Matthew Wood's shares in the mines, and for the blank bills of exchange, and that proper directions might be given for the payment of the bills drawn in the name of the Crinnis Mine Company, or such of them as were outstanding; or in case the court should be of opinion that the Appellant and Matthew Wood were not partners with the Respondent in the mines, then that a like account might be taken of the profits thereof received by, or by the order, or for the use of the Appellant and Matthew Wood, or either of them; and that the Respondent might have credit given to him in taking the account for all those profits and for the blank bills of exchange, and for all the bills issued by Matthew Wood, in the name of the Crinnis Mine Company, or might be indemnified against the bills; and that the Appellant and Matthew Wood might, upon being paid what, (if any thing,) was due to them, deliver up possession of the mines, and the

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stock therein, to the Respondent; and that the Appellant and Matthew Wood respectively might in the mean time be restrained by injunction from issuing or negociating any bills or notes in the name of the Crinnis Mine Company, or any of the blank bills of exchange, and from using the name of the Crinnis Mine Company in any manner; and that Matthew Wood might also be restrained by injunction from proceeding in the execution, and from all other proceedings at law under the judgment; and that Sir A. O. Molesworth might, in like manner, be restrained from selling the Respondent's effects, or from otherwise proceeding in the execution. *

* The bill was unusually long, but contained no other allegations material to be stated for the purpose of making the plea and the judgment upon the appeal intelligible. On account of the observations made by the Lord Chancellor in moving the judgment (Post. 606, et seq.) a short statement of the proceedings which occurred between the filing of the bill and the plea is here introduced by way of note.

On the 19th of July 1816, the statements of the bill being supported by affidavits, an injunction to restrain proceedings under the execution was applied for, *ex parte*, and granted.

A joint and several answer had been prepared for the Appellant and M. Wood. In the month of November 1817, M. Wood alone swore to the answer, with an understanding (as stated by affidavit) that P. W. Wood should not be required to answer until certain proceedings then pending in an ejectment, which related to the mines, should be determined.

On the 29th of January 1818, the sheriff applied for a receiver of the effects, which had been levied under the execution. An order was accordingly made with the consent of all parties, and the appointment was afterwards completed with the usual recognizances.

No further step was taken in the cause until the month of

The Appellant put in upon oath the following plea:—

"This defendant, &c. saith, That since the said "bill of complaint was exhibited, the said com-

July 1819, when the plaintiff issued an attachment returnable immediately against P. W. Wood for want of an answer. Notice of a motion having been given to set aside this attachment, affidavits of what had taken place in the intermediate time were filed by both parties.

An affidavit was filed by the Respondent, as explanatory of the case, and a joint and several affidavit by the Appellant and two other persons, in which the agreement was set forth; it then proceeded to state, that in pursuance and furtherance of the agreement, the Respondent and Benjamin Wood, acting on behalf of M. Wood and the Appellant, had investigated accounts; and that on the 6th of March 1819, *a farther agreement* was made between the parties, in which the account between the Respondent and M. Wood and the Appellant was set forth according to the result of the investigation. At the end of this statement of acceunt appears the following reservation:—"The above account is correct, subject to the following respective claims and charges; the same to be agreed on between the undersigned, if possible, if not, to be referred in two months from this date." Then follow several claims for credit, &c. among which is a claim on the part of *M. Wood and the Appellant to be credited for the profits on* 24 64*th shares*, in Wheal Regent, from the 27th of May 1818. The memorandum concludes thus:—

It is agreed between the undersigned, that particulars of all accounts of every description shall be forthwith furnished mutually for the settlement of the above claims and charges.

It is agreed to refer the valuation of the ship-timber to, &c.

It is also agreed to refer the claim for stock, and rent of Dartmoor brewery, on, &c. to, &c., they to call in a third person if they do not agree.

(signed) Josh. Rowe,
B. Wood, for Matthew Wood.

The Crinnis Mine, 6th March 1819.

