[267] Further Adjourned Sittings in London, after Michaelmas Term, 1827, before Lord Chief Justice Best.

Jan. 18th, 1828.

ROUTLEDGE *v.* GRANT.

(A. proposed to B. to give him a certain sum for a thirty-one years' lease of a house, with possession on the 25th of July, and a definitive answer was to be given within six weeks. B. about three weeks after the proposal wrote that he accepted it, and would give possession on the 1st of August. A. in a few days wrote, withdrawing his proposal. Some time after this, and just before the end of the six weeks, B. wrote that it was by mistake he had offered possession on the 1st of August and stating that he was ready to give it according to the proposal:—Held, at Nisi Prius, that the letter of B. offering possession in August, was not an acceptance of A.'s proposal, and that A. had a right afterwards to retract his offer, and having done so, the second letter of B. amending the offer of possession, was too late. The declaration in the first and third counts alleged the possession of the whole interest by B., and in the second, the possession of a contract for it. It appeared that there had been some conversation between B. and the owner of the freehold, about granting a thirty-two years' lease, but there was no written contract, nor did it appear that there was any positive verbal agreement upon the subject. The only interest which B. had in the premises, at the time of the proposal and retraction was a ten years' interest:—Held, both at Nisi Prius and in Bank, that there was a material variance between the declaration and the proof.)

[Subsequent proceedings with annotations, 4 Bing. 653.]

Assumpsit.—The first count of the declaration stated, that at the time of the promise by the defendant &c., the plaintiff was lawfully possessed for the residue of a certain term of years, to expire on the 25th of December, 1856, of a certain dwelling-house &c., and thereupon, theretofore, to wit, on the 29th day of April, 1825, by a certain agreement then and there made between him and the defendant, it was agreed that the defendant should pay a premium of £2750, upon receiving a lease of the said premises for twenty-one years &c., with the option, upon giving six months' notice, of having the time extended to thirty-one years, &c., and that by the said agreement possession was to be given on or before the 25th day of July then next &c., as by the said agreement &c., would more fully appear. It then averred mutual promises, and that, up to the 6th day of April, the plaintiff was ready to grant a lease pursuant to the terms of the agreement, but that the defendant then and there discharged him from it. It afterwards averred a sale by auction of the premises, and a loss in consequence of £2230, which it alleged the defendant was liable to pay.

[268] The second count stated that at the time &c., the plaintiff was entitled, under and by virtue of a certain contract, to a certain term of thirty-two years from the 25th day of December, 1824, of a certain dwelling-house, &c., which was contracted and agreed to be granted to him by one J. A. Hermon, who then and there had lawful authority in that behalf; and that afterwards, to wit, on the 18th day of March, 1825, the defendant proposed and agreed to pay a premium of £2750, upon receiving a lease for twenty-one years, with the option &c.; and that a definitive answer to such proposal should be given by the plaintiff within six weeks from the time of making the said agreement. It then averred, that the plaintiff, within the six weeks, to wit, on the 29th day of April, returned a definitive answer, that he acceded to it. It then further averred the granting by Hermon, within the six weeks, of a lease to the plaintiff for thirty-two years, &c.

The third count was nearly similar to the first. It averred the tender of a lease, and the defendant's refusal to accept it and to pay the premium. There were the usual money counts; and the plea was *non assumpsit*.

It appeared that the defendant, being desirous of treating for the purchase of a house in Saint James's Street, on the 18th of March, 1825, having previously had a conversation with the plaintiff on the subject, made him this proposal in writing:—

" To pay a premium of £2750, upon receiving a lease for twenty-one years, with the option, upon giving six months' previous notice to the landlord, of having the time extended to thirty-one years, paying the same yearly rent as before, for such further time; rent, £250. Mr. Grant to take the fixtures at a valuation. Possession to be given on or before the 25th of July next; to which time all taxes and outgoings are to be paid up by Mr. Routledge; and a definitive answer to be given within six weeks from this 18th of March, 1825."

[269] On the 6th of April, the plaintiff sent the following letter in reply :—

" Mr. Routledge begs to say that he accepts Mr. Grant's offer for his house in Saint James's Street, and that he will give Mr. Grant possession on the 1st of August next.

" Mr. R. will esteem it a particular favour, if Mr. Grant will not mention the subject to anyone."

On the next day the defendant wrote to the plaintiff as follows :—

" Arlington Street, 7th April, 1825.

