

of way 100 feet wide for the railway; and the agreement under which the defendant company held was subject to the same reservations and, also, a reservation of any land that might be required for the right of way and station grounds of the Grand Trunk Pacific Ry. Co. This reservation had been imposed by the Crown. There was also in both agreements a provision restricting the cutting of timber. None of these reservations were mentioned or referred to in the plaintiff's agreements from the defendant company which agreed to sell to him the whole land without exception.

At the hearing an instrument was produced, executed by the C. N. R. Co. and the Quill Plains Co. long after the commencement of the action, releasing the above reservations except that in favour of the G. T. P. Co. The trial Judge held that the plaintiff had failed to prove the misrepresentations relied on, which were that the defendant company was the owner of the land and that they were of a certain quality, and the plaintiff was nonsuited. On the argument of the appeal, plaintiff's counsel contended that the evidence disclosed an absence of title which entitled him to the relief claimed, but defendant's counsel protested that this point was not raised by the pleadings and could not now be considered.

*Held*, per HOWELL, C.J.A., and PHIPPEN, J.A., at the trial, the sole points at issue were two questions of fraud which were properly decided against the plaintiff; and it was not until the hearing of the appeal that the plaintiff took the position that he was entitled to rescind because the defendant's title was not good. Such a case was not made by the pleadings and it was too late to raise it now.

As to the reservation not released, viz., that in favour of the Grand Trunk Pacific Ry. Co., there was no evidence that any of the lands bought by the plaintiff were or would be affected by it, so that it was no valid objection to the title. The defendants were shewn to be the equitable owners of the lands with a right to get in the absolute title before they should be called on to convey, and the plaintiff was not entitled to the relief claimed: *Shaw v. Foster*, L.R. 5 H.L. 350; *Egmont v. Smith*, 6 Ch.D. 476; *Re Hood's Trustees*, 45 Ch.D. 310; *Want v. Stallibras*, L.R. 8 Ex. 175, and *Re Bryant*, 44 Ch.D. 219. The purchaser not having demanded an abstract of title or called on the vendor to make the title good, had no right to rescind the contract; and, as the title was apparently perfect at the date of the trial, the court should not now rescind it.