1921

*June 15.
*Oct. 11.

CLAYTON PETERSON (PLAINTIFF) APPELLANT.

AND

ADELINE BITZER (DEFENDANT) . . RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO.

Contract—Statute of Frauds—Memo. in writing—Implied terms.

An action was brought for specific performance of an agreement contained in the following document: "Received from Clayton Peterson the sum of one hundred dollars on deposit for house at 62 George St., $1,400 payable May 1st, 1920, and balance of $2,300 on 5 year mortgage." A cheque bearing the same date as the above was given to Mrs. B. It read "Pay to the order of Mrs. Adeline Bitzer one hundred dollars deposit on 62 St. George St., at purchase price of $3,800, $1,400 payable on May 1st, 1920, and assume a 5-year mortgage of $2,300.

Held, reversing the judgment of the Appellate Division (48 Ont. L.R. 386) Idington and Duff JJ. dissenting, that the documents could be read together and constituted a sufficient memorandum in writing of a contract of purchase to satisfy the Statute of Frauds; that the date, May 1st, 1920, on which the cash payment was to be made and security given for the balance of the purchase money indicated the time for taking possession; and that a stipulation that the mortgage would bear interest could be implied, the rate to be five per centum as provided by statute.

APPEAL from the decision of the Appellate Division of the Supreme Court of Ontario (1) reversing the judgment at the trial in favour of the plaintiff.

The material facts are stated in the above headnote.

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

(1) 48 Ont. L.R. 386.

G. F. Henderson K.C. and *Hattin* for the appellant. The finding of the trial judge that the parties had reached an agreement should not have been disturbed by the Appellate Division. *Morrow* v. *Ogilvie Flour Mills Co.* (1); *Ruddy* v. *Toronto Eastern Ry. Co.* (2). And see *McKenzie* v. *Walsh* (3).

The receipt and the cheque can be read together. *Doran* v. *McKinnon* (4); *Stokes* v. *Whicher* (5).

The mortgage would bear interest if the contrary is not expressed. *Martin* v. *Jarvis* (6), at page 374; Fry on Specific Performance (5 ed.) paras. 368 and 372.

McKay K.C. for the respondent. The complete agreement must appear in writing. *Douglas* v. *Baynes* (7).

The cheque is not referred to in the memorandum and they cannot be read together. *Stokes* v. *Whicher*(5).

THE CHIEF JUSTICE.—For the reasons stated by Sir William Meredith, Chief Justice of Ontario, in his dissenting opinion in the Appeal Court of Ontario (First Division), in which I fully concur, and to which I have nothing useful to add, I would allow this appeal with costs here and in the Appellate Division and restore the judgment of the trial judge.

IDINGTON J. (dissenting).—The appellant sues for specific performance of an agreement contained in the following:—

(1) [1918] 57 Can. S.C.R. 403.
(2) [1917] 33 D.L.R. 193.
(3) [1920] 61 Can. S.C.R. 312.
(4) 53 Can. S.C.R. 609.
(5) [1920] 1 Ch. 411.
(6) 37 Ont. L. R. 269.
(7) [1908] A.C. 477.

1921

PETERSON v. BITZER.

Idington J.

Kitchener, Ont., Dec. 29, 1919.

Received from Clayton Peterson the sum of one hundred dollars, on deposit for house at 62 St. George St., $1,400 payable May 1st, 1920, and balance of $2,300 on 5 year mortgage.

Adeline Bitzer.

The respondent, besides denying such an agreement as appellant sets up, pleads the Statute of Frauds.

The learned trial judge finds as a matter of fact that the rate of interest was not mentioned or discussed. And I may add from a perusal of the evidence that the question of interest was never spoken of by any one until some time after above foundation for this suit.

That fact seems conclusively established by the evidence of appellant wherein he spoke as follows:—

Q.—Was there any discussion then as to interest on the mortgage? A.—No, there was not.

Q.—The memorandum which is Exhibit No. 1 here, does that contain all that was discussed at that day? A.—Everything.

And more than that it was some days later when having realized that they had not discussed about the driveway to the lot, the size of the lot and the rate of interest, he sought out respondent's son, who had been present at the signing of said receipt (and in fact wrote it as appellant dictated it), and pretends that the son assented to the change he desired made in the receipt.

The said son admits appellant's visit to him where he was working but denies that he assented to any of such changes and further says that appellant wished him to insert words in the receipt to cover said points. This he properly refused to do and said he would tell his mother what appellant said.

It seems to me highly probable that this is the correct version of what transpired on that occasion especially as no more passed between them till a

month later when the said son, on behalf of respondent, tendered back to the appellant the cheque which had never been used or indorsed by respondent.

That cheque reads as follows:—

Kitchener, Ont., Dec. 29, 1919.

To Canadian Bank of Commerce, (Name of Bank)
Waterloo, Ont. (Branch)

Pay to the order of Mrs. Adeline Bitzer, $100.00 (one hundred dollars), deposit on 62 St. George St., at purchase price of $3,800.00, $1,400.00 payable on May 1st, 1920, and assume a 5-year mortgage of $2,300.00.

C. Peterson.

It is attempted to strengthen appellant's case under the above receipt as a compliance with the requirements of the Statute of Frauds by insisting that both must be read together.

If she had used or indorsed this cheque of course that would be a fair argument. Inasmuch as she did neither the cheque, in my opinion, cannot be read as part of what she is presumed to have bound herself by in writing.

In all the cases relied upon herein by appellant in that regard, none as I read them has gone so far.

And in any event it does not help the case made by the receipt in any regard except to indicate that it was a purchase of the property that was involved.

Both read together in any way one may desire do not cover the terms of interest.

