KLOEPFER WHOLESALE HARDWARE AND AUTOMOTIVE COMPANY LIMITED ..... *(Defendant)* APPELLANT;

AND

R. G. ROY ..... *(Plaintiff)* RESPONDENT.

1952

*May 15, 16

*June 30

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Vendor and Purchaser—Contract for Sale of Land—Repudiation by Vendor—Purchaser's right upon anticipatory breach to immediately sue for declaratory judgment and specific performance—The Judicature Act, R.S.O. 1950, c. 190, s. 15(b).

By a written agreement made on November 29, 1949, the appellant agreed to sell to the respondent, who agreed to purchase, certain lands in Toronto, the sale to be completed on or before January 29, 1950. On December 5, 1949, the appellant repudiated the contract. On December 14, 1949, the respondent by letter denied his right to do so and before the date fixed for completion issued a writ claiming a declaration that the contract was binding and enforceable and ought to be specifically performed.

The action was defended on the ground that the appellant had been induced by false representations to execute the agreement, that the document was incomplete as a contract with respect to material matters, that it was ambiguous, uncertain and that there was no memorandum in writing sufficient to satisfy the *Statute of Frauds*. These issues were decided against the respondent at the trial and in the Court of Appeal. The appellant contended that the action having been brought before the day fixed for completion was premature and that the respondent's claim, if any, was for damages only.

Held: (Dismissing the appeal), that the defences pleaded by the appellant failed. Since the respondent had claimed a declaratory judgment that there was in existence a binding and enforceable agreement, the action was not prematurely brought. *The Judicature Act,* R.S.O. 1950, c. 190, s. 15(*b*). The dictum in *Roberto v. Bumb* [1943] O.R. 299 at 310, disapproved if it was intended to mean that at the time of the issue of the writ the plaintiff did not have a complete cause of action for a declaration that the agreement was a binding contract and that it ought to be specifically enforced. Comment as to last sentence in Halsbury vol. 31, para. 468.

APPEAL from an order of the Court of Appeal of Ontario (1) affirming a judgment of Wells J. (2) decreeing specific performance of a contract for the sale of land and awarding damages.

R. M. W. Chitty Q.C. for the appellant. The plaintiff having sued upon an anticipatory breach is not entitled to a decree of specific performance. The law is clear and

*PRESENT: Kerwin, Estey, Locke, Cartwright and Fauteux JJ.

(1) [1951] O.W.N. 774; [1952] 1 D.L.R. 158.

(2) [1951] O.R. 366; 3 D.L.R. 122.

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has not been challenged since 1853, that where prior to the time for performance of a contract one party has stated to the other that he does not intend to carry out the contract, the latter may choose to treat the contract as broken and sue immediately upon the breach, or he may refuse to accept the attempted repudiation and continue to treat the contract as subsisting and when the time for performance arrives, if it is not completed owing to the other party's default, sue for the breach. 31 Hals. 2nd ed. p. 401, para. 468; *Mersey Steel & Iron Co.* v. *Naylor* (1). When the defendant, the vendor, notified the plaintiff of its refusal to perform, the plaintiff has the choice of treating that as a breach of contract and suing immediately or he could refuse to accept the anticipatory breach and wait until the time for performance arrived, and if the contract was then subsisting, put the defendant to his election to perform by tendering, and if the defendant defaulted then treat that failure to perform as a breach and then sue. In each case the cause of action is the same, for breach of contract, but the breach is entirely different in the two cases. Therefore when the plaintiff was notified of the defendant's refusal to perform, he was put to his election whether to accept the anticipatory breach and sue without waiting or wait for the later breach, if it should occur, and make that the ground for his cause of action. Having unequivocally elected to sue upon the anticipatory breach, he cannot be heard to say that the contract was not then broken: *Scarf* v. *Jardine* (2) per Lord Blackburne at 360-1. The fact that the plaintiff did not claim the relief appropriate to an action for anticipatory breach cannot prevent his act in suing from being an unequivocal acceptance of the defendant's repudiation. He only had an action at the time if the contract had been broken. In order to sue he had to found his action on a breach of the contract. *Miller* v. *Allen* (3). The Court of Appeal relies upon *Roberto* v. *Bumb* (4). In that case it was only argued that the action was, at most, premature. The action was much more than premature. The plaintiff has only one cause of action for breach of the contract. The breach entitling the plaintiff to specific performance is a failure to perform

