[HIGH COURT OF AUSTRALIA.]

GALL AND OTHERS . . . . . APPELLANTS;
PLAINTIFFS,

AND

MITCHELL . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1924.

SYDNEY, *Nov.* 19, 20, 28.

Knox C.J., Isaacs and Starke JJ.

Sale of Land—Specific performance with abatement—Sale of more land than vendor owns—Exercise of Court's discretion—Hardship.

The respondent entered into a contract to sell to the appellants a certain pastoral property for a lump sum. About one-fifth in area of the property was of poor quality and belonged to the respondent's children, who did not concur in the sale and would not allow the respondent to make title to that portion. The respondent had told the appellants that he would not sell his good country without selling his bad country also. The appellants brought an action for specific performance of the contract or of so much of it as the respondent was competent to perform, with compensation in respect of so much of it as he was incapable of performing.

Held, that specific performance with compensation in respect of the land to which the respondent could not make title should be decreed—neither the fact that the respondent would not have sold his land unless he thought that he was in a position to sell his children's land, nor that the children's land could not be as profitably worked by itself as in conjunction with the respondent's land, constituting a hardship which should prevent the Court from exercising its discretion to grant such relief.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Gall* v. *Mitchell*, (1924) 24 S.R. (N.S.W.) 503, reversed.

APPEAL from the Supreme Court of New South Wales to the High Court.

A suit was brought in the Supreme Court in its equitable jurisdiction by Gordon Logan Gall, Oswald Chapman Gall, Ross Percival Gall, Rhoda Mary Gall, Euphemia Isabel Williamson and Mary Ann Moxham, trading as the Tycannah Pastoral Co., against Hugh Fraser Mitchell, in which by their statement of claim the plaintiffs alleged (in substance) that on 3rd May 1923 it was agreed that the defendant should sell and the plaintiffs purchase a certain pastoral property of about 8,700 acres together with 5,000 sheep depasturing on the same for a lump sum of £32,750; that after the making of the agreement the defendant stated that he was unable to transfer the whole of the property the subject of the agreement as about 1,750 acres thereof was the property, as to 700 acres, of his daughter and, as to 1,050 acres, of his son; and that the plaintiffs offered to accept so much of the property as the defendant was competent to transfer, with compensation for so much thereof as the defendant was unable to transfer, but the defendant neglected and refused to perform the contract in whole or in part with or without compensation.

The plaintiffs claimed (so far as is material) a decree for specific performance of the contract or of so much thereof as the defendant was competent to perform, with compensation in respect of so much thereof as he was incapable of performing; a reference to the Master in Equity to inquire and certify as to the compensation payable in respect of any deficiency in area and as to the damages sustained by the plaintiffs by reason of the neglect and refusal of the defendant to perform the contract; and a decree that the defendant pay to the plaintiffs the amount so certified by the Master. The suit was heard by *Harvey* J., who refused to grant specific performance on the ground that he was satisfied that the defendant would not have offered to sell his land had he not thought that he was in a position to sell the land which belonged to his son and daughter: *Gall* v. *Mitchell* (1).

From that decision the plaintiffs now appealed to the High Court.

(1) (1924) 24 S.R. (N.S.W.) 503.

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Loxton K.C. (with him *Wickham*), for the appellants. Where a vendor includes in land which he contracts to sell some land which belongs to someone else, the Court will grant specific performance of so much of the contract as he is able to perform (*Burrow* v. *Scammell* (1); *Barker* v. *Cox* (2); *Rudd* v. *Lascelles* (3)). Hardship which will induce the Court to refuse specific performance must amount to injustice (*Thomas* v. *Dering* (4); *Goldsbrough, Mort & Co.* v. *Quinn* (5)). Damages may be given under sec. 9 of the *Equity Act* 1901 (N.S.W.) where all the facts exist which would entitle the plaintiff to specific performance if the Court thought fit in the exercise of its discretion to grant it (*Ferguson* v. *Wilson* (6)).

[ISAACS J. referred to *King* v. *Poggioli* (7); *Hipgrave* v. *Case* (8); *Fullers' Theatres Ltd.* v. *Musgrove* (9).]

