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*Oct. 24, 27.
*Dec. 9.

GEORGE BALL (DEFENDANT).....APPELLANT;

AND

PHILIP P. GUTSCHENRITTER AND ANOTHER (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN

Sale of land—Vendor and purchaser—Reservations in original grant from Crown—Disclosure by vendor—Land Titles Act, R.S. Sask. (1920) c. 67, s. 60.

In an action for specific performance of an agreement for the sale of land, dated in April, 1920, two defences were set up, the second of which was the alleged inability of the vendors to make title owing to the existence of reservations in certain original Crown grants dated in 1906 and 1907. The agreement for sale contained a covenant by the vendors "to convey the lands to the purchaser by good and sufficient deed or transfer" but contained no words of exception or limitation such as "subject to the conditions and reservations contained in the original grants from the Crown." The agreement also contained a covenant by the purchaser accepting the title of the vendor.

Held, affirming the judgment of the Court of Appeal (18 Sask. L.R. 443), Idington J. dissenting, that, in the circumstances of this case and in view of the provisions of section 60 of the Land Titles Act, the vendor was under no obligation to caution the purchaser about the reservations in the original grant to which his title was normally subject

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

(1) [1922] 2 A.C. 128.

and that the purchaser ought to have inquired himself about the nature of the title the vendor could give.

APPEAL from the decision of the Court of Appeal for Saskatchewan (1) affirming on equal division of the court the judgment of the trial judge (2) and maintaining the respondents' action for specific performance of an agreement for the sale of land.

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

Stapleton for the appellant.

Jonah for the respondents.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.) was delivered by

DUFF J.—This appeal arises out of an action brought by the respondents against the appellant for specific performance of an agreement of the 14th April, 1920, for the sale and purchase of a farm in Saskatchewan, by payment of the balance of principal and interest due under the terms of the contract and in default thereof for cancellation of the agreement and forfeiture of the moneys already paid. There were two defences: First, that the appellant was induced to enter into the contract by misrepresentations of the respondents as to the adaptability of the land to agriculture; and, secondly, that the respondents were unable to make a title to the property. Respecting the first of these defences, the learned trial judge held that there had been no misrepresentation, and, moreover, that the appellant had relied exclusively upon his own investigations as to the character of the farm. As to the questions of fact raised by this defence it seems sufficient to say that, having regard to the letters written by the appellant after he had enjoyed possession of the land for a considerable period, it is impossible to hold that the learned trial judge took an extreme view in thinking that the evidence of the appellant was not of sufficient weight to justify a finding in his favour.

As to the second defence, which was based upon alleged deficiencies in the respondents' title, the complaint of the

(1) [1924] 18 Sask. L.R. 443; [1924] 2 W.W.R. 128.

(2) 17 Sask. L.R. 422; [1923] 3 W.W.R. 619.

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appellant is concerned with reservations in the patents that were the source of the respondents' title to part of the land, and with a proviso in the same instruments. The proviso and the reservations, which form the principal ground of complaint, are set forth in the following extract:—

> Saving and reserving, nevertheless, unto us, our successors and assigns, the free uses, passage and enjoyment of, in, over and upon all navigable waters that now are or may be hereafter found on or under, or flowing through or upon any part of the said parcel or tract of land; also reserving all mines and minerals which may be found to exist within, upon, or under such lands, together with full power to work the same, and for this purpose to enter upon, and use and occupy the said lands or so much thereof and to such an extent as may be necessary for the effectual working of the said minerals, or the mines, pits, seams and veins containing the same; and also reserving thereout and therefrom all rights of fishery and fishing and occupation in connection therewith upon, around and adjacent to the said lands, and also the privilege of landing from and mooring boats and vessels upon any part of the said lands and using the said lands in connection with the rights of fishery and fishing hereby reserved, so far as may be reasonably necessary to the exercise of such rights.
>
> To have and to hold the said parcel or tract of land unto the said Thomas Ross, his heirs and assigns forever.
>
> Provided, and, in pursuance of section 5 of the Northwest Irrigation Act, 1898, it is hereby declared that these presents shall not vest in the said Thomas Ross, his heirs and assigns, any exclusive or other property or interest in or any exclusive right or privilege, with respect to any lake, river, stream or other body of water, or in, or with respect to any water contained or flowing therein, or the land forming the bed or shore thereof.

