1929
*Oct. 21, 22.
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*Feb. 4.

THE ROYAL TRUST COMPANY, ES-QUAL AND OTHERS (DEFENDANTS)..... } APPELLANTS;

AND

JOHN DE N. KENNEDY, ES-QUAL (PLAINTIFF) ..... } RESPONDENT.

ON APPEAL, PER SALTUM, FROM THE SUPERIOR COURT FOR THE PROVINCE OF QUEBEC

Sale—Property—Agreement by purchaser to pay taxes—Sale of property to third party for unpaid taxes—Action for purchase price—Liability of purchaser.

The respondent, representing the vendor, sued the appellant, representing the purchaser, for the balance of the price of sale of a certain parcel of land. The latter denied his liability on the ground that the property could not be transferred to him by the vendor as it had been sold for unpaid taxes; but the vendor contended that the purchaser was still bound because the sale of the property for taxes was due to the failure by the purchaser to pay them as covenanted.

Held that the respondent's action should be dismissed. The vendor was aware that the taxes had not been paid and was looking to the purchaser for the money wherewith to pay them; he had already collected some rent for the property which he was holding as a credit against the taxes and it can be inferred that the vendor anticipated that payments on account of taxes, when made, would

*PRESENT:—Anglin C.J.C. and Duff, Newcombe, Rinfret and Lamont JJ.

pass through his hands. When, therefore, the property was sold for taxes, it was not because the vendor was misled into a belief that the purchaser had paid or intended to pay the taxes; the vendor had been notified, previously to the sale for taxes, that the purchaser repudiated the contract and was looking for a refund of his payments, and in withholding payment of the municipal claim the vendor acted deliberately, with a full knowledge of the facts. Moreover, effect must be given to the language of the contract, according to the whole scope of the instrument. The vendor, as the owner, is primarily liable for the taxes, and the covenant, whereby the purchaser becomes bound to pay, while it serves to oblige the purchaser to indemnify the vendor, does not create any direct obligation as between the purchaser and the municipal authorities. The direct or proximate cause of the municipal sale, being the non-payment of the taxes required by the *Assessment Act,* was not any act or default of the purchaser or his representatives; they had the faculty to pay, but they were in no sense agents or actors in effecting the sale; nor did the sale follow as a consequence of their neglect. The law ascertains the damage for breach of the covenant according to the measure indicated by *Lethbridge* v. *Mytton* (2 B. & Ad. 772) and *Loosemore* v. *Radford* (9 M. & W. 657): 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.

APPEAL, *per saltum,* from the judgment of the Superior Court for the province of Quebec, Martineau J., maintaining the respondent's action for $48,860 and costs, as the balance of the price of sale and accrued interest under an agreement to purchase land in the province of Ontario.

The material facts of the case are fully stated in the judgment now reported.

W. N. Tilley K.C. and *E. M. McDougall K.C.* for the appellants.

E. Lafleur K.C. and *J. W. Weldon K.C.* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—Mr. Donald Hogarth, of the city of Port Arthur, Ontario, real estate agent, party of the first part, entered into an agreement, under seal, dated 15th June, 1912, with Captain Francis Chattan Stephens, of the city of Montreal, stock broker, party of the second part, whereby the party of the first part agreed to sell to the party of the second part, who agreed to purchase, a certain parcel of land situate at Port Arthur, and particularly described in the agreement, for the sum of $40,000, to be paid, $12,000 on the execution of the agreement, the receipt whereof was

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acknowledged; a like sum on 15th of June, 1913; $4,500 on 15th of June, 1914; $4,500 on 15th June, 1915, and the balance, $7,000, in seven equal payments of $1,000 each; with interest, at the rate of seven per cent. per annum, payable yearly, with each of the instalments:

provided that the party of the second part may pay off the whole or any additional (sic) part of the amount hereby secured at any time without notice or bonus.

The party of the second part covenanted well and truly to make the payments above mentioned, and to pay the interest as aforesaid, and also that he

shall and will pay and discharge all taxes, rates and local improvement assessments, wherewith the said land may be rated and charged from and after the 15th June, 1912,

and the vendor in like manner covenanted, upon payment of the consideration money with interest as stipulated, to convey the premises to the party of the second part, his heirs and assigns, by good and sufficient deed in fee simple. These clauses follow:

But subject to the conditions and reservations expressed in the original grant thereof from the Crown; and such deed shall be prepared at the expense of the said party of the first part, and shall contain the following covenants namely: the usual statutory covenants.

And also shall and will suffer and permit the said party of the second part his heirs and assigns to occupy and enjoy the same until default be made in the payment of the said sums of money above mentioned, or the interest thereon or any part thereof on the days and times and in the manner above mentioned; subject nevertheless to impeachment for voluntary or permissive waste.

