

*Judgment of the Lords of the Judicial Committee  
of the Privy Council on the Appeal of George  
A. Pearson v. Thomas R. O'Brien and  
another, from the Court of Appeal for  
Manitoba ; delivered the 12th November 1912.*

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Present at the Hearing :

THE LORD CHANCELLOR.

EARL OF HALSBURY.

LORD MACNAGHTEN.

LORD ATKINSON.

LORD SHAW.

[DELIVERED BY LORD ATKINSON.]

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In the month of May 1910 the Respondent Thomas Douglas was, or purported to be, owner of a house and premises in Colony Street in the city of Winnipeg, described on a certain plan as lot 26, and S.  $\frac{1}{2}$  S. of lots 23, 25, and 85, St. James.

The primary, and in one event, the only question for decision in this case is whether the Respondent Douglas, in the latter end of this month of May, entered into with the Appellant a concluded and binding agreement to sell this house. This is a question not of law but of fact, and in the present instance resolves itself into the question whether the Appellant accepted definitely a certain option of purchase, which may conveniently be called an offer, to sell this house, contained in a letter, bearing date the 24th of May 1910, sent to him by the Respondent Douglas. The letter runs thus :—

“ Moose Jaw, 24th May 1910.

“ I hereby agree to accept \$9,750 for my house on Colony St. 287, on the following terms :—

“ \$2,000 cash by 26th May.

“The difference in existing mortgage and what can be raised in excess of it, to be paid to me as soon as new mortgage can be completed.

“The balance of my equity to be paid in three equal annual instalments, with interest at six per cent. per annum.

“This agreement to last until 26th May 1910, and is given to Mr. Geo. A. Pearson.

“It is understood that there is no commission or brokerage fee.

“T. DOUGLAS, M.D.”

No place having been named in this letter at which the purchase money was to be paid, the law implies that the residence of the vendor is the place of payment, and the offer is therefore to be read as if the words “to be paid at Moose Jaw” were written into it after the figures \$9,750. This is the construction the Respondent insists the offer bears. It by no means follows, however, that an unskilled person, a person not a lawyer, would understand the letter in this sense. It is plain that by the words “the balance of my equity to be paid,” it is meant that the balance of the purchase money, *i.e.*, \$7,750 was to be paid. Otherwise these words would be meaningless, since an equitable interest in either land or money cannot be *paid*, in whatever other manner it may be dealt with. On this necessary assumption the offer meant that this sum of \$7,750 should be paid in three equal annual instalments, so that until May 1913 the Appellant's debt to the Respondent would not be entirely discharged. This, however, was subject to one contingency, namely this, that the whole, or a portion, of this balance of \$7,750, might be raised by mortgage of the property sold, and on the mortgage being effected, whenever that event should take place, paid to the vendor. Any acceptance of the offer which ignored this latter contingency, and treated the balance as payable in three annual

instalments and in no other way, would not be an acceptance of the offer actually made, but a variation of it, differing from it in a material particular. Again, the offer leaves it entirely vague as to terms upon which the mortgage was to be effected, the rate of interest to be paid, the time during which the loan was to remain outstanding, the person by whom the mortgage was to be effected, and the precise nature of the interest to be pledged. The stipulation, which is however express and clear, is that as large a sum, in excess of the existing incumbrances, as could be raised should be raised, and when raised be paid to the vendor, Douglas. That being the ambiguous nature of this offer, an unskilled person is not, except upon strong proof, to be disbelieved when he states that he put upon it a construction differing from that which to the mind of a lawyer would be its true construction. The Appellant by his letter dated the 25th of May 1910, purported to accept, and no doubt intended to accept this offer in the sense in which he understood it.

The letter runs as follows :--

" Dr. T. Douglas, Esq.,  
" Moose Jaw, Sask.

" Dear Sir, 25th May 1910.  
" (*Re* Lot 26 and S.  $\frac{1}{2}$ 's of 23 and 25, 85, St. James.

" Plan 127.)

" Enclosed you will find cheque payable to your order  
" at par in Moose Jaw for the \$2,000, being the first payment  
" on the above property and agreements of sale on same  
" already signed and witnessed by me in accordance with  
" my option which you gave me yesterday.

" Now I trust you will kindly sign the agreements and  
" return one to me at your earliest convenience, also forward  
" me the keys of the house and stable, or if they are here in  
" Winnipeg kindly give me an order to get them. I suppose  
" you should also send me an order to collect the rent on the  
" stable, too, as the tenant will probably demand this before  
" he will pay me.

"Trusting you will be well pleased with my business  
 " with you, I remain,

"Yours very truly,

"(Sgd.) GEO. A. PEARSON."

