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ALEXANDER McINTYRE (DEFENDANT)..APPELLANT;

AND

WILLIAM NELSON HOOD (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA (IN EQUITY).

Property—Offer to sell—Acceptance on completion of title—Specific performance.

On the 26th of January, 1882, *McI.* wrote to *H.* as follows: "*A. McI.* agrees to take $35,000 for property known as *McM.* block. Terms—one-third cash, balance in one year at eight per cent. per annum. Open until Saturday, 28th, noon." On the same day *H.* accepted tbis offer in the following terms: "I beg to accept your offer made this morning. I will accept the property known as *McM.* block, being the property on *M.* street, for $35,000, payable one-third cash on completion of title, and balance in one year at eight per cent. You will please have papers and abstract submitted by your solicitor to *N. F. H.*, Esq., 22, *D.* block, as soon as possible, that I may get conveyance and give mortgage." On a bill for specific performance, the Court of Queen's Bench (*Man.*) decreed that *H.* was entitled to have the agreement specifically performed.

Held—(*Ritchie*, C.J., and *Fournier*, J., dissenting), that there was no binding, unconditional acceptance of the offer of sale, and therefore no completed contract of sale between the parties.

APPEAL from a judgment of the Court of Queen's Bench *Manitoba*, (equity side), dismissing an appeal from a decree made in the cause by Mr. Justice *Dubuc* in favor of the respondent.

This was a suit by the plaintiff (respondent) against the defendant (appellant) for the specific performance of an alleged contract, with compensation, on alleged defects in the subject-matter of sale.

The prayer of the bill and defendant's answer, as

*PRESENT.—Sir W. J. Ritchie, C.J., and Strong, Fournier, Henry and Gwynne, JJ.

well as the documentary evidence relied on by the parties and the decree of Mr. Justice *Dubuc*, are given at length in the judgment of *Ritchie*, C.J., hereinafter given. A hearing of the cause, by way of appeal against Mr. Justice *Dubuc's* judgment and decree, took place before the Court of Queen's Bench (in equity), Chief Justice *Wood* and Mr. Justice *Dubuc* being present, and the court being equally divided, the appeal from the decree was dismissed with costs.

The defendant thereupon appealed to the Supreme Court of *Canada*.

Mr. *Lash*, Q.C., for appellant:

There was no subsisting contract between the parties to this suit because there is a variance between the proposition of the defendant and the alleged acceptance thereof by the plaintiff. The plaintiff, in lieu of a cash payment, proposes a delay until completion of title, and introduced a new condition, viz., a conveyance and mortgage. *Oriental Inland Steam Company* v. *Briggs* (1); *Crossley* v. *Maycock* (2); *Hussey* v. *Horne-Payne* (3).

The plaintiff was aware of the fact that the property in question was leased, and having bought with this knowledge, he cannot now object to take the property subject to such leases.

If the plaintiff is entitled to specific performance of the agreement it can only be decreed on the terms that the property is to be taken as it stands without compensation.

The defendant further submits that the decree in the court below, if any were granted in favor of the plaintiff, should have been merely one for specific performance without compensation and giving to him the costs of the suit.

(1) 4 De G. F. & J. 191. (2) L. R. 18 Eq. 180.
(3) 8 Ch. D. 670.

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Mr. *Dalton McCarthy*, Q.C., and Mr. *A. F. McIntyre* for respondent:

There was a complete contract satisfying the statute of frauds made between the appellant and respondent for the sale and purchase of the property in question by the appellant's proposal or offer of the 26th of January, 1882, and by the respondent's acceptance of the same date. The acceptance is unconditional, and the latter part of the respondent's letter of acceptance does not, as argued by the appellant, contain any proposal to vary or add any new term to the agreement between the parties, for the suggestions made are those attaching by law to the contract. *Fry* on Specific Performance (1).

The argument of the appellant that it is not an unconditional acceptance is not sustained by authority, the case of *Crossley* v. *Maycock* (2), relied upon by the appellant, is not an authority under the circumstances of this case. There were terms sought to be imposed, not usual but special. This case is more like the case of *Lewis* v. *Bras* (3), where similar words to those used here were not held to affect the unconditional nature of the acceptance, and see Lord *Cairns's* reasoning in his judgment in *Hussey* v. *Horne-Payne* (4); 2 *Dart* on V. & P. (5).

There is no new term where the acceptance merely proceeds to treat, as in this case, of the way in which the contract was to be carried out.

