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C. A.

McMARTIN v. CHISHOLM.

Cemetery—Right of Way to Burial Plots—Interference with—Way Shewn on Plan—Title to Lots—Injunction.

Appeal by plaintiffs from judgment of CLUTE, J., at the trial, dismissing the action.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

C. H. Cline, Cornwall, for plaintiffs.

H. Cassels, K.C., and J. C. Brown, Williamstown, for defendants.

MOSS, C.J.O.:—The plaintiffs in this case, claiming to be the owners of or entitled to two burial plots in a small churchyard surrounding St. Andrew's Church, Martintown, in the township of Charlottenburg, in the county of Glengarry, sought to restrain the defendants from proceeding with the work of extension or enlargement of the church edifice according to a plan which had been determined upon by the congregation. The ground upon which the right was claimed was that the proposed work would interfere with and diminish a right of way to the burial plots, which, the plaintiffs alleged, was shewn on a plan of the churchyard and the burial plots therein situate, in the shape of a roadway 15 feet wide between the north wall of the church building and the south end of the two burial plots. The plaintiff

McMartin claims to be entitled to plot No. 62, as the daughter and one of the heirs and next of kin of one Archibald McCallum, deceased, who is said to have acquired it in the year 1873. Mrs. McMartin has been for 11 years a resident of the city of Ottawa, and has ceased to be a member of the congregation. Her only brother has been absent from the country for over 23 years, and apparently there is very little communication between them. She testified that 6 interments filled the plot, and that 6 members of her father's family were already buried there. So far, therefore, as her claim is concerned, a way of 15 feet width is not requisite for the only purposes for which it would be required, viz., for access to and fro for visiting the plot and doing what was necessary to maintain and keep it and the monuments on it in repair. And any title that she shews does not appear to extend beyond that, even if it goes so far. See Moreland v. Richardson, 22 Beav. 596, 24 Beav. 33; May v. Belson, 10 O. L. R. 686, 6 O. W. R. 462. It is quite apparent on the evidence that if she had been left to herself, she would not have considered it necessary to take proceedings to restrain the building operations.

The plaintiff Graham claims to be the owner of plot 63, in which 4 interments have been made. He is apparently still a member of the congregation, but one of a number who are dissatisfied with the action of the congregation in forming a union with another body known as Burns Church congregation, involving amongst other things the proposed enlargement of the church building.

His rights, and whatever rights his co-plaintiff may have, are derived under documents which are not produced. They have been lost or destroyed, it is said, but a copy of the form in which they issued was proved. The documents purport to be signed by the chairman and secretary of the trustees of the church. They are not under seal, and contain no words of grant of the soil, or of inheritance, or any language that goes beyond a license or privilege of interment in the plot named. They are in form certificates of the purchase of numbered plots in the graveyard surrounding the church, according to a map of the same belonging to the trustees, and state that the purchaser is entitled to the plot, subject to the rules and regulations which have been or may thereafter be passed by the trustees.

It is plain that it was not intended, and the certificate does not operate, to convey any title to the soil. Neither does it, by implication or otherwise, assure a right of way of 15 feet in width or any other right of way, save such as is necessary and proper for the purpose of making use of the plot for the purposes for which it has been procured.

It is argued for the plaintiffs that the reference in the certificate to the map which indicates the wide space, amounts to a warranty or undertaking that there was a way of that width, and that it would be maintained.

As a fact, the space in question was never laid out as a roadway. It is a part of the churchyard surrounding the church, and is covered with grass in the summer. But it is well settled that the exhibition of a map or plan or a reference to one, even on a sale and purchase of freeholds, does not create a contract to maintain ways or roads shewn on it, or even to a representation that they will be made or retained. For this it is only necessary to refer to Feoffees of Heriot's Hospital, 2 Dow. 301, where Lord Eldon remarked (p. 307) that "it was perfectly wild to say that the mere exhibition of a plan was sufficient to form a building contract;" and the language of Lord Cottenham in Squire v. Campbell, 1 My. & Cr. 459, at pp. 478, 479. Reference may also be made to Fry on Specific Performance, 4th ed., p. 407, and to Carey v. City of Toronto, 11 A. R. 416 (affirmed in the Supreme Court, 14 S. C. R. 172), where a number of the cases bearing on the question are referred to.

As pointed out by the trial Judge, the evidence makes it plain that in regard to this particular churchyard there are many of the plots without any means of access save by going over plots.

The right or privilege given is subject to the rules and regulations made or to be made by the trustees, and it is plain that it was never intended to assure to the purchasers of the plots in question the continuance for all time of the space between the church wall, as then existing, and the ends of these plots. Nothing more was intended to be given, or was in fact given, than an easement granted and taken, subject to such changes as the altered circumstances of the congregation or the neighbourhood might render necessary. The power of the trustees to make rules and regulations would not, of course, extend to preventing access to the

plots in a reasonable way for the purposes for which they were procured: Ashby v. Harris, L. R. 3 C. P. 523.

