

*Gordon Woodbury, George W. Prescott, and Oliver E. Branch,*  
for the plaintiff.

*William A. J. Giles and Harry G. Sargent,* for the defendant.

CHASE, J. The defendant, by accepting the assignment, became bound to perform the agreement set forth in it to be performed by him, although he did not sign the instrument. *Burbank v. Pillsbury*, 48 N. H. 475; *Harriman v. Park*, 55 N. H. 471; *Winnepesaukee Camp Meeting Association v. Gordon*, 63 N. H. 505, 506. His executory agreement was the sole consideration for the conveyance to him of the patent right, dies, and tools. By repeatedly declining to perform it he has rescinded the contract, so far as his acts could accomplish that result; he has at least given the plaintiff an option to consummate a rescission by an acceptance of the offer of rescission necessarily included in his declination. The plaintiff, by bringing this suit, has manifested his assent to the proffered rescission. No prior notice was necessary under the circumstances. The plaintiff's repeated demands upon the defendant for the performance of his agreement were sufficient notice that the plaintiff did not intend to waive his rights. As the plaintiff received nothing from the defendant, he had nothing to return before exercising the right of rescission. Upon the defendant's reconveyance of the property received, the parties will be in their former positions. *Danforth v. Dewey*, 3 N. H. 79; *Fuller v. Little*, 7 N. H. 535; *Lucey v. Bundy*, 9 N. H. 298; *Snow v. Prescott*, 12 N. H. 535; *Abbot v. Johnson*, 32 N. H. 9, 20; *Drew v. Claggett*, 39 N. H. 431; *Smith v. Hatch*, 46 N. H. 146; *Chamberlin v. Perkins*, 55 N. H. 237; *Appleton v. Insurance Company*, 59 N. H. 541, 546; *Foster v. Bartlett*, 62 N. H. 617. If the property in the defendant's possession by virtue of the assignment were all chattels like the dies and tools, an action at law for its recovery might be an adequate remedy; but it is not. A substantial portion of it is a patent right,—an intangible, incorporeal thing, which cannot be specifically recovered in an action at law. As the plaintiff has not an adequate remedy at law, he is entitled to a remedy in equity.

*Exception sustained: demurrer overruled.*

CLARK, J., did not sit: the others concurred.

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TRAINOR v. HEATH & a.

If an action in which the parties had a constitutional right to trial by jury was by their agreement marked for trial by the court, the agreement and marking remain in force after a trial by the court which does not result in a decision, and will not be vacated except for cause shown

CASE, for personal injuries caused by the defendants' negligence. The damages demanded exceed one hundred dollars. At the March term, 1891, the case, after having been put upon the jury list, was taken from it by agreement, marked "issues to the court," and continued. At the next term it was tried under the agreement, but was not decided. The question was reserved whether the plaintiff is now entitled to a jury trial.

*Denis F. O' Connor and David Cross, for the plaintiff.*

*Alpheus C. Osgood and Burnham, Brown & Warren, for the defendants.*

CHASE, J. The agreement binds the parties, and, like other agreements made matter of record, should be specifically enforced, unless it appears that it ought to be vacated for good cause. *Alton v. Gilmanton*, 2 N. H. 520; *Fernald v. Ladd*, 4 N. H. 370; *Dexter v. Young*, 40 N. H. 130; *Blain v. Patterson*, 47 N. H. 523, 526; *Wells v. Jackson Iron Company*, 48 N. H. 491, 526; *Page v. Brewsters*, 54 N. H. 184; *Brooks v. New Durham*, 55 N. H. 559, 561; *Vaughan v. Morrison*, 55 N. H. 580, 592; *Weare v. Putnam*, 56 N. H. 49; *Woodbury v. Swan*, 59 N. H. 515; *Russell v. Babbitt*, 60 N. H. 373. Whether it should be vacated is a question of fact to be determined at the trial term. By the agreement, the plaintiff waived her right of trial by jury. The waiver continues while the agreement is in force. There is no provision in the agreement by which the case is to be tried by a particular member of the court, or at a particular term, or by a jury at subsequent trials if the first does not result in a verdict. Its terms are general, and include all trials that are necessary to reach a decision of the issues.

*Case discharged.*

CLARK, J., did not sit: the others concurred.

CHESHIRE.

WHITNEY & als. v. HALE & als.

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If A as principal and B as surety make a note and have it discounted and the avails paid to B, A signing it in consideration of B's promise to convey to him certain land or to refund the money, and B has disabled himself from conveying the land, and has not refunded the money or paid the note, his mortgage to A to indemnify him against loss by signing the note is valid.