ONTARIO ASPHALT BLOCK COMPANY (PLAINTIFFS) ..... APPELLANTS;

AND

LUKE MONTREUIL (DEFENDANT) .... RESPONDENT.

1915
*Dec. 3.

1916
*Feb. 21.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Specific performance—Agreement for sale of land—Inability to perform—Liability to damages—Diminution in price.

A lease of land for ten years provided that on its termination the lessee could by giving notice, purchase the fee for $22,000. In a suit for specific performance of this agreement.

Held, applying the rule in *Bain* v. *Fothergill* (L.R. 7 H.L. 158), Fitzpatrick C.J. and Davies J. dissenting, that if the lessor, without fault, was unable to give title in fee to the land the lessee was not entitled to damages for loss of his bargain.

Per Fitzpatrick C.J. and Davies J.—The above rule should not be applied in a case like this where the lease contained onerous conditions binding the lessee to expend large sums in improving the property and it must have been contemplated by the parties that such expenditure would have caused him special damage if he could not purchase the fee.

Judgment appealed against (32 Ont. L.R. 243) affirmed.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario(1), varying the judgment at the trial(2) in favour of the plaintiffs.

On the 2nd day of February, 1903, the respondent leased to the appellants a certain parcel of land in the Township of Sandwich East, and extending from

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

(1) 32 Ont. L.R. 243. (2) 29 Ont. L.R. 534.

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the front River Road to the water's edge and from there to the channel bank of the Detroit River, for a term of ten years at a rental of $1,000 a year. The lease contained a provision giving the appellants the right to purchase the premises at the end of the term of ten years for $22,000, provided the company gave six months previous notice in writing of its intention to do so.

The appellant company was incorporated for the purpose of manufacturing asphalt blocks, and upon entering the premises under the lease they erected a large expensive manufacturing plant and built expensive docks, partly on the land and partly on the water lot, the whole of the expenditure amounting to about $200,000, and from year to year the company spent some $8,000 to $12,000 a year for betterments and improvements, including the necessary repairs.

The company gave the required six months notice in pursuance of the terms of the lease, and on the 2nd day of February, 1913, at the end of the said term granted by the lease, tendered to the respondent the sum of $22,000 demanding a conveyance of the lands and premises. But the respondent refused to accept said sum and refused to make the conveyance as provided under the terms of the lease.

The company commenced an action on the 10th day of February, 1913, claiming specific performance of the covenant contained in the lease, and damages.

The action came on for trial before the Honourable Mr. Justice Lennox without a jury on the 27th day of May, 1913, and it appeared at the trial from the evidence of the respondent, Montreuil, that he had made the lease in question under the assumption that he was the owner in fee simple of the property set out

in the lease, but that he discovered in 1908 that he only had a life estate in the property.

The respondent was advised by counsel at that time that the property went to his children after his death, but no evidence was offered of any effort being made by the respondent to get in a title to the property, nor was any evidence offered of any refusal by the respondent's children to join in a conveyance of the property to the appellant company under the terms of the lease. But there is evidence that they did join with him in the conveyance of other portions of the property.

Evidence was given that the property had increased enormously in value since the making of the lease.

The learned trial judge reserved judgment, and subsequently on the 19th day of June, 1913, delivered judgment decreeing specific performance of the agreement for the interest of the defendant in all the demised lands and an abatement in the purchase money for the difference in value on the 2nd day of February, 1913, of an estate in fee simple and an estate for the life of the defendant in respect of so much of the land as the defendant was not able to convey in fee, and also in respect of the damages which the plaintiffs might suffer by reason of such breach of contract over and above the difference in value of an estate in fee simple and for the life of the defendant; and directed reference to the master of the court at Sandwich.

The respondent appealed to the Appellate Division of the Supreme Court of Ontario, which gave judgment on the 27th day of November, 1914, varying the judgment of the trial judge by directing that the abatement in the purchase money should be based upon the assumption that the value of the fee simple

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was, at the date of expiry of the term, the proportionate part of the purchase price agreed upon attributable to the land in which the lessor had only a life estate and by directing further that the plaintiff company should have no damages for any loss sustained by reason of the money expended upon the property or by reason of any other matter except the abatement aforesaid.

From this judgment the appellants now appeal to the Supreme Court of Canada.

D. L. McCarthy K.C. and *Rodd* for the appellants. The appellants expended large sums in carrying out the object for which the purchase was intended and should recover back the same as damages even under the rule in *Bain* v. *Fothergill*(1).

