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1899
*May 30.

FRANK VICKER HOBBS (PLAINTIFF)...APPELLANT;

AND

THE ESQUIMALT AND NANAIMO RAILWAY COMPANY (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Sale of land—Agreement for sale—Mutual mistake—Reservation of minerals—Specific performance.

The E. & N. Ry. Co. executed an agreement to sell certain lands to H., who entered into possession, made improvements, and paid the purchase money, whereupon a deed was delivered to him which he refused to accept as it reserved the minerals on the land while the agreement was for an unconditional sale. In an action by H. for specific performance of the agreement the company contended that in its conveyances the word "land" was always used as meaning land minus the minerals.

Held, reserving the judgment of the Supreme Court of British Columbia (6 B. C. Rep. 228), Taschereau J. dissenting, that the contract for sale being expressed in unambiguous language, and H. having had no notice of any reservations, it could not be rescinded on the ground of mistake and he was entitled to a decree for specific performance.

APPEAL from a decision of the Supreme Court of British Columbia (1), varying the decree at the trial which declared the plaintiff entitled to a conveyance but not to specific performance:

The action was brought by the appellant to enforce specific performance of an agreement by the railway company to sell to him certain land in British Columbia. The agreement is contained in the follow-

*PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 6 B. C. Rep. 228.

ing document delivered to appellant in pursuance of his request for an allotment.

"ESQUIMALT & NANAIMO RAILWAY CO.—
LAND DEPARTMENT."

VICTORIA, B.C., Nov. 28th, 1889.

"Received of Frank Vicker Hobbs, the sum of one hundred and twenty dollars ($120.00), being a first payment on account of his purchase from the E. & N. Ry. Company of one hundred and sixty (160) acres of land in Bright District, at the price of three dollars ($3.00) an acre. Commencing at a point about two (2) miles west of Louis Stark's Crown Grant in Cranberry District; thence running west forty chains to Berkeley Creek: thence south 40 chains; thence east 40 chains; thence north 40 chains to place of commencement, the balance of purchase money to be paid in three equal instalments of seventy-five (75) cents an acre, at the expiration of one, two and three years from date, with interest at the rate of 6 per cent per annum."

(Sgd.) JOHN TRUTCH,
"*Land Commissioner.*"

The question in dispute between the parties is whether or not the railway company, in executing the conveyance to carry out this agreement, is entitled to reserve the minerals in the land therein described.

The company claims that Mr. Trutch had no authority to convey the minerals, and that in its forms of conveyance the word land is always used to mean surface rights only. The trial Judge held that the claim as to want of authority was well founded, but that the company had ratified the agreement. As he was of opinion, however, that the ratification was made under a mistake as to the legal effect of the agreement he refused to decree specific performance but declared in his judgment that the plaintiff was entitled at his option to a conveyance as offered by de-

1898

HOBBS v. THE ESQUIMALT AND NANAIMO COMPANY COMPANY.

fendants or to repayment of the purchase money with interest and compensation for improvements. The plaintiff appealed and the decree was varied by a direction that the plaintiff was entitled to a conveyance reserving the minerals without option of repayment. The plaintiff then appealed to this court.

Riddell for the appellant. The trial judge held that Trutch had no authority to sell minerals. But corporations cannot invest agents with authority and then limit it by private instructions. *Royal British Bank* v. *Turquand* (1); *Mahony* v. *East Holyford Mining Co.* (2); *South of Ireland Colliery Co.* v. *Waddle* (3); *Canada Central Railway Co.* v. *Murray* (4).

A mistake as to the legal effect of an agreement is no answer to a claim for specific performance. *Stewart* v. *Kennedy* (5).

Hogg Q.C. and *Marsh Q.C.* for the respondent. As to the effect of a mistake in a contract for a sale, see *Ball* v. *Storie* (6); *Alvanley* v. *Kinnaird* (7). Also *Hussey* v. *Horne-Payne* (8); *Day* v. *Wells* (9), where specific performance was refused.

Courts have granted relief against mistakes in law. *Hood* v. *Oglander* (10); *Coward* v. *Hughes* (11). And it makes the case stronger where there is a mistake both of law and fact. *Broughton* v. *Hutt* (12).

