THOMAS J. WALLACE AND MARIA KEARNEY (DEFENDANTS) } APPELLANTS;

AND

ALEXANDER G. HESSLEIN AND LEWIS J. HESSLEIN (PLAINTIFFS) ..... } RESPONDENTS.

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*May 3.

*Nov. 21.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Vendor and purchaser—Specific performance—Laches—Waiver.

The purchaser under contract for sale of land is not entitled to a decree for specific performance by the vendor unless he has been prompt in the performance of the obligations devolving upon him and always ready to carry out the contract on his part within a reasonable time even though time was not of its essence ; nor when he has declared his inability to perform his share of the contract.

The purchaser waives any objection to the title of the vendor if he takes possession of the property and exercises acts of ownership by making repairs and improvements.

APPEAL from the decision of the Supreme Court of Nova Scotia (1) affirming the judgment at the trial in favour of the plaintiffs.

In April, 1894, an agreement was entered into between the plaintiffs and the defendant Wallace in the following terms:

"It is hereby agreed that Thomas J. Wallace shall and does hereby purchase, for the sum of two thousand five hundred dollars, and Alexander Hesslein, as executor of his late father, agrees to sell, and does hereby sell, to said Thomas J. Wallace, that property near the lunatic asylum, Dartmouth, formerly owned by Lewis P. Fairbanks, including the water lot in front, if also owned by Mr. Hesslein, for the sum of

PRESENT :—Sir Henry Strong, C.J., and Taschereau, Gwynne, King and Girouard JJ.

(1) 29 N. S. Rep. 424.

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two thousand five hundred dollars, with five hundred dollars off. The sale to be completed and property conveyed on or before the expiration of three months, interest to be paid from 1st May till completion of sale and purchase by said Thomas J. Wallace. A good title to be given in fee simple, and the said two thousand dollars also to be paid, or partly paid, and mortgage for balance to the satisfaction of Mr. Hesslein."

Wallace went at once into possession of the property described in said agreement, and afterwards leased it to the other defendant. He failed, however, to pay the purchase money within the specified time, and in 1895 the plaintiffs, having previously requested him to carry out his contract or deliver back the property, notified him that the agreement was at an end and demanded immediate possession. This demand not being complied with they took an action for possession in which the defendants set up want of title in plaintiffs and also counter-claimed for specific performance and damages.

On the trial the plaintiffs had judgment for possession of the property with damages for mesne profits which was affirmed by the full court, from whose judgment this appeal was taken.

Wallace, appellant in person, and *Sinclair* for the appellant Kearney. The plaintiffs were not entitled to rescind the contract. Fry on Specific Performance, pp. 485, 1060; *Stone* v. *Smith* (1); *Freeth* v. *Burr* (2); *The Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (3); and they had no title to the water lot or to the right of way. Notice was given that plaintiffs intended to claim the benefit of a condition making time of the essence of the contract. *Crawford* v. *Toogood* (4). See

(1) 35 Ch. D. 188.
(2) L. R. 9 C. P. 208.
(3) 9 App. Cas. 434:
(4) 13 Ch. D. 153.

also cases cited in Fry on Specific Performance (3 ed.), sec. 1094.

Borden Q.C. for the respondents. The possession of plaintiffs alone is sufficient to establish their title. *Cunard* v. *Irvine* (1); *Smith* v. *McKenzie* (2); *Freeman* v. *Allen* (3). The defendants were tenants at will to plaintiffs and cannot dispute their title. A purchaser let into possession under contract is tenant at will to vendor. *Doe d. Hiatt* v. *Miller* (4); *Doe d. Tomes* v. *Chamberlaine* (5); Cole on Ejectment, pp. 58, 449, 450; and such purchaser cannot dispute his vendor's title. *Doe d. Milburn* v. *Edgar* (6); *Doe d. Bord* v. *Burton* (7); Cole on Ejectment, p. 213, 215.

Assuming however that plaintiffs were in default the purchaser is not entitled to possession unless he is in a position to enforce specific performance against the vendor. See *Walsh* v. *Lonsdale* (8); *Swain* v. *Ayres* (9); and from defendants' counter-claim, which claims specific performance, it will be seen that the defendant Wallace was not in a position to enforce specific performance. He is not entitled to such relief by reason of his delay and non-performance of the contract on his part. Fry on Specific Performance (3 ed.) secs. 922, 1100.

We also rely upon *Young* v. *Halahan* (10); *Harris* v. *Robinson* (11), per C. J. at page 397; and *Denison* v. *Fuller* (12) as to waiver of defects of title by the taking of frivolous objections.

THE CHIEF JUSTICE.—The action of the respondents for the recovery of the land was clearly maintainable

(1) James 31.
(2) James 228.
(3) 2 Old. 293.
(4) 5 C. & P. 595.
(5) 5 M. & W. 14.
(6) 2 Bing, N. C. 498.
(7) 16 Q. B. 807.
(8) 21 Ch. D. 9.
(9) 20 Q. B. D. 585; 21 Q. B. D. 289.
(10) 9 Ir. Rep. Eq. 70.
(11) 21 Can. S. C. R. 390.
(12) 10 Gr. 498.

