HON. MR. JUSTICE MIDDLETON. MAY 14TH, 1914

FESSERTON v. WILKINSON.

6 O. W. N. 347.

Vendor and Purchaser—Agreement for Sale of Land—Material Difference in Subject-matter of Sale—Land Subject to Right of Way—Parties not ad Idem—Executory Agreement—Rescission—Lien for Money Paid and for Improvements—Use and Occupation—Costs.

Where purchaser of a house had no knowledge of a right of way, and the agreement for same made no mention of it.

MIDDLETON, J., *held* that there was an honest mistake, but the parties were never *ad idem* for the vendors never intended to sell save subject to the right. .

That the right of way made the subject-matter materially different, and the purchaser had the right to refuse to accept something other than he thought he was purchasing and for which the contract called: *Paget* v. *Marshall*, 28 Ch. D. 255, and *Wilding* v. *Sanderson*, [1897] 2 Ch. 534.

Action for a declaration that the defendant had no further interest in, or right to, certain lands, the subject of an agreement for sale by the plaintiff to the defendant.

H. F. Upper, for plaintiff.

A. C. Kingstone, for defendant.

HON. MR. JUSTICE MIDDLETON:—Northrup and Beaumont owned the lands in question, subject to a right of way, reserved to one Skinner over the western eight feet. This right of way was reserved to afford access to the rear of a large block, fronting on the next street, upon which Skinner proposes erecting an apartment house.

When the house in question was sold to Wilkinson by Misener, agent for the owner, he had no knowledge of the right of way, and the agreement makes no mention of it. This was an honest mistake, but the parties were never *ad idem*, for the vendors never intended to sell save subject to the right.

The right of way makes the subject matter materially different, and the purchaser has the right to refuse to accept something other than what he thought he was purchasing and which the contract calls for. *Paget* v. *Marshall*, 28 C. D. 255; *Wilding* v. *Sanderson*, [1897] 2 Ch. 534.

The contract, being executory, should be rescinded and the purchaser should be declared to have a lien on the lands