The respondent is not only entitled to specific performance, but is entitled to compensation as given him by the decree, because the property was leased and he had no notice. *Fry* on Specific Performance (6); *Jones* v.

(1) Sec. 280, and cases there cited.
(2) L. R. 18 Eq. 180.
(3) 26 W. R. 152.
(4) 4 App. Cases at p. 322.
(5) P. 876.
(6) 2nd. ed. sections 1222, 1223 and 1224.

Evans (1); *Canada Permanent Building and Saving Society* v. *Young* (2).

Even if he had notice of leases or tenancies. *Barker* v. *Cox* (3).

Mr. *Lash*, Q.C., in reply.

RITCHIE, C.J.:—

The plaintiff in this suit prays:

1. That the agreement may be specifically performed, or if it shall appear that the defendant is unable to wholly perform the said contract by reason of the said leases, that it may be specifically performed as far as he is able with an abatement out of the purchase money for the loss occasioned to the plaintiff by the existence of the said leases, and for that purpose that all proper directions may be given and accounts taken.

2. That it may be referred to the master of this court to enquire as to the title of the defendant to the said lands, and to fix a sum proper to be allowed the plaintiff as an abatement out of the said purchase money on account of the existence of the said leases.

3. The plaintiff hereby offers to perform the said agreement on his part, or if the same cannot be specifically performed completely by the defendant, to perform the same to the extent to which the defendant may be entitled.

4. That the defendant may be ordered to pay the plaintiff's costs.

5. That the plaintiff may have such further and other relief as the nature of the case may require.

The defendant (appellant) in answer to the plaintiff's bill in this suit claims, that at the date of the filing of the said bill there was no contract in existence between him and the plaintiff, that there was at

(1) 17 L. J. Chy. (2) 18 U. C. Chy. 566.
(3) 4 Ch. D. 464.

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no time a contract sufficient to satisfy the requirements of the Statute of Frauds, but merely a proposal made on the one hand and not accepted in the terms in which such proposal was made on the other hand.

The following correspondence took place between the parties:

Winnipeg, 26th January, 1882.

I, Alex. McIntyre, agree to take $35,000 for property known as *McMicken* block. Terms one-third cash, balance in one year at 8 per annum. Open until Saturday, 28th noon.

Witness, *W. N. Hood*, (Signed) *Alex. McIntyre.*

January 26th, 1882.

Dear Sir,

I beg to accept your offer made to me this morning. I will accept the property known as *McMicken's* block, being the property on *Main* street to the north of *Horsman's* store, on west side of it, 49 to 50 feet by 120 feet, for thirty-five thousand dollars ($35,000), payable one-third cash on completion of title, and balance in one year at 8 per cent. You will please have papers and abstract submitted by your solicitor to N. F. Hagel, Esq., 22 *Donaldson's* block, as soon as possible, that I may get conveyance and give mortgage.

Witness, *W. N. Hood*, *James A. Miller*, I am, Sir, Yours truly, *Wm. Nelson Hood.*

Alex. McIntyre, Esq., City.

Offer referred to above.

(Letter from defendant to plaintiff.)

Winnipeg, 24th February, 1882.

Wm. Nelson Hood, Esq.:

Sir,—I beg to notify you that I have been and am ready to carry out my offer, dated the 26th of January, 1882, in reference to the sale of the *McMicken* block, without any variation or qualification. And I also hereby notify you that if the terms of such offer are not complied with on or before Monday next, the 27th instant, at 12 o'clock, noon, I shall consider such offer on my part rescinded.

You will please take notice, and govern yourself accordingly.

Yours, &c., *Alex. McIntyre.*

(Cheque signed by plaintiff.)

No.——— *Winnipeg, Man.*, February 24, 1882.

To the Manager of the Imperial Bank of Canada:

Pay to *Alex. McIntyre*, or bearer, eleven thousand six hundred and sixty six and 66-100 dollars.

$11,666.66. (Signed) *W. N. Hood.*

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(Letter from plaintiff to defendant.)

Winnipeg, February 27, 1882.

DEAR SIR:—As I told you in my last of 25th, I handed your letter to Mr. *Blanchard*, your solicitor, and requesting you to call and see him about the property on *Main* street we have been in communication about.

I handed Mr. *Blanchard* a cheque on February 25th, which he holds upon satisfactory completion of title and delivery of possession.

I am, sir, yours,

Alex. McIntyre, *W. N. Hood.*

City.

(Letter from defendant to Messrs. *Bain & Blanchard.*)

Winnipeg, 2nd March, 1882.

