[HIGH COURT OF AUSTRALIA.]

GOLDSBROUGH, MORT & CO. LTD. . . APPELLANTS;
PLAINTIFFS,

AND

JOHN THOMAS QUINN . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 9, 10, 11, 12, 19.

Griffith C.J., O'Connor and Isaacs JJ.

Specific performance—Sale of conditionally purchased land—Price "calculated on a freehold basis"—Option of purchase given for value—Revocation of offer—Ambiguity—Mistake as to meaning of agreement—Damages—Equity Act 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *sec.* 9—*Costs—Deduction from purchase money.*

The defendant, for valuable consideration, gave the plaintiffs an option for a week to purchase the defendant's conditionally purchased and conditionally leased lands at a price of 30s. per acre, "calculated on a freehold basis." Before acceptance the defendant repudiated the offer. The plaintiffs, notwithstanding the alleged repudiation, accepted the offer within the week, and brought a suit for specific performance of the agreement for sale at a price of 30s. per acre, after deducting the payments due to the Crown to make the land freehold, which was a fair price for the land. The defendant swore that when he signed the contract he understood that he would receive a clear sum of 30s. per acre for the land.

Held, that the option having been given for value was not revocable, and that the acceptance of the offer by the plaintiffs constituted a binding contract, which was enforceable by specific performance.

Held, also, that the expression "calculated on a freehold basis" was not ambiguous, and that, as defendant had signed the contract in which he knew this term was included, and there being no circumstances of fraud or misleading, and no hardship in the bargain, the defendant could not resist specific performance upon the ground that he entered into the contract under a mistake as to its meaning.

Semble, per Griffith C.J. and *O'Connor* J., if it had been clearly established that such a mistake had been made, the Court would refuse to decree specific performance.

The plaintiffs' costs of the trial and the appeal were ordered to be set-off against the purchase money.

Semble, per Isaacs J.—If specific performance had been refused on the ground of mistake, damages should have been awarded under sec. 9 of the *Equity Act* 1901.

Decision of *A. H. Simpson* Ch. J. in Eq.: *Goldsbrough, Mort & Co. Ltd.* v. *Quinn*, 10 S.R. (N.S.W.), 170, reversed.

APPEAL by the plaintiffs from the decision of *A. H. Simpson*, Chief Judge in Equity, dismissing the plaintiffs' suit for specific performance.

The facts are sufficiently stated in the judgment of *Griffith* C.J.

Langer Owen K.C. and *Harvey*, for the appellants. The proper construction of the option given by the defendant was that, if the plaintiffs agreed within a week to buy the land at the price stated, the defendant would convey it to them. In the absence of consideration the defendant could have withdrawn the offer before acceptance: *Dickinson* v. *Dodds* (1). But when consideration is given the defendant cannot prevent the plaintiffs from accepting the offer at any time during the week. The defendant could have been prevented from selling the land to any other purchaser during the week: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (2). The plaintiffs having accepted the defendant's offer while the option was current, there was a binding contract enforceable by specific performance. The defendant is not entitled to resist specific performance on the ground of mistake when there is no hardship, and the defendant has not been misled by the plaintiff: *Tamplin* v. *James* (3); *Fry on Specific Performance*, 4th ed., pars. 760, 761. The expression, "on a freehold basis," is clear and unambiguous, and the defendant knew when he signed the contract that it contained these terms. It is no answer for the defendant to say that he did not understand the effect of the contract if he so conducted himself that the plaintiffs reasonably believed that he was

(1) 2 Ch. D., 463. (2) (1901) 2 Ch., 37. (3) 15 Ch. D., 215.

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assenting to the terms proposed and entered into the contract upon that belief: *Smith* v. *Hughes* (1); *Powell* v. *Smith* (2); *Van Praagh* v. *Everidge* (3); *Dyas* v. *Stafford* (4); *Stewart* v. *Kennedy* (5); *Pollock on Contracts*, 6th ed., p. 477; *Malins* v. *Freeman* (6). The Court will decree specific performance of an option to purchase land: *London and South Western Railway Co.* v. *Gomm* (7).

[ISAACS J. referred to *Raffety* v. *Schofield* (8).]

If this is not a case for specific performance it is clearly a case for an inquiry as to damages: *Tamplin* v. *James* (9); *Elmore* v. *Pirrie* (10); *Equity Act* 1901, No. 24, sec. 9.

Loxton K.C. and *Clive Teece*, for the respondent. The Court will in no case decree specific performance of a contract to give an option. To entitle a plaintiff to specific performance a higher degree of assent is required than is necessary to prove a contract: *Coles* v. *Trecothick* (11); *Wood* v. *Scarth* (12); *Webster* v. *Cecil* (13); *Manser* v. *Back* (14).

[ISAACS J. referred to *Onions* v. *Cohen* (15)].

If the Court is satisfied that one of the parties to the contract has entered into the contract under a mistake, specific performance will not be granted: *In re Hare and O'More's Contract* (16); *Douglas* v. *Baynes* (17); *Swaisland* v. *Dearsley* (18). The words "calculated on a freehold basis" are ambiguous, and the defendant might reasonably have contemplated they were used in the sense in which he swears he understood them. If this was a reasonable and *bonâ fide* mistake the Court will hold he is entitled to relief, even if his construction of the contract is not warranted. The question is not whether the defendant got the market value for his land, but whether he should be forced to sell his property when he does not wish to do so except at a fancy price. In fact the parties were never *ad idem*. Before the plaintiffs accepted

(1) L.R. 6 Q.B., 597, at p. 607.
(2) L.R. 14 Eq., 85.
(3) (1903) 1 Ch., 434.
(4) 7 L.R. Ir., 590.
(5) 15 App. Cas., 108.
(6) 2 Ke., 25, at p. 35.
(7) 20 Ch. D., 562.
(8) (1897) 1 Ch., 937.
(9) 15 Ch. D., 215.
(10) 57 L.T., 333.
(11) 9 Ves., 234.
(12) 2 K. & J., 33.
(13) 30 Beav., 62.
(14) 6 Ha., 443.
(15) 2 H. & M., 354.
(16) (1901) 1 Ch., 93.
(17) (1908) A.C., 477.
(18) 29 Beav., 430.

the offer it had been withdrawn. The only contract proved is a contract to give an option. Assuming the defendant committed a breach of that contract, it is not the contract of which the plaintiffs are seeking specific performance.

