

HON. MR. JUSTICE MIDDLETON.

NOVEMBER 18TH, 1912.

BEER v. LEA.

4 O. W. N. 342.

Vendor and Purchaser—Specific Performance—Parol Option—Effect of—Hour of Expiry—Revocation of Offer—Option Taken by Agent—Resale—Full Disclosure as to Necessary—Tender by Cheque—Cash Tender Requisite.

Action by purchaser for specific performance of an alleged agreement to sell certain lands. One D., the medical adviser of defendant, obtained from him an option in writing, but without consideration, and not under seal, for the purchase of the lands in question for 30 days, and, in addition, the right to sell such lands as agent. The terms of payment provided for payment in cash of certain sums on account on acceptance. D. procured a purchaser, the plaintiff, to whom he proposed to sell the lands at a price \$2,000 above the option price. He notified defendant that a purchaser had been obtained, relating, however, that the price at which the lands were to be sold was only \$400 above the option price. Defendant promised to meet plaintiff and D. at 2.30 p.m. on the last day of the life of the option to close. Having decided not to sell, he did not keep the appointment, and, on being telephoned at 6.30 p.m., the same day, claimed that the option had expired at 4.30 p.m., the time of the day on which it had been given, and stated that he was no longer willing to sell. D. thereupon mailed an acceptance of the option and a marked cheque for \$5,000 to defendant, and later in the evening, attended defendant and handed him a letter accepting the option, and an unmarked cheque for \$10,500, the amount of the cash payment agreed on, which defendant refused to accept. This action was thereupon brought.

MIDDLETON, J., *held*, that the option in question was no more than a mere offer to sell, which was revoked by defendant by his telephone conversation with D.

That D. could not purchase until he had divested himself of his character as agent and disclosed honestly all the facts as to any contract of resale he may have made.

Bentley v. Nasmith, 46 S. C. R. 477, followed.

That the tenders by D. were of no effect, as a cash tender was necessary.

Cushing v. Knight, 46 S. C. R. 555, followed.

That the duration of the option was only until 4.30 p.m. on the last day thereof, and not until midnight.

Cornfoot v. Royal Exchange (1904), 1 K. B. 40, approved, and other cases referred to.

Action dismissed, without costs.

Action for specific performance, tried at Toronto on the 4th of November, 1912.

E. F. B. Johnston, K.C., and S. W. McKeown, for the plaintiff.

A. W. Anglin, K.C., and H. A. Reesor, for the defendant Lea.

Glyn Osler, for the defendant Ogilvie.