I most respectfully submit that without a word said in the bargaining as to interest, a vital part of every bargain of the kind, the court cannot read into this receipt or into both documents taken together, a provision as to interest—either to provide for interest or the rate of interest.

1921

PETERSON v. BITZER.

Idington J.

No case is cited that ever went so far and I venture to think that until this none is to be found so naked as this now presented.

Interest at the statutory rate is implied in many cases determining the sum payable as damages.

But this is of an entirely different character and under a statute that requires the essential features of the bargain to be set forth in a writing binding the party sought to be held liable.

To say that a mortgage necessarily implies the legal rate of interest would surprise many people in some parts of our Dominion where the vendor generally looks for a good deal more than five per cent per annum upon balances of unpaid purchase money.

Nay more, I venture to think if we so decided we would enable dishonest men desiring to take advantage of vendors to act upon this receipt as a model, and try to cheat the unwary vendor out of the difference between five and six, seven or eight per cent per annum.

It is to be observed as said elsewhere that the receipt (by omitting the word "purchase") does not shew that it is for any purchase and hence cases cited such as *Hughes* v. *Parker* (1), shewing the purchase is *prima facie* that of the fee simple, relied upon by the learned trial judge, are not applicable.

And again, the help got from the cheque if it had been so incorporated therewith as it might have been either by indorsement thereof, or an express reference thereto in the receipt, must have regard to the assuming of a mortgage. The only existent mortgage possibly referred to, was that to Magdalena Clemens which bore interest at five and a half per cent, payable semi-annually. And that mortgage happens to be for only two thousand dollars.

(1) 8 M. & W. 244.

One argument might have been raised that as no interest was named the mortgage was to be one without interest, which is by no means an unheard of thing.

Unfortunately for appellant he recognized the omission and says he agreed with young Bitzer for a six per cent rate. And in light of that and other features of the case the courts should not enforce such a claim by directing specific performance.

Yet it is worth while turning the light that way as a means of shewing what change is involved in reading into a contract which is required by law to be in writing something not there but clearly omitted by mistake which would be another ground for refusing specific performance.

There are other features of the case which present difficulties of a kind like unto the interest question, but one such (fatal as I hold) seems to me enough to deal with at such length.

I may in parting from this case point out how the common sense of the appellant led him to realize the mistakes he had made, and need for amending the contract, so called.

And when the alleged contract was repudiated how far beyond what is usual took place in making a tender of deeds and mortgages.

If indeed the case is so clear on the alleged legal authorities and principles of law involved, why did it require so many alternative tenders and such length of exposition in making clear what the tender as made really meant?

I think the appeal should be dismissed with costs.

1921

PETERSON v. BITZER.

Duff J.

DUFF J. (dissenting).—I think this appeal should be dismissed. I agree for the reasons given by Mr. Justice Ferguson that the cheque cannot be looked at and that being so there are essential terms of the contract which are not mentioned in the document relied upon as a memorandum.

BRODEUR J.—The receipt of one hundred dollars signed by Mrs. Bitzer on the 29th of December, 1919, and handed over to the plaintiff Peterson, is a document which contains all the essential terms of a contract for the sale of the property therein mentioned. The parties, property and price are all included. If it was simply an option, as contended by the respondent, it would have been written in a different way. This court which had to construe lately an almost similar document in the case of *McKenzie* v. *Walsh* (1), came to the conclusion that such a receipt complied with the requirements of the statute of frauds.

The receipt in the present case did not specifically mention that the money was paid for the purchase of a property as in *McKenzie* v. *Walsh* (1). But the price stipulated could not apply to a lease of the property. Besides, the cheque which was given by the appellant to the respondent for one hundred dollars ($100), which was accepted and kept for some time by Mrs. Bitzer, was more explicit in that respect than the receipt itself since it specified that it was given for a purchase price.

The two documents, namely, the cheque and the receipt, could be read together. *Doran* v. *McKinnon* (2); *Stokes* v. *Whicher* (3).

(1) 61 Can. S.C.R. 312. (2) 53 Can. S.C.R. 609.
(3) [1920] 1 Ch. 411.

In the last case of *Stokes* v. *Whicher* (1), the document signed by the vendor did not contain the purchaser's name. But as a cheque had been given by the purchaser for the deposit stipulated in the document, it was held that the documents and the cheque could be read together to ascertain the purchaser's name and form a sufficient memorandum to satisfy the Statute of Frauds.

It is contended by Mrs. Bitzer that the document did not contain any date at which possession was to take place.

The 1st of May, 1920, was stipulated as the date at which the cash payment was to be made and at the same time a mortgage was to be given for the balance of the purchase price. In the absence of a contrary intention appearing possession should take place at that date. The date of payment of the purchase money may be regarded as the date of completion (Halsbury, Vol. 25, No. 625).

It is contended also by the respondent, Mrs. Bitzer, that there is no stipulation as to the interest on the mortgage.

A mortgage agreement generally provides for interest. But this is not necessary, for a mortgage whether legal or equitable carries interest although not expressly reserved. *Thompson* v. *Drew* (2).

As to the rate to be paid, our Dominion statute, ch. 120 R.S.C., sec. 2, provides that if no rate is fixed by the agreement the rate shall be five per cent.

For these reasons, I would allow the appeal and restore the judgment of the trial judge with costs of this court and of the court below.

(1) [1920] 1 Ch. 411.

(2) 20 Beav. 49.

1921

PETERSON v. BITZER.

Mignault J.

MIGNAULT J.—For the reasons given by the learned Chief Justice of Ontario, which are perfectly satisfactory to me and in which I express my respectful concurrence, I would allow this appeal with costs here and in the Appellate Division, and restore the judgment of the learned trial judge.

Appeal allowed with costs.

Solicitors for the appellant: *Clement, Clement & Hattin.*

Solicitors for the respondent: *A. L. Bitzer.*