(1) (1884) 9 App. Cas. 434.
(2) (1882) 7 App. Cas. 345.
(3) (1912) 4 O.W.N. 346.
(2) [1943] O.R. 299.

in accordance with the terms of the contract when the time for performance has arrived and when the defendant has been properly put to his election to perform or default by making a proper tender upon him. If no tender is made the contract is at an end. *Brickles* v. *Snell* (1). Until there has been a failure to perform under those circumstances there is no breach and no cause of action. If, before that time arrives and that breach occurs, the plaintiff sues, it is to be presumed that he had a cause of action and where there has been an anticipatory breach and the plaintiff has elected to sue by reason of it, that anticipatory breach must be his cause of action. It is the only cause of action he can show to support his action. If his action was only premature he might have discontinued before the time for performance arrived and then properly put the defendant to its election to perform or default. He did not do so and the time for performance having passed without his doing so, his action for specific performance is gone. *Brickles* v. *Snell, supra. Jacta est alea.* His action is much more than premature, he has exhausted his cause of action for breach of the contract. The right to sue upon an anticipatory breach is a legal remedy. Specific performance is an extraordinary remedy in equity. The remedy is not available in law and is only granted in equity upon strict terms which must exist for it to be available because equity follows the law. 13 Hals. 2nd ed. p. 83.

There is no suggestion in any of the long line of cases that since 1853 have developed the right to sue for anticipatory breach, that such a breach can found an action for specific performance. Statements in the cases are unequivocably against such a suggestion. See particularly the judgment of Lord Atkinson in *British & Benningtons Ltd.* v. *N. W. Cachar Tea Co.* (2) quoted by Wells J. In Fry on Specific Performance 6th ed. p. 497, para. 1062, an anticipatory breach is only mentioned as giving a right to recission. Specific performance ought not to be decreed on the following grounds—(*a*) the contract was not complete; (*b*) performance of the whole contract cannot be enforced; (*c*) mistake; (*d*) the plaintiff made no tender. As to (*a*) the contract provides for the closing of the transaction on or before Jan. 29, the defendant to give possession on or

(1) [1916] 2 A.C. 599. (2) [1923] A.C. 48.

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before May 31 and to pay the plaintiff between closing and May 31, $641.75 per month for the space occupied by the defendant. The contract does not provide for any of the terms of the defendant's tenacy, nor for who was to heat the premises, pay the expenses of up-keep, electricity, water and gas, nor which of the parties would be entitled to the rents from the tenants during that period.

The Court can only grant specific performance of the whole contract. Fry on Specific Performance, 6th Ed. p. 383, para. 821, and since parts of it cannot now be performed the plaintiff should be confined to the remedy of damages by reason of the repudiation by the defendant. The plaintiff having sued before the time for completion of the sale, the defendant was never a tenant of the plaintiff's. The extent of the defendant's obligations as tenant were not defined by the contract and had never been agreed upon. The extent, therefore, of the extra obligations imposed on the defendant as owner in possession cannot be ascertained and the Court is not in a position to enforce performance of the whole contract as it is not able to adjust the rights between the parties in respect of that part of the contract entitling the defendant to a lease of the building after completion. To enforce performance of the whole contract the Court must imply many terms upon which the parties were not *ad idem*. The Court will not imply terms unless it is driven to the conclusion that they must be implied: *Hamlyn & Co.* v. *Wood & Co.* (1), or that they were left out because they were so obvious: *Shirlaw* v. *Southern Founderies* (2).

The contract was entered into by the defendant under a mistake sufficient to deprive the plaintiff of his remedy by way of specific performance. The evidence of White shows that he discussed with the plaintiff a tentative arrangement whereby if the defendant was unable to find suitable premises to move to before May 31 that it could remain on in the building being bought and that the plaintiff implied there would be no difficulty in entering into an arrangement of the kind desired by the defendant but that immediately after the agreement had been entered into the plaintiff advertised the whole building for rent. If the plaintiff had taken this stand before the contract was

(1) (1891) 2 Q.B. 488. (2) [1939] 2 All E.R. 113.

made, the defendant would not have entered into it. In its pleading the defendant sets up this as a misrepresentation, but does not need to go that far: 31 Hals. 2nd ed. p. 378, para. 432, and this is particularly so if a mistake made by the defendant is contributed to by anything done by the plaintiff. *Jones* v. *Rimmer* (1). The plaintiff made no tender but tender is necessary for two purposes, to show the readiness of the tenderor to perform and to put the tenderee to his election to perform or refuse to perform. *McDonald* v. *Murray* (2); *Snider* v. *Snider* (3). Here the plaintiff cannot approbate the repudiation to excuse tender and reprobate the repudiation to claim specific performance.

