[HIGH COURT OF AUSTRALIA.]

COX . . . . . APPELLANT;

AND

HOBAN AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1911.

MELBOURNE.

March 23,24; *May* 22.

Griffith C.J., O'Connor and Isaacs JJ.

Vendor and purchaser—Specific performance—Time limited for production of Title— Notice to produce—Deficiency of area—Annulment of contract—Compensation—Land Act 1901 (*Vict.*) (*No.* 1749), *secs.* 35, 49 (6), 56 (6).

By a contract of sale of seven specified Crown allotments of land, described therein as containing 2,131 acres or thereabouts, the titles to which were Crown leases of grazing areas granted under the *Land Act* 1901 (Vict.), the vendors agreed that they would apply to select two of the allotments as agricultural allotments and a third as a grazing allotment, and to have issued to them a lease under sec. 49 (6) of the Act in respect of the two allotments and a lease under sec. 56 (6) in respect of the third allotment. It was also agreed that "the two last-mentioned leases" and the leases of the other grazing areas should be "produced to the purchaser or his solicitor within eight months from the day of sale and a copy thereof may be made by the purchaser or his solicitor on application in that behalf to the vendors or their solicitor," and that in the event of non-production of the leases it should be lawful for either the vendors or the purchaser to annul the sale. It was further provided that, if any mistake should be made in the description or area of the property or any other error should appear in the particulars, such mistake or error should not annul the sale, but compensation should be fixed by referees. It was finally provided that time should be of the essence of the contract in all respects. The two allotments agreed to be selected as agricultural allotments were comprised in a single Crown lease and together contained more land by about 30 acres than could under the Act be so selected, and the allotment agreed to be selected as a grazing allotment contained more land by about three acres than could under the Act be so selected, and the leases issued in respect of such selections were

of correspondingly smaller areas. The price was at the rate of 5s. per acre for the land agreed to be selected as agricultural allotments, and 10s. per acre for the rest.

Held, that in order to entitle the vendors to rely on the non-production of the leases within the specified period they must before the expiration of that period have asked for production.

Held, also, that the deficiency in the area of the land selected was not a ground for resisting specific performance of the contract, but was a matter for compensation under the contract.

Decision of *à Beckett* J.: *In re Hoban and Cox's Contract* (1911), V.L.R., 49; 32 A.L.T., 97, affirmed.

APPEAL from the Supreme Court of Victoria.

A contract in writing having been entered into between Herbert John Cox, the appellant, and Agnes Bridget Hoban and others, the respondents, for the sale by the respondents to the appellant of certain land, a summons under sec. 10 of the *Conveyancing Act* 1904 was taken out by the respondents asking for a declaration that the appellant was not entitled to rescind the contract, either on the ground of failure to produce the leases covenanted to be produced to the appellant or his solicitor within eight months from the day of sale, or on the ground that the respondents did not select the allotments contracted to be selected, or on any other ground.

The material facts are fully stated in the judgment of *Griffith* C.J. hereunder.

The summons was heard by *à Beckett* J., who held that the appellant was not entitled to rescind on any ground (*In re Hoban and Cox's Contract* (1)).

From this decision the appellant now appealed to the High Court.

Duffy K.C. and *Winneke*, for the appellant, The respondents undertook to produce the leases within a certain time, and that means that they would go to the appellant and produce them. [They referred to *Prideaux on Conveyancing*, 5th ed., p. 190.] The respondents alone would know when the leases were granted, and it was at least their duty to give notice within the time limited

(1) (1911) V.L.R., 49; 32 A.L.T., 97.

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that the appellant could inspect them: *Pease and Latter on Contracts*, p. 239; *Canning* v. *Temby* (1).

[GRIFFITH C.J. referred to *Vyse* v. *Wakefield* (2).

ISAACS J. referred to *Rippinghall* v. *Lloyd* (3)].

The parties must be taken to have known that under the provisions of the *Land Act* 1901 the respondents could not select the whole of the land undertaken to be selected, and the contract, therefore, being impossible of performance at the time the agreement was made, is invalid: *Harris* v. *Gollings* (4); *Leake on Contracts*, 4th ed., p. 481. The respondents have agreed to make title to the whole of the land, and they have not done so. The words "in respect of" in the undertaking to select does not indicate that the parties contemplated that only part of the particular areas could be selected. If that had been so, the language in the undertaking to produce the leases would have been different.