This reduces the matter of this appeal to the question whether what is proposed to be done interferes unreasonably with the right of the persons owning or entitled to the plots in question. And upon the evidence, and having regard to the size of the churchyard, the situation of the church building, and the position and means of access to other plots, there is no good reason for interfering with the finding of the trial Judge. The action of the congregation was taken in good faith, under the belief, reasonably entertained, that the circumstances of the union and the necessity for extension and enlargement of the church building called for the performance of the work which had been decided upon after full consideration. And there is really no fair ground for apprehension that the plaintiffs will be deprived of such reasonable means of access to and from the plots as they are entitled to.

The appeal must be dismissed.

MACLAREN and MEREDITH, JJ.A., each gave reasons in writing for the same conclusion.

OSLER and GARROW, JJ.A., also concurred.

JUNE 28TH, 1907.

C.A.

FRAWLEY v. HAMILTON STEAMBOAT CO.

Master and Servant—Injury to Deck-hand on Lake Steamer—Seaman—Negligence of Mate—Findings of Jury—Workmen's Compensation Act.

Appeal by defendants from judgment of CLUTE, J., after trial with a jury, awarding plaintiff $1,300 damages, upon the jury's answers to questions submitted to them.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A.

J. E. Jones, for defendants.

A. M. Lewis, Hamilton, for plaintiff.

Moss, C.J.O.:—Plaintiff was in the employment of defendants as a deck-hand on their steam vessel "Macassa," and, while engaged in assisting to bring her alongside the pier in the Burlington canal, his foot was cut off by a hawser or check line, in which it became entangled. The hawsers are used in bringing the vessel to a stop alongside a pier or dock. There is one on each side forward near the bow, and also one on each side near the stern. They are operated from the promenade deck, and when ready for use are coiled neatly near the rail by the side of timber heads used in the operation of checking the vessel as she approaches the pier or dock. When it is desired to bring her up to a pier or dock, the engines are stopped at such a distance as will enable the vessel to come up by her momentum. She is headed so as to bring the bow in close to the piers and enable two of the hands to get ashore, to attend to the hawsers, one attending to the bow and the other the stern hawser. Their business is to place the loop of the shore end of the hawser they are in charge of, over a post or pile on the piers or dock, as directed by the master or others who have in charge the management of the vessel ends of the hawsers.

On the occasion in question, the management of the stern line or hawser was in the mate's charge, plaintiff and another man handling it under his directions. As the vessel approached the Burlington piers, the vessel's speed was slowed down, and all three went up to where the line was on the promenade deck. There were a large number of passengers on board, and the deck was very crowded in the vicinity where the line lay as well as everywhere else. It was part of plaintiff's duty to handle, under the mate's direction, the line while it was running out after the loop of the shore end had been placed over the post on the pier. It was the mate's duty to throw the shore line to the man on the pier, and see that it was placed on the proper post. But before doing that it was his duty to see that the line on board was properly coiled so as to run out freely when the time came, and that passengers were made to stand back so as to be free of the coil of the line as it went out. As the vessel came in towards the pier, and he saw that the head-line had been landed, the mate threw the stern line; it was taken by the man on the pier and passed over the post. Plaintiff passed his end over the timber heads for the purpose of checking the vessel. Owing, as he says, to the speed at which she

was still moving, he was thrown or dragged toward the timber heads, and his leg became entangled in the line, with the result already stated.

The mate swore that, before going to the stern to attend to throwing the line, he gave orders to have it properly coiled, and that he saw that it was done and the passengers moved away. There was evidence, on the other hand, that the coil was greatly disarranged and lying about loosely, that no orders were given, and that nothing was done to get it into proper shape.

The trial Judge properly ruled that plaintiff's action would only lie under the Workmen's Compensation Act, and he put questions to the jury framed with reference to the provisions of that Act.

The jury found that defendants were guilty of negligence causing the accident; that it consisted in the mate not instructing plaintiff to coil the rope properly, and in allowing the passengers to displace the coil of rope, causing the coils to be scattered. In answer to a question, "Was the plaintiff's injury caused by the negligence of any person in the defendants' employ who had any superintendence intrusted to him while in the exercise of such superintendence? If so, to whom?" they responded, "Yes; the mate." In answer to a question, "Was the plaintiff's injury caused by the negligence of any person in the service of the defendants to whose orders the plaintiff, at the time of the injury, was bound to conform and did conform? If so, whom?" they replied, "Yes; the mate." To the question, "Could the plaintiff by the exercise of ordinary care have avoided the accident?" they answered "No."

For defendants it was argued that there was no sufficient evidence to support these findings. But the most that can be said is that there was a conflict of testimony, and that while, as to some of the findings, if the jury had chosen to adopt the contrary view, it would have been well sustained, it cannot be said that there was not evidence on which they might reasonably come to the conclusion that they did.