(At the close of the appellant's argument the respondent was told by the Court that he need only argue on the appellant's first point.)

F. A. Brewin Q.C. and *R. Scott* for the respondent. The facts of this case make it abundantly clear that the respondent upon the appellant's announced intention to repudiate the contract, did not elect to treat the contract as at an end, and sue for damages, but did elect to treat the contract as binding and at once invoked the assistance of the Court to enforce it. See correspondence between the respondent's and appellant's solicitors. The respondent has throughout these proceedings insisted that the contract was a binding contract. It is true that as the respondent has elected to treat the contract as valid and binding, that this would enable the other party to complete the contract and notwithstanding his repudiation of it to take advanage of any supervening circumstances which would justify him in declining to complete it. The facts of the case, however, indicate clearly that the appellant has made no effort or pretence at completing the contract and that there have been no intervening circumstances which would justify the appellant in declining to complete it. The respondent is only required to allege and prove as he has done, his willingness and readiness to complete. He is not bound to do further and to do a nugatory act such as tendering the purchase money which the appellant has already indicated he will not accept. *Jones* v. *Barkley* (4). The appellant has not pleaded failure to tender as a defence,

(1) (1880) 14 Ch. D. 588.
(2) (1885) 11 A.R. 101.
(3) (1911) 2 O.W.N. 1434.
(4) (1781) 2 Doug. 684.

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and if he did it would be met by the fact that tender is waived in the correspondence between the solicitors above referred to and the conduct of the parties.

The judgment of Kerwin, Estey and Fauteux, JJ. was delivered by:—

KERWIN J.:—By a written agreement dated November 29, 1949, the appellant agreed to sell and the respondent agreed to purchase certain lands and premises, and the sale was to be completed on or before January 29, 1950. On December 5, 1949, the appellant telegraphed to the respondent that it repudiated the contract, and on December 14, the respondent's solicitors wrote the solicitors for the appellant denying the latter's right to repudiate. On January 10, 1950, the writ of summons in this action was issued and the statement of claim delivered on January 17. It was argued that, admitting the respondent could immediately take advantage of the appellant's anticipatory breach and sue before the time fixed for completion, he could do so only on the basis that the contract was at an end, and he would, therefore, be confined to an action for damages for breach of contract. It was said that on the date of the writ, January 10, the respondent had no cause of action in the sense of being able to ask (as he did) for a declaration that the agreement of November 29 was a binding contract and that it ought to be specifically performed and carried into effect. That, of course, it may be observed is one of the usual claims in an action for specific performance and the judgment follows the claim.

No authority has been cited for the proposition advanced on behalf of the appellant and we find it untenable. It is settled that an action may be brought upon an anticipatory repudiation of a contract (*Fry on Specific Performance*, 6th ed. para. 1062), and in paragraph 1311 of *Williston on Contracts* it is said:—

> But would a court, it may be asked, grant specific performance on January 1, of the contract to convey Blackacre the following July, on the ground that the defendant had been guilty of an anticipatory repudiation on the earlier day? If such repudiation is an actual breach justifying an action at law, there seems no reason why a suit in equity should not be maintainable. Certainly no decree would require performance before July 1, and it would at least be made clear that repudiation does not accelerate the obligations of a contract.

With that statement we agree.

The argument of the appellant overlooks the power of the Court to make a declaratory judgment: Ontario Judicature Act, R.S.O. 1950, c. 190, s. 15(*b*). Although it was submitted that the point had not been advanced in *Roberto* v. *Bumb* (1), in the same manner as here, Laidlaw J.A. in that case did say, at page 310: "The cause of action was not complete when the proceedings were commenced in the Court", and, at page 311: "I think that a court of equity would not permit an appellant to avoid the contract merely because the action was started prematurely, nor would the respondent be thus deprived of his equitable right to a decree of specific performance, if he were otherwise entitled to it." If these extracts mean merely that at the time of the issue of the writ the Court could not have ordered that specific performance be carried out immediately, no objection may be found with them; but if they mean that the plaintiff did not have a complete cause of action for a declaration that the agreement was a binding contract and that it ought to be specifically enforced, we are unable to agree. The plaintiff having that right, the agreement would be carried out when the time for completion had expired.

