ALFRED B. CUSHING AND ARTHUR T. CUSHING (DEFENDANTS) ..... } APPELLANTS;

AND

RICHARD H. KNIGHT (PLAINTIFF) .. RESPONDENT.

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*May 8.
*June 4.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Vendor and purchaser—Sale of mortgaged lands—Agreement—Condition precedent—Cash payment—Default—Objection to title—Repudiation—Specific performance.

An agreement for the sale of land provided that the purchase-money was to be paid by instalments "$10,000 cash on the signing of this agreement, the receipt of which is hereby acknowledged," the remaining instalments to be paid in one, two and four years, with interest from the date of the agreement, and there was a proviso making time of the essence of the contract and, on default in performance of conditions and payment of instalments, for the cancellation of the agreement by the vendors on giving written notice to the purchaser. The land in question formed part of a larger area and there was an undischarged mortgage upon the whole property of which both parties had knowledge at the time of the agreement. The cash payment was not made, the purchaser refusing to pay this amount until the mortgage was severed and apportioned so that the land mentioned in the agreement should bear only a determinate share thereof, and the agreement amended to this effect. The vendors then withdrew from the agreement by a letter addressed to the purchaser's solicitor. In an action against the vendors for specific performance,

Held, per Davies and Anglin JJ.—The execution of the agreement constituting the relationship of vendors and purchaser was the consideration for the cash payment then to be made and, in default of such payment, the obligation to sell and convey the lands with a good title did not become binding upon the vendors.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff, Anglin and Brodeur JJ.

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Per Duff and Brodeur JJ.—Payment of the ten thousand dollars in cash was a condition precedent to the constitution of any obligation by the vendors to sell or convey the lands and, consequently, to shew good title.

Per Idington J.—In the circumstances the purchaser's refusal to make the cash payment was a repudiation of the agreement which deprived him of the right to a decree for specific performance.

Judgment appealed from (1 D.L.R. 331, 1 West. W.R. 563) reversed.

APPEAL from the judgment of the Supreme Court of Alberta (1), by which the judgment of Simmons J., in favour of the defendants, was reversed, Harvey J. dissenting, and the action of the plaintiff was maintained with costs.

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

Ewart K.C. and *C. F. Adams* for the appellants.

Wallace Nesbitt K.C., C. C. McCaul K.C. and *J. E. Wallbridge* for the respondent.

THE CHIEF JUSTICE.—This appeal is allowed with costs in this court and in the Supreme Court of Alberta, *in banco*, and the action is dismissed with costs.

DAVIES J. concurred in the opinion of Anglin J.

IDINGTON J.—These parties executed an agreement for the sale and purchase of half of two lots in Edmonton for the sum of $33,750, of which the sum of $10,000 was to be paid, by the express terms of said agreement, "on the signing of this agreement, the receipt of

(1) 1 D.L.R. 331, 1 West. W.R. 563.

which is hereby acknowledged." This provision for payment proceeded to provide also that $10,750 should be paid in a year, $8,000 in two years and $5,000 in four years. A mortgage existed for $15,000 and interest at seven per cent. per annum in favour of a third party and covering the whole of said lots, but did not fall due till a few months after the last of said payments of purchase-money.

The respondent refused to pay the $10,000 payable on the execution of the agreement he had signed unless specific provision was made therein for the early severance of the mortgage so that each half would bear a determinate share in case it became desirable for him later on to have paid off what was to be borne by the half he was buying.

He had signed with full knowledge of the existence of this mortgage and as a man of education and ordinary sense must have been alive to these possible complications before he signed the agreement; especially so as that had been preceded by a payment of $100 and a receipt therefor given him setting forth above terms of payment upon which the completed agreement was to be framed.

I pass by a mass of evidence in regard to an alleged verbal understanding providing for this outstanding mortgage as at best only confusing the questions to be solved. It is admitted as fact that respondent knew of this mortgage when he signed the agreement.

The plain language of the agreement required payment of $10,000 cotemporaneously with the execution of the document. And when respondent refused to comply, with such express language binding him, he gave appellants the right to treat such explicit refusal as an abandonment or at all events repudiation of the

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agreement entitling them to rescind. They rescinded accordingly after having given four days to respondent to consider his position.

The latter chose, at the end of four days, to insist on their amending the agreement before paying over the $10,000. How could he more clearly repudiate that agreement? His hope of getting a new agreement to suit him is no answer.

The demand made, if complied with, might have turned out an impossibility for appellants to have fulfilled.

If the agreement had not by its terms impliedly excluded, as the judgment appealed from maintains, in acceding to respondent's claims all right to interest in this $10,000 it might have been urged with greater fairness that it was only to be considered as an instalment to be postponed till title passed.

Moreover, by paying the $10,000 at the time of signing the respondent risked nothing. The balance of the purchase-money after such payment exceeded by over $7,000 the total mortgage. The respondent had a right under the agreement to proceed, after paying the $10,000 deposit, to insist on the title being made out before going further, and, before next payment, being made good on due protection being given him against the complications he professes to have dreaded.

And in case of his electing the right given in the agreement to pay up the entire purchase-money he could have forced the appellant to redeem the mortgage no matter how unexpectedly onerous that might have proved to appellants. Of course the collateral verbal agreement might have modified this. I am

passing no opinion upon that, but upon the agreement which is sued upon and must be construed as it reads.

This agreement was the outcome which the parties to the previous receipt anticipated.

If the agreement could be treated as not executed at all then there was nothing but that receipt to be considered; imperfect by reason of the mutual intention that it should be followed by and be only the foundation for such agreement.