Messrs. *Bain & Blanchard*, Barristers, *Winnipeg*:—

GENTLEMEN,—I am in receipt of yours of the 1st instant.

In reply, I beg to say I have employed Messrs. *Biggs & Wood* to look after this particular matter for me, and so told Mr. *Carey*, a clerk in your office, to inform your Mr. *Blanchard* prior to any money being paid into your hands by Mr. *Hood*, as alleged in your letter.

Yours, &c.

Alex. McIntyre.

(Letter from *Bain & Blanchard* to defendant.)

Bain & Blanchard,
Barristers, Attorneys, etc.,
Winnipeg, Manitoba.
John F. Bain, Sedley Blanchard. *Winnipeg*, 1st March, 1882.
Alex. McIntyre, Esq., City.

DEAR SIR:—Mr. *Nelson Hood* has requested us to write to you upon the subject of the sale of land by you to him. He has deposited with us a marked cheque payable to your order for the amount of the first payment. We have no instructions from you in the matter, but are informed by Mr. *Hood* that you referred him to us. Will you kindly inform us as to whether you have instructions for us?

Yours truly,

Bain & Blanchard.

The decree of Mr. Justice *Dubuc* was as follows:

This court doth declare that the agreement in the pleadings mentioned was duly entered into by the defendant, and that the plaintiff is entitled to have the said agreement specifically performed, and to compensation for the difference between the rents under the existing leases of said property and the rents which might have been obtained on renting and giving possession of the same at the beginning of May last; and also for any damages sustained by the plain-

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tiff by reason of the said agreement not being specifically performed, and doth order and decree the same accordingly.

And this court doth further order and decree, that it be referred to the Master of this court to take accounts and make inquiries as follows:

An inquiry what leases affecting the property in question were in existence at the date of the said agreement extending over the first of May last, and what compensation or abatement ought to be allowed in respect thereof.

An inquiry what damages have been sustained by the plaintiff by reason of defendant not having specifically performed the said agreement.

And this court doth further decree that the said Master do tax to the plaintiff his costs of, and incidental to, this suit and of the said reference.

And let such sum or sums as shall be allowed to the plaintiff on said inquiries, together with the amount of his said costs, be deducted for the purchase of the said lands.

And upon the plaintiff paying to the defendant the balance which shall be certified to be due to him in respect of such purchase money after such deduction as aforesaid, this court doth order and decree that the defendant do execute a proper conveyance of the said lands in the pleadings mentioned to the plaintiff, or to whom he shall appoint, such conveyance to be settled by the said Master.

And this court doth further order and decree that at the time of execution and delivery of the said conveyance, the defendant do deliver to the plaintiff, upon oath, all deeds and documents in his possession or control relating to the title of the said lands.

I think this was a good acceptance of this offer, that where a party offers to sell for a certain sum and his terms are one-third cash, balance in one year at 8 per cent. per annum, and this offer is accepted on completion of title, it becomes a concluded agreement, and that it cannot be said, in my opinion, in this case, that this acceptance is subject to any condition whatever, suspending the operation of this acceptance until anything was done which the law did not require to be done. Supposing the acceptance had been simply "I accept your offer," the contract is complete; and the purchaser, on paying or tendering the cash, is entitled

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to have the property conveyed and possession given to him, and the seller, not having stipulated for any security for the balance, it may be very questionable whether under this agreement he is entitled to demand it, not having required it by the terms of the proposal, but having on receipt of the one-third trusted to the personal security of the buyer under the agreement. But it is not necessary to discuss the question, the buyer having been willing, on the title being completed, to give a mortgage for the balance. I do not think, under such an offer and acceptance, he could, on receiving the one-third in cash, not only refuse to give the buyer a title, but also retain the possession of the property whereby he would have the use of one-third of the purchase-money and interest for a year on the balance, and likewise the possession and use of the property in addition. I think the contract contemplated, and the parties intended thereby, that the sale was to be an immediate sale as affects both parties, to take effect from the time of the making of the cash payment of one-third; that when this was paid the vendee was to have a title to the property and possession given to him, and as regards the latter part of the acceptance, asking for papers and abstracts, it was nothing more than that he might have the title investigated in the usual way by his own solicitor, that he might get the conveyance and give his mortgage, which was clearly in the interest of the vendor, as it removed any doubt as to his right to a mortgage security for the balance of the purchase money.

In the absence in the contract of any statement as to the title which is to be shown by the vendor, I think the purchaser's right to a good title is implied by law, and before he is compelled to pay the purchase money he has a right to require that a good title should be shown, or at any rate, to use plaintiff's expression, to

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"have the papers and abstracts submitted," to enable him to have the title investigated and get a conveyance and give a mortgage.

