PAINLESS PARKER (PLAINTIFF).....APPELLANT;

AND

NICK KOGOS (DEFENDANT).....RESPONDENT.

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*May 8.
*June 4.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Sale—Agreement—Construction—Interest—Specific performance

On the 20th July, 1922, K. agreed to purchase from J. an immovable for $85,000, payable $6,000 on the execution of the agreement and $79,000 as follows: $6,000, on the 20th July, 1923, 1924, 1925 and 1926, $25,000 on the 20th July, 1927, and the balance on the 20th July, 1928, with interest at 7 per cent, "the amount of the aforesaid deferred payments respectively to be applied first in payment of the interest upon the said purchase money to the date of the respective payments, then towards the said purchase money." K. paid the first instalment due on the date of the agreement and became entitled to possession of the premises. On the 8th of February, 1923, K. agreed to sell to P. the same property for $123,000 payable as follows: $7,000 on the execution of the agreement, $79,000 by assuming the payment of the above balance of purchase money due by K. to J., $28,000 on the 15th of March, 1923, and $1,000 on the 15th of each month, April to December, 1923, with interest at 7 per cent. This last agreement also provided that "all adjustments, including rents (were) to be made as of the 15th day of March, 1923, * * *." Of the first deferred payment of $6,000 payable 20th July, 1923, a sum of $3,605.70 was attributable to interest up to the 15th of March, 1923, upon the purchase money, according to the first agreement of sale. P. withheld the interest earned up to 15th March, 1923, amounting to the aforesaid sum of $3,605.70, claiming that he was entitled to that allowance upon the instalment of $6,000 due 20th July, 1923. K. refused to credit the interest, claiming that P. was not entitled to any deduction. P. sued for specific performance.

Held that, upon the true interpretation of the agreement of sale, P. was not liable for the interest accrued previously to 15th March, 1923, the adjustment date.

APPEAL from the decision of the Court of Appeal for British Columbia, affirming, on equal division of the court, the judgment of the trial judge and dismissing the appellant's action for specific performance of an agreement of sale.

The material facts of the case and the questions at issue are fully stated in the above head-note and in the judgment now reported.

Farris K.C. and *Wismer* for the appellant.

Lafleur K.C. and *Barclay* for the respondent.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.

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The judgment of the court was delivered by

NEWCOMBE J.—By agreement of 20th July, 1922, the defendant (respondent) agreed to purchase from Arthur William Jones and Arthur Philip Luxton, trustees under the will of the late Arthur Wellesley Vowell, deceased, certain real estate in the city of Vancouver for the sum of $85,000 payable, $6,000 on the execution of the agreement, and the balance of $79,000, with interest thereon, or on so much thereof as shall for the time being remain unpaid, at the rate of 7 per cent per annum, computed from 20th July, 1922, in the amounts and at the times following, viz: $6,000 on 20th July, 1923, and the like sum on the same day in 1924, 1925 and 1926; $25,000 on 20th July, 1927, and the balance on 20th July, 1928; and it was moreover provided that

> the amount of the aforesaid deferred payments respectively be applied first in payment of the interest on the said purchase money to the date of the respective payments, then towards the said purchase money.

The respondent paid the first instalment of $6,000 and thus became entitled to and had possession of the premises. Afterwards he agreed to sell the property to the appellant (plaintiff), and by the agreement, dated 8th February, 1923, it was recited that the respondent had agreed to sell the property to the appellant, and the appellant had agreed to purchase it for $123,000,

> payable in manner and on the days and times hereinafter mentioned, that is to say: the sum of seven thousand ($7,000) dollars on the execution of this agreement (the receipt whereof the said vendor doth hereby admit and acknowledge), and the balance payable as follows: $79,000, being the balance due and owing under a certain agreement for the sale and purchase of the said lands dated the 20th day of July, 1922, between Arthur William Jones and Arthur Philip Luxton, trustees under the will of Arthur Wellesley Vowell, deceased, which said agreement and the payments due thereunder the purchaser doth hereby assume, $28,000 on the 15th day of March, 1923, and $1,000 on the 15th day of each of the months of April, May, June, July, August, September, October, November and December, 1923, together with interest at seven (7%) per cent per annum, payable with the last instalment of principal.

Following these recitals the purchaser covenanted with the vendor that he would

> well and truly pay, or cause to be paid, to the vendor the said sums of money above mentioned, together with interest thereon at the rate of 7 per cent per annum both before and after maturity, and on the days and times in manner above mentioned.

It was also agreed in effect that the purchaser should have

possession from the making of his first payment. The agreement contained also the following clause:

> All adjustments, including rents, are to be made as of the 15th day of March, 1923, provided however that the vendor shall not be required to account to the purchaser for any advance rents which he may have collected prior to the date hereof.

It will have been perceived that according to the intent of the agreement of 20th July, 1922, which evidences the respondent's title, and which is described in the case as the Vowell agreement, the deferred payments were to be applied first in payment of the interest upon the purchase money to the respective dates of payment, and then towards the principal; in consequence, according to the figures which were accepted for the purposes of the argument, the first of these deferred payments, amounting to $6,000, which became payable on 20th July, 1923, was, to the extent of $3,605.70, attributable to interest on 15th March upon the purchase money, and it was only the balance which went in reduction of the latter. The appellant had possession from the date of his agreement, 8th February, 1923, and, in view of the adjustment clause, it was not questioned that, if it were intended that the interest should be apportioned, the apportionment should take effect as from the last mentioned date. The defendant maintains however that, according to his understanding of the agreement, interest was not among the adjustments provided for, and that the plaintiff should assume and pay at his own charge the entire instalment of $6,000, which, by the Vowell agreement, became payable on 20th July next following the date of the agreement between the parties to the action. He claimed that this was true upon the interpretation of the latter agreement, or, if otherwise, that the agreement did not in this particular express the intention of the parties, and that it should therefore be reformed; upon the latter issue evidence was introduced.

