BOWN V. WEST

(1846), 1 U.C. Jur. 639

Upper Canada Court of Chancery, Jameson V.-C., 13 January 1846

(Appealed to Upper Canada Executive Council, infra p. 30)

A bill being filed to rescind a contract for the purchase of an Indian right to certain lands on the Grand River, and to set aside the assignment executed in pursuance thereof, on the grounds of fraudulent misrepresentations, or to obtain compensation for an alleged deficiency in the quantity of the lands: Held, that as the whole estate, both legal and equitable, was in the Crown, it was not a case in which the Court would interfere, even if the plaintiff had established the case stated in the bill by evidence; and that no fraud having been proved, the bill ought to be dismissed with costs.

The bill filed in this cause stated that in the early part of the month of September, 1843, the defendant, *"pretending to have, and representing himself as having a leasehold or "some valuable and transferable estate or interest of and in the "parcel or tract of land and premises hereinafter particularly de- "scribed, and as being entitled to the possession, and as being in "fact in possession thereof, agreed with the plaintiff to sell him, "and the plaintiff agreed to purchase for the sum of 2651., all the "said estate, right, title, interest and possession of him, the said "defendant, of and in the said parcel or tract of land and pre- "mises; which said parcel or tract of land and premises consists "of about 134 acres, whereof about 70 acres are cleared and im- "proved, in the vicinity of the town of Brantford,"* being, &c., and described, &c.

That the treaty for the sale was carried on by plaintiff's agent. That plaintiff had paid 112*l*. 10*s*., and given a note of hand for the balance of the purchase money agreed upon. That after execution of assignment and, the delivery of the title deeds, &c., to plaintiff; and a notice to the tenant of defendant to pay rents to plaintiff, plaintiff's agent had gone to the premises with the defendant, and found them to agree in quantity and extent of improvements with the representations made by defendant, and was put in possession of a tavern on the premises, and believed such partial possession was given as and for possession of the whole parcel of 134 acres; and it was not intiff, for the first time, learned from the person in possession of the tavern, that the defendant had not been entitled to the possession of the whole tract of 134, *but had a valuable and assignable interest* in 30 acres only, or thereabouts , and had in fact been in possession of that quantity only--which information he found upon enquiry to be correct, and thereupon saw defendant, and proposed to rescind the contract, &c, which defendant refused to accede to: but it was afterwards verbally agreed between plaintiff and defendant, that plaintiff should retain possession of the tavern and thirty acres of land, of which he was in possession, with liberty for defendant at any time within two years to repay the sum of 112*l*. 10*s*., and repossess himself of lands, &c.; and that defendant should forthwith deliver up the note given by the plaintiff for the balance of the purchase money; but if the defendant should fail to repay the said sum of 112*l*. 10*s*. within the period of two years, that then the plaintiff should retain possession of the said premises without further consideration beyond that sum.

That defendant had refused to give up the note without a bond from plaintiff for the due

performance of his part of the agreement; which plaintiff went and had prepared accordingly; but on his return with the bond, he found the defendant had gone away, and from that time further negotiation ceased. That the sum of 112*l*. 10*s*., paid by plaintiff, on account of purchase money, was more than the portion of the premises which plaintiff had been put in possession of was worth.--*To be continued.*

The bill charged that the defendant had commenced an action against plaintiff for recovery of the amount of note--that defendant, at the time of entering into the agreement, knew that he had not any valuable or assignable interest in the whole tract of 134 acres, and that he had not in fact, nor was he entitled to have the possession of a greater portion thereof than 30 acres, or thereabouts; and that the defendant had induced plaintiff to enter into the agreement by misrepresentation or suppression of the truth and matters within his knowledge.

And plaintiff submitted that he was entitled at his election to have the contract wholly rescinded, or carried into effect, so far as defendant could do so, with abatement of purchase-money, &c.; and prayed that the contract might be rescinded, and defendant ordered to deliver up the promissory note of plaintiff, and pay all costs, &c., incurred by plaintiff in respect of the contract and the action at law. Or, if plaintiff should elect to have the contract carried into effect, so far as defendant could execute it, then a reference to the master to enquire what compensation plaintiff is entitled to, in respect of the differences in quantity between the parcel of land comprised in the agreement and the portion thereof in which plaintiff had actually acquired an interest from defendant; and if it should appear upon such enquiry that the defendant had received more than the value of the interest and possession so acquired by the plaintiff, then that defendant might be ordered to repay such excess, the plaintiff offering to pay such further sum, in addition to the sum of 112*l*. 10*s*., as might appear just. That the defendant might be ordered to deliver up the note of hand given by plaintiff, and for injunction, &c.