It has never been judicially decided that an offer is irrevocable when consideration is given.

[ISAACS J. referred to *Bruner* v. *Moore* (1); *Page on Contracts*, 1905 ed., vol. I., p. 63.]

If the plaintiffs have no equitable right damages cannot be granted.

Langer Owen K.C., in reply. The plaintiffs should be allowed to deduct their costs from the purchase money.

Cur. adv. vult.

The following judgments were read :—

May 19.

GRIFFITH C.J. This was a suit by the appellants for specific performance of an agreement, the terms of which are contained in a document dated 8th February 1909, and signed by the respondent in the following terms :—" I John Thomas Quinn in consideration of the sum of five shillings paid to me hereby grant to Goldsbrough, Mort & Co. Ltd. the right to purchase the whole of my freehold and conditional purchase and conditional lease lands situate near Canonbar, and known as Bena Billa, comprising about 2,590 acres, within one week from this date at the price of £1 10s. per acre, calculated on a freehold basis, and subject to the usual terms and conditions of sale relating to such lands, and upon the exercise of this option I agree to transfer the whole of the said lands to the said company or its nominee."

The respondent says that before the expiration of the week, and before acceptance of the offer by the appellants, he informed the appellants' solicitor, at whose office the document was drawn up and signed, that he repudiated the offer, alleging that it had been made under a mistake. There is some conflict of evidence on the question whether the repudiation alleged was made by the respondent personally before acceptance, or whether it was made

(1) (1904) 1 Ch., 305, at p. 309.

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by a person assuming to act for him, but I will assume the facts in his favour. The appellants, notwithstanding the alleged repudiation, but without any other notice of it, accepted the offer within the week.

The respondent contends that under these circumstances there never was any complete contract for sale of the land, that the only agreement evidenced by the document of 8th February was an agreement to make another agreement, which if made might have been enforced specifically, and that the only remedy for breach of the actual agreement is in damages.

This question was not discussed before the learned Chief Judge, but has been fully argued before us, and I proceed to express my opinion upon it.

All agreements consist, in substance, of an offer made by one party and accepted by the other. The offer and acceptance may be contemporaneous, or the offer may be made under such circumstances that it is to be regarded as a continuing offer subsisting at the moment of acceptance. At that point there is a *consensus ad idem*, *i.e.*, a contract. But an offer may be withdrawn at any time before acceptance. A mere promise to leave it open for a specified time makes no difference, because there is, as yet, no agreement, and the promise, if made without some distinct consideration, is *nudum pactum* and not binding. But if there is (as in the present case) a consideration for the promise it is binding. This is often expressed by saying that an option given for value is not revocable: see *e.g. per Farwell* J. in *Bruner* v. *Moore* (1). I think that the true principle is that in such a case the real transaction is not an offer accompanied by a promise, but a contract for valuable consideration, viz., to sell the property (or whatever the subject matter may be) upon condition that the other party shall within the stipulated time bind himself to perform the terms of the offer embodied in the contract. I think that such a contract is not in principle distinguishable from a stipulation in a lease that the lessee shall have an option of purchase, which is in substance a contract to sell upon condition. The nature of the consideration for the promise is not material.

If, however, the only promise were a promise not to withdraw

(1) (1904) 1 Ch., 305.

the offer, I should have some difficulty in saying that a breach of it could not be properly compensated for in damages.

I think, therefore, that this point fails, and that a suit for specific performance may be maintained in respect of the contract constituted by the letter of 8th February, and its acceptance by the appellants, although no English case has been cited in which such relief has been given.

The substantial defence to the suit was that the respondent entered into the contract under a mistake. In order to appreciate this defence, it is necessary to consider the subject matter of the bargain, which was an area of about 2,590 acres of land, of which some was freehold, some was held under the tenure known as conditional purchase, and some under that known as conditional lease. These tenures, created by the Crown Lands Acts of New South Wales, are well known in that State, and the incidents of the tenures are well understood. One, and the most important in the present case, is that on payment to the Crown of the full price of 20s. per acre the conditional purchaser or conditional lessee is entitled to acquire the freehold if certain other conditions upon which the right to transfer depends have been fulfilled. In the present case it must be assumed that they had been fulfilled. The mistake set up is in the meaning of the words "at the price of £1 10s. per acre calculated on a freehold basis." The appellants say that these words are free from ambiguity, and mean that the price to be actually paid in cash is to be estimated as if the land had been made freehold by the vendor, *i.e.*, that the necessary payments to be made to the Crown to make up 20s. an acre are to be deducted from 2,590 times 30s. The result would be that the vendor would receive a clear sum of 10s. per acre over and above whatever sum he might have paid to the Crown in respect of the land. In this view the actual amount which he might have paid would not be material to the purchaser, since the actual price of the freehold to him would be £1 10s. per acre. The conditions as to interest on deferred payments to the Crown are such as to be practically equivalent to payment in cash. If this is the meaning of the words the actual amount payable to the respondent in cash would have been about £1,680. The respondent alleges that he understood the words to mean that he

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was to receive a clear sum of £1 10s. per acre for the whole area, whatever he might have paid in respect of purchase money. In this view the purchase money would be about £3,980, a difference of £2,300.

I think that if it were clearly established that such a mistake had been made the Court would rightly refuse to decree specific performance.

The learned Judge thought that the words were capable of either meaning. The respondent swore that he understood the words in the sense already stated. A party to a contract cannot, as the learned Judge pointed out, escape specific performance by simply swearing that he did not understand it: *Tamplin* v. *James* (1). He remarked that the respondent swore that he attached the sense which I have stated to the words, but he refrained from saying that he believed him. He, however, dismissed the suit on the ground that he "was not satisfied that the defendant's consent to the option as it stands was sufficiently full and deliberate to justify the Court in granting specific performance against him." I am not quite sure that I understand the doctrine assumed in these words, but I will return to this point later. I will now deal with the facts as disclosed by the evidence relating to the alleged mistake.