The learned judge, who pronounced his judgment orally at the trial, found for the respondent upon the interpretation of the agreement, and that upon the appellant's interpretation, the instrument did not carry out the respondent's understanding; but he held moreover that, if it were necessary to reform the instrument in order to give effect to the intention found, he did not consider the evidence strong enough

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because rectification must be of a mutual mistake and it must be proved by satisfactory evidence.

The Court of Appeal was composed of four judges and they were divided in the result. The Chief Justice and M. A. McDonald J.A. would have allowed the appeal for reasons which they state, and which appear to me satisfactory, while Martin J.A. and McPhillips J.A. were for the respondent; they agreed with the trial judge upon the interpretation of the contract, and Martin J.A. moreover expressed the view that a clear case for rectification had been established by the proof to which he referred.

Considerable evidence was taken touching the negotiations which preceded the execution of the agreement, but, in the view which I take of the case, the question will be resolved upon the interpretation of the instrument, and I do not find it necessary to discuss the oral testimony.

It is obviously not the meaning of the recital that the purchaser shall pay to the vendor $79,000 as part of the stipulated purchase price, and also to the Vowell estate the amount said to be due and owing under the agreement of sale from it to the respondent. The parenthesis in the recital,

> which said agreement and the payments due thereunder the purchaser doth hereby assume,

is ancillary; it is evidently introduced as descriptive of the manner and the days and times of payment of the price or sum of $123,000, and it operates to define or to explain these by reference to the Vowell agreement, and to show that what is thus paid under that agreement is paid on the respondent's account and goes in diminution of the purchase price of $123,000. It must be realized that the $79,000, corresponding to the amount of the principal payments undertaken by the respondent in the latter agreement, is treated in the agreement between the parties to the action as a portion of the balance of the consideration money of $123,000, after deducting $7,000, the amount paid on the execution of the agreement, and there is nothing to define the manner or time of payment of the $79,000 except by way of assumption of the Vowell agreement.

The appellant's covenant which is found in the first paragraph of the operative part of his agreement provides that he shall pay to the respondent the sums of money mentioned in the recital, which aggregate exactly $123,000,

with interest at 7 per cent, but upon no principle of construction can this covenant be interpreted to include an obligation for the payment of interest accrued before the making of the agreement or while the vendor had the possession, and which is not included in the sums mentioned in the recital. That interest continues to be the obligation of the latter, to be discharged by him, or to be compensated if paid by the purchaser. The ordinary rule is that the purchaser does not pay interest accrued before the completion of the purchase, *Monro* v. *Taylor* (1), and I do not find anything in the language of the agreement to evince an intention that the appellant shall pay more than the stipulated consideration money of $123,000.

When the accounts came to be adjusted between the parties pursuant to the agreement, on or about 15th March, 1923, the appellant, who was in California, sent Mr. E. A. Parker, the man who looked after the construction of his offices, to pay the $28,000, which fell due at that time, and to see to the adjustments. He and Mr. Boultbee, a real estate agent who was acting for the plaintiff, met the respondent and they had some conversation, resulting in the payment of the $28,000, less $856.08 found payable by the respondent to the appellant, and E. A. Parker then gave the respondent a receipt for the latter amount, which he signed in the appellant's name, and which is expressed to be

> in full of all adjustments re sale Kogos to Parker, lots 25 and 26, block 9, D.L. 196. Balance of deferred payments due from Parker to Kogos, as per agreement of sale, $9,000.

This transaction, which, as has been said, took place on or about 15th March, was of course prior to the payment of the first instalment of $6,000 under the Vowell agreement, which fell due on 20th July following; the appellant was not present at the interview; no adjustment of interest was made or mentioned, and it is contended for the respondent that the fact that an adjustment was made, expressed to be in full, without any reference to the subject of interest, confirms his understanding of the contract that the interest accrued under the Vowell agreement was to be paid by the appellant. On the other side it is said that the agent was not fully instructed, and that, as the interest became pay-

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able only at a later date, it would naturally stand over. It would have been prudent no doubt, and might have been expected, that, if the parties had realized that there was an outstanding question about interest, they would have at least stipulated a reservation in the receipt; but, however that may be, if, as I find, the contract is not ambiguous, the court may not look to this circumstance to aid in its interpretation. A receipt does not operate as a discharge.

As to the question of reformation, I see no reason to disturb the finding of the learned judges, including the trial judge, who considered that the evidence was insufficient. The contract of course binds according to its purport and tenor, and it is upon the respondent, seeking reformation, to show that it ought not to do so. I have considered the evidence very carefully, and not only does it fail to convince me that the instrument does not accurately express the understanding and intention with which the parties executed it, but I think it is reasonably apparent that the appellant did not intend or contemplate at the time that he should become bound for payment of purchase price in excess of $123,000.

For these reasons the appeal should be allowed with costs throughout, the counter-claim should be dismissed with costs, and there should be judgment for the appellant for specific performance of the agreement.

Appeal allowed with costs.

Solicitor for the appellant: *W. W. Walsh.*
Solicitor for the respondent: *E. Meredith.*