1886
*Nov. 23.
1887
†June 4.

SAMUEL SEA (PLAINTIFF).....APPELLANT;

AND

ALEXANDER McLEAN AND JAMES STEWART, EXECUTORS, &C., (DEFENDANTS).....RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Sale of land—Unknown quantity—Sold by the acre—Words "more or less"—Executors—Breach of trust.

The executors of an estate were authorized by the will to sell such portion of the real estate as they in their discretion should think

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

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necessary to pay off a mortgage and such debts as the personal estate would not discharge. They offered for sale at auction a lot described as sixty acres (more or less) section 78, Loch End Farm, Victoria District, and giving the boundaries on three sides. The lot was unsurveyed and was offered for sale by the acre, an upset price of $35 being fixed. By the conditions of sale a survey was to be made after the sale at the joint expense of vendors and purchaser.

S. purchased the lot for $36 per acre and on being surveyed it was found to contain 117 acres. The executors refused to convey that quantity alleging that only some $2,000—was required to pay the debts of the estate, and refused to execute a deed of the 117 acres tendered by S. In a suit by S. for specific performance of the contract for sale of the whole lot:—

Held, reversing the judgment of the court below and restoring that of the judge on the hearing, Gwynne J. dissenting, that S. was entitled to a conveyance of the 117 acres, and that the executors would not be guilty of a breach of trust in conveying that quantity.

APPEAL from a decision of the Supreme Court of British Columbia reversing the judgment of the Chief Justice at the hearing (1) in favor of the plaintiff and decreeing the specific performance of a contract for sale of land.

The defendants were executors of the will of one Robert Anderson, of Victoria District, Vancouver Island, and by the terms of the will were to hold the real and personal estate of the testator in trust for the use of his wife during her life and after her death to sell the same and out of the proceeds pay the debts of the estate and certain specified legacies and divide the residue among the testator's children. The following codicil was annexed to the will:—

"I hereby authorize and empower Alexander McLean and James Stewart the trustees and executors of my said will, to sell and dispose of by public auction or private sale and convey such portion of my real estate as they in their discretion shall think necessary for the purpose of raising money to pay off the existing

(1) 2 B. C. L. R. 67.

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mortgage upon my said real estate and such of my just debts as my personal estate may be insufficient to discharge. In all other respects I confirm my said will."

Under the authority given to them by this codicil the executors proceeded to sell a portion of the testator's real estate and caused the same to be advertised for sale, as follows:—

"ADVERTISEMENT OF SALE.

"AUCTION SALE—REAL ESTATE.

"I have received instructions from Alexander McLean and James Stewart, Esquires, the executors of the late Mr. Robert Anderson, to sell at the salesroom, Yates street, on Friday, the 30th inst., at 12 o'clock, noon, some sixty acres, (more or less), Section 78, Loch End Farm, Victoria District.

"☞ The property to be sold adjoins Mr. Matthias Rowland's land, and has a frontage on the Burnside Road and also on the road commonly known as 'Carey's Road.'

"Deeds at purchaser's expense.

"Terms, cash.

"W. R. CLARKE,

"Auctioneer.

The sale was made subject to certain conditions, among which were the following:—

"6. The property is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to any easements which may be subsisting thereon, and if any error be discovered the same shall not annul the same, *nor shall any compensation be allowed by the vendors or purchaser in respect thereof.*

"8. The vendors will bear half the expense of surveying the property sold."

A plan was produced at the sale showing the land intended to be sold colored pink, and giving the

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boundaries as described in the advertisement.

The land was offered for sale by the acre, an upset price of $35 per acre being fixed, and the plaintiff Sea being the highest bidder it was knocked down to him at $36 per acre. A survey was subsequently made according to the plan and the lot was found to contain 117 acres. The plaintiff caused a conveyance to be prepared of that quantity and tendered it, together with the purchase money, to the executors who refused to execute the conveyance, alleging that they only required some $2,000 to carry out the directions in the codicil to the will, and that they only intended to sell about sixty acres to realize that amount. Sea then brought a suit for specific performance of the contract, and on the hearing before the Chief Justice specific performance was decreed. The Supreme Court of British Columbia reversed the judgment of the Chief Justice on the ground that it would be a breach of trust in the executors to sell more than they required to carry out the instructions of the testator as contained in the codicil to his will. The plaintiff then appealed to the Supreme Court of Canada.