The testimony of the captain and mate makes it clear that it was the latter's duty to see that the line was properly coiled, and that the passengers were kept away so as not to interfere with it. As already mentioned, the mate swore that he did so, but in this he was contradicted, not only by plaintiff but by others.

The mate also swore that after he had thrown the line ashore he told plaintiff to let it run and not to check. Plaintiff denied that he received any such order, and says that, acting on the usual instructions, as soon as he saw the rope placed over the post on the pier he proceeded to check by passing the line over the timber heads. There was evidence that the momentum was very considerable, and plaintiff seems to have been jerked or dragged towards the timber heads. If at that time the line was not properly coiled, but, as the jury found, lying scattered on the deck, there would be danger of plaintiff getting entangled and being unable to save himself. And that is, no doubt, the conclusion that the jury came to.

In his able argument in support of the appeal Mr. Jones contended that the Workmen's Compensation Act did not apply to seamen, and that plaintiff came within the class, and he relied on Hedley v. Pinkney, [1892] 1 Q. B. 58, [1894] A. C. 222. But he subsequently abandoned the point, frankly stating that, in the face of sec. 2, sub-sec. 3, of the Act, it could not be sustained.

Appeal dismissed with costs.

OSLER and MEREDITH, JJ.A., gave reasons in writing for the same conclusion.

GARROW, J.A., also concurred.

JUNE 28TH, 1907.

C.A.

DESCHENES ELECTRIC CO. v. ROYAL TRUST CO.

Contract—Construction—Provision for Cancellation—Right of Administrators under—"Assigns"—Lease—Partnership.

Appeal by plaintiffs from judgment of ANGLIN, J., 9 O. W. R. 517, dismissing with costs an action for a declaration that defendants had broken a contract, dated 10th May, 1902, made between plaintiffs and one F. X. St. Jacques, deceased (of whose estate defendants were administrators), for the supply of electric current to the Russell

House, an hotel in the city of Ottawa, and for damages for such breach of contract. The question presented was whether the subsequent occupants of the Russell House were "assigns" of St. Jacques within the meaning of a proviso in the contract.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MEREDITH, JJ.A.

G. F. Henderson, Ottawa, for plaintiffs.

J. F. Orde, Ottawa, for defendants.

OSLER, J.A.:—In my opinion, the action fails. If the word "assigns" in the proviso of the agreement of 10th May, 1902, the lighting contract, between these plaintiffs and St. Jacques, means assigns of the hotel premises then under lease to him by the demise of 10th May, 1902—and this, looking at the whole agreement, I am inclined to think is what it does mean—the Mulligans, claiming under the new lease to be granted to them by the owners, are not claiming under St. Jacques in any way. They are or will be tenants and occupiers of the hotel under a new lease not derived through St. Jacques or his representatives, and not in any sense a renewal of the lease expiring on 1st March, 1907, or granted under any covenant contained in or right conferred by that lease upon St. Jacques or his assigns. If, on the other hand, the word means assigns of the lighting contract, it seems equally clear that, except sub modo and down to the date when the lease of 10th May, 1902, expired, they never became the assignees of that contract. Therefore, neither St. Jacques, nor his heirs, executors, administrators, or assigns, being owner, tenant, or occupier of the hotel, either by themselves with another or others, after 1st May, 1907, his administrators, the defendants, were entitled, by the terms of the proviso, to cancel the lighting contract, which I think they have effectually done, and thus put an end to all claims of plaintiffs thereunder.

Appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., and GARROW, J.A., concurred.

JUNE 28TH, 1907.

C.A.

PURE COLOUR CO. v. O'SULLIVAN.

Promissory Note — Discount by Payees with Bank — Action Brought by Payees while Bank Still Holders of Note—Note Taken up by Payees Pending Action—Failure of Action—New Ground of Relief Urged in Court of Appeal—Right of Payees to Compel Maker to Indemnify them against Note—Leave to Amend Refused.

Appeal by plaintiffs from order of a Divisional Court reversing judgment of MABEE, J., at the trial, and dismissing the action, which was brought upon a promissory note dated 13th March, 1905, for $3,500, made by defendant, payable to the order of plaintiffs on demand, with interest at 6 per cent. The statement of claim alleged that the note was given in consideration of $3,000 worth of capital stock in the plaintiff company subscribed for by and allotted to defendant, and the sum of $500 lent and advanced by the company to defendant. Defendant pleaded that plaintiffs were not the lawful holders of the note at the time of action brought, and further that there was an agreement between himself and one Clarkson, plaintiffs' president and agent, of which plaintiffs had notice, that he should not be called upon for payment of the stock or of the loan for 5 years.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

J. Bicknell, K.C., and W. M.. McClemont, Hamilton, for plaintiffs.

A. O'Heir, Hamilton, for defendant.

OSLER, J.A.:—. . . As regards the note, it appeared that plaintiffs had discounted it with the Bank of Hamilton, transferring to the bank at the same time, as collateral, the shares for which it was supposed to have been given, and that at the time the action was brought the bank were still the holders of the note and shares. Plaintiffs afterwards took up the note, and it was produced by them at the trial. The trial Judge ruled that possession of the note at that

time was sufficient, and gave judgment for plaintiffs, holding that it was not necessary that they should have been the holders at the time this action was brought. He held also that the alleged agreement to postpone payment had not been made out.