The last sentence in paragraph 468 of Halsbury, volume 31, "in such cases neither party can claim specific performance" can only refer to the earlier part of the paragraph where it is stated that if one party has evinced an intention no longer to be bound by a contract, the other party is entitled to treat that as a repudiation and to accept it as such. If it means more, it cannot be supported.

The respondent was not put to any election upon the receipt of the telegram of December 5, 1949, and he has consistently taken the position that the appellant could not repudiate while the appellant has continued to aver that it was entitled so to do. The respondent's right to ask the Court for a declaration of validity and to specifically perform the contract arose immediately and nothing intervened before the date fixed for completion of the contract to change the position of the parties. The respondent was a party to a contract with the appellant which the latter had definitely stated it would not carry out and, therefore, it is not a case of a plaintiff not being able to show an

(1) [1943] O.R. 299.

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actual existing interest in the subject-matter at the date of the issue of the writ. It is of some significance and assistance that a vendor may bring an action for specific performance, and the inquiry as to title is whether he can make a good title and not whether he could do so at the date of the contract and, therefore, when once the inquiry has been directed, he may make out his title at any time before the certificate (*Fry*, paragraph 1366).

The contract between the parties was complete and without uncertainty. Performance of the whole contract could be enforced, and it must not be forgotten that by the time of the trial, the appellant had been in possession during the period for which it was to have a lease under the terms of the contract. Both Courts below have found that there was no mistake, and nothing was shown on the argument to cause us to think that that conclusion is not the right one on the evidence. A tender was not required when as was apparent from the actions of the appellant and from the proceedings and evidence at the trial, the appellant never intended to perform the contract. It is not necessary in connection with any of these points to refer to the clause in the contract:—

> It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported there by other than is expressed herein in writing.

Finally, as to the suggestion that damages would be sufficient because it is contended that the plaintiff desired to use the property as an investment, it is sufficient to say that generally speaking, specific performance applies to agreements for the sale of lands as a matter of course.

The appeal must be dismissed with costs.

The judgment of Locke and Cartwright, JJ. was delivered by:—

LOCKE, J.:—This is an appeal from a judgment of the Court of Appeal for Ontario (1) dismissing an appeal from a judgment of Wells, J. (2) by which specific performance of a contract for the sale of land was decreed.

(1) [1951] O.W.N. 774; [1952] 1 D.L.R. 158.

(2) [1951] O.R. 366; [1951] 3 D.L.R. 122.

The evidence of the contract between the parties is contained in an undated written offer made by the respondent to the appellant on November 29, 1949, which was accepted in writing by the latter on that date in the following terms:—

> I hereby accept the above offer and agree to duly carry out the same on the terms thereof.

The property thus agreed to be sold was a parcel of land situate on the north side of Wellington Street East in the City of Toronto: the stipulated price was the sum of $52,500 which was to be paid in part by the assumption of a first mortgage registered against the property and the balance in cash on the closing of the transaction. Other terms provided that the respondent might remain in possession of part of the premises for a stated period upon payment of a stipulated monthly rental, that the purchaser was to examine the title at his own expense and to have fifteen days from the date of the acceptance of the offer for that purpose, and included the usual provision for the adjustment of taxes, interest and other such matters as of the date of the completion of the sale which was to be on or before January 29, 1950. The matter of the completion of the sale was referred by the respective parties to their solicitors and by letter dated December 3, 1949, the solicitors for the appellant wrote to the solicitors for the respondent enclosing a draft deed of the property, asked for particulars as to the grantee and said that a statement of adjustments would follow in due course.

The appellant, however, thereafter decided not to carry out the agreement and on December 5, 1949, sent a telegram to the respondent in the following terms:—

> We repudiate contract for sale of premises 44-50 Wellington Street East on grounds of want of mutuality.

On the day following, the appellant's solicitors wrote the solicitors for the respondent confirming that this telegram had been sent and asked for the return of the draft which had been enclosed with their letter of December 3rd. On December 13, 1949, the solicitors for the respondent wrote the solicitors for the appellant making requisitions as to title. On the day following they wrote again

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acknowledging the letter of December 6th and insisted that the contract was binding on the parties and said:—

> You might advise us if you waive tender and we can get on with an action for specific performance.

The only written answer to these last communications was a letter from the solicitors for the appellant, saying that they had authority to accept service of any writ that the solicitors for the respondent were instructed to issue. No tender of a conveyance was made by the respondent to the appellant and the action was commenced in advance of January 29, 1950, the date fixed for the completion of the sale.

