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* Mar. 12, 13.

JOHN H. RODD (PLAINTIFF).....APPELLANT;

AND

ARTHUR D. CRONIN AND IRENE E. CRONIN (DEFENDANTS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Contract—Sale of land—Objection to title—Purchaser terminating contract—Vendor claiming specific performance—Extent of title agreed to be conveyed—Vendor claiming rectification of formal contract—Alternative claim for specific performance of formal contract, with reference as to title.

Plaintiff sued for specific performance of an agreement of sale of land and land covered with water from him to defendant. Shortly after the agreement, the Crown in the right of the Dominion of Canada had asserted a claim to a part of the land as having passed to it at Confederation, under s. 108 of the *B.N.A. Act*, as part of a public harbour, and, on plaintiff's refusal to remove this objection to title, defendant had purported to terminate the agreement. The trial judge found (sustaining plaintiff's claim) that, under the agreement, plaintiff was selling only such title as he had in the lands, and granted specific performance. This judgment was reversed by the Court of Appeal for Ontario, which found that plaintiff had agreed to convey a good and sufficient title to the lands, and dismissed his action. Plaintiff appealed to this Court.

Held: Appeal dismissed. A certain executed formal document, under which plaintiff was bound to convey a good and sufficient title to the lands, constituted the only binding agreement, and plaintiff had established no adequate case for reformation in the sense claimed. The trial judge apparently failed to appreciate the evidentiary weight which must be ascribed to the fact of execution of that document and the legal consequences of that fact. As to defendant's objection to title because of said claim of the Crown—the evidence tended to show that part at least of the westerly portion of the lands was used as a public harbour before Confederation, and warranted the court in refusing to force such a doubtful title on defendant.

The court refused to plaintiff a decree of specific performance of the agreement as it stood, with a reference as to title, because, (1) when

* PRESENT:—Duff C.J. and Cannon, Crocket, Davis and Kerwin JJ.

plaintiff took the stand that defendant was bound to accept such title as he had, he was virtually repudiating his obligations under the formal agreement, and defendant, in view of the situation created by the Crown's claim, had just and solid grounds for his action in terminating the agreement, which thereupon ceased to have any virtue as a foundation for any claim by plaintiff; (2) no such claim or offer to accept such a decree (alternatively to rectification of the formal agreement) had been made by plaintiff until argument at trial after completion of the evidence, and, in view of plaintiff's persistent attitude up to that time, such claim should not be allowed in the appellate courts.

APPEAL by the plaintiff from the judgment of the Court of Appeal for Ontario which, reversing the judgment of Jeffrey J., dismissed the action, which was brought, by plaintiff as vendor, for specific performance of an agreement for sale of lands. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

R. S. Rodd K.C. for the appellant.

E. C. Awrey K.C. for the respondents.

The judgment of the court was delivered by

KERWIN J.—At the conclusion of the argument of counsel for the appellant, we considered that no grounds had been shown upon which this Court could interfere with the judgment of the Court of Appeal, and it was therefore unnecessary to call upon counsel for the respondents.

In his statement of claim, the appellant asked specific performance of what he alleged was the agreement between himself and the respondent, Arthur D. Cronin, but made no reference to a formal written document executed by the parties on June 27th, 1933. The said respondent, in his statement of defence, alleged that the contract between himself and the appellant was embodied in this formal document, in which the lands that were the subject of the sale were described by metes and bounds, to which the appellant agreed to give a good and sufficient title; that, the title to a large part of the lands described being still in the Crown, it was understood that the respondent should proceed with the necessary application to the Public Works Department under the *Navigable Waters' Protection Act* for approval of the construction of a dock for the purpose of which the respondent was acquiring the pro-

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perty; that, the application of the respondent to the Public Works Department having been brought to the attention of the Department of Marine, that Department asserted a claim to the site of the proposed structure as part of a public harbour which had passed to the Dominion at Confederation by force of section 108 of the *British North America Act;* that the respondent, having ascertained that the appellant had neither a title in himself nor power to require conveyance of the title, and the appellant having "notified the respondent that he would not clear up the title," rescinded the contract.

By paragraph 3 of the Statement of Claim, the appellant averred:—

> Although the said defendant was to take the title as patented he subsequently desired a definite patent carrying the lands to the harbour line, and after some negotiation the plaintiff undertook to obtain the patent from the Department of Lands and Forests of the Province of Ontario, each of the parties, however, to pay half of the fee to be charged by the Department for such patent.

and by paragraph 3 of the reply:

> * * * the fact is that this defendant was to accept the title to the lands as patented by the Crown, but subsequently at his request, and to hasten the closing of the sale, the plaintiff did undertake to and did obtain a confirmatory and extended grant from the Crown in the right of the Province of Ontario, but at the joint expense of both as the agreement shows. No other or different agreement or understanding in respect thereto was ever made or come to.

