

he would enjoy of denying it upon oath if the relative position of the parties was changed.

It is said, however, that the proof makes out a clear case of intention, and that this Court has the power and will cure the defect, and execute the contract according to the intention of the parties. There can be no doubt in this state, that chancery will receive parol proof to reform a written contract so as to make it correspond with the real intention of the parties, and then decree its specific execution as rectified. *Moale vs. Buchanan*, 11 G. & J., 314. Thus repudiating the doctrine that parol evidence of mistake could only be offered by the defendant to rebut an equity. But this is not a case in which parol evidence is offered to rectify a written contract upon the ground of fraud, surprise, or mistake. The contract here is by parol, and void; and if the intention of the parties was ever so clearly expressed, it would be no better. It would still be void for want of writing, and no reformation of it by this Court can make it otherwise. It follows, therefore, that in my opinion the defence cannot be maintained, and that the plaintiff must have relief if this Court has jurisdiction to give it to him.

The objection to the jurisdiction is for the first time taken at the hearing, and after the argument had commenced, and though I do not deem myself at liberty to disregard it on that ground, it certainly furnishes a reason for looking with some degree of disfavor upon it. Prior to the passage of the Act of 1841, ch. 163, an objection to the jurisdiction of this Court might be taken in the Court of Appeals, though the defendant had wholly omitted to place his defence upon that ground in the Chancery Court, so that it frequently happened that parties who had meritorious claims if prosecuted in the proper forum, lost them by having an exception to the jurisdiction sprung for the first time in the Appellate Court, when, if the objection should be sustained, limitations or loss of evidence would be fatal to a recovery upon being compelled to sue at law. The Act referred to was to cure this evil; and though it does not apply to this Court, or require the defendant to object to its jurisdiction at any particular stage of the cause,