The defendant by his answer set forth, that abut the year 1843, one W. Parker was in possession of 15 or 20 acres cleared and improved land near Brantford, (part of Indian tract), with a house thereon. And about that time defendant entered into treaty with Parker for the purchase of his right to the said dwelling-house and parcel of land, who produced to defendant in course of such treaty, as evidence of his title, certain instruments in writing, signed by one Isaac Duncombe, one of the Six Nations Indians, resident on the Grand River tract, whereby Duncombe conveyed, or assumed to convey to Parker, for a valuable consideration, all his (Duncombe's) *right, interest* and *possession* to the said dwelling-house and the land thereto adjoining, containing 143 acres, more or less, as Surveyed by Lewis Burwell, Esquire, D.P.S., including the improved land adjoining the house, and was the same as mentioned in the bill.

That defendant then understood and believed that by taking an assignment from Parker to himself of the said instruments of conveyance, and entering into actual possession of the said dwelling-house and the clear land adjoining, (he the defendant) would acquire a right to keep possession not only of the dwelling-house and cleared land, but also a right to enter on the remainder of the said tract of 134 acres, and take actual possession thereof, by clearing and fencing it. And under such impression, and being satisfied with Parker's title, defendant purchased his interest in the premises for 125*l*., and took an assignment in writing of the said instruments of conveyance, and was put into possession of the dwelling-house and cleared land adjoining thereto, and so remained in possession until the sale to the agent of plaintiff; and while so in possession, defendant cleared and improved about 15 or 20 Acres more of the said

surveyed tract of 134 acres, and fenced the whole clearing of about 35 acres, and built there- on a tavern and out-houses.

That in September, plaintiff and Robert R. Bown (the agent of plaintiff), waited on defendant, and offered him $1000 for the premises aforesaid; which offer was declined by defendant; but afterwards on the same day he left word at residence of said R.R. Bown, that he would take $1100. Next day, R. R. Bown, stated to defendant that he would give $1060 in cash, if defendant would give possession on the morrow . That defendant had taken the writings, including the conveyance from Duncombe to Parker and the assignment thereof to defendant, and exhibited them to R.R. Bown, who examined them and expressed himself satisfied there- with. That during the treaty for sale, and before the completion thereof, defendant had observed to R.R. Bown, that he supposed he (Bown) was aware of the nature of Indian lands; and that Bown had replied he knew all about it as well as he (defendant) did, and that defendant had stated that he would put him in possession of that part of the premises that was under fence, and the buildings; but for the woods, meaning all the rest of the said tract, Bown must look out for himself, who expressed himself fully content on that behalf to rely on the said papers of defendant. That thereupon an assignment was drawn up and executed, and part of purchase-money paid, and note of hand given for the balance.

The next day defendant had gone to the premises with R. R. Bown, and took him over the tavern, out-houses and cleared land thereto adjoining, and gave him possession thereof, being under fence, and containing about 35 acres, and then told the said R.R.Bown that what was under defendant's fence, meaning the said 35 acres, he gave him possession of, but as to the rest of the said tract of 134 acres he (Bown) must look out for himself, and that defendant knew nothing of it: and that Bown replied, that he knew that.

That before leaving the premises defendant had stated to plaintiff that he had sold the place, meaning the premises, too cheap; and offered Bown to return the note of hand, if he would give defendant four years to repay the amount of cash (112*l*. 10*s*.) paid to defendant, and defendant would allow him (Bown) to hold the premises in security; to which Bown replied that he never made "children's bar- gains." Defendant denied having agreed to rescind the contract as in the bill stated.