Mitchell K.C. and *Schutt*, for the respondents. The clause as to production is substantially the same as that in Twenty-Fifth Schedule, Table A to the *Transfer of Land Act* 1890, and there the words "on application in that behalf to the vendor or his solicitor" have been held to apply to production as well as to taking a copy: *Morrison* v. *Richardson* (5). Notice by the vendor is only necessary when there is more than one place named for production: *Rippinghall* v. *Lloyd* (3); *Berry* v. *Young* (6). If the contract is susceptible of two constructions as to production, that construction which will uphold the contract should be adopted. An obligation on the part of the respondents to give notice that he is ready to produce can only arise when the appellant gives notice that he wants to see the leases, for he may not want to see them. Time is not of the essence of the contract with regard to production, for production does not go to the root of the contract: *Moroney* v. *Roughan* (7). There was no rescission within a reasonable time: *Farrer on Conditions of Sale*, 2nd ed., p. 88. The deficiency in areas is not a ground for rescission, but can be amply compensated for.

(1) 3 C.L.R., 419.
(2) 6 M. & W., 442, at p. 453.
(3) 5 B. & Ad., 742.
(4) 17 V.L.R., 686; 13 A.L.T., 100.
(5) (1907) V.L.R., 218; 28 A.L.T., 166.
(6) 2 Esp., 640 (*n*).
(7) 29 V.L.R., 541; 25 A.L.T., 103.

Duffy K.C. in reply. It is unimportant whether the words "on application in that behalf by the vendors or their solicitors" qualify the obligation to produce or not. If they do, then the application must be one which the appellant can reasonably make, that is, an application after notice that the leases are ready for production. He referred to *Sugden's Vendors and Purchasers*, 14th ed., p. 431; *Best on Evidence*, 7th ed., p. 327.

Cur. adv. vult.

May 22.

The following judgments were read:—

GRIFFITH C.J. The contract of sale, dated 27th August 1909, was headed "Particulars and Conditions of Sale of Leasehold land." Under the head "Particulars" the following description was given: "All those pieces of land being Crown allotments 50, 50D, 93, 92, 92A, 92B and 104A parish of Whanregarwen County of Anglesey containing 2131 acres or thereabouts. Together with all buildings and improvements thereon."

The vendors were four persons, apparently members of the same family. There was nothing in the contract to indicate which of the vendors was the owner of any particular part of the land. It was suggested for the respondents that the purchaser must be assumed to have known the details of each vendor's title, but in the absence of any evidence on the point, and in view of the terms of the conditions of sale, I think that the presumption is the other way. Condition 5 so far as material was as follows:—

"The titles to the property sold consist of Crown leases of grazing areas granted pursuant to sec. 35 of the *Land Act* 1901 for the term of fourteen years and nine months less four days from 2nd day of April 1906: the vendors or some or one of them respectively have been residing within five miles of allotments 50, 50D and 104A for the term of six years, and they and some or one of them have or has effected improvements on allotments 50 and 50D to the value of 15s. per acre and on allotment 104A to the value of 10s. per acre. Some or one of the vendors as may be necessary will make immediate application to select said allotments 50 and 50D as agricultural allotments and to select

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allotment 104A as a grazing allotment and to have the licence to occupy such allotments ante-dated and to have a lease under sec. 49 sub-sec. 6 of the *Land Act* 1901 issued to them or some or one of them in respect of said allotments 50 and 50D and a lease under sec. 56 sub-sec. 6 of the *Land Act* 1901 issued to them or some or one of them in respect of the said allotment 104A. The two last-mentioned leases shall, together with the leases of grazing areas now existing in respect of allotments 92, 92A, 92B and 93 and the consent of the Board of Land and Works to the transfer thereof to the purchaser, be produced to the purchaser or his solicitors within eight months from the day of sale and a copy thereof may be made by the purchaser or his solicitors on application in that behalf to the vendors or their solicitor, and the purchaser shall within ten days from the date of such production deliver to the vendors or their solicitor a statement in writing of all objections or requisitions (if any) to or on the title or concerning any matter appearing on the particulars or conditions, and in this respect time shall be the essence of the contract."

