1912

*Oct. 4, 7.
*Oct. 29.

FREDERICK M. NEWBERRY (DEFENDANT) ..... APPELLANT;

AND

JOHN F. LANGAN, WILLIAM B. RYAN AND HARRY P. SIMPSON (PLAINTIFFS) ..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Vendor and purchaser—Sale of land—Condition dependent—Deferred payment—Disclosure of title—Abstract—Refusal to complete—Lapse of time—Defeasance—Specific performance.

In an agreement for the sale of an interest in land, for a price payable by deferred instalments at specified dates, there was a condition for defeasance, at the option of the vendor, for default in punctual payments, time was of the essence of the contract, and receipt of a deposit on account of the price was acknowledged. Some time before the date fixed for payment of the first deferred instalment the purchasers made requisitions for the production for inspection of the vendor's evidence of title to the interests he was selling and the vendor refused to comply with the requisitions. The payment was not made on the appointed date and the vendor declared the agreement cancelled in consequence of such default. In suit for specific performance, brought by the purchases;

Held, affirming the judgment appealed from (17 B.C. Rep. 88), that the vendor was bound, upon requisition made within a reasonable time by the purchasers, to produce for their inspection the documents under which he claimed the interests he was selling in the lands; until he had complied with such demand the purchasers were not obliged to make payment of deferred instalments of the price and, in the circumstances, their failure to make the payment in question was not an answer to the suit for specific performance. *Cushing* v. *Knight* (46 Can. S.C.R. 555), distinguished.

Per Duff J.—In the absence of any express or implied stipulation to the contrary in an agreement respecting the sale of land in British Columbia, which is not held under a certificate of inde-

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

feasible title, the purchaser is entitled, according to the rule introduced into that province with the general body of the law of England, to the production of a solicitor's abstract of the vendor's title to the interest in the land which he has agreed to sell.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the judgment of Clement J., at the trial, and maintaining the plaintiffs' action for specific performance with costs.

The agreement mentioned in the head-note was contained in two receipts, that respecting one of the parcels being as follows:—

"Vancouver, B.C., Nov. 18th, 1910.

"Received from W. B. Ryan the sum of $500 (five hundred dollars), being deposit on account of purchase of 13.79 acres, lot (15) fifteen, block 15, subdivision 463, Coquitlam, for the sum of $4,830, on the following terms: $500 cash, $2,330 on January 1st, 1911. Balance will assign my agreement Wakefield to myself. The deferred payments to bear interest at the rate of 7% per annum until paid. Net, no commission. Time is the essence of this agreement, and unless payments with interest are punctually made at the time or times appointed, this sale shall be (at the option of the vendor) absolutely cancelled or rescinded, and all money paid on account thereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance, $5, to be paid by the purchaser. This receipt is given by the undersigned as agent, and subject to the owner's confirmation.

"F. M. NEWBERRY,
"Owner."

(1) 17 B.C. Rep. 88.

1912

NEWBERRY v. LANGAN.

The receipt affecting the other parcel was framed is similar terms, with the exception that it was signed by F. M. Newberry as "Agent for Owner."

Wallace Nesbitt K.C. and *J. Sutherland MacKay,* for the appellant, cited *Kintrea* v. *Preston*(1); *Phipps* v. *Child*(2); Dart, "Vendors and Purchasers" (7 ed.), 315; *Brooke* v. *Garrod*(3); *Lord Ranelagh* v. *Melton*(4); 21 Am. & Eng. Encyc. of Law, *vo.* "Option."

