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*April 25.
*June 13.

PATRICK HENRY MURPHY (DEFENDANT) ..... } APPELLANT;

AND

HENRY JOSEPH McSORLEY AND PRINCE EDWARD HOTELS LIMITED (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Contract—Sale of land—Option of purchase in lease—Terms of purchase —Cash payment and "balance to be arranged"—Attempted exercise of option—Want of complete enforceable agreement.

A contract dated October 30, 1926, for lease of premises for one year from November 1, 1926, gave to the lessee (appellant) an option to purchase the premises "for a period of one year from the date hereof at a price of $45,000 with a cash payment of $15,000 and balance to be arranged." Before the end of the year some discussions took place as to terms of payment of the balance but no further agreement was reached. On October 29, 1927 (a Saturday evening), the lessee, stating his intention to purchase (without reference to terms for the balance), tendered $15,000 (accompanied by a letter) as being the first payment under the option, which was not accepted, the lessor (respondent) requiring terms that the balance be "practically cash" or be placed in escrow in the bank pending delivery of title. On October 31 (Monday) the lessee had decided to pay the whole price in cash, but could not find the lessor who was out of town, and, on his return, notified him on November 3 that $45,000 was on deposit in a certain bank and would be paid out in accordance with the terms required. The offer was refused, and the lessee claimed damages for breach of contract.

Held (affirming judgment of the Court of Appeal of British Columbia, 40 B.C. Rep. 403), Newcombe J. dissenting, that the lessee could not succeed. By the option terms the balance of the price was left to be determined by a further understanding between the parties, which did not take place; the lessor's terms not having been accepted on October 29, there was no enforceable agreement; acceptance on November 3 was too late.

Per Newcombe J., dissenting: The expression "balance to be arranged," having regard to the context, was unilateral, and intended only to evidence an obligation of the purchaser, the word "arranged" having the sense of "provided." To convert the option into a contract of sale it was not necessary for the lessee (purchaser) to do more than he did. It involved him in the obligation to provide $30,000 more, to be paid when the lessor (vendor) made out his title; and the passing of the conveyance and payment of said balance should, in ordinary course, take place simultaneously. The lessee had fortified himself

*PRESENT:—Duff, Mignault, Newcombe, Lamont and Smith JJ.

with the money; in other words, he had "arranged" the balance, and it would have been paid but for the lessor's default in rejecting the tender and ignoring the contract.

APPEAL by the defendant from the judgment of the Court of Appeal for British Columbia (1) which, reversing the judgment of Morrison J. (2), dismissed his counterclaim for damages for alleged breach of contract in not carrying out the sale of certain hotel premises in accordance with a certain alleged exercised option to purchase contained in a lease. The material facts of the case are sufficiently stated in the judgments now reported. The appeal was dismissed with costs, Newcombe J. dissenting.

J. W. de B. Farris K.C. for the appellant.

Aimé Geoffrion K.C. and *W. F. Hansford* for the respondents.

The judgment of the majority of the court (Duff, Mignault, Lamont and Smith JJ.) was delivered by

MIGNAULT J.—On the 30th of October, 1926, the parties entered into a contract of lease for one year from the 1st of November, 1926, of an hotel known as the King Edward Hotel in Revelstoke, B.C. The contract gave to the lessee (the appellant) an option to purchase the hotel which reads as follows:—

And the said lessors hereby give to the said lessee the first option to purchase the said lands, premises, furniture and equipment for a period of one year from the date hereof at a price of $45,000 with a cash payment of $15,000 and balance to be arranged.

The present litigation has arisen over an attempt of the appellant to exercise the option granted by this clause, and the whole difficulty is occasioned by the words "balance to be arranged" in the option. It was apparently not intended that more than $15,000 should be paid in cash, and there had to be a further agreement between the parties as to the terms of payment of the balance of the purchase price.

The appellant waited until the year was nearly completed before taking any steps to exercise the option. He had every reason to expect trouble because, on September 17, 1927, the respondent McSorley gave him a written

(1) 40 B.C. Rep. 403; [1928] 3 W.W.R. 589.

(2) (1928) 39 B.C. Rep. 505.

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notice that he had sold to the other respondent, Prince Edward Hotels, Limited, the land and premises, furniture and equipment of the King Edward Hotel at Revelstoke. McSorley had previously asked Murphy to release him on the option, which the latter refused to do. About three months before the end of the year McSorley had asked him what he was going to do, and Murphy replied: "If you tell me what your terms are, I will tell you right now what I can do." McSorley's answer was that the terms would have to be practically cash.

