Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the South Melbourne and Albert Park Land Investment Company, Limited, v. *Peel, from the Supreme Court of Victoria; delivered 29th July* 1891.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD HANNEN.
SIR RICHARD COUCH.

[*Delivered by Lord Macnaghten.*]

The dispute in this case arose out of a contract for the sale of a piece of land containing some 15 acres, situate at Yarraville near Melbourne, which in May 1888 belonged to the National Bank of Australasia. The Bank were then owners in fee; they seem to have been at one time mortgagees.

The property in question lies between Whitehall Street on the west and the river Yarra (formerly called Hobson's river) on the east. With the addition of a rectangular piece of land to complete the corner at the south-west it forms a rectangular parallelogram, the depth to the river being about twice as great as the width. The piece of land at the corner, which contains three acres, now belongs to Cuming, Smith, & Co., who have chemical works there. It was sold to their predecessors in title in 1870 by the predecessors in title of the Bank.

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On the 19th of May 1888 the Bank agreed to sell the property, which was lying unoccupied and unproductive, to one Singleton for 23,000*l*. On the 19th of July 1888 Singleton agreed to sell it to the Respondent for 30,000*l*. On the 28th of July the Respondent agreed to sell it for 33,000*l*. to the Appellants, a Limited Company, formed in May 1888, with a nominal capital of 20,000*l*., of which 12,000*l*. have been subscribed and paid up.

Subject to the variations consequent upon the difference in price, the agreement of the 28th of July was identical in its terms with that of the 19th of July. The agreement of the 19th of May is not in evidence, but it also seems to have been precisely in the same form.

In each case part of the purchase money was payable in cash in two sums, one on signing the agreement, the other shortly afterwards; the balance was secured by promissory notes payable on the 17th of May in each of the years 1889, 1890, and 1891. The interest was also secured by promissory notes. The purchase was to be completed on the last of the promissory notes becoming due.

The agreement of the 28th of July 1888 is headed as follows :—" Contract and Conditions of " Sale.—Conditions of Sale of Freehold Land "—then follows a description of the property, with this qualification appended—" but as to the road, " 33 feet wide, running from Whitehall Street to " the pier, subject to the rights of any parties " created by indenture of conveyance, registered " No. 262, Book 202."

The conveyance so referred to in the agreement of the 28th of July 1888 was the conveyance to the predecessors in title of Cuming, Smith, & Co. It was dated the 4th of July 1870, and described the piece of land conveyed to them as bounded " on the north by a road or

way 33 feet wide." It purported to grant a right of way over "the said road or way 33 feet
* *Sic.* "*and pier, leading from Whitehall Street afore-
"said to Hobson's River." Then there is a reference to a plan in the margin of the deed as showing the road over which the right of way was granted. The plan shows a road running straight from Whitehall Street to the river. On the road at the end next the river is written the word "Pier." In point of fact no pier was ever constructed at the end of the road as delineated in the plan, nor was the road apparently ever continued to the water's edge. A few feet from the water's edge it turned to the south, and was continued for a short distance to the front of some stone buildings which were formerly used as a bone mill, and there it stopped. The only pier ever constructed on the property was a pier built in front of the bone mill. This pier is still in existence. It is connected with the road in front of the bone mill by a tramway running under cover between two covered sheds.

At the date of the agreement of the 28th of July 1888 the property had not been brought under the Transfer of Land Statute. Shortly after the agreement the Appellants required, as they were entitled to do, a clear certificate of title to be produced for their inspection. It appears that the Bank had already taken steps for the purpose of bringing the property under the Transfer of Land Statute. An application for that purpose had been made on the 13th of August 1888.

The first promissory note for principal was dated to fall due on the 17th of May 1889. The Appellants had no money in the Bank to meet the note. There had been a serious fall in the land market, and the bargain was then a very disadvantageous one for them. So, on the 16th of May 1889, the Appellants issued a writ

claiming rescision of the contract, on the ground that the Respondent had not produced a certificate of title within a reasonable time, and that the Appellants were, under the circumstances, entitled to be relieved from further performance of the contract, and to the return of the money and promissory notes paid and given thereunder.

The statement of claim was delivered on the 6th of June 1889. On the 6th of July the Respondent delivered his defence with a counter claim, asking in effect for specific performance.

