

The action was tried without a jury at St. Catharines.

A. C. Kingstone, for the plaintiff.

M. J. McCarron, for the defendant.

FALCONBRIDGE, C.J.K.B.:—An action for specific performance. The weight of evidence is, that the agreement sued on was left with A. H. Trapnell, a Division Court Clerk, who drew the document and acted for both parties, as an escrow — not “eschrow,” as it is invariably spelt in the statement of defence. Solicitors ought to read over their pleadings after they have been extended by their secretaries. For example, I read in the 3rd paragraph of the statement of defence (sub fin.), “upon certain terms and conditions which were *disgusted* by the plaintiff and defendant and the said Trapnell.”

The condition was the consent of the mortgagee, McPherson, and it was plainly intended that the consent should be in writing, for it is endorsed on the agreement.

The plaintiff and McPherson say that they arrived at an agreement about a proposed payment on account of the mortgage and the release of the lots which the defendant was buying. It was not the arrangement contemplated in the agreement sued on, but a different one. It was not reduced to writing, and the plaintiff never took the trouble to notify the defendant or Trapnell of the mortgagee's assent to any arrangement.

The mortgagee says that he is sure he told the defendant, “it may have been a week or two after, or more.” His evidence was very unsatisfactory, and I do not accept this statement as against the defendant's positive denial.

Although a payment of \$1,900 would have been due on the 20th March and one of \$250 on the 1st July, matters were allowed to rest until the defendant thought, as he was justified in thinking, that it was “dead and buried;” and, on his instructions, his solicitor wrote to the plaintiff on the 10th July demanding the return of the \$100 down-payment made to the agent of the plaintiff, who suddenly woke up and demanded performance of the agreement. On this ground alone the plaintiff would disqualify himself from claiming a decree for specific performance, which is within the discretion of the Court—of course to be judicially exercised.

In some respects the defendant's conduct was equally unsatisfactory and unbusinesslike; and, while I dismiss the action and give judgment for the defendant for \$100 (without interest), I make no order as to costs.