And it is expressly understood that time is to be considered the essence of this agreement, and unless the payments are punctually made at the times and in the manner above mentioned, these presents shall be null and void and of no effect and the said party of the first part shall be at liberty to re-sell the land.

It is also stipulated that the vendor

is to pay off the present registered mortgage, as follows:—

To Franklin W. Wiley.....	$ 4,000 00
To Ruttans Estates Ltd.....	11,000 00
To James Conmee	11,250 00

and if the same are not paid, according to the terms thereof, the party of the second part shall have the privilege of taking up the said mortgages as they become due, and deducting the amount so paid on such mortgages from the payments due under this agreement to the party of the first part.

The purchaser paid $12,000 down and $1,960 plus $3,000 by two payments in 1913. These are the only payments; but, in addition, it is acknowledged that the vendor, who, notwithstanding the provision of the agreement as to pos-

session, appears to have been in receipt of the rents, received $775, which amount is credited to the purchaser.

Captain Stephens went to the war and came home wounded at the beginning of 1916. He died on 16th October, 1918. After his return he consulted and instructed his solicitor with respect to the transaction in question. The latter, Mr. McMaster, of Montreal, had correspondence with Captain Stephens in 1916. Mr. Hogarth, of J. J. Carrick and Company, Limited, of Port Arthur, wished to enforce the agreement, and there were negotiations for settlement. On behalf of Mr. Hogarth, it had been represented that he was interested under the agreement only as the agent or trustee of the Carrick Company. There is among the plaintiffs' exhibits an affidavit of Mr. Hogarth sworn in England 16th February, 1917, wherein the deponent disclaims any beneficial title and says that he is interested only as trustee for J. J. Carrick. There is also in evidence a deed of 26th October, 1917, whereby he conveyed the property, in consideration of $1, to that company. This deed, however, was not registered until 13th November, 1918.

On 11th August, 1916, Mr. McMaster wrote to the Carrick Company, saying:—

> Captain F. C. Stephens has placed before us the correspondence you have had with his father-in-law, the Honourable Mr. Kemp, and we have now before us your letter of the 26th of June.
>
> Captain Stephens instructs us to say that he is prepared to adjust the matter in the manner suggested in this letter, and will be pleased to forward cheques for $8,921.34 as requested.
>
> We propose to deal with the matter in the following manner, which we trust will meet with your approval:—
>
> We will ask you to cause the three mortgages to be prepared directly from Captain Stephens to the three mortgagees, and also a deed of sale from Mr. Hogarth or whoever is now the registered proprietor of the property to Captain Stephens. You will then send these documents to us or to any one in Montreal whom you may prefer, and Captain Stephens will complete the documents and hand over the money. If you care to send the documents to us we undertake that they shall not go out of our possession until Captain Stephens has executed them and placed certified cheques for the amount in our hands. Captain Stephens is doing this, of course, on the assumption that the title of the property is in order and we are to-day writing to a practitioner in Port Arthur asking him to look into this question for Captain Stephens on our behalf.

And three days later, the Carrick Company answered as follows:

> We have yours of the 11th inst., stating that your client, Capt. F. C. Stephens, has agreed to comply with the suggestions outlined in our communication of June 26th.

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We are preparing all the necessary papers in this connection and shall arrange to have the documents forwarded not later than the 16th inst.

The title to the property is free from any encumbrance or defects, and there should be no difficulty in having the matter completed at an early date. The title to the property was searched by D. J. Cowan, barrister of Port Arthur, for Mr. Stephens at the time of the purchase and since that time, there have not been any changes, of which we have any knowledge.

When the documents are completed, we shall arrange to forward them to your firm and you may arrange with Mr. Stephens for the payment of monies as outlined in the communication mentioned herein.

Meantime Mr. McMaster had instructed Messrs. Keefer and Towers, his agents at Port Arthur, to search the title, and, in due course, 5th September, 1916, they reported that there was an execution, amounting to $50,000, against the property; whereupon Mr. McMaster wrote the Carrick Company, enclosing copy of his agents' report, and saying:

We send you herewith copy of a letter we have just received from Messrs. Keefer, Keefer & Towers whom we asked to search the title of the above property for us.

You will see that according to Messrs. Keefer, Keefer and Towers there is registered against the property an execution for $50,623.68 with costs which according to an official statement from the sheriff aggregate $76.60. There are also back taxes amounting to $2,237.05 up to the 31st of December, 1916, and we would be glad to know what proportion of these taxes should be borne by Captain Stephens and what by Mr. Hogarth.

In reply it was stated, on behalf of the Carrick Company, by letter of 8th September, 1916, in effect, that Captain Stephens was responsible for the taxes, up to and including 1916, subject to a credit of $875 received by the Carrick Company for rent; and that, as to the execution, they had referred the matter to Mr. A. J. McComber, their solicitor, who considered that the execution

would have no bearing on this property, as the property had already been transferred by agreement of sale to Mr. F. C. Stephens prior to the execution coming into force.

