BARTHOLOMEW O'BRIEN (PLAINTIFF) ..... } APPELLANT;

AND

CHARLES HERBERT MACKINTOSH (DEFENDANT). ..... } RESPONDENT.

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*Oct. 28,29.

*Nov. 30.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Contract—Agreement in writing—Construction of terms—Sale of timber—Terms of payment.

The appellant held rights in unpatented lands and agreed to sell the timber thereon to respondent one of the conditions as to payment therefor being that, as soon as the Crown grant issued, the respondent should settle a judgment against the appellant which, they both understood could at that time be purchased for $500. On the issue of the grant, about six months afterwards, the judgment creditor refused to accept $500 as full settlement at the latter date and he took proceedings to enforce execution for the full amount. The execution was opposed on behalf of the appellant, the respondent becoming surety for the costs and being also made a party to the proceedings.

Held, affirming the judgment appealed from (10 B. C. Rep. 84) that the agreement to settle the outstanding judgment was not made unconditionally by the respondent, but was limited to settling it for $500, after the issue of the Crown grant for the land.

Held, also, Davies J. dissenting, that the costs incurred in unsuccessfully opposing the execution of the judgment, upon being paid by the respondent, were properly chargeable against the appellant.

APPEAL from the judgment of the Supreme Court of British Columbia *en banc* (1), reversing the trial court judgment and dismissing the plaintiff's action with costs.

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*PRESENT:—Sir Elzéar Taschereau C.J. and Girouard, Davies, Nesbitt and Killam JJ.

(1) 10 B. C. Rep. 84, sub nom. *Manley* v. *Mackintosh.*

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On 13th January, 1900, an agreement was made between the plaintiff, of the first part, and the defendant, of the second part, for the sale to the defendant of the timber growing on a lot of land described for $1050. The agreement was made for the purpose of shewing in a formal manner, by a deed which might be registered, a former agreement by a letter signed by plaintiff for the sale of the timber to the defendant for $2000, the consideration mentioned as $1050 being the balance remaining on the price after deducting $250 for cost of survey, $200 for Crown dues, and $500 for the settlement of a judgment by one Manley against the plaintiff. *See* 8 B. C. Rep. p. 284.

The action was for the rectification of the agreement on the grounds that it did not represent the arrangement arrived at between the parties, because it made the consideration $1050 instead of stating that sum to be the balance of the purchase money, after the above mentioned deductions, and also because it wrongfully provided for the payment of the cost of survey and the Crown dues out of that balance, whereas they had already been deducted before that balance was established.

The plaintiff had not obtained his Crown grant at the time of the agreement and there was also the judgment for about $1000 in favour of Manly against him unsatisfied and registered against his interest in the land. An arrangement was made by the present defendant with Manly's solicitor under which it was understood that the judgment could be settled for $500, and the defendant agreed to settle it after the issue of the Crown grant.

The grant issued in July, 1900, in favour of the plaintiff and the defendant then tendered $500 in settlement of the judgment but the tender was refused, the full amount of the judgment demanded and pro-

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ceedings were taken in execution for the sale of the land on which the timber was standing. These proceedings were resisted on behalf of the present plaintiff, the payment of the costs being guaranteed by the present defendant, on the ground, among others, that Manly was bound by the agreement to accept $500 for the judgment and the present defendant was made a party to the proceedings. In the result, after an appeal, the decision in respect to this agreement was that Manley was not bound to accept $500 for the judgment and the decision was also against the present plaintiff on the other grounds. *See* 8 B. C. Rep. 280. The costs, for which Mackintosh had become liable amounted to $1086.54 and Manley took proceedings against him as garnishee, on the ground that he was owing a balance to O'Brien under the agreement. On the issue being tried, the decision was in favour of Mackintosh. *See* 10 B. C. Rep. 84.

At the trial of the present action the rectification of the agreement was decreed by Hunter C.J., but his judgment was reversed by the judgment now appealed from.

