

FRFDERICK B. HAYES (PLAINTIFF).....APPELLANT;

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AND

*Nov. 7.

REMIGIUS ELMSLEY (DEFENDANT).....RESPONDENT.

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ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

*June 14.

Vendor and Purchaser—Agreement to pay interest—Delay—Default of vendor.

Under a contract of purchase of real estate providing that "if from any cause whatever" the purchase money was not paid at a specified time interest should be paid from the date of the contract the vendor is relieved from payment of such interest while the delay in payment is caused by the wilful default of the vendor in performing the obligations imposed upon him.

A contract containing such provision also provided for the payment of the purchase money on delivery of the conveyance to be prepared by the vendor. A conveyance was tendered which the vendee would not accept whereupon the vendor brought suit for rescission of the contract which the court refused on the ground that the conveyance tendered was defective. He then refused to accept the purchase money unless interest from the date of the contract was paid. In an action by the vendee for specific performance :

Held, affirming the decision of the Court of Appeal, that the vendee was not obliged to pay interest from the time the suit for rescission was begun as until it was decided the vendor was asserting the failure of the contract and insisting that he had ceased to be bound by it, and after the decision in that suit he was claiming interest to which he was not entitled, and in both cases the vendee was relieved from obligation to tender the purchase money.

By the terms of the contract the vendor was to remain in possession until the purchase money was paid and receive the rents and profits.

Held, that up to the time the vendor became in default the vendee, by his agreement, was precluded from claiming rents and profits and was not entitled to them after that time as he had been relieved from payment of interest and the purchase money had not been paid.

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

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

The only questions raised on this appeal were whether or not the defendant, under a contract to sell real estate to the plaintiff, was entitled to interest from the date of the contract or for any part of the time since elapsed, and whether or not the plaintiff was entitled to the rents and profits of the said real estate of which he had not paid the purchase money and was never in possession. The circumstances under which these questions arose sufficiently appear from the above head note and the judgment of the court.

Donovan for the appellant.

W. Cassels Q.C. for the respondent.

The judgment of the court was delivered by :—

THE CHIEF JUSTICE.—By the contract dated the 24th November, 1886, the purchase money was to be paid in cash within twenty-one days from that date and on delivery of the conveyance, which was to be prepared by the vendor and delivered free of costs to the purchaser. The vendor was to remain in possession and in receipt of the rents and profits until the payment of the purchase money when the purchaser was to be let into possession. The contract contained the following clause as to interest :

If from any cause whatever the said sum of \$40,000 is not paid within thirty days from the date hereof together with the said proportion of taxes, interest from the said date shall be paid thereon at the rate aforesaid to the vendor, but this stipulation is without prejudice to the vendor's right to cancel the sale as above provided.

The purchaser never having been let into possession his liability to pay interest depends entirely upon the

terms of the agreement. According to these he became liable to pay interest from its date, namely, from the 24th November, 1886, when at the expiration of thirty days from that date he had failed to pay the purchase money. No difficulty arose as to the title; that was perfectly good and accepted as such. It was then for the vendor to take the next step by preparing and tendering a proper conveyance. What was done as to this may be stated in the words of the learned Chief Justice in the case of *Elmsley v. Hayes*, the action for rescission. The learned Chief Justice says:—

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In a very few words I will state why I feel compelled to join in allowing this appeal. On July 6th plaintiff's solicitor sends a draft of conveyance requiring acceptance so as deed can be executed in a week. This draft was fatally defective and impossible for defendant to accept. It was not a mere mistake in writing the word "lessee" for "lessor" but it required the vendee to covenant for the performance of the covenants on the part of the tenant or lessee, thus emphasizing the mistake. The letter reached defendant next day. He delays answering till the 17th and then sends an amended draft. Plaintiff's solicitor on same day returns the draft unopened, declares the contract at an end and files the bill for rescission in three days, viz. : from the 20th July.

It is a well settled rule of the law of vendors and purchasers of real estate as administered by courts of equity, that a purchaser is relieved against an obligation to pay interest imposed by a clause expressed in the same terms as those which are used in this contract, namely, a clause providing that if there shall be delay "from any cause whatever," after a certain date interest shall be paid, when it can be shown that the delay was caused by the wilful default of the vendor (1).

As to what constitutes wilful default on the part of the vendor no exact definition can perhaps be found. It is certainly, however, extensive enough to include

(1) Dart Vendor and Purchaser 6 ed. p. 719; *Greenwood v. Churchill*
 8 Beav. 413.

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what may be called gross negligence to perform obligations which he has imposed upon himself by his contract. It must therefore *a fortiori* comprehend cases in which the vendor is not merely guilty of inaction and neglect, but in which he actually repudiates his agreement altogether, and also cases in which he makes grossly untenable claims and refuses to complete except on the terms that such claims are acceded to. In both these latter respects was the vendor in the present case in default. First, from the date of the action for rescission begun on the 20th July, 1887, until the 10th March, 1891, when that litigation was terminated by the judgment of the Court of Appeal, the vendor, the present respondent, was most energetically asserting the determination of the contract, and insisting that he had ceased to be bound by it. Upon the plainest principles he could not be entitled to claim interest under the contract from a purchaser not in possession nor in receipt of the rents and profits, during the period covered by this litigation. And it makes no difference that during part of this time the purchaser may have been claiming more than he was entitled to; the unfounded claim of the one cannot be set off against that of the other, and it is manifest that during the whole time the respondent was thus seeking a judicial rescission of the contract the appellant was relieved from the obligation of offering to pay the purchase money since the attitude of the respondent in that litigation was a continuous declaration that he would not accept it.

From the termination of the litigation in the first action until the commencement of that for specific performance, now under appeal, the vendor was insisting on terms to which he was not entitled, that is to say, to the payment of interest during the pendency of the action for rescission. This is shown by the course

taken by the respondent in his defence of this action and otherwise. He made this specific claim most distinctly, and down to the date of the present judgment he has by his own course of conduct, if not in words and correspondence too, and by his line of defence herein, always insisted on his right to be paid this interest, so that the appellant was justified in assuming that it was useless to offer to pay the purchase money without the interest thus unjustifiably claimed. I am therefore of opinion that there was continuing wilful default from the 20th July, 1887, down to the date of the present judgment of this court, and that consequently the purchaser cannot be ordered to pay interest during that interval. From the 24th December, 1886, to the 20th July, 1887, or perhaps only to the 17th July, 1887, the purchaser is bound to pay interest, for during that time the respondent was not in default.

The purchaser is not entitled to any account of rents and profits. He had no right to possession until he paid his purchase money and therefore was not entitled to receive any rents and profits, or to possession, down to 20th July, 1887, when the vendor became in default. Since that date he has been relieved from the payment of interest and he could not possibly be entitled to rents and profits for the time during which the purchase money was unpaid and the vendor is deprived of interest. To give him this would be to take from the vendor the fruits both of his estate and the purchase money and would be little less than confiscation.

If the appellant has been damnified by the respondent's refusal to carry out his contract the remedy for that should have been sought in damages and not in an account of rents and profits. Any claim for damages was, however, renounced by the appellant at the trial of the present action.

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The appeal must be allowed to the extent indicated. The appellant is to be declared entitled to specific performance upon payment of the purchase money and interest from 24th November, 1886, to 20th July, 1887, and the respondent must pay the costs in all the courts. In default of payment of purchase money and interest by a day to be fixed in the judgment, the contract is to be declared to be rescinded.

Appeal allowed with costs.

Solicitor for appellant: *Joseph A. Donovan.*

Solicitors for respondent: *Kingstone, Wood & Seymour.*