In this letter he states that the agreement of sale already signed and enclosed was "in accordance with the option" which the Respondent had given him the day before. That statement may be untrue, and the proof of its untruth may be furnished by the cheque also enclosed in the letter, but if it be true then it appears to their Lordships that it must be taken as establishing that the meaning which the option or offer bore to the mind of the writer was one which authorized and justified the framing of the agreement as he had framed it. Now the first important provision introduced by him into this agreement is in direct conflict with the construction which according to the law the option, or offer, bears as to the place of payment. It runs thus: "At and for the price and sum of  
 " nine thousand seven hundred and fifty dollars  
 " in gold or its equivalent to be paid to the  
 " vendor at Winnipeg as follows: Two thousand  
 " dollars upon the execution of this agreement,  
 " and the balance of seven thousand seven hundred and fifty dollars in three equal annual  
 " payments to become due 26th May 1911,  
 " 1912 and 1913, with interest thereon at the  
 " rate of 6 per cent. per annum." This provision cannot be treated as a mere formal mode of carrying out the common understanding of two parties. The only indication given by the vendor of his intention as to the place where the money was to be paid was furnished by his silence on the point, coupled with the address his letter bears as his place of residence. If the statement in the Appellant's letter be true, then the executed agreement shows he never thought that he was required to pay any

portion of the purchase at Moose Jaw, and never consented or agreed to do so. Thus the vendor, speaking through his letter, would appear to say to the purchaser in effect "You must pay at Moose Jaw," and the purchaser, speaking through his letter in reply, and through the agreement enclosed in it, would appear to say to the vendor, "I'll pay at Winnipeg." On these documents, if they stood alone, it would, therefore, be obvious that there was no consensus of the minds of the two contracting parties on this point. But these documents cannot be allowed to stand alone. They must be taken together with the cheque and considered in combination, effect being given, so far as possible, to the contents of each of the four.

Whatever might be the proper construction of the offer in the Appellant's mind as to the place of payment, he was not, and could not be under any misapprehension as to the date fixed for the payment of the instalment of \$2,000, or as to the time within which he should accept the offer if he accepted it at all.

The letter of the 24th of May expressly provides that this sum of \$2,000 cash is to be paid by May the 26th, and also provides that the offer or option was only to last till the 26th of May 1910. It was therefore absolutely necessary for him to pay 2,000 dollars on 26th of May if he meant to avail himself of the option at all.

The payment of this sum however merely proves that the purchaser desired and intended to accept the offer. It proves nothing as to the sense in which he understood it. The cheque he sent is peculiar in form. It runs as follows :—

" No. 1068. Winnipeg, Man., 25th May 1910.

" Geo. A. Pearson & Co.

" Realty Brokers, Loans and Leases.

" Pay to the Order of Thomas Douglas, M.D., \$2,000.00,

" Two thousand dollars.

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" Being first payment in full on lot 26 and S.  $\frac{1}{2}$ 's  
 " of lots 23, 25 in 85 St. James, plan 127.  
 " Price \$9,750. Terms, \$2,000 cash balance  
 " of equity in 1, 2 and 3 years at 6 $\frac{1}{2}$ % annually.  
 " To the  
 " Union Bank of Canada. (Sgd.) G. A. Pearson.  
 " Endorsements on face:  
 " Accepted 25th May 1910, Union Bank of Canada,  
 " Winnipeg.  
 Moose Jaw Branch, please pay at par W. W. S. p. Acct.  
 " Endorsements on back:  
 " T. Douglas.  
 " Union Bank of Canada, Winuipeg, 2nd June 1910,  
 " R. to Z.  
 " Receiving teller.  
 " Bank of Montreal, 30th May 1910, Moose Jaw, Sask.  
 " Pay to the order of any Bank or Banker, Union  
 " Bank of Canada, Moose, Jaw, Sask, Jno. G. Vico,  
 " Manager."

It evidently purports to set out the terms of the offer. It omits, however, all reference to the mortgage, and represents on its face that the balance of the purchase money, 7,750 dollars, was to be paid in three annual payments, and in no other way. It has been urged that this omission is of no importance since the mortgage could only be effected by the consent of both parties, and that by consent they might make any supplementary provision they pleased for the payment of the balance of the purchase money. Even assuming, however, that this is the true meaning of the provision as to raising a further sum by mortgage, the omission of all reference to the mortgage in the cheque is, in their Lordships' view, significant, and of some importance, when one has to consider whether the contents of the cheque are sufficient to show that the Appellant could not have thought, or believed that the signed agreement which he transmitted was in conformity with the option. The cheque though drawn upon the Winnipeg Branch of the Union Bank of Canada, is, by an endorsement on its face signed with the initials of the accountant,

