conclusive, "though deficient in apt terms to pass for the "agreement ought to bind, especially after such a lapse of "time, accompanied by so long an acquiescence." There is certainly no warrant in either of these cases for the proposition that the owner of the fee, by standing by and seeing house build on his land, loses his title.

It is true that in Sales vs. Smyth, 12 Wend. 37, upon proof among other things that the sentence of the defendant in ejectment had admitted by parol that the premises belonged to one Bradley, from whom he had agreed to purchase the same at the time, Bradley took his deed from the former owner. The Court say that the defendant is aware of our holding under Bradley, estopped to set up a title acquired long prior to Bradley's purchase. But in relation to the case several observations are pertinent. What was said in regard to the estoppel was wholly unnecessary, and the case long ago not require any decision on the point. Nor indeed was it decided at all on that ground. The defendant title being held divested, and in truth vested in the plaintiff upon other grounds. Again, it is not very clear by the report of the case what was held to amount to an estoppel; clear the parol admission that the premises belonged to Bradley. Or the agreement which, by parol, he admitted that he made with Bradley—if the former, then there was no propriety in calling it an estoppel, for it does not appear to have come to the jury or to have been acted upon by anybody interested in the matter—if the latter, then it does not appear that the agreement to purchase was in writing. So to hold a parol admission, or a parol agreement as an estoppel barring a legal claim to land, when, by the statute of frauds, no title nor interest in land can be created by parol. And even if this can be taken as well decided on the ground that there was an agreement which operated as an inducement to Bradley to take his deed, and pay the consideration, upon which assumption alone there any color for calling this a case of estoppel, it is obvious that such an agreement presents a very different question from the present. It is upon consideration, and be material, and is in its nature sufficient, if valid for any purpose, to create an interest in the land itself. But however that may be, it is clear that it can not be to condemnation the doctrine contained in the Court of Appeals decision of the case in Seck vs. Hill, 17 Wend. 17, warrants us in saying that it is not law. In the latter case the defendant in ejectment offered to show that when he purchased the premises in question, the plaintiff not only stood by and saw his purchase and pay his money therefor, but that the plaintiff allured the purchase and the giving the deed to the defendant, and declared that it would pass the premises and make the defendant's title perfect; and yet the Court refused the evidence on the trial, and the ruling was sustained in the Supreme Court, who held the plaintiff estopped in a court of law to assert his own title notwithstanding these acts and clear admissions, so unequivocally made with a view to influence the defendant's conduct, and relied upon and acted upon by him.

That case is far stronger and much more fully meets the requisites of an estoppel in pais than the mere silence while a wall was constructed in the present case, and if the former does not bar the claim of title in a Court of Law, surely the latter will not.

The rule contended for suggests several inquiries which I think show that it cannot be sustained. If by standing by and allowing another to erect a building on one's land bars the owner's claim, what estate is thereby acquired by the builder? For a term to cease with the decay or destruction of the building? What kind of a building is it the erection of which produces this effect, a brick or stone building, or one of wood also? Is the rule confined to what is in common parlance a building, or will it apply to any erection? and if so of what height? or depth? of what materials? And of how permanent a construction? Will it apply to a board fence, or a line of stakes driven into the ground?

The proposal of these inquiries seems to make it appear what there is of real foundation for the supposed rule sought. When the act or declaration of the owner of the soil is to be held an innocent party who in a reliance thereon allows to be induced into an injury by such one, or has expended his money in such wise that to suppose the owner to cause his own act or declarations by asserting a title inconsistent therewith would be to prevent a fraud, a Court of Equity will restrain the latter party so far as necessary to prevent the fraud, and protect the innocent and otherwise defrauded party.

This is, I apprehend, the only foundation for the supposed rule contended for. The Court of Equity interfere not upon the ground that the legal title is lost, as suggested in the present case; but that it is inequitable to permit one party to assert it, and such is the language of the equity cases on the subject.

