[HIGH COURT OF AUSTRALIA.]

BURGES . . . . . APPELLANT;
DEFENDANT,

AND

WILLIAMS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

H. C. OF A. 1912.

PERTH, *Nov.* 1, 4.

Griffith C.J., Barton and Higgins JJ.

*Contract for sale of property—Specific performance—Misrepresentation—Warranty—Mortgage and attempted sale by vendor since action brought—Sale of small portion—Vendor able to give title.*

In an action by the vendor for specific performance of a contract for the sale of a farming property and stock, the purchaser alleged (1) that he had been induced to enter into the contract by misrepresentation as to the number of sheep upon the property, and as to the position and condition of the boundary fences, and (2) that the vendor had, since action brought, precluded himself from obtaining specific performance by mortgaging the property and by attempting to sell it, and by having sold a small part of it. Judgment having been given ordering specific performance and directing an abatement of the price in respect of the deficiency in the number of sheep, the defendant appealed.

*Held*, that the stipulation as to the number of sheep was not a condition but a warranty, for which an action would lie, but was not a sufficient ground for refusing specific performance; and

That there was no reason for interfering with the finding of the Judge of first instance as to the alleged misrepresentations regarding the boundary fences.

*Held*, also, that the mere granting of a mortgage was unimportant, if the vendor could make a good title to the property upon the inquiry into title; and

That an unsuccessful attempt by the vendor to sell the property to another person and the sale of a small portion, of which the vendor could obtain reconveyance, did not, under the circumstances, show a rescission of the contract.

Decision of the Supreme Court of Western Australia: *Burges* v. *Williams*, 14 W.A.L.R., 139, affirmed.

APPEAL from the Supreme Court of Western Australia.

An action was brought by the respondent against the appellant in the Supreme Court of Western Australia for specific performance of a contract for the purchase by the latter of certain farming property (containing about 5,000 acres) and sheep thereon. The defences set up were to the effect that the defendant had been induced to enter into the contract by misrepresentations as to the number of sheep on the property and the position and condition of the boundary fences, and also that the plaintiff had precluded himself from obtaining specific performance as be had, since action brought, mortgaged the property and had attempted to dispose of the property elsewhere and had sold a small part of it. At the trial of the action the plaintiff obtained judgment for specific performance.

From this judgment the defendant appealed to the Full Court, which dismissed the appeal: *Burges* v. *Williams* (1).

The defendant now appealed to the High Court from the decision of the Full Court.

*Draper* K.C. and *Downing*, for the appellant. The main point of the case is misrepresentation generally as to the condition of the fences—the respondent having represented that they were in good condition, whereas in fact they were at most in fair condition only, and in places in a very bad condition. Consequently, specific performance of the contract should not have been granted. The Court will not decree specific performance where there has been misrepresentation.

[HIGGINS J.—A mere misrepresentation which does not go to the root of the contract, but may be compensated by a money payment, is not a ground for refusing specific performance, and the Court will always allow the plaintiff to pay the amount neces-

(1) 14 W.A.L.R., 139.

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sary to make the contract such as he represented it: *Hynes* v. *Byrne* (1).]

The effect of partial misrepresentation may be such as to destroy the agreement: *Clermont* v. *Tasburgh* (2). See also *In re Banister*; *Broad* v. *Munton* (3); *Lamare* v. *Dixon* (4).

[HIGGINS J. referred to *Powell* v. *Elliot* (5).]

The plaintiff has by his own act, after having received notice rescinding the contract, mortgaged the property. He has also assigned it for the purpose of obtaining further accommodation from the bank, and he has succeeded in selling a portion of it. He should not have done any of these things for the purpose of deriving a benefit from them: *In re Hallett's Estate*; *Knatchbull* v. *Hallett* (6).

*Stawell* and *Keall*, for the respondent, were not called on.

GRIFFITH C.J. This is an action for specific performance of a contract for the sale of a farming property and stock. The substantial defence set up is that the plaintiff, the vendor, induced the defendant to enter into the contract by misrepresentation. The first fact alleged to be misrepresented is that 1,800 sheep were upon the property, whereas there were only 1,600. That contention is founded upon the contract itself, which described the number of sheep to be sold as 1,800 or more. The learned Judge came to the conclusion that the stipulation as to the 1,800 sheep was not a condition but a warranty, for breach of which an action would lie. He accordingly, in giving judgment for specific performance, directed an abatement of the price in respect of the deficiency in the number of sheep. The other alleged misrepresentation was that the plaintiff represented to the defendant that the fences on the property were on the proper boundaries and that the improvements were in good order. There was evidence on both sides, and the learned Judge came to the conclusion that the alleged misrepresentation was not proved. The untruth of the representation set up related almost entirely

(1) 9 Q.L.J., 154.
(2) 1 Jac. & W., 112.
(3) 12 Ch. D., 131, at p. 141.
(4) L.R. 6 H.L., 414.
(5) L.R. 10 Ch., 424.
(6) 13 Ch. D., 696, at p. 727.