As regards the leases, I think the purchaser would be bound to take the property, subject to the leases of which he had notice, as existing in the property when the offer and acceptance was made. As to any others, if any, he might be entitled to an abatement or compensation in case the value of the property was in fact depreciated thereby.

STRONG, J.:—

I am of opinion that this appeal should be allowed and the decree of the court below reversed upon the ground that there never was any completed contract of sale between the parties. This is the first and principal reason assigned for the dissenting judgment of the late Chief Justice of *Manitoba*, and I entirely concur in the conclusion to which he came that there was not such an acceptance of the defendant's offer of the 26th of January, 1882, and the 24th February, 1882, as to constitute a binding agreement for the sale of the property in question.

The defendant's offer of the 26th January, 1882, is as follows:

Winnipeg, 26th January, 1882.

I, *Alex. McIntyre*, agree to take $35,000 for property known as the "*McMicken* block." Terms, one-third cash, balance in one year at 8 per cent. per annum. Open until Saturday, 28th noon.

Witness, *W. N. Hood* } *Alex. McIntyre.*

It is said that this offer was accepted by the letter of the plaintiff addressed and sent to the defendant on the same day, and which is in the following words:

January 26, 1882,

DEAR SIR:—I beg to accept your offer made to me this morning. I will accept the property known as "*McMicken* block," being the pro-

perty on *Main* street to the north of *Horsman* store, on the west side of it, 49 to 50 feet and 120 feet, for thirty-five thousand dollars ($35,000), payable one-third cash on completion of title and balance in one year at 8 per cent. You will please have papers and abstract submitted by your solicitor to *N. F. Hagel*, Esq, 22 *Donaldson's* block, as soon as possible, that I may get conveyance and give mortgage.

I am, sir,

Yours truly,
Wm. Nelson Hood.

Wittness:
W. N. Hood,
James A. Miller,

Alex. McIntyre,
City.

I do not consider this letter as equivalent to a simple acceptance in terms of the defendant's offer, but as containing counter proposals which are not implied in the proposition of the defendant, and to which the defendant never acceded. The offer was to sell for one-third cash, "balance in one year at 8 per cent. per annum." By his letter the plaintiff proposes that the purchase money shall be "payable one-third cash on completion of title and balance in one year at 8 per cent." These are not the same terms proffered, by the defendant. The condition precedent to the payment of the $\frac{1}{3}$ cash, that the title should be completed is a variation from the offer, and an agreement concluded on the basis of it would not be the same contract as would have been constituted by a simple acceptance of the defendant's proposition. The expression one-third cash, I construe as an elliptical form of expression for "one-third cash down at the time of acceptance of the offer." And if the proposal had been expressed in this way, there could be no doubt that the stipulation for the payment of one-third of the purchase-money would not have been subject to the condition precedent of a good title being shown, but would have been a payment in the nature of a deposit to be made immediately on the acceptance of the offer. I can attribute no other meaning to one-third cash than that just mentioned, and if this is so, it

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is manifest that the plaintiff's letter was not such an absolute and equivocal accession to the terms proposed, as to constitute an agreement between the parties according to the well understood and elementary principles of the law of contract. If there had been a simple acceptance of the defendant's offer, the plaintiff would, of course, have had a right to insist on a good title being shown before completion, this would have been an implied term of the contract, as in every case of an agreement for the sale of real property, but what I hold is, that we cannot imply that such good title was to be shown prior to the payment of the one-third of the purchase-money which was to be paid in cash.

Further, I am of opinion the concluding paragraph of the plaintiff's letter of the 26th January, asking that the abstract and papers be sent to Mr. *Hagel* that he might get conveyance and give a mortgage, also amounts to a proposal of terms neither expressed nor implied in the defendant's offer. If there had been a contract on the basis of a simple acceptance of the defendant's terms, the defendant would not have been bound to complete by a conveyance until the two-thirds (residue) of the purchase money was paid, and this payment was postponed for a year, he could not have insisted on immediate completion, and compelled the defendant to accept a mortgage as security for this deferred payment, for such a mode of carrying the contract into execution would not have been stipulated for; and in the course of some years experience in Courts of Equity, I have never heard it even seriously argued that a purchaser, the payment of whose purchase money is postponed, has, without an express provision to that effect in the contract, a right to demand immediate completion by a conveyance, on the terms of securing the deferred purchase money by mortgage. No authority for such a proposition can be found, and the ordinary practice of

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Courts of Equity is against it. I, therefore, consider the words:—"that I may get conveyance and give mortgage" read in connection with the other part of the letter, as a proposal to carry out the contract in a different manner from that which was implied in the defendant's offer and consequently in this respect again the acceptance was subject to a variation of the terms on which the defendant offered to sell.