TASCHEREAU J.—I would dismiss this appeal. The reasons given in the courts below against the appellant's right to specific performance are, in my opinion, unanswerable. There has been no contract between this company and Hobbs. The company thought they

(1) 6 E. & B. 327.
(2) L. R. 7 H. L. 869.
(3) L. R. 3 C. P. 463.
(4) 8 Can. S. C. R. 313.
(5) 15 App. Cas. 75.
(6) 1 Sim. & Stu. 210.
(7) 2 M. & G. 1.
(8) 4 App. Cas 311.
(9) 30 Beav. 220.
(10) 34 Beav. 513,
(11) 1 K. & J. 443.
(12) 3 DeG. & J. 501.

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Taschereau J.

were selling the land without the minerals; Hobbs thought he was buying the land with the minerals. So that the company did not sell what Hobbs thought he was buying, and Hobbs did not buy what the company thought they were selling. Therefore there was no contract between them. Hobbs would not have bought if he had known that the company were selling only surface rights, and the company would not have sold if they had thought that Hobbs intended to buy the land with the minerals. The ratification by the company stands upon no better ground. It was nothing but the ratification of a sale without the minerals. *Banque Jacques Cartier* v. *Banque d'Epargne de la Cité et du District de Montréal* (1). Appellant's contentions on this ratification savour of a *petitio principii*.

The rule that any one dealing with another has the right to believe that this other one means what he says, or says what he means, is one that cannot be gainsaid. But it has no application here. Assuming that the agent sold the land with the minerals, he did what he had not the power to do. However, he did not do it.

I would dismiss the appeal with costs.

GWYNNE J.—This case is in my opinion reduced upon the evidence into a simple question of the construction of a contract initiated in an application signed by the plaintiff dated the 28th November, 1889, and a payment of $120 then made and receipt given therefor signed by the land commissioner of the defendant and culminating in a letter dated the 2nd of March, 1896, written by the land commissioner, by direction of the vice-president and managing director of the company in pursuance of which the plaintiff

(1) 13 App. Cas. 111.

1899

HOBBS
v.
THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

paid the balance of purchase money agreed upon in November, 1889, with interest. In the year 1887 a Mr. Trutch was appointed land commissioner of the company and under him was placed the transaction of all contracts for the sale of the company's lands which constituted a very extensive estate. The mode of dealing with persons desirous of purchasing lands of the company was as follows: Persons desirous of purchasing were required to make an application in writing to the land commissioner describing as best they could what piece of the unsurveyed land of the company they wished to purchase, and upon receipt of a first instalment the land commissioner gave a receipt therefor signed by himself stating the terms of the contract; and then an entry of the contract was made in books of the company kept for the purpose. Neither in this application nor in the land commissioner's receipt could the piece of land applied for be described with accuracy by reason of the land not being surveyed, and the practice therefore was this, that when a deed should come to be issued the purchaser was required to produce a survey of the premises for which upon being approved by the land commissioner the deed was issued. Now upon the 28th November, 1889, the plaintiff having selected a quarter section which he desired to purchase and having planted thereon a post or stake to indicate that it was taken up made an application which he handed to Mr. Trutch, the land commissioner, at the offices of the company, which is as follows:

28th November, 1889.

The description of a piece of land I wish to pre-empt or purchase. A piece of dry land and swamp situated in or about two miles west of Stark's place, Harwood Lake, Cranberry District, commencing at the top of a ridge, running west to Berkeley's Creek; thence south down Berkeley's Creek to a corner post at a swamp; then east, then north to the top of the ridge at the place of commencement. It is on

or about two miles west of Lower Harwood Lake, and about a mile or a mile and one-half or two miles from Donahue's claim and contains in or about 160 acres, it was formerly claimed by Mr. Stamp.

(Sgd.) FRANK VICKER HOBBS.

A price of $3 per acre was then agreed upon between the plaintiff and the land commissioner, and the plaintiff then paid to the land commissioner the sum of $120 and received from him a receipt in the terms following a copy of which the land commissioner retained:

ESQUIMALT & NANAIMO RAILWAY CO. LAND DEPARTMENT.

VICTORIA, B.C., November 28th, 1889.

Received of Frank Vicker Hobbs the sum of one hundred and twenty dollars ($120.00) being a first payment on account of the purchase from the E. & N. Ry. Company of one hundred and sixty (160) acres of land in Bright District, at the price of three dollars ($3.00) per acre, commencing at a point about two (2) miles west of Louis Stark's Crown Grant in Cranberry District; thence running west 40 chains to Berkeley's Creek; thence south 40 chains; thence east 40 chains; thence north 40 chains to place of commencement; the balance of purchase money to be paid in three equal instalments of seventy-five (75) cents an acre at the expiration of one, two and three years from date, with interest at the rate of six per cent per annum.

