

ant, which they say, correctly sets forth the terms upon which they were willing to purchase, when the title could be rendered unexceptionable. Now, if a contract of purchase, was in fact made, it is impossible to determine from the evidence, what the terms were? Did the parties agree upon the terms of the paper exhibited by the plaintiff, or by the defendants? Is there in truth, a single witness, who undertakes to prove all the terms of the alleged contract? Some of them certainly do speak of particular terms, but upon a careful examination of the depositions, I do not find a single witness who professes to know all the terms, and stipulations of the agreement; and, especially, there is no witness who has undertaken to prove the identical agreement charged in the bill. There can be no doubt, that the plaintiff has succeeded in proving *some* agreement; and indeed, the answer admits, that *some* agreement was made. But this, Chancellor Kent says, is not sufficient; the *particular* agreement charged must be proved, as must the part performance of the same agreement, or the statute will be a bar.

And the plaintiff, has not only, as I think, failed in proving the agreement laid in his bill, but he has also failed in his proof of the act of part performance.

The bill alleges, that possession was delivered by plaintiff, and received by the defendants, according to the form and effect of the agreement, as charged. This averment is likewise flatly denied, and the possession which the defendants admit they took, is referred to a totally different agreement. The burden of proof in regard to the alleged act of part performance of the contract, as well as of its alleged existence, is of course upon the plaintiff, and the weight of the burden is most essentially increased by the positive denials of the answer, in direct response to the bill. Has the plaintiff been successful in proving such an act of part performance of the contract, as he has stated in his bill? An act, in the language of Lord Hardwicke, "as could be done with no other view, or design, than to perform the agreement;" and "with a direct view to its performance?" I think not. There is not a single witness who speaks of the terms upon