HENRY M. WILLISTON (PLAINTIFF) ...APPELLANT; 1891

AND *Feb. 17.
*Nov. 17.

HENRY LAWSON (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA.

Contract—Statute of Frauds—Matters for future arrangement—Sale of land or of equity of redemption.

L. signed a document by which he agreed to sell certain property to W. for $42,500, and W. signed an agreement to purchase the same. The document signed by W. stated that the property was to be purchased "subject to the encumbrances thereon." With this exception the papers were, in substance, the same, and each contained at the end this clause "terms and deeds, &c., to be arranged by the 1st of May next."

On the day that these papers were signed L., on request of W.'s solicitor to have the terms of sale put in writing, added to the one signed by him the following: "Terms, $500 cash this day, $500 on delivery of the deed of the Parker property, $800 with interest every three months until the six thousand five hundred dollars are paid, when the deed of the entire property will be executed."

The property mentioned in these documents was, with other property of L., mortgaged for $36,000. W. paid two sums of $500 and demanded a deed of the Parker property which was refused. In an action against L. for specific performance of the above agreement the defendant set up a verbal agreement that before a deed was given the other property of L. was to be released from the mortgage and also pleaded the statute of frauds.

Held, affirming the judgment of the court below, Patterson J. doubting, that there was no completed agreement in writing to satisfy the statute of frauds.

Per Ritchie C.J.—The agreement only provides for payment of $6,500 leaving the greater part of the purchase money unprovided for. If W. was to assume the mortgage it was necessary to provide for the release of L.'s other property and for matters in relation to the leasehold property.

Per Strong J.—The agreement was for sale of an equity of redemption

*PRESENT:—Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

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only, and as questions would arise in future as to release of L.'s other property from the mortgage and his indemnity from personal liability to the mortgagee, which should have formed part of the preliminary agreement, specific performance could not be decreed.

APPEAL from a decision of the Supreme Court of Nova Scotia, reversing the judgment given at the trial in favour of the plaintiff.

The facts upon which the appeal was brought and decided sufficiently appear from the above head note.

At the trial before Mr. Justice Townshend judgment was given in favour of the plaintiff, the learned judge being of opinion that the documents in evidence, coupled with the surrounding facts and circumstances, established an agreement sufficient under the Statute of Frauds to bind the defendant. The court *en banc* reversed this decision and ordered judgment to be entered for the defendant. From the latter decision the plaintiff appealed.

Newcombe for the appellant. The agreement in writing was complete and any subsequent dealings not reduced to writing cannot defeat the contract contained in it; *Foster* v. *Wheeler* (1); *Bolton Partners* v. *Lambert* (2); *Gray* v. *Smith* (3); *Bellamy* v. *Debenham* (4); *Rossiter* v. *Miller* (5).

The expression at the end of the signed documents only contemplates a more formal agreement which will not render the contract invalid; *Parker* v. *Taswell* (6).

The alleged parol agreement was a mere negotiation. *Harding* v. *Stair* (7); Fry on Specific Performance (8).

(1) 36 Ch. D. 695; 38 Ch. D. 130.
(2) 41 Ch. D. 295.
(3) 43 Ch. D. 208.
(4) 45 Ch. D. 481.
(5) 3 App. Cas. 1124.
(6) 2 DeG. & J. 559.
(7) 21 N. S. Rep. 121.
(8) 2 ed. sec. 1006.

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Plaintiff is certainly entitled to recover back the $1,000 which he paid.

Russell Q.C. for the respondent. The parties were never *ad idem*, there being matter to be settled before a complete contract could be made. *Stanley* v. *Dowdeswell* (1); *Honeyman* v. *Marryatt* (2).

The contract was abandoned and a new one made. *Britain* v. *Rossiter* (3); *Leroux* v. *Brown* (4).

Sir W. J. RITCHIE C.J.—I think there was no final arrangement and adjustment of the terms and deeds to be arranged and signed by the first of May then next, as provided by the memorandum of the 9th of April, 1889, and therefore the defendant was justified in refusing to give a deed of the Parker property until such terms were arranged, or at any rate until plaintiff had arranged to release and discharge defendant and his property at the north end, mentioned in the mortgage for $36,000, from such mortgage.

