

back to him in case the grantees failed—as the defendant certainly had failed—to perform the promise of maintaining the plaintiff.

The deed must be set aside. There should be judgment accordingly with costs.

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ORDE, J.

MARCH 13TH, 1920.

PELLEGRINO v. MULHERN.

*Vendor and Purchaser—Agreement for Sale of Land—Deficiency in Quantity of Land—Condition as to Objection to Title—Right of Vendor to Rescind—Right of Purchasers to Specific Performance with Compensation—Amount of Compensation Fixed by Court—Protection of Purchasers against Mortgage.*

Action for specific performance of an agreement for the sale by the defendant and the purchase by the plaintiffs of land in the town of Thorold, or for damages.

The action was tried without a jury at St. Catharines.

A. W. Marquis, for the plaintiffs.

F. E. Hetherington, for the defendant.

ORDE, J., in a written judgment, said that the only question for determination was the nature and extent of the plaintiffs' remedy against the defendant. The defendant admittedly made a contract with the plaintiffs to sell them a certain parcel of land, and was not in a position wholly to perform his contract. He offered to rescind the agreement, to refund so much of the purchase-money as had been paid, and to pay for the improvements made by the plaintiffs. The latter declined to accept a rescission, and desired a conveyance of so much land as the defendant was able to convey, with compensation for the deficiency.

The agreement was dated the 1st February, 1919, and contained a clause to the effect that the purchasers should be allowed 10 days to investigate the title, and if, within that time, they should furnish the vendor in writing with any valid objection to the title which the vendor should be unable or unwilling to remove, the agreement should be null and void and the deposit-money returned to the purchasers without interest.

The plaintiffs were clearly entitled to a conveyance from the defendant of all that he could convey and to compensation for the deficiency, unless the defendant was entitled to rescind under the conditions referred to: Fry on Specific Performance, 5th ed., p. 599 et seq; Rawlins on Specific Performance, p. 57 et seq.