useless, for he had no certain interest to release: it was not, then, [651] certain whether he would ever have to sue Buckman or not.

Bompas. The witness ought not to have been rejected; his interest, if any, being too remote. The interest, to have excluded him, ought to have arisen directly out of the cause. But the Defendants if they had failed could never have sued him, they could only have sued Wilson; and the inconvenience would be great if the excluding interest were not confined to an interest in the cause in hand: no line could be drawn: and the possibility of exposure to an action, after many others should have been tried in succession, would render it necessary to procure a multitude of releases, which would render justice unattainable. But the rule has always been confined to an interest in the particular cause. In *Carter* v. *Pearce* (1 T. R. 164), the Court said, "In order to shew a witness interested, it is necessary to prove that he must derive a certain benefit from the determination of the cause one way or the other." And in *Abrahams* v. *Bunn* (4 Burr. 2254), it is laid down, that where the interest is doubtful, the objection must go to the credit rather than the competency of the witness. The verdict, too, in this cause would never have been evidence against Buckman; for in an action between Wilson and Buckman it would have been res inter alios gesta, and the Defendants could only sue Wilson, not Buckman. He being competent, the releases were unnecessary.

BEST C. J. I am clearly of opinion that the Defendants could not sue Buckman: any action they could have maintained in case the Plaintiff had recovered, must have been brought against Wilson, under whom [652] they claimed; if so, no release was necessary from them to Buckman. I doubt whether a release were necessary even from Wilson; because, if so, it would be necessary in many cases for a hundred persons to release in succession; and it is better that objections to the competency of a witness on the score of interest should be confined to his interest in the immediate cause. But if it were necessary for Wilson to release, I am of opinion that he has sufficiently done so. Where at the time the instrument is executed the transaction has occurred out of which the future action, if any, is to arise against the witness, there is no reason why a party should not bar himself with respect to that transaction, though it might be otherwise with respect to causes of action which had not arisen at the time the release was executed.

PARK J. I confine my opinion to the last point: the witness was, at all events, rendered competent by the release from Wilson. Morris and his partner could never have sued the witness, and Wilson, who might perhaps have been placed in a situation to sue him, has effectually released every claim to arise out of the transaction in dispute.

BURROUGH J. declined to deliver any opinion.

GASELEE J. The Defendants could not sue Buckman, and therefore it is unnecessary to say whether the first release were valid or not, though I am inclined to think it was, because it related to a transaction in which the three relessors were all concerned. But as an action could only have been maintained against Buckman by Wilson, his release is sufficient.

Rule absolute.

## [653] ROUTLEDGE *v.* GRANT. May 13, 1828.

[S. C. 1 Moo. & P. 717; 6 L. J. C. P. (O. S.) 166: at Nisi Prius, 3 Car. & P. 267. Distinguished, *Dickinson* v. *Dodds*, 1876, 2 Ch. D. 469. Referred to, *Byrne* v. *Van Tienhoven*, 1880, 5. C. P. D. 347; *Stevenson* v. *M'Lean*, 1880, 5 Q. B. D. 351; *Reichel* v. *Bishop of Oxford*, 1887-89, 35 Ch. D. 68; 14 App. Cas. 259; *Bristol, Cardiff and Swansea Aerated Bread Company* v. *Maggs*, 1890, 44 Ch. D. 625.]

1. Defendant having offered to purchase a house, and to give Plaintiff six weeks for a definitive answer, Held, that before the offer was accepted, the Defendant might retract it at any time during the six weeks.—2. Averment, that Plaintiff was entitled to a term of thirty-two years in the premises, under a contract with A. and that Plaintiff having agreed to take the premises, Defendant was ready to grant him a lease of thirty-one years:—Plaintiff having only twelve years' term in the premises, and shewing no written contract with H. for a term of thirty-two years, Held, a material variance.—3. Defendant offered to purchase a house upon certain terms,

"possession to be given on or before 25th July;" Plaintiff agreed to the terms, and said he would give possession on the 1st of August, Held, no acceptance of Defendant's offer.

Assumpsit. The declaration stated (first count) that the Plaintiff was possessed of a term in a dwelling-house, to expire 25th December 1856; and that Defendant agreed, on the 29th April 1825, upon receiving a lease for twenty-one years, at 250l. a year rent, with the option of having the time extended to thirty-one years, on giving six months' notice, and, upon having possession on the 25th July then next, to pay Plaintiff 2750l., and take the fixtures at a valuation.

Averment of Plaintiff's readiness to grant the lease. Breach; refusal to accept it, and to take the fixtures at a valuation; and non-payment of the 2750l.