In the meantime the proceedings in the Office of Titles were continued. There was a good deal of delay, owing, it is said, to the complicated state of the title. The Examiner made his report upon the title on the 12th of May 1889. Then the Registrar of Titles, having before him Singleton's contract and the plan of the property, which showed the pier and the road 33 feet wide as delineated on the plan on the conveyance of 1870, but no means of communication between that road and the pier, required the plan to be amended, so as to show the width and position of the road which led to the pier. This was done by colouring yellow a strip of land about 33 feet wide, and containing in all 13 perches, lying between the southern side of the landward end of the pier and the straight road delineated in the plan. The land so coloured yellow included the diversion of the road to the front of the bone mill, and the whole frontage to the river between the end of the straight road and the pier.

The certificate of title was completed on the 11th of July 1889. It certified that the Bank, subject to the incumbrances notified thereunder, was the proprietor of an estate in fee simple in the property in question, described as "all "those pieces of land delineated and coloured

" red blue and yellow on the map in the " margin."

The straight road was coloured blue. The rest of the property not coloured yellow was coloured red.

The incumbrances referred to were described as follows :—

" As to all the lands.—The rights of Henry " Plant Singleton under a contract of the 19th " of May 1888, whereby the Bank agreed to sell " and Singleton agreed to purchase the lands " coloured red and yellow on plan in margin, with " a right of carriage way over the land coloured " blue, subject as to the land coloured yellow to " the easements affecting the same.

" As to the land coloured blue.—The easement " granted by conveyance registered Book 202, " numbered 262."

This certificate was produced to the Appellants. In their next pleading, which was a reply to the Respondent's rejoinder, they stated that as to the certificate of title they would object, as follows :—

" (*b*) As to the land coloured yellow on the " said plan, the same was purchased without " being subject to any easement whatever.

" (*c*) Prior to the sale to the Plaintiff repre- " sentations were made to its Directors by the " Defendant and his agents that the land pur- " chased from the Defendant abutted throughout " the whole of the length of its eastern boundary " on the River Yarra; and such representation " induced the purchase; and the Plaintiff alleges, " as the Defendant well knew, that the fee " simple in possession in the land coloured " yellow in the said plan was indispensable to or " necessary for the intended user by the Plaintiff " of the said purchased lands."

The Respondent replied that there were no easements over the land coloured yellow, and in

the alternative, that if there were any such easements the Appellants had bought with notice.

On these pleadings the parties went to trial. The action was tried on the 14th, 15th, and 16th of October 1889, before His Honour Mr. Justice Hodges. By the judgment pronounced on the 16th of October 1889 it was ordered that the Plaintiffs should be at liberty to amend their statement of claim by adding an allegation that the Defendant had not at the time he made the contract, and had not at the then present time either by himself or by the person from whom he purchased, a title to the piece of land coloured yellow in the certificate of title, and that he had no present right to procure a title to such piece of land, and such amendment being made it was ordered that the said contract be rescinded with consequential directions. The Plaintiffs were ordered to pay the costs up to the said amendment, and subject thereto judgment was entered for them on the claim and counter claim without costs.

In giving his reasons Hodges, J., stated the findings of fact on which he based his judgment.

(1.) The learned Judge found that before the agreement for sale the Directors of the Company and the Defendant's agents went down to look at the land, that the land was pointed out by the Defendant's agents, and that the land so pointed out was shown on the plan of the property before it was altered by colouring yellow the frontage to the river between the end of the straight road and the pier.

It is not very easy to see what is the exact meaning of this finding; nor is the finding altogether satisfactory having regard to the oral evidence. If the witnesses for the Defendant are to be believed it was pointed out to the Directors of the Company that Cuming, Smith,

& Co. used the pier, and obtained access to it by the diverted road leading to the front of the bone mill. If the Managing Director of the Plaintiffs is to be believed, he "knew" when he executed the contract "there was only one pier, and the "only way of getting to it was over the land "coloured yellow."

(2.) The learned Judge found that the property which the Plaintiffs agreed to buy, and the Defendant agreed to sell, was the property as described on the plan before it was altered.

Unfortunately the learned Judge does not explain what he understood to be the effect of the reference in the heading of the contract of the 28th July 1888 to the road and "the pier," and to the conveyance of 1870. In their Lordships' opinion that reference very fairly directs the attention of the purchasers to the origin of the right of way over the property, and to the actual user of that right by Cuming, Smith, & Co.