Bodwell K.C., for the respondents, cited Armour on Titles (3 ed.), p. 4; *Townend* v. *Graham*(5); *Cameron* v. *Carter*(6), *per* Boyd C. at p. 431; *McDonald* v. *Murray*(7); *Ogilvie* v. *Foljambe*(8), *per* Grant J. at p. 64; *Souter* v. *Drake*(9); *Ellis* v. *Rogers*(10), *per* Cotton L.J. at p. 670; *Doe d. Gray* v. *Stanion*(11), *per* Parke B., at p. 701; *Armstrong* v. *Nason*(12), *per* Strong C.J. at p. 268; *Brewer* v. *Broadwood*(13), *per* Fry J. at p. 107; *Boustead* v. *Warwick*(14); *Upperton* v. *Nickolson*(15), *per* James L.J. at p. 443; *Foster* v. *Anderson*(16), *per* Moss C.J. at p. 570, and in the court below(17), *per* Boyd C. at pp. 370 and 372, *per* Anglin J. at p. 574; *Cudney* v. *Gives*(18).

THE CHIEF JUSTICE.—I do not entertain any doubt; this appeal should be dismissed with costs.

(1) 25 L.J. Ex. 287.
(2) 106 R.R. 496.
(3) 2 DeG. & J. 62.
(4) 2 Drew. & Sm. 278.
(5) 6 B.C. Rep. 539.
(6) 9 O.R. 427.
(7) 11 Ont. App. R. 101.
(8) 3 Mer. 53.
(9) 5 B. & Ad. 992.
(10) 29 Ch. D. 661.
(11) 1 M. & W. 695.
(12) 25 Can. S.C.R. 263.
(13) 22 Ch. D. 105.
(14) 12 O.R. 488.
(15) 6 Ch. App. 436.
(16) 16 Ont. L.R. 565.
(17) 15 Ont. L.R. 362.
(18) 20 O.R. 500.

1912

NEWBERRY v. LANGAN.

The Chief Justice.

There are two tracts of land in question, and the agreements are identical in terms, except as to the description of the property. There can be no doubt on the evidence that the appellant's offer to sell was accepted by Ryan, and that acceptance made the offer an agreement *inter partes* for the sale and purchase of the tracts of land described in it. The appellant from that moment had a right of action to recover the purchase price and his corresponding obligation to deliver the things sold arose then. It seems to me also clear, on the authorities to which we are referred, that it was incumbent on the vendor to disclose his title before demanding payment and the purchaser, therefore, was justified in his request that this title should be produced before paying the purchase price or any portion of it. If there was any failure on the part of the purchaser to pay within the stipulated delay, it was caused by the wrongful refusal of the appellant to shew his title. I accept the reasons of the judges in the Court of Appeal.

DAVIES J.—This was an action for specific performance of an agreement for the sale of land from appellant to respondents. The trial judge dismissed the plaintiffs' action on the ground that they had failed to make payment of the instalment of the purchase money on the day provided by the contract, that there was no default on the defendant vendor's part excusing such failure, and that time was expressly made the essence of the contract.

The Court of Appeal for British Columbia reversed this judgment, holding, amongst other things, that there was default on the defendant's part in refusing to produce for inspection the agreements under which

1912

NEWBERRY v. LANGAN.

Davies J.

he held the land he agreed to sell, and that this default excused the plaintiffs from the payment of the instalment of the purchase money on the day named.

The question was raised as to the nature and character of the defendant's interest in the land which the agreement professed to sell. At any rate one thing is sure, and that is that the plaintiffs bought and the defendant sold all the title and interest which the latter held in the land. I am of opinion that the plaintiffs were entitled to inspection of such agreements or evidence of title as the defendant had before they could be called upon to pay the instalment in question.

This inspection, although asked for by the plaintiffs a reasonable time before the instalment fell due, was refused by defendant. The defendant thus put himself in default, and his refusal to produce his agreements under which he claimed title excused the plaintiffs from tendering payment of the instalment on the day named.

The defendant, appellant, relied upon *Cushing* v. *Knight*(1), lately decided in this court. That case was a very different one from the present and turned entirely upon the terms of the agreement there in question, the construction of which we held demanded the payment of the instalment of the purchase money contemporaneously with, if not before, the execution of the written contract by the vendors, and that, there having been default in such payment, the obligation on the vendor's part to sell and convey the lands had not been created.

Assuming, therefore, that the contention of the appellant's counsel was correct and that Newberry only agreed to sell whatever rights he had in the lands

(1) 46 Can. S.C.R. 555.