The second count alleged the Plaintiff to be entitled to a certain term, to wit, a term of thirty-two years, in the dwelling-house, under a certain contract between the Plaintiff and Anthony Hermon, who was authorized in that behalf; and then stated the agreement with the Defendant, and the breach, as before.

The third count alleged Plaintiff to be possessed for the residue of a certain term, to expire 25th December 1856; and the agreement, tender of lease to Defendant, and breach, as before.

At the trial before Best C. J., London sittings after Michaelmas term, it appeared, that on the 18th March **[654]** 1825, the Plaintiff received a note from the Defendant touching the premises, in these terms:—

"Mr. Grant's proposal.

"To pay a premium of 2750l., upon receiving a lease for twenty-one years, with the option (upon giving six months' previous notice to the landlord or his agent) of having the time extended to thirty-one years, paying the same yearly rent as before, for such extended term of ten years beyond twenty-one years.

"Rent, 250l.

"Mr. Grant to pay for the fixtures at a valuation, possession to be given on or before 25th July next, to which time all taxes and outgoings are to be discharged by Mr. Routledge; and a definitive answer to be given within six weeks from the 18th March 1825."

The Plaintiff, who at this time had only a term of twelve years in the premises, had to apply to his landlord for a new lease, before he was in a condition to accept the Defendant's offer. The Plaintiff having come to an understanding with his landlord, wrote the following note to the Defendant:—

"Mr. Routledge begs to say that he accepts Mr. Grant's offer for his house, No. 59 St. James's Street, and that he will give Mr. Grant possession on the 1st of August next.

"St. James's Street, 6th April 1825.

"Mr. R. will esteem it a particular favour if Mr. Grant will not, for the present, name the subject to any one."

The Defendant returned the following answer:—

"7th April 1825.

"Sir,—I received your note last night, and hasten to acquaint you, that having considered as confidential **[655]** the negotiation respecting your house, I had mentioned it to no one; but, upon consulting with a friend this morning, in whose opinion I have more confidence than my own, I am advised, for some reasons which had not occurred to myself, not to think of taking a house in St. James's Street for a dwelling-house. May I therefore request you to permit me to withdraw the proposal I made to you about it? I am in hopes you will make no hesitation to do this, when you consider the spirit of candour and openness in which it was made to you. But should it be otherwise, as I am the last that would willingly act with inconsistency, I will willingly refer the question to friends for decision, and abide by their opinion of the case.—I have the honour to be, &c. "ALEX. GRANT.

"Mr. Thomas Routledge."

To this the Plaintiff replied as follows:—

"8th April 1825.

"Sir,—In answer to your letter of yesterday, I beg to state, that, relying upon your performing the agreement for the purchase of my house in St. James's Street, I have taken another house, and made arrangements which I cannot without great loss relinquish. I hope, therefore, that you will not wish me to withdraw it.—I am, &c.

"THOS. ROUTLEDGE.

"Alexander Grant, Esquire."

The Defendant rejoined,—

"9th April 1825.

"Sir,—Your note of yesterday surprised me, being altogether at variance with your conversation with me two or three hours previous to your note, dated on the [656] evening of 6th, in which, you must recollect, you one moment declared yourself off; and, finally, you went away to have the opinion of Mrs. Routledge, about the answer you were to send me. How, therefore, you can, under such circumstances, suffer loss and inconvenience from my declining to proceed further in the treaty, I am at a loss to imagine; and I was in hopes you would have been satisfied with what I had stated in reply to your first note, to have had the liberality of letting the matter drop. But if that should not be your intention, I have only too add, that you may proceed with your claim for 'loss and inconvenience' as you may think most advisable.—I am, &c.

"ALEX. GRANT.

"Mr. Thomas Routledge."

The Plaintiff after this surrendered the existing lease to his landlord, and obtained from him a new one, dated 21st April 1825, from the 25th December 1824, for thirty-two years, for the same clear yearly rent of 250l., payable quarterly; in which the covenants on the part of the lessee were similar to those in the former; and then wrote the Defendant the following letter:—

"Sir,—Upon referring to my letter to you of the 6th instant, accepting your offer for my house, No. 59 St. James's Street, I perceive that I, by mistake, stated that I would give possession on the 1st day of August next. By your offer, you state that possession is to be given on or before the 25th July next; and I inform you that I am ready to give you possession, according to your proposal.—I am, &c.

"THOS. ROUTLEDGE.

"29th April 1825."

