1928

*May 16.
*June 12.

IN THE MATTER OF AN AGREEMENT FOR SALE OF LAND

WILLIAM LOUCH AS PURCHASER.....APPELLANT;

AND

PAPE AVENUE LAND COMPANY LIMITED AS VENDOR..... } RESPONDENT;

AND IN THE MATTER OF RULES 605 AND 606 OF THE CONSOLIDATED RULES OF PRACTICE OF THE SUPREME COURT OF ONTARIO.

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

Sale of land—Objections to title—Clause in agreement providing for rescission in case of objections to title which vendor is unable or unwilling to remove—Operation of clause—Purchaser claiming right to specific performance with compensation—Contention that vendor by conduct elected to abandon rights under clause.

An agreement for sale of land provided that "the purchaser is to be allowed 40 days * * * to investigate the title * * *. If within said 40 days the purchaser shall make any valid objection to title in writing, which the vendor is unable or unwilling to remove and which the purchaser will not waive, this agreement shall be null and void." The purchaser made requisitions on title, as to some of which the vendor notified him that it was unable to comply. Some negotiations took place touching an offer by the vendor to substitute other lands for those affected, but without result; and on October 18 the vendor's solicitors wrote the purchaser's solicitors that the vendor was ready to close and unless the transaction was closed by October 25 it would cancel the agreement; and on October 26 orally informed them that the agreement was no longer in force. The purchaser contended (1) that the vendor by its conduct in answering the purchaser's requisitions and in endeavouring to remove his objections elected to abandon its rights under the above quoted clause; and (2) that, as the objections in question affected only an insignificant part of the lands, he was entitled to insist upon specific performance with compensation, and that he should be given adequate time to consider whether or not he should take that course, before the clause was put into operation.

Held: The vendor was within the protection of said clause, and the agreement had been rescinded. The purchaser's first contention failed in point of fact, as he was never misled into a belief that the vendor had assumed the obligation of meeting the demands in the requisitions in question. As to the purchaser's second contention, the right to rescind given by said clause was not subject to an over-riding right in the purchaser to insist upon specific performance with compensa-

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

tion, even though, but for that clause, he might, on the facts, have been entitled to such relief; the right given by the clause was for the vendor's protection in just such situations, and to enable him in such circumstances to insist upon receiving the contract price without abatement or to withdraw from the contract (*Ashburner* v. *Sewell*, [1891] 3 Ch. 405, at p. 410, cited).

Judgment of the Appellate Division, Ont., affirmed.

APPEAL by the purchaser from the judgment of the Appellate Division of the Supreme Court of Ontario (1), dismissing the purchaser's appeal from the judgment of Raney J. (2), pronounced upon an application made by the vendor by originating notice of motion, under Rules 605 and 606 of the Consolidated Rules of Practice of the Supreme Court of Ontario, for an order declaring the vendor's rights under a written contract for sale of lands. The material parts of the agreement and the material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

Arthur Macdonald for the appellant.

Fraser Raney for the respondent.

The judgment of the court was delivered by

DUFF J.—This is an appeal from the judgment of the Second Divisional Court of the Supreme Court of Ontario, dismissing an appeal from a judgment of Raney J., pronounced upon an application, under Rules 605 and 606 of the Consolidated Rules of Practice, on behalf of the respondent company as vendor, for an order declaring the rights of that company under an agreement in writing of the 27th of June, 1927, between the respondent company as vendor, and the appellant as purchaser, relating to certain lands in the township of East York.

The material parts of the agreement are these:

8. The purchaser is to be allowed forty days from the date hereof to investigate the title at purchaser's expense * * *. If within said forty days the purchaser shall make any valid objection to title in writing, which the vendor is unable or unwilling to remove and which the purchaser will not waive, this agreement shall be null and void and the deposit money shall be returned to the purchaser without interest * * *.

9. (Containing, *inter alia*, a declaration that "time shall be of the essence of every term of this contract").

(1) (1927) 33 Ont. W.N. 184. (2) (1927) 33 Ont. W.N. 156.

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14. The vendor covenants, promises and agrees to assume and pay the existing registered charge or mortgage and to indemnify and keep indemnified the purchaser from all damages, costs and other charges arising from its failure so to do. It shall be a condition precedent to payments hereunder by the purchaser that the said mortgage account shall be in good standing and free from arrears at the time of the making payment by the purchaser.