Finally Murphy placed the matter in the hands of a Mr. A. M. Grimmett, a solicitor of Revelstoke. Mr. Grimmett had an interview with McSorley on October 28, 1927, and the latter stated that the terms would be $15,000 cash and the balance placed in escrow pending delivery of title. Mr. Grimmett says:

> I told him that Mr. Murphy did not consider those terms satisfactory; however, would pay him $40,000 cash if, in consideration for giving the cash, Mr. McSorley would throw off $5,000. Mr. McSorley said, "No," that he was definite in his terms, and it would have to be $15,000 cash and the balance placed in the bank in escrow pending delivery of title. We had further discussion as to the advisability of such terms, but Mr. McSorley would not deviate, and I told him that I would place the proposition before Mr. Murphy.

On October 29, a Saturday, during the evening, Mr. Grimmett and Murphy met McSorley by appointment. What ensued may be stated in the words of Mr. Grimmett:

> On the 29th of October I went, in company with Mr. Murphy, to the King Edward Hotel, an appointment having been made with Mr. McSorley for eight o'clock. I waited in the lobby until approximately 8.10, when Mr. McSorley was free, and the three of us went into the ladies' parlour, and Mr. Murphy took a certified cheque, which he had attached to a letter, and offered it to Mr. McSorley, saying "This is the first payment under the terms of the option." Mr. McSorley said, "I won't accept it." He said, "You know my terms. It has to be practically cash,"—or, "you know my terms, the balance to be placed in escrow in the bank." Mr. McSorley then said: "I want to know what Mr. Murphy intends to do." Mr. Murphy said, "I tender you the $15,000 in accordance with the terms of the option and intend to purchase the hotel." Mr. McSorley refused it, and there was nothing said for a few moments. Then I said, "Well, I guess that is all we can do." And another silence for a few moments; I repeated what I said, then got up, and we left.

The letter to which Mr. Grimmett refers reads as follows:

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REVELSTOKE, B.C.,
October 29, 1927.

H. J. MCSORLEY and
King Edward Hotel Ltd.,
Revelstoke, B.C.

Dear Sir:

I herewith tender to you the sum of fifteen thousand dollars ($15,000), by certified cheque, being the first payment under the terms of a certain option to purchase, made between Henry Joseph McSorley and the King Edward Hotel Limited of the one part and Patrick Henry Murphy, of the other part, bearing date the 30th day of October, A.D. 1926.

Yours truly,

P. H. MURPHY.

It appears from the above that the parties separated on the evening of October 29, without having agreed upon the terms of payment of the balance of the purchase price. The next day, Sunday the 30th, was the last day of the year mentioned in the option. On Monday, the 31st October, Murphy had decided to pay the whole purchase price in cash. But he could not find McSorley, who had gone to Vancouver. When the latter returned, Mr. Grimmett notified him, on November 3, that

the sum of $45,000 is now on deposit in the Imperial Bank of Canada at Revelstoke, B.C., and will be paid out to you or the King Edward Hotel Limited in accordance with the terms set out by you on the 29th of October.

McSorley refused to accept this offer, and as Murphy had remained in possession of the hotel after the expiration of the year, he took proceedings with Prince Edward Hotels Limited, to have him ejected. To this action Murphy counterclaimed demanding specific performance of the agreement of sale. The issue under the counterclaim is now reduced to a claim of damages for breach of contract, for Murphy was unable to tie up so large a sum as $45,000 during the litigation.

The learned trial judge (Morrison J.) decided the case in favour of Murphy (1). He said:

Any difficulty which the incidents of the transaction present arises from the words—"balance to be arranged," which appear in the lease. To my mind, it cannot be that the price of $45,000 having been fixed, and $15,000 to be paid in cash, it was intended the balance should also be in cash, as demanded by the plaintiff. The character of the transaction and the knowledge which it is reasonable to find that the plaintiff had of the defendant's financial capacity repel such submission. So that the true

(1) (1928) 39 B.C. Rep. 505.

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meaning of that clause as to the arrangement for the balance would, in my opinion, come within the cases cited in the judgment of Martin J., in the *Townley* case (1).

The balance was to be arranged impliedly upon a reasonable and fair basis. The attitude taken by the plaintiff was, in my opinion, not reasonable or fair. I find there was no waste or neglect on the defendant's part. For ought it appears the plaintiff could have performed his part of the contract, but he would not do so.