" Sir,—I received your note last night, and hasten to acquaint you, that having considered as confidential the negotiation respecting your house, I had mentioned it to no one; but upon consulting with a friend this morning, in whose opinion I place more confidence than in my own, I am advised, for some reasons that had not occurred to myself, not to think of taking a house in Saint James's Street, for a dwelling-house. May I therefore request you will permit me to withdraw the proposal I made to you about it. I am in hopes you will make no hesitation to do this, when you consider the spirit of candor and openness in which it was made to you; but should it be otherwise, I am one of the last that would willingly act with inconsistency, or be considered capable of doing an improper act. I will willingly refer the question to friends for their decision, and abide by their opinion of the case. I am &c. A. GRANT."

To this letter the plaintiff sent the following answer :—

" 8th April 1825.

" Sir,—In answer to your letter of yesterday, I beg to state, that, relying upon your performing the agreement for the purchase of my house in Saint James's Street, I have taken another house, and made arrangements, which I cannot, without great loss, relinquish. I hope therefore that you will not wish me to withdraw it. I am &c.
THOMAS ROUTLEDGE."

[270] This gave rise to the following letter from the defendant in reply :—

" 9th April, 1825.

" Sir,—Your note of yesterday surprised me, being altogether at variance with your conversation with me, two or three hours previous to your note, dated on the evening of the 6th, in which you must recollect, you one moment declared yourself off, and finally you went away to have the opinion of Mrs. Routledge, about the answer you were to send me. How, therefore, you can, under such circumstances, suffer loss and inconvenience, from my declining to proceed further in the treaty, I am at a loss to imagine: and I was in hopes you would have been satisfied with what I had stated in reply to your first note, to have had the liberality of letting the matter drop. But if that should not be your intention, I have only to add, that you may proceed with your claim for 'loss and inconvenience,' as you may think most advisable. I am &c. ALEXANDER GRANT."

Some further correspondence took place between the parties and their attornies, and on the 29th of April the plaintiff wrote to the defendant as follows :—

" Sir,—Upon referring to my letter to you of the 6th instant, accepting your offer for my house, No. 59, Saint James's Street, I perceive that I, by mistake, stated, that I will give you possession on the 1st of August next. By your offer you state, that possession is to be given on or before the 25th of July next; and I now inform you that I am ready to give you possession according to your proposal."

The plaintiff had not, at the time of the proposal, viz. 18th March, 1825, more than a ten years' interest, in the premises, but he subsequently obtained a lease for

thirty-two years from the owner of the freehold, which was dated the 21st of April.

[271] It appeared from the evidence of the landlord, that, previous to the granting of this lease, some conversation respecting it took place between the plaintiff and him, but no written contract was entered into, nor did it appear, that there was any positive verbal agreement upon the subject. It was admitted, that a draft of a lease, according with the terms of the proposal, and also the key of the house, were sent to the defendant on the 25th of July, and that they were returned by him on the following morning. The premises were sold by auction, and fetched only £520.

Taddy, Serjt., for the plaintiff.—The six weeks mentioned in the proposal apply only to the plaintiff and not to the defendant. The words must mean, I am bound by this offer, if you accept it within six weeks. The defendant was bound during the whole six weeks, and the plaintiff was to have that time for consideration. In the defendant's letter of the 7th of April, he does not allude to the difference between the 1st of August and the 25th of July. But, if he had, it would not have made any difference, for, within the six weeks, viz. on the 29th of April, the plaintiff offered possession, according to the terms of the proposal. The case nearest in point is that of *Adams* v. *Lindsell* (*a*)[1].

Wilde, Serjt., for the defendant.—The ground of decision in *Adams* v. *Lindsell* is, that till acceptance there is a continuing offer; but if there be an express rescinding of the offer, then it is not continuing. Before the plaintiff had accepted the defendant's proposal, the defendant had **[272]** a right to withdraw it; and the plaintiff's letter, written on the 6th of April, cannot be considered an acceptance, as it offers possession at a different time to that which is stated in the proposal. The learned Serjeant cited the case of *Payne* v. *Cave* (*a*)[2]. He also contended that there was a variance between the interest alleged in the declaration and that which the plaintiff was possessed of.

Best, C. J.—What had the plaintiff to sell on the 18th of March. He could not grant a lease for thirty-one years, for he had then only an interest for ten years.

Taddy, Serjt.—It is not necessary that a party should always be ready with his title.