That about two months after the completion of the sale, R.R. Bown had stated to defendant the he (Bown) could not hold as much land as the lease specified; to which defendant replied, that he could not help it, that he had sold it for better or worse, as it was, and that he had not sold any land, but only the right defendant had under the papers; that R.R.Bown then expressed his readiness to accept the offer formerly made by defendant to rescind the bargain, &c., but defendant declined to accede thereto, as Bown had not accepted such offer at the time, &c. That the premises in the actual possession of plaintiff, were worth the full amount agreed upon (265*l*). The answer also denied all knowledge by defendant of the badness of his title, and all misrepresentation, &c.

R.R. Bown, and some of the members of his family who had been examined as witnesses on the part of the plaintiff, stated in their depositions, that at the time of making the bargain respecting the sale of the premises in question, defendant represented that he had about 130 acres, about 70 of which were cleared, and had produced a map of the premises in question.

R.R.Bown also stated, in his evidence, that before the note became due, he had accompanied defendant to the land to take possession in the name of the plaintiff, and walked around the boundaries with defendant: that he then thought part of the land on which defendant took him, was not his, and for the first time he found he had been deceived by defendant; that part of the land on which he had been taken, was improved land, and ascertained afterwards that it was not the property of the defendant; that defendant, in offering to sell, did not pretend to sell the fee-simple, but merely the right he had under his deeds to Indian lands; *that he never had any conversation with Mr.Burwell respecting the purchase from defendant;* that when defendant put him in possession of the premises, *he did not give him possession of 30 acres alone, informing him that he must look out for himself for the rest, nor did the witness reply that he knew it*; that defendant, at the time, professed to give possession of land which was found to belong to another person; that defendant never made the proposition for rescinding the bargain and repaying the purchase-money in four years, the only proposition to that effect was made by witness, and that he had never made use of the expression, "*he never made children's bargains;"* and that after a document (in evidence) for the purpose of rescinding the contract had been prepared by Mr. Lewis Burwell, according to the mutual agreement of all parties, defendant refused to sign it.

Other witnesses proved that defendant had stated that he had sold his right or interest in 134 acres to plaintiff; that defendant had never lived on the premises; that upon being told that plaintiff had said that defendant had only 30 acres, defendant answered that he had only sold his right to the land in question; that defendant had said that there was not the quantity of land he had proposed to sell.

On the part of the defendant, Mr. Lewis Burwell stated he had surveyed the premises in question, and the value of them, if held in fee-simple, would be above 500*l.* ; that defendant, so far as he knew, had never been in possession of the whole tract, but only of 33 or 34 acres--the remainder, for the last 20 or 30 years, had been in possession of one Tuttle and his representatives. Tuttle's possession was held under a lease from a number of the chiefs and others of the Six Nations Indians. That about the time of the execution of the assignment to plaintiff, R.R.Bown had gone to witness's office, and employed him to draw up a paper between the parties to this suit--could not recollect whether such paper was prepared at the time--but R.R. Bown had gone to wit- ness that he was about to purchase in the name of his son (the plaintiff), the possession of the defendant of the said premises; and that witness then told him that defendant could not sell more than 33 or 34 acres, and that the remainder was in the possession of Mrs. Patterson, formerly Mrs. Tuttle, and one Johnson; that witness told him that defendant had had a trial before the magistrates with Mrs. Patterson and her husband, for an alleged trespass in respect of the premises, in which defendant had failed, the former having established their possession; and stated to him that Wm. Parker had been deceived in purchasing originally from the Indians, Duncan, and advised Bown to take an assignment of what defendant had in his possession; to which Bown answered, that the defendant had made him acquainted with the circumstances, as stated to him by wit- ness, and that he was only purchasing the quantity that he was in the actual possession of, but would take an assignment of his interest in all that Parker's lease covered, and perhaps he might be able to get it; and that he considered the part he was purchasing and getting possession of, was worth the money he was paying for it, as it lay so near the town of Brantford. That on a subsequent occasion, about the 18th or 19th September, 1843 , R.R.Bown stated to witness that he wished an alteration in the contract with defendant, and employed witness to draw up an instrument for that purpose; and that he had subsequently, at the request of the

plaintiff, made a survey of the lands in question, the object of the plaintiff being to ascertain the precise quantity of land the defendant had put him in possession of, and desired the plan also to embrace the lines contained in lease from Davis or Duncan (the Indian), to Parker.

