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* May 27.
* Oct. 1.

ERNEST SOULLIERE, EXECUTOR OF THE ESTATE OF EDMOND PRATT, (PLAINTIFF) ..... APPELLANT;

AND

AVONDALE MANOR LAND COMPANY LIMITED (DEFENDANT).... RESPONDENT.

HENRY PRATT AND HEDGWIDGE PRATT (PLAINTIFFS) ..... APPELLANTS;

AND

AVONDALE MANOR LAND COMPANY LIMITED (DEFENDANT).... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Sale of land—Action by vendor to recover from purchaser balance of purchase price—Inability of vendor to convey title because title lost through purchaser's default in covenant to pay taxes.

Where the vendor under an agreement for sale of land is unable to convey title to the land he cannot, by an action for enforcement of

* PRESENT:—Duff C.J. and Davis, Kerwin, Hudson and Taschereau JJ.

covenant, recover from the purchaser the balance of the purchase price, even though the vendor's inability to convey title is because his title was lost in consequence of default (known to the vendor) by the purchaser in his covenant to pay the taxes on the land (and, *per* the Chief Justice and Kerwin J., even though the purchaser had taken possession and accepted the vendor's title, or even if there were a primary obligation on the purchaser to the municipality to pay the taxes). But, *semble*, the vendor may have a right of action against the purchaser for damages for breach of the covenant to pay the taxes.

Royal Trust Co. v. *Kennedy*, [1930] S.C.R. 602, applied.

APPEALS by the plaintiffs from the judgments of the Court of Appeal for Ontario dismissing their appeals from the judgments of Makins J. (1) dismissing the actions. The actions were similar and were tried together.

Each action was brought to recover the balance of purchase price, and interest, alleged to be due and owing by the defendant under a covenant to pay contained in an agreement for sale of lands to defendant. The defendant had covenanted to pay taxes and had made default therein, to the knowledge (as found by the trial judge) of the plaintiffs; and the Township of Sandwich West (within which township the lands were situated), under its powers and rights under *The Ontario Municipal Board Act, 1932* (22 Geo. V, c. 27), s. 109, had registered against the lands, or the greater portion thereof, a certificate vesting the title thereto in the said Township; and the lands were lost to the parties.

The trial judge, Makins J., on the authority of *Royal Trust Company* v. *Kennedy* (2), gave effect to the defendant's contention that the plaintiff, having lost title and ability to convey, cannot enforce the agreement, and he gave judgment dismissing the action without costs. He suggested that the proper procedure for the plaintiff would be to sue for damages for breach of covenant.

On appeals by plaintiffs to the Court of Appeal for Ontario, that Court (without written reasons) dismissed the appeals without costs, "reserving to the plaintiff the right to bring an action for damages or to seek any relief except that which is specifically sought in this action."

(1) *sub nom Souldoere* v. *Avondale Co. Ltd.*, [1939] Ont. W.N. 86; [1939] 1 D.L.R. 785.
(2) [1930] S.C.R. 602.

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The plaintiffs appealed to the Supreme Court of Canada. By the judgment of this Court now reported the appeals were dismissed with costs.

A. F. Gignac for the appellants.

A. Racine K.C. for the respondent.

The judgment of the Chief Justice and Kerwin J. was delivered by

KERWIN J.—These are appeals from judgments of the Court of Appeal for Ontario affirming, with a variation, the judgments of the Honourable Mr. Justice Makins. The latter are based upon *Royal Trust Company* v. *Kennedy* (1). While in that case suit had been brought in Quebec, the law of the Province of Ontario applied, and, unless the decision can be distinguished, it is fatal to the appellants.

It is perhaps advisable to mention first certain other decisions, some of which were referred to on the argument. In *Lebel* v. *Dobbie* (2), Mr. Justice Hyndman determined that where a purchaser under an agreement for sale of land covenants to pay the taxes thereon but fails to do so and the land is forfeited because of their non-payment, the vendor, notwithstanding his lack of title, is entitled to recover the amount of the purchase price from the purchaser, as the latter cannot avail himself of his own default as a defence. It was argued that the vendor, if entitled to succeed at all, should have judgment for damages only, to the extent of the value of the land, but that argument was not given effect to. An appeal, heard by Harvey, C.J., Stuart, Simmons and McCarthy, JJ., was dismissed with costs, without written reasons being given.