Best, C. J.—At the time of the retraction by the defendant, you had not the lease for thirty-one years. The lease is dated the 21st of April; and, before that time, namely on the 9th, the defendant had withdrawn his proposal.

Taddy, Serjt.—The proposal does not suppose that we actually had the thirty-one years' term, but merely that we had the power of obtaining it; and that we had that power, is shewn by the fact that we did afterwards obtain it. If it is to be said, that the contract is defeated, because we had not the title at the precise moment, then there are few contracts that might not be put an end to.

Jones, Serjt., on the same side.—This is not a case of fraud. The question is, whether the party must have, at the moment, the complete and consummate technical title, which he contracts to communicate. I submit that he need not. All that is required, is, that he should be able **[273]** to fulfil his contract at the time appointed for its execution. There would be danger in almost all titles, on account of incumbrances, trusts, &c., if it were held, that the strict legal estate must be in the party at the time of the contract.

Best, C. J. (stopping Wilde, Serjt.).—It is not necessary for me to decide whether the letter of the 7th of April be a repudiation of the contract by the defendant, or only amounts to a request to be relieved from it. In the letter of the 9th of April, the defendant unequivocally declares, that the bargain is at an end, and defies the plaintiff to proceed for any compensation that he may think himself entitled to. The defendant, on the 9th of April, had a right to retract his offer, it not having been

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(*a*)[1] 1 B. & A. 681. A. by letter offered to sell B. certain specified goods, receiving an answer by return of post. The letter being misdirected, the answer notifying the acceptance arrived two days later than it ought to have done. On the day following that on which it would have arrived, if the original letter had been properly directed, A. sold to a third person :—Held, that there was a binding contract from the moment the offer was accepted.

(*a*)[2] 3 T. R. 148. That case decides that a bidder at an auction may retract his bidding at any time before the fall of the hammer.

at that time accepted by the plaintiff. The offer was on the condition that possession should be given on or before the 25th of July. The answer to that offer proposed to give possession on the 1st of August. An acceptance on terms differing from the offer cannot be a final arrangement, and it is therefore not a valid acceptance. Although the defendant gave the plaintiff six weeks to accept his offer, yet as there was no express stipulation that, for the chance of the plaintiff's acceptance, the defendant should, during that six weeks, be bound not to retract, the defendant might retract at any time before the plaintiff accepted. The language in which the judgment of the Court of King's Bench is expressed, in the case referred to, proves that this is the law. The Court say, that, until an acceptance, the party is supposed to be continually repeating his offer. The presumption of a repetition of the offer is rebutted by a declaration that the offer is retracted. It is not just, that one party should be bound when the other is not. I also think, that the objection on the ground of variance is sufficient to prevent the plaintiff from recovering. He states in one count, that he had, at the time of his agreement with the defendant, a contract for a lease. That means, **[274]** such a contract as may be enforced in a Court of Law. Now there certainly was no contract in writing; and I cannot collect, from the testimony of the landlord, that there was even a parol contract. There had been some conversation about renewing the lease, but nothing seems to have been concluded upon between the landlord and the plaintiff. It is stated, in the other counts, that the plaintiff had a lease that would expire in 1856, whereas, the lease which he had, would expire in 1835. That difference between the lease which the plaintiff had, and the lease set out in the declaration, is a substantial difference. I do not decide whether a man may assert in his contract that he has goods, or an estate, which he has not, if he be ready with such goods as he sells at the time they are to be delivered, or with a good title to the estate, at the time it is to be conveyed. I think the plaintiff must be nonsuited, on account of the repudiation of the contract before it was complete, and of the variance in the description of the thing bargained for.

Nonsuit.

Taddy, and Jones, Serjts., and Wightman, for the plaintiff.

Wilde, Serjt., and Patteson, for the defendant.

[Attornies—Rivington, and Forbes.]

In the following Term, a rule *nisi* was obtained for a new trial; but the Court were of opinion that the nonsuit was clearly sustainable on account of the variance between the declaration and the proof, as to the nature of the interest which the plaintiff had in the premises; and the rule, therefore, was eventually

Discharged.*

* See the cases of *Kennedy* v. *Lee*, 3 Meriv. 454; *Cooke* v. *Oxley*, 3 T. R. 653; and *Carvick* v. *Blagrave*, 4 J. B. Moore, 303, and 1 B. & B. 536.