MARY STEVENSON AND OTHERS (PLAINTIFFS) ..... } APPELLANTS;

AND

ROBERT H. DAVIS (DEFENDANT).....RESPONDENT.

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*Mar. 20.

*June 24.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Vendor and purchaser—Contract of sale—Interest payable by purchaser—Delay—Duty to prepare conveyance.

A person in possession of land under a contract for purchase by which he agreed to pay the purchase money as soon as the conveyances were ready for delivery and interest thereon from the date of the contract is not relieved from liability for such interest unless the vendor is in wilful default in carrying out his part of the agreement and the purchase money is deposited by the vendee in a bank or other place of deposit in an account separate from his general current account.

The vendor is not in wilful default where delay is caused by the necessity to perfect the title owing to some of the vendors being infants nor by tendering a conveyance to which the vendee took exception but which was altered to his satisfaction while still in the hands of the vendors' agent as an escrow and before it was delivered. Fournier and Taschereau JJ. dissenting.

A provision that the purchase money is to be paid as soon as the conveyance is ready for delivery does not alter the rule that the conveyance should be prepared by the purchaser. Fournier and Taschereau JJ. dissenting.

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 action in this case arose out of a contract for the sale of land in the following terms.

"This memorandum witnesseth that Robert H. Davis, Esq., sheriff, has agreed to purchase from the heirs of

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

(1) 19 Ont. App. R. 591. (2) 21 O.R. 642.

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R. V. Griffith, deceased, the Griffith homestead in North Gayuga, immediately adjacent to the town of Gayuga, containing about sixty acres, being parts of lots 30, 31 and 32, in the first concesssion north of the Talbot road, for the price or sum of $2,000 ; possession to be taken at once by the purchaser, and the purchase money to be paid as soon as the conveyances are ready for delivery; interest to be paid on the purchase money from the date of possession; the purchaser to be paid a fair value for straw and manure taken off the property by R. J. Martin since last autumn, at a valuation satisfactory to both parties."

Under this agreement the defendant Davis entered into possession but the preparation of the conveyance was delayed owing to some of the vendors being infants which rendered it necessary to procure the approval of the official guardian to the conveyance. When it was eventually prepared by the solicitor for the purchaser, but who has been held by the Divisional Court to have been acting for the vendor in preparing it, it was executed and given to the agent of the vendors to deliver to the purchaser who objected to one of its provisions. It was altered, however, to the satisfaction of the purchaser in presence of representatives of both parties and accepted.

On entering into possession of the land the defendant had deposited the amount of the purchase money in the bank to a separate fund, the deposit bearing no interest and after a time he changed the deposit so that it would draw three per cent. On accepting the conveyance he refused to pay any larger amount for interest than he had received for this money and the vendors claiming six per cent from the date of the contract brought this action to recover the same.

The Divisional Court and the Court of Appeal held in favour of the contention of the defendant.

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Donovan for the appellants.

Furlong for the respondent.

The judgment of the majority of the court was delivered by:

THE CHIEF JUSTICE.—This is an action brought by vendors of land against the vendee to recover the purchase money. I am of opinion however, that the rules of decision to be applied, when upon any of the questions arising in such an action there is a difference in the principles heretofore prevailing in courts of law and courts of equity, are to be found in the latter system. This seems to be the effect of the change wrought, not in procedure merely but in the law itself, by section 53, subsection 12, of the Judicature Act.

We must therefore be guided by the rules applied by courts of equity in carrying out purchases of real property, both as regards the obligation to pay interest and also as to the preparation of the conveyance.

By the contract the purchaser, the respondent, was to be let into possession (which was done), he was to pay interest from the date of possession and to pay the purchase money as soon as the conveyances were ready for delivery.

The respondent being in possession and being bound by the contract to pay interest, (reciprocal terms,) he could not according to the established principles of courts of equity be exonerated from his liability for interest so long as he retained the possession, unless he brought himself within two essential conditions. These conditions required first, that the vendors should be in wilful default, a somewhat vague and not very appropriate expression used in such cases. Secondly, that the purchaser should deposit the purchase money in a bank or other proper place of deposit, not to his general current account, but to a

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separate account, so that he might be in a position to retort, when his objection to pay interest was met by the fact that he was enjoying the possession of the land, that he was losing the use of the purchase money.

The second condition the vendor so far complied with when on the 2nd May, 1889, he deposited $1,975 and $87.19 in a bank, of which the plaintiffs' agent, Mr. Mitchell, had notice. The two sums deposited together exceeded the amount of the principal sum due on account of price, and this, on the authority of *Kershaw* v. *Kershaw* (1) would have been sufficient to stop the running of further interest if the first condition I have mentioned had existed, that is if the vendors had been in default. There was not, however, any wilful default on the part of the vendors. Delay was caused in completion by the infancy of some of the vendors and the consequent necessity of obtaining the concurrence of the guardian or officer whose sanction was required to the conveyance. The title in all other respects was perfectly good and there were no objections on that score. It is not suggested that the vendors were guilty of any unreasonable delay in procuring the assent of the officer of the court. And at all events the decision in the case of *De Visme* v. *De Visme* (2) has not been followed and delays caused by the state of the title do not, unless there has been in addition some gross negligence or misconduct, amount to wilful default. It is said, however, that the vendor tendered an insufficient conveyance, a deed that had been avoided by alteration, and one to which other objections were made. I have looked into the point about the alteration and have satisfied myself that it was made before delivery and whilst the deed was a mere escrow in Mitchell's hands, and with the assent

(1) L. R. 9 Eq. 56.

(2) 1 McN. & G. 336.

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of all parties, and therefore that it did not vitiate the deed. (1) I do not, however, dwell on this, nor do I adopt it as a ground of decision.

I say that the vendors were in no default respecting the conveyance. It was not their duty to prepare the conveyance but the duty of the purchaser according to the general practice in all cases in which the agreement of the parties has not made some other provision. No such provision is to be found in this contract for the clause that "the purchase money to be paid as soon as the conveyances are ready for delivery" contains nothing militating against the well-established general rule referred to. It is the duty, indeed it may be called the privilege, of the purchaser to prepare his own conveyance; this, however, when ready for execution the vendor must procure to be executed. The reference in the contract does not imply that the vendors were to be burdened with this duty of preparing the conveyance merely because it speaks of the delay of the conveyance, for that refers to their final execution by delivery and to their delivery to the purchaser after having been prepared by him and executed by the vendors. All that the vendors' agent did then in preparing the instrument which was delivered to him as an *escrow* signed and sealed by the vendors, was in excess of any obligation of the contract and entirely gratuitous on the part of the vendors who consequently were not, by reason of the mistake and alteration, guilty of any default whatever. The delay in completion was entirely the fault of the purchaser himself, in not first preparing his own conveyance and then calling on the vendors to execute it or to procure its execution.

The judgment of the Chief Justice of the Queen's Bench was right in all respects save one. I should

(1) See Elphinstone on Interpretation of Deeds pp. 25-26.

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have thought the plaintiffs entitled to their costs of the action, but that was not and could not have been a subject of appeal. Therefore the appeal must be allowed with costs and the judgments of the Divisional Court and Court of Appeal reversed with costs to the appellants in both these courts, and the judgment of the Chief Justice of the Queen's Bench Division must be restored.

FOURNIER and TASCHEREAU JJ. were of opinion that the appeal should be dismissed.

Appeal allowed with costs.

Solicitor for appellants: *Joseph A. Donovan.*

Solicitors for respondent: *Furlong & Beasley.*