[HOUSE OF LORDS.]

SOPER (PAUPER) . . . . . APPELLANT; H. L. (E.)

AND 1889

ARNOLD AND ANOTHER . . . . . RESPONDENTS. *July* 30.

Vendor and Purchaser—Rescission—Forfeiture of Deposit—Defect in Title subsequently discovered—Common Mistake—Action to recover Deposit.

The conditions in a contract of sale of land provided that the purchaser should pay a deposit, and that if he failed to comply with the conditions the deposit should be forfeited and the vendors should be at liberty to resell. The purchaser paid the deposit, and accepted the title, but when the time for completion arrived he could not provide the residue of the purchase-money. The vendors thereupon gave the purchaser notice that the contract was rescinded and the deposit forfeited. Three years afterwards, the vendors having contracted to sell to another purchaser, it was decided that their title was bad, owing to a defect which had appeared upon the face of the abstract delivered to the first purchaser. The first purchaser thereupon brought an action to recover his deposit on the ground of mutual mistake and failure of consideration:—

Held, affirming the decision of the Court of Appeal (37 Ch. D. 96), that the title having been accepted, and the deposit having been forfeited solely in consequence of the purchaser's default, he was not entitled to recover the deposit.

APPEAL from a decision of the Court of Appeal (37 Ch. D. 96).

In November 1882 the respondents, who were trustees under the will of B. A. Arnold, contracted to sell to the appellant certain freehold hereditaments at the price of £6100, £610 to be paid on signing and the residue on completion. The conditions of sale provided that if the purchaser failed to comply with the conditions the deposit should be forfeited to the vendors, who should be at liberty to proceed to another sale. The appellant paid the deposit of £610. The title was approved and accepted by the appellant's solicitor, but when the time for completion arrived the appellant was unable to provide the residue of the purchase-money. In consequence of this default the respondents in March 1883 (with notice to the appellant) rescinded the contract and declared the deposit to be forfeited.

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In 1885 the respondents contracted to sell the property to another purchaser, who took an objection to the title on the ground that the trustees of Mr. Hoare's will (who had sold the property to Mr. Arnold) had not an absolute power of sale. Chitty J. decided that this objection was well founded, and the sale went off. The terms of the power of sale under Mr. Hoare's will had appeared upon the face of the abstract delivered to the appellant in 1882.

In 1886 the appellant brought an action against the respondents to recover back the deposit on the ground of a mutual mistake of fact and failure of consideration. Kekewich J. gave judgment for the defendants (1), and this decision was affirmed by the Court of Appeal (Cotton L.J. Sir J. Hannen, and Lopes L.J.) (2).

Against these decisions the plaintiff appealed.

July 29, 30. *J. M. Rigg* (*J. A. Thorne* with him) for the appellant:—

This is a case of a common mistake. The purchaser and vendors both supposed that the vendors had a good title, when in truth they had none. The purchaser on discovering this is not bound to complete and can recover back his deposit: *Cooper* v. *Phibbs* (3), per Lord Westbury. Equity will relieve (even in the case of a completed contract) against a common mistake without fraud: *Jones* v. *Clifford* (4); *Bingham* v. *Bingham* (5).

In *Want* v. *Stallibrass* (6) the argument of the plaintiffs' counsel was apparently adopted by Martin and Pollock BB. A vendor who describes his property as a freehold—that is the fee simple—not having such an estate to sell, commits a legal fraud and will be decreed to repay the deposit, even after conveyance: *Hart* v. *Swaine* (7). The observation of Lord Selborne in *Brownlie* v. *Campbell* (8) as to the doctrine of Scotch law is only obiter dictum as to English law.

(1) 35 Ch. D. 384.
(2) 37 Ch. D. 96.
(3) Law Rep. 2 H. L. 149, 170.
(4) 3 Ch. D. 779.
(5) 1 Ves. Sen. 126; Belt's Suppt. p. 81.
(6) Law Rep. 8 Ex. 175, 184, 185.
(7) 7 Ch. D. 42.
(8) 5 App. Cas. at p. 937.