As to part of the land, the patents contain no reservation of minerals, the subjects of complaint being reservations affecting navigable waters, rights of fishery and ancillary rights.

Section 5 of the Irrigation Act of 1898, referred to in the last paragraph of the above extract, in terms directs that after the passing of the Act, except in pursuance of some agreement or undertaking then existing, no grant shall be made by the Crown of lands or of any estate, in such terms as to vest in the grantee any exclusive or other right or interest of the character described in the proviso contained in that paragraph; and the effect of s. 5 is, that no property or exclusive interest in any stream or other water within the contemplation of that section, which, of course, includes navigable waters, or in the bed of such stream or water, can be lawfully granted by the Crown after the passing of the Act. In view of this enactment, the reservation of rights of navigation in navigable waters is, perhaps,

otiose, and was inserted, it may be assumed, in compliance with the requirements of some order in council, passed prior to the date of the Irrigation Act, which has not been called to our attention. The reservations respecting fisheries and minerals are those required by orders in council passed under the authority of the Dominion Lands Act, dated, respectively, the 19th March, 1887, and the 17th September, 1889.

As regards reservations touching streams and other waters, and the beds thereof, and fishing and navigation, the enactment contained in s. 5 of the Irrigation Act, already referred to, seems to preclude the possibility of a patentee from the Crown, in the absence of some agreement to the contrary in existence at the time of the passing of the Act, acquiring any such exclusive right to any natural stream or water or its bed as would prevent the Crown or its licensees exercising such rights as those reserved in the patents. Subject to the exception mentioned, all grants acquired from the Crown since the date of the Act are, by the general law, subject to that limitation; and there would appear to be no authority except the authority of Parliament from which such exclusive rights could be derived.

It is by no means clear that it would be impossible for a patentee under a patent reserving mines and minerals, or his successor in title, to obtain a grant of the minerals reserved, including coal; and, without expressing any opinion on the point, it may, for the purposes of this appeal, be assumed that there would be no insuperable legal impediment in the way of acquiring such a title.

Under an agreement for the sale of land, a purchaser acquires (unless his rights are expressly or impliedly restricted), a right to receive a good title in fee simple to all the subjects, *usque ad coelum et ad inferos* (within the description of the parcels), denoted by the term "land" in English law; as well as the right to have the vendor's title disclosed to him in a proper abstract of title, and to have the abstract verified by sufficient proofs. Juridically, this right has been ascribed to the force of a contractual term implied from the character of the agreement itself; and, on the other hand, it has also been described as a right given *ab extra* by the law. Whatever the juridical basis of

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the right may be, it is settled that it may be limited, or entirely displaced, by the fact of the purchaser's knowledge at the time of entering into the agreement that the vendor's title was affected by some flaw or deficiency which it was not in his power to remove—a qualification of the purchaser's right, which, however, does not come into play where the agreement itself contains a specific stipulation requiring the vendor to give a good title. In such cases, the matter is ruled exclusively by the terms of the contract, the purchaser's rights being subject to such qualifications only as are stated expressly or as arise by necessary implication from the words themselves of the contract, properly construed. For the purposes of this appeal it will be unnecessary to consider a question of some importance, whether, namely, under an open agreement for sale, that is to say, an agreement containing no express stipulations governing the obligations of the vendor as touching the subject of title—the vendor's title being a registered title governed by the Land Titles Act of Saskatchewan—the purchaser can demand any better or other title than that received by the grantee under the original grant from the Crown. That is a question which does not arise, and no opinion is expressed concerning it. The agreement under consideration deals with the subject of title, the pertinent stipulation being in these words:

