PARKS *v.* JOHNSTON.

4-3313

Opinion delivered January 29, 1934.

1. SPECIFIC PERFORMANCE—SUFFICIENCY OF TITLE.—A vendor who furnished an abstract showing a good and merchantable title to land contracted to be sold *held* entitled to specific performance and not merely to retention of a small initial payment of $100 as liquidated damages.
2. VENDOR AND PURCHASER—MERCHANTABLE TITLE.—A purchaser of land who was to be furnished an abstract of title satisfactory to him cannot arbitrarily refuse to accept a title shown by the abstract to be a good and merchantable title.
3. VENDOR AND PURCHASER—SUFFICIENCY OF DESCRIPTION.—Where a vendor promised to transfer title to a strip of land for an opening to a highway, the purchaser could not claim that the description in the deed was insufficient where a road had been already laid out and in use on the land, and the description of such right-of-way was the same in the deed as in the deeds under which the vendor held.

Appeal from Sebastian Chancery Court, Fort Smith District; *C. M. Wofford,* Chancellor; affirmed.

STATEMENT BY THE COURT.

This appeal comes from a decree for specific performance of a contract for the sale of ten acres of land near Winslow, Arkansas.

Appellant sued to recover the $400 paid on the contract of purchase, alleging that he did not approve the title to said land, nor accept it; and that there had been an agreement to refund any money already paid if the deed furnished him and the abstract to said property were not satisfactory to him.

The answer admitted the execution of the purchase and sale contract, described the property, and set out the terms of said contract; admitted that Parks took possession of the property after the contract of sale was made and after the seller thereof had furnished a good and marketable title, as alleged, to said property; admitted the payment of $400 by Parks on the purchase price as part performance of said contract; denied that $100 was put up by the purchaser to bind the bargain, or was liquidated damages; alleged a tender of the deed in full compliance with the contract of purchase in accordance with its terms, and prayed for a specific performance of the contract.

It appears from the record that the parties entered into a purchase and sale contract for the said lands, the negotiations being started orally and carried on by telephone and in writing. In the letter of appellant to appellee, dated September 10, 1930, the appellant inclosed a check for $300: "To apply and completing first payment of $400 on purchase price of $3,900 for property at Winslow." The reply to that letter was an acknowledgment and receipt of $400 completing the first payment on the property at Winslow, and advised that the abstract and deed would be delivered on or about October 1st. It was further stated therein: "I agree to transfer to you the property belonging to me at Winslow, which is approximately ten acres. If I hold title to the strip of land for an opening to the highway, I will see that it is included in the deed, as it is my intention to transfer to you all of my interest in the Winslow property. * * * If title to the property is not good, in the judgment of your

attorney, I would refund any money which you had paid."

Appellant was advised by letter that the warranty deed would be signed by the seller on October 1st, and mailed with the abstract and the lien notes for examination and signature. One or two objections were made to the abstract which were without real merit, corrections being made, and the deed exhibited showing the fact. Finally, after the abstract was corrected and the deed returned to the bank for the execution of the notes by appellant, the reporter of the newspaper took the matter up with appellant, asking about the purchase as a matter of news, and he said he was not ready to announce the completion of the purchase, but would do so when the deal was closed. On September 12, the date of the paper announcing the closing of the deal, appellant called Mrs. Duncan, who regarded the matter a big news item, and informed her that the deal was closed and that he and his wife would go to their new home shortly. The language as given by the witness and published in the newspaper was: "You may now say that the deal is completed. Mrs. Parks and I will move to our new home after the 15th, that being the date of the closing of Camp Wildwood." Witness also testified that appellant was in the home several weeks, and that appellant and his family lived there for that time.

The chancellor decreed a specific performance of the contract, and this appeal is from that decree.

*J. S. Jameson* and *John Mayes*, for appellant.

*James B. McDonough*, for appellee.

KIRBY, J., (after stating the facts). It is insisted that the chancellor erred in decreeing a specific performance of the contract, appellant claiming that by its terms he had the right to refuse to perform so long as an abstract of title was not furnished "that was satisfactory to him," and that no more than liquidated damages could be recovered for his breach of the contract, the $100 which he insisted had been agreed upon as liquidated damages and paid to bind the bargain.

The evidence, however, is amply sufficient to show the making of the contract, its terms and appellant's refusal

to perform it. Appellant could not arbitrarily refuse to accept a title shown by the abstract to be a good and merchantable title, a complete and perfect title in fact; and under no proper construction of the contract or agreement of purchase was he permitted to refuse to perform same for any reason and escape the obligations thereof by the payment of $100 as liquidated damages. There was no such provision in the contract. It was a contract of sale and purchase, not an option to buy, properly entered into, and he was bound by its terms upon its performance by the appellee to take the land as agreed, and the chancellor correctly held that appellee was entitled to a specific performance of the contract.

There was no right of election on the appellant's part under the terms of the contract to refuse to perform it upon the payment of $100 damages for his failure to do so; nor did any such offer lessen in any way appellee's right to a specific performance, as the chancellor held, upon his compliance with the terms of the contract.

Neither is there any merit in appellant's claim of a right to refuse to perform the contract on account of any insufficient description in the lands for the road to be laid out on. The testimony shows that there had been a road already laid out and in use on the land, and that the description of the right-of-way of said road was the same in this deed as it was in the deeds under which appellee held the land.

We find the decree of the chancellor in all respects correct, and it must be affirmed. It is so ordered.