On the 23rd of July the requisitions on title were delivered, and, by these and later requisitions, the appellant as purchaser,

(*a*) required evidence that a certain mortgage was in "good standing" and free from arrears of interest and principal, and

(*b*) demanded that certain rights of way should be surrendered and that an agreement for sale affecting part of the land should be discharged.

The respondent company appears to have satisfied the appellant as to the first of these requirements. But as to those comprised under head (*b*), the appellant was notified in due course that the respondent company was unable to comply with them. Some negotiations took place touching an offer by the respondent company to substitute other lands for those affected by the agreement and rights of way, but without result; and on the 18th of October, the solicitors for the respondent company wrote to the solicitors for the appellant that "our clients are ready to close and have instructed us to notify you on behalf of your client that unless this transaction is closed on or before the 25th inst., that they will cancel the agreement and withdraw therefrom." The appellant having done nothing in consequence of this notice, the solicitors for the respondent company, on the 26th of October, orally informed the purchaser's solicitors, that the agreement was no longer in force. On the 3rd of November a caution was filed by the appellant in the Land Titles Office, and on the 9th of November the originating notice was served. The contention on the part of the respondent company was that the facts were such as to bring into play article 8 of the agreement, quoted above.

Mr. Justice Raney, after stating the facts substantially as I have stated them, and pointing out that since there

were no material facts in controversy, the dispute fell within the scope of Consolidated Rule 605, proceeded:

> It is conceded that the purchaser's objections to the title were made in writing and that they were valid objections. It appears also that the Vendor is "unable or unwilling" to remove the objections other than that in respect of the mortgage, and there is no suggestion of bad faith. The purchaser declines to waive these objections. The matter is thus brought, I think, squarely within the eighth clause of the agreement, and the agreement is, therefore, in my view, null and void. There will be a declaration to that effect and an order for the repayment of the deposit money, and on the return of the deposit money for the vacation of the caution. There will be no costs to either party.

There is before us no report of the reasons for the judgment of the Second Appellate Division.

Several contentions were advanced in support of the appeal, of which it is only necessary to mention two.

First, it is argued that the respondent company, by its conduct in answering the appellant's requisitions and in endeavouring to remove his objections, elected to abandon its rights under article 8. This contention fails in point of fact. The appellant was never misled into a belief that the respondent company had assumed the obligation of meeting the demands in the requisitions in respect of the agreement of sale and the rights of way. On the contrary, he was informed in due course that the respondent company was unable to comply with them. The proposal to substitute other lands was an act indicating, not a willingness to meet the requisitions in these respects, but the opposite.

Second, it is contended that, since the agreement of sale, to which exception was taken, and the rights of way mentioned, affected only an insignificant part of the lands in question, the appellant was entitled, if so advised, to insist upon specific performance with compensation in respect of the part so affected, notwithstanding the terms of article 8; and further, that he was entitled, before that article was put into operation, to be given adequate time to consider whether or not he should take that course. The answer to this contention is, that the right to rescind given by article 8 is not subject to an over-riding right vested in the appellant to insist upon specific performance with compensation, even though, but for the stipulations of that article, he might, on the facts, have been entitled to such relief. It is a right given to the vendor for his protection in just such situations as that we are now considering, and

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to enable him in such circumstances to insist upon receiving the contract price without abatement, or to withdraw from the contract. In the contract in question in *Ashburner* v. *Sewell* (1), there was a clause similar in all pertinent respects to clause 8, and another clause providing for compensation in case of the description proving erroneous. Mr. Justice Chitty, as reported on page 410, says:

> The question whether errors which fall within clause 6 also fall within the protection given to the vendor under clause 8, is one of fact, to be decided in the particular circumstances of each case, and is one requiring great consideration. Take, for instance, the case where a piece of land is included in the description to which a title cannot be made out: regard must be had to the importance of that particular piece, and the amount of compensation which would have to be paid. I think it quite reasonable for the vendor to say, "I will reserve to myself a mode of escape from all the trouble of these inquiries and investigations and expenses of arbitration. I desire to settle the price myself; and if the purchaser insists on his objections to my title, I will retain in my own hands the power to rescind." That, I think, is a reasonable view to take of a contract like the one under consideration. In the result, I am of opinion that the purchaser's construction of the contract is not well founded, and that the objection raised is one of title falling within clause 8, and that the vendor was right in giving the purchaser notice of rescission.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Macdonald & Louch.*

Solicitors for the respondent: *Wickett & McNish.*