Then on the 24th of February, 1882, the defendant wrote and sent to the plaintiff this letter:

Winnipeg, 24th February, 1882.

Wm. Nelson Hood, Esq.:

I beg to notify you that I have been and am now ready to carry out my offer, dated the 26th January, 1882, in reference to the sale of the *McMicken* block, without any variation or qualification, and I also hereby notify you that if the terms of such offer are not complied with on or before Monday next, the 27th instant, at 12 o'clock, noon, I shall consider such offer on my part rescinded. You will please take notice and govern yourself accordingly.

Yours, &c.,

Alex. McIntyre.

It is clear upon the evidence that there never was any acceptance of the original offer as repeated in this letter for two reasons. First, Mr. *Blanchard*, to whom on the 25th of February the plaintiff handed a cheque and communicated what it is contended constituted an acceptance, is not found to have been the defendant's solicitor or agent, or to have had any authority to receive the acceptance of the option, and, secondly, for the reason already mentioned as applicable to the first offer, that the cheque was, as stated in the plaintiff's own evidence, not to be handed over to the defendant "until the papers were made and everything completed to the satisfaction of my solicitor," conditions which would have rendered the contract an entirely different one from that which the defendant had proposed to enter into. That the plaintiff did not intend by his communication to Mr. *Blanchard* simply to accept the

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defendant's terms, but only proposed to pay the $11.666 upon the immediate completion of title and delivery of possession, to which the defendant had never proposed to assent is, also, evident from plaintiff's letter of the 27th of February, in which he says: "I handed Mr. *Blanchard* a cheque on the 25th which he holds upon satisfactory completion of title and delivery of possession." I do not, of course, doubt that if Mr. *Blanchard* had had authority to act for the defendant, and there had been an unqualified acceptance of the defendant's proposition, that acceptance, though verbal, would have been sufficient to constitute a contract binding on the defendant under the Statute of Frauds, but the evidence shows there never was such an acceptance. In my opinion, the decree should be reversed and the bill dismissed, with costs to appellant in both courts.

FOURNIER, J.:—

La demande en cette cause a pour objet de faire spécifiquement décréter l'exécution (*specific performance*) de la vente d'un certain terrain, situé dans la cité de *Winnipeg*, connu sous le nom de *McMicken's Block* Un décret à cet effet n'est accordé que lorsqu'il y a un contrat formellement conclu entre les parties dont il y a un écrit, avec en outre l'accomplissement des autres formalités voulues par le *Statute of Frauds*, concernant les ventes d'immeubles.

Celle dont il s'agit a été effectuée au moyen des deux écrits ci-après cités. Par le premier, *Alexandre McIntyre*, l'appelant fit à l'intimé, le 26 janvier 1882, l'offre de lui vendre la propriété en question, dans les termes suivants :—

Winnipeg, 26th January, 1882.

I, *Alex. McIntyre*, agree to take $35,000 for property known as *McMicken* Block. Terms 1-3 cash, balance in one year at 8 per annum. Open until Saturday, 28th noon.

Witness, *W. N. Hood.* (Signed,) *ALEX. McINTYRE.*

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Cette offre fut acceptée le même jour par l'intimé au moyen de la lettre suivante :—

January 26, 1882.

DEAR SIR,—I beg to accept your offer made to me this morning. I will accept the property known as *McMicken's* Block, being the property on Main street to the north of *Horsman's* store, on west side of it, 49 to 50 feet by 120, for thirty-five thousand dollars ($35,000), payable 1-3 cash on completion of title, and balance in one year at 8 per cent. You will please have papers and abstract submitted by your solicitor to *N. F. Hagel*, Esq., 22 *Donaldson's* Block, as soon as possible, that I may get conveyance and give mortgage.

Witness,
W. N. Hood,
James A. Miller.

I am, Sir,
Yours truly,
WM. NELSON HOOD.

Alex. McIntyre, Esq.
City.

Le principal moyen de défense offert par l'appelant, est une dénégation du contrat allégué, à laquelle il a ajouté comme second moyen de défense, que les formalités de la section 4 du *Statute of Frauds* n'ont pas été observées.