Before the Divisional Court defendant again relied upon the defences put forward at the trial, and by that Court the judgment at the trial was reversed, on the ground that plaintiffs were not the holders of the note when the action was brought. Plaintiffs now appeal, and, while urging but faintly that the judgment below was wrong on this point, contend that, inasmuch as they were liable to the bank as sureties on the note for defendant, they had the right to bring or to maintain the action to compel him to pay it to the bank, and to indemnify them in respect of it. This cause of action was not set up on the pleadings, and was put forward for the first time on the appeal to this Court.

It is now, in my opinion, too late for plaintiffs to attempt to recover their lost ground. The note was outstanding in the hands of a third party when they commenced their action, and so they had no title to sue in the shape in which they launched it and in which they have presented it up to the present stage. See Davis v. Reilly, [1898] 1 Q. B. 1, on which we understand the Court below relied.

A new trial on payment of the costs of the former trial and of the Divisional Court and of this appeal—nearly all the costs of the action—would be but an illusory favour. Moreover, having contested the case throughout on one ground and failed, it would be, under the circumstances, unreasonable to permit plaintiffs now to set up another inconsistent with it, and one which, even if it was open to them while the bank were still the holders of the note, ceased to be a cause of action or ground of equitable relief when plaintiffs took it up and became, as payees and holders, entitled to sue upon it. That is now their cause of action, if they have one, and, as it is not affected by anything which has been decided in the present suit, there is no reason to interfere with the judgment.

Appeal dismissed with costs.

MEREDITH, J.A., gave reasons in writing for the same conclusion.

MOSS, C.J.O., GARROW and MACLAREN, JJ.A., concurred.

JUNE 28TH, 1907.

C.A.

WILSON v. DAVIES.

Master and Servant—Injury to Servant and Consequent Death — Negligence of Master — Dangerous Employment — Primary Negligence of Servant Immediate Cause of Injury — Findings of Jury — Voluntary Assumption of Risk.

Appeal by defendant from judgment of MABEE, J., on the findings of a jury, in favour of plaintiff for $1,500, in an action by the widow of John Wilson to recover damages for his death.

E. F. B. Johnston, K.C., and R. H. Greer, for defendant.

J. E. Jones, for plaintiff.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, JJ.A.), was delivered by

MACLAREN, J.A.:— . . . Deceased was employed in defendant's brick factory, and it was part of his duty to remove from the drying room to the cooling room cars loaded with bricks as they severally became ready for such removal. The drying room in question was a long narrow room with 4 parallel tracks, each 3 feet in width, which had an incline from the north end where the loaded cars entered of one inch in 10 feet or a total incline of 8 inches in the 80 feet. The cars projected 5 or 6 inches over the tracks on each side, so that when the tracks were filled with cars there were two trains of cars on the east side and two on the west with a passage in the centre, but with the space from either wall to this passage completely covered. At the south or lower end of the drying room, separating it from the cooling room, were two doors which were raised by weights when required. Between these doors at the south end of this passage was a post with grooves into which the sliding doors fitted. Under the forward wheels of the southerly car on each track was placed a block of wood, a little over 3 feet in length, to prevent the cars from running against the sliding doors.

When any cars were sufficiently dried and were to be removed into the cooling room, the operator would raise the door at the end of the track, remove the block of wood, when the car or cars would move into the cooling room, either by gravitation or by slight assistance, the operator replacing the wooden block in front of the wheels of the car which he wished to retain in the drying room when it came forward to a position near the sliding door.

On the night of the accident it was the duty of the deceased to remove one or more of the cars on the easterly centre track into the drying room. No other person was present, but some time after he was found crushed to death between the forward car of this central track and the post at the end of the passage. It was evident that the car had been a short distance back from the post and the door, and he had gone on the central or westerly side of the track to remove the wooden block. When the car came forward opposite the post, there was a space of only 6 inches between the car and the post, and he was caught with the head and right arm in front of the car and post, and the remainder of his body behind them. Each car had about a ton of bricks upon it, and there were 10 or 12 cars on the track in question.

At the close of plaintiff's case, defendant moved for a nonsuit; the question was reserved by the trial Judge; the defendant put in evidence, and then renewed his application. The whole case was submitted to the jury, who found defendant guilty of negligence: (1) in not having sufficient room between the track in question and the post; and (2) in having a steeper grade than necessary. They also found that the deceased voluntarily ran the risk of danger in removing the cars in question. Of this last answer the foreman gave some explanation, which, however, did not clear it satisfactorily.