> And he covenants and agrees with the purchaser that upon the full, prompt, faithful performance by the purchaser of said and every of said covenants and agreements by him to be performed, kept and fulfilled, and upon payment of the money and sums of money above mentioned in the manner and at the time specified; then and in such case the said vendor will convey the said land and premises to the purchaser by good and sufficient deed or transfer, prepaid by the vendor's solicitor at the expense of the purchaser.
>
> And it is further agreed that the purchaser hereby accepts the title of the vendor to the said lands and shall not be entitled to call for the production of any abstract of title or proof, or evidence of title or any transfer papers, or documents relating to the said property other than those which are now in the possession of the vendor.

Stipulations exonerating the vendor from his obligation under a contract for the sale of land to vest in the purchaser a good title to the subject of the sale, or limiting that obligation, are very strictly construed.

The condition before us is couched in very general terms, and it is impossible to say that its language is calculated to

inform the purchaser that he is assuming the risk of being saddled with a title which no purchaser from him would accept, or that he is renouncing his rights arising from the vendor's duty on the treaty for sale to disclose to him the facts touching the nature of his title, or to direct his attention to this duty at all; it has been held, rightly it would appear, that a condition expressed in the terms of this stipulation must be read and applied subject to that right; *In re Haedicke and Lipski's Contract* (1); it does not relieve the vendor from his obligation to disclose facts which it would be his duty to disclose in the absence of it.

The concrete question before us is this: Are the defects of title now set up by the appellant within the scope of the rule imposing upon the vendor this duty of disclosure? The disabilities of the patentee arising from the reservations in the patent are, unquestionably, defects of title and, in point of verbal construction, come within the scope of the qualification. Is the vendor precluded from opposing to the purchaser's objection grounded upon these defects the purchaser's own agreement to accept his title, by reason of his failure on the treaty for sale to acquaint the purchaser with the terms of the patents?

The vendor's duty of disclosure, broadly speaking, rests ultimately upon considerations analogous to those which give rise to the corresponding duty in the case of some other classes of contracts—insurance, for example. One of the parties to the negotiation in such cases may ordinarily be supposed to have exclusive cognizance of certain matters material to the contract; and both justice and convenience seem to require that upon that party there shall rest—and therefore the law imposes upon him—a duty of disclosure in relation to such matters. *In re Banister* (2); *In re Marsh and Granville* (3); *Reeve* v. *Berridge* (4).

The general principle is that the vendor, who is presumed to know the state of his title, must inform the purchaser of all material defects in his title which are within his exclusive knowledge, and which the purchaser would not be expected to discover for himself with the care commonly

(1) [1901] 2 Ch. 666.
(2) [1879] 12 Ch.D. 131, at p. 136.
(3) [1882] 24 Ch. D. 11.
(4) [1888] 20 Q.B.D. 523 at p. 528.

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used in such transactions and with the opportunities of investigation available to him. *Carlish* v. *Salt* (1).

The principle has been frequently applied, and is admirably illustrated in cases in which the vendor is a lessee, and the lease is the subject of the sale. The vendor is not expected to be at pains to disclose the terms of a lease which contains only the ordinary typical terms; of these the purchaser may be presumed to have notice through the nature of the transaction itself. Anything in the terms of the lease unusual or exceptionally onerous affecting the lessee, however, he is expected to disclose. Such terms are material in the sense that they may affect the mind of the proposed purchaser as to the desirability of the bargain; and the vendor will, as a rule, not only be cognizant of the terms of his own lease, but will, as well, be aware of the fact that the purchaser will be, and must remain, in ignorance of such terms, unless they are made known to him by or on behalf of the vendor himself. It is a convenient, as well as a just rule—a rule conducive to fair and honest dealing—to require the vendor, whose lease contains unusually disadvantageous conditions, to disclose that fact, or, at all events, to invite the purchaser to examine the lease, and to give him full opportunity of informing himself about it. *Molyneux* v. *Hawtrey* (2).