W. W. S., made payable at Moose Jaw, through the Moose Jaw Branch of that Bank, and to that extent it is in conflict with the provisions of the signed agreement. The cheque accompanied the draft agreement. It was given in payment of the first instalment only. It was not paid apparently at Moose Jaw until the 30th of May, and on the 27th Messrs. Knowles and Hare returned to the Appellant the agreement signed by him together with another agreement, a new agreement, containing a new clause by which the Appellant was made to undertake to pay off the existing mortgage, and indemnify the vendor against all claims in respect of it, and providing that the whole price 9,750 dollars should be paid at Moose Jaw, 2,000 dollars on the execution of the agreement and 7,750 dollars in three equal annual payments to become due on May 26 1911, 1912, and 1913 respectively. In this letter of these gentlemen there is a statement that the new agreement forwarded was, save as to this indemnity clause, exactly the same as the agreement the Appellant had prepared and forwarded. This was, of course, inaccurate. They were not the same. One clause was struck out from the Appellant's agreement, and the place of payment changed; but nothing turns upon this representation. The Appellant was not misled by it. He detected the alterations, and on the 30th of May 1910, wrote to Messrs. Knowles and Hare a letter containing the passage following:—

“ Knowles and Hare,

“ Barristers, &c.,

“ Moose Jaw, Sask.

“ Dear Sirs,

30th May 1910.

“ Enclosed you will find the Agreement of Sale which  
 “ you executed, signed and witnessed by me, it is quite  
 “ satisfactory to me to have the extra clause inserted, but  
 “ you changed the place of payment from Winnipeg to  
 “ Moose Jaw, and as the property is here, it is only proper  
 “ to have the payments payable at par in Winnipeg, which  
 “ you will see that I have changed.”

The Appellant here states what he meant to do rather than what he actually did. He did not strike out or alter the clause making the purchase money payable at Moose Jaw, but after the words "to be paid to the vendor at "Moose Jaw, Saskatchewan, as follows" contained in the agreement he interpolated the words "but at par in Winnipeg," thus making the agreement, as he thought conformable to what was, in his view, the proper meaning of the offer. To this letter of the 30th of May he received a reply dated the 2nd of June 1910 containing the following passage:—

"We have your letter of the 30th ultimo returning "one copy of the contract in this matter executed by "yourself. We notice that you have changed it so that "as it now stands, it is not the contract executed by our "client Dr. Douglas. We refer to the change of the place "of payment from Moose Jaw to Winnipeg. This is not "satisfactory to our client and instructions are given us to "say that he withdraws from the agreement and will not "now conclude it upon the present basis. He is not averse, "however, to entering into a new contract. As to this he "will see you in Winnipeg sometime during the next week "and will confer with you upon the matter."

This latter paragraph may, when read in connection with the Respondent's negotiation with his co-Respondent O'Brien, explain why the vendor, while repudiating the contract of sale, retained the portion of the purchase money he had received. It is therefore clear from the correspondence that if the Respondent's offer of the 24th of May 1910 was not by the Appellant's letter of the following day accepted definitely, and without any misunderstanding of its meaning and effect, there was no final and conclusive acceptance of it at all. As has been already pointed out the Appellant states in this letter in effect that the option was of such a nature as to accord with the agreement he had signed, and he accepted it in that sense. It now appears this is not the sense in



which the Respondent understood the offer. If the Appellant's statement be true the parties were never *ad idem*. The question is what is the correct inference of fact to be drawn from the contents of the cheque taken in conjunction with the letter which covered it, and with the agreement which accompanied it. Is the true inference that the Appellant did not think that the meaning of the offer was that the purchase money should be paid at Winnipeg, or is it that he wrote the truth when he, in effect, stated that he thought it provided that the money should be paid there.

Different minds may differ as to the weight and significance to be attributed to this cheque as a piece of evidence, and may, therefore, draw different conclusions from the consideration of its terms in connection with those of the other documents referred to; but, on the whole, their Lordships are unable to come to the conclusion that the Appellant's statement in his letter of the 25th of May was untrue, or that there was any definite and conclusive acceptance by him of the Respondent's offer in the sense in which he, the Appellant, understood it. This disposes of the case. All that occurred after that date is immaterial. It could not estop the Respondent from relying on his solicitors' letter of the 2nd of June 1910, or amount to a waiver of the objection they made to the Appellant's alteration of the draft agreement. Their Lordships are therefore of opinion that the Appeal must be dismissed, and they will humbly advise His Majesty accordingly. The Appellant must pay to the Respondents their separate costs of the Appeal. It is right to point out that the Appellant introduced into the agreement prepared by, or for him, a clause giving definite shape to the provision touching the future mortgage contained in the offer. It was to the

effect that the vendor was to raise a mortgage of 5,000 dollars, or whatever amount a loan company would advance on said property. In this he appears to have correctly interpreted the meaning and intention of the vendor, as the clause was copied into the agreement prepared by the vendor's solicitors.

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In the Privy Council.

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GEORGE A. PEARSON

*o.*

THOMAS R. O'BRIEN AND ANOTHER.

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DELIVERED BY LORD ATKINSON.

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