The judgment of the Divisional Court (FALCONBRIDGE, C.J., and STREET, J.) was delivered by

STREET, J.—By the terms of the contract the plaintiff was entitled to a perfect title, and the defendant continued to assert down to the trial that he had a good title, either by paper title or by possession. Under these circumstances the plaintiff's remaining in possession should not be held to be a waiver of his right to insist upon a good title being shewn. Waiver is a question of intention, to be determined from the acts of the party, and it seems impossible to hold that the purchaser has waived his right to a good title by acts done at a time when he was insisting upon a good title being shewn, and the vendor was insisting that his right was perfectly good: Re Gloag and Miller, 23 Ch. D. 320. The question of waiver was the only question upon the pleadings necessitating a trial, and, had it not been raised, judgment might have been obtained upon a motion, for the only other question raised upon the pleadings which could be disposed of before the question of title had been determined, was that of title, and that would have been referred to the Master upon motion on the pleadings. Having failed upon the question of waiver, therefore, the defendant must pay the costs of the hearing.

There should also be a general reference as to title to enable plaintiff to make title either from VanNorman or by possession, the latter being a title which a purchaser may be compelled to take if it can be satisfactorily established: Scott v. Nixon, 3 Dr. & War. 388: Gaines v. Bonnor, 33 W. R. 64; Dart V. & P., 6th ed., p. 462.

An account should not have been directed as to improvements. There is nothing in the pleadings or evidence to take this case out of the general rule which restricts the damages of a purchaser to the costs of the investigation of the title: Bain v. Fothergill, L. R. 7 H. L. 207. Nor is there anything to bring it within the doctrine of Engel v. Fitch, L. R. 3 Q. B. 314, and 4 Q. B. 659. See also Williams v. Glenton, L. R. 1 Ch. 209, and Day v. Singleton, [1899] 2 Ch. 320, 332-3.

The rule followed in the old case of Miloson v. Wordsworth, 2 Sw. 365, and stated by Sugden, 14th ed., p. 347, is that which still prevails in the absence of fraud or other special circumstances. . . .

The reference should be as to title, and when a good title was first shewn. The plaintiff should have costs of the