And if such a receipt so given is to alone constitute the foundation for this action there seem to be many difficulties in respondent's way.

The Statute of Frauds, the verbal understanding and what seems, in light thereof, very like equivocal conduct on part of respondent in claiming something unprovided for therein as a *sine qua non* of his proceeding to close up the transaction, furnish, I incline to think, impassable barriers to his resting an action of specific performance on the receipt alone.

He knew about the mortgage before writing his solicitor and when he instructed him to look at the title and if that found right to hand over the cheque, he ought at least to have told him that he knew of this mortgage and perhaps have told him his understanding as to that.

As I read his letter it shews he thought the agreement completely executed and ready for the investigation of title and if that satisfactory then to hand over the cheque.

He has seen fit to sue upon it and surely he cannot be heard to say now it was not executed. If so, then all else merged therein save possibly the collateral verbal agreement if evidence can warrant it being held such.

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In my view his action fails and this appeal should be allowed with costs.

DUFF J.—I think the appeal should succeed on the ground that the cash payment of ten thousand dollars not having been made the appellants' obligation to sell (and, consequently, their obligation to shew a good title) did not become absolute.

From the first the parties contemplated the execution of a formal contract of purchase. The evidence of the agent is precise that, according to his understanding with the respondent, the sum mentioned was to be payable upon the execution of that contract; and it is clear enough that the appellant Alfred B. Cushing, who acted for his brother as well as for himself, always had the same view of the arrangement.

The fact that such a formal agreement was contemplated is, as Lord Cranworth said in *Ridgway* v. *Wharton*(1), strong evidence that the parties did not intend finally to bind themselves until that agreement should be completely constituted and there is a great deal to be said for the view that, according to the evidence, read as a whole, the legal position of the parties up to the time of the execution of the agreement of the 12th September was that the appellants had made an offer of sale in terms of the receipt which they had precluded themselves from revoking until a reasonable time had elapsed to enable the parties to prepare and execute a formal instrument. It is, however, not necessary to consider what the legal position of the parties might have been if the document of the 12th of September had never been executed. That

(1) 6 H.L. Cas. 238.

instrument was prepared in accordance with the original intention of both parties and with the object of setting forth the terms of their agreement in final and binding form. It was executed by the appellants first and afterwards by the respondent; upon it the respondent sues; and it evinces, in my judgment, in the clearest way the intention of both parties that a condition precedent to the constitution of any obligation to sell on the part of the appellants was the payment of ten thousand dollars down. The parties do not, it is true, in formal terms provide that the payment of that sum is to be a condition; but the intention that it should be so is manifested by the frame of the agreement as a whole, the stipulations of which pre-suppose that this payment has already been made and shew unmistakeably that it is upon the basis of this assumed state of facts that the parties are contracting.

In this view it is, perhaps, unnecessary to notice the point made upon the last paragraph of the agreement. This paragraph applies, of course, only to default in respect of payments to be made in future.

I cannot understand, I may add, the contention that the respondents after refusing to comply with this condition, can (after the time fixed for payment has long passed and the property has greatly increased in value) fasten a contract to sell upon the appellants by offering now to make the cash payment stipulated for. With great respect, to give effect to that contention would seem to be constituting a fresh contract.

ANGLIN J.—In my opinion, on a proper interpretation of the contract for the specific performance of

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which the plaintiff sues, the consideration for the payment by him of the sum of $10,000 "cash on the signing of this agreement" was the execution of the agreement itself — the constitution of the relationship of vendors and purchaser between the parties — the promise or undertaking of the vendors to sell and convey. The plaintiff was not entitled to require the vendors to shew their title to the land in question before payment of this sum of money: the agreement specially provides otherwise.

If the parol evidence may be looked at for this purpose (which, I think, more than doubtful), it seems to me to make it reasonably clear that it was well understood that the $15,000 mortgage (the existence of which, as a single charge on the land in question and other property for the whole amount secured, the plaintiff relies on as a justification for his refusal to pay the $10,000 until this incumbrance had been removed or had been so apportioned that the land which he was purchasing would stand as security to the mortgagee for only $5,000) would remain unchanged until the transaction should be closed by the purchaser paying the entire purchase money, either at the time stipulated, or in advance under the provision for that purpose.

The property in question was of a speculative character to the knowledge of both parties. Time was of the essence of the agreement. The defendants' notice giving the plaintiff four days within which to pay the $10,000, with cancellation as an alternative, was, in the circumstances, reasonable, and on his default they were entitled to treat the agreement as cancelled unless they had bound themselves not to do so. I find nothing which so binds them.

The express provision in the agreement for rescission by notice in the event of default in payments refers, in my opinion, not to the $10,000 cash payment, but to the subsequent payments which the purchaser covenanted to make. That provision the defendants do not invoke and it does not affect whatever rights accrued to them on the plaintiff's refusal to pay the $10,000. As already stated, his default, in my opinion, gave them the right to withdraw and cancel. That right they have exercised — I think legally and efficaciously.

I would, for these reasons, allow this appeal with costs in this court and in the court *en banc,* and would restore the judgment of the learned trial judge.

BRODEUR J.—I agree with the views expressed by Mr. Justice Duff. This appeal should be allowed with costs in this court and in the court *en banc,* and I would restore the judgment of the trial judge.

Appeal allowed with costs.

Solicitors for the appellants: *Ewing & Harvie.*
Solicitor for the respondent: *J. E. Wallbridge.*