The Carrick Company, by this letter, proceeded to say:

We might add that although Mr. Hogarth was the registered owner of this property he never had at any time any personal interest in the land. The rightful owner of the property was J. J. Carrick and on the formation of the J. J. Carrick Company Limited, we took over this property, which had been in Mr. Hogarth's name, and we have been the owners of the land since Feb. 1, 1914.

Providing that our solicitor cannot convince you that the writ of execution is null and void in so far as this property is concerned, there are many ways in which the title can be perfected, and the writ of execution cancelled, and as mentioned above, if our solicitor is unable to satisfy you, we will stand the expense of having the title cleared up to your satisfaction

On the same date, Mr. McComber wrote Mr. McMaster, arguing and expressing his opinion that, as the execution against Mr. Hogarth was subsequent to the sale to Captain Stephens, it did not affect the land sold. There was further correspondence, but it failed to satisfy either Mr. McMaster or his agents, and, on 20th December, 1916, the Carrick Company wrote Mr. McMaster, enclosing a statement, and saying:

> We anticipate being able to advise your Port Arthur solicitors that the title to the Arthur Street property is free from all encumbrance, including the execution to which you have made objection not later than the 10th of January, 1917, and we are forwarding this statement at this time so as to give you ample time to get in touch with Mr. Stephens and have him arrange to have the monies in your possession so that as soon as you are satisfied as to the title of this property, you will be in a position to complete the transaction without any further delay.

Meanwhile proceedings had been taken on behalf of the vendors, under the Ontario *Vendors' and Purchasers' Act,* for the purpose of having it adjudged that the property was not bound by the execution. These proceedings were contested by the execution creditor, and they dragged; in fact, they never came to trial; and, on 12th June, 1917 Messrs. Keefer and Towers, Mr. McMaster's agents at Port Arthur, by letters addressed to Mr. Hogarth and to J. J. Carrick & Company Limited, gave notice, on behalf of Captain Stephens, that

> by reason of your inability to furnish title to him in fee simple, by reason of the execution above referred to and the mortgages above set out, Francis Chattan Stephens repudiates the contract of purchase and rescinds same, and demands refund of all moneys paid under said agreement for sale and purchase, together with legal interest.

The answer, dated 20th June, 1917, came from Mr. McComber, who stated that Mr. Hogarth had left Canada for the Old Country, and would not receive Messrs. Keefer and Towers' letter for some time, but that he could not accept "Mr. Stephens' repudiation and rescission of the contract"; and he said,

> At any time after he tenders his money in full, I will be prepared to see that he gets a deed clear of mortgages and the execution. As he is in default with his payments, he cannot blame Col. Hogarth for being in default with his payments. I might also point out that Mr. Stephens has not paid the taxes on the property as called for by the contract and the arrears amount to a large sum. Col. Hogarth and the J. J. Carrick Company Limited look to Mr. Stephens to carry out his agreement.

It appears by Mr. McComber's evidence and the certificates of title, that the lands were sold in 1918 for taxes and

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redeemed. Subsequently they were sold again for taxes, and not redeemed. Mr. McComber was asked in his cross-examination:

Q. As to the suggestion of his Lordship, if the Estate Stephens were now to pay fifty odd thousand dollars to the Port Arthur and Fort William Mortgage Company, what chance would they have of getting title to that property?—A. They would get a complete title outside of the tax sale.

Q. Would they get the property?—A. I don't know. They might attack the tax sale and set it aside.

Q. That is to say, that the only recourse the Stephens Estate would have, if they now paid their money, would be to take an action to set aside the tax sale, in order to get that property which Hogarth undertook to deliver?—A. Not necessarily. They might be able to get it back from the present owner.

Q. Well then, it comes to this, that even though the court should render judgment in favour of the plaintiff, then the Stephens Estate would be left to go and fight for that property somehow and get it?—A. Yes, because we claim, of course, it was through their default that the property was allowed to go to tax sale.

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.

The action was commenced on 13th June, 1927, and the amended declaration upon which the parties went to trial was filed on 21st June, 1928. The plaintiff, by this declaration, claims as liquidator, under the *Winding Up Act*, of the Port Arthur and Fort William Mortgage Company Ltd., for the balance of purchase money and interest, amounting as shewn by his particulars, to $48,680, alleging that Hogarth was trustee for the Carrick Company, and, being indebted in a large amount to the Port Arthur and Fort William Mortgage Company Limited, sold and conveyed to that company by deed of assignment of 15th April, 1926, all his right, title and interest in the land, subject to the agreement, and all his right and claim against the estate of the late Captain Stephens and against the defendants as his executors and trustees.