The evidence for plaintiff was very meagre. Five witnesses were examined. Plaintiff herself testified as to the earnings and family of deceased; her son-in-law testified as to the incline, the number of cars, and the method of blocking them; one of defendants' workmen (Andrews) and a car shunter from an adjoining brick factory (Timson) gave evidence, to which further reference will be made presently: while a law student who examined defendant's factory and 3 other brick factories in the neighbourhood some 6 weeks before the trial and 6 months after the accident, was the

principal witness for plaintiff. This last-named witness had no experience in the business, and did not in any way qualify as an expert. He found that cars in the other factories would not move by gravitation alone, as in defendant's, but required some muscular force to put them in motion; also that in the others the doors leading from the drying room to the cooling room moved to the side on wheels and were not raised as in defendant's factory. This last difference could have no bearing on the accident, and no evidence was produced to prove that there was any danger in the other. The two practical witnesses on behalf of plaintiff (Andrews and Timson) describe the construction and operation of the works, about which there is no dispute. They both say that it was dangerous and negligent for the deceased to stand on the west side of the car when removing the block. There was ample room for him to stand on the east side in front of the next line of cars, where he would have been absolutely safe, and in which event the accident could not possibly have happened. No reason is disclosed by the evidence, or even suggested, why he should have placed himself in this admittedly dangerous situation.

There was no evidence on which the jury could properly find that there was negligence on the part of defendant which either caused or contributed to the accident. The negligence on the part of the deceased established by the evidence of plaintiff's own witnesses, and which was the cause of the accident, could not properly be called contributory negligence upon which the jury might be called upon to pass. It was deally the primary negligence which was the immediate cause of the accident. There being no dispute about the facts, or even about the proper inferences to be drawn from the facts, there was nothing left for the jury to decide: Dublin, etc., R. W. Co. v. Slattery, 3 App. Cas. 1155; Wakelin v. London and South Western R. W. Co., 12 App. Cas. 41; Davey v. London and South Western R. W. Co., 11 Q. B. D. 213, 12 Q. B. D. 70.

I am, consequently, of opinion that there was no case to go to the jury, and that the action should have been dismissed on defendant's motion for a nonsuit.

Nor was there anything in the testimony of the witnesses called by defendant that could possibly help plaintiff's case, or lay a foundation for submitting the case to the jury. It was shewn that defendant's works were constructed after the most approved modern methods; that the incline was

the usual and proper one; that the deceased was shewn and instructed by defendant's engineer, when the works were completed two months before the accident, that he should stand in front of the next row of cars when removing the block from the one which caused his death. The fact that the loaded cars in defendant's drying room moved more freely than those in the other factories was accounted for by the fact that they were newer and were less clogged with clay and dust. By the time of the trial, 7 months after the accident, they moved less freely, and, like the others, would not always move by gravitation alone.

The facts of the present case are strikingly like those in . . . Callender v. Carlton Iron Co., 9 Times L. R. 646, affirmed in the House of Lords, 10 Times L. R. 366. . . . It does not appear in that case that the deceased was actually aware of the danger; in the present case the deceased could not be unaware of it, as it was quite apparent to every one, and the situation was the same during the whole of the 6 weeks that he had been doing this work, since the new appliances were installed.

The situation was simply this: the block could be removed from either side of the track; on one side, where the deceased had been instructed to stand when removing it, and where he had always previously stood, so far as the evidence goes, he would have been perfectly safe, and the accident could not possibly have happened. On the other side, where he stood on this fatal occasion, it was obviously dangerous, and no reason is given, or even suggested, for his having placed himself in the dangerous position. He knew that the car would move as soon as the block was removed, and his unnecessarily placing himself between the car and the post, in a space of not more than 2 or 3 feet, would fully justify the answer of the jury that he had voluntarily incurred the risk. It is an unfortunate case, but I do not think there is any evidence of negligence on the part of defendant that was the cause of or contributed to the accident.

Appeal allowed and action dismissed with costs, if defendant should claim the costs.

JUNE 28TH, 1907.

C.A.

ATTORNEY-GENERAL FOR ONTARIO v. HARGRAVE.

Crown — Mining Leases — Action by Attorney-General to Cancel — Improvidence — Misrepresentations — Affidavit as to Discovery—Untruth of—Evidence—Land Titles Act — Costs — Compensation for Improvements — Notice — Questions of Fact—Appeal—Duty of Appellate Court.

Appeal by defendants E. C. Hargrave and the White Silver Mining Co. from judgment of BOYD, C., 8 O. W. R. 127, in favour of the plaintiff in an action for the cancellation of certain mining leases and to recover possession of the lands comprised therein.

E. F. B. Johnston, K.C., for defendant E. C. Hargrave.

J. Shilton, for defendants the White Silver Mining Co.

C. H. Ritchie, K.C., and R. D. Moorhead, for the Attorney-General.

The judgment of the Court (MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.), was delivered by

MOSS, C.J.O.:—The Chancellor . . . has dealt very fully with the case. He has stated at length the reasons for the conclusions he reached, and agreeing, as I do, with his conclusions, I do not propose to endeavour to add to what he has said.