In *Broder* v. *Rink and McRadu* (3), the Court of Appeal of Saskatchewan dismissed an appeal from the trial judge, who had dismissed an action for specific performance by a vendor of land. The vendor had agreed to sell one, Toader Pahomi, lots 5 and 6 in block 29, Regina, for $1,500, payable in instalments. Pahomi agreed to sell these lots to the defendants and later released to the plaintiff, who was still the registered owner, all his right, title and interest therein. Subsequently, McRadu, one of

(1) [1930] S.C.R. 602. (2) (1919) 15 Alta. L.R. 126.
(3) (1920) 56 D.L.R. 478.

the defendants, paid a certain sum on account to the plaintiff. The defendants failed to pay the taxes which in their agreement of sale with Pahomi they had agreed to pay, and in November, 1916, the lots were offered for sale for taxes. The plaintiff redeemed lot 5; the trial court found, and the Court of Appeal confirmed the finding, that the plaintiff purchased lot 6 at the tax sale, in the name of his wife. The Court of Appeal dealt only with one point, viz., whether the plaintiff, having bought lot 6 at the tax sale, and having subsequently put it out of his power to convey that lot to the defendants, was entitled to collect from them the purchase price.

Mr. Justice Lamont, speaking on behalf of the Court (consisting of Haultain, C.J.S., Newlands, Lamont and Elwood, JJ.A.), said it was not necessary to consider whether the *Lebel* case (1) was correctly decided. "I do not suggest (he says at page 480) that it was not,

> for I have not considered whether the failure of a purchaser to pay the taxes carries with it the results therein set out, or whether it exposes him merely to an action for damages for breach of covenant and the other remedies expressly provided for in the agreement of sale.

Mr. Justice Lamont pointed out that in the *Lebel* case (1) the failure of the purchaser to pay the taxes resulted in the title passing out of the hands of the vendor and into the hands of the town, while in the instant case the failure of the defendants to pay the taxes had no such result. After the tax sale, Broder was still the owner of both lots and could have made title to the defendants had he so desired. In fact the statement of claim alleged both his ability and willingness to do so. Mr. Justice Lamont found no analogy between the case of a vendor buying in his property at a tax sale and that of a second mortgagee buying mortgaged property at a sale held under a first mortgage. He suggested that a much closer analogy would be the case of a first mortgagee buying in the mortgaged premises. He referred to *Mutual Life Assurance Co. of Canada* v. *Douglas* (2), as authority for his statement that if a mortgagee acquires title under a sale for taxes, he cannot hold the title under his tax title and at the same time recover the mortgage moneys under the mortgagor's covenant to pay. He also referred to the judgment of Mr. Justice Anglin in *Sayre and Gilfoy* v. *Security*

(1) (1919) 15 Alta. L.R. 126. (2) (1918) 57 Can. S.C.R. 243.

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Trust Company Ltd. (1). In the last mentioned case the judgment appealed from was affirmed in this Court on an equal division of opinion.

In *Hutton* v. *Dent* (2), suit was brought in Ontario on a judgment recovered in Saskatchewan and, in the alternative, on the original cause of action, which was a covenant to pay for lands agreed to be purchased. In the Saskatchewan action, judgment had been recovered upon this covenant and an order made for the sale of the lands and payment by the defendant of any deficiency after crediting the money realized at the sale. The plaintiff obtained the leave of the court to bid, and bought the property. Subsequently, the first mortgagee sold the property under the power of sale in its mortgage. In the Ontario Court of Appeal, Hodgins J.A., who delivered the main judgment, stated that if it were a case between mortgagee and mortgagor, the facts would bring it within the exception to the equitable doctrine set forth in *Palmer* v. *Hendrie* (3) and *Walker* v. *Jones* (4). This exception (he states) allows recovery to be had in cases where the land has, by the default of the party liable to pay the debt, passed out of the hand of the mortgagee. After referring to Coote on Mortgages, etc., Mr. Justice Hodgins continues:—

> I think the principle upon which this exception depends is one which obtains between vendor and purchaser, for it is one of reason and common sense. This is an ordinary action on a covenant and the rules as to contract apply and govern the rights of the parties.

