

was not recognized as a party by the plaintiffs, and was neither a party to the agreement nor to the writings evidencing it.

It cannot be found upon the evidence that there was any such mistake or misapprehension with regard to what was being purchased as should prevent specific performance. There were no representations as to the limits or the presence or absence of settlers made by the plaintiffs, and Benson was fully aware of the facts with regard to settlers, and set them forth in his report. There was also a reference to them during the discussion on the 2nd October, and the defendant then made no objection, but went on with the negotiations, and finally closed the bargain with full knowledge of the facts or with such knowledge as should have put him on further inquiry. He must be taken to have decided to accept the limits as they then were, if he could get them for \$45,000.

The objection to the plaintiffs' want of title is disposed of by the form of the judgment, which only compels the defendant to take the property in case a good title is made. It is not a valid objection to an action by a vendor that at the time of the contract he has not the legal estate or title to the property vested in him, provided he is in a position to procure it to be vested in the purchaser. And, as a general rule, questions of title are not disposed of at the trial of an action for specific performance, but are properly the subject of a reference. Furthermore, if the defendant desires the question of the plaintiffs' title to be dealt with at the trial, he must see that the defect or supposed defect is prominently put forward in the pleadings: *Lucas v. James*, 7 Ha. at p. 425. See also *Harris v. Robinson*, 21 S. C. R. at p. 400. Here the question of title was not raised by the statement of defence, and it was properly made the subject of a reference to the Master.

The judgment should be affirmed with costs.

SEPTEMBER 19TH, 1902.

C. A.

LEWIS v. DEMPSTER.

Contract—Furnishing and Erecting Monument—Dispute as to Design Selected—Performance of Work—Assignment of Contract—Action by Assignees—Appeal—Reversal of Judgment on Questions of Fact.

Appeal by plaintiffs from judgment of BOYD, C., dismissing the action with costs.