Innes K.C. (with him *Davidson*), for the respondent. To compel specific performance in this case would be a great hardship on the respondent and his family which would justify the Court in refusing that relief (*Rudd* v. *Lascelles* (3); *Gould* v. *Kemp* (10)). The Court will consider the hardship to the children of the respondent, for they are interested in the property contracted to be sold (*Thomas* v. *Dering* (11)). There was such a mutual mistake that the Court will not grant specific performance with an abatement (*Earl of Durham* v. *Legard* (12); *McKenzie* v. *Hesketh* (13); *Rees* v. *Marquis of Bute* (14)). It would be a hardship on the respondent to compel him to break up the family home and render the land of his children almost worthless by separating it from the respondent's land with which it is worked. The Court has not jurisdiction under sec. 9 of the *Equity Act* 1901 (N.S.W.) to award damages in such a case as this. Where the Court cannot order specific performance of the whole contract it will not award damages in lieu thereof.

Loxton K.C. was not called upon to reply.

Cur. adv. vult.

(1) (1881) 19 Ch. D. 175, at p. 182.
(2) (1876) 4 Ch. D. 464, at p. 468.
(3) (1900) 1 Ch. 815.
(4) (1837) 1 Keen 729.
(5) (1910) 10 C.L.R. 674, at pp. 680, 687.
(6) (1866) L.R. 2 Ch. 77, at pp. 88, 91.
(7) (1922-23) 32 C.L.R. 222, at p. 246.
(8) (1885) 28 Ch. D. 356, at pp. 359, 361.
(9) (1923) 31 C.L.R. 524, at p. 549.
(10) (1834) 2 My. & K. 304, at p. 308.
(11) (1837) 1 Keen, at p. 743.
(12) (1865) 34 Beav. 611.
(13) (1877) 7 Ch. D. 675.
(14) (1916) 2 Ch. 64.

The following written judgments were delivered :—

KNOX C.J. AND STARKE J. The defendant sold a pastoral property known as Kingstown, containing about 8,700 acres, which had been the home of himself and his family, to the plaintiffs, on terms which were both " fair and just and not productive of " any " hardship." He chose to enter into the contract, representing and agreeing to sell it as his own, but some 1,700 acres of the property, of poor grazing quality, belonged to the defendant's son and daughter, who have not concurred in the sale or allowed their father to make title to the area. The son and daughter wish to keep the old home intact, and their refusal to join in the sale is doubtless dictated by this very natural desire.

The plaintiffs, however, have brought an action for specific performance of the contract, claiming that the defendant specifically perform it, or " so much thereof as he is competent to perform, with compensation in respect of so much thereof as he is incapable of performing." But the defendant insists that the performance of the contract, with an abatement of purchase-money, would impose too great hardship upon him, and that the Court ought not to make such a decree, but should leave the plaintiffs to their remedy in damages. This view found favour in the Court below, but cannot, in our opinion, be sustained.

The learned Judge who tried the action was satisfied that the defendant would not have sold the Kingstown property if he had not thought he was in a position to sell the 1,700 acres. The reason was that he desired to sell the whole of the family holding, but all the purchasers knew was that the defendant would not sell his good country without selling his bad country also. But what is the hardship ? The defendant will get his purchase-money, less an abatement for the 1,700 acres, which, on the evidence, is capable of easy estimation at a money value. So that he is not prejudiced pecuniarily or in his rights. The children have no rights or interests in their father's land, and are not, therefore, prejudiced in any rights by an order that the father carry out his contract so far as he can and pay compensation for the deficiency. Further, the children retain control of their land and may do as they please with it. The father has no interest in their land, and the fact that the children

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cannot work or sell their land as profitably by itself as in conjunction with his land in no wise prejudices him pecuniarily or in his rights. Again, the fact that the children may be unable to work or sell their land as profitably by itself as in conjunction with their father's land does not interfere with or prejudice any right of theirs. If such a detriment or loss is likely to occur, the children would be well advised to concur in their father's sale, but the father cannot say that it imposes any hardship upon him or affords any reason for refusing to perform his contract so far as he can.

Specific performance, with abatement in purchase-money as to land in respect of which the defendant cannot make a good title, should be decreed in the ordinary form and with the usual consequences.