But, first, I should say that the words "calculated on a freehold basis" are, in my opinion, plain and unambiguous. They are not words of art, but ordinary English words to be interpreted as applied to the subject matter. In a contract for the sale of land at so much per acre it is implied, if no more appears, that the title to the land is freehold and that the vendor will make a clear title. If the title to a great part of the land is, as in the present case, not freehold, but capable of being converted into freehold at the option of the purchaser, such an implication might or might not arise. But the words in question, especially when read with the words "subject to the usual terms or conditions of sale relating to such lands," remove all doubt. In my opinion they can only mean that the price is to be fixed on the assumption that the land for which it is given is to be made freehold before or after transfer, so that the purchaser will

(1) 15 Ch. D., 215.

acquire a freehold title, and so that if the vendor does not make them freehold a deduction must be made from the named sum equivalent to what the purchaser will have to pay to acquire the freehold. In any other sense they would, at best, be merely surplusage.

Assuming, however, that it is possible that the respondent might have misunderstood them, the question arises whether, beyond his own statement, there is any evidence upon which it can be found that he did so.

He had been a resident of the district for twenty years, and had been in occupation of part of the land in question for all that time. He appears to be an intelligent man, and had, indeed, been the first president of a local association called the Farmers and Settlers Association, so that he could not be ignorant of the value of land in the locality. In fact the price of 30s. per acre as freehold land was, as found by the learned Judge upon ample evidence, a fair if not a full price for the land in question. The land was under mortgage to a bank, and about a month before 8th February the bank manager, in respondent's hearing, asked Mr. McLeod, the appellants' manager, if he would make an offer for it. The respondent says that he took no part in the conversation, but McLeod says that he said it was for the respondent to make an offer, to which respondent replied that he would consider the matter. It is clear, on either version, that the subject of a sale was not new to either party on 8th February. Respondent's account of what took place on that day is that he met McLeod, apparently by appointment, and that they went together to the office of Mr. Flashman, the appellants' solicitor ; that before going in McLeod said, "Are you inclined to sell Bena Billa ? If you are I think I can find you a good buyer. . . . What would you be asking for your place at Bena Billa ?" to which respondent replied "Considering Rowley got 35s. an acre for his holding my place is worth as much as his" : that McLeod said "Rowley didn't get 35s., he got 30s. an acre. I can get you 30s. an acre for the whole of your holding if you leave me the offer for a week" ; to which respondent replied "I will" : that McLeod then asked "Will you sign an agreement to that effect," and respondent replied "Yes."

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They then went into the solicitor's office, where McLeod asked Mr. Flashman to draw up the agreement, *i.e.*, the document of 8th February, which he did. Respondent says that after writing it Flashman read it to him. He said, further, in an answer to his own counsel: "The document was not explained. I did not think the words freehold basis meant any difference in the price. I didn't know what they meant. I thought I was going to be paid 30s. an acre." In cross-examination he said: "What Flashman read out expressed the agreement I was prepared to make. I thought 'on a freehold basis' meant 30s. an acre all round. I did not think that price was extravagant. I thought it was a good price. I thought it was a very high price." He further said that nothing was said at that interview about how much Rowley got after paying the Crown, or what he got per acre, and that nothing was said about balances due to the Crown.

The agreement made by Rowley was put in evidence, from which it appeared that the price which he received, calculated on a freehold basis, was about 33s. an acre, but I do not think that this evidence is material on the case raised by the defence.

McLeod and Flashman gave a very different account of the interview, but from the respondent's own account it appears that he was fully aware that the words "calculated on a freehold basis" were contained in the document which he signed, and which therefore accurately expressed his offer in the very words which he intended to use. He, however, invites the Court to believe that he thought he was to get for the land a sum 150 per cent. larger than the price which his words indicated, and as much in excess of its fair value.

If a bargain were made on the terms now set up by the respondent the amount which the purchaser would have to pay in order to acquire the freehold would depend upon the respective areas held under the different tenures, and the amounts payable to the Crown in order to convert them into freehold.

It appears that no inquiry was made by McLeod on either point, so that the offer, in this view, left it to the appellants to ascertain the facts from extrinsic sources. It is suggested that the information might have been obtained by the appellants from

the Treasury within the week, but I cannot find any foundation for the suggestion.

Taking the respondent's own account of the matter, therefore, I think that the other facts of the case, so far from corroborating his statement that he understood that the words in question meant that he was to get £2,300 more for the land than it was fairly worth, discredit it. If McLeod's evidence is accepted, respondent fully understood what he was doing, and discussed with him the difference between "a freehold basis," and what is called a "walk in and walk out" basis—a term familiar in New South Wales, and the meaning of which is sufficiently apparent.

It is further suggested that the land may have had some special value to the appellants, and that the respondent may have thought that this accounted for their asking that it might be put under offer to them at so extravagant a price. This is a mere suggestion, and is not in my opinion supported by any evidence.

I am therefore of opinion that the respondent failed to establish the mistake which he alleged, and that he must be held to his bargain unless he can bring the case within the wider meaning of the word "mistake" as applied to specific performance and explained by *Sir E. Fry*, 4th ed., par. 752, as follows:—"Mistake may be of such a character as in the view of a purely Common Law Court to avoid the contract on the ground of want of consent or of total failure of consideration. But Equity does not confine the defence of mistake to these cases. The principle upon which it proceeds is this:—that there must be a contract legally binding, but that this is not enough,—that to entitle the plaintiff to more than his Common Law remedy, the contract must be more than merely legal. It must not be hard or unconscionable: it must be free from fraud, from surprise, and from mistake: for where there is mistake, there is not that consent which is essential to a contract in Equity: *non videntur qui errant consentire.*"

Now, in the present case there is no ground for suggesting that the contract is hard or unconscionable; there is no element of fraud or surprise; and the vendor was not misled by the purchaser.

I have already quoted the reason given by the learned Judge for dismissing the suit. I conjecture that he was referring to

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the rule stated in par. 400 of *Sir E. Fry's* work, to which he had previously referred, that wherever there are circumstances of surprise or want of advice or anything which seems to import that there was not a full entire and intelligent consent to the contract the Court is cautious in carrying it into effect. The passage occurs in the chapter on Want of Fairness in the Contract, and the learned author is referring to cases where the parties are not dealing in equal terms.