Abram Bradley.--Owns the farm adjoining the premises in question. In selling Indian lands, a quit claim deed of the right of the seller is usually given--such seller being in possession of the land, and entitled, or supposed to be entitled, to a right of pre-emption,--leases were often made to embrace more land than was under improvement, *but not more than the seller claimed.* Defendant was in actual possession of about 34 acres, with buildings, &c. Witness had conveyed to defendant, and informed him at the time of doing so, that the person who had conveyed to witness, he (witness) had been told, had conveyed only 34 acres. Witness knew nothing of the possession or claim of any one to any other part of the 134 acres. R.R.Bown had been engaged in purchasing Indian properties--had bought three. Witness, when he held the deeds of the premises in question, had told R.R.Bown that he owned them and the farm adjoining, and that wit- ness had 80 acres in the farm, and 34 in the premise in question--had pointed out to R.R. Bown the line fence between the premises in question, and those of one Paterson. Annual value of the 34 acres and buildings, about 36*l*.

At the hearing of the cause, the counsel for the plaintiff submitted, there could be no doubt that the bill asserts that the defendant professed to sell the right of possession of one hundred and thirty-four acres, or thereabouts, and there is no principle clearer than that the plaintiff had a right to that possession; no matter if it were only a possession at will, still for that possession he had bargained with the defendant, and was entitled to obtain it. Had the contract been concerning the sale of a fee simple, the authorities are clear to the point, that if the vendor is aware of any material defect in is title, and conceals such defect from the vendee, the latter will not be held to the sale; and a party purchasing only the possession, would also be entitled to come to this court to rescind a contract concerning the sale of such possession, on the ground of such fraudulent concealment; in the present case there can be no doubt of such concealment, for the defendant himself has not even denied, but shews clearly, that he concealed the defective nature of his title. The only question for enquiry being, whether or not the defendant was aware of such defect in his title at the time of entering into the con- tract, on this point the evidence given by Mr. Burdwell is clear to show, not only that defendant never had had possession of what he professed to sell the plaintiff, but also, that in certain proceedings which had been had against West, the right of Patterson to certain portions of the premises had been established.--Citing Besant v. Richards, Tam. 509; Winch v. Winchester, 1 V. & B. 375; Partridge v. Usborn, 5 Russel, 195; Edwards v. McClay, Cooper, 308; Dobell v. Stevens, 3 B. & C. 625; Hill v. Bulkley, 17 Ves. 394; Bulmanno v. Lumley, 1 V. & B. 224; Milligan v. Cooke, 16 Ves. 1.

For the defendant, it was contended that the bill did not state, nor did the evidence shew with any precision, in what respect the title of the defendant was defective.

The statement in the bill was too vague and general, it should have set forth the custom of the Indians to sell certain portions of the lands set apart for their use, which the crown, of its mere grace and favour, had been in the habit of recognizing, and granting a patent of the lands so sold to parties holding the conveyances from the Indians.

There is nothing shown, either in the bill, answer, or de- positions, upon which the court can found any decree.

The bill also calls upon the court to make abatement, on the ground, that the plaintiff has not possession of the whole of the premises in question; but it does not appear that the plaintiff here has not a right to apply to the government for a grant of the whole tract originally conveyed by Duncombe, and the court will not presume that such right would not be recognized by the crown. The instrument (a) Set out in the judgment of the court. which the defendant had executed, itself shows that the possession was not what was agreed to be sold, but it was intended merely to assign the leases under which the defendant claimed, and all interest that he held in the lands under such leases.

The statements made by the bill are not supported by the evidence; there is no absence of the land mentioned and de- scribed in the several assignments, the title is admitted by the bill to be good for thirty-four acres and there is nothing stated in the bill to shew that any other person had a better right than the defendant to the remainder, nor is any person shown to be in possession. The plaintiff and his agents both resided near the premises, and must have been aware if any person had been in possession of the rest of the tract, and he also knew that defendant had a claim to the whole; that claim he had purchased, and such as it was, it had been assigned to him. There could not, therefore, have been any misrepresentation, made by the defendant, and if any had been made, it was clear that the plaintiff could not have been prejudiced thereby, for the evidence shows that it had been previously mentioned to the agent of plaintiff.--Citing E. India Compy. v. Henchman, 1 Ves. Jr. 287; Cressett v. Mutton, 1 Ves. Jr. 499; Serjeant Maynard's case, 1 Sug. 555, 8, 9, 62 & 3 (9th Ed.); Early v. Garrett, 4 M. & R. 687; Thomas v. Powell, 2 Cox., 394; Cann v. Cann, 3 Sim. 447; Bree v. Holbeck, Doug. 654, Free. 2; But. note 1, Co. Litt. 34, a; Cator v. Lord Bolingbroke, 1 B.C.C. 301, 2 ib. 282.