By the statement of claim the respondent claimed:

> a declaration that the said contract made between the plaintiff and the defendant on the 29th day of November, 1949, is a binding contract between the plaintiff and the defendant for the sale to the plaintiff of the lands and premises mentioned in paragraph 3 hereof, for the price set out in the said contract and that the same ought to be specifically performed and carried into effect.

and that the matter be referred to the Master to take the accounts, including an account of the damages suffered by reason of what was called the defendant's repudiation of the contract.

The defences pleaded were that the defendant had been induced by false representations to execute the agreement, that the document was incomplete as a contract with respect to material matters, that it was ambiguous and uncertain with respect to the terms of the defendant's tenancy thereof and that there was no memorandum in writing sufficient to satisfy the *Statute of Frauds*.

Wells J. by whom the action was tried found against the present appellant on each of these issues and also upon two further questions argued before him, namely, that by bringing the action in advance of the date fixed for the completion of the contract the plaintiff had elected to accept the repudiation of the contract by the defendant and was at best only entitled to damages and that the action for specific performance was premature.

The formal judgment entered pursuant to these findings declared that the agreement made between the parties was a binding contract and ought to be specifically performed and carried into effect, and included the usual directions

as to the taking of the account and reserved further directions until after the Master should have made his report.

The Court of Appeal concurred in the conclusions of the learned trial judge. In delivering the judgment of the Court, Laidlaw J.A. said in part that Wells J. had properly given effect to a clause in the contract reading:—

> It is agreed that there is no representation, warranty, collateral agreement or condition affecting this agreement or the real property or supported hereby (sic) other than is expressed herein in writing.

in dealing with the issues of misrepresentation and of mistake. The reasons delivered at the trial, however, appear to me to make it clear that in dealing with these issues Wells J. based his conclusions on his acceptance of the evidence of the defendant. It is, therefore, unnecessary, in my opinion, to express any view as to the effect of this term of the contract in the circumstances of this case. In dealing with the argument that the action, in so far as the claim was for specific performance was premature, Laidlaw J.A. in finding against this contention followed the decision of the Court of Appeal in *Roberto* v. *Bumb* (1). While I respectfully agree with the conclusions of the Court of Appeal upon the various questions arising for decision in the present matter, I disagree with the opinion expressed in *Roberto's* case that an action for specific performance brought before the date fixed for the completion of the transaction by the parties is premature.

It is of importance to note that in the present matter, in addition to the claim for specific performance, the respondent asked for a declaration that the contract was binding upon the parties. To make such a declaration of right is expressly authorized by subsection (*b*) of s. 15 of the Judicature Act (c. 190, R.S.O. 1950), whether any consequential relief is or could be claimed or not. The section of the Ontario Act reproduces verbatim r. 5 of Order XXV of the Rules of the Supreme Court 1883, under which it has been held that the making of such a declaration is not confined to cases where the plaintiff has a cause of action against the defendant (*Guarantee Trust Co.* v. *Hannay* (2); *Russian Commercial and Industrial Bank* v. *British Bank for Foreign Trade* (3), Lord Sumner at 452). In *Hanson* v. *Radcliffe Urban Council* (4), Lord Sterndale

(1) [1943] O.R. 299.
(2) [1915] 2 K.B. 536.
(3) [1921] 2 A.C. 438.
(4) [1922] 2 Ch. 490 at 507.

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expressed the opinion that the power of the court to make a declaration under this rule where it is a question of defining the rights of two parties is only limited by its own discretion. In the circumstances of the present case it cannot be successfully contended that in so far as a declaratory judgment was sought the action was premature.

As to that portion of the prayer for relief which asked a declaration that the contract "ought to be specifically performed and carried into effect", this was no doubt intended to be, not simply a claim for a declaration, but for the substantive relief of specific performance. As to this, it is argued that since the vendor was not bound to complete the sale until January 29th no action could be brought until a tender of conveyance had been made and there had been a refusal on the part of the vendor to convey the property on or before the named date. The terms of the telegram of December 5th and the letter of December 6th and the fact that the only answer made by the appellant's solicitors to the letter from the solicitors for the respondent of December 13th, in which they asked if the appellant waived the necessity of making a tender, was the letter of December 15th, made it clear that the appellant did not intend to carry out the agreement and that any tender would be rejected. In these circumstances none was necessary, in my opinion.

