

**A COMPARISON OF LAVERY v PURSELL, AND
McINTYRE v STOCKDALE**

RONALD A. BREWER

LAVERY v PURSELL—Case No. 1

The plaintiff, purchasing through an auctioneer, entered into an agreement with the defendant for building materials to be obtained by pulling down an old house. He deposited with the auctioneer the sum of £100 as part payment of the purchase price. One of the covenants in the contract was that the materials must be removed by January 11th and if not removed the materials to be forfeited. The only writing as to the contract was a receipt from the auctioneer. The plaintiff obtained the keys to the property from the caretaker and hired the caretaker to do the work. Defendant a few days after making the contract informed the plaintiff he did not want to go through with it and refused to allow the plaintiff to go on the property.

In this action the defendant relied on the fact that the contract was not in writing and thus did not conform with the provisions of Sec. 4 of the Statute of Frauds.

The plaintiff pleaded his act of paying the £100, the obtaining of the keys and the hiring of the caretaker as part performance, being sufficient to take the contract out of the Statute and asked for damages in lieu of specific performance.

The question before the Court was, whether under the circumstances, the plaintiff had any right to damages in lieu of specific performance.

McINTYRE v STOCKDALE—Case No. 2

Plaintiff purchased house and premises from defendant paying him \$500.00 down and agreed to pay the balance in monthly payments of \$20.00. The deed and mortgage were prepared and plaintiff attempted several times to have them completed but each time the solicitors were out. The plaintiff took possession of the house and continued his monthly payments. Some months later the defendant being offered more money for the house sold to a third person.

The plaintiff relied on the previous case, Lavery v Pursell.

COMMENT

In Case No. 1 the plaintiff asked for specific performance and in the alternative damages.

In Case No. 2 the plaintiff asked for specific performance only.

Both of these cases dealt with a contract for the sale of land with no written memorandum and in each the court felt there was sufficient evidence of part performance to take the case out of the Statute of Frauds. In the Lavery case we have the act of the plaintiff of paying money, receiving the keys and the hiring of the defendant's servant, in the McIntyre case we have the paying of money and the possession for sixteen months. In both cases it would be impossible for the Court at the time of the hearing to grant specific performance, in the Lavery case because the fixed date agreed upon by the both parties for the termination of the contract had passed and in the McIntyre case because the defendant had passed his title to a third person.

Taking under consideration the Lavery case, it will be found that the plaintiff pleaded L. Cairns Act feeling that the Act should be interpreted to mean, if specific performance cannot be granted then the Court of Equity could allow damages. Romer, Q. C. for the defendant contended, if the contract could not be carried out and it was impossible to grant specific performance that the equitable doctrine of specific performance could not be used for the purpose of obtaining damages.

Chitty, J. in his judgment, based upon his previous judgment in *Re Northumberland Avenue Hotel Company*, interpreted L. Cairns Act to mean that although the Act had widened the power of the Court of Chancery and empowered it to give damages as well as specific performance it did not give the Chancery Court a general jurisdiction whenever it thought fit and could only be used in a case where the specific performance would have been the proper decree in the first place and because of other circumstances entering into the case it would be better to grant damages, but it could not apply to a case where specific performance would never have been granted.

From the above it can be seen that these two cases are dependent upon one factor, i.e. could specific performance ever have been granted? In *Fry on Specific Performance* 6th Edition, it is stated that in order to have specific performance four requirements must be fulfilled, to this Hanbury adds an additional requirement.

The Lavery case complies with all the requirements laid down in *Fry* with the exception of the third, "the contract to which they refer must be such as in its own nature is enforceable by the Court." The McIntyre case complies with all the requirements. This in my opinion is the difference between the two cases.

Chitty J., in the Lavery Case, "As is well known the Court of Chancery would not grant specific performance of an agreement for a holding for a year", the reason for this being that it is improbable that a decree could be obtained in the ordinary course within a year and as this action commenced after the date agreed upon by both parties as the terminating date of the contract it would be at no time possible to grant specific performance and to do so would be to disregard Fry's third requirement. Reading this in conjunction with the correct interpretation of Lord Cairn's Act it can be seen that it would be impossible to grant damages in lieu of specific performance.

In the McIntyre case we have the third requirement complied with in that at the beginning of the contract the Court could have granted specific performance and up until the time the defendant, taking advantage of the plaintiff's laxity in not having the mortgage executed, by an act of fraud made it impossible for the Court to grant specific performance. Reading this set of facts in connection with Chitty's interpretation of Lord Cairn's Act it can be seen that the Court having at one time the power to grant specific performance, which power had been taken away by an act of the defendant, could grant damages in-lieu of specific performance.



SYMPATHY NOTE

Deepest sympathy is to be extended to Eleanor Baxter, a first-year law student, on the untimely death of her mother, Mrs. J. B. M. Baxter. Eleanor's father, the late Chief Justice Baxter, former Dean of the Law School, passed away only last year.

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CYRUS F. INCHES, K.C.
D. ING HAZEN, K.C.

23 ROYAL SECURITIES BLDG.
MARKET SQUARE

SAINT JOHN, N. B.

J. C. VanHorne

Barrister, Etc.

137 WATER STREET

CAMPBELLTON, N. B.