Blake and Brough, for plaintiff.

Sullivan and Esten, for defendant.

Tuesday, 13th January, 1846.

THE VICE CHANCELLOR.--This is a bill to rescind a contract for sale; or to decree compensation by an abatement of price proportioned to the difference in the quantity of land comprised in the agreement, and the portion in which the plaintiff considers that he has actually acquired an interest.

Among some conflicting evidence which, according to my view of the law, it is not important to sift or decide upon, the main facts of the case I take to be as follows:

On the 10th of March, 1834, a sale is made from Isaac Davids alias Isaac Duncan, an Indian of the Mohawk tribe, in consideration of 50*l*. to one William Parker, of "all and "singular certain improvements and buildings lying and "being situate on a certain parcel or tract of land which is "composed of part of the Indian territory on the Grand "River, bounded as follows, &c., containing one hundred and "thirty-four acres;" with the form of a covenant, "that he "the said Davids is the true, lawful and rightful owner of "all and singular the said improvements and buildings, ac- "cording to the custom of the said Six Nations Indians in "apportioning and settling the lands amongst each other."

After various assignments of the right, whatever it may be, to these improvements, it vests in the defendant Alder Baker West. What improvements existed at the time of the sale from the Indian ,

does not appear: but at the commencement of the suit, somewhere about 34 acres had been cleared and fenced, partly by the defendant, and a tavern built upon the land on the road between Brantford and Hamilton.

The next important document, dated 11th September, 1843, is as follows: "Know all men by these presents, that I, "Alder Baker West, of the town of Brantford, &c., blacksmith, "for and in consideration of the sum of £265 of &c., to me in "hand paid by John Young Bown of the same place, gentle- "man, the receipt &c. hath granted, sold, assigned and set "over to him the [said] John Young Bown, his heirs and "assigns, all and singular my right, title, claim, possession "and demand whatsoever, in and to the annexed assignment "or quit claim from John McDonald to [*the said*] Abram "Bradley, and from the said Abram Bradely to the said Alder "Baker West, and to have and to hold the same unto the said "John Young Bown, his heirs and assigns, &c."

Together with this, all the previous transfers, each assigning the rights supposed to attach to its predecessor, were handed over to the plaintiff. Part of the purchase money was paid, and a note given for the remainder.

After somewhat hastily, as it might seem, concluding this transaction, the plaintiff examined the land described in the instrument from the Indian, and had reason to believe that the amount which he states that the defendant represented himself to be in possession of, was not near so much as he had stated. Indeed it is not pretended that the portion fenced and cultivated in the visible possession of the defendant or his tenant, much exceeded thirty-four acres; the rest was in a great measure forest land undivided by enclosures. He discovered, it appears, that there was some conflicting claim to a portion at least of the en- closed lands, originating in a similar source form which sprung that of the defendant. As to what these claims are, or to what extent, or how indicated on the land, we have no evidence whatever, except form one of the defendant's witnesses, Mr.Lewis Burwell, who states that the portion not cleared and possessed by the defendant, has long been in the possession of Stephen Tuttle and his representatives. He says, "Tuttle's possession was, I believe , under a lease "from a number of the chiefs and others of the Six Nations "Indians." What Mr. Burwell meant by possession, does not appear. On the small plan drawn by him, and referred to in the evidence for the plaintiff, the name "Tuttle" is inscribed on land adjoining, but forming no portion of this irregular block of 134 acres.

On this the plaintiff, after some unsuccessful negotiations with the defendant, files his bill for relief in this court.