W. Barber Q.C. (*Vernon Smith* and *Reginald Kemp* with him) for the respondents:—

The title whether really defective or not—and it must for the purposes of this appeal be taken to be defective—was accepted by the appellant with knowledge of the defect, if it was one. If the vendors had filed a bill for specific performance the Court would not have gone into the question of title after the time had passed and the title had been accepted: the vendors would have been entitled to a declaration to that effect in their order for specific performance. After conveyance there is no jurisdiction to set it aside except in "the case of misrepresentation and fraud, or an error in substantialibus sufficient to annul the whole contract;" *Brownlie* v. *Campbell* (1), per Lord Selborne. The deposit is a guarantee for the completion of the contract: *Ex parte Barrell* (2); *Howe* v. *Smith* (3). The cases relied on by the appellant are clearly distinguishable. Here the purchaser had put an end to the contract by his own default. [He also cited *Rogers* v. *Ingham* (4); *Stewart* v. *Stewart* (5).]

Rigg replied.

LORD HERSCHELL:—

My Lords, the only question raised by this appeal is whether the appellant is entitled to recover from the respondents a sum of £610 which was paid to them some years ago, as a deposit upon a contract of sale made between the appellant and the trustees of the will of Mr. Arnold, whereby the trustees agreed to sell certain property to the appellant for the sum of £6100. By the conditions of sale it was provided that "all objections and requisitions (if any) in respect of the title or the abstract, or anything appearing therein respectively, shall be stated in writing and sent to the vendor's solicitor within seven days from the delivery of the abstract, and all objections and requisitions not sent within that time shall be considered to be waived, and in this respect time shall be deemed the essence of the contract."

(1) 5 App. Cas. at p. 937.
(2) Law Rep. 10 Ch. 512.
(3) 27 Ch. D. 89.
(4) 3 Ch. D. 351.
(5) 6 Cl. & F. 911.

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An abstract was delivered by the trustees to the appellant. That abstract disclosed that Mr. Arnold had purchased from the trustees of the will of Mr. Henry Hoare, and that those trustees had purported to sell to Mr. Arnold under the authority of a power contained in the will. The abstract disclosed the terms of the will—it shewed exactly the terms of the power which the trustees had purported to exercise in selling. The solicitors of Mr. Soper, the purchaser, made certain requisitions and objections. Some of the objections indeed were connected with the fact of the sale having taken place by the trustees of Mr. Hoare under the powers of his will; but they took no exceptions to the title except such as were removed to their satisfaction, and ultimately they accepted and approved the title. That fact is distinctly stated in the statement of defence to the action and is not traversed in the reply; and therefore we may take it, indeed we are bound to take it, that the title was so accepted and approved.

Thereupon a conveyance would have followed in the natural course, but the appellant, as is admitted, was unable to find the balance of the purchase-money, and for that sole reason the payment of the balance was not made, and the transaction was not carried through by a conveyance and the payment of the purchase-money accordingly. The time having elapsed within which the payment was to be made, the vendors served a notice upon the appellant that unless he paid the money in accordance with the contract within fourteen days they should rescind the contract and not be under any further obligation to carry it out and complete the purchase. No payment was made, nothing was done, and matters remained in that position, the deposit continuing to be held by the respondents.

So matters stood for some years until the present action was brought, in which the appellant seeks to recover back the money which he so paid, upon the ground that the trustees of the will of Mr. Henry Hoare had not power to sell the estate except upon a condition which had not happened. It must be taken I think for the purposes of this appeal that the trustees had not the full power of sale which they purported to exercise, that their power was only exercisable absolutely in case there were no children of

the marriage who could become entitled to the property under the trusts of the will; and it appears that there is a daughter of the marriage, who on her majority will become entitled under those trusts. There was, therefore, the plaintiff insists, the defect in the title to which I have called attention; and his point is this: he says, "Inasmuch as I now discover that at the time when I paid the deposit on the sale and at the time when I failed to pay the residue of the purchase-money and you declared the contract to be at an end, you, the vendors, could not have made out a good title to the property, therefore I am entitled to have my deposit back."

Now, my Lords, as I have pointed out, the defect, such as it was, was communicated, on the very face of the abstract of title, to the appellant and was as well known to him as to the trustees at the time when he accepted and approved the title. There can be no doubt that if he had possessed the money and had been in a position to pay it, the residue of the purchase-money would have been paid and a conveyance executed notwithstanding that defect. I apprehend that it is clear that if that had taken place no objection could afterwards have been taken to the title such as is now suggested, and no relief could have been obtained on account of the defect to which I have alluded. How does the matter stand, then, with regard to the deposit? The deposit is given as a security for the performance of the contract. The appellant admittedly cannot recover that deposit if it was through his default that the transaction was not completed. And, under the circumstances which I have detailed, I cannot doubt that it must be regarded as a contract uncompleted through the default of the appellant. As I have said he took no exception to the title—he was willing to take that title—he had intimated his willingness to take it by accepting and approving of it, and the vendors were ready and willing to convey to him that title which he had so intimated his willingness to accept. But he, although he did not object to the title at all, was not prepared to carry out his contract, he had not the means, and that became known to the vendors. Thereupon they, after due notice, determined the contract as against him.

