1917
*May 1
*June 22

HENRY CLEMONS MEEKER (DEFENDANT)..... } APPELLANT;

AND

NICOLA VALLEY LUMBER COMPANY (PLAINTIFF)..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Sale—Option—Condition precedent to payment—Prevention of fulfilment by purchaser—Vendor excused from making title.

The respondent sold to appellant a mill site comprising 108 acres of timber limits. At the time of the sale, the respondent was operating a temporary mill (the permanent mill having been destroyed by fire) situated at the northern end of the site. The purchase money was $25,000, the agreement of sale providing that the appellant was to pay $10,000 cash and take possession of the mill site and limits, and that the balance of $15,000 was to be paid by the appellant as soon as the respondent had obtained title to the mill site from the Crown. Acting on expert advice, the appellant built a permanent mill at the southern end of the 108 acres, so that the portion at the north end, where the mill had formerly stood, was so wholly disconnected and so far away from the mill that the Crown refused to regard it as a part of the mill site and the respondent was therefore unable to obtain a patent to 81 acres of the original 108 acres.

Held, Fitzpatrick C.J. and Idington J. dissenting, that the appellant was precluded by his conduct, from insisting upon the exact fulfilment of the condition that the respondent should make title to the parcel of 81 acres, before requiring payment of the last instalment of $15,000.

Per Fitzpatrick C.J. and Idington J. dissenting.—The respondent had no right to exact payment of the balance of the purchase money, as there was no provision in the agreement of sale obliging the appellant to erect a mill at all, much less obliging him to erect one upon any particular part of the land sold.

Per Idington J., the respondent, to his knowledge, allowed the appellant to go on and build the mill without remonstrating or proposing a rescission of the agreement.

Judgment of the Court of Appeal (31 D.L.R. 607, 1 W.W.R. 566), affirmed.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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APPEAL from the judgment of the Court of Appeal for British Columbia (1), reversing the judgment of Morrison J. at the trial, by which the plaintiff's action was dismissed with costs. The material facts of the case and the issues raised on the present appeal are fully stated in the above head-note and in the judgments now reported.

J. A. Harvey K.C. for the appellant.
W. B. A. Ritchie K.C. for the respondent.

THE CHIEF JUSTICE (dissenting).—The respondent, plaintiff in the action, by deed dated the 10th June, 1910, agreed to sell to the appellant:—

> All and singular that certain tract of land situate a short distance below the point of junction of Spius Creek and Nicola River in the County of Cariboo in the Province of British Columbia heretofore occupied and used by the said vendor as a sawmill site comprising 108 acres more or less,

also eight timber licences therein described.

And all the personal property save as therein mentioned of the vendor situate on said mill site and at other points in said County of Cariboo.

The respondent never owned the land it agreed to sell and admits that it can now never acquire title thereto.

Under ordinary circumstances when a vendor fails to make a good title to property he has agreed to sell the purchaser is entitled to recover back his deposit together with the costs of investigating the title. Further, if he undertakes to sell knowing that he has no title he may be liable in damages to the purchaser for the loss of his bargain.

At first sight, therefore, it seems rather surprising that a vendor who never had even any colour of title should claim not only to be under no liability for the

(1) 31 D.L.R. 607; [1917] 1 W.W.R. 556.

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performance of his contract, not only to be entitled to retain the deposit paid on account of the purchase money but to sue the purchaser for the entire balance of the purchase money.

No doubt other things besides the lands were included in the sale, but in this action at any rate the court cannot decide what is the value of the annual timber licences assigned or apportion the purchase money even if this were asked, which it is not.

It is of course necessary for the appellant to find some ground on which his claim can be supported and the only one put forward, so far as I am able to see, is that the appellant by his own acts prevented the respondent acquiring title to the land.

The land was the property of the Dominion Crown and the respondent had made application to the Dominion Government for a homestead grant of it and was in possession at the date of the agreement sued on. The mill had then been recently burned down and the appellant did not rebuild on the same site. The Minister of the Interior was of opinion that the 108 acres applied for by the respondent were not needed in connection with the mill on its new site and refused the application accordingly.

