

The plaintiff relies on the case of *March v. Eastern Railroad Co.*, 43 N. H. 515. In that case one road was leased to the other upon certain terms, and then a change of policy was pursued by the lessee, which operated to destroy the benefit or profit which would properly accrue to the lessor under the lease. Whatever *dicta* favorable to the contention of the plaintiff may be found in the case, the facts are so different that we cannot consider the case as applicable to the present one.

These conclusions make it unnecessary to consider the other questions raised. Bill dismissed.

WATERMAN v. WATERMAN.

SAME v. PORTER.

(Circuit Court, D. California. March 1, 1886.)

1. VENDOR AND VENDEE—CONTRACT—CONSIDERATION—WRITTEN CONTRACT.
The real consideration for a contract to convey may be shown, although the contract states only a nominal one.
2. CONTRACT—ADEQUACY OF CONSIDERATION—EVIDENCE.
Where a party advances several thousand dollars to develop certain silver mines, in consideration of which he is to be repaid out of their first product, and receive in addition an undivided fractional part of the mines, *held*, that the contract cannot be avoided on the ground that the consideration was inadequate.
3. SAME—UNCERTAINTY—HARDSHIP.
On the same state of facts, *held*, that the contract cannot be avoided on the ground that the property to be conveyed is uncertain, or that the performance of the contract would work hardship.
4. SAME—MUTUALITY—OPTION.
In an action on a contract, want of mutuality cannot be set up as a defense by the party who has received the benefit, simply because it was left optional with the other party as to whether he would enforce his right.
5. SAME—SECURITY—EVIDENCE.
Evidence considered, and *held* not to sustain the position that the contract to convey was given simply as security for the money advanced.

In Equity.

The actions referred to in the following opinion were brought by the complainant as the assignee of her deceased husband, to compel the specific performance of certain contracts in writing entered into with him by the defendants. One of the contracts was as follows:

“SAN BERNARDINO, May 14, 1881.

“For and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, I hereby agree that, at any time within twelve months from this date, upon demand of J. S. Waterman, or his heirs, administrators, or assigns, I will execute to him a good and sufficient deed of conveyance to an undivided twenty-four hundredths (24-100) of the following mines, known as the Alpha, Omega, Silver, Gance, and Front, each being

600 feet front by 1,500 feet long; and the same interest in all the lands that may be located, or have been located, for the development of the above mines; with such machinery and improvements as are to be placed upon the same,—all subject to the same proportion of expenses, which is to be paid out of the development of the above property; all situated near the Grape Vine, in the county of San Bernardino, state of California.

[Signed]

“R. W. WATERMAN.”

The other contract was of a similar character, but was signed by G. L. Porter, who agreed therein to convey, on demand, to J. S. Waterman three one-hundredths of the same mines. The other facts are sufficiently stated in the opinion of the court.

SAWYER, J., (*orally.*) This case of *Waterman* against *Waterman*, is a suit in equity to compel the specific performance of a contract to convey portions of the silver mines described in the bill of complaint. I have gone through this record very carefully. The testimony is very voluminous, and the principal questions are questions of facts. It would be unprofitable to enter into a long discussion of the evidence, and I shall only announce my conclusions in the matter.

In my judgment the plaintiffs are entitled to a decree for the conveyance of the property, and for a reference to take an account of the profits of the undivided portion of which a conveyance is sought.

The legal points made by the defendants are, briefly: first, insufficiency of consideration. The consideration in the written agreement of conveyance mentioned is one dollar. If the parties agree to sell for one dollar, I do not see that anybody has a right to complain. On the face of the bill, and certainly upon the testimony, there is nothing to justify a holding that the consideration, expressed or real, was inadequate. If the amount expressed is adequate for a deed of conveyance, it certainly ought to be adequate to sustain a contract to convey. Besides, it appears that that was not the real consideration at all. The failure to state the full consideration makes no difference. The parties took up a mining claim, had it partially prospected, and, being impecunious, had no means to develop the mine and procure machinery. They entered into an agreement by which another party was to furnish the money, and they gave a contract to convey a part of the property, and besides agreed to pay the money back out of the first proceeds of the mine. The capitalist, J. S. Waterman, advanced in all something over \$26,000, and, in addition to that, his brother, R. W. Waterman, who was one of the parties, received a remission of all the indebtedness due from him to J. S., which was about \$11,000; and that, with \$3,500 to pay private indebtedness, was the real consideration for the contract. J. S. Waterman did not choose to take a conveyance at the time, for the reason that he did not wish to put himself in the position of a partner. This was substantially, *on his side*, an option. For the development of the mine, he was willing to furnish the funds and take that risk for a share of the mine, in case it should prove valuable, but he was not