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" plainant and M. Wood, and this defendant being " mutually desirous of determining all proceedings " under the said bill, Benjamin Wood, as agent " for the said M. Wood and of this defendant, " as also in and on his own individual capacity " and behalf, and the said complainant did for that " purpose, amongst others, on or about the 27th " day of May 1818, make and enter into and duly " sign an agreement in writing, which was and is " in the words and figures following, (that is to " say;) We, the undersigned, hereby mutually agree " to the following effect: viz. 'That Wheal Regent " forms a part of Campdown Set, and is therefore " included in the sale to M. and P. Wood, and " also in the mortgage securities to M. Wood, but " as she has made no profit up to this time, the " accounts respecting the same shall not be taken " one way or the other, but from this date.' 'The " mine accounts during the possession of J. Rowe, " and also during the possession of M. Wood, to be " settled as per deed dated on or about December " 1814, between the undersigned, if possible, if not, " by two indifferent persons, one to be named by " each of the undersigned. All the ship-timber " now undisposed of to be taken at a valuation of

The Respondent claimed credit for the balance of purchase-money on the shares sold to M. Wood and the appellant, and for profit on the residue of the shares.

On the 31st of July 1819, the Lord Chancellor, upon the ground that the attachment had issued without a full communication with the defendants as to the steps intended to be taken in the cause, ordered it to be set aside, without costs, and without prejudice to any future proceedings.—See 1 J. and W. p. 322.

" two indifferent persons, and if they do not agree,
" then to call in a third, and the same to be charged
" to the mine account.' ' M. Wood to give J. Rowe
" 1, 2, 3, 4 and 5 years, by equal instalments, for
" the payment of the balance due upon making
" up the accounts, which is agreed to be done
" without delay, between M. Wood, P. Wood and
" J. Rowe; but whatever J. Rowe may deliver in
" stores to the mine, including the before-mentioned
" ship-timber, as well as his proportion of the profits,
" to go towards the next instalment coming due,
" but M. Wood to be paid as much sooner as the
" profits may amount to.' ' J. Rowe agrees to the
" charge of 1,000*l.* per year to the mines for B.
" Wood's services.' ' M. Wood to remain in full
" possession of the mortgage property as he is at
" present, but J. Rowe to have the control of the
" working part of the mine; B. Wood to receive
" and pay every thing, and to purchase and manage
" all the stores.' ' The injunction to be immedi-
" ately dissolved, and the execution withdrawn, *and*
" *all proceedings in law and equity to cease between*
" *J. Rowe and M. and P. Wood,*' (thereby mean-
" ing the complainant and M. Wood, and this de-
" fendant.) ' When J. Rowe has paid the balance
" of the account due to M. Wood, on making up
" all accounts between him and M. and P. Wood,
" the securities to be re-assigned.' ' Should any
" difference arise hereafter between J. Rowe and
" M. and P. Wood, the same to be left to two in-
" different persons, one chosen by each party, and
" if they cannot agree, a third to be called in.'
" Should any deeds be required to carry the above

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" arrangement into effect, the same to be prepared " by Mr. Joseph Edwards, as adviser between the " parties.'

" 'J. Rowe to assign to B. Wood all his pro- " perty and debts, for the benefit of his common " creditors, they agreeing not to proceed against " him in law or equity for 5 years, from the 1st of " June next.' 'All payments and receipts to be " made by B. Wood, and what purchases may be " required for carrying on any of the works of the " said J. Rowe, to be made by the said B. Wood; " but the management of the said works to remain " under the control of the said J. Rowe, B. Wood " making such dividends within the 5 years as he " may be enabled to from the monies in his hands.'

" 'J. Rowe not to draw for more than 1,000*l.* " per year from his estate, for his maintenance.'

" 'B. Wood to charge 5 per cent. on all the monies " he receives for his trouble, and also to charge what " other actual expenses he may pay or incur; but " the 5 per cent. to include all other commissions.'

" Dated this 27th day of May 1818. '*B. Wood*, " for self, *M. & P. Wood—J. Rowe.*'

" And this defendant doth aver, That the said " B. Wood, at and before the time of the signature " of the said agreement by him and the said com- " plainant, was duly authorized and empowered to " enter into and sign such agreement, as the agent " for and on behalf of this defendant and the said " Matthew Wood.

" And this defendant doth also aver, that by " the proceedings in equity, which it is by the " agreement stipulated should cease between the

" complainant and M. Wood and this defendant, " were meant and intended the proceedings in this " present suit; and that at the time when the " agreement was entered into and signed, there was " not, nor were there any other suit or proceedings " in equity, between the complainant and M. Wood " and this defendant, or either of them, than this " present suit and the proceedings therein.

