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KNIGHT SUGAR COMPANY (PLAINTIFF) ..... } APPELLANT;

AND

WILLIAM B. WEBSTER (DEFENDANT)...RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Contract—Sale of land—Printed form—Alteration by pen and ink—Whether ambiguity or repugnancy between clauses—Interpretation—Evidence of intention by use of deleted words.

The appellant sold to the respondent two large areas of land in Alberta. The parties in formulating their agreement employed the printed form which the vendor customarily used for such transactions, filling up the blanks in typewriting; but there were some handwritten interlineations in the print, and the printed clause immediately following the blank in which the description of the parcels of land was typewritten appeared in the original executed agreement in the following form:

"* * * excepting thereout and therefrom ~~all coal and~~ any overriding royalty of ten per cent of all oils or gas found or produced from said ~~other minerals, including petroleum, natural gas, and~~ lands ~~valuable stones in or under the said land, and the right to use so much of the said land or the surface thereof as the vendors or their assigns may consider necessary for the purpose of working and removing the said coal or other minerals, including petroleum or natural gas,~~ and any portion of the said lands taken for roads or public purposes * * *;"

Later in the instrument, and as part of the printed form not stricken out, there was a covenant by the vendor that, if the purchaser pay the purchase money and perform all and singular the conditions of the agreement, he shall be entitled to receive from the vendor a transfer of the land in fee simple, "excepting thereout and therefrom all coal mines and other minerals including petroleum and natural gas and valuable stones." The sale was for a price of $190,219.80 of which $45,000 was paid upon the execution of the agreement and the balance was made payable in five yearly instalments with interest and taxes. None of the deferred payments was in fact made by the respondent except a sum of $384; and, the agreement not being fulfilled, the appellant brought this action for specific performance. The respondent resisted payment on the ground that the land agreed to be sold embraced all coal mines, coal pits, seams and veins of coal and the right to work the same, which coal mines, etc., were the property of the Crown, and the appellant being unable to make title thereto

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Lamont and Smith JJ.

as required by its agreement, the respondent counterclaimed for the repayment of $45,000 and a declaration that the agreement was cancelled.

Held, Anglin C.J.C. dissenting, that, according to the meaning of the deed, it was not the intention of the agreement that the vendor should convey the mines and minerals with the lands.

Held, also, Anglin C.J.C. dissenting: In order to reach the conclusion that, according to the meaning of the deed, the mines and minerals were to go with the lands, the trial judge and the Appellate Division had to take into consideration "the printed form as it existed before the erasures," relying upon the authority of *Strickland* v. *Maxwell* (2 Cr. & M. 539). But, although it is difficult to distinguish the material facts of that case with those in the present one, the opinion therein expressed by Bayley and Vaughan B.B., who held it admissible to reason from the obliteration, cannot be followed, because that seems contrary in principle to the rule against extrinsic evidence as laid down by the books and, moreover, in conflict with the judgment in *Inglis* v. *Buttery* (3 App. Cas. 552).

The original grant from the Crown contained the reservation by it of "all coal mines, etc., * * * together with full power to work the same * * *" and while there is an exception embodied in the agreement which, according to the above holding, embraces coal mines, etc., if there be any, it does not provide expressly for the working powers and liberties. There are however powers and liberties incident to the ownership and they rest upon the implications of the case. But the respondent raised the ground that the powers for working, as expressly reserved by the Crown, are more comprehensive than those which are incident to the exception created by the agreement and therefore the appellant company has less than it has agreed to convey. *Fuller* v. *Garneau,* (61 Can. S.C.R. 450) relied on.

Held, further, per Duff, Newcombe, Lamont and Smith JJ., that there was no evidence that the lands subject to the agreement contained any coal, or, if any, that it could not be worked without causing damage to the surface. The Crown grants are in common form, and no inference can be drawn that a parcel of land contains coal because the grant by which the parcel is conveyed contains the common form of reservation. But if there be coal upon which the reservation operates, it is only "to such an extent as may be necessary for the effectual working" of it that the right "to enter upon or use or occupy the said lands" may be exercised. The necessity must therefore be shewn, either by the vendor or by the purchaser, before the reservation of the Crown grant can be found to extend beyond the exception for which the agreement provides. The onus is upon the party who suggests or relies upon the necessity, namely the respondent, to produce the proof or to establish this evidence, and the respondent has failed to do it.