When a man of intelligence, in full possession of his faculties, conversant with the subject matter, and knowing the precise words he uses, evidences his consent to a contract by signing it, I do not know of any other criterion by which the sufficiency of his consent can be measured in the absence of evidence of fraud or surprise or misleading, or mistake as to some material fact. If the learned Judge intended to suggest that there were circumstances of surprise I am unable to find any evidence to support that view.

In my opinion the real explanation of the case is afforded by the evidence of what happened after the respondent had signed the contract. On the same day he had an interview with the bank manager, and, no doubt, ascertained how much would be coming to him after discharge of the mortgage. This being probably less than he had anticipated, he repented of his bargain and repudiated it. But a mistake as to the expected result of a calculation by which the price of land is to be ascertained under the terms of a contract which is itself clear is not a mistake of which the Court can take notice in the absence of any other ground for staying its hand.

For these reasons I think that the appeal must be allowed.

O'CONNOR J. The matter in controversy between these parties resolves itself into two questions. First, does the contract sought to be specifically performed constitute an agreement binding at law on both parties, for if it does not the appellants' case is at an end. Secondly, if it does, has the respondent proved that there is, either in the contract itself, or in the circumstance of its formation, anything which would justify a Court of Equity in refusing to decree specific performance. There is no difficulty

in answering the first question. Whatever may be the form or effect of the document of 8th February 1909, and to that I shall refer later, no doubt has been raised as to the meaning of any of its terms, except that which refers to the price, "calculated on a freehold basis." It is to my mind clear on the evidence that the respondent knew that that expression was being used in the document as Mr. Flashman read it over to him, that he assented to its being therein embodied, and intended that his offer to McLeod should be expressed in that language. If the offer had before withdrawal been accepted the respondent would have been bound at law, no matter what meaning he might have attached in his own mind to the language which he used. As was pointed out by Lord *Watson* in *Stewart* v. *Kennedy* (1), a party by delivering to another an offer in writing represents to that other that he is willing to be bound by all its conditions and stipulations construed according to their legal meaning, whatever that may be. He contracts, as every person does who becomes party to a legal contract, to be bound in case of dispute to the interpretation which a Court of law may put upon the instrument. It is in my opinion abundantly clear that the true interpretation of the words, the meaning of which has been disputed, is that upon which the appellants have based their case. Under these circumstances the respondent cannot at law escape from the binding effect of his contract on the ground that he did not in his own mind intend the words "calculated on a freehold basis" to have the meaning which the Court is bound to place upon them.

Before considering the second question it is necessary to advert to the form of the offer and to its effect. In substance it is an undertaking by the respondent to sell and transfer to the appellants the lands referred to at the price named on condition that the appellants on their part are willing to buy on those terms, and signify their assent within one week from 8th February 1909. In other words, it is an agreement to sell on a condition subsequent, the condition being the acceptance of the other party within the time named. The appellants' right under the contract is to accept within the week, and having fulfilled

(1) 15 App. Cas., 108, at p. 123.

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the condition they were entitled to all the benefits of the contract. The respondent's refusal to perform his part by withdrawing his undertaking and preventing the appellants from accepting was a breach which entitled them to maintain an action for damages at law, or if the case were deemed to be one for specific performance, entitled them to a decree for that relief. But the document may also be regarded from another point of view. Assume that it was merely on offer to sell on the terms embodied in the document. The respondent on the face of it undertakes for valuable consideration to keep it open to the plaintiff for a week. During that week he could not lawfully withdraw it. That proposition seems to me obvious on the established principles of the law of contracts, and it appears to have been assumed to be so in many cases. In *Bruner* v. *Moore* (1), for instance, *Farwell* J. takes it to be settled law that an option for value is not revocable during the period for which it is given. The respondent therefore having withdrawn the offer during the week is liable at law to an action for depriving the appellants of their right of acceptance. The position in equity, assuming the agreement proper under all the circumstances for specific performance, is I think correctly stated in the passage from *Page on Contracts*, vol. 1, pp. 63-64, quoted during the argument. A Court of Equity will disregard the withdrawal, and treat the offer as if it had been duly accepted while still open for acceptance. In my view it is of little moment whether the document is regarded as an agreement by the vendor to sell subject to a condition subsequent which the purchaser has performed, or as an option given for valuable consideration which could not be withdrawn, and the withdrawal of which before acceptance a Court of Equity will disregard in adjusting the rights of the parties. Looked at in either aspect there is nothing in the form or effect of the document to disentitle the appellants from obtaining a decree for specific performance of the whole agreement to as full an extent as if the option was still subsisting at the date of acceptance. That being so it lies upon the respondent to satisfy the Court that there is something in the circumstances surrounding the making of the agreement that

(1) (1904) 1 Ch., 305, at p. 309.

would justify refusal of a decree for specific performance. The respondent's case is founded upon what is called "mistake" in equity—mistake not arising from fraud or default in the other party to the contract, but from a mistake on his own part as to the meaning of the language which he has used, with the result that he has become bound in law to the performance of a contract which he never intended to enter into. In applying the remedy of specific performance the Court will in exercising its discretion disregard the rigorous rule of the law in one respect. In law a party is bound, as I have already pointed out, by the meaning which the law will attach to the words he has used in a contract, whether that is or is not the meaning which he intended they should bear. But a Court of Equity will not force a party to perform a contract if it is completely satisfied that he in fact never intended to enter into it, and that a hardship amounting to injustice would be inflicted on him by holding him to his bargain. The grounds upon which specific performance will be refused in such a case are well established. I can see no difference in the doctrine laid down in *Tamplin* v. *James* (1), and in the earlier cases such as *Manser* v. *Back* (2), although, no doubt, in some of the earlier cases the application of the doctrine has, to use the words of *James* L.J. in the former case, "gone too far." I take the law to be as laid down by *Baggallay* L.J., and approved by the Court of Appeal in *Tamplin* v. *James* (1). In the application of the doctrine the Court must be clearly convinced that the party resisting specific performance was in fact mistaken as to the meaning of the contract by which he bound himself. In *Manser* v. *Back* (3) Vice-Chancellor *Wigram* says:—"That the defendant, who undertakes to prove such a case, undertakes (as Lord *Eldon* said) a task of great difficulty, is not to be denied. But if the difficulty be got over by evidence so stringent that the Court may safely act upon it, why is not the principle to be applied?" Again, care must be taken to distinguish between the case in which the party alleges mistake as to the meaning of the words he has used in a contract, and that in which, being well aware of the meaning of the words he has used, his mistake has been as to the effect of the contract on his own interests.