" And this defendant doth also aver, that the " agreement hath not been waived or determined, " but is now subsisting and in full force; and this " defendant doth therefore plead the matters afore- " said, in bar to the said complainant's bill of com- " plaint, and the relief and discovery thereby sought; " and he humbly hopes to be hence dismissed with " his reasonable costs in this behalf sustained."

The plea was argued before the Vice Chancellor, on the 10th of November 1819, and allowed.

The respondent thereupon presented his petition of appeal against the order allowing the plea to the Lord Chancellor.

The appeal was heard in April 1820, when the Lord Chancellor reversed the order of the Vice Chancellor, and overruled the plea.

Against this order of the Lord Chancellor the appeal to parliament was presented.

For the Appellants:—*Mr. Heald, Mr. Sugden*, (and *Mr. Sidebottom.*)

For the Respondent:—*The Attorney General*, and *Mr. Horne.*

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The Lord Chancellor :—

[After some prefatory observations, and stating the effect of the pleadings and proceedings ;]

There are two ways in which this question must be considered. In the first place, I am not quite prepared to say that the affidavits filed in the cause might not be judicially noticed by the Court, nor do I say they could, nor do I mean to state that they had not a considerable influence on my mind *. The first question is, whether they ought or ought not to be looked at as a matter of record, to enable us to determine upon the validity of this plea? Considering the affidavits as matter of record, suppose that on Monday the attachment had been disposed of, and on Tuesday this plea had come before me, if I could not have judicially taken notice of the affidavits, I should have had entirely to forget them; which would have been a difficult operation. As matters of record they might be looked to. Considering the nature of this agreement, and looking at the averments, the Court was authorized to say argumentatively, and supposing such facts had taken place which the affidavits say did take place, and if the facts had taken place before the agreement, could those facts form a part of this plea; and if necessary to form a part of the plea, how could it be supported not noticing those facts? In these circumstances I think it would have been perfectly correct to look at the affidavits in a

* One of the facts averred by affidavit was, that the Respondent had been fraudulently induced by the Appellant and M. Wood to sign the agreement. This was denied by the affidavits of the opposite parties. The same fact was alleged by the petition of appeal from the judgment of the V. C. to the Lord Chancellor.

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judicial point of view. When the case came before me I was puzzled to know how to deal with it. I observed that it was the first time within my experience that such an executory contract had been pleaded. It was asked, did you ever hear of a Court allowing such a plea? and the answer was, did you ever hear of such a plea being overruled? On which my observation was, that I never heard of any such plea being allowed, or, on the other hand, of any such plea being overruled. I have considered with great attention the observations made on the subject of supplemental bills, according to the view which the Court below* took of the case: Where it was said this agreement applies to the whole suit, for by one of the terms of the agreement the Court is bound to dismiss the bill, and if any thing has been done to deprive the defendant of the benefit of that plea, it must be made available by a supplemental bill.

The important view of the case, taken by one of your lordships†, that it is a plea of one where the suit is against several, and where the interests of several are affected, did not wholly escape me. This view of the case presented itself to my mind: Supposing this agreement has not been acted upon in such a way that Rowe could compel the performance of it against Matthew Wood, then Philip Western Wood pleads this plea; and supposing land should have fallen in value, would there have been any thing to hinder Matthew Wood from saying, I am not bound to remain the purchaser of these shares in this mine; I will not join in the plea; I have no desire to enforce the agreement against Rowe; I will not be the purchaser of these shares in the character

* The Vice Chancellor. † Lord Redesdale.

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which the agreement would fix upon me. The grounds upon which I proceeded were these: In the first place this being an executory contract merely under the signature of the party, (I say nothing of a release under seal), I could not bring my mind to think that such an executory contract in a court of equity could be a bar to the whole of this suit: in the next place, if I had been bound to give my opinion upon it, I should have thought, from the contents of this agreement, all taken together, that a court of equity would have found it so difficult to execute that it would not have been executed. Whatever might be the law on the one side or on the other, looking at the date of this agreement, and the time when the plea was pleaded, I was of opinion that the plea was defective in matter altogether; and that it was defective in averment. It was asked by the counsel for the Appellant, Suppose it had been pleaded immediately after it was signed, would it not have been a good plea? Why, to be sure, pleading it then, the performance of the conditions of the agreement could not have been averred. At that moment it must have been averred, that under those circumstances, (which averment this plea wants,) they could not have been performed.

