CASES

DETERMINED BY THE

SUPREME COURT OF CANADA

ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

ELIZA J. McDOUGALL AND OTHERS (DEFENDANTS)..... } APPELLANTS;

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*Feb. 14, 15.
*May 2.

AND

R. G. MacKAY (PLAINTIFF).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Sale of land—Equity—Same property orally sold to two purchasers—Agreements then reduced to writing—Statute of Frauds—Equal equities—Priority in time—Caveat—Plea by a purchaser for value without notice—Onus.

The appellants in 1919 entered into an agreement to purchase certain land from one McC. A condition thereof being that no assignment of it should be valid unless approved by the vendor. The respondent became, on the 21st June, 1920, by oral agreement the purchaser of the equitable interest of the appellants for $6,500; and, on the evening of the 22nd June, 1920, this oral agreement was reduced into writing, differences in the agreements being as to the time when possession was to be given and as to the terms of

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

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payment of the purchase price. About noon on the 22nd June, 1920, the appellants orally agreed to sell the same property to R. for $6,550, which agreement was immediately put into writing; and on the 23rd June, 1920, R. paid $1,550 to the appellants. The respondent, on the 30th June, 1920, registered a caveat. On the 6th July, 1920, McC., having received the balance of the purchase price from R., executed a transfer of the property to the latter, who, on the 8th July, 1920, had it registered subject to the respondent's caveat.

Held that, upon the evidence, the respondent's written agreement sufficiently embodied the terms of the oral agreement to warrant its being taken as a memorandum of the latter which satisfied the Statute of Frauds; therefore, the respondent had a valid agreement prior in time to that of R.; and, the equities of R. and of the respondent being equal at the time of the registration of the caveat, the respondent's equity being first in time, must prevail. *McKillop and Benjafield* vs. *Alexander* (45 Can. S.C.R. 551) followed.

Per Duff J.—When a party sets up that he is a purchaser for value without notice, the *onus* is on him to prove absence of notice. *Laidlaw v. Vaughan, Rhys.* (44 Can. S.C.R. 458).

Judgment of the Court of Appeal (15 Sask. L.R. 24) affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of MacDonald J. at the trial (2) and maintaining the respondent's action for specific performance of an agreement for sale.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Gregory K.C. and *Hodges* for the appellants.—By reason of the additional terms as to the time of going into possession of the land and as to the change in the method of payment of the purchase price, the written agreement is not sufficient to satisfy the Statute of Frauds.

(1) 15 Sask. L.R. 24; [1921] 3 W.W.R. 833.

(2) 14 Sask. L.R. 111; [1921] 1 W.W.R. 419.

The caveat filed by the respondent being in respect of a contract dated June 22nd, 1920, did not protect his rights under the oral contract of June 21st, 1920. At the time of the registration of the caveat the equities of the respondent and of R. were not equal; and R. had at that time a better right to call for the legal estate.

Tingley K.C. for the respondent.—The respondent was prior in equity up to the registration of his caveat, which preserved that priority.

If the respondent was not prior in equity when he registered his caveat, he obtained priority for his interest by the registration of the caveat.

THE CHIEF JUSTICE.—For the reasons stated by Mr. Justice Lamont when delivering the unanimous judgment of the Court of Appeal, I am of the opinion that this appeal should be dismissed with costs.

IDINGTON J.—For the reasons assigned in the judgment of Mr. Justice Lamont speaking on behalf of the Court of Appeal, I think the prior equity of respondent ought to prevail and hence this appeal should be dismissed with costs.

DUFF J.—The question upon which the Court of Appeal proceeded presents no difficulty to my mind. In principle this court decided in *McKillop* v. *Alexander* (1), that notwithstanding the terms of the agreement between McClellan and Mrs. McDougall the effect of the agreement of sale made by Mrs. McDougall and Mackay was to give to Mac-

(1) [1911] 45 Can. S.C.R. 551.

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kay an equitable interest in the lands of which McLellan was the legal owner. Now it is found by the trial judge, and the Court of Appeal have accepted his finding, that on the 21st of June, 1920, the McDougalls agreed to sell the property to Mackay. The agreement, it is true, was an oral one, but it was long ago established that the effect of the Statute of Frauds was only to prescribe the kind of evidence required for proving a contract for the sale of land and not to lay down a statutory condition of the valid constitution of such a contract. The agreement of the 21st June was a valid contract and enforceable, it is true, speaking generally, only against the party signing a memorandum complying with the requirements of the 4th section of the Statute of Frauds, but a valid contract none the less.

