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*Nov. 11.
*Dec. 17.

ALEXANDER C. McKENZIE (PLAINTIFF) ..... } APPELLANT;

AND

HATTIE WALSH (DEFENDANT) ... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Sale of land — Memo. in writing — Statute of Frauds — Additional terms.

Pursuant to an agreement to purchase her property the vendor signed the following document: "Received from A. C. McKenzie the sum of two hundred dollars on the purchase of house No. 33 Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed." In an action by the purchaser for specific performance.

Held, that this document contained all the essential terms of a contract for the sale of land and complied with the conditions of sec. 7 of the Statute of Frauds. R.S.N.S. [1900] ch. 141.

It was contended that the time for completion of the purchase was a term of the contract and should have appeared in the written memorandum.

Held, that the finding of the trial judge that the time for completion was agreed on after the document was signed should be accepted and it was, therefore, not a term of the original contract but an arrangement for carrying it out.

Per Duff J.—This defence was not pleaded nor submitted to the jury and, as a question of fact, could not be raised after verdict since it was not disclosed so as to challenge the attention of the plaintiff.

It was also alleged that the property sold was mortgaged and the purchase was only of the equity of redemption which the memorandum did not disclose.

Held, that the purchase was of the whole property and not of the equity of redemption only and that the contract contained in the memorandum could be worked out as if it provided for the mortgage.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

APPEAL from a decision of the Supreme Court of Nova Scotia, (1) reversing the judgment at the trial in favour of the plaintiff and dismissing the action.

The material facts and the questions raised on this appeal are sufficiently stated in the above head-note.

Jenks K.C. for the appellant.

Power K.C. for the respondent.

THE CHIEF JUSTICE.—I must confess I was not, at the close of the argument, without some doubts as to the sufficiency of the written receipt or memorandum relied upon in this case as satisfying the Statute of Frauds. After consideration, however, and reading of the authorities cited by counsel on both sides, I have reached the conclusion that the memorandum or receipt is sufficient. That it must contain all the essential terms of the contract and must show that the parties have agreed to those terms is conceded by both sides. That it does do so, I conclude. The essential terms are the parties, the property and the price.

The memo. or receipt in this case reads as follows:

Halifax, N.S.
February 5, 1919.

Received from A. C. McKenzie the sum of two hundred dollars on the purchase of house, No. 33 Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed.

(Signed) Hattie Walsh.

It seems to me that these three essential terms of the contract—parties, property and price—are all included.

It appears that after the memo. was signed the parties met and arranged for a time of completion, viz., the 15th of April, and possession, the 1st of May.

(1) 54 N.S. Rep. 26.

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The Chief Justice.

I have read most carefully the judgments delivered in the court below and concur with the opinion of Chief Justice Harris that the written memorandum or receipt discloses a contract in writing sufficient to satisfy the Statute of Frauds and that the arrangements subsequently made for a time of completion and possession were in the nature of appointments merely to carry out the contract and not varying its terms.

I concur with the learned Chief Justice's judgment and for the reasons given by him would allow this appeal and restore the judgment of the trial judge with costs throughout.

IDINGTON J.—The appellant as plaintiff sued respondent for specific performance of an agreement entered into by her for the sale to him of a house and premises in Halifax.

The appellant paid, after several meetings at which negotiations had taken place, two hundred dollars, and got from the respondent the following receipt:—

Halifax, N.S.,
February 5, 1919.

Received from A. C. McKenzie the sum of two hundred dollars on the purchase of house No. 33, Spring Garden Road. Purchase price ten thousand five hundred dollars. Balance on delivery of deed.

(Signed) Hattie Walsh.

She evidently, a month or so afterwards, had made up her mind not to sell.

The appellant brought this action on the 2nd of May, 1919, and, by his statement of claim, delivered later, set forth therein a copy of this agreement as basis of his claim.

It is now contended by respondent, after being beaten in several other contentions she set up, that this is not a sufficient memorandum in writing to comply with the Statute of Frauds.

Prima facie it certainly seems to be so by containing all the essential elements of a bargain and sale of land.

It is given expressly, for the cash payment, on the purchase of a house, definitely described, of which the purchase price is to be $10,500 and the balance on delivery of deed.

Surely that covers all that is necessary to satisfy the Statute of Frauds unless there is something rendering the transaction entered upon much more complicated than usual, which does not appear herein.