The respondent was bound to do all in his power to enable him to give us a title and has done nothing. See *Day* v. *Singleton*(2); *Engell* v. *Fitch*(3); *Lehmann* v. *McArthur*(4); *Jones* v. *Gardiner*(5).

Cowan K.C. for the respondent. The respondent was in good faith and is not liable to damages. *Flureau* v. *Thornhill*(6); *Bain* v. *Fothergill*(1).

THE CHIEF JUSTICE (dissenting).—The respondent granted to the appellant a lease dated 2nd February, 1903, of certain parcels of land in the Township of Sandwich East fronting on the Detroit River for the term of ten years at the rents and subject to the

(1) L.R. 7 H.L. 158.
(2) [1899] 2 Ch. 320.
(3) L.R. 4 Q.B. 659.
(4) 3 Ch. App. 496.
(5) [1902] 1 Ch. 191.
(6) 2 W. Bl. 1078.

covenants and conditions therein mentioned. The lease contained the following (amongst other) provisions:—

It is agreed between the parties hereto that the lessee, its successors and assigns shall have the right to purchase the demised premises at the end of the demised term of ten years for the cash sum of $22,000, provided it shall have given six months' previous notice in writing of its intention so to do.

And the said lessor for himself, his heirs, administrators, executors and assigns, covenants that he will on the exercise by the lessee of said option to purchase and on payment of said sum of $22,000 execute and deliver to the lessee, its successors and assigns, a good and sufficient deed in fee simple free of incumbrances of the land hereinbefore described.

It is also agreed that in case said lessee fails to exercise said option to purchase by giving said notice it may on giving three months' notice in writing before the expiration of the demised term have a renewal of this lease for a further term of ten years on the same terms as to rent, payment of taxes and water rates.

The lessee for itself, its successors and assigns agrees to build a dock on the demised premises within one year from the date hereof at a cost of at least $6,000, which dock is to become the property of the lessor at the end of the demised term or after the renewal term in case of renewal as aforesaid unless in the exercise of the option the lessee purchases the said lands.

The appellant constructed the dock stipulated for in the lease and during its currency expended many thousand dollars in buildings on and improvements to the property.

The appellant duly gave the requisite notice to purchase the demised premises. It then appeared that the respondent was not possessed of the fee simple of the premises and was consequently unable to carry out his agreement to sell. Such title as the respondent had was derived from the will of his father, Luc X. Montreuil.

The devise which covers the lands in question in this suit is in the following terms:—

I give and devise to my son Luc all that, etc., * * * to him said Luc during his natural life, then to his children, should he

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marry and have issue share and share alike their heirs and assigns forever.

The respondent had nine children.

The appellant claimed:—

1. Specific performance of the covenant to convey contained in the indenture of lease.

2. Damages.

The judgment of the appeal court proceeds on the rule established by the jurisprudence of the English courts that the contract for sale of real property is an exception to the ordinary rules of law applicable to the question of the damages recoverable upon a breach of contract.

This rule, first laid down in the case of *Flureau* v. *Thornhill*(1), is that upon a contract for the purchase of real estate if the vendor, without fraud, is incapable of making a good title the intended purchaser is not entitled to any compensation for the loss of his bargain.

Flureau v. *Thornhill*(1) was much disputed and in several cases held open to exceptions. It was, however, discussed and approved in the case of *Bain* v. *Fothergill*(2) in the House of Lords when the judges were summoned to advise the House.

Though it is claimed to have been introduced from the civil law it has been said that the exception to the general rule as to damages established by *Flureau* v. *Thornhill*(1) is not founded upon any principle. In the case of *Engell* v. *Fitch*(3) Lord Chief Baron Kelly speaks of the rule as a

qualification of the rule of common law, * * * founded entirely on the difficulty that a vendor often finds in making a title to real estate.

(1) 2 W. Bl. 1078.
(2) L.R. 7 H.L. 158.
(3) L.R. 4 Q.B. 659, at p. 666.

not from any default on his part, but from his ignorance of the strict legal state of his title.

Where the condition for this reason for the rule does not exist, at any rate to the same extent, it would seem that the latter would have a more limited application. The state of the title to real estate in England is undoubtedly vastly more complicated than in this country. The defect in the title in the present case is so obvious that it does not require a lawyer to discover it; the property is left to the devisee

during his natural life, then to his children;

if the respondent had looked to his title at all he could hardly have thought himself the absolute owner of the property to dispose of as he alone pleased.