Now it was not the act of building the new mill which could be said to have prevented the respondent obtaining its grant but rather the failure by the appellant to rebuild the mill burned down upon its old site. But what was the obligation of the appellant to do this? Clearly he had entered into no express contract to that effect. McPhillips J., who has delivered the most elaborate judgment in the Court of Appeal, admits that it is necessary to find that "*it was incumbent upon respondent* (the present appellant) *to place the saw mill upon the mill site.*" I can however

find no ground by which on any principle of law we are justified in imposing such liability upon the appellant when the contract between the parties did not even contain any provision obliging the purchaser to erect a mill at all.

The courts can only adjudicate upon the legal rights of litigants and cannot undertake to make such settlement between them as they may think fair without regard to any such rights. In any event, I think it would be difficult to hold that a purchaser agreed to waive his right to have the property contracted for whilst remaining liable to pay the whole of the purchase money.

The learned trial judge went as far as he properly could in urging upon the parties the desirability of a settlement of the case and I agree in thinking that this would have been the best course. The respondent, however, rejected any such suggestion and I do not see therefore that the judge could have made any other disposition of the action than he did.

Although the three judges who sat in the Court of Appeal reversed the judgment, they did so apparently on different grounds, as Martin J.A. in his reasons for judgment says, "*there is no real dispute about the law,*" whilst McPhillips J.A. says: "*this appeal raises a very difficult question of law.*"

I would allow the appeal with costs.

DAVIES J.—I concur in the reasons of Mr. Justice Anglin for dismissing this appeal.

IDINGTON J. (dissenting)—The respondent on the 21st March, 1910, gave the appellant an option in writing to purchase eight timber claims or limits in British Columbia and a quantity of timber and lumber and mill machinery and other personal property and a

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mill site situate at the confluence of Nicola River and Spius Creek containing 108 acres more or less

for the sum of $25,000, of which $10,000 was to be paid on or before the 1st June, 1910.

The recital in said option represented, amongst other things, as follows:—

> And the vendors are also the owners of that certain mill site situate at the confluence of the said Nicola River and Spius Creek containing 108 acres more or less.

The appellant paid $1,000 of the said first instalment of $10,000 to secure the said option and either within the time specified or thereabout the balance thereof when the bargain was concluded and an agreement of sale and purchase in writing, dated the 10th day of June, 1910, was executed by said parties.

That agreement recited the facts that the vendor had agreed to sell and the purchaser had agreed to purchase the lands and hereditaments, timber licences issued by the Province of British Columbia, and personal property as thereinafter specified.

Of the property thus specified the first item is as follows:—

> All and singular that certain tract of land situate a short distance below the point of junction of Spius Creek and Nicola River in the County of Cariboo in the Province of British Columbia, heretofore occupied and used by the said vendor as a sawmill site, comprising one hundred and eight (108) acres more or less.

The receipt of the $10,000 is acknowledged and the balance was to be paid in two years from date together with interest for the first year at six, and the second year at eight per cent. per annum.

Then follows a covenant as follows:—

> The said purchaser doth hereby covenant, promise and agree to and with the said vendor that he will well and truly pay or cause to be paid to the said vendor the said sum of money above mentioned together with interest thereon at the rates aforesaid on the days and times, and in the manner above mentioned; and also shall and will pay and

discharge all taxes, rates and assessments wherew th the said land and goods and chattels may be rated or charged from and after this date; and also shall and will so long as any portion of the said principal money or interest shall remain unpaid, duly renew and keep renewed the said timber licences and pay to the Province of British Columbia, all annual or renewal fees or charges which may hereinafter become payable in respect of said timber licences or any of them. In consideration whereof and of the payment of said sum of ten thousand dollars, the said vendor hath assigned and transferred or caused to be assigned and transferred to the said purchaser, the said timber licences and all renewals thereof, and hath assigned and transferred to the said purchaser, all the said personal property, goods, and chattels freed and discharged from all encumbrances.

And it is hereby further agreed by and between the parties hereto that the said vendor shall forthwith take all the proceedings necessary to obtain a patent or Crown grant of said lands and hereditaments from the Government of the Dominion of Canada. And the said vendor doth hereby covenant, promise and agree to and with the said purchaser that on the receipt by the said vendor of said patent, the vendor shall and will convey and assure to the said purchaser by a good and sufficient deed in fee simple, the said lands and hereditaments together with the appurtenances thereto belonging or appertaining, free and discharged from all encumbrances, and such deed shall contain the usual statutory covenants. When the said deed shall have been duly executed, the said deed shall b placed in escrow in the Bank of Montreal, aforesaid, and shall be delivered to the said purchaser on the due payment in manner aforesaid, of the balance of said purchase money and interest.