Now, my Lords, when an action is brought by the appellant

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to recover the deposit and the objection is taken that the vendors were not able to make out what is in law a complete and perfect title the answer seems to me to be this, that the vendors were perfectly ready and willing to convey to the appellant that title which he had accepted and approved and declared himself willing to take, and the contract only went off because he afterwards was not in a position or prepared to carry it out on his part. That seems to me to shew that it was owing to his default that the contract came to an end; and I venture very much to doubt whether, under circumstances such as I have described, if the vendors had brought an action for specific performance to compel him to complete the purchase and to pay the residue of the purchase-money, he could have resisted such an action on the ground, even if he had then ascertained the fact, that there was some defect in the title. No authority has been cited to shew that under such circumstances, where a purchaser has accepted and approved a title, all the facts being known to him at that time, he can resist a decree for specific performance and claim to have the title investigated. If that be the case, it seems to me that it would be out of all reason to suppose that he could recover the deposit on the ground that the contract had come to an end not through his default but through that of the vendors when the circumstances were such that they could have compelled him specifically to perform the contract. But I do not think it necessary to determine this point, because for the reasons which I have stated it seems to me that he was in default, that the contract went off owing to his default, and that under those circumstances he cannot recover the deposit. Any other decision would lead to most inconvenient consequences, because under circumstances such as these, where trustees were selling, the deposit might have been distributed by them amongst their beneficiaries, and yet at any time within six years afterwards if the purchaser discovered that there was some defect which would have prevented their making out a perfect conveyancing title he could bring an action against the trustees to recover back the deposit which he had so paid though he had accepted and never taken any objection to the title. That would be a result which would be productive of the gravest inconvenience. I

know of no authority in point of law to warrant it, and I therefore move your Lordships that this appeal be dismissed.

LORD FITZGERALD:—

My Lords, I have, during the course of this rather singular and unusual case, had upon my mind a considerable degree of hesitation in affirming the judgment of the Court below; but a great deal of it has been removed by the argument which Mr. Barber has addressed to us. Therefore I am able to say that I do not dissent from the judgment which has been announced by the noble and learned Lord on the woolsack—nay more, that I concur in it.

LORD MACNAGHTEN:—

My Lords, I certainly mean no reflection on the learned counsel for the appellant, who has argued the case with perfect fairness and much ability, when I say that the appellant's claim seems to me to be groundless and almost absurd.

There was a contract for the sale of some real property. There were the usual conditions of sale. There was a deposit paid, and there were the ordinary provisions as to the forfeiture of the deposit. An abstract was delivered; the vendors' title was fully disclosed; that title was duly accepted and approved; the conveyance was prepared, and everything seemed ready for completion; but when the time came for paying the price the balance of the purchase-money was not forthcoming. The purchaser had to abandon the contract; the deposit was forfeited, and the matter was apparently closed. Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out it goes against the purchase-money—but its primary purpose is this, it is a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not.

Some years afterwards there was a contract to sell the property to some one else, and that person found out a flaw in the title

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which in the opinion of a learned judge prevented the vendors from enforcing the contract. The appellant now comes forward and says: "Give me back my money, because if I had found out that flaw I should not have allowed my money to be forfeited." I am not sure that every judge would have taken the same view of the construction of Mr. Hoare's will that Chitty J. took; but I express no opinion upon that, and I assume that this flaw was a fatal defect in the title.

The real answer to the claim of the appellant I think is that the deposit was forfeited for a good and sufficient reason. It was forfeited because the purchaser could not pay the stipulated price and for no other reason. If instead of forfeiting the deposit the vendors had brought an action for specific performance after the purchaser had accepted and approved the title, as it is admitted he did, they would I think have been entitled to a judgment for specific performance with a declaration that the title had been accepted, and I apprehend the Court would have declined to go into any question as to the construction of Mr. Hoare's will. Under these circumstances in my opinion it would be most inequitable to allow the appellant to re-open the matter.

Judgments appealed from affirmed and appeal dismissed.

Lords' Journals 30th July 1889.

Solicitors for appellant: *Granville Smith & Co. for T. & J. Hutchings, Teignmouth.*

Solicitors for respondents: *Lovell, Son & Pitfield.*