Robinson Q.C. and *Eberts* for the appellant cited the following cases:—*Whitfield* v. *Langdale* (1); *Newman* v. *Johnson* (2); *Barker* v. *Barker* (3); *Thomas* v. *Townsend* (4).

No counsel appeared for the respondents.

Sir W. J. RITCHIE C.J.—On the appeal the contract of sale seems to have been admitted to have been for the whole lot, and the only ground on which the full court reversed the decision of the Chief Justice was that the sale of the whole lot was a breach of trust on the part of the trustees and that such

(1) 1 Ch. D. 61.
(2) 1 Vern. 45.
(3) 2 Sim. 249.
(4) 16 Jur. 736.

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being the case the court would not decree specific performance.

No doubt, generally speaking, a Court of Equity will not enforce, on behalf of a purchaser, a contract by trustees which amounts to a breach of trust, and of which the beneficiaries have a right to complain as a breach of trust. But in this case no question as to a breach of trust was raised by the pleadings or at the trial and, had any such question been raised, I can discover no evidence whatever to sustain any such contention.

By his will the testator appointed McLean and Stewart as follows :—

I appoint Alexander McLean, of the City of Victoria, British Columbia merchant, and James Stewart, of the same place, merchant's clerk, hereinafter called my trustees to be the executors and trustees of this my will.

I give devise and bequeath unto my trustees all my real and personal estate upon the following trusts, namely, after my decease to permit and allow my wife Jessie Anderson, to hold, manage and enjoy the same during the term of her natural life, and at her death to sell and dispose of the same and convert into money and out of the proceeds of such sale and conversion of my said real and personal estate, pay my debts, and the following legacies that is to say :

And by a codicil he authorized McLean and Stewart as follows—

I, Robert Anderson, of Lake District, Vancouver Island, farmer, declare this to be a first codicil to my last will dated the 24th day of April, A. D., 1883.

I hereby authorize and empower Alexander McLean and James Stewart the trustees and executors of my said will, to sell and dispose of by public auction or private sale and convey such portion of my real estate as they in their discretion shall think necessary for the purpose of raising money to pay off the existing mortgage upon my said real estate and such of my just debts as my personal estate may be insufficient to discharge. In all other respects I confirm my said will.

In witness whereof I have to this my first codicil to my said will set my hand this 5th day of June, A. D., 1883.

In *Lord Rendlesham* v. *Meux* (1) in which the words

(1) 14 Sim. 249.

of the will were

> And in case it should be considered necessary by the trustees or trustee for the time being of this my will to sell any part of my estate for the purpose of raising money to discharge any of the incumbrances thereon,—

And it was contended that the trustees had sold the whole of the estate and that the purchase money greatly exceeded the amount of the incumbrances, the Vice-Chancellor said:

> The general language of the testator has made it plain that the power of sale depends upon the opinion of the trustees that a sale is necessary.

In this case, then, I think the sale was, as found by the Chief Justice and the jury, of the whole lot between the two roads; that in making such sale there was no breach of trust; that the power given by the codicil was well exercised by the sale of the lot in question; that the agreement as found is sufficiently free from uncertainty and ambiguity to be enforced; and I think that all reasonable diligence was used to obtain the best price and prevent the property being sacrificed by fixing what would seem to have been a fair upset price, and I do not think the price obtained can reasonably be considered inadequate. In fact the Chief Justice says the contract was entered into at the fair, and even the best, price of the day.

If this sale took place under circumstances which amounted to a breach of trust I am free to admit that the court should not decree a specific performance of the contract. If the block of land had been sold for a lump sum then it might fairly be said they should have ascertained the quantity to have enabled them to form an adequate idea of its value; but as they sold by the acre, and as they fixed the upset price per acre as the fair value to be obtained, the necessity for an actual ascertainment of the quantity would appear to become the less necessary, and it may be that they

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may have thought it more expedient, and more in the interest of the estate, to sell the whole block rather than the exact quantity that would produce $2,000, supposing that was the amount required which, however, is by no means clearly established, for the Chief Justice says in his judgment on appeal to the full court:

