in respect to the inchoate dower of one Mrs. Gore, if she was entitled; and that the agency of one Cummins for defendant Newton was clearly established.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. D. Armour, K.C., for defendant Newton.

W. N. Ferguson, for defendant Wright.

W. M. Douglas, K.C., for plaintiff.

MOSS, C.J.O.:—This being an action for specific performance, it is, I think, clear upon the authorities that it is open to the defendant to resist the relief sought on the ground that the written agreement of which specific performance is sought does not truly represent the agreement which he intended to enter into.

In Needler v. Campbell, 17 Gr. 592, Mowat, V.-C., thus stated the rule (p. 595): "It is not of every legal contract that courts of equity grant specific performance; and it is a general rule that if a written agreement happens to omit a term which one of the parties understood to form part of the bargain, or happens not to be in some other material respect what he intended to agree to and understood that he was agreeing to, courts of equity will not enforce the written contract against him, as they hold it to be against conscience for the other party to take advantage of the omission or mistake. It is also the rule that parol evidence is admissible to shew the omission or mistake by way of defence to a bill for specific performance." In Wood v. Scarth, 2 K. & J. 33, Vice-Chancellor Sir W. Page Wood said (p. 42): "That a person shall not be compelled by this Court specifically to perform an agreement which he never intended to enter into, if he has satisfied the Court that it was not his real agreement, is well established. Perhaps no case better illustrates the principle than Marquis of Townshend v. Haugroom, 6 Ves. 328, which shews both that an agreement will not be specifically performed by this Court with a parol variation; and, on the other hand, that this Court will not decree specific performance without such variation if it be relied on as a defence."

In this case the testimony of Cummins and McGillivray and of the plaintiff himself satisfies me that it was part of