Per Anglin C.J.C. (dissenting).—While, under ordinary circumstances, it is not proper to look at deleted words in an instrument as an aid to its construction (*Inglis* v. *Buttery,* 3 App. Cas. 552), that rule does not apply where, as a result of the deletion, there is ambiguity between different clauses of an agreement. And when the ambiguity is obvious, as in the present case, the principle which governs is that laid down in *Strickland* v. *Maxwell* (2 Cr. & M. 539), namely, that "the works struck out might be looked at to shew what the intention of the parties was."

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Judgment of the Appellate Division (24 Alta. L.R. 174) reversed, Anglin C.J.C. dissenting.

APPEAL from the decision of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of the trial judge, Ives J., dismissing the appellant's action for specific performance and allowing the respondent's counterclaim for rescission.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgments now reported.

A. McL. Sinclair K.C. and *D. H. Elton K.C.* for the appellant.

P. H. Russell and *J. B. Barron* for the respondent.

The judgment of the majority of the court (Duff, Newcombe, Lamont and Smith JJ.) was delivered by

NEWCOMBE J.—The parties made a contract in writing, dated 1st April, 1926, whereby the plaintiff agreed to sell and the defendant agreed to purchase two large areas of land in the province of Alberta, firstly and secondly therein described as comprising respectively 10,762.32 acres and 1,920 acres, for the sum of $190,219.80, of which the purchaser paid $45,000, and agreed to pay the balance in five equal annual payments of $29,043.96, with interest, beginning on 2nd April, 1927; also to pay the taxes. None of the deferred payments was in fact made, but it appears that the purchaser did pay, in addition to the $45,000 above mentioned, a sum of $348, which is credited on account on 1st June, 1926.

Thus the agreement was not fulfilled; and, on 9th February, 1928, the plaintiff commenced this action for specific performance. On 9th March, next following, the defendant wrote the plaintiff, referring to the agreement of sale and the payment of $45,000, and continuing thus:

> I have just discovered that in respect to sections one to eighteen, in township three, range twenty-three, west of the fourth meridian, you are unable to deliver to me title to the coal mines, coal pits, seams and veins of coal, which, together with the right to work them, are reserved to the King of Great Britain, who also owns all coal lying under sections thirty-four, thirty-five and thirty-six, in township two, range twenty-three, west of the fourth meridian.

(1) (1929) 24 Alta. L.R. 174; [1929] 2 W.W.R. 505.

As I am entitled under agreement with you to call for title to all coal mines, coal, coal pits, seams and veins of coal and the right to work them, and as you have not the title to these, I hereby notify you that I repudiate the agreement of April 2, 1926, made with you and demand from you the repayment to me forthwith of the sum of forty-five thousand dollars which I have paid you in connection therewith.

On 13th March, 1928, the defendant pleaded a defence and counterclaim, whereby, along with the usual denials, he alleged that

* * * the land agreed to be sold embraced all coal mines, coal pits, seams and veins of coal and the right to work the same, which said coal mines, coal pits, veins and seams of coal are not owned by the plaintiff but are in fact the property of His Majesty King George V., who also has the right to work the same.

The defendant also relied upon the letter quoted above as repudiating the agreement, and he counterclaimed for the amount of $45,000.

It is admitted that the original grant from the Crown contains the following:

* * * excepting and reserving unto Us, Our Successors and Assigns, all coal mines, coal pits, seams and veins of coal, as well open as not open, which shall or may be wrought, found out or discovered or which may exist within, upon or under the said lands, together with full power to work the same, and for this purpose to enter upon and use and occupy the said lands or so much thereof, and to such an extent as may be necessary for the effectual working of the said mines, pits, seams and veins; * * *.