This judgment was set aside by the Court of Appeal (Macdonald C.J. and Martin & Galliher JJ.), Mr. Justice Galliher dissenting (2). The substantial ground of reversal, as stated by the learned Chief Justice was that

an agreement which leaves one of the essential terms to be determined by the parties mutually at a future time is unenforceable. It was contended that, since an election to purchase was made within the year, respondent was in time when he notified the appellant of his election. There are two answers to that contention, first, the agreement is void *ab initio*, and secondly, if that be not a sufficient answer, there was an attempt to arrange the terms, which failed; *Godson* v. *Burns* (3); *Bocalter* v. *Hazle* (4).

With the learned trial judge, I am of opinion, as I have already stated, that the understanding of the parties, so far as it had progressed at the time of the lease, was not that if Murphy exercised the option, he should pay the whole price in cash. There was to be a down payment of $15,000, and the balance was to be "arranged," that is to say, its mode of payment, no doubt very imprudently, was left to be determined by a further understanding between the parties, for to "arrange" something is to come to an agreement in respect of it, to settle or adjust it. Unfortunately for the appellant, this further understanding or meeting of the minds did not take place. It is no answer to say that McSorley's attitude was not "fair" or "reasonable." As it takes two to make a bargain, the only way this bargain could have been made would have been by acceptance of McSorley's terms at the interview of October 29. It was too late to accept them on November 3. The court cannot make for the parties a bargain which they themselves did not make in proper time. It follows, with all possible deference for the opinions of the learned trial judge and of Mr. Justice Galliher, that the majority of the Court of

(1) *Townley* v. *City of Vancouver* (1924) 34 B.C. Rep. 201, at pp. 211-212.

(2) 40 B.C. Rep. 403; [1928] 3 W.W.R. 589.

(3) (1919) 58 Can. S.C.R. 404.

(4) (1925) 20 Sask. L.R. 96.

Appeal were right when they rejected the appellant's counterclaim for damages.

The appeal should therefore be dismissed with costs.

NEWCOMBE J. (dissenting).—I would have thought that if, within the year to which the option extended, the appellant had exercised his option and tendered to the respondent McSorley the stipulated price, $45,000 in cash, the latter would have been bound; on the contrary, it is the real foundation of the respondents' case that there was no contract, and that, even in the event which I have assumed, McSorley would have been justified to reject the tender and to deny any obligation—an interpretation which denudes the option clause of any effect; but the construction ought to be otherwise if reasonably possible. It is the duty of the Court to find a reasonable intendment when the words are capable of it, and the contract should be construed *ut res magis valeat quam pereat.*

Now there is not a word expressed in the contract to indicate that, as has been said, the mode of payment was left to be determined by a further understanding between the parties. I repeat the clause:

> And the said lessors hereby give to the said lessee the first option to purchase the said lands, premises, furniture and equipment for a period of one year from the date hereof at a price of $45,000 with a cash payment of $15,000 and balance to be arranged.

What is to be arranged? The balance, that is, $30,000. Who was to do this? I should think, undoubtedly, the purchaser. The expression "balance to be arranged," having regard to the context in which it stands, is unilateral, and intended only to evidence an obligation of the purchaser. The word "arrange," while it often may import a meaning which requires two parties for the effecting of the arrangement, does not necessarily have that meaning; and, in the sense in which it is here used, when you look for the subject of the verb, expressed, as it is, in its passive form, and you find it to be $30,000, it becomes obvious that it was for the appellant to do the arranging. I would give effect to the word, as we find it, in the sense of "provided"; that is an authorized or admissible synonym, and is very frequently used as a convenient equivalent, particularly in business transactions. When a man says, "I will arrange the funds," he means, "I will provide the funds"; and, if he says, "The

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funds will be arranged," in relation to a transaction in which it is implicit that the funds are to come from him, it means nothing but that he will provide the funds.

Then, upon the assumption that an effective purchase would have been contracted by the tender of the purchase price on 28th October, it is clear that the contract was not, upon its face, utterly inefficient; and it is necessary to inquire further as to what was the vendor's position in the circumstances as they existed. In order to convert the option into a contract for sale, it was necessary, according to the stipulations, for the appellant to do no more than he did. The purchaser attended upon the vendor on the penultimate day of the year and tendered the requisite payment of $15,000 in cash, stating that he intended to purchase the hotel. This involved the purchaser in the obligation to provide $30,000 more, to be paid, of course, when the vendor made out his title; and the passing of the conveyance and the payment of the aforesaid balance should, in ordinary course, take place simultaneously. The appellant had fortified himself with the money. In other words, he had arranged the balance, and it would have been paid but for McSorley's default in rejecting the tender and ignoring the contract and his obligations thereunder.

Upon this view of the case, I would allow the appeal.

Appeal dismissed with costs.

Solicitors for the appellant: *Farris, Farris, Stultz & Sloan.*

Solicitors for the respondents: *Harper & Sargent.*