> But is it a breach of trust to complete this contract? The defendants now propose to read the will as if it said the trustees were to have no power to sell more than so much of the land as should be necessary to pay debts. But these are not the words of the will. The trustees, here, were certainly acting within the words of their power, viz., to sell "such portion of the testator's land as they may think necessary" to raise money to pay off debts. They found the testator's land divided into two portions. One portion would apparently not produce enough money for their purpose. They therefore thought it necessary to sell the other portion, and contracted to sell it accordingly. They now suggest that the purchase money has provided more cash than was necessary, (viz.) nearly $4,000 dollars net; and that they only calculated a little more than $2,000 to be necessary; that if they had known the land offered would have produced so much they would have auctioned only half the quantity, or some 60 acres. But there is no proof of all this. The debts may, for all that appears, be $4,000 or upwards. But suppose they had offered only 60 acres and the bidding had risen to $60 or $70 per acre, so that the money raised would again have been twice as much as the demands on the estate. so far as then known, rendered necessary, would the trustees in such a case be deemed to have exceeded their powers, so as that this court would not permit them to carry out the sale?

In view of all which I think the judgment of the Chief Justice should not have been disturbed and should now be restored.

STRONG and FOURNIER JJ. concurred.

HENRY J.—I also am in favor of allowing the appeal and concur in the views expressed by His Lordship the Chief Justice. I can see no grounds for the allegation that the trustees could not sell all the land, or that they were guilty of a breach of trust in doing so.

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TASCHEREAU J.—I am of opinion that this appeal should be allowed and the judgment of the 10th July, 1884, restored for the reasons given by Sir. M. W. Begbie at *nisi prius* and in full court.

That the defendants offered for sale, and that the plaintiff bought, without either of them knowing its acreage, the whole of the Loch End farm lying between Carey's road and Burnside road, at $36 per acre, seems to be clearly established, and, in fact, if I do not misunderstand them, Mr. Justice Crease and Mr. Justice Walkem do not materially differ from the Chief Justice on that part of the case. But their conclusions were adverse to the plaintiff on the ground that the defendants, in selling more than was necessary to pay the testator's debts, were guilty of a breach of trust which the courts are bound to restrain. I cannot view the case in that light. The defendants were empowered to sell all of the real estate which they, in their discretion, should think necessary. They exercised their discretion and sold this farm. There is no fraud proved nor even alleged. There is no evidence that their discretion was improperly exercised, and no breach of trust has been shown. Having exercised their discretion, their power to sell was complete and unconditional as regards *bonâ fide* purchasers, whatever liabilities they might have incurred towards their *cestuis que trustent* if they had wrongfully acted towards them.

The courts cannot say that a trustee has not the discretion which the testator has given him, nor refuse to recognize contracts openly entered into at the fair and, according to the evidence in this case, the extreme price that could be had. Such are the conclusions of the Chief Justice and in them I concur.

GWYNNE J.—The plaintiff in his statement of claim

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in the court below alleges that the defendants caused to be put up for sale by public auction "a messuage "and land situate in Victoria, District of British Col- "umbia, being all that portion of section 78 in said "district lying between the Burnside road on the south "and the Carey road on the north;" that at such auction sale the plaintiff was the highest bidder for the same and purchased the said premises from the defendants and the defendants sold the same to the plaintiff for $36 per acre; that it was agreed by and between plaintiff and defendants that one Peter Leech, land surveyor, should proceed to ascertain the acreage of said part of said section and that on the completion of the said survey the plaintiff was to pay the balance of purchase money on the acreage as ascertained by said Peter Leech, and that the vendors should then execute a conveyance of said premises to the purchaser at the purchaser's expense; that the plaintiff paid the defendants a deposit of $540 as part payment of the purchase money immediately after said sale and was always ready, willing, and still is, to pay the remainder; that Peter Leech proceeded to survey the said tract so put up for sale and ascertained that the acerage of the same was $117\frac{35}{100}$ acres; that plaintiff tendered to the defendants for execution a deed for the conveyance by the defendants as trustees of the will of Robert Anderson, deceased, to the plaintiff in fee in consideration of the sum of $4224.60, all and singular that certain parcel or tract of land situate, lying and being in Victoria district aforesaid, which may be more particularly described as all that portion of section seventy-eight, lying between the Burnside road on the south, and the Carey road on the north, containing in the whole one hundred and seventeen acres and thirty-five hundreths of an acre, and that the defendants refused to execute such conveyance and the plaintiffs

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claimed that the defendants as such trustees as aforesaid might be decreed specifically to perform said agreement and for other relief.

