

children on a footing of entire equality. It is perfectly clear, that the testator intended to give to each the same precise interest in his estate, in regard alike to quantity and quality, and to permit this arrangement to be disturbed, would be to defeat a cherished object of the testator.

The rule as assented by the Court of Appeals in the case of *McElfresh vs. Schley and Barr*, is, "that a man shall not take a benefit under a will, and at the same time defeat the provisions of the instrument," &c., and, as according to my view of this case, the complainant is now attempting, by this bill, to violate this rule, I should on this ground, if none other existed, refuse him relief.

[The decree in this case was affirmed on appeal.]

JAMES OWINGS,
vs.
WILLIAM BALDWIN
AND
GEORGE WHEELER.

DECEMBER TERM, 1847.

[PART PERFORMANCE—SPECIFIC EXECUTION.]

THERE can be no doubt, that if a party has succeeded in proving a contract, and in showing that it has been in part performed, he is entitled to have it specifically executed.

This right is founded, not upon the notion that part performance is a compliance with the statute of frauds, but upon the ground, that it takes the case entirely out of the statute.

In order to take a case out of the statute, on the ground of part performance, the plaintiff must make out, by clear and satisfactory proof, the existence of the contract, as laid in the bill, and the act of part performance must be of the identical contract set up by him.

It is not enough that the act is evidence of *some* agreement; but it must be unequivocal and satisfactory evidence of the particular agreement charged in the bill.

Where delivery of possession is relied upon, it is indispensable that such delivery to, and taking possession by, the defendant, is referable to the contract alleged in the bill, and not to a distinct or different title.