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*Feb. 21, 22.
*Mar. 22.

JOHN MILLARD (DEFENDANT).....APPELLANT;

AND

JOHN L. DARROW (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract for sale—Action for price—Counterclaim—Specific performance—Costs.

In an action for the price of land under an agreement for sale, or in the alternative for possession, defendant filed a counterclaim for specific performance and paid into court the amount of the purchase money and interest demanding therewith a deed with covenants of warranty of title. Plaintiff proceeded with his action and recovered judgment at the trial for the amount claimed and costs, including costs on the counterclaim, the decree directing him to give the deed demanded by the defendant as soon as the costs were paid. The verdict was affirmed by the court *en banc*.

Held, that as the defendant had succeeded on his counterclaim he should not have been ordered to pay the costs before receiving his deed and the decree was varied by a direction that he was entitled to his deed at once with costs of appeal to the court below *en banc*, and to the Supreme Court of Canada against plaintiff. Parties to pay their own costs in court of first instance.

Held, per Gwynne J.—Defendant should have all costs subsequent to the payment into court.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) affirming the verdict at the trial in favour of the plaintiff.

The only question to be decided on this appeal was whether or not the judgment in the court below against defendant for costs subsequent to the payment of money into court should stand. The facts are

* PRESENT:—Taschereau, Gwynne, Sedgewick, King and Girouard JJ.

(1) 33 N. S. Rep. 334.

sufficiently stated in the above head-note and are fully set out in the judgment of Mr. Justice Gwynne.

Russell K.C. and *Wade K.C.* for the appellant.

J. A. McLean K.C. for the respondent.

TASCHEREAU J.—I concur with Mr. Justice King in allowing the appeal.

GWYNNE J.—This case appears to me to be very simple when divested of all superfluity and prolixity of pleading. The plaintiff in his statement of claim alleges three alternative causes of action. In the first he alleges in paragraph numbered

2. That on or about the 10th day of September, 1896, it was agreed by and between the the plaintiff and the defendant by an agreement in writing signed by the defendant on that date that the plaintiff should sell to the defendant, and the defendant should purchase from the plaintiff a wharf property land and premises in the first paragraph of the statement of claim mentioned at the price of $450, and that defendant should pay to the plaintiff $100 per year for the first three years, and $150 the fourth year with five per cent interest until said price or purchase money should be paid, and that the said plaintiff should accept payment in full any time within the said dates.

3. That the defendant went into possession of the said wharf property under said agreement and in part performance thereof on or about said 10th September, 1896

4. That plaintiff was at all times material to this action ready and willing to complete said sale and purchase and carry out said agreement on being paid said purchase money.

5. That the said defendant has not paid to the plaintiff the said price or purchase money or any part

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thereof although the periods at which the first and second instalments of $100 each year were due and payable, have long since elapsed.

6. That the defendant since he went into possession of the said property has continued and remains in possession thereof though the periods at which the first two instalments of purchase money were payable has long since elapsed and that the defendant has wrongfully refused to carry out said agreement on his part, &c.

In paragraph 8 the plaintiff in the alternative makes a claim similar to the above save that the agreement is alleged to be partly in writing and partly oral.

In paragraphs 10 and 11 the plaintiff alleges alternatively a cause of action in trespass, namely, that the defendant on divers days and times between the 10th of September, 1896, and 10th September, 1897, wrongfully entered the plaintiff's said property and tore down and removed part of a building of the plaintiff thereon and dug away and removed gravel and soil of the plaintiff from the said property to the injury thereof, and the plaintiff claimed the relief following:

1. Possession of the said property and $211 mesne profits.

2. $211.90 for damages for breach of the agreement as set out in paragraph 2.

3. Or in the alternative $211.90 amount of unpaid instalments of purchase money and interest as damages for breach of the agreement as set out in paragraph 8, of the statement of claim.

4. Alternatively the plaintiff claims $200 damages under paragraphs 10 and 11 in the statement of claim, that is to say for the alleged trespass in those paragraphs pleaded.