In making the agreement, the parties used a printed form, filling up the blanks in typewriting, but there were some handwritten interlineations in the print, and the printed clause immediately following the blank in which the description of the parcels is typewritten appears in the original executed agreement in the following form:

"* * * acres to be the same more or less, excepting thereout and therefrom ~~all coal and other minerals, including petroleum, natural gas, and valuable stones in or under the said land, and the right to use so much of the said land or the surface thereof as the vendors or their assigns may consider necessary for the purpose of working and removing the said coal or other minerals, including petroleum or natural gas,~~ any overriding royalty of ten per cent of all oils or gas found or produced from said lands and any portion of the said lands taken for roads or public purposes; * * *"

Follows in the agreement a statement of the consideration money, and terms of payment, and certain covenants, the third of which reads as follows:

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And the purchaser hereby agrees with the vendors, and this agreement is made on the express stipulations and conditions:

* * *

(3) If the purchaser or legal representative or approved assignee shall pay the several sums of money aforesaid punctually at the several times above fixed, and shall in like manner strictly and literally perform all and singular the aforesaid conditions, then the purchaser, as hereinafter provided, upon request at the office of the vendors, at the town of Raymond, and the surrender of this agreement, shall be entitled to a transfer of the said land in fee simple excepting thereout and therefrom all coal mines and other minerals, including petroleum, natural gas and valuable stones.

The agreement does not expressly provide for the possession of the premises, but the eighth and ninth admissions are as follows:

8. The defendant became entitled to the possession of the said lands immediately after the completion of the said agreement for sale.
9. The plaintiff has not at any time received any rents or profits of the said lands since the date of the said purported agreement.

The case was tried before Ives J., of the Supreme Court of Alberta, and he maintained the action, because, while he had no hesitation in holding that the intention of the agreement was that the vendor should convey the minerals, nevertheless he thought that the defendant, by leasing a part of the area which he had agreed to purchase, after he knew that the minerals were reserved, had elected not to take advantage of the alleged defect in the plaintiff's title, and was therefore bound to complete his purchase. The Appellate Division, however, reversed the learned trial judge upon this point, considering that the leases were made *pendente lite* and subject to the litigation, and that there was no evidence sufficient to establish waiver or intention to waive. At the hearing before this court a similar view prevailed, and the defence of waiver was accordingly denied.

The Appellate Division was, nevertheless, in agreement with the trial judge that, according to the meaning of the deed, the minerals were to go with the lands, but in reaching that conclusion the learned judges took into consideration "the printed form as it existed before the erasures," relying upon the authority of *Strickland* v. *Maxwell* (1). I confess that I find it difficult to distinguish the material facts of that case, but I cannot follow the opinion of the two learned judges (Bayley and Vaughan B.B.), who held it admissible to reason from the obliteration, because that

(1) (1834) 2 Cr. & M. 539, 4 Tyr. 346; 3 L.J. Ex., 161.

seems to me contrary in principle to the rule against extrinsic evidence as laid down by the books, and, moreover, in conflict with the judgment of the House of Lords in *Inglis* v. *Buttery* (1), by which we are bound. In the latter case fourteen material words had been deleted, and Lord Hatherley said in his speech, at page 558, their Lordships being unanimous upon the point,

> Nor can I think, and I believe your Lordships will concur with me in this opinion, that it is legitimate to look at those words which appear upon the face of the agreement with a line drawn through them, and which are expressly, by the intention of all the parties to the agreement, deleted, that is to say, done away with, and wholly abolished. It is not legitimate to read them and to use them as bearing upon the meaning of that which has become the real contract between the parties, namely, the final arrangement of the document which we must now proceed to construe.

See also *Leggott* v. *Barrett* (2), per James L.J. at pp. 309, 310; *Manchester Ship Canal Co.* v. *Horlock* (3).

Reading the first exception as it stands, it is this:

> Excepting thereout and therefrom any overriding royalty of ten per cent of all oils or gas found or produced from said lands.

And, in clause no. 3 above quoted, which is introduced as a "stipulation or condition" of the contract, it is provided that when the purchaser, having made the payments or performed the conditions stipulated, becomes entitled to a transfer of the land purchased, the transfer shall be in fee simple,

> excepting thereout and therefrom all coal mines and other minerals, including petroleum, natural gas and valuable stones.

At the hearing nobody was able to explain precisely what was meant by the handwritten exception; and there is no evidence of any lease or the constitution of any royalty. The expression "any overriding royalty of ten per cent of oils or gas" is indefinite; while apparently intended to include any royalty of the character described, constituted before the grant, it seems to contemplate a state of uncertainty as to whether or not there were any such royalty.

There is no repugnancy that I can see between the printed exception in clause no. 3 and the preceding handwritten exception. They operate in the same field only with relation to oils or gas, and there they do not conflict. More-

(1) (1878) 3 App. Cas. 552. (2) (1880) 15 Ch. D. 306.
(3) [1914] 1 Ch. 453, at pp. 463, 464.

