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*Oct. 9.
*Dec. 6.

MARCH BROTHERS & WELLS (DEFENDANTS) ..... } APPELLANTS;

AND

HARRY W. BANTON (PLAINTIFF) .... RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF SASKATCHEWAN.

Vendor and purchaser—Condition of agreement—Sale of land—Payment on account of price — Cancellation — Notice — Return of money paid—Rescission—Form of action—Practice.

An agreement for the sale of lands acknowledged receipt of $600 on account of the price and provided, in the event of default in the payment of deferred instalments, that the vendor might, on giving a certain notice, declare the agreement null and void and retain the moneys paid by the purchaser. On default by the purchaser to make payments according to the terms of the agreement the vendor served him with a notice for cancellation which incorrectly recited that the contract contained a stipulation for its cancellation, in case of default, "without notice," and concluded by declaring the contract null and void "in accordance with the terms thereof as above recited." The vendor, subsequently, refused a tender of the unpaid balance of the price and re-entered into possession of the lands. In an action by the purchaser for specific performance or the return of the amount paid, rescission was not asked for.

Held, that, as the vendor had not given the notice required by the conditions of the agreement he could not retain the money as forfeited on account of the purchaser's default; that, as the payment had not been made as earnest, but on account of the price, the purchaser was entitled to recover it back on the cancellation of the contract, and that, as the relief sought by the action could not be granted while the contract subsisted, a demand for rescission must necessarily be implied from the plaintiff's claim for the return of the money so paid.

APPEAL from the judgment of the Supreme Court of Saskatchewan, affirming the judgment of John-

*PRESENT: Davies, Idington, Duff, Anglin and Brodeur JJ.

stone J., at the trial, by which the plaintiff's claim for specific performance of a contract for the sale of lands was refused and a direction was made for the repayment to him of the sum of $600 paid, on account of the price of the lands, at the time of the execution of the agreement for sale.

The circumstances of the case are stated in the above head-note.

J. B. Coyne for the appellants.

C. D. Livingstone for the respondent.

DAVIES J.—This was an action brought by respondent for specific performance of an agreement for the sale of certain lands to him by the appellants and, in the alternative, for the recovery of a part of the purchase money paid by him at the time the agreement was entered into.

The trial judge dismissed the claim for specific performance on the ground of delay on the plaintiff's part in carrying out his part of the agreement, namely, in making the payments it called for. No appeal was taken from his judgment on this point. The learned judge, however, gave judgment for the plaintiff for the $600, part of the price of the land, paid by him.

From that judgment the appellants appealed to the Supreme Court of Saskatchewan, which court unanimously dismissed the appeal, and the appellants now appeal to this court.

The simple and only point for our decision is whether, in the circumstances, the plaintiff was entitled under the pleadings and facts to a return of the instalment of the purchase moneys paid by him, or

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whether that payment had become forfeited to the vendors.

I take it as clear that in all cases the question of the right of the purchaser to the return of moneys paid by him — whether by way of deposit only, or "by way of deposit and as part payment of the purchase," or as part payment of the purchase money only — is a question of the conditions of the contract, and the intention of the parties as expressed in or to be implied from those conditions.

If the money has been paid as deposit simply or, as in the case of *Howe* v. *Smith*(1), "as a deposit and in part payment of the purchase money," unless the agreement contains something shewing a contrary intention, the payment is held to be a guarantee for the performance of the contract by the purchaser, who cannot recover the money back in case of his failure within a reasonable time to perform his contract. In order to enable the vendor, however, to retain, even moneys paid as a deposit, there

> must be acts proved on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract,

per Cotton L.J., at page 95.

The reason, however, for holding that moneys paid either as a deposit simply, or "as a deposit and in part payment of the purchase money," cannot be recovered back where the contract goes off by default of the purchaser, namely, that they are held as having been paid "as a guarantee for the performance of the contract" has no application to the case where moneys are paid simply on account of and as part of the

(1) 27 Ch. D. 89.

purchase money. Moneys so paid have not the character of a guarantee and, upon rescission of the contract, the consideration for the payment being extinguished, in the absence of language in the agreement shewing a clear intention of the parties that the moneys should be forfeited, restitution must be made: *Cornwall* v. *Henson*(1), and on appeal(2); *Labelle* v. *O'Connor*(3).

In the case now under consideration in my opinion the agreement did not contain any language from which such an intention could be drawn.

On the contrary it provided in express terms the conditions under which the vendor was entitled to hold the moneys paid as forfeited.