If the bill itself were alone to be viewed as the statement of an alleged case of equity, it would present this state of facts only: That one party sells, and the other purchases the right to the possession of Indian, that is of Crown Lands, such right of possession never having been our of the Crown, but specially appropriated to the use of the Six Nations Indians, under the proclamation of Governor Haldimand. The nature of this tenure by the Indians, and their incapacity either collectively or individually to alienate or confer title to any portions of such lands, might have been sufficiently plain, even though the point had not been raised in Doe Jackson v. Wilkes, (a) Easter Term, 5 Wm. IV. and the whole matter maturely and lucidly considered and decided on by the Court of King's Bench.

There is one fact, however, which if it had been stated in the bill, and the present averment in the

bill proved, would have shewn that the plaintiff might have had a sort of possible contingent title to the land in question, supposing the defendant's rights had been such as he contracted to sell; which is, that in settling the lands of the Indians, surrendered by them to the Crown for sale and settlement for their express benefit--using the word surrender merely as meaning that their express concurrence is in such case given, and that the alienations by the Crown are not against the faith of Governor Haldimand's proclamation--where in many cases, (putting the Brant Leases out of the question), individual Indians had assumed separate apportionments of these lands, and made improvements, and then sold them, the purchasers have, where the transactions bore evidence of bona fides, been generally preferred in some cases I believe even to the extent of having free grants; the Indians themselves in these cases having by their custom sanctioned such alienations, being compelled to do equity. This practice, however, is the exception; the general rule having been to consider sales of lands or exclusive local rights by Individual Indians, as a fraud upon the whole body, for whose use is was set apart.

This custom or equitable practice in the Crown Land Department, however, has not been alluded to in the bill; neither is it attempted to be shewn what is "the custom of "the Six Nations Indians, in apportioning and settling their "lands among each other." as referred to in the instrument which forms the ground-work of this claim; and it is only on knowledge dehors the pleadings, that we can understand any thing like an approach to a right to the land in ques- tion. But for the benefit of the plaintiff I choose to allude to the fact as within my own knowledge instead of binding him down to the uncertainty of his bill. On the face of it there appears simply a case of parties calling upon the court to deal with a contract affecting property, on both hands confessedly belonging to a third party, and assumed by them without that party's consent or concurrence--merely self- constituted rights--the real owner a stranger to the transaction. Had it been competent to a party joining in such an agreement, to say that his own act was not a contract, and that the bargain in which he was concerned was one which could not be supported in equity, the bill would have been demurrable; but as he cannot demur, it is for the court to do it, if it sees clearly that it ought not to entertain jurisdiction in the matter. If this be a contract such as a court of equity can deal with it at all, it must be reciprocal, one which it can enforce as well as rescind. But how could the court enforce such a contract as this, and (supposing the alleged counter claims or rights of other lessees out of the question) decree that the defendant shall put the plaintiff in *possession* of the excess of 134 acres of Crown lands beyond the 34 of which he is, as was the defendant before him, in the visible possession and occupation? I cannot comprehend how any possession of the unsurveyed lands of the Crown can be had even by implication, except by the actual clearing, fencing or cultivation of a particular spot, which to strangers would afford a presumption of the right of possession. But the court can never decree possession to be given of property which each party has admitted and shewn belonged to neither.

It does not appear clear that, beyond the 34 acres in the visible possession of the defendant, any part of the 134 acres (the *improvements* upon which, not the *land,* were assigned by the Indians Davids or Duncan,) has ever been enclosed or cultivated; or that there is any tangible or manifest possession in the person or persons alleged by not proved to have claims thereto, inconsistent with those assigned by the defendant to the plaintiff, nor is the nature of these suggested claims set forth: nor, assuming that they were such as the Crown would entertain, whether they were anterior, or in any respect paramount to those of the defendant at the time of the assignment. The objection is taken chiefly from Mr. Burwell's evidence that the defendant was not in possession of the whole, but that one Tuttle or his representatives had certain anomalous claims or rights

such as those relied on by the defendant: but as already remarked, no evidence is produced that there was any visible possession known to the defendant, and such as might have put the purchaser even of such a claim as this upon his guard, had he taken common precaution.