The argument appears to me to be based upon a misconception of the nature of the proceedings. Some support, however, for the submission that courts of equity do not interfere until the time for performance has passed and default has been made is to be found in a passage from *Fry on Specific Performance* (6th Ed. p. 3) where the learned author says that the court rarely, if ever, interferes until the time for performance has passed, a statement which is repeated at p. 539 of the 12th Edition of Pollock on Contracts. Opinions to the contrary are expressed in the passage from the Restatement of The Law of Contracts (Vol. 2, p. 645), referred to by the learned trial judge, and in Williston (Vol. 5, p. 3708).

In my opinion, the right of the respondent to resort to a court of equity for the enforcement of his rights and the protection of his interest in the land arose immediately upon receipt of the telegram of December 5th and the

letter of the day following. These statements were unequivocal declarations on the part of the appellant of its intention to disregard the terms of the contract and not to complete the sale. If, in fact, there was at that time a binding and enforceable agreement for the sale of the land, the respondent was as between himself and the appellant in the eyes of a court of equity the real beneficial owner (*Shaw* v. *Foster* (1), at 338 per Lord Cairns, at p. 349 per Lord O'Hagan: *Lysaght* v. *Edwards* (2), Jessel M.R. at 505; *McKillop* v. *Alexander* (3), Anglin J. at 578. In *Rose* v. *Watson* (4), Lord Westbury said that when the owner of an estate contracts for the immediate sale of land the ownership of the estate is in equity transferred by that contract.

Courts of equity are constantly asked to intervene for the protection of contractual and other property rights. In *Heathcote* v. *The North Staffordshire Railway Company* (5), Cottenham, L.C. in contrasting the exercise of the jurisdiction in equity in respect to contracts for the sale of goods and those for the sale of land, said in part (p. 112):

> If, indeed, A. had agreed to sell an estate to B., and then proposed to deal with the estate, so as to prevent him from performing his contract, equity would interfere, because in that case B. would by the contract have obtained an interest in the estate itself, which in the case of the goods he would not.

In *Hadley* v. *The London Bank of Scotland* (6), Turner L.J. said in part:—

> I have always understood the rule of the Court to be, that if there is a clear valid contract for sale the Court will not permit the vendor afterwards to transfer the legal estate to a third person, although such third person would be affected by *lis pendens*. I think this rule well founded in principle, for the property is in Equity transferred to the purchaser by the contract, the vendor then becomes a trustee for him, and cannot be permitted to deal with the estate so as to inconvenience him.

The assistance of the court may be invoked to restrain by injunction a threatened breach of contract, thus in effect compelling its performance. In Kerr on Injunctions, 6th Ed. p. 411, the learned author says that it is not necessary that the breach in respect of which the interference of the court is sought should have been actually committed: it is

(1) (1872) L.R. 5 H.L. 321.
(2) (1876) 2 Ch. D. 499.
(3) (1912) 45 Can. S.C.R. 551.
(4) (1864) 10 H.L.C. 672 at 678.
(5) (1850) 2 M. & G. 100.
(6) (1865) 3 De G. J. & S. 63 at 70.

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enough that the defendant claims and insists on his right to do the act complained of, although he may not have actually done it. The court intervenes for the protection of equitable as well as legal rights (*Performing Right Society* v. *London Theatre* (1)). In the present matter the denial by the appellant of the existence of an enforceable agreement for the sale of the land was a denial of the fact that the respondent then had an equitable estate or interest in it and was as between himself and the appellant the beneficial owner: it was implicit in such an attitude that the appellant, the registered owner of the property, contended that it was at liberty to deal with the property as its own. Whether or not the defendant's attitude would have justified the respondent in bringing an action claiming an injunction to restrain any such dealing with the property, it is, in my opinion, clear that he was entitled immediately to bring an action for a declaration as to the nature of his interest and for a decree that the contract be specifically performed and to file a *lis pendens* against the title to the property to prevent any dealing with it, unless subject to his interest. The principles stated by Cockburn, C.J. in *Frost* v. *Knight* (2), as to the remedies at common law of a party to a contract, where the other contracting party announces in advance of the time for completion his intention not to perform it, do not appear to me to touch the question as to when the assistance of a court of equity may be sought in circumstances such as these.

I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Slaght, McMurtry, Ganong, Keith & Slaght.*

Solicitors for the respondent: *Cameron, Weldon, Brewin & McCallum.*

(1) [1924] A.C. 1 at 14. (2) (1872) L.R. 7 Ex. 111 at 112.