The respondent in defence pleaded that the actual agreement was only an optional one dependent upon whether or not the respondent would be able to obtain possession of another property which she had leased, and further that the respondent signed the above quoted memorandum upon the representation by appellant that it was a mere receipt for two hundred dollars.

Upon this issue the parties went to trial and the result, upon most conflicting evidence, was a verdict of the jury answering questions submitted entirely negativing the contentions thus set up.

No other questions seem to have been suggested by the respondent.

In an ordinary trial as to the validity of the receipt as a contract setting out the terms, this should have ended the whole matter in dispute.

The resourceful counsel for respondent was only able to suggest at the close of the learned trial judge's charge the following, answered as appears by the learned judge as follows:—

Mr. Ralston: Will you explain that the arrangement is everything that took place between them that night?

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His Lordship: The arrangement is the agreement between the parties; the written agreement is conclusive in McKenzie's favour, if he is telling the truth, but the woman says that agreement was not the whole agreement, that the whole agreement contained that condition, and that is the difference between the parties.

Then one would have expected the matter to end by the verdict of the jury, for counsel did not object to the charge further, or except thereto in any other way.

What transpired between the learned judge and counsel later, does not appear in the case before us, but one may infer from the judgment of the learned judge that some further contentions, however irregular, had been set up by counsel, for there is a judgment of the learned trial judge in which he deals with a contention first that the time for completion of the contract had not been contained in the memorandum of the contract, and secondly that the mode of dealing with the problem of an existing mortgage had not been dealt with in the memorandum.

He disposes of the former by finding as a fact that the time for completion had been determined by the parties after the signing of the memorandum.

It was quite competent for the parties proceeding upon the validity of the memorandum to have done so, and default that, for the court to have determined what was a reasonable length of time, on the assumption that the contract was sufficient within the Statute of Frauds.

The finding of the learned trial judge may fall within either and must bind all concerned.

The other question of the existence of a mortgage is an every day incident dealt with by the courts in suits for specific performance and is amply covered by the decision of this court in *Williston* v. *Lawson* (1), at page 679, as expressed by Strong J. in the language quoted.

(1) 19 Can. S. C.R. 673.

I doubt if there ever sat in any Canadian Court a judge more learned in the relevant law to be observed as a guide, or better qualified to express an opinion on such a point of equity jurisprudence upon which the right to specific performance rests.

It would seem to me that the matter should have rested there. But the respondent was persistent and appealed, taking, in her notice of appeal, the following grounds, the nature of which I give in abbreviated form:—

1st, that the findings were against the weight of evidence; 2nd, such as reasonable men should not have made; 3rd, because they were against the probabilities; 4th, that the learned judge wrongly instructed the jury; and 5th, because the learned judge's direction as to the effect of the conflict was to present an issue of one or other party committing perjury and hence a withdrawal of the case from the jury.

Not a word therein points to the question of the requirements of the Statute of Frauds having been fulfilled or not.

I cannot find in the case any leave to amend this notice or take any other ground.

The first observation I think this calls for is that all argument addressed to us relative to the non-compliance with the Statute of Frauds never seems to have occurred to counsel at the trial beyond what was properly submitted to the jury and thus disposed of; and seems to have been abandoned as a hopeless contention when giving notice of appeal but, by reason of something which does not appear, suggested in appeal, is again mooted.

The result thereof is an opinion judgment of the learned Chief Justice completely answering any such contention; another of Mr. Justice Longley that

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finds fault with the learned trial judge's charge, and expresses the opinion that there should be a new trial, and then, though finding difficulty in assenting to the proposition of Mr. Justice Ritchie that the document was not of a character to fulfil the conditions of the Statute of Frauds, finally assents thereto and to the dismissal of the action.

I recite all this as illuminating how little confidence either bench or bar had in the contention now made the sole basis of answer to this appeal here.

I respectfully submit that once the issues raised before the jury had been by them disposed of adversely to the respondent, there was nothing more, reasonably to be hoped for, as resting upon the Statute of Frauds.

I repeat that the memorandum was not solely a receipt for money, but *prima facie* evidence of a complete contract within the Statute of Frauds, and when such substantial issues as presented to the jury were disposed of by them, nothing more should have been given effect to, and that the mere matters of method or form of carrying out the contract need not have been further considered as being required by the Statute of Frauds.

Hence I think the appeal should be allowed with costs throughout and the judgment of the learned trial judge restored.

DUFF J.—I concur on the whole with the judgment of the Chief Justice of Nova Scotia, and there is only one point which I would like to put in a slightly different way.