Provided and it is expressly understood and agreed that the said vendor shall not be entitled to the payment of said moneys until the said deed has been placed in said bank as aforesaid.

Upon this covenant so conditioned the respondent sued for the $15,000 with interest from the 12th June, 1912, although the patent for the mill site had never been procured and, of course, the conveyance of the said lands in fee simple has never been given as agreed upon.

The learned trial judge, who heard all the witnesses and was in better position to determine than we can be what weight, if any, is to be attached to such statements of fact as relied upon by the Court of Appeal and in argument by counsel for respondent here for excusing the performance of respondent's agreement

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constituted as above a condition precedent to the right to recover the said sum of $15,000, held that there was no excuse, that the action was premature, and offered to allow plaintiff to withdraw it without prejudice to pursuing such remedy as it might be advised.

It is somewhat difficult to grasp exactly what is relied upon.

One oft repeated statement is that the appellant with others had induced some capitalists to join them in the procuring of the incorporation of a company to take over the purchase and develop the property and it had erected a mill for the purpose of doing so.

In one way the matter is put it is urged that this mill is not on the mill site in question and hence the respondent has become entitled in law to recover the full price for the property it sold. Surely it is a novel proposition that because a man is a member of a corporate company that erects a sawmill, therefore he has done some wrong to his covenantor and hence the latter has thereby become entitled to disregard his obligations.

Again, when it is shewn that the company has in fact built a mill at least partly on the mill site and has occupied in the carrying out of the project about thirty acres of the said hundred and eight acres for the purposes thereof, it is urged that that part of "the mill site" is not the part where the respondent once had erected a mill which was burnt down and which it replaced by a portable mill forming part of the personalty sold to the appellant, and that the expectation of its re-erection exactly on that part of the mill site was so reasonable as to constitute an implication of an obligation that it would be done and hence the omission to do so relieved the respondent from the condition precedent imposed by above contract.

It appears that the original application of the respondent for a patent for the mill site was the result of two similar applications in 1907, each for a hundred acres having been consolidated and converted into an application for two hundred acres being made in 1908.

The application is not produced or its contents proven, but I gather from the evidence that pending the consideration of it by the department, one Ross had located a parcel of land which so cut into that covered by respondent's application as to leave in substance two separate parcels of irregular shape and approximately equal in quantity which together would measure a total of 108 acres of land with only a small strip of land connecting them.

It was on the northerly one of these parcels that respondent's mill which had been burnt down and said portable mill were respectively placed and used preceding the sale now in question. It is claimed that there was an implied duty resting on the appellant to build, when building, on same site. How can anything of the kind be properly imported into this contract without a shred of expression pointing to such an obligation? There never was imposed any obligation to build any mill or refrain from doing so.

I am unable to understand how there could be implied in the agreement any obligation to erect a mill at all, much less an obligation to erect one upon any particular part of the land in question.

Although the application of the respondent had been before the department for all that time under these circumstance and the urgent need of expediting the business in light of the covenant to do everything to produce a deliverance from the department answering the application, nothing effective seems to have been done.

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Let us assume respondent had done everything it could during the three months which elapsed between the completion of the agreement and the time when the company promoted by the appellant was formed, and had come to a decision to build, then the appellant had, I think, no reason to suppose either he or his company had, if ever, any obligation resting upon them to wait longer.

The company was advised by experts to build on the southerly part near where its operation could be most profitably carried on by reason of the facility afforded for forming a pond for storage of logs and other features of the property. Moreover, that was the only way the appellant could find the financial support to build a mill at all.

It is quite evident the appellant's own preference was for the northerly part of the mill site until thus convinced. What else he could do I fail to see unless to rescind the contract entirely. He was not bound to that alternative.

The company then proceeded to build but before doing so made an application to the department to be assured by it that a title could be obtained for the land actually needed to be used for buildings and the storage of logs.