It is true, no doubt, as often has been said (*Howard* v. *Miller*) (1), that the proposition that a purchaser having only an agreement for sale of land has an interest in the land rests upon the assumption that the agreement is enforceable by equitable process *in personam* against the legal owner and, generally speaking of course, this would not be so in the absence of the evidence required by the 4th section of the Statute of Frauds. But as I have just said, the memorandum prescribed by the statute is required as evidence only and when the evidence is forthcoming and the agreement is consequently enforceable by legal process the interest of the vendee is deemed to have sprung into existence at the time when the agreement was actually made. On behalf of the appellant it is argued that the formal agreement entered into on the 22nd June between Mrs. McDougall and the respondent differs from the oral agreement made on the 21st June in a material

(1) [1915] A.C. 318.

particular and that consequently the oral agreement must be deemed to have been superseded and that the only interest vested in the respondent came into existence on the date of the execution of the written agreement.

This argument wholly ignores the distinction between rescission and variation. The subject was much discussed by the law lords in *Morris* v. *Baron* (1), and it was there pointed out that where the terms of an existing agreement are varied as, for example, by a change in price, the first agreement is not necessarily rescinded. That may of course be the effect of the second agreement because rescission may take place in one of two ways. It may take place because the parties have explicitly agreed *simpliciter* to rescind the agreement; and it may take place because upon the same subject matter the parties have entered into a fresh agreement complete in itself and that an intention to rescind the former agreement is implied because these two agreements cannot be simultaneously operative. But on the other hand, as the learned law lords pointed out in the case mentioned, you may have a variation of one or more terms of the contract without rescission of the contract, either express or implied. A very obvious case is the case in which the change which has been made merely varies the mode in which the contract is to be carried into effect. The question in any particular case must be a question of fact because it is a question of intention as to whether or not there was to be only partial rescission, that is to say, a variation, the original contract being kept on foot, or whether there was to be a complete rescission, a second and a new contract being substituted for the first.

(1) [1918] A.C. 1.

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Now you could not reach the conclusion that what occurred between the parties to the present litigation belonged to the second category of arrangements rather than to the first without concluding at the same time that it was the intention of the respondent to abandon his rights under the agreement of June 21st. There is a presumption against that; see *Thorne* v. *Cann* (1); and there is not the slightest evidence of any such intention. My conclusion is that on this point the decision of the Court of Appeal was right.

Another question of a different kind is raised by the appellant, and the question arises in this way. Rusconi entered into an agreement with the McDougalls by which in effect he agreed to take over the burden of the contract paying $1,500, the amount of the purchase money already paid by the McDougalls in cash and paying direct to McLellan the residue of the purchase money. He entered into communications with McLellan, the result of which was that McLellan executed a transfer, and deposited apparently the transfer in escrow to be delivered to Rusconi upon the payment of the residue of the purchase money to him. The contention put forward is that Rusconi was entitled to fortify his position by getting in the legal estate from McLellan and this, it is contended, he did because he had acquired the right to call for the legal estate by the arrangements he had made with McLellan and in consequence it is argued he had, upon settled principles, the better equity. The question as to the circumstances in which the acquisition of the right to call for the legal estate will be held to impart superiority in point of equity to a later over an earlier equitable interest is a question upon which it is difficult to lay down with confidence a precise general rule; the subject

(1) [1895] A.C. 11.

need not be considered because there is one answer to the appellant's contention which is conclusive against him. That answer is this; the position which he seeks to assume is that of purchaser for value without notice; and it is settled law (the subject is fully discussed in *Laidlaw* v. *Vaughan-Rhys* (1)), that the defence of purchase for value without notice is a defence which must be pleaded and proved affirmatively. It is a defence in respect of which the onus in the strict sense is on the party claiming the benefit of it. He must affirmatively establish absence of notice. In the present case the appellants have not even pleaded that Rusconi entered into his contract with the McDougalls without notice of the McDougalls' contract with Mackay; absence of notice was not found by the learned trial judge or by the Court of Appeal and there is no evidence before this court enabling us to make a finding upon the point. This contention therefore also fails.

The appeal should be dismissed with costs.

ANGLIN J.—One McClellan, the registered owner of the property in question, sold it to the defendants, the McDougalls, in October, 1919, the contract containing a provision that no assignment of it should be valid unless approved and countersigned by the vendor.

The plaintiff, MacKay, became the purchaser, by oral agreement, of the equitable interest of the McDougalls on the 21st June, 1920, paying $100.00 on account of the purchase price of $6,500. Subject to a question as to discrepancies, this oral agreement was reduced into writing on the evening of the 22nd June. The plaintiff lodged a caveat to protect his interest on the 30th June.

(1) [1911] 44 Can. S.C.R. 458.