The majority of the full court took the view that the 4th section of the Statute of Frauds had not been complied with inasmuch as it was a term of the agreement that the balance of the purchase money was to

be paid on the 15th of April and the deed then delivered and that this term does not appear in the memorandum produced by the plaintiff. I assume, without expressing any opinion on it, that the document produced is not in itself of such a character as to preclude oral evidence shewing that it did not embody all the material terms of the contract and consequently that it was open to the defendant to plead and prove by oral evidence that a stipulation to the effect mentioned was a term of the agreement.

The statement of defence raises no such issue. The 9th paragraph, it is true, alleges that the memorandum produced by the appellant did not contain all the terms of the agreement actually entered into between the parties but the language of the plea ("does not contain all the terms of the said conditional agreement or option") unmistakably relates to the agreement alleged by the defendant in paragraph 7 which, while professing to set out fully the terms of the agreement, mentions no stipulation touching the date of the delivery of the deed or payment of the purchase money. The state of the pleadings is not without importance as indicating the issue to which the evidence was directed; although of course the pleadings in themselves are by no means conclusive as to that. An examination of the proceedings at the trial, however, leaves no doubt on one's mind that the evidence was not directed to the issue whether or not such a stipulation formed part of the agreement between the parties. Such an issue would of course be an issue of fact and primarily therefore a question for the jury. In that issue the onus would be on the defendant because the plaintiff had alleged a contract in the terms of the memorandum set out and if the defendant denying an agreement in such terms alleged

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in the alternative that if there was an agreement in such terms there was a further term not disclosed by the memorandum that would be matter of defence and of the onus of that defence he must acquit himself. Only once during the trial was the point adverted to. In cross-examination, the plaintiff was asked whether the arrangement that the balance of the purchase money was to be paid on the date mentioned was made on the day on which the memorandum was signed or later. The plaintiff was unable to answer although he did say that this was a part of the arrangement between him and the defendant. No question was submitted to the jury upon the point, no suggestion was made by defendant's counsel that the jury should be asked to pass upon it. On motion for judgment the trial judge was asked to dismiss the action on the ground that no date for completion was mentioned in the memorandum but he rejected the contention taking the view that the arrangement in respect of the date of completion was made after the day on which the memorandum was signed and that in any event this arrangement was not part of the contract but in the nature of an appointment for the purpose of carrying out the contract.

It was not, in my opinion, open to the defendant after the verdict to raise this question as a question of fact. I express no opinion as to whether the practice of the Nova Scotia courts would permit such a question to be decided by the judge as a question of fact. No such question of fact could be raised after verdict because the point not having been taken on the pleadings, it was the defendant's duty, if intended to rely upon it, to disclose it in such a way as to challenge the plaintiff's attention to it and it is very clear that this was not done. ?

I may add, however, that dealing with it as a question of fact, reading the memorandum with the evidence given by the plaintiff, my finding would be that the defendant had failed to prove that such a term was part of the contract. It follows, of course, from this that the defendants could not, raising the point as a point of law, succeed.

The appeal should be allowed and the judgment of Mr. Justice Drysdale restored.

ANGLIN J.—This case has, in my opinion, been so satisfactorily dealt with by the learned Chief Justice of Nova Scotia that I shall content myself with expressing respectful concurrence in the opinion which he delivered. I would merely add a reference to the well-known language of Halsbury L.C. in *Nevill v. Fine Art and General Ins. Co.* (1), at page 76, on the hopelessness of asking for a new trial for mere non-direction where no exception has been taken to the charge at the trial.

MIGNAULT J.—This is an action taken by the appellant for the specific performance of an agreement for the sale by the respondent to the appellant of the former's house in Halifax. On the 5th February, 1919, the appellant called on the respondent and proposed to purchase her house. The appellant testifies as to his conversation with the respondent as follows:—

Q. Tell us what the conversation was? A. I just asked her if the house was for sale; she told me it was; then I asked her the price; she told me what the price was, $10,500.00, and after a little talking back and forth I told her I would give her her price.

Q. That is $10,500.00? A. Yes.

(1) [1897] A.C. 68.

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Q. What happened then? A. At the same time she told me she was offered $10,000.00, or had been offered $10,000.00 and that she was asking $10,500.00.

Q. You agreed to give her $10,500.00? A. Yes; then I went out and told her I would be back in half an hour; I went out and came back with the receipt and the money.

