JAMES ARMSTRONG AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

JOSEPH NASON (PLAINTIFF)..... RESPONDENT.

1894
*Oct. 17, 18.
1895
*Mar. 11.

JAMES ARMSTRONG AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

ALFRED WRIGHT (PLAINTIFF)..... RESPONDENT.

JAMES ARMSTRONG AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

WM. J. McCLELLAND (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and purchaser—Sale of lands—Waiver of objections—Lapse of time—Will, construction of—Executory devise over—Defeasible title—Rescission of contract.

An agreement for the sale and purchase of land contained the provision that the vendee should examine the title at his own expense and have ten days from the date of the agreement for that purpose, and should be "deemed to have waived all objections to title not raised within that time."

Upon the investigation of the title by the purchaser it appeared that the vendors derived title through one P. a purchaser from one B. S., a devisee under a will by which the land in question was devised by the testatrix to her daughter the said B.S. and certain other land to another daughter; the will contained the direction that "if either daughter should die without lawful issue the part and portion of the deceased shall revert to the surviving daughter," and a gift over in case both daughters should die without issue.

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

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At the time of the agreement B.S. was alive and had children. An objection was taken to the title but not within the ten days from the date of the agreement. The purchasers brought a suit for specific performance, or rescission of the contract.

Held, reversing the judgment of the court below, that although B.S. took an estate in fee simple subject to the executory devise over in case she should die without issue living at her death, inasmuch as the purchaser would get a present holding title accompanied by possession, the objection taken did not go to the root of the title and was one to which effect could not be given, not having been taken within the time limited by the agreement.

APPEAL from decisions of the Court of Appeal for Ontario (1), affirming judgments rendered in the High Court of Justice (2) in favour of the respective plaintiffs.

Certain lands were devised in two separate lots in fee to the testator's two daughters Anne and Bridget, with the following proviso:

"And be it understood that if either of my daughters die without lawful issue the part and portion of the deceased shall revert to the surviving daughter, and in the case of both dying without issue then I authorize my executors, together with the pastor of St. Paul's Church and my brother Michael Murnan, to subdivide the estate, or the proceeds of the estate, amongst my relatives, as those gentlemen whom I have appointed for that purpose may deem right and equitable in their prudence, justice and charity.

The appellants having acquired title through the devisees made agreements for the sale of certain portions of the lands to the respondents respectively. The agreements each contained the provision that the vendee should be obliged to examine the title at his own expense, and should have ten days from the date thereof for that purpose, and should be deemed to have waived all objections to title not raised within that

(1) 21 Ont. App. R. 183. (2) 22 O.R. 542.

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time, the vendors not to furnish abstract of title, title deeds or copies thereof, or any evidences of title other than those in their own possession. And it was expressly provided that time should be considered the essence of the agreement.

Specific objections to the title were not made within the time specified, and the vendees went into possession of their respective lots, but after the payment of several instalments under the agreements the defects in the title were discovered, and suits were brought by the respondents for specific performance, or in the alternative for rescission of the agreements and the return of the moneys so paid.

Cook and *Macdonald* for the several appellants. The agreement is explicit that all objections to title not made within ten days shall be deemed to be waived. In *Rosenberg* v. *Cook* (1), a similar time limit bound the vendee. See also *Imperial Bank* v. *Metcalfe* (2).

A vendee may agree to take the vendor's title without question and in such case he must accept whatever the vendor is able to give. *Duke* v. *Barnett* (3).

The vendees did not elect promptly to disaffirm and must abide by the contract. *Robinson* v. *Harris* (4). And see also *re Gloag and Miller's Contract* (5); *Bown* v. *Stenson* (6).

Armour Q.C. for the respondents Nason and Wright. It is admitted that the title is defective and the only question is whether or not the plaintiffs are estopped from disputing it by the agreement.

Courts are unwilling to force defective titles on purchasers. *Want* v. *Stallibrass* (7); *Saxby* v. *Thomas* (8); *Brown* v. *Pears* (9).