Shepley K.C. for the appellant. There is no dispute, (except as to some costs for which respondent claims credit) regarding the payments made by respondent to appellant. On the day the agreement was signed $50 was paid to the appellant and $250 to the surveyor, making $300, and, subsequently, several sums were paid to appellant and $354.66 to the Crown (being $154.66 more than the estimated dues), making in all $845.31. Of these sums $250 and $200, *i.e.* $450, were amounts assumed by respondent making only $395.31 actually paid on account of the $1,050 and leaving a balance of $654.69 still due as found by the trial judge. The main dispute arises with regard to the assumption of the judgment which is not mentioned in the written

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agreement and the non-payment of which has given rise to this litigation. It will be noticed that the assumption of this judgment by the respondent was by parol and was not intended to be included in the writing. There is no evidence to justify the conclusions of the judgment below. The proof is that respondent believing he had bought the judgment, represented to appellant that he had done so and would settle it so that appellant would have no further concern with it. Appellant, relying upon these representations, assented to the deduction of $500 from the purchase money for this purpose and executed the agreement. Respondent's neglect of the ordinary business precaution of having his agreement in writing and disregarding warnings to settle at once brought about the whole trouble.

If respondent became responsible for the judgment by reason either of his agreement or representations, his claim to credit the costs incurred in opposing the sale proceedings cannot be allowed, as these were incurred by reason of his failure to carry out his agreement or make good his representations. If, on the other hand, the real purchase money was $2,000, and respondent assumed payment of surveyor's and Crown fees to the extent of $450, but is not obliged to pay the judgment, then the question arises: Is the respondent entitled to charge against appellant the sums for costs incurred in contesting Manly's application to sell? The appeal from the order on the second motion was solely at the instance of respondent and he alone was responsible for the costs. There being no evidence as to the amount of the costs of the appeal, the above payments may have been no more than sufficient to satisfy them. Therefore, as respondent was not concerned with the costs of the first motion and was not requested by O'Brien to guarantee or pay any costs of

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either of the sale proceedings, he cannot succeed in his claim to set-off these cases against purchase money.

The respondent was in no sense an equitable mortgagee but simply a purchaser. In any case the costs of the litigation arose by reason of his unfounded contention that he had bought the judgment.

Davis K.C. for the respondent. The claim for rectification is based solely on the ground of mutual mistake in stating the price at $1050 in the agreement. In order to rectify an instrument on the ground of a mistake, there must be proof, not only that there has been a mistake, but the plaintiff must shew precisely the form to which the deed ought to be brought in order that it may be set right, according to what was really intended, and he must establish, in the clearest and most satisfactory manner, that the alleged intention of the parties to which he desires to make it conform continued concurrently in the minds of all parties down to the time of its execution. The evidence must be such as to leave no fair and reasonable doubt upon the mind that the deed does not embody the final intention of the parties. There can be no rectification if the mistake be not mutual or common to all parties or if one of the parties knew of the mistake at the time he executed the deed. Where one only has been under the mistake, while the other knew the character of the deed, the court cannot interfere by forcing a contract never entered into or depriving a party of a benefit *bonâ fide* acquired. A mistake on one side may be a ground for rescinding, but not for correcting or rectifying an agreement. Kerr, Fraud and Mistake (3 ed.) 461, 469. The court will not, under the name of rectification, add to the agreement a term which had not been determined upon nor agitated. There can be no rectification of an agreement executed in accordance with proposals nor, if it was the intention

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of the parties, on the ground that the written instrument did not comprise all the terms of the actual agreement. *Townshend* v. *Stangroom* (1); *Harbidge* v. *Wogan* (2); Seton on Decrees (5 ed.) p. 1914. The evidence does not satisfy the standard of proof required for rectification. *Dominion Loan Society* v. *Darling* (3); *Ferguson* v. *Winsor* (4); *Darnley* v. *London, Chatham & Dover Railway Co.* (5); *McNeill* v. *Haynes* (6).

