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MARY HARRIS (DEFENDANT).....APPELLANT;

*June 21, 22.
*Oct. 10.

AND

FRANCIS ROBINSON (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*Contract—Specific performance—Time for completion—Extension—Rescission—Conduct of party seeking relief—Laches.*

The exercise of the jurisdiction to order specific performance of a contract is a matter of judicial discretion, to be governed, as far as possible, by fixed rules and principles, but more elastic than in the administration of other judicial remedies. In the exercise of the remedy much regard is shown to the conduct of the person seeking relief.

H. and R. agreed to exchange land and the agreement, which was in the form of a letter written by H. proposing the exchange, the terms of which R. accepted, provided that the matter was to be closed in ten days if possible. R. at the time had no title to the property he was to transfer but was negotiating for it. Nearly four months after the date of the agreement the matter was still unsettled, and a letter was written by H. to R.'s solicitor notifying him that unless something was done by the next morning the agreement would be null and void.

Prior to this there had been several interviews between the parties and their solicitors, in which it was pointed out to R. that there were difficulties in the way of his getting a title to the land he proposed to transfer; that there was no registry of the contract which formed the title of the man who was to convey to him, and that the lands were subject to an annuity; R., however, took no active steps to get the difficulties removed until after the above letter was written, when he brought an action against the proposed vendor and obtained a decree declaring his title good. He then brought suit against H. for specific performance of the contract for exchange.

*Held*, reversing the judgment of the Court of Appeal, Taschereau J. dissenting, that the action could not be maintained; that R. not having

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* PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.
(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

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title when the agreement was made H. could rescind the contract without giving reasonable notice of his intention, as he would be bound to do if the title were merely imperfect; that the letter to the solicitor was sufficient to put an end to the bargain; and that even if there had been no rescission the conduct of R. in relation to the completion of the contract was such as to disentitle him to relief by way of specific performance.

*Held*, also, affirming in this respect the judgment of the courts below, that time was originally of the essence of the contract, but there was a waiver by H. of a compliance with the provision as to time by entering into negotiations as to the title after its expiration.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming, by an equal division of the judges, the judgment of the Divisional Court (2) by which the judgment for defendants at the trial was reversed.

The material facts are set out in the above head-note and in the judgment of the court.

*Reeve* Q.C. for appellant referred to Dart on Vendors and Purchasers (3) and Fry on Specific Performance (4).

*Hodgins* and *Coatsworth* for the respondent. As to waiver see *Salisbury* v. *Hatcher* (5) and *Hoggart* v. *Scott* (6).

Plaintiff was entitled to reasonable notice of rescission. *Green* v. *Sevin* (7); *Murrell* v. *Goodyear* (8).

As to right of plaintiff to specific performance see *Hall* v. *Warren* (9).

The judgment of the majority of the court was delivered by.

STRONG J.—On the 1st of August, 1888, the appellant and respondent entered into an agreement for the exchange of certain landed property and houses in the

(1) 19 Ont. App. R. 134.
(2) 21 O. R. 43.
(3) 6 ed. p. 482.
(4) 2 ed. ss. 1070 & 1072.
(5) 2 Y. & C. 54.
(6) 1 Russ. & Mylne 293.
(7) 13 Ch. D. 589.
(8) 1 DeG. F. & J. 432.
(9) 9 Ves. 605.

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city of Toronto. By this agreement the appellant was to convey to the respondent seven lots situate in Dupont and Kendal avenues, subject to a mortgage for $4,375, and the respondent was to convey to the appellant two houses on George street, and in addition to give the appellant a mortgage for $1,000 on the avenue lots and to pay to the appellant $175 in cash. This agreement was in writing in the form of an offer or proposal signed by the appellant, to which was subjoined an acceptance signed by the respondent.