ISAACS J. The respondent, a station owner, by contract in writing sold to the appellants what was described as "property known as Kingston, comprising approximately 8,700 acres . . . together with about 5,000 mixed sheep now depasturing on property." The contract of sale was as follows :—"Kingstown, 3rd May 1923. —Walter J. Hawke & Co., Armidale, conjointly Crane & Co., Moree, as agents for H. F. Mitchell, of Kingstown, have this day sold to Tycannah Pastoral Company the property known as Kingstown, comprising approximately 8,700 acres, freehold, C.P. and C.L., Parish Baldwin, County Hardinge, together with about 5,000 mixed sheep now depasturing on property, also all plant used in the working of the place, with the exception of horses, waggon, harness, saddles, sulky and motor-car, and furniture for a lump sum of £32,750—cash. Included in the above 8,700 acres are about 400 acres of land which is now in treaty for a similar area and which is not to be paid for until exchange is completed, and then to be sold to purchaser at £3 7s. per acre. Delivery of property and stock to be taken and given at the end of May 1923, unless vendor agrees to accept right of retaining sheep and property until end of October or 15th November when purchaser agrees to take over all land and plant at above price, after deducting the following, namely, 15s. for all weaners and 25s. per head for grown sheep," &c.

The evidence, including that of the defendant himself, is clear that from first to last the price was arrived at by calculating what is the defendant's own land at £3 7s. per acre and what is the children's land at £2 5s. per acre. The identity of those portions of the property sold was carefully preserved, not because of the separateness of title, but because of the difference in quality. The identity of the sheep was similarly preserved, as was that of the plant. The separate values of each unit was calculated and added together and came to something over £33,000. Then, as the result of the bargaining, the vendor agreed to take off £545 from the total, leaving the contract price £32,750. That reduction did not destroy the internal separateness of the items, which is evident from the last clause quoted. The difficulty in this case arises from the reluctance of the two children, both now of age, to transfer, using their strict legal rights as a means of preventing, if they can, the vendor, their father, from fulfilling in its integrity the bargain he made, and thereby furnishing him with what is urged as a valid reason, in the view of a Court of equity, for declining to fulfil his bargain at all and leaving the purchaser to his remedy at law.

As *Harvey* J. says, there were three grounds put forward as constituting reasons sufficient to justify this, namely, (1) the purchasers' knowledge of the infirmity of title to the 1,700 acres; (2) the hardship on the son and daughter of losing the benefit of working their inferior land with the father's superior land, and (3) the distinct statement by the vendor to the purchasers that the purchaser must take the whole or none. The learned primary Judge repelled the first and second reasons, but accepted the third. He so decided on the third ground because, as his Honor said (1):—"I am satisfied that the defendant would never have offered his 6,705 acres for sale had he not thought that he was in a position to sell the 1,700 acres which belonged to his son and daughter. The reason was not disclosed to the plaintiff at the time. The only inference which Mr. Gall would have drawn from the vendor's language was that he wanted to sell his bad country with the good, whereas the real reason was that he wished to sell the whole of the family holding in the district." In those circumstances the Court ought not, the

(1) (1924) 24 S.R. (N.S.W.), at p. 507.

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learned Judge considered, to force the vendor to part with his property. His Honor considered that specific performance with compensation was essentially a matter of discretion, and that a case was not made out for the exercise of that discretion. *Harvey* J. further held that, though damages were recoverable at law, he had no power under sec. 9 of the *Equity Act* to award any.

The appellants contest both the adverse conclusions; that is, they contend that they are, notwithstanding the facts found relative to the third ground, entitled to specific performance with abatement in respect of the 1,700 acres and, alternatively, are entitled to damages in equity. I think their primary contention correct.