The questions in issue are almost, if not wholly, matters of fact, to be determined upon the evidence, documentary and oral, forming the record on the appeal. In dealing with it, however, we are not to overlook, upon any question of credibility, the advantage which the Chancellor possessed in having seen the witnesses, observed their demeanour, and formed an impression as to their intelligence, truthfulness, and honesty. And further, it is to be borne in mind that the conclusions of the trial Judge, upon questions of fact, are not to be overturned unless, upon full consider-

ation of the facts and circumstances, and the fair inferences to be derived therefrom, it is manifest that a wrong conclusion has been reached.

It was strongly urged for the appellants that, in dealing with the question whether there had been misrepresentations and false statements, as to the fact of discoveries made, to the Crown in order to procure from it the issue of the leases the recall of which are the subject of this action, the Chancellor had erroneously assumed that the onus of proving the fact of the discoveries was on the defence, whereas it lay with the plaintiff to establish that there were no discoveries in fact; that there was no legislative provision or departmental rule rendering obligatory the statement of the date of a discovery; and that it was not enough for the plaintiff to shew that there were no discoveries in December, 1904, as alleged in procuring the leases; it was also incumbent on him to prove that there were not discoveries in the preceding November. If the case was to turn on this point, the plaintiff fully discharged the onus, so far as it was on him. The Crown having been led into the error of supposing that the discoveries had been made in the month of December, and having issued the leases on the basis of such alleged discoveries, could not be required to do more than shew the falsity of the statements on which its action was founded. How would the case have stood if the only evidence given in the case was the production of the affidavits of discoveries and the other material on which the Crown acted, the proof that the statements as to discoveries as alleged in the affidavits were untrue, and that there were no discoveries in December, 1904, as therein alleged?

There would have been but one finding, viz., that the Crown had been deceived and misled, and that there must be a restoration of its rights.

Here, the plaintiff did shew that, so far as the alleged discoveries in December were concerned, there was no foundation for the statements. That is now virtually conceded by the appellants. And if the case stopped there, they would be without any answer to the action.

But they set up that, admitting it to be true as alleged in the affidavits that there were no discoveries in December,

yet there were in truth discoveries in the month of November, and that it was in respect of these that the application was made for the issue of the leases, and that the statement as to the discoveries in December was a mistake. That is, a case to be established by the appellants, in respect of which the onus was upon them. And it would be quite sufficient to dispose of it, to find that the appellants failed in their effort to establish it, that the evidence upon which they sought to prove the fact of discoveries in November could not be relied on, and was insufficient to convince. The Chancellor came to this conclusion, not merely, as I understand him, acting upon a rule of evidence as to the onus of proof, but upon the whole testimony, and having regard to all the facts and circumstances. Viewed with or without regard to the question of onus, the testimony fully sustains the Chancellor's conclusions.

Having regard to the circumstances connected with the manner in which the application for the issue of the leases was made, and supported by and through the intervention of the appellant Hargrave and his solicitor, and the fact that the leases were issued to him along with his co-defendants in this action, Rutherford and Williams, there is no room for the argument that the appellant Hargrave stands in any better or stronger position as purchaser for value or otherwise as a defendant in the action, than any other party to it. He dealt directly with the Crown for the issue of the leases, and he is one of the parties named as lessees. It is true, he says that this was done at the suggestion of an official of the Crown lands department, and was not the result of his action, but that does not alter the fact that the impeached instruments issued to him. He has never been in the position of a person who could, under the ancient practice of pleading the defence of purchaser for value without notice, have maintained that character, even if the defence is open as against the Crown, a point which it is not necessary to determine in this case.

In procuring the issue of the leases he had necessarily to avail himself of the affidavits and other material laid before the department, and it was obligatory upon him to satisfy himself that they truly represented the facts. Nor can he relieve himself of this position by endeavouring to

cast the duty of protecting him upon the officials of the department.

Nor do the provisions of the Land Titles Act on which reliance is placed assist the appellants, for the reason pointed out by the Chancellor, that the attack of the Crown upon the impeached instruments was made while the title remained vested in the parties to whom the grant was made, and that before that no title had passed to a purchaser for value.

The case of Attorney-General v. Goldsborough, 15 V. L. R. 639, affords no assistance. The decision of the appellate Court turned altogether upon a special statutory enactment, which has no counterpart in our Act.

Upon consideration of the whole case, I think the appeal fails, and should be dismissed with costs.

JUNE 28TH, 1907.

C.A.

TOOLE v. NEWTON.

Vendor and Purchaser—Contract for Sale of Land—Specific Performance — Oral Understanding as to Procuring Release of Claim for Dower—Addition to Written Contract of Words "if in his Power to do so"—Terms of Judgment for Conditional Specific Performance.

Appeal by defendants Newton and Wright from order of a Divisional Court affirming (with a variation as to costs) the judgment of BOYD, C., at the trial, in favour of plaintiff in an action for specific performance of an alleged contract for the sale to plaintiff of a lot of land in the town of Kenora, of which defendant Newton was mortgagee and defendant Wright assignee of the mortgage.