Now here it may be observed that as to this trespass claim there is no pretence whatever for the insertion

of that claim, for it is admitted in the statement of claim that the defendant's entry upon the premises was in part performance of and under the provisions of the agreement for sale and purchase which the plaintiff claims to be still in full force and effect; and therefore the main claim asserted in the plaintiff's action is to recover the two first instalments thereby made payable and which the plaintiff alleges that although overdue the defendant wrongfully refuses to pay. We may then deal with the cause of action as set out in the 2nd, 3rd, 4th, 5th and 6th paragraphs of the statement as really containing the whole substantial cause of action alleged in the statement of claim. The whole of the contention between the parties which has given occasion for this action consists in this that the defendant insists that it was part of the agreement between him and the plaintiff that the latter should sign an agreement for the execution of a deed upon payment of the purchase money. Immediately upon entering under the agreement he proceeded to build a house on the premises; while doing so some question arose as to whether some person or persons had or not a right of way over the premises. The defendant upon mentioning this to plaintiff saying also that he was negotiating for sale of the premises and therefore was anxious about the agreement, and that it should covenant for a deed with absolute covenants for title when the purchase money should be paid; that the plaintiff peremptorily refused to give the agreement or a deed with covenants for title except against his own acts; that this refusal of the plaintiff was the sole cause of the defendant not having paid the two instalments sued for in the statement of claim.

Upon the statement of claim having been served on the defendant he seems to have been well advised not

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to rest his case upon his right to have the agreement which he had insisted upon but which the plaintiff refused but while defending the action upon that ground to become himself a plaintiff by filing a counter-claim against the plaintiff in the action for specific performance; accordingly the defendant tendered to the plaintiff the full amount of principal and interest, namely $510.54, and demanded the execution of a deed with covenants for title, and thereupon pleas to the action were filed on the defendant's behalf in which the defendant admitted all the allegations contained in paragraph 2 of the statement of claim except that the said agreement was in writing, and he denied that the said agreement was in writing, and he said that the agreement was a verbal one and that at the time of the making thereof and as part of the said agreement the plaintiff agreed to execute and deliver to the defendant a written agreement of sale containing the terms set forth in said paragraph, and he said that he was in possession of said premises under said verbal agreement up to the present time; and he denied that the plaintiff was at all or at any time ready to complete and carry out the said agreement by executing a proper conveyance on being paid the purchase money, and he denied that he, the defendant, had ever refused to carry out the said agreement. He pleaded similar pleas to the cause of action as stated in the 8th paragraph of the statement of claim. He then counter-claimed for specific performance of the agreement upon the terms as set out in the plaintiff's statement of claim, and he averred that he had tendered the plaintiff the sum of $510.54 being the full amount of the said purchase money and all interest, and had demanded a deed of conveyance of said property which the plaintiff refused to give, and he alleged that he brought that amount into court to be paid to plaintiff upon the

said contract upon delivery of such deed to the defendant; he made then a claim for damages for loss from inability to resell and otherwise, but no evidence at the trial was entered into upon this head.

Now upon the filing and service of that counterclaim it is apparent that nothing remained to be decided in the plaintiff's action but the question of costs up to that time; the fact of the defendant not having availed himself of the privilege of the last clause of the agreement as set out in the plaintiff's statement of claim until after action brought did not deprive the defendant of his right to demand specific performance of the contract by the execution of a proper deed upon tender of the full purchase money and interest, and the question of the liability for costs up to that time depended upon the question whether the plaintiff's or defendant's contention should prevail as to the right which the defendant had claimed to have a written agreement of sale signed by the plaintiff; instead however of submitting to the defendant's demand for specific performance as contained in the counterclaim the plaintiff in a long replication averred among other things that defendant had waived all right to any written or other agreement than that set forth in the statement of claim, and he *denied that he had ever agreed to execute and deliver to the plaintiff any agreement to give a good and sufficient deed of the said property with or without covenants or warranties as soon as the defendant had paid the price or at all*, and in a much longer pleading in answer to the counterclaim containing much unnecessary and irrelevant matter, the plaintiff

denies that the defendant ever tendered to him $510.54 or any sum, and he does not admit that such sum is the amount of said purchase money with full interest thereon, and he denies that the defendant demanded delivery of a deed of conveyance of said property or

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of any property which plaintiff refused to deliver or otherwise, or that plaintiff refused to deliver said or any deed.

At the trial the plaintiff was examined on his own behalf, and his evidence establishes the defendant's contention. He produced his title deeds to show his title to the property. He produced a paper signed with the defendant's initials which the defendant had written as a memorandum of the agreement which is in the terms set out in the plaintiff's statement of claim, and he explains how it came into his possession. He testified that he agreed to sell the property on the 10th of September, 1896, for $450, $100 each year and the last year $150, with 5 per cent interest, and he to have the right to pay the whole. He produced the paper written by the defendant and signed with his initials, which, he said, was written when the bargain was made. He said that under this the defendant went into possession. He said that he left the bargain not fully complete—that the defendant wrote the paper which he produced in his store, and told witness to carry the paper to Mr. Mack, solicitor, to get agreement written for sale of his property.

One, he said, would have a copy signed by the other, or however Mr. Mack would do it.