There is another ground which distinguishes this case from *Flureau* v. *Thornhill*(1). It was held that the case of *Hopkins* v. *Grazebrook*(2) provided an exception to the rule in the former case and one of the grounds on which the decision was based was that the defendant expressly undertook to make a good title. The respondent in this case expressly undertook to execute a conveyance in fee simple.

The rule in *Flureau* v. *Thornhill*(1) finds little favour in the United States. In Sedgwick on Damages, 9th ed, vol. 3, at p. 2121, we read:—

If the defendant fails to convey because he has not a good title, he is always liable in substantial damages. This is commonly called the United States Supreme Court Rule, and represents one extreme of the series of principles of which the highest English court has adopted the other extreme. It seems to be the correct one on principle.

I have thought it well to make the foregoing remarks as perhaps affording support to the appeal, but

(1) 2 W. Bl. 1078. (2) 6 B. & C. 31.

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the real ground on which I rest my judgment is that in any event this case is outside the transactions to which in its widest interpretation the rule making exception to the general law of contracts has any application.

The rule deals solely with a simple contract for an immediate sale of real estate. According to the English practice this is directly followed by the delivery by the vendor to the purchaser of the abstract of title. If it then appears that the title is defective the expenses to which the purchaser has been put are ordinarily little more than for the investigation of the title and these he is entitled to recover; beyond this actual outlay he has lost nothing but the fancied goodness of his bargain and for this he is not entitled to damages.

It must be remembered that the practice of giving options does not obtain to any great extent in England and there is very little to be found in the books on the subject.

Now in *Bain* v. *Fothergill*(1) Mr. Justice Denman speaking of the case of *Engell* v. *Fitch*(2), in which it was held that the rule in *Flureau* v. *Thornhill*(3) did not apply, said:—

> The case is of great value as shewing beyond all question that the rule in *Flureau* v. *Thornhill*(3) is a rule wholly confined to cases of inability to make a title, and not to breaches of contract in respect of the sale of real property from whatever cause arising.

And criticising the judgment in *Hopkins* v. *Grazebrook*(4), he says:—

> When carefully examined, I think that all the observations of the learned judges in that case, read with reference to the facts of the case, amount to no more than a decision that mere inability to

(1) L.R. 7 H.L. 158.
(2) L.R. 4 Q.B. 659.
(3) 2 W. Bl. 1078.
(4) 6 B. & C. 31.

make a good title does not, of itself, bring a vendor within the rule laid down in *Flureau* v. *Thornhill*(1) as to damages; but that it depends upon the nature of the contract, and also upon the reasons for the inability, whether he can avail himself of that rule: and that in such a case as that of *Hopkins* v. *Grazebrook*(2) a vendor was not within the rule. * * * In my opinion the judgments are to be read as only containing some of the reasons for holding that whether *Flureau* v. *Thornhill*(1) was correctly decided or not, it certainly was no authority for the proposition that under all circumstances, and whatever the cause of the default, a vendor unable to make a good title should have a right to break his contract, subject to a certain limited amount of damages.

In Mayne on Damages (8 ed.), p. 245, we read:—

It has also been held that the rule in *Flureau* v. *Thornhill*(1) does not apply in cases where the agreement shews upon its face that the vendor has not as yet got and, therefore, possibly may never get the title which he undertakes to convey; yet he expressly undertakes at once, or on a given date, to put the purchaser in possession; and the purchaser, in consideration of such agreement, undertakes to do, and does, something which cannot be undone, and which is of permanent benefit to the vendor; for the very nature of the undertaking, on both sides, shews that it is not dependent on the contingency of a good title being made out. In such a case damages for breach of agreement will not be merely nominal. The purchaser will be entitled, under the general rule of common law, to such a pecuniary amount as is the difference between the present state of things, and what it would have been if the contract had been duly carried out.

A case in support of this is *Wall* v. *City of London Real Property Co.*(3).

Now what is the contract in this case? The respondent leases to the appellant for ten years at $1,000 a year with onerous covenants by the lessee; it is agreed that the lessee shall at the expiration of the term have the option to purchase for $22,000, the lessor covenanting to execute a good and sufficient deed in fee simple; in case the lessee fails to exercise the option to purchase it may have a renewal of the

(1) 2 W. Bl. 1078. (2) 6 B. & C. 31.
(3) L.R. 9 Q.B. 249.