(Sgd.) JOHN TRUTCH,
Land Commissioner.

The contract was then entered in the land sales book of the E. & N. Railway Company by the gentleman who is now land commissioner of the company, but who was then bookkeeper in the land department. The entry is made as being on lot no. 6, in "the Bright District," date of purchase, "28th November, 1889," name "Frank Vicker Hobbs." How acquired, "by purchase." Acreage, "160 acres." Price, "$3.00." Date when first payment made, "28th November, 1889." Amount paid, "$120." Remarks, "balance in three yearly payments of $120. "Interest at 6 per cent." It was subsequently discovered that

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

the land which the plaintiff had applied for was entered in the land book wrongly as being in "the Bright District," and that in truth it was in a district designated by the company the Douglas District, and accordingly an entry was made in the land sales book in the Douglas District, as follows: "Lot 6, in Douglas District, and all the other particulars transferred from the Bright District entry" which latter was erased. In 1890 the plaintiff erected a log house upon the land as located by him, but did not reside upon the premises having gone into business instead. In the month of April, 1892, the plaintiff wrote the following letter:

NANAIMO, 4th April, 1892.

To the E. & N. Railway Co's Land Agent:

DEAR SIR,—As I am about to survey the piece of land recorded by me on the 28th November, 1889, I wish to know who is your surveyor in this district. I am all alone out in that part and I do not know where the nearest corner post is, it is certainly a very long way from my claim and I can only survey from my post, about two miles from Louis Stark's Crown Grant. I have already paid $120 on it and I am anxious to survey and complete the purchase so an early reply would greatly oblige.

Yours faithfully,
FRANK VICKER HOBBS.
Sawmill, Nanaimo, B.C.

This letter was received by a Mr. T. S. Gore who was then land commissioner of the defendants, and who by a letter addressed to the plaintiff replied to it as follows:

ESQUIMALT & NANAIMO RAILWAY CO. LAND DEPARTMENT.

VICTORIA, B.C., April 6.

DEAR SIR,—I beg to acknowledge the receipt of your letter dated the 4th instant in reference to your purchase of land in Douglas District. In reply I would say that you can employ any Provincial Land Surveyor you wish, probably Mr. Fry, of Duncan's, or Mr. Priest, of Nanaimo, would be the best.

As near as I can tell from your description of the location of the land in question the portion coloured red on the enclosed tracing will

include what you describe in your application. In any case the survey will have to be made in such a way as to leave no fractional portions of land between yours and other claims in the neighbourhood.

Yours truly,
(Sgd.) T. S. GORE,
Land Commissioner.

1899

HOBBS
v.
THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

The piece of land designated in this letter was inaccurate and was afterwards in 1895 corrected by the company when by the log cabin which had been built by the plaintiff upon the land applied for by him they were enabled accurately to discern the quarter section applied for by the plaintiff and which now appears to be a piece of land designated by the company as lot no. 6, Douglas District.

In the month of May, 1894, Mr. Solly, the present land commissioner of the company was appointed to that office. In the fall of the year 1895, the plaintiff called upon the officers of the company in Victoria for the purpose of paying the balance due upon his purchase. Mr. Solly's account of this interview is as follows: He says that the plaintiff came to his office in the Esquimalt and Nanaimo Railway Company's offices in November, 1895, and said that he wished to make a payment on some land in Douglas District, and that he informed the plaintiff that he could not accept *any further* payment on the land without *further* consulting Mr. James Dunsmuir, that he thereupon left the plaintiff in his office and went into the private room of Mr. James Dunsmuir, who was vice-president and managing director of the company. Now in the summer of 1895 coal was discovered in the neighbourhood of the land which the plaintiff had applied for. In the course of the prospecting for the coal so discovered the parties engaged therein came across the plaintiff's log cabin, and it was found to be on unsurveyed land of the company, but which neverthe-

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

less was designated on their office plan as lot No. 6, in the Douglas District, and the cabin was marked by the company upon their plans as on that lot. Some little time prior to the plaintiff's calling on Mr. Solly, in November, 1895, the vice-president of the company had, upon the discovery of coal in the neighbourhood, sent for Mr. Solly, the land commissioner, and called for the production of all plans and books containing entries and information relating to all purchases and pre-emptions in the neighbourhood. Mr. Solly produced them to him and gave him all the information he required. At that time the plaintiff's name appeared on the plan on lot No. 6, Douglas District, and the books showed him to be in arrear in his payments. Mr. Solly says that the vice-president was not in any doubt as to where the plaintiff's land was, that he, Solly, showed him that that was the lot which stood in the plaintiff's name, and that is the same piece which he now claims.

