when he arrived all three were there together, waiting for him, and they then requested him to write their Wills, that there was an agreement made by the said three brothers in reference to the disposition of their property, and they distinctly stated it to him, that he might the better know how to put it in writing. He then states that they agreed to leave their property as it is devised in their respective Wills, Mr John Johns agreeing to devise his real Estate known as "Snow Hill" and "Gill Place", to his three brothers and upon the death of the survivor of them to John T. Johns son of his brother Richard, what he states in reference to the dispositions made in their respective Wills he says is what they agreed upon in the presence of himself and Each other, and he accordingly committed it to writing in conformity with their agreement, by drawing up their Wills in conformity to it. He says that this agreement was made and rehearsed over in the presence of himself, and Each other, before he wrote any of the Wills. His Witness then testifies most clearly and distinctly that these brothers agreed together to devise their Estates, in a certain manner and that John Johns agreed with them to devise the property above specified to the Complainant.

2. This Evidence removes of the agreement is merely oral, and not in writing for I do not regard these several Wills drawn in conformity with the agreement as furnishing any Evidence in writing that they were made in pursuance of an agreement on the part of the testators. In my opinion, a will never furnishes such Evidence unless it recites the agreement. A Will in its nature, upon its face, does not import an agreement in in pursuance of which it is made. A deed or any other instrument sealed upon consideration does because it sets forth the consideration. It is not so with a Will which upon its face is voluntary, and does not import a contract. But is not this agreement sufficiently proved notwithstanding the absence of any written Evidence of it? I am of opinion that it is, because it has been performed, to such a degree, as to Exempt it from the operation, of the Statute of frauds, requiring agreements relating to lands, to be reduced to writing, to give them validity. The facts and circumstances connected with this transaction, place it that class, of agreements relating to lands, that are taken out of the Statute by part performance. All three of the brothers performed the agreement in part by Executing their respective Wills in conformity therewith, two of them fully performed it by leaving their Wills unrevoked, and John Johns accepted and Enjoyed the benefit he was to derive from it under the Will of his brother Kensey. Under these circumstances it appears to me that no Court of Justice would give Ear to the objection relied upon by the defendants, that this agreement has not been reduced to writing and cannot be legally proved by oral Evidence. The authority for my opinion on this point will be found in the cases, to which I shall refer upon the question that I shall next consider that is to say:

3. Are there any such rights acquired under a contract of this character as a Court of Equity will Enforce?

This question is very distinctly answered by Parsons in his treatise on Contracts Vol. 2. p. 563. He there says, "an agreement to make a certain disposition of property by last Will is one which strictly speaking is not capable of Execution, not in the party's life time because any testamentary instrument is by its nature revocable and after his death, it is no longer possible to make his last Will. Yet it has been held to be within the jurisdiction of Equity to do what is Equivalent to specific performance of such an agreement, by requiring those upon whom the legal title has descended to convey the property in accordance with its terms. And the Court will not allow this post

mortem remedy to be defeated by any devise or conveyance in the life time inconsistent with the agreement." Newland on Contracts p. 111. Story Eq. Jur: 751. 755. 756. numerous English decisions fully sustain this law as stated by these Elementary authors 7 Simons 64. Podmore v. Gunning, Logan v. Weir law 7. Bligh. 53. 1 Dickens 419. Logan v. Weir hall 7. Bligh's R. 53. 54. among the American cases see Avers v. Avers 3 Dessaus Rep. 195. Izard v. Executor of Izard 1 Bailey 116. And in the late case of Johnson v. Hubbell Hopkins Chan. Rep 332. this subject is fully considered, and all the decisions referred to and commented on. There a father had agreed and promised that if his son would execute the necessary deeds for an Equal partition of his mother's Estate between himself and sister, that he the father would leave all his own property Equally to these two Children, share and share alike. His son Executed the deeds necessary to complete the division. The father afterwards made his last Will by which he Entirely cut off and Excluded his son from all participation in his Estate. The Chancellor in delivering his Opinion says "there can be no doubt but that a person may make a valid agreement binding himself legally to make a particular disposition of his Estate by last Will and testament, no good reason can be assigned why he may not make a legal agreement to dispose of his property to a particular individual or for a particular purpose, as well by Will as by a conveyance to be made at some future specified period or upon the happening of some future Event. A Court of Equity will decree a specific performance of such an agreement upon the recognized principles by which it is governed in the Exercise of this branch of its jurisdiction." And again "this agreement made between the Complainant and his father was a legal agreement, and this Court should decree its Execution &c." generally the agreement can be enforced without any Embarrassment, If A. enters into an agreement for which he receives a good consideration with B, A having undertaken to make C. a voluntary gift of that which he had no right in case to dispose of, the Court does no injustice to C. by declaring him a mere trustee, To permit C. to hold the property as against B. the Court would sanction the fraud which A. had committed in disposing of his property in violation of the agreement. And to the objection urged in that case and which is relied on also here, the Chancellor remarks "It is said, that this agreement was in fraud, and is therefore contrary to the Statute of frauds, But although this agreement was a mere fraud one, if there was a part performance of it of such a character as upon the principles recognized & acted on by this Court, will take a fraud agreement out of the Statute, then there is nothing peculiar about an agreement of this kind to exclude it from the operation of those principles. If one party to a fraud agreement has wholly or partially performed it on his part, so that its non fulfilment by the other party is a fraud the Court will compel a performance.

In this case the fraud performed his part of the agreement, In fact everything was done by both parties that the character of the transaction would admit of. There is no objection to a decree on the ground of the contract not being in writing." The case before this Court in all its facts and circumstances is quite as strong as the above, But the Complainant is not without strong authority for the relief he prays in adjudicated cases in our own Courts. The Case of Colegate D. Owings v. Charlotte C. D. Owings reported in 1 Bland 374 is a direct authority upon the several questions discussed in this case. The decisive character of that case upon these subjects is not perceived at first view, in consequence of the nature of the pleadings and the mode in which relief was afforded to the defendant. The bill in that case was filed