The statements in the first sentence of this condition as to residence and improvements were relevant to show a right under the Crown Lands Acts to make the applications mentioned in the second sentence, by which it was stipulated that "some or one of the vendors as may be necessary" will make application to select allotments 50 and 50D as agricultural allotments. Under the Statute regulating grazing areas a lessee of a grazing area is entitled under certain circumstances "to select thereout" an area not exceeding 320 acres as an agricultural allotment. It appears that in fact Crown allotments 50 and 50D, which together comprised an area of 348 acres, were included in a single Crown lease of a grazing area of which one of the respondents, Agnes Bridget Hoban, was lessee. It was, therefore, by law impossible for her to select the whole of those Crown allotments as an agricultural allotment, and equally impossible for any other of the vendors to obtain a title to the residue as an agricultural allotment. But there was nothing to show that the purchaser was aware of this disability, or that both allotments were comprised in a single grazing area lease. A similar difficulty existed in fact with respect to Crown allotment 104A, which exceeded the

maximum area allowed to be selected as a grazing allotment by about 3 acres, but this was equally unknown to the purchaser.

The words "the two last mentioned leases" in the third sentence of condition 5 clearly mean the new leases to be applied for of Crown allotments 50 and 50D, and of Crown allotment 104A as an agricultural allotment and a grazing allotment respectively. Literal compliance with this stipulation was, therefore, *ab initio* impossible.

Condition 7 provided that:—

"If any mistake be made in the description or area of the property or any other error whatsoever shall appear in the particulars of the property such mistake or error shall not annul the sale but a compensation or equivalent to be settled by two referees mutually appointed in writing or their umpire shall be given or taken as the case may require. The party discovering such mistake or error to give notice in writing thereof to the other party within seven days after such discovery."

Conditions 13 and 16 were as follows:—

"13. In the event of the vendors or some or one of them not producing the leases mentioned in condition 5 within the time thereby limited, or in the event of the Board of Land and Works refusing its consent to the transfer to the purchaser of the existing leases to allotments 92, 92A, 92B and 93, then it shall be lawful for either the vendors or purchaser to annul the sale by writing under their respective hands, and the stakeholders shall thereupon repay to the purchaser the deposit and all other moneys paid by him."

"16. Time shall in all respects be the essence of the contract."

The price was the sum of £978 10s., being at the rate of 5s. per acre for allotments 50 and 50D, and 10s. per acre for the remainder.

The period of eight months from the day of sale expired on 26th April 1910. Up to that time there had been no communication between the parties, but on 2nd May 1910 the vendors' solicitor wrote to the purchaser's solicitors, informing them that all titles "in this matter are available for your inspection," and also giving them notice "under condition 7," that a mistake or error had been made in the area of the property sold, the correct area

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being 2,110 acres 0 roods 1 perch instead of 2,131 acres as mentioned in the contract.

On 6th May the purchaser's solicitors inspected the titles "under protest." On 9th May the vendor's solicitor notified the appointment of a referee to settle compensation in respect of the deficiency in area. On 13th May the purchaser's solicitors wrote, acknowledging the letters of 2nd and 9th May, and stating that "Inasmuch as the leases referred to in condition five of the leasehold contract have not been produced to the purchaser within eight months from the day of sale or at all the purchaser hereby annuls the sale under the leasehold contract. The purchaser also annuls the freehold contract under clause fourteen of the latter contract."

Some further correspondence followed, in the course of which the purchaser's solicitors pointed out that the leases produced for inspection did not include the whole of the land agreed to be sold. The new lease of Crown allotments 50 and 50D was in fact of an area of 318 acres 3 roods 21 perches, and there was a deficiency of about 3 acres in the case of the new lease for Crown allotment 104A. On 7th June the vendors' solicitor for the first time offered to deliver grazing area leases for the deficient quantities.

On 11th October a summons was taken out asking for a declaration that the purchaser was not entitled to rescind either on the ground of failure to produce the leases within eight months from the date of sale or on the ground that the vendors did not select the allotments contracted to be selected or on any other ground.

