

E. S. Wigle, K.C., for the plaintiff.

H. Clay and W. A. Smith, for the defendant.

FALCONBRIDGE, C.J.:—The plaintiff claims specific performance of the following contract:—

“Ohio City, Col., July 14th, 1911.

“This agreement made in duplicate this 14th day of July, 1911, between T. Clark, of Kingsville, Ont., and Darius Wigle, of same place. I hereby agree to sell two thousand shares of Sandy Hook to Darius Wigle, mining stock, *Wigle agrees to take said stock*, which mine is located on the Ohio Creek, Gunso County, Cal., at seventy-five cents per share, the same to be transferred three months from this date without interest, the parties hereto set their hand and seal in the presence of

“Norman Peterson,

Thos. Clark.

“Witness

Darius Wigle.”

At the trial the plaintiff's counsel put in a few questions from the cross-examination of the defendant, admitting his signature to the document; and closed his case. The defendant, being called on his own behalf, testified that the writing was drawn up by the plaintiff in a tent at the mine in California, in presence of one Norman Peterson. He swore that the writing was not in the same condition as when he signed it; that the italicised words, “*Wigle agrees to take said stock*,” had been inserted since he signed it; and he produced the paper which he said was written and signed at the same time. It is also in the plaintiff's writing, but does not contain these words. This, he says, is the real agreement “as near as possible;” that he never heard of the alteration until last winter, about February, or perhaps just before the issue of the writ (11th January, 1912).

Norman Peterson was called by the defendant, having heard the evidence of both the plaintiff and the defendant. He says that the defendant said something about if everything went as he calculated he would take it, i.e., the stock, or be able to take it. He says he paid very little attention to what was going on. He cannot say if the writing is in the same condition, or whether the two writings were just alike. And on cross-examination he says, “he thought it was a sale in the tent, the way they talked.”

The plaintiff was then called in reply. He said that the defendant dictated this agreement, and he, the plaintiff, wrote it out; that he, the plaintiff, said it ought to have those words in it; that he, the plaintiff, reached over for the other copy to underline them, and the defendant said: “It is no matter; this binds you to give it, and that binds me to take it;” and that the defendant consented to have the underlined words inserted. That