(1) 15 Ch. D., 215. (2) 6 Ha., 443. (3) 3 Ha., 443, at p. 449.

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Mistake of the latter kind affords no ground for refusing specific performance: *Powell* v. *Smith* (1).

Turning now to the facts of the case, the question on the threshold is, was the expression which it is claimed misled the respondent so ambiguous as to be likely to mislead him? To the learned Judge of first instance it appeared to be ambiguous. Ambiguity in all such cases must be relative. No doubt to some persons and under some circumstances one can well understand the expression being ambiguous. But the real matter to be determined is whether the respondent has shown that they were ambiguous to him. Upon that question the learned Judge has made no express finding, and I do not think that any such finding is involved in his holding that he "was not satisfied that the defendant's consent to the option as it stands was sufficiently full and deliberate to justify the Court in granting specific performance against him." The mistake alleged by the respondent is no doubt serious. If he is right in his contention, to force the contract upon him would be to compel him to sell his property for considerably less than half the sum at which he says he intended to part with it. If he had produced clear and satisfactory evidence that he had been mistaken as he alleges, no Court of Equity ought in my opinion to force upon him a contract such as the appellants put forward. But after full consideration of the evidence I am unable to satisfy myself that the respondent was mistaken as to the meaning of the expression "calculated on a freehold basis." It is difficult to believe that a person of his age and experience, his knowledge of land matters, and his position of leadership amongst the farmers of the district, could have been unaware of the meaning of the expression. Taking his own version of the negotiations that preceded the offer, it is impossible to understand the absence of all inquiries by the intending purchaser as to the amounts then due to the Government on the different species of holdings. On the other hand, the omission is easily understood if the parties were negotiating on a basis of calculation which made the ascertainment of that amount immaterial to the intending purchaser. If McLeod's evidence is adopted as the true account of the negotiations, the

(1) LR. 14 Eq., 85.

embodiment in the offer of the expression, "calculated on a freehold basis" was natural and appropriate. McLeod swears that there was a discussion between the respondent and himself as to the prices ruling in the district, and as to other transactions of a similar kind in the neighbourhood, that he told the respondent of the prices paid by the appellants for T. Wood's land on a "walk in walk out" basis and that at which Wood's brother placed his land under offer on the same basis; he swore further that as to each case he explained what the figures amounted to calculated on a freehold basis, that thereupon the respondent made the offer to sell his land at 30s. on a freehold basis, which in fact works out at 2s. to 2s. 6d. an acre more than the price paid to T. Wood would have amounted to if taken on that basis. If that evidence is true it is impossible that the respondent could have been mistaken in the meaning of the expression "calculated on a freehold basis." The respondent no doubt contradicts McLeod as to that portion of his evidence. But in my opinion all the circumstances and all the probabilities corroborate McLeod's account, and I find it to be the true account. In thus accepting McLeod's version of the negotiations it is not necessary to impute any wilful falsehood to the respondent. There can be little doubt, I think, that the respondent was mistaken as to the cash result of the contract to him, and in that sense was mistaken as to its effect. A mistake of that kind is, as I have pointed out, no answer to a claim for specific performance. The respondent says that he discovered the mistake ten minutes after leaving Flashman's office, where he had just signed the option. He met Herrick, a friend. They had a conversation, he then went to the acting manager of his bank, Mr. Hogg, who had roughly worked out for him the result. It was after that he went back to Flashman and protested that he had not understood the meaning of "freehold basis." It is not at all unlikely that the respondent in afterwards giving evidence of what he thought and felt and said on that occasion should confuse his mistake as to the effect of the contract with a mistake as to its meaning. In the view that I take of the evidence the respondent has failed in the very foundation of his case, inasmuch as he has not succeeded in establishing that he entered into the contract in question under a

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mistake as to its meaning. As to the other aspects of the transaction to which the Court might in such cases direct its attention, there are findings of the learned Judge well founded on the evidence which remove any possible difficulty as to decreeing specific performance. He expressly finds that there was no unfair dealing or attempt at overreaching on the plaintiffs' part, that the price was fair value, quite possibly full value. For these reasons I am of opinion that the appellants are entitled to have the agreement specifically performed, and that the learned Chief Judge ought to have so decreed. It follows that the appeal must be allowed and the judgment appealed against set aside.

ISAACS J. The first question is as to the effect of the contract of 8th February 1909. That contract is what is ordinarily known as an option; it consists of a promise founded on valuable consideration to sell land on stated terms within a given time. Unsupported by valuable consideration such a promise would be *nudum pactum*, and until the creation of a contract by acceptance in strict accordance with the stated conditions, could be withdrawn. So much is clearly established by a century of decisions commencing with *Cooke* v. *Oxley* (1), and continuing to *Bristol &c. Aerated Bread Co.* v. *Maggs* (2).

If accepted in accordance with the stipulated conditions, no attempted withdrawal having meanwhile taken place, the relation of vendor and purchaser is created by the contract thus formed, and such a contract may be ordered to be specifically carried out. Again, that is the subject of express decision as in *Bruner* v. *Moore* (3).

The respondent argues that in the circumstances of this case there was no contract of sale. He contends that, although the offer is supported by valuable consideration, yet if the promisor does in fact, before due acceptance, declare his intention not to carry out his promise, that is a withdrawal of his offer, and no subsequent acceptance can convert the relation of the parties into that of vendor and purchaser. The result, it is argued, is that though damages for breach of the original contract to let the offer stand may be recovered, yet in law there is no contract of

(1) 3 T.R., 653. (2) 44 Ch. D., 616. (3) (1904) 1 Ch., 305.

sale and purchase of land to specifically perform, or for the breach of which even damages can be awarded.