In considering the scope of this obligation of disclosure as affecting the present controversy, it is most important to remember that the application of the principle has been dictated by these general assumptions—that, in the normal course of affairs, the vendor will know, and the purchaser will be ignorant of, any material defects in the vendor's title.

The learned Chief Justice of Saskatchewan has set forth in his judgment certain facts touching the origin of land titles in that province, which are most pertinent at this point. Many million acres have been given to the Canadian Pacific Railway Company and other railway companies as land grants, without any reservation of minerals or mining rights; lands granted by the Crown prior to January, 1890, and lands entered for as homesteads before

(1) [1906] 1 Ch. 335, at pp. 340 and 341.

(2) [1903] 2 K.B. 487.

the regulations of 1889, as well as lands included in those reserved to the Hudson's Bay Company, were not subject to any such reservation. And the titles to these in great part are free from any restriction or burden arising from the enactments of the Irrigation Act or affecting rights of fishing. And it follows, of course, as the learned Chief Justice says, that it cannot be presumed, with regard to any parcel of land in the province, that it was granted by the Crown with all or any of the reservations to which the respondents' title is subject. On the other hand, by s. 60 of the Saskatchewan Land Titles Act, c. 67, R.S.S. 1920:

> Any certificate of title granted under the Act shall, unless the contrary is expressly declared, be subject to
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> (*a*) any subsisting reservations or exceptions contained in the original grant of the land from the Crown.

As Lord Haldane says, in *Grand Trunk Ry. Co.* v. *Robinson* (1), the law imputes to people who are subject to it the duty of knowing its principles; and purchasers of land in Saskatchewan registered under the Land Titles Act there, must have their rights determined on the footing that such purchasers act with knowledge of this provision of that enactment. Knowledge, generally, of the provisions of statutes and orders in council affecting land titles in that province must be imputed to them. That is to say, the rights of parties to dealings in lands must be determined on the footing that such knowledge exists; the purchaser must, for example, be assumed to know that any title to land acquired in the ordinary way by homestead entry since 1889, embracing, admittedly, much the greater part of the Crown granted agricultural land of the province, is subject to precisely the same reservations affecting fishing and minerals as those affecting the respondents' title, and to be aware of the enactments of the Irrigation Act. For the same reason, knowledge must also be ascribed to both parties of the fact that, in the ordinary course the precise character of such reservations can be ascertained by inspection of the documents in the Land Registry.

In view of these considerations, is the vendor, possessing the ordinary, the typical, title, derived through homestead entry made since the date (the year 1889) mentioned—the title under which the agricultural lands of the province are

(1) [1915] A.C. 740 at p. 748.

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for the most part held—under an obligation to caution his purchaser about the reservations in the original grant to which such a title is normally subject? On the contrary, it would appear, indeed, that in such circumstances the whole basis of the duty of disclosure, as touching such facts as the existence of these reservations, disappears. The plain common sense of the business seems to be that a purchaser, if at all concerned to have a title of a different character—in other words, if concerned to have a title more absolute than this typical title—might be expected himself to inquire about the nature of the title the vendor could give.