The Chancellor held that plaintiff was entitled to judgment for specific performance, with a reference to the Master to settle the proper amount of purchase money after making deductions for taxes and any incumbrances that might exist, and to adjust what should be paid as deduction

in respect to the inchoate dower of one Mrs. Gore, if she was entitled; and that the agency of one Cummins for defendant Newton was clearly established.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, MEREDITH, JJ.A.

E. D. Armour, K.C., for defendant Newton.

W. N. Ferguson, for defendant Wright.

W. M. Douglas, K.C., for plaintiff.

MOSS, C.J.O.:—This being an action for specific performance, it is, I think, clear upon the authorities that it is open to the defendant to resist the relief sought on the ground that the written agreement of which specific performance is sought does not truly represent the agreement which he intended to enter into.

In Needler v. Campbell, 17 Gr. 592, Mowat, V.-C., thus stated the rule (p. 595): "It is not of every legal contract that courts of equity grant specific performance; and it is a general rule that if a written agreement happens to omit a term which one of the parties understood to form part of the bargain, or happens not to be in some other material respect what he intended to agree to and understood that he was agreeing to, courts of equity will not enforce the written contract against him, as they hold it to be against conscience for the other party to take advantage of the omission or mistake. It is also the rule that parol evidence is admissible to shew the omission or mistake by way of defence to a bill for specific performance." In Wood v. Scarth, 2 K. & J. 33, Vice-Chancellor Sir W. Page Wood said (p. 42): "That a person shall not be compelled by this Court specifically to perform an agreement which he never intended to enter into, if he has satisfied the Court that it was not his real agreement, is well established. Perhaps no case better illustrates the principle than Marquis of Townshend v. Haugroom, 6 Ves. 328, which shews both that an agreement will not be specifically performed by this Court with a parol variation; and, on the other hand, that this Court will not decree specific performance without such variation if it be relied on as a defence."

In this case the testimony of Cummins and McGillivray and of the plaintiff himself satisfies me that it was part of

the agreement for the sale of the lands in question, and one of the terms upon which it was signed, that it was not to be binding on the defendant Newton, unless he could procure a release of Mrs. Gore's claim for dower for the sum of $100, or make title without her concurrence, and that the words "if in his power to do so" were written into the agreement for the purpose of expressing that understanding.

The plaintiff's testimony at the trial leaves little doubt as to this. For some time before the "option" or agreement of 16th May, 1905, on which the plaintiff is now suing, was signed by Cummins, there had been negotiations between him and the plaintiff for the purchase of the premises, in the course of which there had been discussions about Mrs. Gore's claim. An attempt had been made, through McGillivray, who was acting as solicitor for her as well as for the plaintiff, to get her to release her claim on payment of $100, but she had refused, and claimed $500. . . .

The following is the letter written by Cummins to defendant Newton:—

"Rat Portage, Ont., May 15th, 1905.

"Chas. H. Newton, Esq.,
"Winnipeg.

"Dear Sir: Re Queen's Hotel Site. Solicitior for purchaser of above refuses to pass title owing to a Mrs. Gore, wife of a former owner, not having barred her dower. The Master of Titles in Toronto, to whom the question was referred, seems to have a doubt about it, and will not, at present, allow the property to be registered under the Land Titles Act. The solicitor here who was acting for Mrs. Gore in the matter, knowing that she had no moral right, and that her legal claim might be overthrown, tried to bluff for $500 to-day, but at last agreed to write and advise her to accept $100 for a quit claim deed. He agreed to send a quit claim deed for $1 away to-night to Seattle, where she lives, and advise her that he would endeavour to collect the $100. I, on my part, said I would advise you to accept this, for the reason that, even if you go ahead with your proceedings and in time made title, your law costs between Ferguson, his solicitor here, and at Toronto, will probably cost more than $100, and should you succeed in wiping out her claim for

dower, she would never sign it away for less than her then assured share of the estate. Kindly advise me by return if I may carry out the above. Truly yours, S. S. Cummins."

The plaintiff knew that this letter was to be sent to the defendant Newton for the purpose of obtaining his authority to carry out an arrangement, if it could be made with Mrs. Gore, for obtaining a release of her claim, and thereby clearing the title. He knew that her claim was the obstacle in the way of the defendant agreeing to sell to him. Cummins was determined not to enter into an agreement while the matter was unsettled. He told the plaintiff he could not and would not sign the option owing to the difficulty about Mrs. Gore's claim. And it was then agreed that the words "if in his power to do so" should be added in order to protect the defendant in case the proposed arrangement should not be carried out. And upon that understanding and upon the insertion of the words, he signed the option.

The plaintiff knew that the defendant Newton would not pay $500 to Mrs. Gore, and that it was not certain that he would agree to pay the $100 as recommended by Cummins.