The appellant made a declaration on the 13th September to facilitate this being done.

I think he had a perfect right to do so, at least after the failure of the respondent to get the assent of the department to a grant of the "mill site" it had covenanted to procure.

How long must he wait?

The judgment appealed from proceeds upon the assumption that there was a breach of good faith on

the part of the appellant by reason of some failure on his part to observe some implied obligation.

I cannot find the implied obligation. And if it ever existed three months was more than necessary to respondent to have availed itself thereof.

This judgment appealed from I respectfully submit rests upon making a contract for the parties which they did not make for themselves.

Moreover, it is abundantly clear that the whole difficulty arises from the policy of the Department of the Interior which forbade the giving of what might constitute two or more mill sites in its view.

Mr. Cowell, later on, endeavoured to get his superiors to waive the objections but the narrower view was taken and a grant refused.

The appellant cannot, in my opinion, be held bound by reason of the failure to abandon his rights. And the court has, I submit, no right to impose upon him any such obligation.

Again, the respondent relies upon the alleged statement of Mr. Cowell that appellant had said something to indicate that he had no use for this northerly part of the "mill site" sold him.

Not only does appellant contradict this but the evidence establishes clearly he always did so and that in time to correct any misapprehension in the department before ruling upon the application of respondent.

One can easily see how the misunderstanding arose. Speaking of the use of the northerly part as a place in which to erect a mill he could have no use for it, but, in the larger sense, as part of a "mill site," in the sense used by the parties to this contract, he clearly had a use for it or of some equivalent thereof.

The learned trial judge saw and heard the parties and must have accepted appellant's view of what was said.

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I do not think it is of very much importance. However, to try to attach to what was a clear misunderstanding as to something that in either view cannot help here, indicates to what respondent was driven.

It is quite clear from what transpired at the trial that less land than one hundred and eight acres would give appellant what he wants.

And it is equally clear that the quantity of land he has got does not suffice.

His good faith as well as these facts seem established by the offer made at the trial to accept forty acres instead of nearly eighty that is in question and pay the full amount.

Why such a proposition should have been spurned instead of being given a prompt response and ready and willing attempt to bring its acceptance about passes my understanding.

I am of the same opinion as the learned trial judge that upon this record the respondent has no right to succeed.

It allowed the new company and appellant to go on and build the mill it did, well knowing the fact, without a word of remonstrance.

If it had remonstrated and proposed a rescission of the agreement, or even tried to enforce that, by reason of all that had preceded and succeeded the contract, it is quite possible evidence might have been adduced (which is not in this record) entitling it to a rescission.

It might even in this case have presented an alternative claim to specific performance, and been granted relief instead of rigidly abiding by that impalpable thing called waiver when there never was any.

If the parties choose to treat the pleadings as if so

amended and take a judgment based upon the principles that a Court of Equity should act upon there does not seem much difficulty in dealing with the case. Indeed, I think it is quite reasonable to assume that such is the possible case the appellant must have faced in proceeding to build instead of proposing rescission of the agreement. Quite probably either party would have failed in September, 1911 to have got specific performance with compensation unless as an alternative to rescission of their contract.

It is one for compensation. And the basis proposed by the appellant at the trial might well be kept in view in such a reference as that relief would require.

I do not think we have any power on this record to deal with such alternative and hence need not elaborate the suggestion.

If not acted upon the appeal should be allowed with costs without prejudice to any future action.

DUFF J.—On the twenty-first of March, 1910, the respondent gave the appellant company an option in writing to purchase certain timber limits together with certain timber and lumber and mill machinery and other movable property and a "mill site situate at the confluence of Nicola River and Spius Creek containing 108 acres more or less," for the sum of $25,000, of which $10,000 was to be paid on or before the 1st June, 1910.

The appellant paid $1,000 of the said first instalment of $10,000 to secure the option and the residue when the bargain was concluded and an agreement of sale executed, dated the 10th day of June, 1910.