The defendants in their answer, in so far as it is material to set it out, deny that they caused to be put up for sale by public auction the portion of the section 78 specified in the first paragraph of the plaintiff's statement of claim, but they say that they did as trustees under the will and codicil of Robert Anderson deceased, cause to be put up for sale by auction a portion of the said section containing 60 acres more or less, adjoining the land of Matthias Rowland, and lying between the Burnside road and Carey's road; that the land put up for sale had not been surveyed, and was not marked out on any plan, but that a sketch plan of the whole of the said section lying to the north of the Burnside road was exhibited at the sale; that the conditions of sale did not stipulate that the highest bidder per acre should be the purchaser, but the auctioneer stated that the bidding would be per acre, and did not stipulate that the expense of the title deeds should be borne by the purchaser; that it was never agreed between plaintiff and defendants that on completion of any survey of the land purchased the plaintiff was to pay the balance of the purchase money on the acreage as ascertained by Peter Leech or any one else; that it was verbally agreed between the plaintiff and the defendant McLean that Peter Leech should survey the property purchased by the plaintiff which the defendants contended was 60 acres more or less of the said piece of said section seventy-eight.

The plaintiff in support of the case as made by him in his statement of claim produced in evidence:

1. The advertisement of the sale which is as follows:—

AUCTION SALE—REAL ESTATE.

I have received instructions from Alexander McLean and James

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Stewart, Esquires, the Executors of the late Mr. Robert Anderson, to sell, at the sales-room, Yates Street, on Friday the 30th instant, at Twelve o'clock, noon, some Sixty acres, (more or less) Section 78, Loch End Farm, Victoria District.

☞The property to be sold adjoins Mr. Matthias Rowland's land and has a frontage on the Burnside Road and also on the road commonly known as Carey's Road.

Deeds at purchaser's expense.

Terms—Cash.

WM. R. CLARKE,
Auctioneer, &c.

2. The conditions of sale which contained among others the following:

"*a.* No person shall, at any bidding advance a less sum than shall be named by the auctioneer, and no bidding shall be retracted. The highest bidder shall be the purchaser and if any dispute arise respecting a bidding the lot shall be put up again and re-sold.

"*b.* Every purchaser shall immediately after the sale of a lot sign the underwritten agreement, and pay into the hands of the auctioneers a deposit of 25 per cent of his purchase money, and shall at the expiration of fourteen days pay to Mr. Hett, the vendor's solicitor, the balance of his purchase money.

"*c.* The property is believed and shall be taken to be correctly described as to quantity and otherwise, and is sold subject to any easements which may be subsisting thereon, and if any error be discovered the same shall not annul the sale nor shall any compensation be allowed by the vendors or purchaser in respect thereof.

"*d.* The vendors will bear half the expense of surveying the property sold."

At the foot of the conditions of sale is the contract of sale, of which the plaintiff is claiming specific performance, as follows:—

I, Samuel Sea, hereby acknowledge that on the sale by auction, this 30th day of November, 1883, of Sixty acres, (more or less,) part of Section 78, Victoria District, I was the highest bidder and was

declared the purchaser thereof, subject to the conditions, at the price of thirty six dollars per acre, and that I have paid the sum of five hundred and forty dollars by way of deposit and in part payment of the said purchase money, to the auctioneers, and hereby agree to pay the remainder of the said purchase money and complete the said purchase according to the said conditions.

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(Signed) SAMUEL SEA.

As agent for the vendors I ratify this sale and acknowledge the receipt of the said deposit.

(Signed) W. R. CLARKE,
Auctioneer.

The vendors as trustees under the will of Robert Anderson had power to sell only for the purpose of paying debts if the personalty should be insufficient for that purpose, and their object in selling was merely to raise the sum of $2000, the total sum which would be required for the above purpose. The notice of the intended sale contained in the advertisement that the auctioneer had received instructions from the trustees to offer for sale "some 60 acres (more or less,") section "78 Loch End Farm, Victoria District," may be fairly construed as conveying an intention of offering for sale about 60 acres, it might be more or it might be less, according as the trustees should find to be necessary to raise the required sum; the words "more or less" as there used are quite appropriate having regard to the position in which the trustees stood, for by the time the sale should take place they might find that the price the land would be likely to fetch per acre would enable them to realise the required sum of $2000 by the sale of only forty or it might be of thirty acres, in which case, quite in accordance with the statement in the advertisement, they might offer for sale and sell forty or thirty acres as the case may be; but having resolved upon not taking less than $35 per acre the sale of sixty acres would be sufficient for their purpose; and their duty

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to their *cestuis qui trustent* under the will required that they should sell no more than was necessary for that purpose. The notice in the advertisement of what would be offered for sale did not say that the whole of that part of section 78 lying between Burnside road and Carey's road would be offered for sale, but that some sixty acres, it might be more or might be less of section 78, adjoining Rowlands, and having a frontage on Burnside's road and Carey's road would be offered for sale.