With respect to the non-production of the leases within the stipulated period of eight months the appellant contends that, as the contract obliged the vendors to acquire new titles to a material part of the land sold, it was incumbent upon them to inform the purchaser whether and when they had acquired them, and that he was therefore under no obligation to inspect the titles until he had received such notice. Reliance was placed on the doctrine laid down in *Vyse* v. *Wakefield* (1) and *Makin* v. *Watkinson* (2), where *Bramwell* B. said:—"If we look to the reason of the rule, it is, that when a thing is in the knowledge of

(1) 6 M. & W., 442.

(2) L.R. 6 Ex., 25, at p. 30.

the plaintiff, but cannot be in the knowledge of the defendant, but the defendant can only guess or speculate about the matter, then notice is necessary."

I was a good deal impressed with this argument, but it does not conclude the matter. Regard must be had to the general course of practice upon contracts for sale of land, and to what it is reasonable for each party to do in such cases. There is no doubt that in ordinary cases it is for the purchaser to go to the vendor if he desires to see the title deeds, and cannot call on the vendor to bring them to him for inspection. The time within which production is to be made is usually short, but the fact that it is long cannot make any difference in principle. As to what is a reasonable course of action to be adopted in such a case, I think that a reasonable purchaser would, when the time limited for production is drawing to an end, communicate with the vendor, inquiring whether the title deeds were ready for inspection, and asking for an appointment. And I think that the vendor might reasonably act on this view. I think also that a reasonable vendor would inform the purchaser as soon as he had acquired his new title. But it does not follow that he is bound to do so. I do not think that as a matter of grammatical construction the words "on application" qualify the word "produced." But I think that, having regard to the subject matter and the usual course of practice in such matters, the word "produce" of itself means "produce if asked," so that the promise is to produce the deeds for inspection if asked, and to do so within eight months. For these reasons I think that on this point the appellant fails.

I turn to the point as to the deficiency in area, and will deal with the facts as to the agricultural allotment. The provision by the vendors under condition 5 was that "some or one of them as may be necessary will make immediate application to select allotments 50 and 50D as agricultural allotments . . . and to have a lease under sec. 49 sub-sec. 6 . . . issued to them or some or one of them in respect of said allotments 50 and 50D," and a lease under the same sub-section "issued to them or some or one of them in respect of allotment 104A." The two last-mentioned leases with the old leases of the rest of the land were

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to be produced within eight months. As already pointed out, this promise was by law impossible of literal performance so far as regards the new leases.

The event mentioned in condition 13 of "the vendors or some or one of them not producing the leases mentioned in condition 5 within the time limited" consequently happened, and it would seem to follow that the right to rescind arose unless the case can be brought within condition 7. In one sense there was no mistake in the description or area of the property intended to be sold. The particulars at the beginning of the contract described the tenure and area of the property with perfect accuracy as it stood at the time of the contract, and it was undoubtedly contemplated that the property to be conveyed should be identical with that described in the particulars. But when the time came for completion the vendors could not make a title of the kind promised to all the land agreed to be conveyed. Can this be regarded as within the words of the condition? I think that condition 5, which states the nature of the title to the land intended to be sold, must be regarded as part of the description within the meaning of the condition. That condition, in effect, described allotments 50 and 50D as two separate allotments capable of being converted into agricultural allotments, whereas in fact they were comprised in a single grazing area lease, and together exceeded 320 acres in area. If this fact had been stated, it would have appeared that a new lease could not be issued for the whole area as an agricultural allotment. In one sense this was a misdescription of title.

The case of *Painter* v. *Newby* (1) shows that an erroneous statement of title may be a misdescription within such a condition. And, on the whole, I am of opinion that the statements in condition 5 with regard to those allotments may be regarded either as a "mistake in the description" or as "an error in the particulars," and that the vendors are therefore within the protection of that condition.

If the land to which the agreed title cannot be given were of such a nature as to affect materially the use or character of the whole estate, other considerations might arise. But there is no

(1) 11 Ha., 26.

suggestion of any such facts, and it is for the purchaser to establish them.

The same considerations apply to the deficiency as to allotment 104A.

For these reasons I think that the appeal fails, and must be dismissed.

O'Connor J. In this case the purchaser claimed a right, under the 13th condition, to rescind the purchase because, as he alleged, two breaches of the 5th condition had been committed by the vendors.

The learned Judge in the Court below held that neither of the breaches were established. In my opinion he was right in so holding.