And he also knew that it was an excess of Cummins's duty and authority to assume to sign an unconditional option or agreement until he knew whether the defendant Newton was willing to pay and Mrs. Gore ready to receive the $100 and give a release.

But he was content to accept the document with the words inserted, in order to secure the purchase in the event of these two matters turning out satisfactorily. On 17th May the defendant Newton wrote agreeing to pay $100 on production of a quit claim deed from Mrs. Gore. But the latter refused to accept that sum, and continued to claim $500.

I think that in this state of the case the judgment should not have declared the plaintiff entitled, without any qualification, to have the agreement performed in case a good title can be made with the consequent directions. There is apparently no difficulty about the title, except the claim made by Mrs. Gore. If her claim is good, it is an objection to the title, but it is capable of being removed by the payment of money. Presumably, Mrs. Gore will release for the sum of

$500, but, even if she demands more, the Master must find that a good title can be made upon payment of the sum demanded. And such a finding will entitle the plaintiff to demand that the defendants pay that sum or that there be a deduction from the purchase money to that extent. See Van Norman v. Beaupré, 5 Gr. 599.

Such a result would, as it appears to me, be quite contrary to the intention and true agreement of the parties, and would inflict a hardship upon the defendants.

As the formal judgment is now framed, there is danger that, viewed in the light of the remarks of the learned Chancellor in giving judgment, it may be so interpreted as to impose that burden upon the defendants.

In my opinion, the agreement ought not to be enforced against the defendants, unless it appears on the reference as to title that the defendants can make a good title without the concurrence of Mrs. Gore, or that they can procure her concurrence for an amount not exceeding $100, or that the plaintiff is willing to accept the land subject to her claim with a deduction of $100 from the purchase price.

The judgment should be varied as indicated in the accompanying memorandum. The minutes may be spoken to in Chambers, in case of any difficulty.

JUDGMENT.

2. This Court doth declare that except as hereinafter declared, ordered, or directed, the plaintiff is entitled to have the agreement in the statement of claim mentioned specifically performed by the defendants, in case a good title can be made, and doth order and adjudge the same accordingly.

3. And this Court doth further declare that, if it shall appear that the defendants cannot make a good title without the concurrence of one Mrs. Gore in respect of her claim as mentioned in the evidence herein, they are not to be required to perform the said agreement unless such concurrence can be procured on payment of a sum not exceeding $100, or unless the plaintiff is willing to accept the title subject to her claim with a reduction of $100 from the purchase price of the lands in the pleadings mentioned, and doth order and adjudge the same accordingly.

4. And this Court doth order and adjudge that it be referred to the Master of this Court at Kenora to inquire and state whether the defendants can make a good title to the lands in the pleadings mentioned without the concurrence of the said Mrs. Gore, and in case he shall find that the defendants can make a good title as aforesaid to the said lands, he is to take an account of what is due to the defendants, or either of them, in respect of the purchase money of the said lands under the said agreement for principal and interest, and to tax to the plaintiff his costs of this action, and of the appeal to the Divisional Court and the Court of Appeal up to and inclusive of this judgment, which are to be deducted from what shall be found due in respect of the said purchase money, and the costs of the said reference are to be in the discretion of the said Master, and in case he shall find the defendants entitled to any costs thereof, the same are to be added to what shall be found due to the defendants, and in case he shall find the plaintiff entitled to any costs thereof, the same are to be also deducted from the amount which shall be found due to the defendants in respect of the said purchase money, and the said Master is to appoint a time and place for the payment of the balance which may be found due on the footing of such account one month after the making of his report.

5. And upon payment by the plaintiff of the balance which may be so found due to the defendants, or either of them, at such time and place as the said Master shall appoint, this Court doth order and adjudge that the defendants do by a good and sufficient deed convey and assure the said lands and premises to the plaintiff, or to whom he may appoint, and deliver up on oath to the plaintiff, or to whom he may appoint, all deeds and documents relating thereto in their or either of their possession, power, or control, and such conveyance is to be settled by the said Master in case the parties differ about the same.

6. But in case the said Master shall find that a good title cannot be made to the said lands without the concurrence of the said Mrs. Gore, and the defendants are unable to procure such concurrence on payment of a sum not exceeding $100, and that a good title can be made in other respects, but the plaintiff is not willing to accept the title subject to the claim with a deduction of $100 from the purchase price, it

is ordered that the action be dismissed and that the plaintiff do pay to the defendants their costs of the action and of the appeals to the Divisional Court and the Court of Appeal.

7. But if the said Master shall find that the defendant has procured or can procure the concurrence of the said Mrs. Gore as aforesaid, or that the plaintiff is willing to accept the title subject to her claim with a deduction of $100 as aforesaid, or if he shall find that a good title cannot be made in other respects, it is ordered that further directions and costs be reserved until after the Master shall have made his report.

MEREDITH, J.A., agreed in the result, for reasons stated in writing.

OSLER, GARROW, and MACLAREN, JJ.A., concurred.