No decision actually determining this precise point has been cited to us; but the reasoning and unvarying *dicta* of Judges of eminence demonstrate that the principle on which actual decisions have proceeded places the matter beyond doubt. In *Cooke* v. *Oxley* (1) all the Judges wholly or partly rest their judgments on want of consideration, as the reason for not disregarding the retraction of the offer. In *Dickinson* v. *Dodds* (2) *James* L.J. relied on the promise being a mere *nudum pactum*. In *Bristol Aerated &c. Bread Co.* v. *Maggs* (3) *Kay* J. observed :—"It was suggested that the ten days during which the offer was to remain open had not expired when it was withdrawn. But that can make no difference. *The offer was not a contract*, and the term that it should *remain open* for ten days was therefore not binding."

In *Bruner* v. *Moore* (4) where £400 was given for the option *Farwell* J. says (5):—"*The option, which is given for value and is, therefore, not revocable*," &c. In *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (6) Lord *Lindley* points out that to break a contract is an unlawful act, and that in point of law a party to a contract is not entitled to break it even on offering to pay damages. This is only another way of saying the promise is irrevocable.

In my opinion the whole question turns on that point, the irrevocability of the option.

The feature which distinguishes an option from a mere offer is the consideration. That, however, does not alter the nature of the offer, it merely ensures its continuance, by creating a relation in which the law forbids the offeror retracting it. He may attempt to do so—ignoring the circumstance that for consideration he has parted with the right to withdraw—but his attempt is in the sight of the law ineffectual.

He has parted with the right to alter his mind for the period limited, and he cannot in breach of his contract be heard to say the contrary. His offer must therefore be deemed to stand.

(1) 3 T.R., 653.
(2) 2 Ch. D., 463.
(3) 44 Ch. D., 616, at p. 625.
(4) (1904) 1 Ch., 305.
(5) (1904) 1 Ch., 305, at p. 309.
(6) (1905) A.C., 239, at p. 253.

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To hold otherwise would be equivalent to saying he had not sold to the promisee on option, but only the promise to give an option, which would be absurd. It is the option which he has sold, that is, the right of electing whether to purchase or not; and in the words of *Farwell* J. already quoted "the option which is given for value and is, therefore, not revocable," and to use the language of the same learned Judge in *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1) the respondent is the "owner of an option."

It was rightly urged by learned counsel for the appellants that such an option gives the optionee an interest in the land, as appears by *London and South Western Railway Co.* v. *Gomm* (2), which as to its statement of the law of perpetuity has been recently affirmed in the House of Lords: *Edwards* v. *Edwards* (3). Of course the interest which the optionee possesses is not the same as that of a purchaser, but it is something real and substantial, and beyond the power of the grantor of the option to withdraw. Nevertheless I do not for this branch of the case rely on that equitable interest, because I would hold the respondent bound on general principles of contract whatever were the subject matter of the agreement, and would regard the offer as irrevocably fixed for the period agreed on.

The inevitable consequence is that in contemplation of law the offer was not withdrawn, and when linked with the acceptance, the necessary mutual contractual obligation to sell and purchase the land on the stipulated terms was created.

The respondent next relies upon the doctrine of mistake. The learned Judge of first instance has not found that the respondent entered into the contract under the influence of any mistake. His Honor's finding as I read it is that the respondent at the time he gave the option knew just what he was doing, but did it without full consideration, and apparently the learned Judge thought that, had more deliberation been bestowed upon the matter, the option would not have been given upon the terms stipulated. But the respondent was *sui juris*, and was under no possible domination of the appellants, there was no confidential relation

(1) (1900) 2 Ch., 352, at p. 364. (2) 20 Ch. D., 562.
(3) (1909) A.C., 275.

existing between them, and, as the learned Judge has expressly found, there was no unfair dealing or even any attempt at overreaching on the part of the appellants, and further the price was a fair and possibly full value for the land. There are therefore no circumstances of hardship or injustice.

The respondent's own evidence distinctly shows that he knew he was giving the appellants an option of purchase, and therefore was fully aware of the nature of the act he was performing. It also establishes that he knew he was offering to sell at " 30/- an acre calculated on a freehold basis," and therefore that he was equally cognizant of the words to which he was subscribing. It is plain, undoubtedly, that without further reference to Flashman he had very shortly afterwards repented of those words. But if he had wanted more time to consider there was nothing to prevent him taking it, he was not bustled into the bargain, it was no sudden project sprung upon him. The idea of selling land originated with him, so far as the appellants were concerned, and whether he signed the document hurriedly or at leisure, he did so fully conscious of its nature and actual terms without pressure, and without any fault of the appellants.

The expression " calculated on a freehold basis " is said to be ambiguous. The learned primary Judge thought it was, and it was urged that the fact of his Honor thinking so demonstrates its possible ambiguity to a reasonable man. But that is not a final test. In any case the construction of a written contract is for the Court, and I cannot entertain the least doubt as to its meaning.

Land at various stages, as I may term them, on the road to a fee simple title was the subject matter of the bargain, the amounts necessary to perfect the title not being uniform, and being moreover within the peculiar knowledge of the respondent. Unless special and most unusual means of inquiry were adopted by the appellants, they could not at the time of entering into the contract have known the respective amounts necessary to perfect the title of the several holdings. Yet the price to be paid is uniform per acre, calculated on a freehold basis.

In other words, assuming the land to be freehold you assume the price to be 30s. per acre; that is the basis—to the extent

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that if the land recedes from that basis so does the price. The calculation being on that basis, the process is simple, namely, deduct from the basic price the sum necessary to perfect the title and the balance of money corresponds to the extent of interest in the land which is transferred. No other construction seems to me reasonable; no reasonable man in respondent's position could have thought the appellants were undertaking any more.