Mr. Justice Ritchie says, and I agree with him, that it is quite evident from the testimony of Mr. Barnhill that the terms which the defendant added to the agreement at his request were only those which had previously been agreed to, and not those which were to be arranged between the parties before the first of May. No other terms were ever afterwards agreed to between plaintiff and defendant; an attempt was made to do so which failed.

And I also agree with him that taking into consideration the position of affairs a good many additional terms required to be arranged so as to make a conclusive agreement.

There is no reference made in either agreement to the mortgage, and according to the terms of that signed

(1) L. R. 10 C. P. 102.
(2) 6 H. L. Cas. 112.
(3) 11 Q. B. D. 123.
(4) 12 C. B. 801.

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by plaintiff he was to pay $42,500 for the land subject to the encumbrances thereon; no provision is made for the payment of the larger portion of the purchase money, and if the mortgage is to be assumed by the plaintiff and taken as part of the purchase money there is no arrangement for obtaining the consent of the mortgagees, or as to the release or other disposal of the north end property. The agreements import the purchase of the fee simple, but the transfer of the leasehold portion is not provided for nor is any provision made in relation to the existing lease and the payment of the rent by the tenants of the defendant, which would have to be settled in some way before the purchase was concluded.

STRONG J.—There would, in my opinion, be no difficulty in holding that the two documents dated the 9th of April, 1889, one signed by the plaintiff and the other by the defendant, when read and construed in the light of the surrounding facts, contained all the essential requisites of a completed contract of sale sufficient to satisfy the requirements of the Statute of Frauds, were it not for the reference to the further arrangement of terms contained in each of them.

When land in mortgage is sold it is, of course, competent to the parties to agree to the sale either of the land itself or of the equity of redemption subject to the encumbrance. It appears that this property was, together with other property belonging to the defendant, subject to a mortgage of $36,000. According to the strict construction of the article signed by the defendant, read without the addition prefaced by the word "terms" subsequently added to it, it would appear that what was intended to be sold was the land for the gross sum of $42,500. The added memorandum, however, shows sufficiently that it was the equity of redemption

subject to the mortgage which was to be sold. This also sufficiently appears from the document signed by the plaintiff where the purchase by him is expressed to be for the price of $42,000 subject to encumbrances. Literally construed this would mean $42,000 over and above the encumbrances, but read in conjunction with the paper signed by the defendant I think it sufficiently appears that what was meant was that the whole price was to be $42,500, and that it was to be subject to the encumbrances the amount of which was to be deducted out of the price.

It is important to distinguish between a sale of the land itself, though in fact subject to encumbrances, and a sale of the equity of redemption the purchaser assuming the encumbrances, inasmuch as the rights of the parties in carrying out the sale are not the same.

If the land itself was sold then, a good title having been shown, or the purchaser having accepted the title, the vendor is bound to procure the concurrence of the mortgagee in the conveyance, he being paid off in the first instance by the vendor or by an appropriation of a sufficient part of the purchase money. The encumbrance in such a case does not constitute an objection to the title but is said to be a matter of conveyancing, that is to say, a matter respecting the completion of the sale by a conveyance. This is the general law and practice which regulates the carrying out of executory contracts of sale, and is always strictly adhered to in English practice and also (in Ontario) in carrying out sales under a decree of the Court of Chancery, though in the case of private contracts the distinction between matters of title and matters of conveyancing is not so strictly observed. This assumes that the vendor is entitled to compel the mortgagor to take his money, that is, the mortgage must be overdue; if this is not so the mortgage

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constitutes an objection to the title and is not a mere matter of conveyancing.

In the case of a sale of an equity of redemption, in other words a sale of land in mortgage upon the terms that the purchaser is to take a conveyance of the mere equity of redemption paying the vendor the specified price for that, a court of equity assumes (unless there is some agreement to the contrary) that the purchaser is to indemnify the vendor against the mortgage if there is any personal liability on his part in respect of it.