(3.) The learned Judge found, as a fact, that Cuming, Smith, & Co., and the persons who occupied their place, had a right to go not only down the straight road, but also over the land coloured yellow, and to use the pier.

This finding, in the sense attached to it by the learned Judge, that is, that the land coloured yellow was subject to a perpetual easement, does not appear to be supported by the evidence. The only evidence on the point was given by Mr. Campbell, who seems to be a partner in Cuming, Smith, & Co., and one of the proprietors of the chemical works. He was called as a witness by the Defendant. In cross-examination he said, "We still use the road in front of the stone building"—that is the bone mill,—"and claim the right to use it; we claim it under the title deed." Then the conveyance of the 4th of July 1870 was put in, and the witness continued, "The vendors to our predecessors did

" not put the pier at the end of the road. They " put it where it is to suit their own purpose." Having regard to this evidence and to what appears on the face of the deed of July 1870, it seems to their Lordships that the proper conclusion would have been that, in consequence of some arrangement between the parties, Cuming, Smith, & Co. used the pier in front of the bone mill and the road to it in substitution for part of the straight road and the pier referred to in the deed of July 1870, but still in exercise of the rights granted by that deed. If this be the true view, it follows that it would have been competent for either of the parties to the arrangement to put an end to it at any time. In that event both parties would have been remitted to their original rights. Whether the arrangement could have been determined simply at the will of the owner of the servient tenement, or whether it would have been obligatory upon him before terminating the arrangement to construct a pier at the end of the straight road or to perform any other condition, is a question which upon the evidence before them their Lordships have no means of solving.

(4.) Then the learned Judge found that neither the Defendant nor the persons from whom he claimed had from July 1888, or at any time since then, a title to the land coloured yellow except subject to the easement which he had described, and he found as a fact that the existence of an easement over the land coloured yellow materially affected the value of the whole of the piece of land to the south of the 33 feet road and deprived that portion of its main value.

Under these circumstances the learned Judge held that he could not enforce the contract, even with compensation, and consequently although he was of opinion that the case made by the Plaintiffs on their pleadings had failed com-

pletely, he allowed them to amend, and pronounced the judgment which has been already stated.

From this judgment the Respondent appealed. The judgment on appeal was delivered by Higinbotham, C. J., on the 13th of March 1890. "Having regard to the time and the circum-"stances of the objection taken to the De-"fendant's title, and the radical amendment of "the statement of claim allowed, and properly "allowed, to the Plaintiff Company at the last "moment," the Court was of opinion "that the "Defendant should have been permitted, upon "terms and within a time limited, an oppor-"tunity of removing, if he could, the objection "taken to title."

Accordingly a reference was directed as to the title to the land coloured yellow, and the Defendant was to be at liberty to produce before the Chief Clerk, within two months from the date of the order but not later, such evidence as he might think fit in support of his title to the said land.

The result was that on the 21st of March, just eight days after the date of the order, a memorandum was entered on the certificate of title to the effect that the encumbrance affecting the land coloured yellow had been removed, and on the 30th of April following the Chief Clerk certified that the Defendant could make a good title to the land coloured yellow.

Their Lordships are of opinion that the order of the Full Court to which the Appellants object was perfectly right—so manifestly fair and just under the circumstances that no argument is required to support it.

On behalf of the Appellants authorities were cited in which it has been held that if a person contracts to sell land, having at the time no title, the purchaser on discovering the fact may rescind

the contract, and the vendor is not to be allowed an opportunity of curing the defect. It was urged that the same rule ought to apply to the case of an easement substantially affecting the value of the property contracted to be sold; and it was argued that the purchaser's right to rescission could not be intercepted by an action for specific performance. It appears to their Lordships that the authorities cited and the arguments founded upon them have no application to the facts of the present case. It was indeed argued that this Board was bound by the findings of fact pronounced by the learned Judge, though in their Lordships' opinion unsupported by evidence in the Record, apparently on the ground that this Board ought to have inferred from the brevity of the learned Judge's notes that there was other and better evidence left unrecorded. That is an inference which their Lordships decline to draw. Then it was contended that, inasmuch as the Respondent had not asked for a reference before the Judge of First Instance, it was not competent for a Court of Appeal to direct one. Their Lordships are unable to give any weight to this objection.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

The Appellants will pay the costs of this appeal.