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over, so far as appears by the case, no point is raised with regard to oil or gas. The objection relates to the coal.

The meaning, of course, must be ascertained by interpretation of the instrument. It is true, as said by Lord Ellenborough C.J., in *Robertson et al* v. *French* (1), speaking of words superadded in writing to a printed form of contract, that such words are entitled,

> * * * if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than to the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects.

And see *Glynn* v. *Margetson and Coy. et al* (2).

But while, therefore, the written words may prevail, or have the right of way, in case of competition, there is, of course, nowhere a suggestion that printed language is not a perfectly good and lawful medium of expression. Lord Herschel indeed says in terms, in the last mentioned case, page 354, that "It would not be legitimate to discard the printed words," and I say the same here.

Moreover, suppose there were no royalty, and it is consistent with the agreement that there may be none, clearly the exception printed in clause no. 3 would remain in operation; and, if the respondent rely upon the handwriting, or contend for an advantage in the interpretation of the instrument by reason of the fact of any overriding royalty within the meaning of the written exception, it is surely incumbent upon him to prove the existence of that royalty, and to make the language of the deed intelligible. All relevant parts of the instrument have to be read together when necessary in order to ascertain the meaning. There is an exception printed in clause 3, and it has been quoted. I see no reason to doubt that the coal mines and other minerals are excepted by force of that clause, and the words "other minerals" therein may I think be interpreted as suggested by my brother Duff at the hearing to mean minerals other than coal in coal mines.

It follows that the plaintiff should succeed upon the questions already considered, but the defendant raises an additional ground. I have referred to the reservation by the

(1) (1803) 4 East 130, at p. 136. (2) [1893] A.C. 351.

Crown of the coal and the power to work it. That power is expressed in very broad terms; and while, if the court adopt my view, there is an exception embodied in the agreement which embraces coal mines, coal pits, seams and veins of coal, if there be any, it does not provide expressly for the working powers and liberties. There are however powers and liberties incident to the ownership, and they rest upon the implications of the case. But it is said that the powers for working, as expressly reserved by the Crown, are more comprehensive than those which are incident to the exception created by the agreement, and therefore that the plaintiff company has less than it has agreed to convey, and the defendant relies upon *Fuller* v. *Garneau* (1), in which it was held by the majority of this court that the reservation in a Crown grant of the mines and minerals, associated with express powers identical with those reserved in the present case, created an easement for the exercise of working powers in excess of those implied by the mere exception of mines and minerals. And it seems to follow, applying the last cited authority, that, if the lands agreed to be sold contain coal mines, there are working rights expressly reserved to the Crown which are not implied in the exception of " all coal mines and other minerals " expressed in the third article of the stipulations and conditions of the agreement; and consequently, upon the like assumption, that the agreement would extend to rights which are withheld from the plaintiff company, and therefore not competent to it to grant.

I think this objection admits of a sound answer; and it is this: There is no evidence whatever that the lands subject to the agreement contain any coal, whether in mines, pits, seams or veins, or, if there be any coal there, that it cannot be worked without causing damage to the surface. The Crown grants are in common form, and no inference can in my opinion be drawn that a parcel of land contains coal because the grant by which the parcel is conveyed contains the common form of reservation. But, if there be coal upon which the reservation operates, it is only "to such an extent as may be necessary for the effectual working" of it that the right " to enter upon or use or occupy the said lands " may

(1) (1920) 61 Can. S.C.R. 450.

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be exercised. The necessity must therefore be shewn, either by the vendor or by the purchaser, before the reservation of the Crown grant can be found to extend beyond the exception for which, as I have shewn, the agreement provides. And who is to produce the proof, or to establish this condition? I would think it must be he who suggests or relies upon the necessity, namely, the defendant, and his case fails for lack of such proof.

The appeal should be allowed with costs in all courts, and the counter-claim should be dismissed with costs.

ANGLIN C.J.C. (dissenting).—I have had the advantage of reading the opinion in this case prepared by my brother Newcombe, in which I understand the other members of the court concur.

In so far as he would affirm the conclusion of the Appellate Division that the evidence was not sufficient to establish waiver by the respondent or intention to waive the defect in the vendor's title, consisting of its inability to convey the mines and minerals in and under the lands agreed to be sold, I entirely agree. But, in so far as my learned brother holds that, on the proper construction of the agreement between the parties, the vendor did not agree to sell such mines and minerals, I find myself unable to share his view.