On appeal to this Court (*Dent* v. *Hutton* (5)), Sir Louis Davies and Mr. Justice Anglin agreed with the present Chief Justice of this Court, who dismissed the appeal with a variation by compelling the plaintiff to allow the defendant the full amount of the purchase money payable under the sale by which the plaintiff acquired title to the property. There were two questions upon which no opinion was expressed. These appear at pages 722 and 723:—

> The first of these is the question whether an unpaid vendor who has, in proceedings to enforce his lien for the purchase money, obtained leave to bid and, pursuant to that leave, purchased the property, can after the property has passed out of his possession and power proceed to enforce the judgment for the unpaid residue. Whether the vendor in such circumstances is in the same position as a mortgagee is a question of general importance, and before deciding it adversely to the view advanced

(1) (1920) 61 Can. S.C.R. 109.
(2) (1922) 53 Ont. L.R. 105.
(3) (1859) 27 Beav. 349; (1860) 28 Beav. 341.
(4) (1866) L.R. 1 P.C. 50.
(5) [1923] S.C.R. 716.

on behalf of the appellant, the weighty considerations which were urged and might be urged in support of that view would require the most careful examination. The other question is whether, the respondent having lost his title to the property in consequence of proceedings taken by the holder of a paramount security, he is in any view of the law, in consequence of the provisions of the agreement between him and the appellant, free from the operation of the principle which the appellant invokes. Upon neither of these questions, it must be understood, is any opinion now expressed.

It does not appear from the report of *Royal Trust Company* v. *Kennedy* (1) that any of these cases were cited in argument, and an examination of the factums discloses that they were not there mentioned. However, Mr. Justice Newcombe, speaking for the Court, after referring to the fact that the lands in question had been sold for taxes and not redeemed, says at page 608:—

> A title in this condition is something very different from that which the purchaser contracted to receive upon payment of the purchase money, and the question is whether he is, nevertheless, bound by reason of his failure to pay the taxes as covenanted. Other points were taken and debated at the hearing; but in the view which I take, it is unnecessary to consider these.

At page 611 he continues:—

> The plaintiff, nevertheless, now denies the purchaser's right to object to the maintenance of the action after the property has been sold for taxes, and so has passed out of the plaintiff's power to convey; and it is said that, inasmuch as the purchaser failed in performance of his covenant to pay the taxes, the defendants are now invoking their own default or that of the deceased as a means of escape; but I do not agree. It would be, in my opinion, very unreasonable to suppose that the parties ever contemplated that, in addition, or in lieu of the indemnity for which the law provides by way of damages, the purchaser or his estate should lose the benefit of his contract while still remaining subject to its burden, which is the result now sought to be accomplished.

It is true that in the *Kennedy* case (1) the purchaser had not taken possession or accepted the vendor's title which was encumbered by a mortgage and a writ of execution, and that Mr. Justice Newcombe states (page 611):—

> It must be realized that the vendor, as the owner, is primarily liable for the taxes, and that the covenant, whereby the purchaser becomes bound to pay, while it serves to engage the purchaser's indemnity for the vendor, does not create any direct obligation as between the purchaser and the municipal authorities.

But the decision was not based upon any of these considerations and the *ratio decidendi* appears in the extracts from the judgment already set out. It can make no

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difference, therefore, if in the case at bar the respondent took possession and accepted the appellant's title, or even if there be a primary obligation on the purchaser to the municipality to pay the taxes. The evidence is not clear on all these points but from what does appear and from the length of time that elapsed they may be assumed in favour of the appellant. None of them can alter the fact that the decision in the *Kennedy* case (1) was placed squarely upon the ground that in addition to a claim for damages for breach of the purchaser's covenant to pay the taxes, a vendor of land is not able to succeed in an action for specific performance where he is not able to give title to the purchaser. The appellant is entitled, under the variation of the judgment of Mr. Justice Makins, made by the Court of Appeal, to bring an action for damages, and the appeal must be dismissed with costs.

