

MIDDLETON, J.

OCTOBER 9TH, 1918.

*BOWES v. VAUX.

Vendor and Purchaser—Agreement for Sale of Land—Inability of Purchaser to Make Title to Small Portion—Failure to Agree upon Sum as Compensation—Absence of Consent to Performance of Contract and to Fixing of Compensation by Court—Rights of Parties as to Sum Paid by Purchaser on Account of Purchase-money—Rescission—Forfeiture—Repayment to Purchaser—Provisions of Contract—Interest—Costs.

Action to recover \$3,000, in the circumstances stated below.

The action was tried without a jury at Toronto.

A. C. McMaster, for the plaintiff.

W. D. McPherson, K.C., for the defendant.

MIDDLETON, J., in a written judgment, said that the plaintiff had agreed to purchase a large house and premises from the defendant, and now sought to recover \$3,000, the amount of the deposit made with the vendor when the agreement was made, upon the theory that, the vendor being unable to make title to part of the premises, the purchaser was entitled to rescind the contract and claim the money paid as money held by the vendor for the use of the purchaser. The right to recover was also based upon the express terms of the contract itself.

The defendant set up the defence that the portion of land to which he had no title was so small as to be negligible and immaterial; and that the plaintiff, having refused to accept the title offered, was in default and the deposit was forfeited. The defendant also claimed the benefit of an offer made to abate the purchase-price, to a limited extent, and sought to apply the principle underlying the equitable doctrine of specific performance with compensation.

There was not on the part of either party an offer of specific performance with compensation, leaving the amount of compensation to be determined. The defendant in a letter referred in vague terms to the compensation which he was willing to allow—his counsel said he was willing to allow only a small sum, less than \$200—while the plaintiff at first asked \$2,500 and later \$4,000.

Almost immediately after the date fixed for closing, the defendant resold the house and premises for \$30,000, being \$2,000 less than the plaintiff was to pay. On the resale the contract provided that the defendant should not be called upon to make