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lease for a further ten years; the lessee agrees to build a dock at a cost of at least $6,000 to become the property of the lessor unless the lessee purchases.

The lessee has not only fulfilled all the agreements in the lease and done everything requisite to obtain a conveyance in fee simple, but has expended further large sums in improvement of the property, of course, in anticipation of becoming the owner at the expiration of the lease.

Is it not obvious that the damages sustained by the appellant by reason of the failure of the respondent to implement his agreement are altogether special and by no means such loss of a bargain as alone is contemplated by the rule in *Flureau* v. *Thornhill*(1) ?

I think it is impossible to hold that such an agreement is to be governed by an admittedly anomalous rule of law in England, one based on reasons which may have little application here; presupposing entirely different conditions and intended to have application not to any damage sustained by the purchaser, but solely to the possible loss of his prospective profit on a resale of the property.

It cannot, I think, be necessary to treat this very special rule as absolutely inflexible regardless of all attendant conditions. I am not quite able to follow the learned judge of the Appellate Division in what he says as to the anomaly of a purchaser who has elected to take what the vendor can convey recovering damages as well. He states that he has not found any cases in which such damages have been awarded. Inasmuch as the rule provides that no damages can be recovered even if partial performance of the contract

(1) 2 W. Bl. 1078.

is not decreed, this would appear to be only natural since the decision of *Flureau* v. *Thornhill*(1). I think before this time cases might be found. In *Cleaton* v. *Gower*(2), the defendant agreed to lease to the plaintiff for ten years with the right to take out coal and other minerals, and in his defence pleaded that he was only tenant for life and, therefore, he could not execute the agreement because

'tis inconsistent with his power so to do.

The court decreed that Gower should execute his agreement in specie as far as he was capable of doing it, and likewise shall satisfy the plaintiff, such damages as he hath sustained in not enjoying the premises according to the agreement, and seal a lease for ten years, etc.

There is no objection to the court in a proper case decreeing specific performance and also awarding damages. In the head-note in *Phelps* v. *Prothero*(3), we read:—

In a case decided before 21 & 22 Vict., ch. 27, came into operation, *held* that the court has jurisdiction to award damages for the want of a literal performance of a contract of which it directs the specific performance and will in general do so.

Of course the "Chancery Amendment Act," 21 & 22 Vict., ch. 27 ("Lord Cairns' Act") gave express power to the court to award damages either in addition to or in substitution for specific performance.

Then as to the remarks of Chief Justice Meredith concerning the appellants' means of knowledge of the respondent's title. The latter being only tenant for life could, of course, make no demise to endure be-

(1) 2 W. Bl. 1078. (2) Finch 164.
(3) 7 De G. M. & G. 722.

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yond his own life and, therefore, was in no position to make the lease for ten years, still less to covenant for its renewal for a further term of ten years. The lessee could not call for or dispute the lessor's title and until the option to purchase was exercised there was no contract for sale which would have entitled the appellant to call for the title.

The Chief Justice says that the appellant had the same opportunity of knowing what the nature of the respondent's title was as the respondent himself had. I think this must be going too far in any case; the respondent must surely as devisee under the will of his father be credited with better knowledge than the appellant. But in any case such knowledge would have been accidental in this particular case and cannot, I think, affect the principle involved.

That it would have been the more prudent course for the appellant when making the contract to have insisted on immediate preliminary proof of the respondent's title may be admitted and perhaps the company may have to suffer loss in any event as a consequence of not doing so, but that is no reason for relieving the respondent from liability for failure to fulfil his contractual obligations. Chief Justice Meredith says that it may seem a hardship that the rights of the appellants should be limited to the relief to which his judgment holds them entitled. I think myself the appellant would suffer a great wrong in such case and am glad to think that there is no absolute rule of law which deprives them of their remedy.

As regards the damages to which the appellant is entitled I do not know that I can do better than refer to the case above cited of *Wall* v. *City of Lon-*

don Real Property Co.(1). The questions in that case were:—

1st. Whether the plaintiff is entitled to nominal damages only ?
2nd. On what principle the damages are to be assessed ?

And the Court:—

We answer the first question by saying that the plaintiff is not confined to nominal damages only. To the second we answer that the arbitrator must apply the general rule of common law, and ascertain as well as he can what the pecuniary amount is of the difference between the present state of things and what it would have been if the contract had been performed and the plaintiff had got a title.

The only difference in the present case is that the Master must ascertain as well as he can what is the pecuniary amount of the difference between the state of things as it will be under the limited estate which the appellant takes in accordance with the judgment and what it would have been if the contract had been performed.