Giving then the benefit to the plaintiff of having stated in his bill the custom of the Indians and practice of the Crown in its land-granting department, by which peculiar favour has been in certain cases shown to purchasers of Indian rights by free grants or privilege of pre-emption, it does not appear that the plaintiff ever tested the goodness of the claim he had purchased, by applying for the recognition of it by the Crown, and for a grant of land upon any conditions;--for however weak his title is, there is no proof that any but the Crown has a better. He knew that he was purchasing that which could only be valuable on the contingency of the Crown confirming it, and yet he himself obstructs the happening of that contingency. It may turn out to be that the assignment from Davis or Duncan of his improvements, however small they may have been com- pared with the tract of land they profess to carry with them, may be favourably viewed by the Crown, and the claims stated to be in conflict with it not so; in which case it will probably be a very beneficial purchase, for its value if confirmed by grant, is stated to be very much beyond what was to be paid for the right such as it exists.

In the absence of direct decisions, and referring to first principles and a supposed analogy to English decisions on questions of Tenant right, I did entertain jurisdiction in the case of Jeffrey v. Boulton, in dealing with equities arising between parties in relation to claims to property, the absolute right to which was still in the Crown. But that it was a very different case from the present. There the possession had for a long period been by its own act out of the crown, first under a lease, and then under a con- tract for sale and payment accepted; a contract it is true not enforceable, for it is a legal impossibility that the Crown can violate its contract. It appeared to me that under such a partial or incohate alienation of Crown lands, there might arise tangible results between parties interested in such lands that would be recognized by the Court or Chancery, and enforced *inter se*, though the patent had not yet issued from the Crown. The Court of Appeal however thought otherwise: and probably by their decision have prevented the court from straying beyond the legal land- marks to grasp at moral subtleties. In the present case there is no recognized possession out of the Crown, except the occupation of the Indians, who cannot alienate; and as no equitable title can be discussed, except as between the equitable and at least *apparent* legal owner; and as in this case the legal owner is the Queen, I cannot settle claims affecting her lands between parties who are in a manner co-trespassers, or make any decree upon this bill.

The second alternative of the prayer of course falls to the ground. If the contract cannot be enforced or rescinded in the whole, it cannot be enforced or rescinded in part.

Notwithstanding my unwillingness to assume jurisdiction in this case, in relation to the subject matter of the suit, I should have no hesitation in so doing as regards costs, had those charges been well substantiated which impute fraud and misrepresentation to the defendant; as to the nature of the property, or rather the chance of acquiring property, sold, I do not see clear evidence of such fraud. He is charged with selling "a transferable interest," whereas he had not in fact any such interest. Such interest as he had, was apparent upon the face of the papers, and was clearly understood by the plaintiff; even setting aside that part of Mr. Burwell's testimony which shews that he cautioned him with regard to the defendant's questionable claim to any part of the 134 acres, except the portion which he had in his manifest possession and occupation. That this

claim had been treated as a transferable interest is clear; for it had not only passed through several hands, but had actually been sold at sheriff's sale under an execution. The instrument of sale itself already quoted, drawn by the plaintiff, only professes to convey the defendant's right, not to the land, but to *the several quit-claims,* on the evidence of which there rested the hope of acquiring the land. He must be intended therefore, were there not direct evidence of the fact, thoroughly to have understood the nature of the right he was purchasing. The defendant is a man in a humble sphere of life, and there appears no reason to doubt, believed in the efficacy of the evidences of the title he was assigning: the plaintiff, a man in a superior grade, from his intelligence perfectly aware of the nature of the right he was purchasing properly called, "an Indian title,"--his agent and relative residing near the spot, with abundant facilities before entering into the bargain of ascertaining facts of which complaint is now made of concealment and misrepresentation,--buying too at a low price when com- pared to the value of the land itself, from which may be inferred, that the purchase was not unencumbered with difficulties. There is no reason to doubt that the defend- ant thought he was selling him all he professed to do, and if it be found that obstacles exist to the plaintiff's urging his claim upon the Crown, I do not see that they arose or were concealed by the fraud of the defendant. This ques- tion has relation only to costs. If fraud were to be inferred, I could only have dismissed the cause generally--but as it is, I think the defendant has been erroneously brought before the court, and must be released with his costs.

Bill dismissed with costs.