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so far as the legal title was concerned. The only question is: Were the appellants in a position to entitle them to the specific performance which they seek by their counter claim?

I am decidedly of opinion that they were not entitled to any such relief. In order to entitle a party to a contract to the aid of a court in carrying it into specific execution he must show himself to have been prompt in the performance of such of the obligations of the contract as it fell to him to perform, and always ready to carry out the contract within a reasonable time, even though time might not have been of the essence of the agreement. It appears from the evidence that the appellants do not bring themselves within these conditions. No doubt it was incumbent on the vendors to have made out a good title; the contract is express on this head; but on the other hand it does not appear that the appellants ever called for the production of the title. It was well observed by the learned counsel for the respondents that in this country sales of lands are not in practice carried out in the formal way in which such contracts are completed in England. It is usual for the vendee to examine the title in the registry office and to rest satisfied with that, and in many cases to complete the purchase without professional assistance. I do not say that the vendor is not bound to make out a title, even in the case of an open contract, and of course he is bound to do so where, as in the present case, he has expressly undertaken to do so. The comparatively small value of real estate would make it out of the question to carry out sales of land here according to the elaborate and costly practice which prevails in England. Mr. Wallace, so far as appears from the evidence of the vendor and his solicitor, Mr. Ritchie, never asked for an abstract or raised any question as

to the title except as to the sale under the foreclosure decree in the case of *Murdoch* v. *Fairbanks*.

The objection on this head seems to have been sufficiently answered by the statute referred to in the judgment of the full court delivered by the Chief Justice.

To the other objections, three in number namely: (1) that the vendor could not make a title to the water-lot; (2) that a strip of land had been expropriated or sold to the Crown for the railway; (3) that the wife of Mr. Fairbanks was entitled to dower, sufficient answers were given at the trial. First, it was show that Mr. Wallace when he entered into the agreement had full knowledge of the notorious fact that the railway had for years run across the land and therefore that the Crown must have acquired title to the strip so occupied either by purchase or expropriation. Next it appeared that Mr. Hesslein never owned the water-lot which had not been included in the mortgage by Fairbanks to Gray. Thirdly, Mrs. Fairbanks was not entitled to dower, her title to legal dower having been absolutely barred by the mortgage deed of her husband to Gray, and a right to equitable dower not having been conferred in Nova Scotia until the statute of 1884, and then only in cases where the husband died beneficially entitled to the land, and it having been shown here that the equity of redemption was sold at sheriff's sale and a conveyance to the purchaser executed by the sheriff in 1875.

Further, Mr. Fairbanks shows that there was generally a good title to the property under the statute of limitations, his father, uncle, himself, the vendors and their father, having been in successive uninterrupted possession since 1836.

The widow of the respondents' father, who was entitled under his will to an annuity charged upon the land, executed a deed releasing that charge.

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There was moreover a clear waiver of all objections to title by Mr. Wallace, who took possession of the property and exercised acts of ownership by making repairs and improvements to the amount of $285, according to his own evidence, thus exercising acts of ownership sufficient to show a waiver.

Further, Mr. Wallace's whole course shows that he did not intend to raise any question of title. On the day fixed for completion he went to the vendor's place of business, taking with him a blank mortgage deed for the purpose of at once carrying out the purchase. Then he never made any objections to the title to Mr. Ritchie save as before mentioned.

There is, however, a distinct ground for refusing specific performance. We must of course give credit to Mr. Ritchie's evidence, and he most distinctly proves that Mr. Wallace declared his inability to perform his agreement. He had, it seems, previously applied to Mr. Ritchie for an extension of time for the payment of the purchase money, but any agreement on this head had fallen through. Then at an interview Mr. Ritchie says, "Mr. Wallace gave me to understand that it was inconvenient to pay the purchase money." Further, on what appears to have reference to a subsequent occasion, Mr. Ritchie says: "Mr. Wallace said he could not carry out his contract. He never said he could pay part. The only thing he could pay was interest and taxes, about $100. He could not complete his part of the agreement."

The respondents then, finding that their purchaser who had taken poseession of their property and had kept possession for some eighteen months without paying anything by way of rent or interest, was unable by his own admission, declared to their solicitor, to carry out the contract by paying the purchase money, had no alternative but to bring the action

which they brought to recover the land; and in the face of the declaration of Mr. Wallace that he could not pay, and after his application for an extension of time had been refused, it would be to set at naught all the principles regulating the exercise of the jurisdiction by way of specific performance, which require a purchaser to be ready, prompt and eager to complete, if the court were now to interfere and to interpose still further delay in the resumption by the respondents of the enjoyment of their property and to decree the execution of a contract which the purchaser had declared his inability to perform.

The judgment is perfectly right in giving the respondents the damages to which under one or other of the denominations of mesne profits, of damages for use and occupation, or on an equitable account against a purchaser in possession, the respondents were clearly entitled.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellants: *J. T. Wallace.*

Solicitor for the respondents: *Joseph A. Chisholm.*