As the trial judge pointed out, the parties in formulating their agreement employed the printed form which the vendor customarily used for such transactions. From that form was struck out the exception and reservation from the land agreed to be sold of

> all coal and other minerals, including petroleum, natural gas, and valuable stones in or under the said land, and the right to use so much of the said land or the surface thereof as the vendors or their assigns may consider necessary for the purpose of working and removing the said coal or other minerals; including petroleum or natural gas.

For this the parties substituted the words,

> any overriding royalty of ten per cent of all oils or gas found or produced from said lands,

these words being inserted by the vendor's attorney in handwriting following the printed words "excepting thereout and therefrom" which in turn follow the description, in typewriting, of the land sold.

It is precisely here, i.e., immediately following the description of the land sold that one would expect to find any exception or reservation intended to be made therefrom of that which the agreement to sell such land would otherwise carry by implication. While the words struck out do not correspond exactly with the words of exception or reservation in the Crown grant, they do so substantially; and they would (speaking generally) have sufficed, had they remained in the instrument, to preclude a claim by the purchaser of a right to receive what had been so reserved to the Crown.

Later in the instrument, and as part of the printed form not stricken out, we find a covenant by the vendor that, if the purchaser pay the purchase money and perform all and singular the conditions of the agreement, he shall be entitled to receive from the vendor a transfer of the land in fee simple,

excepting thereout and therefrom all coal mines and other minerals including petroleum and natural gas and valuable stones.

Ex facie there is an ambiguity in this document the only exception from the description of the property purchased being

any overriding royalty of ten per cent of all oils or gas found or produced from said lands.

Prima facie the purchaser is entitled to get the land agreed to be sold subject only to this exception; but, in the covenant to convey, the exception, subject to which the title is to be transferred, reads

excepting thereout and therefrom all coal mines and other minerals including petroleum, natural gas, and valuable stones

which forms the most substantial part of the very exception that the parties had deliberately stricken from the printed form where it was appended to the description of the property sold. That he was satisfied of the *bona fides* and honesty of the defendant in refusing the vendor's demand that he carry out the purchase, on the ground of the latter's inability to make title to the mines and minerals, is a necessary implication of the learned trial judge's judgment, which the Appellate Division has accepted. That court, under these circumstances, considered itself entitled to look at the words which had been so stricken out and for which the words, "any overriding royalty, etc.," were substituted, not to vary nor to contradict them, but to con-

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firm their completeness. As I read the opinion of my learned brother, on the authority of *Inglis* v. *Buttery* (1), he thinks this course was unjustified. He would reconcile the words of exception in the vendor's covenant for the deed with the exception in the description of the lands to be sold by saying that

> they operate in the same field only with relation to oils or gas, and there they do not conflict.

With the utmost respect, I am unable to accept the view that they can be so reconciled. The idea that a clause in the sale agreement which excludes from the property to be conveyed

> all coal mines and other minerals including petroleum, natural gas and valuable stones,

is not hopelessly inconsistent with a clause therein which excepts from the property purchased only

> any overriding royalty of ten per cent of all oils or gas found or produced from said lands

I have, with deference, much difficulty in appreciating. While, no doubt, under ordinary circumstances, it is not proper to look at deleted words in an instrument as an aid to its construction (*Inglis* v. *Buttery* (1)), that rule, I venture to think, is sometimes too broadly stated and does not apply where, as a result of the deletion, there is an ambiguity such as that now before us. In *Inglis* v. *Buttery* (1) Lord O'Hagan said (p. 571) that the court was asked to commit the error of "attempting to construe a contract, perfect in itself, by acts antecedent to it." In that case no ambiguity whatever resulted from the deletion. After the words had been stricken out the contract was clear, unambiguous and complete. In the case at bar, on the contrary, the ambiguity is obvious and, under such circumstances, the principle on which the Court of Exchequer decided *Strickland* v. *Maxwell* (2), in my opinion, governs. While I cannot find that that judgment has been followed or expressly approved in subsequent cases, on the other hand, its correctness has never been challenged so far as I am aware; and it is cited in modern text books of repute as authoritative. See Norton on Deeds, 2nd Ed., (1928), at p. 94; Beal on Legal Interpretation, 3rd Ed., (1924), pp.