In this action we have nothing to do with the question whether or not a bargain was made for the satisfying of the judgment, and the question whether. as between the solicitor and Mackintosh, the latter was right or wrong in insisting on payment after the Crown grant issued. This can not affect Mackintosh's arrangement with O'Brien under which it is clear that Mackintosh was not to pay until the Crown grant issued. The costs were not incurred by reason of any breach of Mackintosh's word, but because O'Brien desired to litigate and procured Mackintosh to guarantee his costs. Then, after the costs were incurred, he admitted the correctness of Mackintosh's accounts in which the payments made on the costs were charged up against him. The agreement to satisfy the judgment for $500 after issue of the Crown grant was a part of the contract and, as such agreement was always impossible of performance, the whole agreement was at an end. *McKenna* v. *McNamee* (7); *Nickoll & Knight* v. *Ashton Edridge & Co.* (8); *Blakeley* v. *Muller* (9); *Griffith* v. *Brymer* (10); *Elliott* v. *Crutchley* (11); *Krell* v. *Henry* (12). The full court in *Manley* v. *O'Brien* (13),

(1) 6 Ves. 332.
(2) 5 Hare 258.
(3) 5 Ont. App. R. 576.
(4) 11 O. R. 88.
(5) L. R. 2 H. L. 43.
(6) 17 O. R. 479.
(7) 15 Can. S. C. R. 311.
(8) [1901] 2 K. B. 126.
(9) 19 Times L. R. 186.
(10) 19 Times L. R. 434.
(11) 19 Times L. R. 549.
(12) 19 Times L. R. 711.
(13) 8 B. C. Rep. 280.

having held that there was no contract for the satisfaction of the judgment for $500, and the whole of the arrangement being based on the assumption that such a contract existed, the principle of the above cases is applicable.

The payments made by Mackintosh for costs are properly chargeable against O'Brien and should be added to his security even though it could be shewn that they were not paid under the guarantee given at O'Brien's request; the respondent being an equitable mortgagee of the lands, would be entitled to charge O'Brien with the same as just allowances for the protection of his mortgage security. *Ramsden* v. *Langley* (1); *Lomax* v. *Hide* (2); *Barry* v. *Stawell* (3); *Wilkes* v. *Saunion* (4); *Wells* v. *Trust & Loan Co.* (5). The respondent being an equitable mortgagee of the lands, is entitled to hold the title deeds deposited with him until all his advances are paid. (See 8 B. C. Rep. 280); *Bank of New South Wales* v. *O'Connor* (6).

So much of the action as asks for rectification also fails for the additional reason that the plaintiff himself was a party to the proceedings reported in 8 B. C. Rep. 280, and succeeded there in having the court place a certain construction upon that agreement. Having allowed the court to assume that the agreement was in reality his agreement, he should not afterwards be allowed to be heard in the court to say that it was not his real agreement. The plaintiff's action also fails by reason of the fourth section of the Statute of Frauds, pleaded as a defence. *Olley* v. *Fisher* (7); Addison on Contracts (9 ed.) p. 120.

On the evidence it is abundantly clear that Mackintosh was never to pay more than $2,000; that he

(1) 2 Vernon 535.
(2) 2 Vernon 185.
(3) 1 Dr. & Wal. 618.
(4) 7 Ch. D. 188.
(5) 9 O. R. 170.
(6) 14 App. Cas. 273.
(7) 34 Ch. Div. 367.

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was not to pay more than $500 for the Manly judgment, and that he was not to pay this $500 until the Crown grant issued.

THE CHIEF JUSTICE and GIROUARD J. concurred in the judgment dismissing the appeal with costs.

DAVIES J.—While acquiescing, with much doubt, in the result that the appeal must be dismissed, I cannot help recording my decided opinion that the respondent is not entitled to charge, against the appellant, any part of the costs incurred in the protracted litigation carried on in British Columbia with the appellant's judgment creditor. These costs were incurred as the result of the respondent's own neglect and default and should be paid and borne by him.

NESBITT J.—I do not think anything can be usefully added to the judgment of Mr. Justice Irving in the court below. It seems clear that the defendant was not to satisfy the Manley judgment unconditionally, but only to pay $500 after the Crown grant issued. It is equally clear that the defendant was only to pay $2,000. After the Crown grant issued I think the proceedings taken to enforce the acceptance of $500 for the Manley judgment were taken for the benefit of O'Brien and the costs so incurred should, as between plaintiff and defendant, be chargeable to the plaintiff and the result of this is that the $2,000 so to be paid by Mackintosh has been exhausted, and the judgment of Mr. Justice Irving should be affirmed with costs.

KILLAM J. concurred in the judgment dismissing the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. A. Macdonald.*

Solicitor for the respondent: *W. S. Deacon.*