1912

NEWBERRY v. LANGAN.

Davies J.

under his agreement with those from whom he bought, I think he was bound to grant inspection of these agreements to the plaintiffs before requiring payment by them of the substantial instalment of the purchase money and, having refused to do so, put himself in default and was not in a position to take advantage of the non-payment by the purchasers of the instalment and to cancel the agreement for such default.

The appeal should be dismissed with costs.

IDINGTON J.—The contention that the contracts here in question were mere options to purchase is hardly tenable in face of the express terms of the receipts evidencing same.

The relation of vendor and purchaser was created between the parties thereto in each case by the payment of the deposit and the delivery of the receipt fully in accord with the conversation had between, and fully disclosing the purposes of the parties.

The vendor became absolutely bound to sell. The vendee might, in law, have set up against him the statute of frauds.

If the vendee had chosen to forfeit the money paid and so plead that statute, if sued on his contract, the vendor was helpless.

In a colloquial sense descriptive of that situation it may, therefore, be that the parties who referred to these contracts as options were not far astray.

But, in the strict, technical sense, in law, of what an option means, as illustrated in the cases appellant's counsel referrred to, such is not the nature of either of the transactions in question; but that of a selling and buying of an interest in real estate. The nature of the interest so sold is here quite immaterial, for the title asked to be shewn was that which the vendor had.

1912

NEWBERRY v. LANGAN.

Idington J.

The appellant saw fit to maintain silence, when applied to by those entitled to claim, on behalf of the respondents, his attention to a request to shew title. He chose to ignore what common courtesy and a straightforward mode of dealing required at his hands.

I think he must take the consequence of failure in these regards and abide by the judgment of the Court of Appeal.

This appeal should be dismissed with costs.

DUFF J.—The appeal is from the judgment of the Court of Appeal for British Columbia in an action for specific performance of two agreements entered into between the appellant, Newberry, and the respondent, Ryan, relating to two separate parcels of land; one parcel being part of district lot 382, group 1, New Westminster District, and the other part of lot 463 in the same group. The first of these parcels is referred to as the "Kendal" and the second as the "Wakefield" lot. The two agreements were entered into on the same day. The terms of the first (relating to the "Kendal" parcel) were set out in a receipt for the first instalment of the purchase money given by Ryan to Newberry, which reads as follows:—

INTERIM RECEIPT. Vancouver, B.C., Nov. 18th, 1910.

Received from W. B. Ryan the sum of $500 (five hundred dollars), being deposit on account of purchase of dist. lot 382, westerly 54 7/100 Block, Coquitlam, subdivision * * * for the sum of $10,940, on the following terms; $500 cash, balance, $5,440 in January, 1911, balance will assign my agreement Kendall to myself. The deferred payments to bear interest at the rate of 7 per cent. per annum until paid. Net. No commission.

Time is the essence of this agreement, and unless payments with interest are punctually made at the times appointed this sale shall be (at the option of the vendor), absolutely cancelled or rescinded, and all money paid on account hereof forfeited to the vendor as and for liquidated and ascertained damages. Cost of conveyance, $5, to be

paid by the purchaser. This receipt is given by the undersigned as agent and subject to the owner's confirmation.

$500. F. M. NEWBERRY
Agent for owner.

The same amount ($500) was also paid as a first instalment of the purchase of the "Wakefield" parcel, and a receipt given identical in terms with that set out, except as to the price and the description of the property.

The instalments of purchase money which became respectively payable under these agreements on the 1st of January, 1911, were not paid. The appellant, thereupon, notified the respondents that because of their failure to make these payments he would treat the agreements as having come to an end; and, on the 13th of January, the respondents commenced their action. The position taken by the respondents was this. They said that it was the duty of the appellant to disclose his title to the property he had undertaken to sell, that the provision requiring payment of an instalment of the purchase money on the 1st of January, though absolute in form, must be read as subject to the implied condition that the vendor must first perform his obligation to satisfy the reasonable demands of the purchaser with respect to disclosure of title, and this the vendor had refused to do.