The fifth condition required that certain leases, being the documents of title to the property purchased, and the consent of the Board of Land and Works to their transfer should be produced to the purchaser or his solicitors within eight months from the day of sale. The vendors were ready and willing to produce the documents to the purchaser or his solicitors, in accordance with the condition, and I assume, for the purpose of this ground, that the vendors had in their possession documents such as they had undertaken to produce. The documents were never in fact produced within the time limited. But that was because neither the purchaser nor his solicitors requested the production of the documents, or attended the vendors, within the time limited, for the purpose of having the production made to them. A few days after the expiration of the eight months, the vendors' solicitor notified in writing, to the purchaser's solicitors, that the documents were ready for production. But the latter contended that the notice was too late, and claimed that it was their right, under the 5th condition, to have notice from the vendors or their solicitor, within the eight months, that at a specified time and place the documents would be ready for production, so that they might attend the vendor or his solicitor, for the purpose of having the documents produced to them. The vendors denied the right claimed, and alleged, on their part, that their obligation under the condition was merely to produce the documents to the purchaser

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or his solicitors upon request by them, and that they were always ready and willing, within the time agreed upon, to produce them, if the request had been made. No such request was ever made by the purchaser or his solicitors, but it appears to be abundantly clear that, if the purchaser or his solicitors had been notified that the documents were ready for production when called for, they would have attended and called for the production.

Under the circumstances the question is who was in default under the contract. The determination of that question will depend upon whether the fifth condition is to be read as imposing on the vendors the duty of notifying, within the period limited, a time at which they would be ready and willing to produce the documents to the purchaser or his solicitors. There are no words in the condition which can be construed as expressly embodying any such stipulation. The condition follows the ordinary form, with such modifications as were necessary to meet the special circumstances connected with the obtaining and producing by the vendors of the title deeds, appropriate to the tenure of the lands as sold. It is not denied that, by universal usage, the vendor, in the absence of some special stipulation, is bound to produce title deeds for inspection only at the purchaser's request, and to the latter or his solicitor attending for that purpose. Where a written condition provides in the ordinary form for the production of title deeds, such, for instance, as that relating to the production of the certificate of title, as embodied in Schedule 25, Table A, of the Victorian *Transfer of Land Act* 1890, it is always read as imposing no duty of production other than that. Under these circumstances it may, I think, *primâ facie* be assumed that the words "shall . . . . be produced to the purchaser or his solicitor," as used in the fifth condition, were used by the parties to impose the usual obligation of production on the vendor and no more, unless there is something in the contract, or the subject matter, which makes it necessary to read into the condition the unexpresed obligation which, the appellant claims, must be implied from the language of the condition, as applied to the subject matter of the contract in this case.

The principle which the Court adopts in implying a term which the parties have not expressly embodied in their written

contract was acted on in *Hart* v. *MacDonald* (1). It is concisely stated by Lord *Esher* M.R., in *Hamlyn & Co.* v. *Wood & Co.* (2):— "The Court," he says, "has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication. It must be a necessary implication in the sense that I have mentioned."

It cannot, in my opinion, be properly said that it was in any sense necessary, for the fulfilment of the purchaser's obligation to attend the vendors or their solicitor, for the purpose of having the production made to them, that the vendors should notify them of the time when they would be ready to produce. Such a notification would no doubt be a convenience to the purchaser. Indeed, it would be under the circumstances very reasonable that the vendors should be bound to make it. But, on the other hand, it was imposing no impossible duty on the purchaser to demand that he should follow the ordinary course of requesting production, and attending for the purpose of having the production made to him, at any time before the expiration of the eight months. The appellant relied on a class of cases in which the principle of *Vyse* v. *Wakefield* (3) had been followed. In all those cases it was apparent that, unless the obligation to give the notice by one party was implied as a stipulation of the contract, the fulfilment of some term of the contract by the other party was in a business sense impossible. In *Vyse* v. *Wakefield* (3), the defendant could not have been expected to comply with the conditions of the insurance unless he had the notice which was essential to enable him to ascertain what the conditions were. In *Rippinghall* v. *Lloyd* (4) it was open to the vendor to produce the title at A, B or C on or before a certain day. It was impossible for the purchaser to know without notice from the vendor at which of the three places the vendor would be ready to produce. In *Canning* v. *Temby* (5) no time was fixed for

(1) 10 C.L.R., 417.
(2) (1891) 2 Q.B., 488, at p. 491.
(3) 6 M. & W., 442.
(4) 5 B. & Ad., 742.
(5) 3 C.L.R., 419.