(1) 3 App. Cas. 552. (2) 2 Cr. & M. 539.

123-4. It upholds the conclusion reached by the Appellate Division that the exception inserted in handwriting in place of the words stricken out, was the whole exception which the parties intended to make from the property that formed the subject of their contract. The material facts of *Strickland* v. *Maxwell* (1) are indistinguishable in substance from those now before us and, as I read the judgment in that case, it does not at all conflict with that of the House of Lords in *Inglis* v. *Buttery* (2). In the latter case no ambiguity whatever resulted from the striking out of the words at which, it was there held, the court should not look for the purpose of construing the contract. Effect was given to the words left after the deletion, viz:—

the plating of the hull to be carefully overhauled and repaired,

as if the words stricken out,

but if any new plating is required the same to be paid for extra,

had never been in the draft contract. Here the respondent relies upon the substituted words of exception and merely invokes the deleted words in order to put it beyond doubt that the former expressed the entire exception which the parties intended. But for the existence, in a later part of the printed form, of the vendor's covenant restricting the scope of the deed which he undertook to give by an exception almost as wide as the printed words stricken out after the description, the resultant inconsistency presumably having escaped attention, this case would have been clearly within the authority of *Inglis* v. *Buttery* (2) and must have been decided as the Appellate Division has decided it. It is perhaps needless to add that in *Inglis* v. *Buttery* (2) there is no allusion whatever to *Strickland* v. *Maxwell* (1).

The presence of the words of exception in the vendor's covenant at the highest creates an ambiguity in the agreement before us and makes the intention of the parties doubtful. The fact that nobody seems to know precisely what was meant by the handwritten exception following the description does not lessen the uncertainty of the situation. Under these circumstances, several pertinent rules of interpretation seem to require that effect should be given to the vendor's covenant as if its stipulation for an exception

(1) 2 Cr. & M. 539. (2) L. R. 3 A.C. 552.

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were the same as that in the defendant's agreement to purchase. It is of the latter's undertaking to pay the purchase money for the lands sold, which alone contains the obligation of the purchaser, that the plaintiff demands specific performance. Specific performance of a contract such as this, at the instance of either party, should, if resisted, be refused. (*Stuart* v. *Alliston* (1); *In re Davis and Cavey* (2). Specific performance with compensation for the inability to transfer mines and minerals by abatement in the purchase price has not been suggested, probably because the difference in value would be so problematical that it could not be fairly computed. (*Brooks* v. *Rounthwaite* (3); *Holiday* v. *Lockwood* (4).

In aid of the view I have taken, reference may be made to the rule of construction that, if there be conflict between the written and the printed parts of an instrument, ordinarily the written part must be given effect to (*Robertson* v. *French* (5); *Gumm* v. *Tyre* (6), rather than the printed part, inasmuch as attention had been pointedly drawn to the change made in writing and it, rather than mere printed words of a general formula, may be supposed to express, in their own language, the intention of the parties.

Another ordinary rule of construction, in case of conflict between earlier and later provisions of instruments *inter vivos*, is that the earlier is usually held to prevail.

No case had been made for reformation of the exception to the description to make it conform to the terms for which the vendor's covenant provides; and, if such a case had been made, it is doubtful whether a decree for specific performance of an agreement so reformed should be granted. Moreover, the reservation in the deed, for which the vendor's covenant stipulates, does not include the right to go upon the land and full power to work the mines, etc., which were explicitly covered by the exception in the Crown grant. The materiality of such an omission was considered by this court in *Fuller* v. *Garneau* (7).

(1) (1815) 1 Mer. 26.
(2) (1888) 40 Ch. D. 601.
(3) (1846) 5 Hare 298.
(4) [1917] 2 Ch. 47.
(5) (1803) 4 East 130, at p. 136.
(6) (1864) 4 B. & S. 680, at pp. 707, 713-714.
(7) 61 Can. S.C.R. 450.

For the foregoing reasons I would uphold the judgment of the Appellate Division dismissing the vendor's claim for the special, extraordinary and discretionary equitable remedy of specific performance. (*Re Scott and Alvarez's Contract* (1)).

Appeal allowed with costs.

Solicitor for the appellant: *D. H. Elton.*
Solicitors for the respondent: *Jamieson, Russell & Co.*