The agreement contained the following covenant:—

Th said purchaser doth hereby covenant, promise and agree to and with the said vendor that he will well and truly pay or cause to be

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paid to the said vendor the said sum of money above mentioned together with interest thereon at the rates aforesaid on the days and times and in the manner above mentioned; and also shall and will pay and discharge all taxes rates and assessments wherewith the said lands and goods and chattels may be rated or charged from and after this date; and also shall and will so long as any portion of the said principal money or interest shall remain unpaid, duly renew and keep renewed, the said timber licenses and pay to the Province of British Columbia all annual or renewal fees or charges which may hereinafter become payable in respect of said timber licenses or any of them. In consideration whereof and of the payment of said sum of ten thousand dollars, the said vendor hath assigned and transferred or caused to be assigned and transferred to the said purchaser the said timber licenses and all renewals thereof, and hath assigned and transferred to the said purchaser all the said personal property, goods and chattels freed and discharged from all encumbrances.

And it is hereby further agreed by and between the parties hereto that the said vendor shall forthwith take all the proceedings necessary to obtain a patent or Crown grant of said lands and hereditaments from the Government of the Dominion of Canada. And the said vendor doth hereby covenant promise and agree to and with the said purchaser that on the receipt by the said vendor of the said patent, the vendor shall and will convey and assure to the said purchaser by a good and sufficient deed in fee simple, the said lands and hereditaments together with the appurtenances thereto belonging or appertaining, free and discharged from all encumbrances, and such deed shall contain the usual statutory covenants. When the said deed shall have been duly executed, the said deed shall be placed in escrow in the Bank of Montreal, aforesaid, and shall be delivered to the said purchaser on the due payment in manner aforesaid, of the balance of said purchase money and interest.

Provided, and it is expressly understood and agreed that the said vendor shall not be entitled to the payment of said moneys until the said deed has been placed in said bank as aforesaid.

I concur with the opinion of the judges of the Court of Appeal for British Columbia that the appellant company is precluded by its conduct from insisting upon exact fulfilment of the condition that the respondent should make title to the parcel of 81 acres, which, by the terms of the contract, was attached to his right to require payment of the last instalment of $15,000. When the agreement was executed all parties contemplated that a title to this property should be acquired under the provisions of the law

and the practice of the department governing the granting of mill sites; and without going so far as to hold that by implication the appellant company was bound actively to take all steps with regard to actual use of the property and the improvement of it as might prove to be necessary to enable the respondent to comply with the conditions exacted by the department, there appears to be abundant ground for holding that the appellant company, at least, assumed the onus of an obligation to do no act in relation to the property or by any communication with the departmental authorities, which should hinder or be calculated to hinder the respondent in his efforts to obtain a grant of it for the purpose of a mill site.

That must necessarily be so because as it would be the duty of the departmental officers to satisfy themselves upon the subject of the purpose for which the applicants intended to use the property, the conduct and the representations of the respondent's assignee if inconsistent with respondent's representations as to the destination of the property, might gravely compromise or entirely neutralize the respondent's exertions. To apply the test often suggested by eminent judges—it is not possible—having regard to the dictates of common experience—to doubt that if the subject had been mentioned at the time the contract was entered into that the appellant would not have been left free to obstruct by its conduct and declarations the respondent's application for a grant while retaining in full literal force the condition that the grant should be produced in order to entitle the respondent to receive the final instalment of the purchase money.

This obligation assumed by the appellant was not fulfilled and in consequence, mainly if

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not entirely, of the non-fulfilment of it, it became impracticable to obtain a grant in the manner contemplated or without the expenditure of a sum of money so much greater than the expenditure that would have been required, if events had been allowed to pursue their normal course, as to make it impossible to require the exact performance of the condition without plainly defeating the intention of the parties.

What is the legal result? Mr. Ritchie contends, and the court below has held, that the plaintiff is entitled *ex debito juris* to the sum of $15,000 on the ground that the condition has been purged and a good deal, no doubt, can be said for this view. Indeed, the language of Mr. Justice Willes in *Inchbald* v. *Western Neilgherry Coffee Co.* (1), cited with approval in *Burchell* v. *Gowrie Colleries Co.* (2), appears to support it; but the actual decision in *Inchbald's Case* (1) was that the plaintiff was entitled to recover such a sum as the jury, or the court substituted for the jury, might consider to be reasonable.

On principle, I think that it is the proper result in the present case. The respondent was entitled to recover the sum of $15,000 less an allowance reasonable in all the circumstances.