At the date of the contract the title to the property in George street which was to be conveyed by the respondent was as follows:—The legal estate in fee was vested in Mr. W. G. Schreiber who, by a contract dated the 1st of November, 1884, had agreed to sell the same to one Frank Simpson for the sum of $3,400, payable in certain instalments which need not be particularly specified. Part of the purchase money, amounting to $799, was to be paid by instalments before conveyance, and the residue was to be secured by a mortgage also payable by instalments. At the date of the agreement between the appellant and respondent $499 of these instalments had become due, and it does not appear whether at that time they had been paid by Simpson or not.

On the 26th of June, 1888, Simpson signed the following offer in the form of a letter of that date addressed to the respondent Francis Robinson:—

> I hereby offer to sell you the lands and premises lots 95 and 97 east side George street, Toronto, for the sum of $5,000 payable in cash on completion of the title, and give you the refusal thereof for 30 days from this date.

There is no evidence in the case showing that this offer was accepted by the respondent within the thirty days limited for its acceptance. Caston in his evidence says it was accepted in writing, and when asked "have

you got that acceptance?" answers "it was forwarded," meaning, of course, forwarded to Simpson. The written acceptance was not, however, produced, and there is nothing to show, what was essential to make out a contract, that it was accepted within the time limited. In connection with this part of the case there is an important piece of evidence in the deposition of Mr. Henderson, who acted as the appellant's solicitor in carrying out the agreement. It is contained in the following extract :—

Q. Didn't Caston tell you he had an agreement with Simpson? A. No ; I didn't understand that he had an agreement with Simpson.

Q. He had a contract of some kind? A. He claimed it was a contract.

Q. And that Simpson was entitled to a deed from Schreiber? A. So he stated.

Q. It is not an unusual thing that there should not be a deed registered? A. There are transactions of that kind.

Q. You would not have regarded that at all as serious? A. If he produced the agreement; he gave me to understand he could not produce.

Simpson's father (Francis Simpson) being called as a witness for the respondent in reply does not prove an acceptance within the 30 days. What he says about it is contained in the following extract from his deposition :—

Q. You instructed counsel that no agreement had been signed with Caston? A. Yes, until I understood differently. I understood the contract to be only to allow 30 days to sell it ; I understood it voided the agreement if the sale did not take place within 30 days, and then of course it fell through ; that is the way I understood it. Afterwards I went to Caston and I saw the original agreement, and, of course, as it was my signature for my son I must agree to it.

Q. That was just before the judgment was pronounced? A. It was at Caston's, some time before that.

Q. You came to my office with Miller? A. That was some time afterwards ?

Q. You made an affidavit in this case at the request of Harris ? A. Yes ; but I want it understood that I made it before I understood that

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that contract was binding; we had no solicitor up to the time the writ was issued against us.

His Lordship—You thought if he could sell it within 30 days it was binding? A. Yes.

His Lordship—If he could not sell it, it fell through? A. Yes.

Q. You did not discover that was binding till shortly before the judgment was delivered against your son? A. No; then I was informed by my solicitor.

Q. Up to that time your son was refusing to carry out the contract? A. We refused to carry it out or had not done so; that was the way we refused.

Up to the time of the trial of this action on the 16th September, 1889, nothing had been paid by Robinson to Simpson on account of the purchase money payable under his contract.

Simpson, the father, speaks positively as to this. His evidence is as follows:—

His Lordship—They had not given you $5,000? A. No.

His Lordship—Have they offered it since? A. No; I am pretty sure they have not; it has not been paid yet.

Q. You would not know if it had been paid? A. Yes; they promised to do so.

His Lordship—It still stands in the same position? A. Yes.