I forbear to enter into many other considerations connected with this plea. I do not press into the aid of the disallowance of this plea any of those facts which appeared in the subsequent affidavits. It appeared upon those affidavits, that all the matters of the bill, even important matters, were not covered by the two agreements. Under the first agreement, Rowe could not have the relief which he prays. By the agreement with Matthew Wood, he may take

into account not only the purchase money which Matthew is to pay for his shares, but also the consideration which Philip Wood is to pay. Under the first agreement that equity could not be enforced. That provision, although it is subsequent to the first agreement, I do not look at as a circumstance affecting its validity; but nobody can deny, on the other hand, that such an agreement, if it is not acted upon, but is merely a contract to be fulfilled, would require that there should be some averment to account why it has not been fulfilled, if it was not meant finally to act upon it.

Lord Redesdale:—

[After stating the pleadings and proceedings;]

With respect to the agreement, which is the foundation of the plea, it is, between Joshua Rowe, Benjamin Wood, Matthew Wood and Philip Western Wood, one entire agreement, which is to have its effect, if at all, according to the obligations which the several parties undertake by that agreement. "We, the undersigned, hereby mutually agree to the "following effect; that Wheal Regent forms a part of "Campdown Set, and is therefore included in the "sale to Matthew and Philip Wood, and also in "the mortgage securities to Matthew Wood; but "as she has made no profit up to this time, the "accounts respecting the same shall not be taken "one way or the other from this date;" this is a part of the agreement which concerns Philip and Matthew Wood.

"The mine accounts, during the possession of "Joshua Rowe, and also during the possession of "Matthew Wood, to be settled as per deed dated on

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" or about December 1814, between the undersigned, " if possible, if not, by two indifferent persons, one to " be named by each of the undersigned ;" that is the deed on which, as I apprehend, it was contended at the bar, as was alleged by Rowe in his bill, that the Woods are to be considered as partners: one part of the prayer of the bill is, that if they are to be considered as partners, then that the account may be taken in one way; but if they are not to be considered as partners, then that the account may be taken in another.

It is material, in any way of construing this deed, to observe, that the agreement does not at all determine what is the effect of it; whether they are to be considered as partners or not; if the disputed account is not settled by that deed, which it is to do if possible, it is to be adjusted by two independent persons, "one to be named by each of the undersigned." Now, though Benjamin Wood is one of the undersigned, Philip and Matthew Wood are the persons intended.

" All the ship-timber now undisposed of to be " taken at a valuation of two indifferent persons, " and if they do not agree, then to call in a third, " and the same to be charged to the mine-account. " Matthew Wood to give Joshua Rowe, one, two, " three, four, and five years, by equal instalments, " for the payment of the balance due upon making " up the account, which is agreed to be done, with- " out delay, between the said Matthew Wood, Philip " Wood and Joshua Rowe:" This provision is of extreme importance with respect to the effect of the agreement, and whether it can or cannot be made a matter of plea, as pleaded to this bill, because this being

a separate stipulation on the part of Matthew Wood, is a part of the consideration of the whole agreement, and if that stipulation on the part of Matthew Wood is not performed, the consideration of the agreement itself cannot be fulfilled.

" But whatever Joshua Rowe may deliver in stores " to the mines, including the before-mentioned ship- " timber, as well as his proportion of the profits, " to go towards the next instalment coming due, " but Matthew Wood to be paid as much sooner " as the profits may amount to;" (this provision " also relates to Matthew Wood) Joshua Rowe " agrees to the charge of 1,000 *l.* per year out of " the mines for Benjamin Wood's services;" (here is a provision for Benjamin's services) " Matthew " Wood to remain in the full possession of the mort- " gage property, as he is at present, but Joshua " Rowe to have the conduct of the working part of " the mine:" That is a stipulation between Joshua Rowe and Matthew Wood—a stipulation which, with respect to Mr. Philip Western Wood, has no effect, except as he was to submit that the possession should be in Matthew Wood, and the management of the mine should be to a certain extent in Rowe, that is as to the working part. " Benjamin " Wood to receive and pay every thing, and to " purchase and manage all the stores:" That is a stipulation in which Matthew Wood is concerned, as well as Philip, and in which Benjamin Wood is also concerned.

