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*May 29.
*June 24.

THE GRAND TRUNK RAILWAY COMPANY OF CANADA (DEFENDANTS) ..... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY (PLAINTIFFS) .. } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Specific performance—Tender for land—Agreement for tender—One party to acquire and divide with other—Division by plan—Reservation of portion of land from grant.

By agreement through correspondence the G.T.R. Co. was to tender for a triangular piece of land offered for sale by the Ontario Government containing 19 acres and convey half to the C.P.R. Co., which would not tender. The division was to be made according to a plan of the block of land with a line drawn through the centre from east to west, the C.P.R. Co. to have the northern half. The G.T.R. Co. acquired the land but the Government reserved from the grant two acres in the northern half. In an action by the C.P.R. Co. for specific performance of the agreement:

Held, affirming the judgment of the court of appeal (14 Ont. L.R. 41) Maclennan and Duff JJ. dissenting, that the C.P.R. Co. was entitled to one half of the land actually acquired by the G.T.R. Co. and not only to the balance of the northern half as marked on the plan.

The court of appeal directed a reference to the Master in case the parties could not agree on the mode of division.

Held, that such reference was unnecessary and the judgment appealed against should be varied in this respect.

APPEAL from a decision of the court of appeal for Ontario(1) reversing the judgment at the trial by which plaintiffs' action was dismissed.

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*PRESENT:—Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

(1) 14 Ont. L.R. 41.

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The action was for specific performance of an agreement for division of land acquired by the defendant company from the Ontario government. The material facts affecting the appeal are stated in the above head-note.

Walter Cassels K.C. and *Cowan K.C.* for the appellants.

Armour K.C. and *MacMurchy* for the respondents.

THE CHIEF JUSTICE.—This appeal is dismissed with costs. I agree in the opinion stated by Mr. Justice Davies and in the direction varying the judgment appealed from.

DAVIES J.—For the reasons given by the Chief Justice of the court of appeal for Ontario I think this appeal should be dismissed with costs and the judgment of the court of appeal confirmed excepting that part referring to the Master the division of the land.

The land respecting which the agreement between the railways was made was a particular plot of land in Toronto belonging to the Crown well known to the officials of both railways and in form a triangle or nearly so bounded on one side by the appellant's railway tracks, and on the other by those of the respondent with Pacific Ave. as a base line. An agreement to be gathered from the correspondence of the officials of the respective railway companies was made that the Canadian Pacific Railway Co. should abstain from tendering for the land and "leave the appellants free to deal with the Crown in the interest of both parties,"

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that the Grand Trunk Railway Co. should purchase it and that it should be divided equally between the companies, both paying one half the purchase money.

After the land was purchased by the appellants subsequently to the above agreement the parties treated the land bought and conveyed by the Crown to the appellants as the identical parcel which had been the subject matter of their agreement although as a matter of fact a small portion at the north-west corner of the plot of about two acres was withheld by the Crown and not sold leaving 17.91 acres conveyed to the appellants for the sum of $32,500.

I think it must be taken to have been the common intention of the parties and that it sufficiently appears in the correspondence that whatever land was in fact acquired was to be divided equally between the companies, each paying half the purchase money.

The plaintiffs (respondents) tendered a conveyance of the north half of the lands acquired by appellants divided in accordance with the principle of division adopted, and I think agreed to by both companies at the time when both supposed the plot would include the two acres subsequently withheld by the Crown, and the plaintiffs at the same time offered to pay the defendants one half of the purchase money according to the agreement.

I think they are entitled to the decree asked by them. Once the conclusion is reached that the land less the two acres is the subject matter of the contract, then the same scheme and principle of division should be applied as was I think understood and agreed to when the parties thought the parcel would embrace the two acres.

I think the judgment of the Court of Appeal

should be varied accordingly and that the cross-appeal against the reference to the Master should be allowed and the appellants declared entitled to have the deed of the one half of the lands executed and delivered to them as prayed for on payment of $16,250 and interest at 5 per cent. from 6th May, 1903.

IDINGTON J.—These parties agreed that a triangular piece of land in Toronto, of about 19 acres, offered or about to be offered for sale, by the Ontario government should be tendered for by the appellants and that in consideration of the respondents' refraining from tendering they should have an option for five years after the appellants' acquisition of the same to pay one-half the purchase price and receive a conveyance of a specified half of what was thus acquired.

This specified half was defined by a line drawn through the block as shewn on a plan prepared for the purpose, assigning the half, north of the line, to the respondents.

The dividing line that was thus drawn makes as clear as can well be, the principle upon which the division was to be made. The line was drawn from the apex of the triangle to the base line thereof. The apex was formed by the intersecting and diverging boundary lines of the respective properties on which the respective tracks of these companies were laid.

But for the fact that the Government did not offer, as expected, the entire block of 19 acres, but reserved two acres of the north half thus defined, and sold the remaining 17 acres, there could not be the slightest question about the certainty of the land that was to be bought or the part of which the respondents were to get. The two acres were the extreme north-west

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part of the triangle, and therefore, would come out of the part allotted by the plan to the respondents. These two acres were neither an essential part for the purposes of the whole dealing in question nor were they necessary to enable a fair and equal division by applying the principle or method of division shewn by the dividing line drawn, as already described, through the block.