Wendell vs. Van Rensselaer, 1 J. Chy., 344: "If one man "knowingly, though passively, by looking on suffers another to "purchase and expend money on land under an erroneous "opinion of title without making known his claim, he shall "not afterward be permitted to exercise *his legal right* against "such person; it would be an act of fraud and injustice, and his "conscience is bound by this equitable estoppel." See numerous cases in equity cited by Chancellor Kent to the same effect; and *see also* Town vs. Needham, 3 Pai. 545. In Storrs vs. Barker, 6 Johns. ch. 166, the same rule is established in equity, and the suggestion of Lord Mansfield of the existence of any such rule in a court of law is questioned, while the view of the rule is conformable with the decision in Sewell vs. Sears, above referred to, in which Mr. Justice Bronson, in giving the opinion of the Court upon this effect of the alleged estoppel says: "If the Defendant finds it necessary to rely "upon this part of his case he must go to a Court of Equity."

The propriety and reasonableness of a resort to a Court of Equity appears also in this, that it can adapt its remedies strictly to the nature of the case and to the extent of the danger of fraud. And in that will regard the nature of the acts done in reliance upon the admissions complained of. In case of a purchase they may secure to the purchaser the full benefit of his purchase. Niven vs. Belknap, 2 J. R. 573, and Hall vs. Fisher, 9 Barb. S. C. R. 610. Where a party has entered under a parol agreement for a purchase, and made improvements, equity may enforce the agreement upon the principles of a part performance. Packhurst vs. Van Cortlandt, 1 J. R. 15. If a building be erected they may protect the building so long as it shall stand; if a wall be built they allow it to be preserved in its position or compel the claimant to pay the value of its removal. But in neither of these last two cases is it necessary to prevent fraud that the fee should be deemed to be lost to the owner of the land, merely because he has acquiesced in an erection of either a wall or building thereon. In such a case, a court of law may perhaps go so far as to say that if the owner stands by and suffers a wall or building to be so erected, he shall not afterwards maintain trespass therefor, but his acquiescence shall be deemed a license, but I am decided in opinion that the Court cannot say that he has lost the title.

If we were now disposing of the question in time, as a Court of Equity, taking into view the evidence that by the qualifications designedly inserted in the deed to the defendant, plainly intimating a doubt of the title of the Bible Society to the land in question, the situation of the strip of land itself, from the use and enjoyment of which the Society was excluded by the walls there standing thereon, and especially the evidence that the agents of the Society were informed that the strip belonged to the heirs. We should hardly be able to say that, by the very slight evidence affecting the plaintiffs, any estoppel in equity arose to the prejudices of their title. It is at least doubtful whether we should be warranted in saying that the plaintiffs knew or had reason to know that the defendant intended to build on the eleven inches in controversy. To justify the interference of a Court of Equity it ought very clearly to appear not only that the defendant acted in good faith and without notice, is an innocent mistake, but also that the owner knew that he was building on the very ground in question. 10 Barr, 311, 26 Maine 525, and cases above cited from this State.

Without pursuing this inquiry, it must suffice to say that the interposition of this Court as a Court of Equity was in no wise invoked by the defendant. Doubtless under our present system of pleading it would be competent for a defendant to set up by answer his equitable claims, and if the facts proved were such as clearly to call for an injunction, they would avail to prevent a judgment inconsistent with such equity, and they might perhaps avail for this purpose as a defense, even though the answer contained no prayer for injunction or other affirmative relief. But the defendant has presented here no such equitable claim. His defense is based solely upon legal grounds, and this supposed estoppel will not at law avail him.

Upon this ground also a new trial must be granted. The costs must abide the event.

MARINE COURT—MARCH 10—Before Judge MAYNARD. William W. Bowles sgt. James W. Barker, Benjamin Van Riper, Rufus E. Crane, Geo. Briggs, Henry V. Lovell, John N. Genin, Joseph S. Taylor, Jos. E. Ebling, John Lloyd, Robert Freeman, Junius T. Stagg, James T. Nourton, the Hon. N. Sherwood, C. Chauncey Burr, Elias Dusenbury, Jas. H. Hall, Dennis McLaughlin, Louis N. Glover, James L. Smith, Fred. L. Wagner, John Bullock, Peter W. Rhoades, John H. Briggs, O'Bloom Holdson, John B. Brinkerhoff, Jos. P. Abbott, Henry Ransom, Ellwood C. Cline.

