MICHAEL B. WRAYTON (PLAINTIFF)...APPELLANT;

AND

JOHN NAYLOR AND EDWARD GUY STAYNER (DEFENDANTS)... } RESPONDENTS.

1894
*Nov. 6.
1895
*Jan. 15.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land—Sale by auction—Agreement as to title—Breach of—Determination of contract.

W. bought property at auction signing on purchase a memo. by which he agreed to pay 10 per cent of the price down and the balance on delivery of the deed. The auctioneer's receipt for the 10 per cent so paid stated that the sale was on the understanding that a good title in fee simple clear of all encumbrances up to the first of the ensuing month was to be given to W. otherwise his deposit to be returned. After the date so specifiedW., not having been tendered a deed which he would accept, caused the vendor to be notified that he considered the sale off and demanded repayment of his deposit, in reply to which the vendor wrote that all the auctioneer had been instructed to sell was an equity of redemption in the property; that W. was aware that there was a mortgage on it and had made arrangements to assume it; that a deed of the equity of redemption had been tendered to W.; and that he was required to complete his purchase. In an action against the vendor and auctioneer for recovery of the amount deposited by W.:

Held, reversing the decision of the Supreme Court of Nova Scotia, that the vendor having repudiated the agreement W., being entitled to a title in fee clear of encumbrances and not bound to accept the equity of redemption, could at once treat the contract as rescinded and sue to recover his deposit.

APPEAL from a decision of the Supreme Court of Nova Scotia (1) reversing the judgment at the trial in favour of the appellant.

The facts of the case are sufficiently stated in the above head-note. The documents signed at the sale

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

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and correspondence between the parties are set out in full in the judgment of the Chief Justice.

Harris Q.C. for appellant.

Borden Q.C. for respondent.

THE CHIEF JUSTICE.—The appellant brought this action to recover back $530, the amount of a deposit paid by him on the purchase at auction of a house and premises situate in South Park Street, in the city of Halifax.

The defendant, Edward Guy Stayner, the assignee for the creditors of his father, Charles A. Stayner, was the vendor, and the defendant, Naylor, the auctioneer employed by him to sell the property. At the conclusion of the sale the appellant signed an agreement, as follows:—

HALIFAX, N.S., 13th April, 1893.

I hereby purchase this house and lot, no. 179 South Park St., for the sum of fifty-three hundred dollars, the same having been knocked down to me at auction by John Naylor, auctioneer.

I agree to pay 10 per cent deposit on the signing of these presents and the balance on delivery to me of the deed.

(Sgd.) M. B. WRAYTON.

On the day following the sale the appellant paid to the defendant, Naylor, the deposit of 10 per cent and received from him a receipt in the words and figures following:—

14th April, 1893.

$530.

Received from Captain M. B. Wrayton the sum of five hundred and thirty dollars, being ten per cent deposit on purchase money of property no. 179 South Park Street, sold by me to him by auction yesterday for the sum of five thousand three hundred dollars, said deposit to be retained by me until his solicitor is satisfied with the title of said property, and the sale is on the understanding that a good title is to be given to Captain Wrayton in fee simple, clear of all incumbrances up to the first day of May next, save and except the civic taxes for the years 1893-4. Should the title not be a good one I undertake to re-

turn the deposit in full, and, on the other hand, if the title is good and Captain Wrayton fails to carry out the sale, the said deposit is to become forfeited as stipulated and ascertained damages to the owner of said land and premises. Possession of said house to be given on or before the first day of May now next ensuing.

(Sgd.) JOHN NAYLOR.

There cannot be a doubt but that, under the contract thus formed, the vendor was bound to make out a good title in fee simple.

On the 2nd of May, 1893, Mr. Barnhill, the solicitor of the appellant, wrote to Mr. Gray, the solicitor of the vendor, Edward Guy Stayner, a letter in the following terms:—

DEAR SIR,—I hereby notify you as the solicitor of Mr. Stayner that unless the title to property no. 179 South Park Street, in this city, is at once fixed up and a deed thereof in fee simple prepared for delivery to us, Capt. M. B. Wrayton will consider said sale off, and proceed accordingly.

Time is an essential condition with Capt. Wrayton.

On the 4th of May, 1893, Mr. Barnhill again wrote Mr. Gray, as follows:—

DEAR SIR,—I inclose herewith the key which Mr. Naylor sent me to-day. I have no use for it, and you can give same to your client, Mr. Stayner. I now notify you that as no sufficient title in fee simple to the property has been furnished Capt. Wrayton, he now declines to have any further dealings and requires payment of his deposit.