(1) 8 Q.B.D. 162.
(2) 11 O.R. 467.
(3) 2 Coll. 337.
(4) 21 O.R. 43; 19 Ont. App. R. 134.
(5) 23 Ch. D. 320.
(6) 24 Beav. 631.
(7) L.R. 8 Ex. 175.
(8) 63 L.T.N.S. 695.
(9) 12 Ont. P.R. 396.

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The failure to object within the time does not oblige the vendees to accept a defective title. *In re Marsh* (1); *McIntosh* v. *Rogers* (2); *Martin* v. *Magee* (3).

Waiver by vendee cannot be based on something he did not know. *Blacklow* v. *Laws* (4); *Want* v. *Stallibrass* (5).

Marsh Q.C. for the respondent McClelland and *Lindsey* for the respondent Wright referred to *Harnett* v. *Baker* (6); *Waddell* v. *Wolfe* (7).

The judgment of the court was delivered by:

THE CHIEF JUSTICE.—This is an action by a purchaser of land asking for specific performance of the contract, and that the vendor may be compelled to make out a good title, and in default of his so doing that the contract may be rescinded and part of the purchase money already paid may be ordered to be repaid.

The agreement for the sale and purchase contained the following provision:

> The vendee to examine the title at his own expense and to have ten days from the date hereof for that purpose, and shall be deemed to have waived all objections to title not raised within that time, and should any valid objection to the title be raised that the said vendors cannot or are unwilling to remove they shall cancel this agreement and return the money paid. The vendors not to furnish abstract of title, title deeds or copies thereof or any evidences of title other than those in their own possession.

Upon the investigation of the title by the purchaser it appeared that the vendors derived title through Henry Callender who was a purchaser from Bridget Sherwood a devisee under the will of Ann Paterson, and it is upon the construction of this will that the objection to the title now made by the respondent is

(1) 24 Ch. D. 11.
(2) 14 O.R. 97.
(3) 18 Ont. App. R. 384.
(4) 2 Hare 40.
(5) L.R. 8 Ex. 175.
(6) L.R. 20 Eq. 50.
(7) L.R. 9 Q.B. 515.

founded. This question of construction was argued in both the courts below. The testatrix, Ann Paterson, devised the land in question to her daughter Bridget Sherwood and also devised other land to another daughter Ann Wallbridge. The will contained the following direction:

> And be it understood that if either of my daughters die without lawful issue the part and portion of the deceased shall revert to the surviving daughter.

Then followed a gift over in case both daughters should die without issue.

It was held by Mr. Justice Street first, and then by the Court of Appeal, that the proper construction of this devise was that Bridget Sherwood took an estate in fee simple, subject to an executory devise over in case she should die without issue living at her death.

This construction, in which I entirely agree, has not been called in question by the appellant in this appeal.

The fact appeared to be that Bridget Sherwood was alive and had children. The vendors at the time of the sale had therefore an estate in fee simple, defeasible in the event of Bridget Sherwood dying without leaving issue living at her death; they had also the possession of the land.

It was sufficiently established in evidence that no objection to the title was taken within ten days, the time limited by the clause of the contract already stated.

The learned Chief Justice of Ontario and Mr. Justice Osler were of opinion, in accordance with the judgment of Mr. Justice Street, the trial judge, that the objection based on the defeasible nature of the vendor's title was still open to the purchasers, and that they were entitled to a rescission of the contract, whilst Mr. Justice Burton and Mr. Justice Maclennan were of the contrary opinion.

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It is an elementary principle that if a vendor contracts to sell land without any saving condition as to the nature of the title he is to confer upon the purchaser, the law implies that it is incumbent on him to make out a good title in fee simple. It is, however, of course, open to the parties to such a contract to agree that the vendor shall be relieved from this obligation. The question before us is whether they have done so by the agreement under consideration.

In carrying out a sale of land the vendor is in all cases bound to deliver an abstract showing a good title unless this duty is dispensed with by the contract. Here this obligation is expressly waived by the vendees. It is therefore not open to us in the present case, as has been done in some English cases, to confine the provision of the contract requiring objections to be taken in the limited time, to objections appearing on the abstract leaving other objections not disclosed by the abstract, but discovered by the vendee, at large, to be taken at any time. In the face of the positive stipulation of the parties this could not be done here without altering the contract.