Now as to what took place at the auction. The auctioneer says he sold according to advertisement. He thought, but very mistakenly as now appears, that there might be about sixty or sixty-five acres in the whole piece lying between the two roads, but being asked whether what he offered for sale was not the whole of that piece he answered: "Sixty acres of it;" that the intention was to sell the rough, uncultivated part. The defendant McLean's evidence is that he intended to sell sixty acres going from Rowland's fence west and abutting on each road. Rowland who was present at the auction says that what he understood to have been offered for sale was sixty acres next to his fence. The plaintiff having bid $36 per acre for what he was buying signed the above contract of sale at the foot of the conditions and paid $540 as the 25 per cent. on his purchase required by the conditions to be paid at the time of sale. Now, the plaintiff's contention is, that this contract, so signed by him and the auctioneer, is a contract for the sale to, and purchase by, the plaintiff of the whole of that part of section 78 which lies between the two above named roads whatever its contents in acres might be and that there being found to be $117\frac{35}{100}$ acres in the piece he is entitled in virtue of the above contract so signed to demand and have a conveyance of the said $117\frac{35}{100}$ acres executed to him

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he paying $36 per acre for every acre in excess of 60 acres. If the plaintiff is right in this contention then not only would he be entitled to compel the defendants to execute to him a conveyance of 500 acres or any greater quantity if such should be found to be the quantity of section 78, between the two roads, but he could also, at the suit of the defendants, be compelled to accept a conveyance of such 500 acres or any greater quantity, and to pay therefor at the rate of $36 per acre, although he should deny that he had ever bid for, or intended to purchase any greater quantity than sixty acres, and in support of such contention should refer to this contract and the mention of sixty acres therein and should insist upon his having, in accordance with the conditions of sale, paid $540 as and for the sum of 25 per cent upon his whole purchase money of $2160 for such 60 acres That the defendants could not under the terms of the contract as signed by the plaintiff compel him to take the whole $117\frac{35}{100}$ acres is to my mind too clear to admit of a doubt.

Now as to the intention of the trustees we can not I think attribute to them, contrary to the sworn evidence of the only one of them who was examined, and contrary to their duty, an intention of selling the whole of the section between the two roads whatever the contents might prove to be, when the sale of sixty acres would be sufficient to supply the purpose for which alone they had power to sell. If they had intended to sell the whole of the piece they surely would have had, as they should have had, the piece surveyed before being offered for sale for, according to the conditions of sale, the deposit of 25 per cent of the whole purchase money to be paid at the time of the sale would vary in proportion to the quantity of land sold, and they could not have in their contract of sale acknowledged, as they had done, the receipt of $540

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as such deposit and part payment of the said purchase money, that is to say, the purchase money for sixty acres at $36 per acre. That, in truth, the trustees did not intend to sell the whole of the section lying between the two roads I am, for my part, satisfied and that, under the circumstances of the sale of sixty acres producing sufficient for the purpose for which alone they had a power of sale they should not have sold the whole cannot admit of a doubt; this therefore is not, in my opinion, a case in which we should compel specific performance although the contract should in express terms be for the sale of the whole of such piece, as it would be unjust to enforce against trustees to the great prejudice it may be of the interests of their *cestuis que trustent* a contract different from what the trustees intended to enter into, and which was therefore improvidently entered into by them. But it is, to my mind quite clear that the contract which the plaintiff has produced and relies upon is not a contract to sell the whole of that part of section 78, lying between the two roads, whatever the quantity might upon survey prove to be, namely, whether 500 acres or 117 acres, or any other quantity, as the plaintiff now contends, but that if it be not avoided for uncertainty by the senseless and inappropriate introduction of the words ("more or less") after the stated quantity of 60 acres, it is in its terms simply a contract to sell sixty acres of part of section 78, lying between the two roads at $36 per acre, upon which contract in accordance with the terms of the conditions of sale the purchaser has paid and the vendors have received the sum of $540 as and for the 25 per cent upon the whole purchase money made payable by the conditions at the time of the sale. There is not a word in the contract about a survey being necessary in order to determine what was the