The plaintiff put in evidence at the trial a deed, dated 22nd April, 1926, from J. J. Carrick Company Limited to the Port Arthur and Fort William Mortgage Company Lim-

ited (in liquidation), conveying the lands described by the agreement.

The action was brought and tried in the province of Quebec, but it is admittedly regulated by the law of Ontario, and evidence was introduced at the trial as to the law of the latter province.

The trial judge found that the purchaser was entitled to require the removal of the execution, and that finding is not, as I understand the case, in question upon this appeal. But the learned judge also found, by his tenth *considérant*, that the sale of the property for taxes was made by reason of Captain Stephens' default to pay them, and that the "defendants alone are responsible for its consequence." The learned judge moreover says, in his notes or reasons for judgment:

> The sale of the property for taxes cannot be a bar to plaintiff's action. If the repudiation was invalid, Stephens should have paid them, and if he has not done so, he is also responsible for the consequences.

If he mean that Captain Stephens or the defendants are responsible for the selling of the land, I do not agree, and for the reasons which I shall state.

The chief end of the agreement between the parties, and the reason for which it was called into being, was the sale and purchase of the lands described; and, while the purchaser had covenanted to pay the purchase money with interest as provided, the vendor had, in like manner agreed, on payment of the purchase money, to convey and assure the premises to the purchaser by good and sufficient deed in fee simple. The terms are therefore dependent. In *Sugden* on *Vendors and Purchasers*, 14th ed., p. 241, the venerable and learned author, who tells us that he wrote and revised every line of this edition, says:

> But an agreement to buy an estate and pay for it on a certain day, implies that the seller is to convey the estate at the same time to the purchaser; the one thing is to be exchanged for the other. And the mere postponement of the time for performance will not alter the effect of the prior stipulation, which is that the money shall be paid upon the execution of the conveyance.

It is true that the purchaser covenants to pay the taxes, and, for breach of that covenant, the vendor may at any time, when unpaid taxes are overdue, maintain an action against the purchaser for the amount. *Lethbridge* v. *Mytton* (1); *Loosemore* v. *Radford* (2).

(1) (1831) 2 B. & Ad. 772. (2) (1842) 9 M. & W. 657.

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It is also to be observed that, according to the Carrick Company's letter to Mr. McMaster of 8th September, 1916, advising that there were taxes of some $2,200 chargeable to the property, it is stated that

> Both Mr. Stephens and Mr. Kemp (the former's father-in-law) have had this information from time to time, and we have at different times requested cheque in order to pay these taxes and save additional percentage charges.

Evidently, therefore, the Carrick Company was aware that the taxes had not been paid, and was looking to Captain Stephens for the money wherewith to pay them; and, moreover, as the letter shews, had already collected rent for the property to the amount of $875, which it was holding as a credit against the taxes; and, so far as the situation is explained or made intelligible, I would infer that the Carrick Company anticipated, as seems most natural, that payments on account of taxes, when made, should pass through its hands. When, therefore, the property was sold for taxes, it was not because the vendor was misled into a belief that the purchaser had paid or intended to pay the taxes. The vendor had been notified, as early as 12th June, 1917, that the purchaser repudiated the contract and was looking for a refund of his payments, and in withholding payment of the municipal claim the vendor acted deliberately, with a full knowledge of the facts.

The correspondence is not complete; only a portion of it is in evidence; but there is enough to shew that the parties had agreed upon new terms in 1916, which would perhaps have resulted in a final settlement if it had not been for the execution, which was discovered upon the search preparatory to the carrying out of the new agreement. And, while it is stipulated by the earlier agreement that, if the purchase money be not punctually paid, the instrument shall be null and void, and the vendor shall be at liberty to resell the land, there is no provision, either by the original agreement or the subsequent correspondence, for default or delay in the payment of taxes, a condition which, it may be supposed, would have been visited with less severe consequences.

The case of *New Zealand Shipping Co., Ltd.* v. *Société des Ateliers et Chantiers de France* (1), was cited, but I do

(1) [1919] A.C. 1.

not think that the sale of the property for taxes resulted from the non-payment of the taxes by the purchaser, nor was it the cause or "mean" of the sale within the meaning of that case and the authorities upon which it depends. Effect must be given to the language of the contract, according to the whole scope of the instrument. 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. The direct or proximate cause of the municipal sale, if it were the non-payment of the taxes as required by the *Assessment Act,* was not any act or default of the purchaser or his representatives; they had, it is true, the faculty to pay; but they were in no sense agents or actors in effecting the sale; nor did the sale follow as a consequence of their neglect; and the law ascertains the damage for breach of the covenant according to the measure indicated by the cases above cited.

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.

I would allow the appeal with costs both in the Superior Court and here.

Appeal allowed with costs.

Solicitors for the appellants: *Casgrain, McDougall & Demers.*

Solicitor for the respondent: *J. W. Weldon.*