Mr. Solly having gone into the vice-president's room as above stated, upon the occasion of the plaintiff calling to pay the arrears of his purchase money, and having had an interview with the vice-president upon the subject, returned to his office and told the plaintiff that the company considered he had forfeited his right and interest by not making his payments, and he also told him that he expected that the amount the plaintiff had paid was also forfeited, whereupon the plaintiff left the office and placed the matter in the hands of his solicitors who entered into a correspondence with the company through their land commissioner upon the subject. There was a good deal of this correspondence, as Mr. Solly says, during which he had several coversations with the vice-president, and was at length instructed by Mr. Dunsmuir *to see the plaintiff personally and to make some arrangement with*

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

him. Accordingly in February, 1896, Mr. Solly called on the plaintiff at his store in Victoria, and told him if he would come down to the company's office and talk the matter over with himself and Mr. Dunsmuir it was most likely it could be arranged. The plaintiff accordingly shortly afterwards went down to the company's office but nothing took place because Mr. Dunsmuir was not in and the plaintiff went away. What next occurred was the receipt by the plaintiff of the following letter from the land commissioner:

ESQUIMALT AND NANAIMO RAILWAY COMPANY.

LAND DEPARTMENT, March 2nd, 1896.

DEAR SIR,—I am instructed to inform you that the railway company are now prepared to issue a conveyance to you of the land you agreed to purchase in Douglas District, providing that within two months from this date you have the land surveyed and the notes sent in to this office, and also pay up the overdue charges on the same which are as below. Kindly send me a line in reply to say if this arrangement will suit you.

By purchase of 160 acres of land in Douglas District.

Balance of purchase money	$360 00
Six years simple interest at 6 per cent	129 60
Title fee	10 00
	$499 60

Yours truly,

(Sgd.) LEONARD H. SOLLY,

Land Commissioner.

The survey was accordingly made by a Mr. Priest, a land surveyor, who sent in his plan and field notes to the company, and in a letter dated April 11th, 1896, Mr. Solly informs the plaintiff that he had received the field notes from Mr. Priest, and that they are quite satisfactory, and "a deed will be at once prepared on receipt of charges as stated in my letter to you of March 2nd."

In a letter dated 28th April, 1896, the plaintiff enclosed to the land commissioner his marked bank cheque for the balance of his purchase money as

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

calculated in Mr. Solly's letter of March 2nd. The cheque was upon the Bank of British Columbia, and directed that the bank pay to the E. & N. Railway Company in full payment of purchase money for Lot 6, Douglas District, four hundred and ninety-nine $\frac{60}{100}$ dollars ($499.60), and was deposited by the company to their credit in the same bank. By a letter dated the 29th April, 1896, the land commissioner acknowledges receipt of the above cheque and adds,

> your deed will be prepared at once and signed as soon as Mr. Dunsmuir returns to Victoria, which will be about ten days.

And on the 8th May, 1896, he encloses to plaintiff the deed which the plaintiff refused to accept (and which constitutes the foundation of the present action) because of the reservations which are contained in it. The description therein contained as being a lot known as and numbered Lot 6, in the Douglas District upon the official map of the said district, a plan of which is annexed to the deed the plaintiff admits to be correct and to correspond with the land for which he made application in November, 1889, and upon which he paid his first instalment of $120.00. The error in describing the land applied for as being lot 6 in the "Bright" District was altogether an error of misdescription of Mr. Trutch's. The insertion of the word "Bright" instead of Douglas, was admitted by Mr. Trutch to have been a manifest error made by him, and it has always been known by the company to have been such.