As I have said I am of opinion that this was a sale of the equity of redemption subject to the mortgage and therefore the plaintiff would be bound to indemnify the defendant against it. It turns out, however, that this mortgage comprises other lands belonging to the defendant which the plaintiff has not purchased. Now upon the plaintiff paying off the mortgage he would be entitled to an assignment of the mortgage. Supposing this to have been done, what are to be his rights regarding these other lands? Is he to be entitled to turn round and call upon the defendant to redeem the other lands by paying him the full amount of the mortgage money? This, of course, it is out of the question to suppose was ever intended by either party. Or was he to be entitled to insist upon having an apportionment of the mortgage money and a ratable proportion of it according to value charged upon the defendant's other lands which the plaintiff would have to redeem in order to get his own property acquired under this contract of purchase exonerated from the mortgage, or would the defendant be entitled to insist on a reconveyance of his other lands without in any way contributing to the payment of the mortgage money, thus making it compulsory upon the plaintiff, when redeeming the property which is the subject of

the purchase, to redeem the defendant's other lands also, and precluding the plaintiff from making any terms with the mortgagee for partial redemption? I do not say what the rights of the parties would be as regards any of these questions. Perhaps there may be little foundation for any apprehension regarding them, or perhaps the law is clear one way or the other. I only refer to them to show that there were, on the proper construction of the contract as a purchase of the equity of redemption, future questions sure to arise which it was reasonable and proper should be determined by some fixed and settled arrangement in the preliminary contract. If the mortgage had embraced no other lands but those which were the subject of the sale no difficulty could have arisen. The well settled principles of law as administered by courts of equity between vendor and purchaser would have supplied the deficiencies of the written agreements of the parties, and I am far from saying that it would not do so notwithstanding the fact that the mortgage covers these other properties of the defendant. The materiality of what I have endeavoured to point out is with reference to the question of there being a completed and concluded agreement in view of the reference to the arrangement of further terms contained in both the articles, as well that signed by the plaintiff as that signed by the defendant. It appears to me, when we find these questions I have adverted to left outstanding and unprovided for, to be impossible to say that the added terms which were appended by the defendant to the memorandum he signed dispose of all that could be meant to be referred to by the proviso "Terms, deeds, &c., &c., to be arranged by 1st May next," and this is still further strengthened by the word "deeds" in the plural having been used in the corresponding proviso in the article signed by the plaintiff.

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I am of opinion that there never was a concluded agreement between the parties. The appeal must therefore be dismissed with costs.

FOURNIER and TASCHEREAU JJ. concurred in dismissing the appeal.

GWYNNE J.—I retain the opinion I had when this case was argued that the appeal should be dismissed.

PATTERSON J.—The first question in this case, which is raised under the Nova Scotia statute equivalent to the fourth section of the Statute of Frauds, does not seem to me to create any great difficulty.

The defendant wrote with his own hand on the 9th of April, 1889, two memorandums, one of which he signed and gave to the plaintiff, and the other of which the plaintiff signed and the defendant kept. They differed in one respect, but they agreed in the essential matters of the parties to the contract, the land that was sold, and the price of it. The price was $42,000, and the difference between the two papers was that that which the plaintiff signed had the words "subject to the encumbrances thereon," which were not in the other. Those words are capable of meaning that the price named was what the purchaser was to pay in addition to assuming the encumbrances, but they do not necessarily mean that, and they were not intended to have that meaning. The defendant himself swears to that. They may without difficulty be construed according to the real agreement, which was that $36,000 of the price was to be reckoned for with the holder of a mortgage on the land for that amount, and $6,500 paid to the defendant. That was made more clear, if it were necessary to show it upon the face of the papers, by the note added on the same day

by the defendant to the memorandum which he had signed, viz.:

Terms, $500 cash this day, $500 on delivery of the deed of the Parker property. $800 with interest every three months until *the six thousand five hundred* dollars are paid, when the deed of the entire property will be executed.

It is not "until $6,500 are paid," but "until *the* $6,500 are paid." This sum was the margin of purchase money coming to the defendant.