By his amended reply the appellant set up a claim for reformation of "the agreement sued upon herein" to bring it into conformity with the agreement so alleged in paragraph 3 of his various pleadings.

At the trial, the appellant maintained the position he had assumed in his pleadings, namely, that the respondent had agreed to purchase from the appellant such title as he had under the patents in existence on May 11th. His counsel is thus reported at page 208 of the case:—

> Mr. RODD: We say with regard to that in the first place there was no agreement at all to give more than the lands which were covered by the patent, and if you should find that is the case then no matter of defence—
>
> His LORDSHIP: You mean the position you take, under a proper interpretation of the agreement you agree to convey to him only such interest as you have in the land.
>
> Mr. RODD: That is it. All the correspondence fully bears that out.
>
> His LORDSHIP: Only such interest as you in fact had, or you purport to have.
>
> Mr. RODD: No matter how serious it might become that is the first step.

On this issue the appellant obtained from the learned trial judge a finding in his favour. "I am of opinion," the learned judge said, "as before expressed, that the defendant purchased from the plaintiff such title as he, the plaintiff, had in the property." It was of this agreement that specific performance was granted at the trial.

The Court of Appeal reversed the judgment of the learned trial judge. They took the view that the document executed by the parties on June 27th (under which the appellant was bound to convey a good and sufficient title to the lands described) constituted the only binding agreement, and that the appellant had established no adequate case for reformation in the sense in which it was claimed by him. With this we agree. The learned judge failed, it would appear, to appreciate the evidentiary weight which must be ascribed to the fact of the execution of the document of June 27th and the legal consequences of that fact.

Under that agreement, the appellant was bound to establish a title in himself in fee simple to all the lands described therein. He contends that he has done so, but, in connection with the various objections raised against such contention by the respondents, it is necessary to refer only to the claim made by the Department of Marine on behalf of His Majesty the King in the right of the Dominion of Canada to that part of the lands described in the agreement that had not been patented before Confederation. This claim arises under section 108 of the *British North America Act:* "The Public Works and Property of each Province enumerated in the Third Schedule to this Act, shall be the Property of Canada." Item two of the third schedule is "Public Harbours." The evidence tends to show that part at least of the westerly portion of the lands in question was used as a public harbour before July 1st, 1867, and warrants the court in refusing to force such a doubtful title on the purchaser.

It was also stated that, even if the formal agreement be not rectified, the appellant was willing to accept a decree for specific performance of it as it stands, with a reference as to title. We were informed by his counsel that this position was taken on behalf of the appellant for the first time in argument before the trial judge after the comple-

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tion of the evidence. He repeated this offer in the Court of Appeal.

There are two distinct grounds on which this indulgence must be refused. First, the respondent was justified in putting an end to the agreement. The appellant, in taking the stand that the respondent was bound to accept such title as he had, was virtually repudiating his obligations under the agreement of the 27th of June. And the respondent was in no sense taking advantage of a mere technical situation. The claim of the Dominion Government, so long as it was pressed, constituted a real cloud upon the title. When the appellant repudiated any obligation to convey any title other than that which he possessed, the respondent, in view of the situation created by the Government's claim, had just and solid grounds for his action in terminating the agreement, which thereupon ceased to have any virtue as a foundation for any claim by the appellant.

Moreover, we agree with the Court of Appeal, that in view of the appellant's persistent assertion of his right to force upon the respondent his own title, whatever its defects might be, down to the trial, and at the trial with success, he could not with justice be allowed in the Court of Appeal to claim relief by way of the specific enforcement of the agreement which he had all along repudiated. The claim has no place in the pleadings; no hint of it was given during the course of the trial until, as already observed, after all the evidence—which had not been directed to issues that might have been raised by such a claim—had been presented. Further comment is superfluous; the appellant cannot be allowed to play fast and loose.

A minor point raised by the appellant is that he should be recompensed for the repairs made by him to the summer cottage which was to be given him in exchange, and which his son-in-law occupied for one season. In taking possession of and making repairs to the cottage, before consummation of the agreement, the appellant took the risk of the matter not being completed. Furthermore, it is to be noted that the respondent Cronin had counter-claimed for an occupation rent of these premises. This counter-claim was dismissed without costs by the trial judge and no appeal was taken by Cronin. While there is no evidence as to

the rental value of the property, one claim might very well be taken to offset the other.

In view of the result we need not consider the position of the respondent, Irene E. Cronin, the wife of the respondent, Arthur D. Cronin.

The appeal must be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Rodd, Wigle, Whiteside & Jasperson.*

Solicitors for the respondents: *Furlong, Furlong, Awrey & St. Aubin.*