Apart from that clerical error Mr. Priest who made the survey of land which has been accepted by both the company and the plaintiff as the land for which the plaintiff made application in 1889, says that the description in the receipt signed by Mr. Trutch in November, 1889, is as good a description as in the then unsurveyed condition of the country could have been

given of the lot No. 6, in the Douglas District. That this was the land which the plaintiff had applied for is abundantly proved in evidence. On it were the log cabins erected by the plaintiff in 1890, then there is the evidence of one Murray and also of Mr. Priest, both of whom testify to their having been as far back as 1892 or 1893 a post planted on the lot within about 100 yards of its northern boundary as surveyed by Mr. Priest. This may reasonably be assumed to be the post which the plaintiff says he planted to indicate that the land upon which it was was taken up, but there is much other evidence to the like effect. Mr. Dunsmuir who has been vice-president of the company ever since its formation, tells us that the company was formed by his father to protect his own private coal interests; that he took and the family still hold half of the capital stock and have the control of the company and of the directorship by arrangement made to that effect. "We dont care" he says, "about telling those things, but we have the control, "we have the majority of the directors," and he himself has always been managing director as well as vice-president. In fact from his evidence he appears to be substantially the company. He says "every "thing comes before my notice, any matter whether "it is land or whatever it is." In answer to a question relating to his knowledge of the plaintiff's agreement, he said:

> You see I know all these things; they will come to me and say, so and so has applied for such and such land in such and such a district, can I let them have it? and they will bring a plan and I will say yes, or will say no; that is the reason I know it; it all comes before me.

He was conversant with the transaction with the plaintiff in 1889 and knew that it related to the land in the Douglas District, and that it was a transaction of sale by the company; he knew the contents of the

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

receipt given to the plaintiff by Trutch, a copy of which was kept in the office. No other form of agreement until recently was ever entered into by the company; he plainly considered that receipt to constitute a contract for the sale of surface rights only. He said that in their office they treat "surface" as "land." "We do not" he says, "say" *surface rights*, we say "*land*," and by "land" they understand land without minerals—that is to say they understand the minerals to be reserved. This was formerly the view of the company, but recently they have changed the form of receipts now given on contracts of sale, which expressly say that the amount paid is received on account of the purchase of "*surface rights.*" It was he, he said, who cancelled the plaintiff's agreement in 1895 when Mr. Solly after the discovery of coal in the neighbourhood came into his room and told him that the plaintiff wished to pay upon his land, but he afterwards relented and let him have it. Mr. Solly's letter of the 2nd of March, 1896, expresses the terms upon which he let him have it, namely, the payment for the land he had agreed to purchase in 1889, the balance of purchase money then agreed upon with interest and title fee.

Then Mr. Solly, who was in the land commissioner's office from the beginning and has himself been land commissioner since May, 1894, says that the company never laboured under the slightest misapprehension as to the lot the plaintiff had applied for, they always knew that the land was in the Douglas District, and that the insertion of the word "Bright" District was a clerical error of Mr. Trutch's—that all the dealings between the plaintiff and the company were in relation to land in the Douglas District, and to his application in 1889; that there never was but the one transaction with the plaintiff, and there never was

any dispute about what land he was to have; its precise boundaries, however, could not be stated until the survey should be made, and such survey was made by Priest and approved by the company, as appears by Mr. Solly's letter to the plaintiff of the date April 11th, 1896. The land so surveyed by Priest is that entered as lot No. 6, Douglas street in the company's book containing an entry of the original sale to the plaintiff in 1889, and on their plans, and is the land which the plaintiff always wanted to get, and expected to get, and the only dispute between the plaintiff and the company was as to the form of the coveyance tendered by the the company and the reservations therein. Mr. Trutch gave evidence that he was in the habit when giving receipts for purchase money similar to that given by him to the plaintiff to tell the purchasers that the company only sold surface rights, but he cannot say that he so told the plaintiff, and the latter swears positively that he did not, nor did he, the plaintiff, know nor had he heard such to be the practice of the company. We need not therefore inquire what effect such a statement should have if made to a purchaser to whom at the same time an express written contract for the sale of a piece of land containing no limitations or reservations whatever should be given.