The sufficiency of the memorandum in relation to the statute is disputed principally because of the words "terms, deeds, &c., &c., to be arranged by 1st May next," which it is argued indicate that the agreement was not complete. I think that is a mistaken idea, but it has been the occasion of a good deal of ingenious argument. On the part of the plaintiff it has been urged that when the defendant, on the day of the date of the agreement, added the note which he headed "terms," doing so because asked by the defendant through his solicitor to set down the mode in which the money was to be paid, the arrangement of terms was made which was to have been made by the first of May. The defendant controverts this construction of his act and is right in so doing, as I apprehend the matter. I think he merely put in writing what was already agreed upon, and what the plaintiff understood and acted on when he sent his solicitor to the defendant with money to pay the $500 cash instalment. At all events these terms of payment, whether previously agreed upon or now for the first time settled, became part of the written agreement and no longer remained a matter that could be treated as still to be arranged. The "terms," whatever that word as used in the contract was intended to denote, either never included, or ceased to include, the mode of payment or the time when the conveyances were to be completed. If we

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assume the added note to state what had been previously agreed upon it is plain that the words "terms, deeds, &c., &c.," cannot have been intended to refer to the time when the deeds were to be executed. The first of May was only three weeks off, and the deed of the entire property was not to be executed till the $6,500 was paid, the payments being, as to $5,500 at least, at the rate of $800 every three months. When that sum of $6,500 was all paid the deed was to be *executed*. The expression seems carefully chosen. The arrangements concerning "terms, deeds &c., &c." were to be completed within the three weeks, but the actual execution of the deeds was to be deferred—the deed of the Parker property to be *delivered* when the plaintiff was prepared to pay a second $500, and the other deed *executed* when the whole was paid.

I understand the office of the words in question to be to fix the first of May as the limit for the completion of such matters of conveyancing as investigating titles, settling forms of deeds and other arrangements, including perhaps arrangements with tenants and with the mortgagee, matters essential to the carrying out of the contract but not being a part of the contract which the statute of frauds required to be in writing.

The word "terms" is no doubt a sufficiently comprehensive expression to include terms of payment, but if the terms of payment had been left at large, or if any other terms of like nature were left for future arrangement, the contract would nevertheless be, in my opinion, a complete contract which, being in writing, would satisfy the statute.

As said by Wilde C.J., in *Valpy* v. *Gibson* (1):

> The omission of the particular mode or time of payment, or even of the price itself, does not necessarily invalidate a contract of sale. Goods may be sold, and frequently are sold, when it is the intention of

(1) 4 C. B. 837, 864.

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the parties to bind themselves by a contract which does not specify the price or mode of payment, leaving them to be settled by some future agreement or to be determined by what is reasonable under the circumstances.

In *Ashcroft* v. *Morrin* (1) the offer was to buy goods "on moderate terms." Tindal C.J. said:

> The order here is to send certain quantities of porter and other malt liquors on "moderate terms." Why is not that sufficient? This is the contract between the parties.

In my opinion this written contract satisfies the statute.

It appears that difficulties arose between the parties owing, as I gather, to the discovery that the $36,000 mortgage covered other land of the defendant besides that which the plaintiff was buying, and it was attempted to avoid trouble by making a new agreement by which the plaintiff was to pay $500 less for the land and was to provide for the mortgage debt so as to set free the defendant's land. That new agreement, which was not reduced to writing, was pleaded and was relied on at the trial as having superseded the written contract, but it was shown to have been tentative only and not absolute, depending on contingencies one of which was the ability of the plaintiff to raise the necessary amount of money. There was conflicting evidence as to its having been expressly negotiated without prejudice to the former agreement, but it strikes me as of very little moment whether that was expressed or not. If an absolute agreement was made it would of course supersede the other. They could not both stand, and it would be idle to talk of its being without prejudice. On the other hand the negotiations could not prejudice the existing contract as long as they fell short of a binding agreement. I believe there was no difference of opinion

(1) 4 M. & G. 450.

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on this point in the court below—though upon the question of the original contract opinions were equally divided, Mr. Justice Townshend at the trial and the Chief Justice in *banc* taking one view, and two judges, forming a majority of the court in *banc*, differing from them.

The inclination of my opinion is to restore the judgment pronounced by Mr. Justice Townshend and to allow the appeal, but I do not feel strong enough in that view to formally dissent from the conclusion arrived at by the other members of the court, particularly having regard to the fact that the plaintiff seeks specific performance, his right to which is complicated by the misunderstanding respecting the property covered by the $36,000 mortgage.

Appeal dismissed with costs.

Solicitor for appellant: *J. L. Barnhill.*

Solicitor for respondent: *John T. Ross.*