It is not clear when the Government decided to reserve these two acres. It is clear, however, that from the beginning to the close, one-half of the whole land being dealt with was what the parties contemplated each should get. It was agreed that the appellants should carry, if need be, until the expiration of the option, the whole property, and receive from the respondent 5 per cent. per annum upon half of the cost price of the whole. It is fair to infer, from the close attention paid by both parties to the subject matter of the purchase that they were both aware of the reservation of the two acres in question.

It is clear to me, reading the correspondence and plans in question, that the parties were of one mind throughout, until after two years from the drawing of the above mentioned plan, a new manager came into control of the appellant company.

It was I think intended by both to accept the division of the whole upon the principle indicated by the dividing line I have referred to. The tender was deposited with the Commissioner of Public Works in November, 1901, some six months after the understanding was arrived at. The correspondence shews respondents' officers never lost sight of the matter, but kept pressing it on until the tender was so deposited. This tender was accepted by an order in council on the 22nd Sept., 1902.

Curiously enough, the respondents, two days after the order in council, revived the correspondence, and pressed for closing up of the transaction between the appellants and the Government, and the appellants and themselves.

The appellants having been rather tardy, the respondents' solicitor, on the 3rd of June, 1903, prepared a deed, and forwarded it to the appellants' solicitor with an intimation that the purchase money, half of the whole price, would be forthcoming on execution of the deed. This seemed to be the result of appellants' general manager asking respondents to confer with the appellants' manager McGuigan.

This was an explicit exercise of the option. Between the date of this letter of June 3rd, tendering the deed and money, and the 5th Oct., 1903, much correspondence ensued, urging attention to the matter. Many excuses were given, but chiefly that appellants' new general manager had not been able to attend to it.

Some months afterwards, this general manager attempted to make appellants' action in this matter conditional upon something entirely foreign to this particular business. He seemed to claim that there was no understanding. He was told very decidedly by respondents' vice-president that this business would not be made dependent upon any other business and that there was an understanding. The general manager claimed then that there was no record with his company, and finally refused to concede what everybody dealing with the matter up to that time had apparently assumed was within the respondents' rights.

There never could have been any doubt in law or

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in fact of the respondents' right to the land north of the dividing line drawn at the start. Appellants seek to set that aside by the alternative plan they offer. They are not entitled to do so. They recognized the respondents' right to one-half the total area purchased. They made and yet make no question of the two acres. The plan adopted in the proposed deed tendered for execution is, I think, under all the facts and circumstances absolutely correct. It manifestly is the fair and reasonable manner in which the division of the whole seventeen acres should be divided as between these parties, if divided into two equal parts, and especially, having regard to their respective needs and the benefits to be derived from such partition, and the appropriate line of division in principle acted upon from the beginning of the dealing in question.

It is clearly what any one in the position of respondents was entitled to expect and what they might fairly understand as had in view by appellants throughout, until the change of manager.

I see, therefore, no need for a reference unless there be a doubt as to the accuracy of the measurements in the proposed deed, about which no question has been raised.

I am unable to understand why the respondents should, under the circumstances of the application to the railway commission, have brought up anything, in regard to their rights in question, there. They had exhausted by that time all that long continued pleading and remonstrance could have possibly done to press their rights upon the attention of the appellants. The railway commission had no authority to determine the dispute.

The appeal should be dismissed with costs, the

cross-appeal allowed with costs, and the judgment in the court below amended in regard to the matter of reference in the way I have indicated.

MACLENNAN J. (dissenting).—I regret to be obliged to decide that this appeal ought to be allowed.

I think there was a good contract between the parties for a defined piece of land. The appellants were to acquire the whole, one defined half for themselves, and the other defined half for the respondents, in case the latter within a limited time exercised the option of taking it. And the price to be paid by the respondents was one-half of the price paid by the appellants for the whole, with interest at five per cent. from the time of payment. The contract, in effect, was for an option upon a defined parcel.

The appellants were unable, without any fault on their part, to acquire the parcel which was the subject of the agreement. But having obtained a very large part of it, I think that, in all fairness, they ought to have acceded to the demand of the respondents for so much of it as they did acquire. But standing, as they have a right to do, upon their strict legal rights, I think we must give effect to them.

By the contract the respondents were to have no rights whatever in the south half of the land. Their right was exclusively in the north half, the part surrounded green, in the plan 1(a), dated 31 May, 1901, referred to in Mr. McNicol's letter of the 1st June, 1901.

The contract unfortunately makes no provision for the case which has occurred, of the appellants failing to obtain all the land bargained for. There was no tenancy in common created in the whole parcel.

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The price to be paid was one-half the price to be paid for the whole.

If the respondents are to receive so much of the north half as was actually acquired, how is the price which they should pay to be ascertained? There is no evidence how the price paid for the whole was estimated, whether at so much per acre, or how otherwise. I see no way in which the price to be paid by the respondents, for the only part of the land to which they can have any claim under the contract, can be ascertained.

This difficulty is overcome, in the judgment appealed from, by holding that the respondents are entitled to one-half of the land actually obtained by the appellants; and that the price to be paid is one-half of the purchase money of the whole, with interest, and by referring it to the Master to make a proper division. In my humble opinion that is not warranted by the only agreement made between the parties.

I think the appeal should be allowed, and that the action should be dismissed with costs, in the courts below but without costs of the present appeal.

DUFF J. (dissenting).—I concur in the judgment of Mr. Justice Maclennan.

Appeal dismissed with costs.

Solicitor for the appellants: *W. H. Biggar.*

Solicitor for the respondents: *Angus MacMurchy.*