Upon the whole of the above evidence it is, I think, abundantly clear that the company through their officer having complete control and management of of all the company's affairs ratified and affirmed the transaction between the plaintiff and the land commissioner in November, 1889, as being a contract for the sale to the plaintiff of a quarter section of land designated by the company and known by them as lot No. 6 in the Douglas District, upon the terms mentioned in the receipt given by the land commis-

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

Gwynne J.

sioner to the plaintiff for the first instalment of purchase money paid by him upon that lot, and not only did they ratify and affirm that transaction, but they did much more, for the letter of the 2nd March, 1896, written to the plaintiff by the express authority of the managing director and those of the 11th and 29th of April, and the receipt inclosed in the letter of the latter date for the balance of the purchase money while affirming the contract made with the plaintiff through the land commissioner in November, 1889, contain within themselves a complete contract for the sale by the company to the plaintiff of the lot No. 6 in Douglas District for which the company received from the plaintiff the purchase money in full as required by the company. Now with intent of fulfilling that contract the company executed under their corporate seal the deed sent to the plaintiff and which he refused to receive as a fulfilment of the contract made with him by reason of the reservations therein contained which he insists are not authorised by his contract, and so as I had said at the beginning the sole question to which the case is resolved is whether or not the reservations are authorised by the contract upon which the plaintiff has paid the balance of his purchase money in full, and this question I must say can, in my opinion, for the reasons I have given, be only answered in the negative, and the plaintiff is entitled to a decree directing the company to execute to the plaintiff a deed of the land specified in the deed already executed and tendered to the plaintiff, but without the reservations in that deed contained.

The appeal must be allowed with costs, and a decree made in the terms above stated with costs.

SEDGEWICK J.—I am of opinion that the appeal should be allowed with costs for the reasons stated by Mr. Justice King.

KING J.—The facts are stated in the judgment of the late Chief Justice Davie before whom the case was tried.

It is found by him that Mr. Trutch acted beyond the scope of his authority in agreeing to a sale of the land without reservation of the minerals, but that the contract so made was rectified by the company. He, however, was of opinion that, in so ratifying it, the company were under a mistake as to its legal effect, and upon this ground he declined to compel performance but left the plaintiff to his common law remedy for breach of contract.

A first question is as to whether there was, by reason of the alleged mistake, a contract at all.

In *Kennedy* v. *Panama Mail Co.* (1), Blackburn J. says:

> Where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission unless it is such as to shew that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration.

Gompertz v. *Bartlett* (2), and *Gurney* v. *Womersley* (3), are instanced,

> where the person who has honestly sold what he thought a bill without recourse to him was nevertheless held bound to return the price on its turning out that the supposed bill was a forgery in the one case, and void under the stamp laws in the other; in both cases the ground of decision being that the thing handed over was not the thing paid for. * * *
>
> The difficulty in every case is to determine whether the mistake or misapprehension is as to the substance of the whole consideration, going as it were to the root of the matter, or only to some point, even though a material point, an error as to which does not affect the substance of the whole consideration.

In *Stewart* v. *Kennedy* there were two separate appeals (4). They were Scotch cases and the Scotch law (differing from the English) gives the right to specific

(1) L. R. 2 Q. B. 580.
(2) 2 E. & B. 849.
(3) 4 E. & B. 133.
(4) 15 App. Cas. 75, and 15 App. Cas. 108.

1899

HOBBS v. THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

King J.

implement or performance as an ordinary legal remedy. The first appeal was in an action by the vendee for (amongst other things) a declaration that the vendor was bound to implement the contract, and the substantial question was whether it was an absolute or a conditional contract. This was decided adversely to the vendor. The second appeal was in an action brought by him for reducing or setting aside the contract upon the ground of essential error as to its absolute character. The Scotch court had held (Lord Shand dissenting) that the alleged error was not in the essentials of the contract, and hence not a ground for setting it aside. The House of Lords held that the error, if it existed, was one affecting the substance of the contract, and to that extent agreed with Lord Shand; but that it did not (apart from any question as to the conduct of the respondent contributing to the error) entitle the appellant to have the contract set aside. Their lordships, however, considered that the appellant was entitled to an issue (rejected by the court below) as to alleged representations of respondent's agent

In the course of his opinion Lord Watson says (p. 121):

> Without venturing to affirm that there can be no exceptions to the rule, I think it may be safely said that in case of onerous contracts reduced to writing, the erroneous belief of one of the contracting parties in regard to the nature of the contract which he has undertaken, will not be sufficient to give him the right (to rescind) unless such belief has been induced by the representations, fraudulent or not, of the other party to the contract. * * * Lord Shand held, I think rightly, that the error averred by the appellant is error in substantials. * * But Lord Shand goes a good deal further than holding that the appellant's error with reference to the nature of the contract of sale was an error in substantials. He expresses the opinion that the existence of such an erroneous belief in the mind of the appellant affords a sufficient ground for annulling the contract. So far as I can judge, his opinion rests upon the inference or assumption that in such a case there cannot be that *duorum in idem placitum consensus*

atque conventio which is necessary to the constitution of a mutual contract. To give any countenance to that doctrine would in my opinion be to destroy the security of written engagements. In this case I do not think it has any foundation in fact. By delivering his missive offer to Mr. Glendinning (respondent's agent), the appellant represented to the respondent that he was willing to be bound by all its conditions and stipulations construed according to their legal meaning whatever that might be. He contracted, as every person does who becomes a party to a written contract, to be bound in case of dispute, by the interpretation which a court of law may put upon the language of the instrument.