Q. You came back; you brought back this receipt I show you and this cheque? A. Yes, and that cheque.

Q. What took place then? A. I read the receipt and passed it over to Mrs. Walsh and apparently she read it; she had it anyway and she apparently read it before she signed it.

Q. She signed it in your presence? A. Yes.

Q. And you gave her this cheque? A. Yes.

Q. You got the cheque back from your bank vouchered cashed? A. Yes.

Q. And what further was said about the property at that time? A. There was nothing particular said at that time.

The receipt referred to is very material because the issue now between the parties is whether it was a sufficient memorandum in writing to satisfy the Statute of Frauds. It reads as follows.

Halifax, Feb. 5th, 1919.

Received from A. C. McKenzie the sum of two hundred dollars on the purchase of house No. 33, Spring Gar. Rd., purchase price ten thousand five hundred dollars.

Balance on delivery of deed.

(Sgd.) Hattie Walsh.

Two objections are now made to the sufficiency of this receipt.

1. It was agreed between the parties, according to the appellant's story, that the balance of the purchase price would be paid on the 15th of April, and that possession would be given the appellant on May 1st, and this term was a material term of the agreement and was not mentioned in the memorandum.

2. There was a mortgage on the house of $5,000 and the appellant states that the respondent said that this mortgage could stay on, and no mention of this is made in the memorandum.

I may say that the learned trial judge (Drysdale J.) tried this case with a jury, and the issue raised at the trial by the respondent was that it was a condition of the arrangement that the appellant was not to have the house unless the respondent could get her tenants out of another house belonging to her by April 1st. The learned trial judge put questions to the jury covering this issue, and the answers were against the pretensions of the respondent. Judgment was given in favour of the appellant, but the respondent succeeded in her appeal to the Supreme Court of Nova Scotia *en banc*.

My opinion is clearly that the learned trial judge's charge was a fair one, and if the evidence of the respondent's daughters was not sufficiently set out by the learned trial judge, his attention should have been called to the matter by the respondent's counsel after the charge. This was not done, and I do not think the objection should now be entertained. I may add that no new trial was granted by the court below, but the appellant's action was dismissed on the objections taken to the memorandum under the Statute of Frauds, the learned Chief Justice of Nova Scotia dissenting.

Coming now to the objections founded on the Statute of Frauds, the only one on which I feel any difficulty is the first one, and this difficulty is on the point whether the agreement alleged by the appellant as to the payment of the balance of the purchase price and the delivery of possession took place at the interview of February 5th, or was a subsequent parol agreement. If the former, I would think it was a material term of the agreement, and should have been mentioned in the memorandum. If it was a subsequent parol agreement, I think the memorandum is sufficient.

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As can be seen, the memorandum describes the house to be sold and mentions the price, $10,500.00, on which $200.00 was then paid, and says:—

> Balance on delivery of deed.

The appellant in his statement of claim says that, by a subsequent parol agreement, it was agreed that payment of the balance and delivery of the deeds should be made by the 15th of April, and that respondent should occupy the house free of rent until May 1st.

In the evidence given by the appellant as part of his case, he says that this agreement would be in March some time, either February or March. When called in rebuttal, he first says it was made the next time he was in the respondent's house, but adds further on that it may have been made either when the receipt was signed or later.

This, as it stands, is somewhat indefinite, but the learned trial judge found as follows:—

> It seems the parties met after the date of memo and arranged for a time of completion, viz., the 15th of April and possession the 1st of May, but I think such arrangements were in the nature merely of appointments to carry out the contract and not an effort to vary the terms, which could not, I think, be verbally done.

I think this agreement, if subsequent to the memorandum, was of the nature stated by the learned trial judge, but the material point is that the learned judge finds as a fact that the arrangement was subsequent to the memorandum. I think this finding of fact should be accepted.

The consequence is that this memorandum contains the material terms of the agreement of February 5th, and is sufficient to support the appellant's action.

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On the question of the sufficiency of the memorandum, the judgment of the learned Chief Justice of Nova Scotia who dissented in the court below, is so complete that I rely on his reasoning and do not find it necessary to repeat it here. I also accept as entirely sufficient the judgment of the learned Chief Justice on the second objection of the respondent as to the mortgage on the property.

In my opinion the appeal should be allowed and the judgment of the learned trial judge restored with costs here and in the court below.

Appeal allowed with costs.

Solicitor for the appellant: *L. A. Lovett.*

Solicitor for the respondent: *John T. Power.*