The first question is: What was the vendor's duty in respect of the disclosure of title?

The appellant contends that the agreements in question created options to purchase merely. The appellant, it is said, bound himself in each case, in consideration of the cash payment of $500, to an offer in terms of the receipt which was irrevocable up to the 1st of January, and which, in the meantime, could be ac-

1912

NEWBERRY v. LANGAN.

Duff J.

cepted in one way only; namely, by the payment of the sum stipulated in their receipt to be paid on that date. If this were truly the nature of the contract between the parties—that the relation of vendor and purchaser was not to be constituted until the January payment should be made — then no obligation to disclose his title would, of course, rest upon the appellant until that payment had been made.

But the language of the instrument manifestly cannot be reconciled with any such view of the character of the bargain; and the learned trial judge has explicitly found that

> the agreements were that the defendant sold and Ryan bought the properties for a certain sum.

Then it is said that the subject-matter of the purchases was not the fee simple in the parcels respectively described in the receipts, but certain agreements for the sale of these lands to the appellant. It was, in point of fact, understood by both parties at the time of the transactions in question that the appellant was not the holder of the fee in either parcel, but that, in respect of one of them, he had an agreement for the purchase of it with one Kendall, whose name appears in the receipt transcribed above, and, in respect of the other, with one Wakefield. In my view it is not necessary to decide, and I do not commit myself to any opinion upon the question whether or not the documents, read by the light of the facts in evidence, justify the conclusion that the subject-matter of the transactions was not the land, but these agreements for the sale of the land. There is, certainly, not a little to be said for the view that the parties were buying and selling the fee simple in the land; but I will assume that the other view, which is the view of the

learned trial judge, is the better one. What, then, in this view of these transactions, was the obligation of the vendor in respect of disclosing his title? If the law of British Columbia touching this matter is the law of England, then the rule to be applied seems to be stated by an eminent equity judge, (Fry J., in *Brewer* v. *Broadword*(1), at p. 107,) in this passage:—

> The first inquiry is, what is the obligation of a person who agrees to sell an agreement to lease? It may be shewn either from the surrounding circumstances or by direct evidence that the intention of the agreement is to sell only such interest, if any, as the vendor may have: and, in such a case as that, the purchaser has no right to require a title to be shewn by the vendor; but, in the absence of such evidence, the view which I take of such an agreement is that it requires the vendor to shew that he has a title to a valid agreement. The law of England in the case of a sale of land in fee simple requires the vendor to shew that he has the fee simple of the land. In the case of a sale of a lease, it requires the vendor to shew that he has a valid title to the lease or to the term granted by the lease. Likewise, in the case of an agreement to lease, I hold that the vendor is bound to shew that there is a subsisting valid agreement to lease.

Assuming that these agreements were the subject-matter of the respondent's purchase, the respondents were then entitled to have valid and subsisting agreements for the sale of these parcels by the vendors vested in them, on the 1st of January, on payment of the stipulated sums. And they were entitled to something more; there were entitled, in each case, to have an agreement vested in them under which the sums remaining at that date to be paid to the original vendor should not exceed the residue of the purchase money stipulated for in the agreement between the appellant and Ryan after the payment to the appellant of the January instalment. It was, consequently, their right to have it shewn, within a reasonable time before the 1st of January, that the appellant was in

(1) 22 Ch. D. 105.

1912

NEWBERRY v. LANGAN.

Duff J.

a position to discharge his obligation in that respect. As I will presently explain more fully, I think the evidence shews that the appellant refused to make any disclosure whatever; but another question of law must first be disposed of. The learned trial judge took the view that the law of England, (with regard to this matter of the obligation of the vendor of land under an open contract to disclose his title) is not, in its entirety, the law of British Columbia, and that there was, in this case, no duty on the part of the vendor to furnish the information demanded by the purchaser.