[657] This letter, on the day it was dated, was delivered at the Defendant's house; and the keys, and a lease of the premises in question, according to the agreement, were tendered to him before the 25th July, but rejected.

The six weeks, from the 18th March 1825, within which, by the Defendant's proposal, a definitive answer was to be given, expired on the 1st May 1825.

Upon these facts it was objected, first, that the Plaintiff being allowed six weeks to accept or reject the Defendant's offer, the Defendant was entitled, also, until it was accepted, to retract it, at any period before the expiration of the six weeks; that there was no acceptance of the terms proposed, till the 29th of April, which came too late, the Defendant having retracted his proposal on the 9th. Secondly, that the Plaintiff had not, before the Defendant withdrew his proposal, any such interest in the premises as he was alleged to have in the declaration, or as would have enabled him to accede to that proposal. The Plaintiff was thereupon nonsuited, with leave to move the Court to set the nonsuit aside.

Taddy Serjt. accordingly obtained a rule nisi to set aside this nonsuit, and

Wilde Serjt. shewed cause. There was no valid contract binding on both parties. By the terms of the Defendant's proposal, the Plaintiff had six weeks to accept or reject it, and the parties would not have been on an equal footing, if the Defendant had not the privilege of withdrawing his proposal during the same period: having finally withdrawn it on the 9th of April, the Plaintiff's acceptance on the 29th came too late, the acceptance on the 6th being out of the question, as not acceding to the terms offered by the Defendant. *Ken-*[658]*nedy* v. *Lee* (3 Meriv. 454) has decided

that an acceptance varying in any degree from the terms of an offer, is, in effect, no acceptance; and *Adams* v. *Lindsell* (1 B. & A. 681), confirms the principle established in *Cooke* v. *Oxley* (3 T. R. 653), that a party who allows time for the acceptance of an offer, may retract before it is accepted. But the Plaintiff, at the time of the Defendant's offer, and up to the period of his withdrawing it, had no such interest in the premises as that stated in the declaration, nor even such as could have enabled him to meet the proposal; he had only a term of twelve years when he agreed to grant thirty-one. On the ground of variance, therefore, the nonsuit cannot be impeached.

Taddy and Jones Serjts. in support of the rule. The Defendant's offer was made on good consideration; namely, that the Plaintiff should procure him a term of thirty-one years in the premises; and a party cannot retract, during the time which he allows for deliberation, an offer made on good consideration. *Cooke* v. *Oxley* was determined on the ground that the bargain was nudum pactum, and, therefore, without consideration. Lord Kenyon said, "at the time of entering into the contract the engagement was all on one side; the other party was not bound; it was, therefore, nudum pactum."

And Buller J. put it on the ground that it ought to have been stated, that the Defendant (who was allowed till four o'clock to consider whether or not he would buy goods on the terms offered) "did agree at four o'clock to the terms of the sale:" from which it may be inferred, that if such a statement had been made in the declaration and proved, the Defendant would have been liable for refusing to perform his contract.

**[659]** In the present case there is a sufficient consideration, and a sufficient averment and proof of the Plaintiff's agreeing to the terms of the contract before the expiration of the time limited. In *Adams* v. *Lindsell*, the defendants were held to be bound by an offer to sell upon receiving an answer in course of post, although by accident the answer did not arrive till two days after the next post, and the defendants had, in the mean time, sold the goods to a third person.

With respect to the alleged variance,—it is sufficient that the Plaintiff had a term at his disposal; the time when it was to expire was immaterial, and the allegation that it was to expire in 1756 may be rejected as surplusage. In *Carvick* v. *Blagrave* (1 B. & B. 536. 4 B. M. 303), where the assignee of the lessor declared in covenant against the lessee, that the lessor at the time of granting the lease was possessed of the premises for the remainder of a term of twenty two years, commencing from the 25th of December 1797; and the lessee pleaded that the lessor was not at the time of the lease possessed of the remainder of the term in manner and form as the declaration alleged, Dallas C. J. said, "it is objected, 'that by this plea the precise extent of the term stated in the declaration is put in issue, and that the Plaintiff's case would be defeated, if it appeared that his term was not of the precise extent alleged.' But we think such consequence will not follow: the plea puts in issue the substance of the allegation, and the substance of it is, that the lessor being possessed of a term made a derivative demise to the Plaintiff."

It is sufficient if the party has at the time of the completion of the contract, that which he proposes to sell. And on the 29th of April, before which time there was **[660]** no complete contract in the present case, the Plaintiff was in possession of the term he agreed to dispose of.