to the condition of a few miles of fencing, of which there were 50 or 60 miles in all. Upon the evidence of the defendant, if adopted, it is possible that something was said by the plaintiff which amounted to the representation alleged; but taking his evidence as recorded most favourably for him, it is very doubtful, to my mind, whether it amounted to a representation at all, in the sense alleged in the defence, or to more than ordinary commendation of his property by a vendor. The learned Judge, who had the opportunity of seeing and hearing the witnesses, did not believe that the alleged representation was made. Then, how can this tribunal be asked to say that he ought to have accepted the evidence of the defendant, when he did not accept it; not that he thought that the defendant was saying what he did not believe to be true, but thought that he was under a misapprehension? He thought that the only representation relevant to the fences was that they were in fair condition, and he thought that they were in fair condition. Upon the evidence I think so too. The learned Judge also gave reasons, and very sound ones, for thinking that the defendant relied upon his own judgment, and not on any statements made in answer to his question. In my opinion, therefore, it is impossible to differ from the learned Judge in his conclusions on this question of fact.

Three other subsidiary defences were set up. One is that the plaintiff since action brought has mortgaged the property. Probably the property was already mortgaged, and I suppose the mortgagee would not wait for his money, if he wanted it, until the action was determined. There was nothing to prevent him from asking for his money, and nothing that I can see to prevent the owner from borrowing from someone else in the meantime, provided, of course, that he can make a good title to the property upon the inquiry into title. The mere granting of a mortgage seems to me to be quite irrelevant. It also appears that, by mistake, he has since his contract sold a parcel of twenty-five acres out of about five thousand: that was not proved, but was admitted at the trial. Mr. *Stawell* says that the admission was accompanied by a statement that arrangements had been made for reconveyance of the land to the plaintiff, if required. Then it is said that the plaintiff, finding that the defendant refused to

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carry out his contract, tried, unsuccessfully, to sell the property to someone else, but I do not think that the defendant can complain of that. If the plaintiff had sold to someone else, the defendant would have gone free. If he had contracted to sell to someone else, the defendant might have been able to say that the plaintiff was not always ready and willing, that is to say, not able, to carry out his contract with the defendant. But the unsuccessful attempt is no evidence of rescission of the contract.

For these reasons I think that the judgment of the Supreme Court was right, and that the appeal fails.

BARTON J. I am of the same opinion. I do not think any other decision could be come to without doing violence to the principles which govern appeals from Judges of first instance on disputed facts. On the subsidiary questions I also agree.

HIGGINS J. I also think that this appeal should be dismissed, but I do not think I would be justified in concurring with the dismissal without stating that I am not satisfied that there was not a misrepresentation as to the state of the fences. Looking at the Appeal Book, his Honor has found, in accordance with the defendant's evidence, what the conversation actually was at the signing of the letter of option. He has found in favour of the defendant's version as follows:—The defendant says: "At that time, after the signing, I asked if the improvements were in good order. He said, Yes, they were. I again asked if the C.P. Conditions had been complied with, to which he replied, Yes. I asked about the improvements, and he said I wanted to satisfy myself as to the condition of the property and I had no time to go over it as I was in a hurry." The learned Judge has found, therefore, that the defendant asked if the improvements were in good order; but his Honor seems to have thought, rightly or wrongly, that that meant, Had the conditional purchase improvements been made under the *Land Act*? For his Honor says: "Now, I think that this second conversation has reference, not to the fences, but to the work which had been done on these C.P. leases." If the words as found occurred in a document, I should have no doubt whatever in saying that the construction of the words is not as stated; and that the word

"improvements" includes fences as well as the statutory improvements that had been done for the purpose of getting title. But what influences me to concur in this judgment on the appeal is that even if there was in fact such a misrepresentation, it is not so material as would justify us in refusing specific performance. It was a misrepresentation in respect of which compensation could be made or damages given; and the defendant himself, by his letter of 23rd May 1911, expresses his view that his claim as to the fences and other improvements could be met by compensation. He said in the letter: "If you are prepared to rebate the price by £2,000, I shall be prepared to waive my objections to the value of the improvements and also the present shortage of sheep and the delay in the registration of the transfer." At first appearance, there seemed to be another and very grave objection to this action for specific performance. For the plaintiff vendor made an attempt to sell the property since the writ. It looked, at first, very like a case of "shilly shallying," of blowing hot and cold, of attempting to enforce specific performance of a contract in respect of which the plaintiff has not been throughout "ready, desirous, prompt and eager." There are numerous cases in which the Court, in the exercise of its discretionary power, has refused specific performance under similar circumstances. But, as the learned Chief Justice has said, it does not lie with the defendant to raise this point. He practically forced the plaintiff into a corner with his mortgagee by his refusal to complete. It is to be remembered also that this intention to sell was never communicated to the defendant, and did not influence the defendant's conduct in any way. Then again, as regards the mortgage, I have no doubt that if the action succeeds the mortgage can be paid off. The existence of the mortgage is an objection of conveyance, not an objection of title.

I think that the judgment of the learned primary Judge was substantially right and ought to be affirmed.

*Appeal dismissed with costs.*

Solicitors, for the appellant, *Parker & Parker*, Perth.

Solicitors, for the respondent, *Stawell & Keall*, Perth.

N. McG.