He adds:

I asked him, that is Mr. Mack, to make the agreement; before I got the agreement made defendant took possession of the property; I was willing and knew defendant took possession and built a new building and filled in wharf; I saw him at work and made no objection; I after that knew defendant sold the property to Firth; I met the defendant in the street, and he asked me if the agreement was ready; I said I would go and see. This was some months after the sale; I left orders for the agreement to be made as soon as possible.

He then admitted the tender of the $510.54 accompanied with a letter dated 18th May, 1899, addressed by the defendant to the plaintiff as follows:

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DEAR SIR,—I herewith tender you $510.54 and demand a delivery of the deed with the usual covenants of the wharf property, &c., sold by you to me on September 10th, 1896, free from all incumbrances—

and he adds:

the money was offered me and he wanted me to sign the papers; I said I would not take it,

that is the money tendered.

Now without referring to the evidence of the defendant, or to any other evidence, the plaintiff here admits the whole of the defendant's counterclaim for specific performance, and he establishes defendant's contention that it was agreed that the agreement verbally made should be reduced to writing and signed by the plaintiff. Upon this evidence the defendant was entitled to judgment upon his counterclaim, and judgment thereon was pronounced in his favour subject to this qualification that before he should receive from the plaintiff a good valid conveyance of the property with usual covenants and warranty he should pay to the plaintiff (in addition to the sum of $510.54 paid into the court which the prothonotary was ordered to pay out to the plaintiff) the costs of the action and of the counterclaim, thus making a new contract for the parties. The defendant's appeal from this judgment must prevail upon the filing of the counterclaim for specific performance. The plaintiff had no just ground for resisting that claim. Upon tender of the full amount of $510.54 he had no claim for any other sum than for such costs as he might have been entitled to as costs of his action. Had he submitted, as he ought to have done to the counterclaim, it would have been competent for the court to have adjudicated, and it, no doubt, would have adjudicated in respect of these costs. All the subsequent costs have, quite unnecessarily, been incurred by the plaintiff resisting the counterclaim by pleading upon the record the matters alleged therein, and which he is

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compelled to disprove himself when coming forward as a witness in his own behalf. Had the plaintiff submitted on the counterclaim to execute whatever deed the court should declare the defendant entitled to, and had he asked at the same time for his costs of action up to that time he would have, no doubt, I think, succeeded, and all the subsequent costs of this action and counterclaim wherein such a small amount pecuniarily is at stake would have been avoided. The plaintiff has already received under the judgment of the court the $510.54 paid into court to abide the judgment of the court on the counterclaim so that in the terms of the contract the defendant was entitled to his deed without his right thereto being qualified by payment of a further sum by way of costs or otherwise. He has succeeded substantially upon his counterclaim and was of right entitled to his costs thereof. The appeal should therefore be allowed with costs and the judgment of the court below varied by ordering the plaintiff to execute forthwith upon demand a good and sufficient conveyance in fee simple of the property in the pleadings mentioned to the defendant with the usual comments for good title, and by ordering the plaintiff to pay to the defendant when taxed all the costs of the counterclaim less the amount of the plaintiff's costs of the action up to the filing of the counterclaim, which costs are allowed to the plaintiff and to be set off against and deducted from the defendant's costs on the counterclaim. This is the utmost relief which, I think, can be granted to the plaintiff in this protracted litigation for the costs of which subsequent to the counterclaim, unnecessarily incurred, I think the plaintiff to be responsible.

SEDGWICK J.—I concur in the judgment of Mr. Justice King.

KING J.—The appellant having succeeded in the courts of Nova Scotia upon his counterclaim for specific performance of the agreement sued on by the respondent, it was error to have made it a condition of his right to the specific performance claimed and allowed, that he should pay the costs of the unsuccessful party. And this is not merely a question of costs, but of substantive right.

The decree should be varied so as that the appellant should be entitled to his deed at once, the full amount of purchase money with interest being in the custody and under the control of the court.

As to the costs in court below of the appellant in respect of the counterclaim, they might be denied to the appellant, *i.e.* there might be no costs allowed one way or the other. This out of deference to the opinion of the courts below.

Accordingly I would be favourable to this variation of the decree—that the appellant be given the immediate right to receive a deed from respondent, but without costs in the court of first instance, and that respondent be entitled (as directed by the court below) to the costs of his original action.

That the appellant will have his costs of appeal in this court and his costs of appeal to the Supreme Court of Nova Scotia.

GIROUARD J.—I concur in the above judgment of Mr. Justice King.

Appeal allowed with costs.

Solicitors for the appellant: *Wade & Paton.*

Solicitor for the respondent: *James A. McLean.*