Mr. Henderson, a solicitor, having been employed to examine the title on behalf of the appellant, raised two objections: First, that the contract which formed Simpson's title had not been registered; and secondly, that there appeared on the registry to be an annuity or rent charge which formed an incumbrance upon the lands having been granted by one Perry in favour of Sir William Campbell when Perry purchased from Campbell as part security for payment of the purchase money on that sale. These objections having been taken at the outset nothing whatever seems to have been done by the respondent towards removing them up to the 19th of November, on which day, as will be hereafter shown, notice of rescission was given on behalf of the appellant. In the interval nothing, so far as appears, was done by the respondent towards

the removal of the difficulties. There were interviews and correspondence, but Caston does not show that he was at all active in endeavouring to surmount the objections to the title. As to the annuity he said "he had been trying to see those parties but could not find out who the man was." There is no evidence that he offered compensation for the annuity. He did, however, offer to give indemnity by a mortgage upon lands at Ingersoll which were subject to an overdue mortgage containing a power of sale. The evidence of Mr. Henderson appears to have been satisfactory to the learned Chief Justice of the Queen's Bench who tried the action. It is as follows:—

Q. Was there any other objection? A. There was an objection as to an annuity.

Q. What position did Caston take respecting the annuity objection? A. He said he would inquire into it, and endeavour to clear it up; he said it was the first he heard of it.

Q. Did you report the objections to Harris? A. Yes; Caston called at the office two or three times on the subject.

Q. Did he remove these objections? A. Never to my knowledge.

Q. What became of the matter, so far as you are concerned? A. He came in, and I met him upon the street once or twice, and he always told me he was endeavouring to get things into shape. He was in my office once or twice; he and Harris came in one morning and I said there was no use fooling away more time. He claimed there would be no difficulty in getting his title; he seemed to think that was a matter of very small moment at the time. I told him there was no use considering the matter till he had that settled. He said his client's title rested upon agreements. I asked him if he could produce copies of them; he could not even do that. I told him it was no use fooling about the matter; that I did not want to hear any more about it; that I was simply asked to report upon the title, and it seemed to me like a farce.

The evidence may therefore be summed up by saying that it is proved that two objections having been taken, the first as to the annuity and the second that neither the contract between Schreiber and Simpson nor that between Simpson and Robinson was regis-

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tered or produced, the respondent took no steps to remove the first objection and declared his inability to produce even an agreement which formed his own immediate title. In this state of things L. G. Harris, the appellant's son who acted for her in the matter, on the 19th November, 1888, wrote to Mr. Caston, as solicitor for the respondent, the following letter :—

TORONTO, November 19, 1888.

Mr. CASTON.

Dear Sir,—Unless something definite is done *re* our "exchange" (of the day) we will have to call it null and void after to-morrow a.m. They have all been here to-day and say they are disgusted, so please, Mr. Caston, come over in the morning first thing and see what we can do.

Yours truly,
L. G. HARRIS.

Nothing further material to be mentioned occurred until the 1st December, 1888, when the respondent commenced an action against Simpson for specific performance of his alleged agreement with the latter.

Subsequently to this some letters appear to have been written by Mr. Caston to L. G. Harris, to one only of which the latter replied, in a letter written on the 29th January, 1889, in which he reiterated his abandonment of the purchase.

This action was commenced on the 22nd January, 1889, and came on to be tried before the Chief Justice of the Queen's Bench at the Toronto Assizes on the 16th September, 1889, when his Lordship gave judgment dismissing the action. This judgment was subsequently set aside by the Queen's Bench Division, composed of Falconbridge J. and Street J., and judgment for specific performance was ordered to be entered for the respondent. From this judgment the appellant appealed to the Court of Appeal, where his appeal was dismissed with costs. From this latter judgment the present appeal has been brought.

No decree was obtained in the action brought by the respondent against Simpson until the 12th December, 1889, when a decree by consent was made. This decree, which was not drawn up until the 25th February, 1890, referred it to the master to inquire as to whether a good title could be made. The master's report was made on the 16th June, 1890, reporting the title good. It does not appear what, if anything, was done in the master's office to remove the objections.

Thus, to begin with, we have a contract entered into on the 1st August, 1888, to be completed within ten days from its date, and nothing to show that a good title could be made earlier than 10th June, 1890, more than a year and ten months after the time originally fixed for completion.