Here the parties were *ad idem* as to the terms of the contract. It was expressed in perfectly unambiguous language in the offer of the plaintiff and in the acceptance of defendants, and the alleged difference is in a wholly esoteric meaning which one of them gives to the plain words.

Then the legal right existing (as held by the court below) is it a case (as also held by it) where a court of equity will leave the party aggrieved by a breach to his common law remedy? As already mentioned, *Stewart* v. *Kennedy* (1) is not a case relating to the effect of mistake upon the exercise of the equitable jurisdiction of English Courts of Equity, but English authorities having been referred to, the jurisprudence is thus summarized by Lord Macnaghton (p. 105):

> It cannot be disputed that the Court of Chancery has refused specific performance in cases of mistake when the mistake has been on one side only, and even when the mistake on the part of the defendant resisting specific performance, has not been induced or contributed to by any act or omission on the part of the plaintiff. But I do not think it is going too far to say that in all those cases—certainly in all that have occurred in recent times—the court has thought rightly or wrongly that the circumstances of the particular case under consideration were such that (to use a well known phrase) it would be "highly unreasonable" to enforce the agreement specifically.

In *Tamplin* v. *James* (2) James L J. says.

(1) 15 App. Cas. 75, 108.
(2) 15 Ch. D. 215.

1899

HOBBS
v.
THE ESQUIMALT AND NANAIMO RAILWAY COMPANY.

King J.

If a man will not take reasonable care to ascertain what he is buying he must take the consequences. It is not enough for a purchaser to swear: "I thought the farm sold contained twelve fields which I knew, and I find it does not include them all," or 'I thought it contained 100 acres and it only contains 80." It would open the door to fraud if such a defence was to be allowed. Perhaps some of the cases on this subject go too far (*i.e.* in the direction of allowing such defence) but for the most part the cases where a defendant has escaped on the ground of a mistake not contributed to by the plaintiff have been cases where a hardship amounting to injustice would have been inflicted upon him by holding him to his bargain and it was unreasonable to hold him to it.

Hence it may be, as stated in Fry on Specific Performance, that the court considers with more favour as a defence the allegation of mistake in an agent than in a principal.

The alleged mistake is given in the evidence of Mr. Dunsmuir, the vice-president of the company. Speaking of the contract entered into by Mr. Trutch, he says:

> It only sold the surface. That is, we term it land in our office. We do not say surface right, we say land, land minus the minerals.

It is evident then that we may put Mr. Trutch aside, and treat the case on this point as if the company, upon an application by plaintiff for purchase of the 160 acres of land, had entered into an agreement to sell the land in the identical words used by Mr. Trutch. In effect they say:

> We agreed to sell the land, but this means land reserving the minerals.

It may well be that in the administration of their varied business a loose but convenient form of speech may have been used in the office, but it is not stated that it was supposed to be a correct one, and it appears incredible that a company, a large part of whose business is that of a land company, could reasonably suppose that in dealings with third persons for the sale of land, the word "land" means land with reser-

vation of minerals. Mr. Trutch does not say that he misconceived the meaning of the word. His impression was that he had verbally notified the plaintiff that the minerals were to be reserved, and if he had done so the plaintiff would be precluded from obtaining the specific performance he seeks; but it has been found that notice was not given. The form of the company conveyances expressly reserving the minerals show that they were aware how to effect such object. The alleged mistake was therefore an unreasonable and careless one, and in view of the fact that the plaintiff went into possession under the contract, I do not think that it can be said to be unconscionable or highly unreasonable to enforce the specific performance of the contract.

GIROUARD J.—Concurred.

*Appeal allowed with costs.**

Solicitor for the appellant: *C. C. Pemberton.*

Solicitors for the respondent: *Davie, Pooley & Luxton.*

**The Judicial Committee of Her Majesty's Privy Council has granted leave to appeal from this judgment.*