FRANCIS HECTOR CLERGUE (DEFENDANT) ..... } APPELLANT;

AND

H. H. VIVIAN AND COMPANY (PLAINTIFFS) ..... } RESPONDENTS.

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*March 15.
*April 5.

Contract—Agreement for sale of land—Deferred conveyance—Default in payment—Remedy of vendor—Reading "or" as "and."

Where, in accepting an offer by V. for the sale of land, C. undertook to pay certain instalments of the purchase money before receiving the deed V. could sue for recovery of unpaid instalments, his remedy not being confined to an action in damages for breach of contract. *Laird* v. *Pim* (7 M. & W. 474) distinguished.

The offer having been accepted by C. for "myself or assigns," to avoid holding the contract void for uncertainty as to the purchaser's identity, the word "or" was read as "and." Idington J. dissenting, on this point.

Judgment of the Court of Appeal (16 Ont. L.R. 372) maintaining that of a Divisional Court (15 Ont. L.R. 280) affirmed.

APPEAL from a decision of the Court of Appeal for Ontario(1), affirming the judgment of a Divisional Court(2), in favour of the plaintiffs.

The facts are stated by Mr. Justice Britton in giving judgment after the trial as follows:

"The plaintiffs, by their agent, on June 20th, 1903, offered to sell to the defendant property consisting of 3,066½ acres for $125,000, payable as follows: $500 as a deposit upon signing the agreement, $4,500 upon completion of the purchase, and $120,000, in five yearly

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

(1) 16 Ont. L.R. 372. (2) 15 Ont. L.R. 280.

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instalments of $24,000 each in one, two, three, four and five years from the date of the offer, with interest at 5 per cent. per annum, at the time of each instalment, on the whole amount that might from time to time remain unpaid. The purchase was to be completed on July 15th, 1903, at the office of Lefroy & Boulton, Toronto, and the defendant was then to be given possession. It was further stipulated and made part of the offer that the defendant as soon as he had paid three-fifths of the total purchase money, together with all interest accrued on the whole, should be entitled to call for a transfer of the lands, upon a good and sufficient first charge or mortgage being executed upon the whole of the lands to the vendors, to secure payment to them of the balance of the purchase money and interest. The defendant was to have until July 15th, 1903, to examine the title, etc. The vendors were to pay the proportion of taxes and insurance up to the date of the offer, and after that date the defendant was to assume them. Then the offer contained this special proviso: 'Time shall in all respects be of the essence of the agreement of sale, and unless the payments are punctually made at the time and in the manner above mentioned, and if such default shall occur before the execution of the transfers and of the charge or mortgage above mentioned, the agreement of sale shall be null and void and the sale cancelled, and in that event you shall have no right to recover any part of the purchase money already paid.'

"On June 23rd the defendant accepted the offer in these words: 'I do hereby accept on behalf of myself or assigns the above offer, and do agree to become the purchaser of the lands mentioned in it upon the terms and conditions therein contained. F. H. Clergue.'

"A supplemental agreement was made as to ore extracted from the land before payment in full of the purchase money, but this is not material for consideration in this action.

"On July 15th, 1903, the plaintiffs accepted from the defendant his promissory note for $4,500 at four months from that date, in lieu of the cash instalment, and defendant was allowed to go into possession of the lands. Defendant put a person in charge of these lands as caretaker, and the authority of this person has never been questioned nor countermanded. The note was not paid at maturity, and the plaintiffs recovered judgment for the amount of it and interest, and that judgment has been paid.

"On June 23rd, 1904, there fell due the instalment of principal, $24,000, and interest for one year on $120,000 at 5 per cent., amounting to $6,000, making $30,000. This was not paid.

"On January 19th, 1905, the defendant assigned his rights under the agreement to the Standard Mining Company of Algoma, Limited, and on March 10th, 1905, the plaintiffs, the Standard Mining Company, and the defendant entered into a new agreement, by which the plaintiffs agreed to sell this same property to that company for $125,000, on which the original deposit or payment of $500 by defendant was to be credited.

"Of the balance, the sum of $4,500, together with interest and costs, represented by the judgment against the defendant, was to be paid within one month, and the yearly instalments were to be made on June 23rd in the years 1905, 1906, 1907, 1908 and 1909,

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together with interest, to be computed from June 23rd, 1903. This agreement is a very elaborate and carefully prepared instrument, but it is not necessary for my present purpose to refer to any of its provisions other than the following:

"(1) The mining company was not to be given possession of the lands until the judgment for $4,500, and interest and costs, and a further sum sufficient to make $10,000, had been paid.

"(2) Upon the execution and delivery of that agreement the mining company were for all purposes substituted for and in the place of the defendant with respect to the first agreement (made by offer and acceptance), and the first agreement was to be deemed to be merged in the latter agreement, subject to this, that the latter agreement and anything that might be done thereunder should not affect nor prejudice the claim of the plaintiffs against the defendant in respect of the sums of $24,000 which fell due on June 23rd, 1904, and on June 23rd, 1905, or upon the interest on the unpaid purchase money up to the date of the assignment, viz., January 19th, 1905, or prejudice the right of the defendant with reference thereto; but until the purchasers should pay the first and second instalments of $24,000 each, with interest as aforesaid, the rights of the plaintiffs and defendant should remain as then existing in respect of these instalments and interest. That agreement recited that the plaintiffs made the claim, as now sued for, and that the defendant resisted that claim, asserting that there was not any personal liability on his part for anything beyond the judgment recovered upon his note for $4,500.