The jurisdiction which courts of equity formerly exercised by way of specific performance, a jurisdiction which is now in Ontario, since the Judicature Act, administered, but upon the same principles and subject to the same limitations, by all courts, is peculiar. It is not sufficient to entitle a party seeking this peculiar relief to show what would be sufficient to entitle him to recover in a court of law, namely, that a contract existed, but, as is well shown by the quotations made in the judgment of the learned Chief Justice of the Court of Appeals from the judgment of the House of Lords in *Lamare* v. *Dixon* (1) and from Lord Justice Fry's Treatise (2), the exercise of the jurisdiction is a matter of judicial discretion, one which is to be said to be exercised as far as possible upon fixed rules and principles, but which is, nevertheless, more elastic than is generally permitted in the administration of judicial remedies. In particular it is a remedy in the application of which much regard is shown to the conduct of the party seeking the relief.

(1) L.R.6 H. L. 423.

(2) Fry on Specific Performance, 2nd ed. sec. 25.

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There can be no doubt, upon the evidence before us, that both parties entered into this contract for speculative purposes, and that the property which is the subject of it was recognized by both as having a speculative value. This was the conclusion of the learned Chief Justice of the Queen's Bench, and I entirely agree with him in that opinion. It follows that originally time was of the essence of the contract, and if there had been no waiver on the part of the appellant by entering into negotiations as to the title he would have been bound to have completed it within ten days, for I do not regard the words "if possible" in the agreement as negativing this inference. The appellant did not, however, insist on a literal compliance with this term of the contract, but by negotiating as to the title after the expiration of the time limited recognized the existence of the contract. So far I agree with Mr. Justice Street's judgment.

I am of opinion, however, that two propositions, both equally fatal to the respondent, may upon the facts in evidence and upon the law applicable to those facts be safely laid down. I say, then, that in the first place the letter of the 19th November, 1888, having regard to the circumstances disclosed in the evidence, was sufficient to put an end to the bargain. Secondly, the conduct of the respondent in relation to the completion of the contract has been such that without reference to any actual rescission he has been guilty of such laches as disentitles him to specific performance. First, as regards rescission: The evidence entirely fails to establish that the respondent had any title whatever, equitable or legal, to the property he was to give in exchange at the time he entered into this contract. It is to be observed that the letter from Frank Simpson to the respondent of the 26th of June, 1888, which is relied on by the respondent as containing his contract

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with Simpson, is a mere offer to sell, not a concluded contract but an option, which did not become a contract unless the respondent, according to the express terms of the letter, should accept it within thirty days from the date of the letter, the 26th of June, 1888. During that period of thirty days, and until his proposal was accepted, Simpson could at any time have revoked his offer. Further, I need scarcely say that in a unilateral offer of this kind time is strictly material, and acceptance after the thirty days without more, that is, without some extension of the time in writing signed by Simpson, would not be sufficient to constitute a binding contract. Now there is no evidence whatever that there ever was an acceptance within the thirty days. All that Caston says in the extract from his deposition before given is that it was accepted in a writing which was forwarded to Simpson; but the written acceptance itself is not produced, as it ought to have been and might have been if it existed since it must have been in the possession of Simpson, nor does Caston say that it was sent within the thirty days. Simpson does not say that there was an acceptance within thirty days; it is true he does not say there was not, but he understood there was to be a sale within thirty days and that otherwise it fell through, which gives much colour to the inference that there was not, in fact, an acceptance within the specified time. Again, Mr. Henderson says that when, finding this agreement was not registered, he pressed Caston to produce it the latter admitted he could not even do that. So that up to the present time there has been no legal evidence in this action that there was, anterior to the 26th July, 1888, when the thirty days option expired, any acceptance by the respondent, either written or oral, of Simpson's offer, and consequently it does not appear that any binding contract

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whatever existed between Simpson and the respondent on the 1st August, 1888, the date of the contract between the respondent and the appellant.

The appellant by her pleading directly puts in issue the defence that the plaintiff had not at the date of the contract any title to the George street property.