We were referred to a judgment of the Saskatchewan Court of Appeal in *Western Canada Investment Co.* v. *McDairmid* (1), in which it appears to have been laid down that an acceptance of title couched in terms similar to those now in question is limited in its operation to such defects of title as the purchaser is aware of or ought to be deemed in law to be aware of. This proposition is too broadly stated. As already intimated, so long as the vendor has made no default in his duty of disclosure (and subject to the effect of special circumstances upon the vendor's right to specific performance), the condition is an adequate shield against objections on the ground of defects in title. He is disabled from using it as such a shield when the purchaser has remained in ignorance of the defect by reason of his default in that duty—and only then. This is the basis of the decision of Byrne J., in *Re Haedicke and Lipski's Contract* (2). The language of the Master of the Rolls in *Bousfield* v. *Hodges* (3), does, at first sight, lend some support, perhaps, to the appellant's contention. But the key to the meaning of the Master of the Rolls is in the phrase "kept back," in which he refers to the kind of conduct he is thinking about—conduct which would make it unfair to insist upon the condition—conduct falling short of the standard to which a conscientious seller would be expected to conform, when exacting such a condition from a purchaser. *Jenkins* v. *Hiles* (4); *Re Haedicke and Lipski Contract* (2), at page 670.

(1) [1922] 15 Sask. L.R. 142.
(2) [1901] 2 Ch. 666.
(3) [1863] 33 Beav. 90.
(4) [1802] 6 Ves. 646.

These reasons are sufficient to shew that the appeal should be rejected; but it is, perhaps, desirable to emphasize the fact that there is nothing in the circumstances of the property which could give to the reservations in the patent any special significance or importance which was not as well known to the appellant as to the respondents. The fact that a considerable stream of water traverses the property for half a mile was repeatedly mentioned during the argument but this was, of course, patent and fully known to the appellant; nor was there anything else in the particular circumstances of the case which could lend support to a charge that the vendor, in insisting upon the conditions in his contract, was acting unconscientiously or unfairly.

The appeal should be dismissed with costs.

IDINGTON J. (dissenting).—By an agreement in writing dated the 14th April, 1920, the respondents agreed to sell to the appellant, and the latter agreed to buy from the former, the whole of section one and the south half of section two, and the east half of the southeast quarter of section three in township twenty-six in range twenty-eight west of the second meridian in the province of Saskatchewan, in the Dominion of Canada, containing one thousand and forty acres, more or less, according to Dominion survey thereof, at and for the price of fifty-two thousand dollars, of which twelve thousand dollars was paid in cash.

The balance was to be paid on the crops payment plan, by which the respondents were to receive each year one half the specified crop.

The agreement is on a printed form which in part is not filled up and thus indicates haste and want of proper precaution at the very outset.

The purchaser, now appellant, had recently come from Ontario on the lookout for land and was an entire stranger regarding the country, except having once passed through on a trip.

The venture he made in said purchase seems to have been unfortunate, for, after farming the place for three years in succession, he was further behind than when he started, and, in February, 1923, the respondents brought this action for specific performance and other alternatives in way of relief.

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The appellant set up many defences and also counterclaimed on several grounds.

The learned trial judge decided against him on all grounds except a trivial one, and gave judgment for the respondents with costs.

From that judgment the appellant appealed to the Court of Appeal of Saskatchewan.

The learned Chief Justice and Mr. Justice Martin were in favour of allowing the appeal on the ground that the respondents could not make the title they had covenanted with the appellant to convey.

Justices Lamont and McKay took the opposite view and the court being thus equally divided the said appeal failed and was dismissed without costs.

Hence this appeal in which the appellant relies upon the ground he had set up at the trial, of misrepresentation as to the quality of the land and in other respects, as well as the impossibility of the respondents making the title they had covenanted to make.

As to the ground of misrepresentation, I am unable to say that it is wholly unfounded for I have not considered all the evidence as fully as I should have done if necessary to determine this appeal.

It seems, however, difficult to rely upon it in face of the appellant continuing to work the farm so long after he must have realized how much he had been misled, instead of repudiating his purchase or complaining in any way to respondents.

Moreover, I have arrived at such a decided opinion, for the reasons respectively assigned by the learned Chief Justice Haultain and Mr. Justice Martin in the court below in support of the ground taken by them, that by reason of the reservation of minerals in the Crown grant this appeal should be allowed.

The said learned judges have between them so fully covered the ground that I do not feel disposed to repeat at length their reasoning here, and cite the leading authorities cited by them and, indeed, see no useful purpose to be served by doing so.