Hood ayant signé comme témoin à cette déclaration de *McIntyre*, on soulève la prétention que cet écrit ne contient pas de la part de ce dernier une offre légale de vendre, et que partant l'acceptation que *Hood* en a faite le 22 janvier 1882, ne peut constituer un contrat, attendu qu'il n'y aurait pas eu offre de vendre. Cet écrit, quoique dans une forme assez singulière, n'en contient pas moins un consentement (*I agree*) de prendre la somme de $35,000 pour la propriété connue sous le nom de *McMicken's Block*, ainsi que les autres conditions pour en faire une offre de vente. Il est difficile de voir quelle différence il y aurait entre les deux proprositions, si au lieu de *I agree to take* $35,000, *McIntyre* avait dit *I agree to sell for* $35,000. Est-ce que dans l'un comme dans l'autre cas, il ne serait pas obligé d'effectuer la vente sur l'accomplissemen des conditions contenues dans cet écrit? Ce langage entre

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hommes d'affaires me paraît suffisant pour constituer une offre de vente. Il serait extraordinaire, pour le moins, de prétendre que *McIntyre*, qui paraît être un homme très entendu dans les affaires, avait simplement voulu par cet écrit faire une déclaration de ses intentions au sujet du *McMicken's Block*, non à quelqu'un en particulier, mais au public en général, comme une sorte d'annonce. Cet écrit a été par lui remis à *Hood* comme contenant les bases d'après lesquelles il était prêt à traiter avec lui pour sa propriété. D'ailleurs par sa lettre du 24 février, l'appelant n'a-t-il pas considéré son offre du 22 janvier comme obligatoire, et ne s'est-il pas déclaré prêt à s'y conformer ? Elle est ainsi conçue :

Winnipeg, 24th February, 1882.

Wm. Nelson Hood, Esq.

I beg to notify you that I have been and am now ready to carry out my offer dated the 26th of January, 1882, in reference to the sale of the *McMicken Block*, without any variation or qualification, and I also hereby notify you that if the terms of such offer are not complied with on or before Monday next, the 27th inst., at 12 o'clock. noon, I shall consider such offer on my part rescinded. You will please take notice, and govern yourself accordingly.

Yours, &c.,

ALEX. McINTYRE.

Après une déclaration aussi claire, peut-on encore mettre en doute son intention de faire une offre de vente qui devenait obligatoire pour lui si elle était régulièrement acceptée. En effet que manque-t-il à cette proposition, si elle est acceptée, pour en faire un contrat complet dont l'exécution puisse être ordonnée par la cour de chancellerie ? Ne contient-elle pas tous les éléments d'un contrat parfait ? La propriété qui en fait l'objet, si elle n'est décrite d'une manière bien précise et détaillée est, au moins, facile à identifier et à rendre certaine, et cela suffit pour l'accomplissement de la condition que l'objet de la vente doit être certain. Le prix en est fixé à $35,000. Les conditions de paiement

sont également bien définies, savoir :—un tiers comptant et la balance dans un an avec intérêt à 8 pour cent. Toutes les conditions requises pour qu'une cour puisse ordonner l'exécution d'un tel contrat se trouvent donc réunies dans celui dont il s'agit. Évidemment la condition de l'écrit exigé par la section 4 du *Statute of Frauds* a été satisfaite par l'offre écrite et signée par l'appelant. Il n'était pas nécessaire que l'acceptation fût par écrit, mais elle l'a été comme on le voit par l'exhibit No. 2.

L'offre ainsi faite devait demeurer ouverte jusqu'au 28 janvier à midi. Il paraît qu'elle a été immédiatement acceptée. Si l'acceptation ci-dessus citée ne contient pas quelque condition ou addition qui soit une déviation à l'offre faite, elle a dû opérer un contrat parfait entre les parties. L'appelant nie qu'elle ait pu avoir cet effet, prétendant que cette acceptation n'est pas sans condition comme elle aurait dû l'être afin de pouvoir réclamer l'exécution.