The second paragraph of the statement in defence is as follows :—

> The defendant further says that the plaintiff had not at the time of the making of the alleged contract, or the rescission thereof as aforesaid, any title to the said lands on George Street or any such title thereto as the defendant was bound to accept, and the plaintiff was unable to perform the said alleged contract on his part.

By the first paragraph of the defence the appellant pleaded the rescission of the contract. As a general rule, under the practice of courts of equity, questions of title were not disposed of at the hearing of a suit for specific performance but were made the subject of a reference to the master, but when the defence of the want of any title is raised, as it is in the present case, not with a view of compelling the plaintiff to show a good title but as a substantive defence to the action, there is no reason why it should not be disposed of at the trial. Upon these pleadings the burden of proving that he had at least some title to the property was upon the respondent, and it is manifest that he has failed in doing so ; on the contrary, the evidence raises at least a strong presumption to the contrary.

Another reason for saying that the plaintiff had no title at the time of the contract is this : he professed to deal with the property itself and not with a mere contract to purchase it, and yet he had nothing, according to his own statement of his case, but an executory contract in respect of which $5,000 had to be paid before his vendor, Simpson, could be called on to convey. This money had not been paid at the date of the trial, and it

does not appear satisfactorily that the respondent was in a position to pay it. Therefore, even assuming, what as I have said before is not proved, that the offer had been duly accepted before the contract with the appellant it still could not be said that the respondent had even an equitable title to the property. A purchaser under an executory contract is sometimes said, in loose phraseology, to have an equitable title, but the distinction as regards equitable title between his rights under such a contract before payment of the purchase money, and a true equitable title, is well marked, and is pointed out by Lord Cottenham in *Tasker* v. *Small* (1); and by Lord O'Hagan in *Shaw* v. *Foster* (2). See also *Wall* v. *Bright* (3). Whilst his rights under such a contract are incomplete owing to the non-payment of his purchase money a purchaser has an undoubted right to assign his contract, but he cannot sell the land itself, and cannot be properly called the equitable owner of it.

My conclusion is, therefore, that upon both the distinct grounds indicated the respondent had no title to the land which he could properly sell at the date of his contract. Had there been a sum of money in excess of, or equivalent to, the amount which the respondent was to pay as purchase money to Simpson, payable in cash under the contract between the appellant and the respondent, this might not have been an objection since the appellant would in that case have had it in her power to apply a proportion or the whole of the price she was herself to pay to paying off Simpson, but the only cash payment from the appellant which the contract of the 1st of August, 1888, calls for is the sum of $175.

Therefore, for this additional reason, the respondent had no title at the date of the contract.

(1) 3 Mylne & C. 63. (2) L.R. 5 H.L. 349.
(3) 1 Jac. & W. 503.

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Further, assuming that there had been no acceptance by Robinson at the time of the contract with the appellant, then that agreement could only have been an attempt to transfer a mere option which, according to Lord Justice Fry, is not the subject of assignment. That learned judge lays down the law thus:

> It must be added that even where a concluded contract would be assignable the benefit of an offer cannot, it seems, be transferred by the person to whom it was made to a third person.

Then to apply the law to this fact of want of title in the respondent to any marketable interest in the land at the date of the agreement, taken in connection with the letter of the 19th November, 1888, rescinding the contract. It is said that this notice did not allow a reasonable time to the respondent. The authorities, however, are clear that when the vendor has no title whatever to the property he assumes to sell when he enters into the agreement, as distinguished from cases in which he has some, though an imperfect, title, that the purchaser may in the first case peremptorily put an end to the bargain and is not bound to give that reasonable notice which it is considered proper to require from him when the title is merely imperfect. The case of *Forrer* v. *Nash* (1), the circumstances of which are stated in the judgment of the learned Chief Justice of the Court of Appeal, is a strong authority for this proposition. *Lee* v. *Soames* (2) is to the same effect. That was an action by a purchaser claiming a declaration that the contract had been verbally rescinded; the defendant, the vendor, counterclaimed for specific performance.