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completion, and the purchaser was bound to be ready and willing to pay as soon as the vendor was ready and willing to deliver the title deeds and transfer. It was known to both parties that, in the peculiar circumstances of the case, the vendor's power to deliver title deeds depended upon his receipt of moneys from England necessary for the discharge of a mortgage before a certain date; if the moneys did not arrive before that date it would be impossible for him to carry out the contract. The receipt of the moneys was a matter within his knowledge, and could not be within the purchaser's knowledge. It was held that the vendor was bound to notify the time when he would be ready and willing to produce his title deeds, otherwise he could not charge the purchaser with failing to be ready with the purchase money.

In all these cases there was a necessity for implying the condition to give notice, which is entirely absent in the present case. For these reasons I am of opinion that the vendors were not bound to give the notice claimed, and that the vendors' failure to produce within the time fixed was not their fault, but the fault of the purchaser. I may add that I am glad to adopt the view of the learned Judge in the Court below because the objection is a mere technicality, as the alleged default of the vendors could not in any way have prejudiced the purchaser.

The second ground on which the purchaser claims the right to rescind under the thirteenth condition is that the documents of title, which the vendors show they were ready and willing to produce in accordance with the contract, do not constitute a reasonable compliance with the fifth condition.

The documents ready to be produced show title to a slightly larger area than the land purchased as stated in the contract, but the areas, in respect of which the title, by way of agricultural allotments and grazing allotments, has been secured, fall short of the area contained in the particulars referred to in the fifth condition. The title short supplied in respect of those areas is made up by additional areas under grazing area and agricultural area leases. The great bulk of the difference is accounted for by the statutory limitations of the quantity of land which can be held as grazing allotments and agricultural allotments, under the pro-

visions of the Victorian Lands Acts. Mr. Justice *à Beckett* pointed out, in his judgment in the Court below, that the parties have, in the fifth condition, used language which shows that conversion of the blocks mentioned into holdings under a different title was to be subject to the Land Acts, and to the rules ordinarily adopted in the administration of them. That, I think, is a complete answer to the objection. If any substantial area of the lands purchased were affected by the objection, the case would be different. But, under the circumstances, it seems to me that the difference between the title as bargained for, and that produced, is not more than must be taken to have been reasonably within the powers of adjustment which both paries contemplated might be exercised by the Victorian Lands Department in converting the titles. But, even if that were not so, another and a complete answer is to be found in the seventh condition, which, in my opinion, may fairly be applied to the circumstances that had arisen. I agree with my learned brother the Chief Justice that the shortages in the holdings under the allotment title are properly the subject of compensation, as arising out of mistakes and errors within the meaning of that condition.

For these reasons I am of opinion that the purchaser was not entitled to rescind the contract under either of the grounds put forward, that the declaration and order of the learned Judge in the Court below were right, and the appeal must be dismissed.

Isaacs J. The contract provides that the documents of title shall be "produced to the purchaser or his solicitors within eight months from the day of the sale and a copy thereof may be made by the purchaser or his solicitors on application in that behalf to the vendors or their solicitor, and the purchaser shall within ten days from the date of such production deliver" notice of objections, &c.

I think the most reasonable construction of this provision is to attach the necessity of an application to both production and copy. A single occasion is contemplated, and it is highly improbable an application to the vendors or their solicitor should be considered necessary for leave to copy a document already produced, but that no application should be required for the more important

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operation of production itself which may be quite unnecessary unless asked for. The phrase "in that behalf" is not likely to be used exclusively for leave to copy. Assuming my view to be right, I agree with the argument of respondents' counsel that the annulment clause only comes into operation if there is a failure to produce as stipulated in clause 5, that is, after application.

It is very reasonable that the application should not be made until after notice, but not impossible. No ground of complaint by the vendors could be sustained against the purchaser for not applying in the absence of notice, and objections to the title would not be waived by such omission to apply; but neither can the purchaser get rid of the condition of production to which he absolutely assented. The case of *Rippinghall* v. *Lloyd* (1) is properly distinguishable on the ground that there the vendor entered into an unqualified covenant (see *per Parke* J. (2)), non-application being or not being a condition precedent according to circumstances. Here it is a qualified covenant, application being always a condition, unless waived. It is the condition that is unqualified, and failure to give notice was not a waiver. The event on which production was to take place therefore did not occur, and the vendors are on the defensive.