I would allow the appeal with costs.

DAVIES J. (dissenting).—The question in this case to be determined is whether the facts bring it within the rule of law laid down in *Bain* v. *Fothergill*(2), that if a vendor of land without fraud is incapable of making a good title the intending purchaser is not entitled to recover compensation in damages for the loss of his bargain.

That rule has for many years been adopted as part of their jurisprudence by the Ontario courts and it is not my desire or intention to call that adoption in question.

The question arising in this appeal is not whether

(1) L.R. 9 Q.B. 249. (2) L.R. 7 H.L. 158.

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that rule is in force in Ontario, but whether the facts of this case bring it within the rule.

I understand a majority of the court holds that the rule applies and I desire to state very shortly my reasons for dissenting.

In the case of *Day* v. *Singleton*(1) the Court of Appeal held that:—

> A purchaser of leasehold property which the vendor cannot assign without a licence from his lessor, is entitled to damages (beyond return of the deposit, with interest and expenses) for loss of his bargain by reason of the vendor's omission to do his best to procure such licence.

In delivering the judgment of the court, Lord Lindley M.R. said, p. 328:—

> Singleton never asked the lessors to accept Day as their tenant without a bar and consequently it would be for him, Singleton, to shew that if he had asked them they would have refused.

Now, in the present case, it is contended that when the respondent Montreuil ascertained that he could not give the Ontario Asphalt Company a good title and that he had only a life estate, the remainder being in his children, it became his duty as between him and the Asphalt Company with whom he had covenanted to give a good title to do all that lay in his power to enable him to carry out his contract and to shew that he had applied to his children to join with him in conveying to the Asphalt Company and that they had refused to do so.

There was evidence that they did join with him upon request in the conveyance of other portions of the same property, but no evidence that he had applied to them to do so with respect to the property in dispute.

(1) [1899] 2 Ch. 320.

I confess I was much struck with this argument. If it was Montreuil's duty "to do all that lay in his power" to give appellants a good title, then it seems reasonable to say that it would be part of his duty to the Asphalt Company under the peculiar facts of this case to try and obtain the signature of his children to the deed and so complete his contracts with them. *Lehmann* v. *McArthur*(1), at pp. 500 and 503; *Williams* v. *Glenton*(2), at pp. 208-9, and *Godwin* v. *Francis*(3), at p. 306.

I do not desire, however, to rest my judgment upon that ground, but rather upon the ground that the special facts of this case and the special terms of the lease to the company with the option of purchase at the end of the term of ten years, provided six months' notice of the lessee's intention to purchase was given, together with the covenant on the lessor, Montreuil's part to convey a good title in fee simple, and a covenant from the lessee to build a dock on the demised premises within a year from the granting of the lease at a cost of *at least* $6,000, which dock was to become the property of the lessor at the end of the demised term, unless the lessee purchased under his option, all combine to convince me that this is not a case in which the rule in *Bain* v. *Fothergill*(4) should be applied, but rather one in which on the neglect, refusal or inability of the lessor to comply with his covenant to give a good title free from incumbrance substantial damages should be awarded.

The evidence shewed that the company had after entering upon the lands under the lease erected an

(1) 3 Ch. App. 496.
(2) 1 Ch. App. 200.
(3) L.R. 5 C.P. 295.
(4) L.R. 7 H.L. 158.

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expensive manufacturing plant and docks partly on the leased upland and partly on the water lot in front of it as to which latter lot Montreuil had obtained a grant from the Crown, the whole expenditure aggregating $200,000, besides yearly betterments and improvements. A part of this expenditure at least was made in pursuance of respondent's covenant in the lease to expend at least $6,000 in dock construction.

The Appellate Division, reversing the trial judge, who had decreed specific performance and an abatement in the price amounting to substantial damages the latter to be determined on a reference, directed that the abatement in the purchase money should be based upon the value of the interest in the lands which the defendant could convey, having regard to the "purchase price" of the whole and refusing other damages beyond the abatement.

I cannot accede to the principle on which the Appellate Court has directed the abatement, basing it upon the stipulated purchase price and limiting it to that while ignoring the expenditure which as part of the consideration for the granting of the lease the lessees covenanted to make in building a dock on the lands.

This expenditure, the minimum amount of which was placed at $6,000 and the maximum of which might reach $60,000 or more, was really and substantially as much a part of the purchase price as the $22,000 mentioned and has just as much right to be considered in determining what abatement should be made as the latter sum.