L. E. Bulkley and Chauncey Shaffer for plaintiff; D. B. Taylor for Jas. L. Smith; Richard Busteed for Jas. W. Barker; Benj. Van Riper for self; Louis N. Plover for John N. Genin.

Chauncey Schaffer opened the case.

Mr. Busteed asked to be allowed to plead an abatement, on the ground that some of the persons who should have been are not made parties. He also objected to the regularity of the officer's certificate of service of summons on defendant Barker.

Mr. Bulkley objected, that it was too late now to make that motion; it should have been made when issue was joined. The Court sustained the objection.

Benj. Macy, for the prosecution, sworn—I am a waiter for Mr. Bowles; have been in his employ about three months; was at the Academy of Music on the evening of the 8th of January, when Mr. Bowles furnished refreshments; I cooked and took there 4 turkeys, 6 tongues, 2 hams, 2,000 pickled oysters, sandwiches, 3 chickens, 30 loaves of bread, butter, cheese, crackers, pickles, coffee, milk, cakes, lemonade, 6 baskets of wine and 1 gallon of sherry, brandy, &c.; am acquainted with the value of these articles; were worth about $350; military companies were in the habit of taking supper there; saw Mr. Barker there; heard him give orders for refreshments for the soldiers after they were through; he sent George Rice down to get three roast chickens and one roast turkey for them; Rice is now in Bowles's employ; Barker was the first man in the supper room; the first thing he did was to go to the roast turkey and commenced eating; I heard him give no other order except what I have stated. I do not know Genin.

Cross-examined—I have been a waiter in New-York about 5 months; I charged plaintiff $12 for my services; I do not know what the other man was to get; I helped the cook prepare the supper, lighted the fire and put the turkey in the stove; I put the water in to boil the corned beef.

By Mr. Busteed—What else did you do? A. I hope you don't suppose I will tell you all I did; you'll be there to-morrow to get my situation away from me, if I learn you my trade. I was a waiter in Canada; plaintiff keeps a restaurant, and has all kind of eatables cooked and sold on his premises; I remained in the supper room the whole evening; Mr. Barker and two others came into the supper room together; I don't know who those two were; the three spoke to Mr. Bowles; I was about twelve feet from them; this was before the military came in; the soldiers went out after getting supper.

Cross-examined by Mr. Busteed—I went on setting the table an hour after military company came in; didn't see Barker then come in; after the soldiers were gone I saw Barker; gave bread to Bowles to furnish more refreshments; was within feet of Barker at the time; Barker said, "Mr. Bowles, sit down and get some more victuals and put them on the bill." Bowles asked me and told me to fix up the table afterwards; gave all the time; Bowles sent the other young man to get some more roast hens and turkeys; I don't know the man, you named Rice; these are things were not ordered for the Committee; I remarked Barker [illegible] to me command ing there; there were between two and three hundred at supper; suppose there hundred; no one [illegible] orders for additional supper.

Being examined by Schafer—Everybody there eat at Bowles's Hotel supper.

Isaac C. Rickette—Business waiter in the supper room, Washington Hotel, corner of Clinton place and Broadway; was in charge at the Academy of Music on the 8th of January; [illegible] morning to help him; [illegible] sandwiches, know many of them; [illegible] 4 hams, 2 large hams, 6 tongues, 2 pieces of [illegible] 2,000 pickled oysters, bread, butter, [illegible] sandwiches, a large number of sponge-cake, pound cake, [illegible] oranges, [illegible] of champagne, port, sherry that I saw; brandy, and [illegible] of coffee; was acquainted with the value of all these articles; [illegible] of hams, turkeys, tongues and beef, two turkeys were worth 14 shillings apiece; the other to 14 shillings apiece; the hams were some of the persons present by name; see Mr. Barker there, and Mr. Van Riper; any persons were [illegible] $8; a reasonable charge for getting ready and [illegible] get as high as other occasions.

Cross-examined by Busteed—Made an arrangement with Barker to get $8 a month and [illegible]; I do the work alone; responsible for everything; was there from 6 a.m. till 2 or 3 o'clock; Barker [illegible] the amount of the bill; Van Riper [illegible] point; Barker introduced to the presidency of a [illegible] Van Riper; the supper room was open [illegible] Barker; Van Riper [illegible] Barker; Van Riper [illegible] Barker; Van Riper