As to this ground therefore I think the appeal fails.

With regard to the second ground, the contract was for the sale of "all those pieces of land" being Crown allotments described. The price was £978 10s. calculated as stated.

By clause 5 the vendors agreed *inter alia* to apply to convert their grazing areas in allotments 50 and 50D into agricultural allotments, and undertook, as already stated, to produce the leases within eight months. That, *primâ facie*, means all the land in the grazing areas was to be contained in the agricultural leases. From the absence of any reference to titles of unconverted land in the allotments mentioned, either in clause 5 or clause 13, I conclude it was intended on production, that proved to be so—that, apart from immaterial and unsubstantial deficiency, the power of annulment could be exercised if the titles produced did not comprise substantially all the land as bargained for, because, the occasion for production having arisen, there

(1) 5 B. & Ad., 742.

(2) 5 B. & Ad., 742, at p. 753.

would be a substantial failure to produce within the meaning of clause 13. The price was for all, and the clause relating to compensation does not cover the case of failure to convert.

But the occasion for production did not arise, and therefore no annulment could take place by virtue of clause 13 on the ground of non-production. The only other contractual ground of annulment under that clause is refusal of consent by the Board of Land and Works.

On the facts of this case, therefore, the contractual power of annulment has not arisen, and the question is whether according to the ordinary principles of law generally applicable to such contracts rescission was or is open to the purchaser.

Up to the present, I agree, on the authority of *Wilson* v. *Wallani* (1), that the annulment as based on clause 13 is informal, but the question raised included whether there was at the date of the summons a right to annul, and I do not think the question of waiver by lapse of time was then considered. The attempted annulment was not then disputed on the ground of form. At any rate, I see no ground for depriving the purchaser of any right he would have to annul under the clause merely because October had arrived without a final correct notice of annulment. But I think he had none. He did not, however, attempt to rescind the contract on the ground of substantial failure of the vendors' promise, and so the only question is whether there was a right to rescind. This is of course an indirect way of asking whether the vendors' failure goes to the root and essence of the contract, or whether they are entitled in equity to specific performance notwithstanding their inability strictly to perform the contract according to its terms.

Fry J., in *McKenzie* v. *Hesketh* (2), said:—"A mere difference in quantity has never been held to be a bar to specific performance. The Court of Chancery always drew a distinction between the essential and non-essential terms of a contract, and allowed the incapacity to perform it in non-essential terms to be made the subject of compensation." And see *Fry on Specific Performance*, pars. 877, 1209, *et seq.*

(1) 5 Ex. D., 155.

(2) 7 Ch. D., 675, at p. 682.

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The test I apply is really the doctrine of *Flight* v. *Booth* (1), and I ask myself the question whether the difference is such that, if known by the purchaser when contracting, he might never have entered into the contract. If it is, he is entitled to rescission.

Looking at the contract as a whole there is no essential failure whatever. The total area purchased was 2,131 acres—calculated at 10s. per acre for 1,783 acres—and 5s. per acre for 348 acres. The vendors are prepared to hand over at least as much land as bought—it is said the leases they are ready to transfer contain even more—but as to allotment 104A there is a shortage of nearly three acres at 10s. per acre, and as to allotments 50 and 50D, the agricultural lease into which they were to be converted is about 30 acres short, these 30 acres still remaining on grazing lease for which 5s. per acre was paid. The vendors can transfer these 30 acres, but not in the form of an agricultural lease. There is no real loss of any kind, the failure in performance being little more than a technical breach. The difference could not have had any material influence on the mind of a purchaser otherwise willing to make the contract. The appellant, therefore, is not, I think, entitled to resist specific performance; in other words, he has not the right to avoid the contract altogether. On this branch of the case I feel indebted to Mr. *Schutt* for his short but suggestive argument. I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for the appellant, *Corr & Corr.*

Solicitors, for the respondents, *Boothby & Boothby*, for *G. D. Leckie.*

B. L.

(1) 1 Bing. N.C., 370, at p. 377.