But over and beyond that I do not think the case

is one within the principle of *Bain* v. *Fothergill*(1), nor that substantial damages should be denied the vendee. That principle is as Lindley M.R. says in *Day* v. *Singleton*(2),

> an anomalous rule based upon and justified by difficulties in shewing a good title to real property in this country, *but one which ought not to be extended in cases to which the reasons on which it is based do not apply.*

Now, I take it that one of the reasons on which the rule is based is that it is not within the contemplation of both parties in the ordinary case of a contract for sale of land, that if the vendor is incapable of making a good title the intending purchaser is to receive compensation for the loss of his bargain beyond the expenses he has incurred.

But if there are special facts in the case shewing that it was and must have been in contemplation of both parties that failure on the part of the vendor to carry out his covenant to

> execute and deliver to the purchaser a good and sufficient deed in fee simple of the land

must inevitably cause the intending purchaser great damage, as was the case here; and if, in addition, the purchaser has bound himself on the faith of this covenant to expend very large sums of money on dock and other improvements as the purchaser did here, then I say in the event of the vendor failing to give the good title he covenanted to give, the common law rule as to damages for breach of contract applies and the "anomalous rule" laid down in *Bain* v. *Fothergill*(1), relating to ordinary contracts between vendor and vendee with respect to the sale of lands does not apply.

(1) L.R. 7 H.L. 158. (2) [1899] 2 Ch. 320.

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I do not contend that any damages can be recovered in respect of anything that the purchaser did or incurred after he discovered the defect in the title; I limit my observations to those incurred by him before such discovery.

For these reasons, I would allow the appeal.

IDINGTON J.—I think the judgment appealed from is right for the reasons assigned in support thereof by the learned Chief Justice for Ontario.

The case seems a hard one, but that is no reason for our adopting bad law and disturbing the minds of those who prefer that well-settled law should be upheld.

In truth we are asked to assess damages besides giving such relief in way of specific performance as can be given.

Assuming for argument's sake damages recoverable at all in such a case (which I do not admit) the basis therefor must be proved as in any other claim for damages. It is not enough to rouse mere suspicion. The respondent was a witness and counsel for appellant refrained from asking him a single question, much less anything tending to shew he had acted in bad faith or failed in any regard to do what his contract bound him to do. It can only be in such a case as shews a failure of duty on a defendant's part that damages would be assessable even if all questions relative to specific performance were out of the case. The circumstances relied on do not supply such proof as required.

The appeal should be dismissed with costs.

DUFF J.—I concur in the judgment of the court dismissing the appeal.

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ANGLIN J.—Admitting the applicability of the rule laid down in *Bain* v. *Fothergill*(1), to the original option in this case, the appellants have sought to bring it within the qualification upon that rule recognized in *Day* v. *Singleton*(2). But in the latter case the Court of Appeal, as the judgment of Lord Lindley shews (p. 328), took the view that the correspondence between Singleton's solicitors and the lessor established that if Singleton (the vendor of the leasehold) did not actually procure the refusal of the lessors' assent to the assignment to Day, he

> certainly made no effort to obtain it * * * as it was his duty to do * * * and it ought to be inferred as against Singleton that the lessors would have accepted Day if Singleton had asked them to do so.

The decision there proceeded upon the fact, held to have been sufficiently proven, that it was within the vendor's power to carry out his contract and that he refused or neglected to take the means available. Here the plaintiffs rely upon the fact that the defendant maintained silence after his inability to make title had become known and they had asked him to obtain confirmation of the option from the remaindermen, the fact that the remaindermen had (under what circumstances, or for what consideration does not appear) confirmed the title of some other grantees of the defendant who were in like plight with the plaintiffs, and the further fact that, in answer to the plaintiff's suit for specific performance, other defences were set up in addition to that of inability to make title. I am quite unable to find in these bald facts—and the plaintiffs have nothing else—enough

(1) L.R. 7 H.L. 175. (2) [1899] 2 Ch. 320.

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to warrant an inference that the defendant after discovery of the defect in his title made no effort to procure the concurrence of the remaindermen; still less do I find enough to warrant the inference that such an effort, if made, would have been successful.

The appeal, in my opinion, fails and should be dismissed with costs.

BRODEUR J.—I am of opinion that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Rodd, Wigle & McHugh.*

Solicitors for the respondent: *Kenning & Cleary.*