

In April, 1918, the father, having obtained letters of administration of the estate of Alexander Mann, brought this action against the vendor and her husband to recover the \$1,000 paid and interest, the cost of stumping and clearing part of the land, loss of profit on hay, and damages for conversion of some lumber and a shack that had been built on the premises—alleging that the vendor had, by reason of her default in respect of the mortgage-moneys and taxes, relieved the purchaser of his obligation to complete the purchase. The defendant Margaret Gray counterclaimed for specific performance of the agreement.

The action was brought in the Supreme Court of Ontario. The action and counterclaim were tried by O'LEARY, Co. C.J., sitting for and at the request of LENNOX, J., at Port Arthur.

The trial Judge was of opinion that the vendor, when she went into possession in May, 1917, elected that the agreement of purchase and sale should be deemed null and void; and he gave judgment for the plaintiff for the return of the \$1,000 as money paid without consideration or on failure of consideration, for interest on the \$1,000, and for \$160 for the lumber converted by the defendants and \$78 for the work and material expended in the erection of the shack, which was torn down or destroyed.

The defendants appealed from this judgment.

The appeal was heard by MEREDITH, C.J.O., MACLAREN, MAGEE, HODGINS, and FERGUSON, J.J.A.

J. H. Moss, K.C., for the appellants.

Hamilton Cassels, K.C., for the plaintiff, respondent.

FERGUSON, J.A., reading the judgment of the Court, said, after setting out the facts and reviewing the evidence, that he was clearly of opinion that the vendor and her husband never intended to terminate the agreement; that none of their acts, declarations, or statements amounted to a termination or a declaration of intention to that effect; and, consequently, that the plaintiff's claim for recovery of the part payment failed.

The plaintiff was entitled, however, to recover for conversion of the lumber, and the trial Judge's judgment as to that should stand.

The defendant Margaret Gray was entitled to succeed on her counterclaim, and there should be judgment for specific performance of the agreement, with a reference to the Local Master for that purpose. In taking the accounts, the plaintiff should have credit for the damages awarded by the trial Judge and also for \$100 which the vendor, in September, 1915, agreed to credit on account of the purchase-money.