"This action is therefore brought to recover the amount due June 23rd, 1904, on principal.....$24,000

"The part of the instalment due June 23rd, 1905—say, seven-twelfths of $24,000.. 14,000

"And interest for one year and seven months from June 23rd, 1903, to January, 19th, 1905, on $120,000—say.... 9,500

"Approximately.....$47,500

His lordship gave judgment for the plaintiffs which was affirmed by the Divisional Court and the Court of Appeal. The defendant then appealed to the Supreme Court of Canada.

Middleton K.C. for the appellant. We rely upon two main defences; (1) that an action will not lie for the purchase price as the vendor has not yet conveyed the lands; and (2) that it was known that the defendant was purchasing for and on behalf of a company, and that it was the intention of both parties that, on the company assuming liability, the defendant should be discharged from all liability. The courts below have erred in holding against us on both defences.

The defendant submits that where a vendor of either land or chattels retains the property in the thing sold he cannot maintain an action for the price. His only remedy is for the damage sustained by the purchaser's default. The courts below have erroneously assumed that the defendant's contention is that the plaintiffs cannot recover at all because the right to recover is in some way dependent upon their readiness to convey or their having conveyed, and have re-

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sorted to cases upon dependent and independent covenants. The defendant's real argument on this branch of the case is that assuming no defence is shewn, the plaintiffs yet having their land can only recover the loss sustained by the breach of contract, that is, the difference between the value of the land and the price agreed on and possibly an allowance for expenses connected with the sale. On this branch of the case we rely on *Laird* v. *Pim*(1); *Moor* v. *Roberts*(2); Dart (7 ed.), page 999; Sugden on Vendors (14 ed.), pages 239-40, and note; *Poole* v. *Hill*(3); *East London Union* v. *Metropolitan Railway Co.*(4); *Pordage* v. *Cole*(5); *Dunlop* v. *Grote*(6); *Thomas and Beatty* v. *Ross*(7); *McArthur* v. *Winslow*(8); Williams "Vendors and Purchasers," pages 937, 958; *Fraser* v. *Ryan* (9); *Cameron* v. *Bradbury*(10).

The same result would follow had the plaintiffs sued for specific performance. The lands would have been sold and the defendant would have been liable for the deficiency.

On the defendant's claim for reformation, the evidence clearly shews that appellant is right.

The court below assumes that the defendant refers to the correspondence after the contract for the purpose of shewing a new contract. The defendant relies upon the correspondence shewing admissions as to what the real bargain was in the first instance. It is in effect admitted by the respondents and by the court

(1) 7 M. & W. 474.
(2) 3 C.B.N.S. 830.
(3) 6 M. & W. 835.
(4) L.R. 4 Ex. 309.
(5) 1 Wm. Saund. 548.
(6) 2 Car. & K. 153.
(7) 19 U.C.Q.B. 370.
(8) 6 U.C.Q.B. 144.
(9) 24 Ont. App. R. 441.
(10) 9 Gr. 67.

below that, if a formal agreement with the Standard Mining Company had been signed before the first instalment fell due, the defendant would not have been liable. The correspondence shews that the company was ready to execute the agreement long before the date in question, and it cannot fairly be argued that the question of the liability of the defendant was to depend on the degree of diligence with which the conveyancing was conducted by the solicitors engaged, and that the defendant was to be made liable because the former documents had not been signed by a named day. Such a construction of the agreement arrived at is contrary to the whole weight of evidence, documentary and oral.

We also refer to *Eastern Counties Rway. Co.* v. *Hawkes*(1); and *Congregation Beth Elohim* v. *Central Presbyterian Church*(2).

Douglas K.C. and *Lefroy K.C.* for the respondents. The rule that no action will lie upon an agreement for the sale of land for the price until the lands have been actually conveyed, or a conveyance tendered, has no application to a case such as this where the agreement of sale provides for payment of the purchase money by annual instalments, and where as here it is expressly agreed that the purchaser is not to be entitled to call for a transfer or conveyance of the land until a certain definite portion of the purchase money has been paid. While the general rule may be that the mutual engagements of the parties to such an agreement are to be considered dependent on each other, the contract may be so worded as to shew that they are

(1) 5 H.L. Cas. 331. (2) 10 Abb. Prac. R. (N.S.) 484.