Cependant en recevant cette acceptation le jour même de son offre, l'appelant ne fit aucune objection à l'insertion des mots "on completion of title," qu'il veut maintenant faire considérer comme une nouvelle condition qui lui permet de retirer son offre. Ce n'est que le 24 février suivant qu'il a cru trouver là un moyen de se dégager du contrat opéré par l'acceptation de l'intimé, et c'est alors qu'il élève pour la première fois cette objection. En première instance devant l'honorable juge *Dubuc* elle a été rejetée ; mais en appel devant deux juges seulement de la cour du Banc de la Reine de *Manitoba* (le troisième se trouvant pour cause d'intérêt incompétent à siéger dans cette cause), l'honorable juge en chef a été d'une opinion contraire à celle de son collègue. La cour se trouvant alors également partagée, le jugement de première instance s'est trouvé confirmé. D'après l'honorable juge en chef l'acceptation aurait

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dû être simplement "*I accept your offer*," au lieu de la lettre ci-dessus, dans laquelle l'intimé, après les mots *one-third cash*, a inséré ceux-ci "*on completion of title*." Il considère l'insertion de ces mots comme une modification de l'offre qui justifie l'appelant à en refuser l'exécution. Ce motif est-il sérieux en fait? L'appellant pouvait-il un seul instant s'imaginer que l'acheteur paierait un prix aussi élevé pour cette propriété sans avoir la certitude d'avoir un titre valable? En consentant à payer comptant, était-il nécessaire d'ajouter qu'il ne se départirait de son argent que sur l'exhibition d'un titre suffisant. Cette condition quoique non énoncée alors, est une de celles qu'il n'était pas nécessaire de formuler. Puisque l'intimé achetait et payait, il devait avoir un titre. Sans titre il n'était pas acheteur. En supposant que l'acceptation eût été telle que le voulait l'honorable juge en chef, *I accept your offer*, l'intimé aurait-il été pour cela privé, au moment du paiement, du droit de dire, "Voici mes deniers, montrez moi votre titre"? Certainement non, et si le titre exhibé n'eût pas été satisfaisant, n'aurait-il pas été justifiable de garder ses deniers. Pour avoir mis l'appelant sur ses gardes, en insérant dans son acceptation les mots *on completion of title*, il n'a fait alors que ce qu'il aurait eu le droit de faire plus tard, ce que d'ailleurs la loi présume dans le silence des parties.

Il n'est pas correct de dire d'une manière absolue qu'un contrat fait comme l'a été celui dont il s'agit, ne peut contenir aucune autre condition que celle que l'on peut trouver dans l'écrit qui en constate l'existence. Au contraire, à moins d'une déclaration expresse excluant formellement toutes conditions implicites, celles que la loi présume ordinairement, se trouvent comprises dans un tel contrat. Voici ce que dit à ce sujet "*Fry, on Specific Performance*," sec. 223:

Besides the express terms of the contract, there are others which, in the absence of any expression to the contrary, are implied by presumption (4, note). With regard to such terms, therefore, whether they be necessary terms or not, the silence of the contract does not render it incomplete.

Dans le No. suivant, 224, l'auteur va plus loin, en déclarant que dans tout contrat pour la vente d'immeubles, il y a la condition implicite de fournir un bon titre.

In every contract for the sale of land, a condition is implied for a good title (No. 8), and for the delivering up of the deeds, so that when this was prevented by the accidental destruction of the deeds subsequent to the contract, it was held that the vendor could not enforce the sale.

Dans une cause récemment décidée dans la division de la cour de chancellerie par *Fry*, J., ce principe a été confirmé.

Il est évident d'après cette autorité que l'insertion des mots "*on completion of title*" ne peut aucunement affecter la validité de l'acceptation, puisque la loi présume l'existence de cette condition. Ce principe a été reconnu par *Fry*, J., en ces termes (1) :

Fry, J.: When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by shewing that the purchaser had notice before the contract that the vendor could not give a good title.

Il n'y a rien dans la preuve en cette cause qui puisse refuter ou contredire la présomption légale, parce qu'il n'a été aucunement question du titre ni d'objections à sa validité. Il y a eu silence absolu à cet effet. La présomption légale doit donc avoir son effet.

Ce principe a aussi été adopté par Lord *Cairns* dans la cause de *Hussey* v. *Horn-Payne*, où l'honorable Chancelier fait au sujet des mots "*subject to the title being approved by our Solicitor*," le raisonnement sui-

(1) *In re* Gloag and Miller's contract 23 Chy. Div. 327.

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vant pour démontrer que ces termes ne constituaient pas une condition modifiant le contrat (1). Réfutant l'objection que l'acceptation contenait en réalité la constitution d'un arbitre de la volonté arbitraire duquel devait dépendre l'exécution du contrat, il dit :

I feel great difficulty in thinking that any person would have intended a term of this kind to have that operation, because, as was pointed out in the course of the argument, it would virtually reduce the agreement to that which is illusory. It would make the vendor bound by the agreement, but it would leave the purchaser perfectly free..... My Lords, I have great difficulty in thinking that any person would agree to a term which would have that operation. But it appears to me very doubtful whether the words have that meaning. I am disposed rather to look upon them,—and the case which was cited from *Ireland* would be authority, if authority were needed for that view,—I am disposed to look upon the words as meaning nothing more than a guard against its being supposed that the title was to be accepted without investigation, as meaning in fact the title must be investigated and approved of in the usual way, which would be by the Solicitor of the purchaser.....