While it is true that specific performance is always discretionary, it is so in a very well settled sense. The relevant authorities on this point are stated in *Goldsbrough, Mort & Co.* v. *Quinn* (1) and *Fullers' Theatres Ltd.* v. *Musgrove* (2). Having regard to the nature of "discretion" as established by those authorities, I am unable, when the statement referred to by the learned primary Judge is properly interpreted, to treat it as a valid ground for exercising the Court's discretion against the appellants. In my opinion, the question comes as a matter of principle to the one test of justice or injustice in such a case that was stated by Lord *Macnaghten* in *Stewart* v. *Kennedy* (3), namely, whether it would be "highly unreasonable" to require the contract to be specifically performed, as it is capable of being specifically performed. Lord *Macnaghten* seems to have had in mind the language about to be quoted. In *Watson* v. *Marston* (4) *Turner* L.J. confirms the law as stated by Lord *Langdale* M.R. in *Wedgwood* v. *Adams* (5), in the following words:—"I conceive the doctrine of the Court to be this, that the Court exercises a discretion, in cases of specific performance, and directs a specific performance unless it should be what is called highly unreasonable to do so. What is more or less reasonable, is not a thing that you can define, it must depend on the circumstances of each particular case. The Court, therefore, must always have regard to the circumstances of each case, and see whether it is

(1) (1910) 10 C.L.R., at pp. 697-700.
(2) (1923) 31 C.L.R., at pp. 548, 549.
(3) (1890) 15 App. Cas. 75, at p. 105.
(4) (1853) 4 DeG. M. & G. 230, at pp. 239, 240.
(5) (1843) 6 Beav. 600, at p. 605.

reasonable that it should, by its extraordinary jurisdiction, interfere and order a specific performance, knowing at the time that if it abstains from so doing, a measure of damages may be found and awarded in another Court. Though you cannot define what may be considered unreasonable, by way of general rule, you may very well, in a particular case, come to a balance of inconvenience, and determine the propriety of leaving the plaintiff to his legal remedy by recovery of damages." Then, said *Turner* L.J., for himself:—"If we acceded to the respondent's argument, we should, I think, be deviating from the principles on which the Court has acted in these cases. The Court does not refuse a specific performance on the arbitrary discretion of a Judge. It must be satisfied that the agreement would not have been entered into if its true effect had been understood." In that case the vendor inadvertently placed herself in a situation by which she incurred a serious risk of direct ulterior loss if the contract were performed. That was held to be a ground of such unreasonableness as attracted the Court's discretion to refuse specific performance.

Here, the learned Judge considered that the vendor would not have offered his own property if he had thought he could not at the same time effectually sell his children's property. I shall assume inability to transfer the son's land. But does this case fall within the principle of *Wedgwood* v. *Adams* (1) or *Watson* v. *Marston* (2)? The circumstance upon which the vendor was relieved from specifically performing his bargain amounts merely to motive, and, being unexpressed to the other party, cannot affect the principle laid down in the following terms by Lord *Eldon* in *Mortlock* v. *Buller* (3):—"If a man, having partial interests in an estate, chooses to enter into a contract, representing it, and agreeing to sell it, as his own, it is not competent to him afterwards to say, though he has valuable interests, he has not the entirety; and therefore the purchaser shall not have the benefit of his contract. For the purposes of this jurisdiction, the person contracting under those circumstances, is bound by the assertion in his contract; and, if the vendee chooses to take as much as he can have, he has a right to that, and to an

(1) (1843) 6 Beav. 600. (2) (1853) 4 DeG. M. & G. 230.
(3) (1804) 10 Ves. 292, at p. 316.

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abatement; and the Court will not hear the objection by the vendor, that the purchaser cannot have the whole." That is to say, the vendor will not be heard to urge his personal inability to give all he undertook to give, as an answer to a claim to have all he is able to give. *Rudd* v. *Lascelles* (1) reaffirms this doctrine of representation. An unexpressed motive cannot overcome that. If, outside his mere inability, he can prove circumstances establishing what the Court would nevertheless regard as making it "highly unreasonable" to order specific performance, he is at liberty to do so, but his mere inability is not so regarded. Here, however, that mere inability is the only ground on which the discretion is rested. It is not as if the vendor stated that he was disposing of the estate as one indivisible working proposition and that, notwithstanding his ability to transfer, he would not transfer part only unless he had the consent of his family. The statement to Gall that "he must take the whole or none" was obviously no qualification of the representation of the ability of the vendor to transfer all, or of his willingness to do so. It was nothing more, so far as Gall would naturally understand, than requiring him to agree to take all if he desired to purchase any. Gall agreed and did purchase all, but that, so far from being a protective stipulation to the vendor, only made it clear that he was prepared to give all and would do so if Gall purchased. The position is, therefore, within the doctrine of *Mortlock* v. *Buller* (2) so far as the third ground is concerned.