Then comes this stipulation, which is the ground of the plea: " The injunction to be immediately " dissolved, and the execution withdrawn, and all

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" proceedings in law and equity to cease between " Joshua Rowe, and Matthew and Philip Wood." Upon this part of the agreement I shall only briefly observe, in the first place, that the execution could only be withdrawn by Matthew Wood, for Philip Wood had no execution or proceedings at law. They were proceedings on the part of Matthew Wood; and it is a little material also to observe, that there is an averment that there were no other proceedings in equity, except the suit instituted by Rowe; but there is nothing said respecting the proceedings at law.

" When Joshua Rowe has paid the balance of " the accounts due to Matthew Wood, on making " up all accounts between him and Matthew and " Philip Wood, the securities to be re-assigned. " Should any difference arise hereafter between " Joshua Rowe and Matthew and Philip Wood, " the same to be left to two indifferent persons, one " chosen by each party, and if they cannot agree, " a third to be called in:" That is indefinitely prospective, extending to any thing which might arise in dispute, and to any period of time during which those mines should be in operation.

" Should any deeds be required to carry the above " arrangement into effect, the same to be prepared " by Mr. Joseph Edwards, as adviser between the " parties; Joshua Rowe to assign to Benjamin Wood " all his property and debts for the benefit of his com- " mon creditors, they agreeing not to proceed against " him in law or equity, for five years from the 1st of " June next:" That, I presume, is a stipulation which Matthew Wood and Philip Wood provided, with a view to putting the whole property of Rowe,

who was concerned with them as to these mines, into such a situation that his creditors might be repaid in the course of time, so as to prevent any embarrassment arising to the mines from any debts due by Rowe.

" All payments and receipts to be made by " Benjamin Wood, and what purchases may " be required for carrying on any of the works " of the said Joshua Rowe, to be made by Ben- " jamin Wood, but the management of the " works to remain under the conduct of Joshua " Rowe, Benjamin Wood making such dividends " within the five years as he may be enabled " to from the monies in his hands:" That is an engagement with all the three parties who contract here—all concerned in one way or other, and for the performance of which all were interested.

" Joshua Rowe not to draw for more than 1,000*l.* " per year from his estate for his maintenance; Ben- " jamin Wood to charge five per cent. on all the " monies he receives for his trouble, and also to " charge what other actual expenses he may pay or " incur; but the five per cent. to include all other " commissions:" That is a stipulation for the benefit of Benjamin Wood, and a stipulation also in which Matthew Wood and Philip Wood, and Rowe, were interested.

This instrument, which is dated on the 27th of May 1818, is signed by Benjamin Wood for himself, and Matthew and Philip Wood, and by Joshua Rowe. The plea, stating the agreement verbatim, avers, that Benjamin Wood was duly authorized and empowered to enter into and sign such agree-

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ment as agent for and on behalf of the defendant, and Matthew Wood; and it is also averred, that by the proceedings in equity, which it is by the agreement stipulated should cease between the complainant, and Matthew Wood, and the defendant, were meant and intended the proceedings in the present suit; and that, at the time when the agreement was entered into and signed, there were not any other suits or proceedings in equity between the said complainant and Matthew Wood, and the defendant, or either of them, than this present suit and the proceedings therein. Then it avers also, that the agreement has not been waived or determined, but is now subsisting and in full force; and the defendant pleads the matters aforesaid in bar to the bill of complaint, and the relief and discovery thereby sought.

This plea is in effect a plea of one part of the agreement; that part which provides that all proceedings in equity should cease between Joshua Rowe, and Matthew and Philip Wood, in bar of the whole bill. It is therefore a plea, the object of which is to prevent any further proceedings in the particular suit; yet that was a suit which was not merely against Philip Wood, but a suit in which Matthew Wood was also a party. In deciding upon this plea and the effect of it, I must consider first what is the object of a plea to a bill in equity. The object of a plea to a bill in equity I take to be this, to reduce the subject of litigation to a single point, and to avoid that expense which would be incurred by entering into all the subject-matter of the dispute. This plea does not effect that purpose; for this, which is made the sub-

ject of plea; is an agreement which embraces several subjects of the suit, and provides for them in a different way from what they could be provided for under a decree in the cause which had been instituted. If, therefore, the court is to proceed upon this plea as a mode by which it is to do justice between the parties, how is it to act? Is it to stay all proceedings against Philip Wood? that will not execute the agreement; it will execute that one part of the agreement which provides that the proceedings instituted in equity shall cease, but it will not execute the other part of the agreement; and I apprehend it is impossible to hold, that any person can have a right to demand that one part of an agreement shall be executed, leaving the other part unexecuted; which consideration alone demonstrates that this agreement could not be a good plea to this suit.