DAVIS J.—The action is not one in equity for specific performance; it is an action to recover money on a covenant to pay. The bare facts are these: A. agrees to sell to B. and B. agrees to buy from A. certain lands, the sale to be completed at a future date; B., the purchaser, expressly covenants to pay the taxes meantime; B. fails to do so and the lands become vested in and the property of the municipality for non-payment of taxes (by virtue of the provisions of the Ontario statute 22 Geo. V (1932), chap. 27, sec. 109); A. sues B. for payment of the balance of the purchase money; B. pleads by way of defence the equitable doctrine that he is not required to pay unless the lands are conveyed to him and that A. is unable to convey; A. replies, "I am unable to convey only because of your own default in not paying the taxes you agreed to pay whereby the lands became by statutory authority vested in and the property of the municipality; consequently the rules of contract apply and govern the rights of the parties. No equity enters into the matter."

While the equitable doctrine is plain that a vendor of land before he can recover judgment for the purchase money must have either conveyed or tendered a conveyance of the lands, there is an exception where the inability of the vendor to do so is the result of the neglect or default of the purchaser. But I can find no escape

(1) [1930] S.C.R. 602.

from concurring in the dismissal of this appeal in view of the decision of this Court in *The Royal Trust Company* v. *Kennedy* (1). The action was dismissed by Makins J. because he felt bound by that decision and an appeal from his judgment to the Court of Appeal was dismissed without written reasons but the formal judgment was varied by reserving to the appellant (plaintiff) " the right to bring an action for damages or to seek any relief except that which is specifically sought in this action."

In *Hutton* v. *Dent* (2), the inability of the vendor to convey was due to the fault of the purchaser in allowing the land to be sold under a mortgage which he had assumed as part of the purchase price. Were I free to do so, I should follow the reasoning and conclusion of the late Mr. Justice Hodgins in the Court of Appeal for Ontario in that case, but I am not free to do so because though an appeal to this Court from that judgment was dismissed (3), the judgment of this Court was put on other grounds.

HUDSON J.—The decision of this Court in the case of *Royal Trust Company* v. *Kennedy* (4) was unanimous. The principle enunciated in the judgment of Mr. Justice Newcombe, speaking for the whole Court, seems to me to be directly in point in this case. For this reason I would dismiss the appeal with costs.

TASCHEREAU J.—These appeals are from the judgments of the Court of Appeal for Ontario which affirmed judgments given by Mr. Justice Makins of the Supreme Court of Ontario. I believe that we are bound by the decision given in *Royal Trust Company* v. *Kennedy* (4). In that case it was decided that the law ascertains the damage for breach of the covenant according to the method indicated by *Lethbridge* v. *Mytton* (5) and *Loosemore* v. *Radford* (6): " when a purchaser covenants to pay the taxes, the vendor may, at any time, when unpaid taxes are overdue, maintain an action against the purchaser for the amount." It was also decided that an action for the balance of the price of sale cannot be maintained when the vendor cannot give title to the property.

(1) [1930] S.C.R. 602.
(2) (1922) 53 Ont. L.R. 105.
(3) *sub nom. Dent* v. *Hutton*, [1923] S.C.R. 716.
(4) [1930] S.C.R. 602.
(5) (1831) 2 B. & Ad. 772.
(6) (1842) 9 M. & W. 657.

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Taschereau J

In the present instance, the vendors, having lost title to the property, are unable to perform their covenants to convey and are, therefore, precluded from recovery of any moneys due under the agreements.

I would dismiss the appeals with costs, reserving to the plaintiffs all the rights they may have to bring an action for damages.

Appeal dismissed with costs.

Solicitors for the appellants: *A. F. Gignac* and *A. B. Drake.*

Solicitor for the respondent: *Armand Racine.*