

Action to recover moneys paid by the plaintiff to the defendant as part of the purchase-money of a farm under an agreement for sale and purchase, and for damages for breach of the agreement.

Counterclaim by the defendant for specific performance.

The action and counterclaim were tried without a jury at a Toronto sittings.

W. F. Greig, for the plaintiff.

James McCullough, for the defendant.

KELLY, J., in a written judgment, said that the agreement was in writing, dated the 1st December, 1919. The purchase was made through one Miller, the defendant's agent. The contract provided for the payment of \$100 down; \$400 on the 1st March, 1920; the plaintiff to assume an existing mortgage of \$1,100 and to give the defendant a second mortgage for the balance of the purchase-price, \$500, for 5 years, with interest at 6 per cent. Possession was to be given on the 1st March, 1920. Time was made the essence of the agreement. The plaintiff paid the \$100 cash and also the \$400 on the 1st March, 1920. The purchased premises were at the time of the contract occupied by one Hosie as tenant of the defendant on a tenancy which expired on the 1st March. Miller was not at any time the agent of the plaintiff.

Before the 6th February the plaintiff had made it known to Miller that he might not require the defendant to deliver possession promptly on the 1st March. What he said to Miller was not authority to Miller or to the defendant to extend on his behalf the time when the tenant should vacate. But Miller wrote to Hosie telling him that the plaintiff was willing that Hosie should stay on the place until later in the spring or perhaps for the summer. Hosie stayed on, and refused to leave when the plaintiff wanted to get possession in April. The plaintiff did not assume the responsibility of getting possession. The plaintiff had moved his stock and goods from his former place of abode to Uxbridge, which was the nearest town to the farm he had bought; but was not able to get possession.

There was no evidence of any attempt by the defendant after the 9th April to carry out his part of the contract, and no evidence that he had obtained possession of the farm from the tenant or had tendered possession to the plaintiff. On the 10th April the plaintiff wrote to Miller repudiating the whole transaction.

His right to damages was established; the question was as to the amount. Upon the quantum of damages, *McCune v. Good*