But what is the nature of this plea? Without entering into the question, whether the averments are or are not sufficient, except that it is manifest from what has been stated, that the averments are not sufficient, because they do not inform the court that Benjamin Wood and Matthew Wood are ready to carry into execution this agreement, without which the agreement cannot be performed. If such a decree cannot be made, the plea does not enable the court to do justice between the parties, and therefore I conceive it cannot be a bar to this suit as it is pleaded. Independently of this objection, can it be contended that an agreement which binds three persons can be offered by one of those persons in bar of a suit which involves other persons? The court upon the hearing of the plea would have that party before it on

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part of the case, and other parties at the hearing upon another part of the case. It would be impossible for a court to act upon the agreement under these circumstances, unless it had also the means at the same time to compel the other two parties to perform that agreement, which it cannot do unless a bill is filed for the purpose.

It has been said this is a dilemma which Rowe, the Respondent in the bill, has brought upon himself by executing this agreement; I say it is a dilemma which the Appellant also has brought upon himself by executing this agreement; both of them have brought themselves equally into that situation. When the Respondent does not insist upon the execution of the agreement, and the Appellant does insist upon it, it lies upon the Appellant to take the steps necessary to have the agreement performed, and not upon the Respondent. That I conceive is also an answer to the plea, and shuts it out from being allowed as a good plea to this bill.

But there is another objection which appears to me important, and which of itself is an answer to this plea, and that is, that it is an executory agreement; it is a ground of action, and I never yet heard that one cause of action could be pleaded in bar against another cause of action. Whether P. Wood has or has not a right to carry this agreement into execution must depend upon a variety of circumstances which cannot be in the contemplation of the court upon the hearing of this plea. In the first place the court would not have all the parties before it, and in the next place it would not have the point in issue as between Rowe and Philip Wood and

Matthew Wood, and consequently it would be impossible for the court to act upon it in any way whatever.

It is said, why is this difficulty to be thrown upon Philip Wood since he is ready to perform the agreement? if so, he must file a bill in equity to compel the performance of it; the agreement gives him no other remedy. It gives him a right to file a bill for a specific performance, but no other right whatever; it is only that species of right which it confers, how then can that as a plea be a bar to the bill? It has been compared to a release; I apprehend it is a totally different thing. Taking it as in the nature of a release, it is only an agreement (as pleaded) for a release of all demands between Philip Wood and Rowe, and that could not be pleaded in bar to the whole relief. It might be pleaded in bar as to any account sought to be taken by this bill, so as to make Philip Wood responsible to Rowe, but it would not be a bar to the whole suit. The suit must proceed with respect to Matthew Wood; and as far as he might have a demand against Philip Wood, though derived from Rowe, the court must decree against all the parties: and the only effect of that decree would be, with regard to the result of the account, if any thing should appear to be due from Philip Wood to Rowe, Rowe could not have any remedy upon that if it should be so decreed. Therefore, if it had been a release, it could not be pleaded in bar; if it had been a release of all demands whatever, it could not be a bar to this bill, because it could not affect the rights between Rowe and Matthew Wood, and the rights of Matthew Wood as against Philip Wood.

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Under these circumstances, it appears to me that this is a case, not only in which this plea with the averments is not a good plea, because the averments are not sufficient; but that no amendment could make it a good plea, because it is not a proper subject of plea: it is a mere right of action which Philip Wood insists he has against the respondent Rowe, and that right of action can only be made available by that mode of proceeding by which a right of action can be made available, that is, by producing it in the proper course of suit. It cannot be a bar to another suit which has been instituted by the party against whom Philip Wood insists he has this right of action. Upon these grounds the order disallowing this plea ought to be affirmed.

The *Attorney-General*:—We trust your Lordships will allow the Respondent his costs of this appeal.

The *Lord Chancellor*:—We cannot allow the costs, because there have been opposite judgments.

The order for over-ruling the plea affirmed.