We are therefore brought face to face with the question whether we can altogether disregard the condition before referred to, for if it does not apply to an objection like that which has been taken it can have no operation whatever. Where the terms of the contract require the vendor to make out a title in fee simple and there is a condition like the present, and it is made to appear that the vendor has nothing at all to sell, not even the possession, it has been held that such an objection going to the "root of the title," as it has been termed, is not precluded by a condition expressed in like terms with that under consideration.

In the case of *Re Tanqueray-Willaume & Landau* (1),

(1) 20 Ch. D. 465.

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the question arose on a contract of sale entered into by executors, who claimed to have an implied power of sale. Mr. Justice Kay held that the purchaser who did not take the objection within the time required by the condition of sale was nevertheless not concluded by it, saying—

I think the condition in these conditions of sale does not prevent the purchaser from raising an objection of that kind because it goes to the root of the whole matter.

This case was carried to appeal, but the Court of Appeal holding that the vendors had the power of sale which they had claimed to exercise the point in question did not there arise.

Want v. *Stallibrass* (1), was an action by a purchaser to recover his deposit. The vendors were trustees under a will which conferred upon them a power of sale to arise on the death of a tenant for life. It appeared on the face of the abstract that this tenant for life was still alive. The power of sale had therefore not become exercisable, and the court held that the vendors, having nothing to convey, notwithstanding the objection had not been taken within the time required by the conditions of sale, the purchaser was entitled to recover his deposit.

Pollock B. there says :

The basis of the contract is that the vendor has a title, and although parties might by these conditions of sale waive even this I do not think the plaintiff has done so ; on the contrary it appears to me that by failing to give any objection or requisition within the stipulated time he cannot be taken to have waived that which was the foundation of the whole contract, and which on the face of the defendant's own abstract is shewn not to exist.

In both the cases just referred to it is apparent that there was a total failure of consideration and that the vendee, if he had been compelled to pay his purchase money, would have got nothing whatever for it.

(1) L. R. 8 Ex. 175.

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In the present case the purchaser will get a present holding title accompanied with possession, a title in fee, defeasible it is true upon the happening of a contingency, and therefore not a marketable title, but still a title, though a precarious one. The objection here taken is therefore one which does not go to the root of the title.

In *Rosenberg* v. *Cook* (3), where the purchaser got nothing but possession, it was held by the Court of Appeal that he was bound by a condition requiring him to take objections in a limited time. It is true that in that case the particulars of sale did disclose that the vendor was not selling an absolutely good title. The judgment of Jessel M. R., however, shews that he was not inclined to treat such conditions as the present as merely illusory stipulations.

In the present case if we do not give effect to the terms of the contract we defeat the intention of the parties and, as Mr. Justice Burton observes, make a new contract for them, for if it was open to the purchaser to take the objection relied on all objections shewing that the vendors could not make a good title would also have been open indefinitely in point of time, and the clause in question would have been altogether reduced to silence. This, I think, cannot be done. I am therefore of opinion that we must allow the appeal with costs and judgment must be entered in the court below for a specific performance of the contract as claimed by the plaintiff, but without any inquiry as to title which he must, for the reasons before stated, be deemed to have waived. Had this been a vendor's action for specific performance different considerations might have been open, since the remedy of specific performance is one subject to the judicial discretion of the court.

(3) 8 Q. B. D. 162.

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The appellants are entitled to costs in the Court of Appeal, but not in the Divisional Court.

Armstrong v. *McClelland* was argued at the same time as *Armstrong* v. *Cook* and the pleadings and evidence are the same; the same judgment must therefore be entered in that case.

Armstrong v. *Wright.*

I agree with the Court of Appeal, that the objection to the title was sufficiently taken within the ten days. That appeal must therefore be dismissed with costs.

Appeals against Nason and McClelland allowed with costs. Appeal against Wright dismissed with costs.

Solicitors for the appellants: *Cook, Macdonald & Briggs.*

Solicitor for the respondent Nason: *Joseph Nason.*

Solicitors for the respondent Wright: *Lindsay, Lindsay & Evans.*

Solicitors for the respondent McClelland: *Smith & Smith.*