

marked J. J., to which, as the evidence shows, a portion of the claim called the furnace account was added, to make up the amount at which the whole claim was settled.

Now, I cannot see how it can be said, at least that the account marked J. J. did not furnish the basis of the settlement—and if this be so, then it follows, that independently of the question of fraud, actual or constructive, the plaintiff will be allowed to surcharge and falsify it, to the extent of the errors specified in his bill. 1 *Story's Eq. sec.*, 523; 1 *Daniell's Ch. Pr.*, 761, 765; *Barrow vs. Rhineland*, 1 *Johns. Ch. Rep.*, 550.

There is a circumstance connected with this case, which, though it does not, in my judgment, invalidate the whole settlement, and induce me to set it aside altogether, is yet, I think, entitled to great weight upon the question of allowing the plaintiff to surcharge and falsify the account. There seems to me no doubt that the plaintiff, for a considerable period, extending, probably, from the year 1839, to the fall of 1844, was, though not perhaps actually *non compos mentis*, deprived of much of the mental capacity which he had before possessed. No man, I think, can read this record, and not come to this conclusion, and I cannot but persuade myself, that in his condition, when these accounts were presented to him, he was incapable of giving them that examination which was indispensable to their full comprehension. His mind had lost much of its vigor, and painfully sympathised with the infirmity to which his physical nature was a prey. The complainant then, as I think, was unable to understand these accounts, and the trustees, and the friend called in, did not examine them—all assuming their correctness as the basis of the agreement.

Now, I feel a strong conviction, under these circumstances, that even regarding this settlement as a family arrangement, which the court will usually uphold with a strong hand, that still it is its duty, if errors are pointed out, to permit the plaintiff to surcharge and falsify the account on which the settlement was made. This course seems to me to be in conformity with the doctrine of Mr. Justice Story, in the 1st volume of his *Equity Jurisprudence*, sections 131, 132.