If, then, respondent laboured under any mistake, it was not as to the words used, nor could he reasonably think they bore any interpretation other than that which is now put upon them. And, what is most material in a question of this kind, it is not shown that the appellants did not *bonâ fide* understand them in their true sense, or had any suspicion, or ground for suspicion, that the respondent understood them otherwise. The reference (fol. 44) to Rowley's land being chiefly conditional purchase and conditional lease land cannot carry so great a burden. And the learned primary Judge did not so find. The learned Judge has not expressed any opinion whether the version of the conversation as given by McLeod (fols. 87 and 88) or the denial by the respondent (fol. 99) is correct. But though a finding on that point adverse to the respondent would necessarily have concluded his case, a contrary finding would not necessarily have determined the controversy in his favour. McLeod's evidence, if true, would have nullified the respondent's assertion of the way he understood the words used; but disbelieving McLeod would not have established it. The mere sworn statement by a party that he misunderstood an essential term of a contract is, as a general rule, much too dangerous to accept as a ground for holding the contract to be a nullity. In this case there are in addition several circumstances which show such a misunderstanding to be highly unreasonable and improbable, and which therefore are strong grounds for distrusting the statement. The respondent most probably has unconsciously confused his expectation of the practical result of the bargain with his understanding of its terms. But assuming he did mentally misconstrue the meaning of the expression used, still, in the circumstances I have stated, he is not in a position to repudiate the agreement on the ground that there was no *aggregatio mentium*. He acted as if there was; by his

conduct he led the appellants to believe there was, and it is plain the appellants so believed, and acted upon that belief by entering into the bargain and giving the consideration. The observations of Lord *Blackburn* (then *Blackburn* J.) in *Smith* v. *Hughes* (1) are very much to the point:—"I apprehend that if one of the parties intends to make a contract on one set of terms, and the other intends to make a contract on another set of terms, or, as it is sometimes expressed, if the parties are not *ad idem*, there is no contract, unless the circumstances are such as to preclude one of the parties from denying that he has agreed to the terms of the other. The rule of law is that stated in *Freeman* v. *Cooke* (2). If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms."

And the passage cited by Mr. *Owen* from Lord *Watson's* speech in *Stewart* v. *Kennedy* (3), completes the answer to the respondent's argument. Lord *Watson*, speaking of the appellant in that case, said:—"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. The result of admitting any other principle would be, that no contract in writing could be obligatory if the parties honestly attached, in their own minds, different meanings to any material stipulation."

Therefore the respondent's mistake, however he understood the terms he outwardly approved, and assuming the mistake to be *bonâ fide*, must have been due to his own want of care or reflection, in other words to his own negligence, and he is not to be allowed to impeach it to the prejudice of the other contracting party simply because he did mistake it. In such a case his mind must be judged by the external manifestation, which he put forward as the true index of his mental condition, and on the

(1) L.R. 6 Q.B., 597, at p. 607. (2) 2 Ex., 654, at p. 663.
(3) 15 App. Cas., 108, at p. 123.

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faith of which the other party acted to their own detriment, and to the benefit of the respondent.

There is consequently a good contract of sale—valid in form, and unimpeachable in substance. The question then is, what is the appropriate remedy ?

The learned primary Judge refused to decree specific performance and left the appellants to their common law remedy in damages, because it appeared to his Honor that the respondent's consent to the option was not sufficiently full and deliberate. It does not appear that any criterion of what a Court of Equity requires in this regard was laid down by the learned Judge, unless we can find it in the passage quoted from Sir Edward Fry's book. But that has no relevancy to such a case as the present. It is true as Lord Chancellor *Cranworth* said in *Harrison* v. *Guest* (1), a case affirmed in the House of Lords (2):—"If persons standing in a particular relation to one another deal as vendor and purchaser, the Court expects the purchaser, when the purchase is complained of by the seller, to show that the seller had due protection afforded him." But the learned Lord Chancellor declined to extend that doctrine to a case where no such relation exists and added (3): "the affairs of mankind could not go on if we were not to act upon some such ground of distinction." So as to the smallness of the consideration, namely five shillings, for keeping the offer open, which learned counsel relied on, Lord *Cranworth's* further observations are pertinent. He said (4):—"The result was, that there was a purchase for what turns out to be an extremely inadequate consideration. That, however, is of no consequence, if the parties were in a situation to judge for themselves." *Haywood* v. *Cope* (5) is a distinct authority that specific performance will not be refused for mere inadequacy of consideration.

In the view I take of the first point to which I addressed myself I necessarily regard the parties as having entered into two separate contracts. The first was a unilateral contract that a certain offer should last for a week, and in this contract the con-

(1) 6 DeG. M. & G., 424, at p. 432.
(2) 8 H.L.C., 481.
(3) 6 DeG. M. & G., 424, at p. 433.
(4) 6 DeG. M. & G., 424, at p. 435.
(5) 25 Beav., 140.

sideration was five shillings. The appellants had no obligation beyond the consideration, the respondent none but to continue the offer for the stipulated time. Had there been any attempt by the respondent to dispose of the land to another during that period he might have been enjoined, because the affirmative promise to the appellants necessarily implied an undertaking not to sell to another: *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1), and *Metropolitan Electric Supply Co.* v. *Ginder* (2). But in the absence of such an attempt the remedy was in the appellants' own hands. They could at any moment before the expiration of the period agreed on, by simple acceptance, convert their position of optionees into that of absolute vendees, with mutual obligations, and so as to bring into operation the principles *Shaw* v. *Foster* (3), which regulate the respective rights and duties of vendor and purchaser. That change of position has been effected by the act of the party entitled, and therefore the remedy of specific performance of the primary agreement is not only unnecessary and inappropriate but impossible. There is nothing in that agreement to perform. Its terms must be looked at, but only to ascertain the offer, which with acceptance constituted the later and distinct contract. The argument as to the five shillings consideration is altogether irrelevant. How far, then, is the Court justified in refusing specific performance of the later contract on the grounds stated in the judgment under appeal, or on the ground of mistake, not sufficient to prevent the creation of a contractual tie?

It cannot be too clearly borne in mind that the function of the Court in such cases is to do complete justice—by requiring a party to specifically carry out a contract he has made, in the very way he agreed to do so. An order in those terms is *primâ facie* free from any suggestion of injustice. No doubt a decree for specific performance is in the discretion of the Court, but Lord *Eldon* L.C., in *White* v. *Damon* (4), enunciated the rule which has ever since bound the Courts, when he said: "I agree with Lord *Rosslyn*, that giving a specific performance is matter of discretion: but that is not an arbitrary, capricious, discretion. It must be

(1) (1901) 2 Ch., 37, at p. 51.
(2) (1901) 2 Ch., 799, at p. 809.
(3) L.R. 5 H.L., 321.
(4) 7 Ves., 30, at p. 35.