Kekewich J. in his judgment says:

> As to Mr. Barber's point, that time not having been made of the essence of the contract the plaintiff was not entitled to fix an arbitrary date in the absence of unreasonable delay on the part of the vendor,

(1) 35 Beav. 167. (2) 59 L. T. N. S. 366.

the doctrine is laid down in Sugden's Vendor & Purch. (1) and cited by Fry J. in *Green* v. *Sevin* (2) and also in Fry on Specific Performance (3). But both these statements of the law assume that there is a contract. In the present case there never was a contract between the real vendor and the purchaser. *Forrer* v. *Nash* (4) and *Brewer* v. *Broadwood* (5) support this view. It was not a contract which the vendor could have carried out. I think the plaintiff was, on the 8th November, 1887, entitled to say "this bargain is at an end. There is no contract."

This last observation of the learned judge exactly describes what, by a fair intendment, the appellant is to be taken as meaning by the letter of the 19th November, 1888. I am, therefore, of opinion that that letter was sufficient to terminate the bargain between the parties to this appeal.

It is further to be remarked that, as appears from the judgment of Mr. Justice Kekewich in the case just quoted from, it is only in cases where there has been no unreasonable delay in making out a title that a vendor is entitled to reasonable notice of rescission. It is impossible to say that the respondent here has shown that he is free from the imputation of unreasonable delay, for down to the time of bringing his action he had wholly failed in taking any active steps to remove the defect in the title, or even to produce the contract (if he had any) which constituted his own title.

Then there is another and wholly independent ground upon which, in my opinion, the action was properly dismissed by the original judgment, that of laches, which is distinctly pleaded by the fourth paragraph of the defence.

Granting that time was not originally of the essence, or that if so it had been waived by the appellant, yet considering the nature of the property and the object for which, as must have been well known

(1) 13 ed. 227.
(2) 13 Ch. D. 589.
(3) 2 ed. p. 471.
(4) 35 Beav. 167.
(5) 22 Ch. D. 105.

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to the respondent, the appellant was seeking to acquire it, namely, for a speculative purpose, that is, in order to sell again at a profit, and that, therefore, it was of the utmost consequence to him that he should be promptly put in a position to take advantage of a rise in the real estate market, the delay from the date of the contract on the 1st of August, 1888, up to the date of the action on the 22nd January, 1889, nearly six months, was most unreasonable. The rule which governs the courts in giving relief by way of specific performance of agreements, even in cases in which time is not made of the essence of the contract, is that a plaintiff seeking such relief must show that he has been always ready and eager to carry out the contract on his part. Can it possibly be said that the respondent has brought himself within such conditions in the present case? Most certainly it cannot. We see, indeed, that he did not obtain a decree in his suit against Simpson until the 12th December, 1889, and that he allowed more than two months to elapse before he had even caused this judgment to be drawn up, and further, that no report on the title was obtained until the 10th June, 1890. There was, therefore, not only gross laches and delay anterior to bringing the present action, but afterwards in prosecuting his action against Simpson. To grant specific performance in such a case would, it seems to me, be to set at defiance the wholesome rule before adverted to, which requires promptitude and diligence on the part of one who seeks at the hands of the court this extraordinary relief.

For these reasons, which are in the main identical with those assigned for their judgments by both the learned chief justices in the courts below, I am of opinion that we cannot do otherwise than allow this appeal, thus restoring the original judgment, with

costs to the appellant in this court and both the courts below.

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TASCHEREAU J.—I dissent, and would dismiss this appeal. I adopt the reasoning of Street J. in the Divisional Court, and Maclennan J. in the Court of Appeal. It is a great satisfaction for me, seeing that I am alone of that opinion in this court, that the conclusion I have reached does not affect the result of the judgment.

*Appeal allowed with costs.*

Solicitors for appellant: *Reeve & Woodworth.*

Solicitors for respondent: *McMurrich, Coatsworth, Hodgins & Geddes.*