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independent. The question is to be determined by the intention and meaning of the parties as manifested in the agreement, and the intention that they shall be independent is clearly manifested in the agreement in question. *Pordage* v. *Cole*(1), note 1, page 551; *Yates* v. *Gardiner*(2); *Stavers* v. *Curling*(3), *per* Tindal C.J., at p. 368; *Wilks* v. *Smith*(4), at p. 360; *McDonald* v. *Murray*(5); *Dicker* v. *Jackson*(6); Norton on Deeds (2 ed.), p. 524; Dart on Vendors and Purchasers (7 ed.), vol. 2, p. 1001; *Armstrong* v. *Auger*(7).

The respondents submit that the words "or assigns" do not extend the operation of the agreement beyond what it would possess without them; that they amount to nothing more than saying that if the appellant assigned the benefit of the contract, no objection would be made to his doing so, provided the assignee was acceptable to the vendors, and that they fall far short of an agreement to relieve the purchaser from liability to pay according to the terms of the agreement. It must be borne in mind that the appellant personally agreed to become the purchaser, entered into possession of the property and was in possession thereof when the instalment of purchase money sued for fell due.

The appellant contends that it was expressly understood and agreed that he was not to be personally liable for any amount beyond the deposit and the promissory note for $4,500, and asks to have the agreement reformed accordingly. We submit that no case

(1) 1 Wm. Saund. 548.
(2) 20 L.J. Ex. 327.
(3) 3 Bing. N.C. 355.
(4) 10 M. & W. 355.
(5) 2 O.R. 573; 11 Ont. App. R. 101.
(6) 6 C.B. 103.
(7) 21 O.R. 98.

of mutual mistake on which reformation could be based is made on the evidence; none of the evidence establishes a case for reforming the writing, and this contention was not pressed in the Divisional Court or the Court of Appeal. Pollock on Contracts (7 ed.), pp. 513-515; *Clarke* v. *Joselin*(1).

As to the contention that the respondents elected to cancel the agreement of sale to appellant, inasmuch as they on 27th Jan., 1904, issued a writ of summons against him claiming "damages for breach of contract," the evidence, shews that this action went no farther than the issue and service of the writ, and that so far from its being a cancellation of the contract it was in fact brought for the object of enforcing one of the terms of the contract, viz.: that the current year's taxes upon the lands sold should be apportioned in the usual way between the vendors and the purchaser and that the purchaser should pay the part apportionable for the period between the date of the offer and the end of the year. Moreover, when that action was commenced, no instalment of purchase money had fallen due.

THE CHIEF JUSTICE and DAVIES J. concurred with Anglin J.

IDINGTON J.—I agree with the general reasoning and the result of my brother Anglin's judgment, though I do not think it is a case for reading the "or" as "and."

DUFF J. concurred with Anglin J.

(1) 16 O.R. 68.

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ANGLIN J.—For the reasons given by the learned Chief Justice of Ontario I would dismiss this appeal.

By the terms of his contract the defendant undertook to pay instalments of the purchase money before he should become entitled to a conveyance. As is pointed out by Parke J. in *Yates* v. *Gardiner*(1), in 1851, this fact entirely distinguishes the present case from *Laird* v. *Pim*(2), so much relied upon by the appellant.

Assuming that there was a binding contract effected by Mr. Clergue's acceptance of the plaintiffs' offer, that contract must have been with Mr. Clergue, at all events in the first instance, and, as pointed out by the learned Chief Justice of Ontario, the agreement contains nothing which would warrant the construction that, upon its assignment by Mr. Clergue, his personal liability under it should cease, not only as to accruing instalments but also as to instalments then overdue.

The only suggestion of difficulty in the case is created by the use of the words "F. H. Clergue *or* assigns" in the plaintiffs' offer and of the words "on behalf of himself *or* assigns" in the defendant's acceptance. If the latter words should be read literally it might be doubtful whether there would be a contract at all. An acceptance by A., on behalf of A. or B., leaves it uncertain who is in fact the party accepting. It is manifest that the parties intended in this case to make a contract, and it is equally manifest that, although Mr. Clergue wished the contract to be so framed that it would expressly provide for his right to assign it, he did not intend to oblige himself to make an assignment of it, and he did intend to put himself

(1) 20 L.J. Ex. 327. (2) 7 M. & W. 474.

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in a position, in the event of his not assigning it, to claim the benefit of the contract personally.

There is no doubt of the intention of the parties; and, where sense requires it, there are many cases to shew that we may construe the word "or" into "and," and "and" into "or," in order to effectuate the intent of the parties.

"And there is no case in which any difference has been made as to this point between a will and a deed, when the court are considering how the intention of the parties can be effected." *Per* Lord Kenyon C.J., in *Wright* v. *Kemp*(1), at page 473; see also *Morgan* v. *Thomas*(2), at page 646.

In order to give effect to the intention of the parties the word "or" should be here read "and." So read, the acceptance unquestionably made a contract which became binding upon Mr. Clergue personally. He was bound to pay the instalments as they accrued due, and upon failure to do so was liable to be sued for them. His assignment of the contract, at all events as to matured payments which alone are involved in this action, did not relieve him from liability.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Macdonald, Shepley, Middleton & Donald.*

Solicitor for the respondents: *A. H. F. Lefroy.*

(1) 3 T.R. 470.

(2) 9 Q.B.D. 643.