The reasons assigned by respondents' counsel seem to me to rest, in the last analysis, solely upon an implied presumption in law that any vendee buying land in Saskatche-

wan and elsewhere in our western provinces since 1907, must have knowledge of the fact that minerals therein are reserved to the Crown, though in fact there are many millions of acres in that and other western provinces to be bought, as was part of this very purchase herein, free from any such reservation.

There is, I respectfully submit, no reasonable ground for such presumptions under such circumstances. No case is cited that on examination will support such a pretension.

With great respect I cannot follow that train of thought in face of the well known facts.

Test it in many obvious ways, for example, by applying the converse implication, and attribute to the vendors knowledge of the fact, though non-existent.

What right have such vendors of such like lands to pretend they are free from such reservations, when in law they must know, if granted since 1907, that they are subject thereto.

How such a train of thought can be properly pressed upon us puzzles me much in view of the actual condition of the litigation that has arisen in the west as illustrated by the following remarks of Mr. Justice Mackenzie in the case of *Burke* v. *Popoff* (1):—

> It has been repeatedly held in Alberta that a coal reservation constitutes a valid objection to title by one who has entered into an agreement to purchase land not subject thereto. See *Greig* v. *Franco-Canadian Mtge. Co.* (2); *Innis* v. *Costello* (3); *Universal Land Sec. Co.* v. *Jackson* (4); *Crump* v. *McNeill* (5).

The certificate of title under section 60 of the Land Titles Act, is relied upon by respondents' counsel. I submit that does not help us as an argument for respondents herein. It simply puts purchasers on their guard to investigate when that stage, in the course of carrying out a purchase, is reached.

A vendor is thereby bound to have all that, and other eight sub-clauses of the said section cleared up when that stage is reached, if not already made so.

(1) [1923] 2 W.W.R. 648, at p. 651.
(2) 10 Alta. L.R. 44; 10 W.W.R. 1139; 34 W.L.R. 1102.
(3) 11 Alta. L.R. 109; [1917] 1 W.W.R. 1135.
(4) 11 Alta. L.R. 483; [1917] 1 W.W.R. 1352.
(5) 14 Alta. L.R. 206; [1919] 1 W.W.R. 52.

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This is one he cannot clear up and a prudent vendor should make it clear, as is often done, by expressing the reservation in his agreement of sale.

I have considered all the authorities cited by respondents' counsel, as well as those in Mr. Justice Lamont's judgment, and I fail to see how respondents are helped thereby.

At first blush I was inclined to think there might be some consolation for the respondents in the apparent acknowledgment, in the articles of agreement, of the respondents' title, but that is swept away by *In re Haedicke and Lipski's Contract* (1), *following Bousfield* v. *Hodges* (2), which I am glad to see frankly presented in respondents' factum, though I cannot adopt the reasoning by which it is sought to be averted.

A great many decisions and authorities bearing upon this aspect of the case are collected in the judgment of Mr. Justice Elwood, in the case of *Strickee* v. *Ruckeman* (3).

The defendant herein as the purchaser, as in many of these cases so cited, was ignorant of the title and of the reservation until his solicitor apparently discovered it in the course of this litigation.

I think, in light of the said authorities and many others that could be discovered, the ignorance of the defendant was quite excusable.

I must conclude, for the foregoing reasons, that this appeal should be allowed with costs subject to the reasonable conditions proposed by Mr. Justice Martin to be imposed upon the appellant, and, in the event of the parties being unable to agree thereon, that a reference be directed to determine same.

Appeal dismissed with costs.

Solicitors for the appellant: *Stapleton & Gerrand.*

Solicitors for the respondents: *Cross, Jonah, Hugg & Forbes.*

(1) [1901] L.R. 2 Ch. 666.

(2) 33 Beav. 90.

(3) 7 Sask. L.R. 371.