I quite agree with the learned trial judge to this extent, — that the establishment of a statutory system of title to land, (such as prevails, for example, in the Province of Saskatchewan,) by which the title is not completely constituted by documents and transactions *inter partes*, but rests upon registration by a public officer, may have the effect of rendering obsolete some of the specific rules governing the reciprocal rights of vendor and purchaser touching the matter in hand. Some of these rules have had their origin in the practice of conveyancers in England and others are based upon considerations of convenience or necessity which may cease to apply when the system of titles has been fundamentally changed. Moreover, the rule entitling the purchaser to demand a solicitor's abstract is a rule of comparatively modern origin, (Sugden on Vendors and Purchasers, 9 ed., p. 447,) and I can conceive circumstances, (having no special relation to the system of land titles,) in which an over-punctilious deference to the letter of the rule as it would, perhaps, be applied in England would, in British Columbia, have consequences very widely at variance

with the expectations of the parties. But, on the other hand, the rule that the vendor under a contract for the sale of an interest in land is under an obligation to give a title to that which he is selling, in the absence of express or implied stipulation, (whether it be an obligation resting upon an implied term of the contract, as Baron Parke and Lord St. Leonards seem to think, or an obligation imposed *ab extra,* so to speak, by the law itself,) is a rule which nobody has ever doubted was introduced into British Columbia with the general body of the law of England; and it has, without any specific enactment on the subject, always been regarded as having been introduced in the same connection into the other provinces in which the body of the law has been derived from the same source. If it is the duty of the vendor to give a title, it would seem to follow, in the absence of special circumstances, (since the vendor may be snpposed to know his title,) that the vendor ought to disclose the particulars of the title he proposes to transfer unless he stipulates to the contrary. If the circumstances of the contract are such as to exclude the possibility of the parties to such a contract having contemplated the delivery of a solicitor's abstract, then, in such a case, there could be no difficulty in implying a stipulation of that character. I can quite understand, for example, that a vendor holding land under a certificate of indefeasible title, (and proffering his certificate,) might properly regard a demand for a solicitor's abstract as a purely vexatious demand. But, in the ordinary case of the sale of land held under a registered title, there being nothing in the circumstances of a special character, I do not see why the rule should not take effect. A cer-

1912

NEWBERRY v. LANGAN.

Duff J.

tificate of title under the "British Columbia Land Registry Act," not being a certificate of indefeasible title, is only *primâ facie* evidence of the title of the holder and the documentary evidence upon which the certificate rests is not necessarily disclosed by the register. The view expressed by the learned judge has never, I think, been accepted in British Columbia. The difficulty of accepting that view is enhanced in the case where, as here, the vendor's interest is in whole or in part unregistered.

This brings us to the question of fact.

The Chief Justice of the Court of Appeal says:—

> The two agreements in question in this action, dated 18th November, 1910, are for the sale by the defendant to one Ryan, the plaintiff's assignor, of two parcels of land. They are practically identical in terms, the one with respect to one parcel and the other to the other. One parcel may be conveniently designated the "Wakefield" lot, and the other the "Kendall" lot. The defendant, prior *to said 18th November*, agreed with Kendall to purchase his lot on deferred payments. He had paid a deposit of $50 and received a receipt therefor. Defendant and one Clark had bought the Wakefield lot on similar terms, but had a formal agreement of purchase which was registered, at all events, before the commencement of this action. It also appears that the defendant had an assignment of Clark's interest, which was not registered. These agreements were not shewn to Ryan, with the exception of the receipt for $50. On the 19th of November, defendant procured a formal agreement from Kendall, which was not shewn to Ryan. * * *
>
> Early in December, plaintiffs requested defendant to shew them the agreements under which he held the property and, I think, the inference from the evidence is *irresistible that they were refused such inspection. Failing to get such inspection, the plaintiffs, on 27th December, formally notified the defendant that they intended to proceed with the purchase, and demanded a solicitor's abstract of title.* This demand was ignored.

I think the evidence fully supports this; and I entirely agree with it.