Ce raisonnement est tout à fait applicable au cas actuel. Dans la cause de *Lewis* v. *Brass*, les mots suivants ajoutés dans l'acceptation d'une offre pour l'exécution de certains travaux, *the contract will be prepared by*, ne furent considérés que comme suggérant un mode facile de mettre à exécution les intentions des parties, et non pas comme une condition additionnelle. Les raisonnements faits par les honorables juges dans cette cause confirment la position prise par l'Intimé dans celle-ci.

Pour ces motifs, je suis d'avis que l'appel doit être renvoyé avec dépens.

HENRY, J. :

I may say, in setting out, that I entirely concur in the views expressed by my learned brother judge *Strong* and in those of the Chief Justice of *Manitoba*, on record

(1) 4 App. Cases, p. 322.

in this case. I adopt, in fact, their reasoning for the conclusions at which they have arrived. If we look at this offer we will see that it is a very bald one, terms one-third cash, and the balance in one year at 8 per cent. That offer was made on Thursday, the 26th of January, and was to remain open until the following Saturday, the 28th, at noon—that is, two days. It is very precise as to time, and the party was bound, if he wanted to purchase, to accept within the time limited. However, on the same day the party accepted that offer, and it is for us to consider whether he did accept it in its legal consequences and result. The offer that he makes in acceptance is limited to the payment of one-third cash on the completion of the title. Now, there is no such term in the offer, that it shall be one-third cash on the completion of the title, nor can it be said that that would not be a deviation from the terms of the offer; but we are told that the party had a right, before he paid his money, or any of it, to see that the title was good. But the acceptance adds something else. I admit that the party would have a right to see that the title was good, and a right to reasonable information as to that from the party selling and a reasonable time to investigate before paying his money, and possibly, under the circumstances, it might be said to apply to the first deposit That, however, is a question that is not necessary to be decided, because he says, "you will please have papers submitted as soon as possible that I may get conveyance and give mortgage."

There is nothing in the original offer that he was to get a conveyance on the payment of that money. His first duty was to tender one-third of the money as agreed upon, and he could not upon acceptance of it, say to the seller, "Give me a deed and I will give you a mortgage," when it is not mentioned in the

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agreement. If he wanted to have these as a part of the terms of the contract, it was his business to have had them inserted in the offer that he was present at the drawing up of, and became a witness to; or if he added these as terms, it was his business to see that there was an acceptance from the seller upon these added terms to form between the parties a binding contract. Now, we are told that the party had a right to get a deed and give a mortgage, but I maintain that he had no such right. There may be reasons why the party who offered to sell the property should say "no, when I am paid the whole of the money, I will give you the title." He might have said "I do not consider one-third payment sufficient security for me, if I have to wait a year for the balance." Properties were jumping up and down in *Manitoba* at the time. There was a good deal of speculation, and if the boom was over a depression was likely to take place. What right had he to say: "Mr. *McIntyre*, I will give you one-third of the purchase-money, but you must depend upon the value of the property in twelve months for the balance?" No such bargain was entered into; no such agreement was thought of or spoken of by either of the parties. I, therefore, take it, there was no valid acceptance of the offer in any way unless there was evidence of acquiescence in it afterwards by the seller, *McIntyre*. I can see no such evidence, and I have come to the conclusion, therefore, for the reasons already given at length by my brother *Strong*, and very fairly and properly put in the judgment of the learned Chief Justice, that the appeal should be dismissed with costs of both courts.

GWYNNE, J.:—

I concur in the judgment read by my Brother *Strong* and in the judgment of the late Chief Justice of

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Manitoba. If I had arrived at a different conclusion I should be of opinion that the plaintiff below has shewn no case of deceit or even of with-holding of knowledge as to the nature of the tenancies to warrant any abatement from the price of the property. The objection is not that the introduction of the words "on completion of title" makes the acceptance defective, but the question is whether the defendant's offer was that he should receive the cash payment on the completion of the title or upon acceptance of the offer.

Appeal allowed with costs.

Solicitor for appellant: *S. M. Wood.*

Solicitor for respondent: *W. B. Canavan.*