The clause of the agreement reads as follows:—

> If the purchaser shall fail to make the payments of principal or interest aforesaid or any of them, or the taxes, strictly at the times above limited, or shall fail in the performance of any of the covenants or agreements herein contained then and in such case the vendor shall have the right at any time to declare the whole amount remaining unpaid upon this contract due and payable and to take action to collect the same, and to deliver to the purchaser a deed to the said land when all of the said sums are collected or in the place of the foregoing, to declare this agreement null and void by giving thirty days' notice in writing to that effect, personally served upon the purchaser or mailed in a registered letter addressed to him at the post office named below, and all rights and interests hereby created or then existing in favour of the purchaser, or his approved assigns, or derived under this agreement shall, thereupon, cease and determine and the premises hereby agreed to be conveyed shall revert to and re-vest in the vendor without any further declaration of forfeiture or notice or act of re-entry, and without any other act by the vendor to be performed or any suit or legal proceeding to be brought or taken and without any right on the part of the said purchaser or his assigns to any reclamation or recompensation for moneys paid thereon.

This clause, I think, fairly expresses the intention of the parties to have been that there should not be

(1) [1899] 2 Ch. D. 710, at p. 714.
(2) [1900] 2 Ch. 298.
(3) 15 Ont. L.R. 519, at p. 550.

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forfeiture of any instalments of the purchase moneys paid on the contract unless and until the expiration of the thirty days' notice in writing therein provided to be given to the purchaser and failure during these thirty days by the purchaser to carry out his contractual obligation.

As a fact no such notice was ever given to the purchaser, but, on the contrary, a written notice was given him on the 6th April peremptorily declaring the contract to be "now null and void." This notice was evidently given under a complete misapprehension of the real contract which the parties made.

If the contract made had contained the stipulations which the notice of the 6th April recited it did contain, and if it had vested in the vendor power in case of default in payment of any instalment or of the interest or of the taxes, as the notice recited it did, summarily to "declare the contract null and void without notice to the purchaser" and had given the vendors the right in that case to "retain any payments that might have been made on account of such contract as and by way of liquidated damages," a very different condition would have been created. It is unnecessary, perhaps, to say that no stipulations of the kind recited in the notice did exist in the agreement, the only stipulations being those set out in the clause of the agreement which I have inserted above.

My conclusions agree, therefore, with what I understand to be those of the court below that, under this contract of sale and in the absence of any notice to the purchaser in default, such as that expressly provided for, the mere neglect and delay on the part of the purchaser, while sufficient to deprive him of his right to specific performance, did not operate as a for-

feiture of the instalments of the purchase moneys paid. These moneys not having been paid as a deposit and not having been forfeited under the agreement of sale, and the defendants being unwilling to accept the balance of the purchase moneys and convey the land on the ground claimed by them that the agreement was at an end and rescinded and the plaintiff having been refused by the trial judge specific performance of the agreement on account of his delay, I am of opinion that the judgment on his alternative claim awarding him a return of the $600 paid by him was correct.

It was suggested that the alternative claim made by the plaintiff for a return of the $600 did not expressly ask the court for a rescission of the contract, but I agree with Lamont J., that it is necessarily implied in the claim made for a return of the money for the court could not grant the relief asked for while the contract was still a subsisting one.

It appeared in evidence that, after the refusal of the appellants to accept the tender made to them of the unpaid purchase money, the respondent vacated possession of the land and the appellants entered into possession of it. They have declared the agreement null and void and have acted as if it was so. The respondent failing to obtain specific performance then makes his alternative claim that the agreement be rescinded by the court and his payments refunded to him.

Under all the circumstances I think the judgment appealed from is right and that this appeal should be dismissed with costs.

IDINGTON J.—The rule seems tolerably clear that a purchaser who has never in fact abandoned or re-

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ceded from his contract, but yet been by reason of laches or otherwise, from causes not falling within abandonment or recession, deprived himself of the right to specific performance, is, in case the vendor refuse to accede to specific performance *primâ facie* entitled to a return of the deposit or part payment; unless some facts are shewn that would render this inequitable.

The respondent sought herein specific performance which the present appellants resisted and the court, thereupon, holding specific performance could not be decreed, and that there was no abandonment of the contract by respondent, ordered a return of the first payment of $600.

This was upheld by the appellate court.

It is now too late to raise nice questions of pleading or relative to the accuracy of view taken of the law by the learned trial judge or expressed by him.

He was substantially right in law if we look at the results he reached; and could have amended the pleadings if need be to carry out his judgment.

There was not such an abandonment or recession from the contract as contended for.

Nor can it properly be said there is anything inequitable in the result.

The appellants had the matter entirely in their own hands.

If they had submitted to specific performance they would have got the balance of their money and interest, which is all they ever were entitled to, or a properly framed judgment for specific performance which, when worked out, would have left them with the money already paid and the land, if later default made in the payment of the balance.

They tried to grasp too much and have failed in getting all. And I have no doubt that the result will leave them, so far as the mere money to be got from the land (apart from costs of their fruitless litigation) is concerned, the gainers in the long run.

I think their appeal should be dismissed with costs.

DUFF, ANGLIN and BRODEUR JJ. concurred with Davies J.

Appeal dismissed with costs.

Solicitor for the appellants: *W. R. Parsons.*
Solicitors for the respondent: *Parker & Livingstone.*