

FALCONBRIDGE, C.J.

MAY 23RD, 1906.

TRIAL.

BOYD v. CHESSUM.

*Vendor and Purchaser—Contract to Sell and Convey Land—
Action by Purchaser to Compel Specific Performance—
Dispute as to Payment—Absence of Receipt—Burden of
Proof.*

Action for specific performance of a contract by defendant to convey land to plaintiff.

J. E. Jones, for plaintiff.

J. D. Montgomery, for defendant.

FALCONBRIDGE, C.J.:—The whole matter in dispute is as to the alleged payment of \$210 by plaintiff to defendant on 2nd August, 1905; defendant contending that he received only \$110. Plaintiff and one Goldstein (now plaintiff's partner in the horse business) swear to the payment of 2 \$50 bills, 5 \$20 bills, and a 10 (\$10). No receipt passed, and these two men swear they cannot read or write, but can tell the denomination of bank notes.

Plaintiff swears that he had \$512 in his pocket that day, which he had counted out in presence of his wife—the money being the proceeds of sales of horses which he had effected in different parts of the country, and that he had no occasion to go to the bank that morning, and that he did not in fact go there. But it is proved that he did cash a cheque for \$200 at the bank on that day, receiving 4 \$50 bills.

Before cashing that cheque he had \$451.30 at his credit, having deposited \$100 on Saturday 29th July.

On the same Wednesday, 2nd August, the parties went to the office of the Imperial Loan and Investment Company, and plaintiff paid \$97.93, defendant contributing the \$7.93, which represented the interest due.

Defendant swears to the receipt of only \$110, and there are undoubtedly circumstances connected with his subsequent conduct which make against the truth of his story.

The solution of the matter comes down to the application of the rule as to the burden of proof. If illiterate or literate