On the 8th of May, 1893, Mr. Barnhill sent a further letter to Mr. Gray, saying:—

DEAR SIR,—Capt. M. B. Wrayton has instructed me to notify you that unless the $530 paid by him to you as a deposit on the Stayner property is paid to me, as his solicitor, at once, he will bring an action against you to recover the same, no sufficient title to the property having been furnished him by the assignee.

Oblige me by an immediate reply, as the conditions on which the money was paid you have not been complied with, viz.: a title in fee imple, and Mr. Wrayton is going away in a day or two.

And on the 9th of May, 1893, the purchaser's solicitor again wrote the vendor's solicitor as follows:—

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DEAR SIR,—As no title in fee simple has been offered or tendered to Capt. M. B. Wrayton of the property no. 179 South Park Street, Halifax, by the owner, he now instructs me to notify you that he considers the sale to him off.

He thinks he has given the sellers sufficient time to furnish the deed, and it not being forthcoming he cannot wait any longer, but must sue for his deposit paid Mr. Naylor.

To this last letter Mr. Gray, on the same day, replied by the following letter:—

HALIFAX, N.S., 9th May, 1893.

J. L. BARNHILL, Esq., Barrister, etc., Halifax.

DEAR SIR,—Replying to your letter of this date in the above matter, Mr. Stayner's assignee has tendered you, on your client's behalf, a deed of the title which he held and sold in the property purchased by your client, who was aware of the mortgage held by Mr. Jones, and, of his own motion, made arrangements to assume it, and so informed those acting for the assignee.

The assignee had but the equity of redemption; could sell nothing further, and instructed no sale beyond it, even if the mortgage, as stated, had not been arranged for by your client, who is required promptly to complete his purchase with damages for the delay.

I am, yours truly,

(Sgd.) B. G. GRAY.

This was a distinct repudiation of the contract evidenced by the memorandum and receipt before stated, under which the appellant was clearly entitled to have made out a good title in fee simple, and was not bound to accept just such title as Mr. Edward Guy Stayner had under his father's conveyance to him, nor was he bound to accept a mere conveyance of the equity of redemption, having agreed to purchase the whole estate in fee and not a mere equity of redemption. The appellant was therefore entitled at once to rescind the contract and sue to recover his deposit which he did.

Where a vendor repudiates the contract and distinctly refuses to make out a good title after having been repeatedly requested to do so by the purchaser, as was done in the present case, the purchaser is not bound to wait but may at once treat the contract as rescinded.

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When, however, the vendor merely delays to show a good title, and time is not either by the terms of the contract or from the circumstances of the case of the essence of the agreement, the purchaser is required to wait a reasonable time for a title to be shown.

This latter rule can have no application in a case like the present where the vendor distinctly disclaims the obligation to make out such a title as the contract calls for

Sir Edward Fry, in his work on Specific Performance (1), states this very clearly at page 484, where he says:—

Where one party to a contract absolutely refuses to perform his part of the contract when the hour for performance has arrived, the other party may accept that refusal and thereupon rescind the contract.

I am of opinion that the judgment of Mr. Justice Townshend was right and ought to be restored.

Had the defendant furnished an abstract or shown by the deeds that he had a good title in fee simple, as he might have done quite consistently with the existence of the mortgage to Mr. Jones provided he was in a position to compel Mr. Jones to take his money and release his mortgage, he would have done enough. It would then have been reduced to a mere question of conveyancing and the contract could have been completed by applying a sufficient proportion of the purchase money to the payment of the mortgagee and procuring him to join in the conveyance. But this the respondent, Stayner, did not offer to do; he never produced any title, and for all that appears his title may have been, in respects other than the mortgage, a defective one. What he insisted on in effect by the last letter his solicitor wrote, was that the purchaser was bound to accept just such title as he had, a conveyance of the equity of redemption, and that with-

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out establishing in any way that the title was, irrespective altogether of the mortgage, otherwise good, a wholly untenable position which relieved the appellant from submitting to further delay, and authorized him to treat the agreement as determined,

The appeal must be allowed with costs.

TASCHEREAU J.—We expressed our opinion at the close of the argument that this appeal was to be allowed. It merely stood over to allow his Lordship to put down in writing our reasons for that conclusion. I fully concur in his opinion.

GWYNNE, SEDGEWICK and KING JJ. concurred.

Appeal allowed with costs.

Solicitor for appellant: *J. L. Barnhill.*

Solicitor for respondent: *Wallace McDonald.*