A reasonable allowance must clearly include the difference in cost to the respondent of obtaining the two sites. Ought it to include more? Ought it to include compensation for the loss of the site of 80 acres or rather for the failure to acquire it? After a good deal of consideration, I have come to the conclusion that it ought not. The appellant had gone into possession of the assets which he had purchased as a *unum quid*; rescission was impossible;

(1) 17 C.B.N.S. 733. (2) [1910] A. C. 614, at page 626

and he chose for his own reasons and quite properly to put into operation a plan with respect to the lay out of the property more advantageous as he conceived than the plan their predecessors had been pursuing. The departure from the old plans involved a change in the locality of the mill and together with the declarations made by the appellant's agent led to the difficulties which have given rise to this litigation. It would not, I think, be just or reasonable from the point of view of the respondent to accede now to the demand of the appellant, that the respondent should be required to compensate him for the value to him in the present circumstances of the 80 acre site, the loss of which or the failure to acquire which was mainly, if not entirely due to the course taken by him in his own interests.

ANGLIN J.—The plaintiffs seek to recover $15,000, a balance of $25,000, the purchase money for a mill site with storage pond, etc., comprising 108 acres, some timber limits and other property. A mill situated on the northern end of the site, about a mile and a quarter from the storage pond at the southern end, had been destroyed by fire. At the time of the sale the vendors were operating a portable mill where their permanent mill had formerly stood. The agreement for sale provided that the purchaser should pay $10,000, should take possession of the mill site and limits and should work the latter. The vendors undertook to obtain title from the Crown to the mill site and the $15,000 was to be held until that was done and thereupon paid over to the vendors.

Acting on expert advice the purchaser, instead of erecting a mill where the vendors had had their mill, built it at the other end of the 108 acres, placing it

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beside the storage pond in a 30 acre parcel consisting partly of the pond and land included in the 108 acres and partly of seven or eight acres additional land in which he procured the rights of a homesteader—one Ross. With the mill at its north end and the storage pond at its south end, the whole 108 acres might not improperly be dealt with as a single industrial site. But with the mill at the south end beside the storage pond the 30 acre parcel formed in itself a fairly complete mill site. At all events the portion of the 108 acres at the north end where the mill had formerly stood was so wholly disconnected and so far away from the 30 acre parcel that the department, on the advice of its agent, refused to regard it and the communicating strip between it and the 30 acres as a part of the mill site on which the new mill and the pond were situated. Hence the vendors were unable to obtain a patent for 81 acres of the original 108 acres as part of an industrial site in connection with the new mill. Upon the evidence, I am satisfied that the purchaser, either because he recognized this impossibility or because, having regard to the altered situation of the mill, he regarded the 81 acres as practically useless for his purposes, informed the Crown Lands' agent that his company would not require the 81 acres and applied, apparently informally, for a grant of 29.4 acres at the south end, including the seven or eight acres over which he had acquired the rights of Ross. The Crown Lands' agent thereupon wrote the department that,

> the present company have no further use for the land originally applied for, and I would, therefore, suggest that it should be released and the application cancelled;

and he advised a grant of the 29.4 acres.

Under these circumstances I agree with the learned

judges of the Court of Appeal for British Columbia that the vendors were excused from making title to the 81 acres as a condition precedent to their right to payment of the $15,000 balance of the purchase money.

Although the action is framed simply as a common law action to recover the balance of the contract price, I see no serious objection to treating it as an equitable action for specific performance or other relief, if that be necessary, in order to make a disposition of the case which shall do justice between the parties. As a matter of equity and fair dealing, I think the vendors should give credit to the purchaser for the $5 per acre that they would have been obliged to pay to the Crown in order to obtain a patent for the 81 acres for which their application had been rejected, and also upon the same basis for the remaining 27 acres of the original 108 acres which they undertook to sell, since the purchaser will be obliged to pay the Crown its price upon this latter acreage before he can obtain a patent therefor. In all $540 should be credited on this account.

With this comparatively slight variation in the judgment *a quo*, I would dismiss the appeal. The appellant should pay four-fifths of the respondents' costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Taylor, Harvey, Stockton & Smith.*

Solicitors for the respondent: *Bowser, Reid, Wallbridge, Douglas & Gibson.*