BEST C. J. The nonsuit was right on both grounds. I put it on the same footing as I did at Nisi Prius. Here is a proposal by the Defendant to take property on certain terms; namely, that he should be let into possession in July. In that proposal he gives the Plaintiff six weeks to consider; but if six weeks are given on one side to accept an offer, the other has six weeks to put an end to it. One party cannot be bound without the other. This was expressly decided in *Cooke* v. *Oxley*, where the defendant proposed to sell, at a certain price, tobacco to the plaintiff, who desired to have till four in the afternoon of that day to agree to or dissent from the proposal; with which terms the defendant complied; and the plaintiff having afterwards sued him for non-delivery of the tobacco, Lord Kenyon put it on the true ground, by saying, "At the time of entering into this contract the engagement was all one side; the other party was not bound." Buller J. said, "It has been argued that this must be taken to be a complete sale from the time the condition was complied with: but it was not complied with; for it is not stated that the defendant did agree at four o'clock to the terms of the sale; or even that the goods were kept till that time." I put the present case on the same ground. At the time of entering into this contract the engagement was all on one side. In *Payne* v. *Cave* (3 T. R. 148), it was holden that

the defendant, who had bid at an auction, might retract his bidding at any time before the hammer was down, and the Court said, "The auctioneer is the agent of the vendor, and the assent of both parties is necessary to make the contract binding; that is signified on the part of the [661] seller by knocking down the hammer, which was not done here till the defendant had retracted. An auction is not unaptly called locus pœnitentiæ. Every bidding is nothing more than an offer on one side, which is not binding on either side till it is assented to. But, according to what is now contended for, one party would be bound by the offer, and the other not, which can never be allowed."

These cases have established the principle on which I decide, namely, that, till both parties are agreed, either has a right to be off. The case of *Adams* v. *Lindsell* is supposed to break in on them; but I think it does not, because the Court put it on the circumstance that the offer was made by the post, and say, "If the defendants were not bound by their offer when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum. The defendants must be considered in law as making during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter." If they are to be considered as making the offer till it is accepted, the other may say, "make no further offer, because I shall not accept it;" and to place them on an equal footing, the party who offers should have the power of retracting as well as the other of rejecting: therefore I cannot bring myself to admit that a man is bound when he says, "I will sell you goods upon certain terms, receiving your answer in course of post." However, it is not necessary to touch that decision, for the reasoning of the Court coincides with the principle on which we now determine. As the Defendant repudiated the contract [662] on the 9th of April, before the expiration of the six weeks, he had a right to say that the Plaintiff should not enforce it afterwards.

But upon the question of variance, we are all of opinion that none of the counts apply. It is not necessary, perhaps, that the termini of the Plaintiff's lease should be set out with precision; but the variance is fatal, if the Plaintiff has not, at least, an interest which will enable him to perform his contract. The variance is not in words, but in substance. The Plaintiff had no such term as that stated in the first and third counts. In the second, he states he had a contract for a lease;—such a contract, to be valid, must be in writing, and he cannot be said to have had it unless he had it in writing. But there was no evidence of any such contract; and, therefore, upon both grounds, the rule must be discharged.

BURROUGH J.(*a*) coincided in discharging the rule on the ground of variance.

GASELEE J. If this case had rested on the first point, I should have wished for time to consider it; but on the ground of variance, I have no doubt that this rule must be

Discharged.

[663] JONES AND ANOTHER *v.* STUDD. May 12, 1828.

Where, to an action on a bill of exchange, the Defendant pleaded a rambling demurrable plea, which appeared to be a trick on the face of it, the Court ordered it to be struck out on an affidavit of its falsehood, giving the Defendant leave to plead de novo, and requiring him to try at the next sittings.

Assumpsit. In the first count of the declaration, the Plaintiffs, as indorsees, sued the Defendant as drawer of a bill of exchange for 857*l.* 10*s.* due September 27th, 1826; the second and other counts were for goods sold, money lent, &c.

The Defendant pleaded non assumpsit as to the second and subsequent counts, except as to 857*l.* 10*s.* parcel of the sums mentioned in those counts; and as to the 857*l.* 10*s.* in those counts, actio non, because after the making of the supposed promises in the declaration mentioned, and before the suit commenced, the Defendant drew his bill on Fraser and Co. in favour of Lupton, who on the 1st of April 1828 indorsed to Plaintiffs, whereupon Defendant became liable to pay Plaintiffs the amount; et hoc verificare, &c.

And as to the supposed promise and undertaking in the first count; that before the bill

(*a*) Park J. was absent at chambers.