There was, therefore, not only a disregard of the request for a solicitor's abstract, but a refusal to permit inspection of the documents evidencing the agree-

ments which the appellant was professing to sell. Such inspection was necessary to enable the respondents to ascertain whether those agreements were of such a character and so vested in the appellant that the appellant was entitled to assign them and whether the conditions on which the appellant's rights must rest had been observed; and it would have been folly for them to proceed with the payment of the purchase money without first having obtained it.

I think the appeal should be dismissed.

ANGLIN J.—On the true construction of the receipts which evidence the transactions here under consideration, I have no doubt that the agreements between the appellant and the respondent Ryan were for the sale and purchase of the lands in question, or at least of the appellants' interest in them. Punctuality in payment was made of the essence of the bargains and provision was made, in the nature of a condition subsequent, for rescission by the vendor upon default of prompt payment. Payment on an instalment due on the first of January was not made on that day. The vendor relies upon this as a default which entitled him to exercise his option to cancel and rescind. The purchasers answer that the vendor had already refused a legitimate demand for production of his title, — namely, in the case of one parcel, the agreement from the registered owner under which he held, and, in the case of the other, the transfer of the interest of his co-purchaser from the registered owner,—and that the failure to make the January payment was, therefore, not a default entitling the vendor to rescind. The learned Chief Justice of the Court of Appeal finds that

1912

NEWBERRY v. LANGAN.

Anglin J.

early in December, plaintiffs requested defendant to shew them the agreements under which he held the property, and I think the inference from the evidence is irresistible that they were refused such inspection. Failing to get such inspection, the plaintiffs, on the 27th of December, formally notified the defendant that they intended to proceed with the purchase and demanded a solicitor's abstract of title. This demand was ignored and the plaintiffs did not make the January payments. When they took the matter up with the defendant, within two or three days afterwards, the defendant in effect declared the agreements cancelled for non-payment on the first of January.

The letter of the 27th of December has been criticized on the ground that it is open to the construction that it calls upon the vendor to furnish an abstract of the titles of the registered owners of the land, and not merely an abstract of his own title from such owners. The language is

in the meantime you will please furnish Whiteside and Edmonds at once with an abstract of your title.

For the respondents it is contended that the purpose of this letter was merely to put in writing the demand already made verbally for the production of the agreements from the registered owners under which the vendor claimed and that an abstract of those agreements only was called for. Whatever may be the proper construction of the letter, and whether the respondents were or were not entitled to an abstract of the titles of the registered owners, they were, at all events, in my opinion, entitled to production and inspection of the documents under which their vendor claimed the interests in the lands of which he was disposing. The evidence abundantly justifies the holding of the learned Chief Justice that production of these documents had been refused and has convinced me of the accuracy of the inference drawn by Mr. Justice Irving that

the defendant was then (on the 3rd of January), and had been at the time when he was requested to shew title endeavouring to bring

about a deadlock with a view to preventing this contract being carried out.

1912

NEWBERRY v. LANGAN.

Anglin J.

This case is entirely distinguishable from the case of *Cushing* v. *Knight*(1), much relied upon by the appellant. We have here a contract of sale with a provision in the nature of a condition subsequent for defeasance in the event of non-payment at the stipulated times; whereas, in *Cushing* v. *Knight*(1) it was held that, on the true construction of the contract there in question, the relationship of vendor and purchaser, with its incidental rights, would not come into existence until actual payment of the money in respect of which there had been default. The refusal of the appellant to produce the agreements evidencing the interests which he was selling I think put him in default and prevents him from claiming that, while such default continued, the respondents were under obligation to make further payments. There was, in my opinion, therefore, no default on their part which entitled the vendor to rescind, and the judgment for specific performance against him was right and should be maintained.

I would dismiss this appeal with costs.

BRODEUR J.—This appeal should be dismissed, and I concur with the views expressed by Mr. Justice Anglin.

Appeal dismissed with costs.

Solicitors for the appellant: *Gwillim, Crisp & Mackay.*
Solicitors for the respondents: *Bodwell & Lawson.*

(1) 46 Can. S.C.R. 555.