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quantity of land sold and what should be the amount of the purchase money the plaintiff should have to pay, and there is no principle upon which any such variation in quantity of land and in the amount of purchase money can be imported into the contract. The plaintiff has not in the contract as signed by him undertaken to pay to the defendant one cent more than the amount of purchase money calculated upon sixty acres at $35 per acre, and of which sum the amount of $540 paid at the time of sale constitutes 25 per cent or one fourth part; in other words the total amount he has contracted to pay, and which the trustees could ever compel him to pay under this contract, is the unpaid balance of the sum of $2,160.

It must be admitted that there has been great carelessness in the preparation of this contract, for in the conditions of sale, at the foot of which is the contract, and which conditions are referred to in and made part of the contract, is one which declares that the property offered for sale is believed to be and shall be taken to be correctly described as to quantity, and that if any error should be discovered the same should not annul the sale nor should any compensation be allowed either by vendor or purchaser in respect thereof, that is to say whether the contents should prove to be greater or less than the quantity stated. Now there is no description of the property offered for sale other than "Sixty acres (more or less) part of Section 78, Victoria District." So that if the plaintiff's contention be correct that what was offered for sale was "the whole of that portion of section 78, lying "between Burnside Road and Carey's road" if the above condition is to apply, we must, to complete the description as to quantity, add here the words "containing 60 acres (more or less)." So that the result would be that under this condition the plaintiff

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would be entitled to a conveyance of the $117\frac{35}{100}$ acres for $2,160, or the sum ascertained to be the price of sixty acres at $36 per acre, a contention which the plaintiff has not been bold enough to make; the whole difficulty in the case arises from what I call the senseless introduction of the words "more or less" in the contract after the words "60 acres."

The plaintiff in the signed contract acknowledges that on a sale by auction of 60 acres, more or less, part of section 78, he was the highest bidder, and was declared the purchaser thereof subject to the conditions, which are part of the contract, at the price of $36 per acre. Now in this sentence to what does the word "thereof" apply—of what does the plaintiff acknowledge himself to be the purchaser? Is it of the sixty acres which is expressed or is it of some greater or less quantity? and if greater of what quantity? The contract certainly does not say that the plaintiff had purchased the whole of that portion of section 78, lying between the two roads, whatever might be the quantity at $36 per acre, and that he had paid $540 on account, and would pay the remainder as soon as the amount should be ascertained upon measurement of the contents of the piece of land sold; and how we are to say that this was the plaintiff's contract, as he now contends, from what is said in the formal signed instrument I fail to see. There he says that the $540 paid was paid by way of deposit and according to the conditions of sale forming part of the contract, which shews that this sum was paid and accepted as 25 per cent on the whole of the purchase money called for by the contract, or the precise price of 60 acres at $36 per acre, and he undertook to pay the balance of his said purchase money, that is an ascertained sum, not a sum yet to be ascertained, and as yet quite undeterminate, at the expiration of 14 days. It might perhaps

be contended that these words "more or less" so introduced into the contract make it so vague and uncertain that it cannot be enforced at all, although when the conditions of sale are referred to, which are part of the contract and require the purchaser at the time of sale to pay a deposit of 25 per cent. of his whole purchase money, I cannot say that I think they are. In my opinion the plaintiff under this contract has no claim whatever for any greater quantity than sixty acres measured west from Rowland's fence, and extending from Burnside Road to Carey's Road. If he is unwilling to accept a deed for that quantity the most favorable judgment that he could have would be for the return of his deposit with interest but without costs, and in my opinion the case should be remitted to the court below to enable the plaintiff to elect whether he will accept a conveyance of sixty acres as above named or that the contract be annulled and his deposit restored to him. In the former event the decree should be for a conveyance to him of such sixty acres upon payment of the balance of the purchase money with interest, but in that case the plaintiff should pay the costs of the court below, for the litigation has been caused by his demand for more than he was entitled to under his contract, and in case he elect to annul the contract and to have his deposit returned by reason of uncertainty in the contract as to the land actually sold, neither party should have costs in the court below. But the plaintiff's appeal to this court should be dismissed with costs.

Appeal allowed with costs.

Solicitor for appellant: *D. M. Eberts.*

Solicitor for respondents: *J. Roland Hett.*