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regulated on grounds, that make it judicial." See also *per Farwell* L.J. on "abstract justice" in *Dean* v. *Brown* (1). *Sir John Romilly* M.R., in *Hayward* v. *Cope* (2) acted upon Lord *Eldon's* statement of the rule, and said: "You cannot exercise a discretion by merely considering what, as between the parties would be fair to be done; what one person may consider fair, another person may consider very unfair. You must have some settled rule and principle upon which to determine how that discretion is to be exercised."

And the remedy of specific performance has now been so constantly applied and has become so deeply rooted in our system of jurisprudence that, if only the case is of a class regarded as appropriate, some sound and recognized reason must stand in the way before the Court refuses the remedy. *Farwell* J. states the position very definitely in *Hexter* v. *Pearce* (3). Apart from the instances referred to where a contracting party is in the power or under the influence of the other, the mere fact that he chose to announce his consent without taking further opportunity for careful deliberation and has since repented of his bargain, is not a recognized ground of refusal to grant a decree. Probably the learned primary Judge had in his mind the expression of Lord *Langdale*, "hurried and inconsiderate," in *Malins* v. *Freeman* (4). But there were other circumstances in that case, and besides, the law on the subject is now much more firmly settled than it was in 1837. The lack of full deliberation may occasion a mistake which in some circumstances affords a defence, and the great weight of learned counsel's argument on this branch of the case rested on mistake—so occasioned. It is I think quite unnecessary and even dangerous to seek for any settled rule as to the effect of mistake in relation to specific performance, in the cases before *Tamplin* v. *James* (5). That was a case of mistake which *Brett* L.J. described as a "mistake not on a point of vital importance." The references by *Cotton* L.J. (p. 222) and *James* L.J. (p. 223) to damages which the Court in that case would afterwards have been bound to consider, point in the same direction and

(1) (1909) 2 K.B., 573, at p. 586.
(2) 25 Beav., 140, at p. 151.
(3) (1900) 1 Ch., 341, at p. 346.
(4) 2 Ke., 25, at p. 35.
(5) 15 Ch. D., 215, at p. 222.

indicate that the mistake set up was not fundamental, and such as to vitiate the contract altogether, but merely to affect the nature of the remedy. And as to such a mistake *James* L.J. recognized that perhaps some of the previous cases went too far in relieving the defendant, but he added that for the most part the cases where the defendant escaped on the ground of a mistake not contributed to by the plaintiff were 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. See also *Fry on Specific Performance*, par. 765.

There are, besides the case of *Tamplin* v. *James* (1), two subsequent judicial pronouncements of high authority which state the law in unequivocal terms and to the same effect as *Tamplin* v. *James*. The first is by *Cotton* L.J. in *Preston* v. *Luck* (2) and is in these words: "It is very true that in some cases, if the party against whom specific performance is sought to be obtained, satisfies the Court by clear evidence that what he on the terms of the contract appears to have contracted for was not in his mind the thing in respect of which he was bargaining, the Court will refuse specific performance, but that is only because in cases of specific performance the Court does not grant that special equitable relief if it finds, for any reason, that it would be what is called a hardship or unreasonable to compel the defendant specifically to perform the contract." The other is by Lord *Macnaghten* in *Stewart* v. *Kennedy* (3), where the learned Lord says:—"It was then contended that even if the purchaser's construction be accepted it would be wrong to order the vendor to perform the agreement specifically if he avers and proves that his understanding of the contract was different. In support of this view, several English authorities were referred to. 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

(1) 15 Ch. D., 215.
(2) 27 Ch. D., 497, at p. 506.
(3) 15 App. Cas., 75, at p. 105.

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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. The Court will not be active in assisting one party to an agreement who has always his remedy in damages to take advantage of the mistake of the other so as to involve him in serious and unforeseen consequences."

But what is the hardship or the injustice or the unreasonableness which would result from specifically enforcing the present contract?

All that could be suggested was, first, that the respondent could probably have succeeded in forcing a higher price from the appellants by reason of the relative situation of their respective properties. But as the learned Judge has found the contract price is certainly a fair, and probably the full price for the land, that contention fails. It is no hardship to be compelled to carry out a fair bargain because possibly a more advantageous one might have been extracted.

Then it was said the respondent was called on to give up his home, and it was a hardship to be compelled to do so without some extra compensation beyond the bare intrinsic worth of the property. But respondent was a willing seller—in fact the proposer of a transaction of sale—and he could not in the circumstances reasonably expect the purchaser to give more than the fair value of the land, except on the ground of some special necessity of the purchaser's peculiar situation. Lord *Eldon* L.C. observed in *Coles* v. *Trecothick* (1):—"Inadequacy of price does not depend upon a person giving *pretium affectionis*, from any peculiar motive, beyond what any other man would give, the reasonable price. But, farther, unless the inadequacy of price is such as shocks the conscience, and amounts in itself to conclusive and decisive evidence of fraud in the transaction, it is not in itself a sufficient ground for refusing a specific performance."

It appears to me therefore, both in reason and upon authority, the respondent's case fails at every point, and that the appeal must be allowed and specific performance directed. It is unneces-

(1) 9 Ves., 234, at p. 246.

sary, in view of the conclusion already arrived at, to decide anything about damages, but with a view to guide future practice I would add a word on the argument as to this. If specific performance had been refused on the ground of non-essential mistake damages should have been ascertained and awarded under sec. 9 of the *Equity Act* of 1901. See the observations of the Lords Justices in *Ferguson* v. *Wilson* (1).

Appeal allowed with costs. Costs of trial and of the appeal to be set off against the purchase money.

Solicitor, for the appellants, *A. J. L. Flashman*, Nyngan, by *McDonell & Moffitt.*

Solicitor, for the respondent, *W. T. Hogan*, Cobar, by *Perkins, Stevenson & Co.*

C. E. W.

[HIGH COURT OF AUSTRALIA.]

GEORGE ROGERS . . . . . APPELLANT;

AND

THE COMMISSIONER OF PATENTS . . RESPONDENT.

ON APPEAL FROM THE COMMISSIONER OF PATENTS.

Patent — Patents Act 1903 (*No.* 21 *of* 1903), *secs.* 4, 46 — *Manner of new manufacture—Refusal to accept specification—Device for burning standing timber—Production of new article.*

(1) L.R. 2 Ch., 77, at pp. 88, 91 and 92.