

Upon the hearing of the appeal it appeared to us that the case was one which ought to be settled, and the matter stood over to allow negotiations but we are now advised that a settlement is impossible.

We do not think that the judgment in review can be sustained. The law is well stated in the case of *McNeill v. Haines*, 17 O. R. 479, cited by Mr. Tudhope: "In order that a deed may be reformed by the Court there must be at least two things established; namely, an agreement differing from the document, well proved, by such evidence as leaves no reasonable ground for doubt as to the existence and terms of such agreement; and a mutual mistake of the parties by reason of which such agreement was not properly expressed by the deed."

In this case the defendant's difficulty is that there never was any agreement save that evidenced by the written contract of May 3rd, 1909. Whatever took place between the defendant and Mr. Evans was entirely preliminary to the document which was drawn up. Mr. Evans did not pretend to have any right to bind the parties beneficially interested in the estate. The only thing that they ever did or were asked to do was to sign the contract and the conveyance in pursuance of it. Quite apart from the Statute of Frauds, there never was any agreement by any of the plaintiffs save an agreement relating to the sixty feet.

It may be that the plaintiff thought that he was getting the sixty-nine feet, and that under the circumstances the Court would not decree specific performance against him; but the transaction is no longer executory. A deed has been given and the situation is so changed that rescission is impracticable.

The appeal must be allowed, and judgment entered for the plaintiffs. The plaintiffs should, however, be held to their offer to allow the defendant to take either sixty feet according to the literal interpretation of the conveyance or sixty feet according to the possession on the ground.

There is no reason why costs should not follow the event.

HON. SIR JOHN BOYD, C., HON. MR. JUSTICE RIDDELL
and HON. MR. JUSTICE LEITCH, agreed.