This, however, does not conclude the matter, because Mr. *Innes* went further and pressed upon this Court the view that it would be a hardship, within the proper understanding of that term, if the vendor should be compelled to break up the family home and injure the children's property by separating the lands in such a way that they would not be used together. I agree with Mr. *Innes* that that is not exactly the same proposition as the one acted on by *Harvey* J. on the second ground. Hardships of third persons entirely unconnected with the property are immaterial. But I do not think that rule excludes the case of third persons so connected with the defendant that, by reason of some legal or moral duty which he owes them, it would be "highly unreasonable" for the Court actively

(1) (1900) 1 Ch. 815. (2) (1804) 10 Ves. 292.

to prevent the defendant from discharging his duty. The circumstances of such a case might, in my opinion, be properly weighed for the purpose of determining the discretion of the Court. But the answer to the point made is that the children in the present case have no legal or equitable interests in the vendor's own land; they have no legal right to work it with their own, and no legal or moral right of theirs would be in any way infringed or affected. The argument, when tested, amounted to nothing but a strong disinclination to shift from the family home until another, which had been contemplated, could be conveniently obtained. The primary impulse comes from the other members of his family, the vendor's own objection is secondary; and the legal title of the children is used only as a means of incapacitating the vendor from fulfilling a bargain that he originally thought advantageous to all concerned, and now under pressure desires to depart from. But that desire cannot be regarded as a valid ground for establishing the unreasonableness necessary to stay the hand of the Court.

The circumstances already detailed under which the price was arrived at are such as to enable the Court, if necessary, to measure the abatement justly (see *Lord Brooke* v. *Rounthwaite* (1)), and, therefore, the appellants' case is complete.

This conclusion renders unnecessary any opinion on the alternative contention, namely, the power, in the event of the primary contention failing, to give damages under sec. 9 of the *Equity Act*. As to that I will only say it deserves very careful consideration.

Appeal allowed. Judgment appealed from discharged. Direct that the defendant specifically perform the agreement sued on subject to an inquiry as to whether any and what abatement should be allowed in the purchase-money in respect of any defect in title, and to a deduction from the purchase-money of such sum as shall be allowed to the plaintiffs on such inquiry. Direct an account of the balance of the purchase-money. Remit case to Supreme Court to do what is right consistently with this judgment.

(1) (1846) 5 Ha. 298, at p. 301.

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Defendant to pay costs of suit to date of this judgment and of this appeal. Reserve further consideration of suit and further costs to Supreme Court.

Solicitor for the appellants, *W. C. Moodie*, Moree, by *Villeneuve-Smith & Dawes.*

Solicitor for the respondent, *C. L. Mackenzie*, Guyra, by *Biddulph & Salenger.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE METROPOLITAN KNITTING AND HOSIERY COMPANY LIMITED (IN LIQUIDATION) . . . . . DEFENDANT, } APPELLANT;

AND

THOMAS BURNLEY & SONS LIMITED . . PLAINTIFF, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 14, 15, 18; *Dec.* 1.

Isaacs A.C.J., Gavan Duffy and Starke JJ.

Contract—Sale of goods—Contract not in writing—Part performance—Payment—Direction to jury—Statute of Frauds (29 *Car. II. c.* 3), *sec.* 17—*Sale of Goods Act* 1923 (*N.S.W.*) (*No.* 1 *of* 1923), *sec.* 9.

Held, by *Gavan Duffy* and *Starke* JJ., that, where a plaintiff, suing upon a contract for the sale of goods which is within sec. 17 of the *Statute of Frauds*, seeks to establish acceptance of or payment for the goods so as to satisfy the section, he must prove that the goods were accepted or paid for in pursuance of the contract sued on; and, therefore, that, where the plaintiff sued upon two contracts for the sale of the same description of goods, one of which contracts was admitted and the other denied by the defendant, the jury were properly directed that in order to satisfy the statute