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About noon on the 22nd of June, the McDougalls agreed orally to sell the property to the defendant Rusconi for $6,550. Subject likewise to some discrepancies, this agreement was also put into writing and on the 23rd of June Rusconi paid $1,550 on account of the purchase price. His agent immediately prepared and sent to McClellan, for execution by him, a transfer of the property to Rusconi. McClellan executed this transfer and on the 26th of June sent it to his bankers with instructions to hand it to Rusconi on receipt of the balance due McClellan on his agreement with the McDougalls. On the 29th June, McClellan wrote the McDougalls that he had accepted Rusconi's cash offer and would "not accept Mr. MacKay on contract." On the 6th of July, Rusconi paid the balance of the purchase price to McClellan's bankers and obtained the transfer, and on the 8th of July had it registered subject to MacKay's caveat.

The learned trial judge took the view that because his written contract of the 22nd of June differed in two particulars from the oral agreement of the 21st, MacKay had no enforceable contract until the evening of the 22nd. These two differences are thus stated in the judgment of the Court of Appeal, delivered by Mr. Justice Lamont:

> (1) Under the oral agreement possession was to be given on July 15th, while in his written agreement it was to be given on July 10th, or sooner if possible, and (2) under the oral agreement the price was stated to be $6,500, while in the written agreement the plaintiff, although he was to pay $6,500 in all, was to pay the McDougalls their equity in cash and pay the balance to McClellan, in accordance with the terms in the agreement with the McDougalls, which was to be assigned to him.

The learned trial judge therefore held that Rusconi had the prior equity under his verbal agreement made at noon on the 22nd of June and on that ground

dismissed MacKay's action against the McDougalls and Rusconi for specific performance. He also took the view that, because MacKay's caveat referred only to the agreement in writing dated the 22nd of June, the interest thereby protected must be taken to have originated when that agreement was executed.

In the Court of Appeal, the view prevailed that the written agreement with MacKay of the 22nd of June sufficiently embodied the terms of the oral agreement of the 21st to warrant its being taken as a memorandum of the latter which satisfied the Statute of Frauds and that MacKay, therefore, had the prior equity, dating from the making of his oral agreement on the 21st, and was on that ground entitled to succeed.

On this question I am inclined to accept the conclusion reached by the Court of Appeal.

On the first point:—

There was nothing to prevent the parties, who had agreed on the 21st of June that possession would be given on the 15th of July, changing that arrangement on the following day and providing, as they did, for possession on the 10th of July, or sooner if possible. Did that change make of the document of the 22nd of June a new contract in substitution for that of the 21st so as to prevent its being regarded as a memorandum thereof? That would seem to depend on whether the provision as to the date of possession should be deemed a material term of the agreement, or either an immaterial term or a collateral arrangement only. Fry on Specific Performance (6 ed) par. 368. An arrangement as to date of possession may be of the latter character: *McKenzie* v. *Walsh* (1); *Anderson* v. *Douglas* (2). On the whole case, I incline to the

(1) [1920] 54 N.S. Rep. 26, at pp. 34-35; (2) [1918] 18 Man. R. 254.
61 Can. S.C.R. 312.

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opinion that the provision as to the date of possession was not such an essential term of the oral agreement of the 21st of June that the change made in respect to it precludes the view taken in the Court of Appeal that the document of the 22nd was really a formulation of the oral contract of the 21st and not a new contract. As put by Mr. Justice Lamont:

> The difference as to the time when possession was to be given is not material.

On the other point:—

The evidence detailed by Mr. Justice Lamont seems to make it clear that the terms as to payment set forth in the written agreement of the 22nd did not differ from those discussed and agreed to orally on the 21st.

The three following objections raised by the defendants call for consideration:

1. That the MacKay caveat protects only such interest as he acquired by the written agreement of the 22nd of June and therefore cannot be invoked to protect rights acquired under the oral contract of the 21st;

2. In view of what has since transpired, specific performance of the MacKay agreement has been rendered impossible;

3. The defendant Rusconi by his diligence acquired the better right to call for a conveyance of the legal estate held by McClellan.

1. As is pointed out in the respondent's factum the caveator claimed an interest as purchaser under the agreement in writing dated June 22nd. This "agreement in writing" is the formal embodiment of the oral agreement of the 21st of June. I think the caveat sufficiently indicated the claim of the plaintiff as

purchaser under the oral agreement of the 21st of June, evidenced by the writing of the 22nd, and therefore protected his equity under the oral agreement. Whatever rights MacKay had in or to the land in question covered by the caveat registered on the 30th of June were thereby preserved to him. *McKillop & Benjafield* v. *Alexander* (1).

2. Nothing had occurred prior to such registration which would prevent the McDougalls transferring their equitable interest to MacKay. All that was done after the caveat was lodged was subject to MacKay's rights as they then existed and cannot interfere with the enforcement of them. For that purpose Rusconi has assumed McClellan's position. This ground of appeal cannot be maintained.

3. Although impressed with the contention that by what he had procured to be done—the execution of the conveyance to him by the holder of the legal estate and the depositing of it with his bankers for delivery on payment to them of the balance of the purchase money and the writing of the letter by McClellan to the McDougalls—Rusconi had acquired a better right than MacKay to call for the conveyance of the legal estate, on further consideration I am satisfied that this is not the case. In dealing with an equitable estate in land the doctrine of obtaining priority by notice to the holder of the legal estate does not prevail; *Hopkins* v. *Hemsworth*, (2). Rusconi did not obtain anything from McClellan which was tantamount to a declaration of trust in his favour or an undertaking to hold the land for him. Until delivery the deed sent to the bankers was wholly inoperative. Whatever might have been the effect of

(1) 45 Can. S.C.R. 551.

(2) [1898] 2 Ch. 347, at p. 351.

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a similar letter from McClellan to Rusconi, McLellan's letter to the McDougalls carried no right to Rusconi. In what took place prior to the lodging of MacKay's caveat there was nothing to displace the original priority of his equitable claim. The uncompleted steps taken to obtain the legal estate had not that effect. *Société Générale de Paris* v. *Walker* (1). McClellan's intention to convey the legal estate to Rusconi remained unexecuted on the 30th of June. Whatever rights were conveyed by the delivery of the transfer on the 6th of July and its subsequent registration were acquired subject to MacKay's prior equity.

I fully recognize that a court of equity will not prefer one equity to another on the mere ground of priority of time until it has found by examination of their relative merits that there is no other sufficient ground of preference between them; that such examination must cover the conduct of the parties and all the circumstances; and that the test of preference is the broad principle of right and justice which courts of equity apply universally. *Rice* v. *Rice* (2). Here after most careful consideration, I find nothing prior to the registration of MacKay's caveat which disturbed the equality between the two equities in all respects other than priority of time, which is therefore effective and entitles MacKay's equity to prevail.

The provision of the McClellan-McDougall agreement that no assignment of it should be valid unless approved and countersigned by McClellan is a stipulation for his benefit and can be invoked only by him. It did not prevent MacKay acquiring an equitable

(1) [1885] 11 App. Cas. 20.

(2) [1853] 2 Drew. 73, at pp. 78, 83.

interest in the property good as against the McDougall's and the subsequent purchaser Rusconi. *McKillop Benjafield* v. *Alexander* (1); *Sawyer & Massey Co.* v. *Bennett* (2).

I would for these reasons affirm the judgment of the Court of Appeal and dismiss this appeal with costs.

BRODEUR J.—I concur in the result.

MIGNAULT J.—It is necessary to consider what was the legal position of MacKay and Rusconi respectively on the 30th of June, 1920, when MacKay registered his caveat. If on that date neither of these parties had more than an equitable right, MacKay being prior in time should be preferred. And any title to the legal estate which Rusconi obtained and registered after that date would be subject to MacKay's caveat.

As matters stood on June 30th, 1920, both MacKay and Rusconi had verbal agreements from the equitable owner for the sale of the property, which agreements had been reduced to writing. Rusconi, at that date, had not obtained the legal estate from McClellan, the legal and registered owner. It is true that on June 26th, McClellan signed in favour of Rusconi a transfer of his estate and interest in the property, but this transfer was sent to the bank to be delivered to Rusconi on full payment of the price, and it was delivered to him after June 30th. He therefore took the legal estate subject to MacKay's caveat.

Did Rusconi, on June 30th, have a better right to call for the legal estate than MacKay? I think not. As matters then stood both MacKay and Rusconi had made an agreement of sale with the equitable

(1) 45 Can. S.C.R. 551.

(2) [1909] 2 Sask. L.R. 516; 46 Can. S. C.R. 622.

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owner, but MacKay was first in time. McClellan was then the registered owner of the property. He apparently objected to the sale to MacKay, and was willing to transfer the property to Rusconi, but no transfer had then been delivered to the latter. McClellan is not a party to these proceedings and MacKay and Rusconi must stand on the rights they had acquired from the McDougalls up to June 30th. These were purely equitable rights and the equities being equal MacKay is entitled to preference, for he was first in time. I would therefore agree with the Court of Appeal which decided in his favour.

The defence based on the Statute of Frauds, in my opinion, fails.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *McNeel & Hodges.*

Solicitor for the respondent: *A. R. Tingley.*