ERNEST H. ROOTS AND DAVID W. BROWN (DEFENDANTS) ..... APPELLANTS;

AND

ARTHUR BASIL CAREY (PLAINTIFF) . RESPONDENT.

1913
*Nov. 6.

1914
*Feb. 3.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

*Vendor and purchaser—Agreement for sale of land—Option—Acceptance—Uncertainty as to terms—Condition precedent—Specific performance.*

On 26th November, 1910, R. gave C. a memorandum respecting the sale of his land, as follows: "In consideration of a payment of $10, I agree to give to Major A. B. Carey the option of my quarter-section — N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ½ on the last day of January of each year till paid." On the 20th of January, 1911, a letter was written, by C.'s solicitor, to R., as follows: "Major Carey is prepared to make payment of one-third of purchase price, and we are anxious to close the matter out at once. We would suggest that, rather than give an agreement for sale, you execute a transfer of the land in favour of our client and take a mortgage back for unpaid balance. We would be obliged if you would let us hear from you at once. We would be pleased to prepare the necessary documents, and you can submit same to your solicitor at Medicine Hat."

*Held*, reversing the judgment appealed from (5 Alta. L.R. 125), Davies and Anglin JJ. dissenting, that the memorandum constituted an offer requiring acceptance; that the letter of the solicitor was not an unqualified acceptance of the terms of the contract such as was called for in the circumstances, and that C. was, therefore, not entitled to a decree for specific performance.

APPEAL from the judgment of the Supreme Court of Alberta(1), by which, Simmons J. dissenting, the judgment of Stuart J.(2) was affirmed.

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 5 Alta. L.R. 125.

(2) 2 West. W.R. 677.

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The memorandum and extract from the solicitor's letter above quoted, constituted, in effect, the evidence in support of the plaintiff's claim for specific performance of an alleged agreement for the sale of the lands in question. The trial judge decided in favour of the plaintiff and ordered a decree as prayed for. This judgment was affirmed, Simmons J. dissenting, by the judgment now appealed from.

The questions in issue on the present appeal are discussed in the judgments now reported.

*Travers Lewis K.C.* for the appellant.

*A. H. Clarke K.C.* for the respondent.

THE CHIEF JUSTICE.—This is an action for specific performance of an alleged contract for sale. The question is: Was there a concluded agreement between the parties? It appears by the evidence, written and oral, that on the 26th of November, 1910, the appellant gave to the respondent a memorandum in writing, in the following terms:—

> In consideration of a payment of $10, I agree to give to Major A. B. Carey, the option of my quarter section — N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ⅓ on the last day of January of each year till paid.

This written instrument contains no date, nor does it say when the first cash instalment is to be paid, but the respondent admits, in his evidence, that the first payment was to be made on the 31st of January, 1911. I read the memorandum as an offer which, to become a contract, required to be accepted, and nothing appears to have been done by the respondent to manifest any intention to accept until the 20th of

January, 1911, when his solicitor wrote to the appellant to say:—

> Major Carey is prepared to make payment of one-third of purchase price, and we are anxious to close the matter out at once. We would suggest that, rather than give an agreement for sale, you execute a transfer of the land in favour of our client, and take a mortgage back for unpaid balance. We would be *obliged if you would let us hear from you at once.*

The suggested modification of the terms of the option required the assent of the appellant. No answer was given to this communication, although acknowledged to have been received within the time, and no tender of the cash payment was made until the 20th of March following.

I cannot find in the solicitor's letter evidence of such an unqualified acceptance of his offer as the appellant was entitled to in view of the speculative character of the market in which the transaction took place, and there is no justification of the respondent's failure to pay the first instalment when it fell due.

Briefly, my opinion is that, in the absence of unqualified notice of acceptance within the time (*en temps utile*), and in view of his neglect to pay or tender the money at the date fixed for the first payment, the relation of vendor and purchaser was never established between the parties and, as there was no concluded contract of sale, the foundation of an action for specific performance fails.

I would allow the appeal.

DAVIES J. (dissenting) agreed with Anglin J.

IDINGTON J.—The respondent claims to be entitled to specific performance of an alleged contract of sale

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and purchase which rests upon the following memorandum written by him in his note-book and signed by the appellant Roots:—

In consideration of a payment of $10, I agree to give to Major A. B. Carey the option of my ¼ section, N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ⅓ on the last day of January each year till paid.

E. H. ROOTS.

This remarkable document, it may be observed, can only be made operative and given some sensible meaning by virtue of the implications therein.

To begin with, it does not express that the option is to be one of pre-emption. That may be implied in the phrase "at the rate of $25 per acre." No time is expressed for its acceptance. That also must be supplied by implication. Is it to be taken as within a reasonable time? Or is it to be determined by acceptance on the part of the respondent on or before the 31st of January then next, or acceptance and payment of a cash instalment before that date?

It is clear from the evidence of the respondent that the transaction took place in a speculative market. And that being the case, if a reasonable time is taken as a test, I think that the respondent was too late on the 20th of March following with his then tender of the cash instalment and a binding agreement signed by himself accepting the proposal.

If it is, however, to be taken that an acceptance and payment of the cash instalment on or before the 31st of January are implied as conditions precedent, then, clearly, the respondent is out of court, for no money was offered till the 20th of March. Looking at the surrounding circumstances, I incline to the opinion that such payment on or before the 31st of Janu-

ary, or tender thereof and acceptance of the proposal, were implied.

The parties were entire strangers to each other, and the nominal payment of ten dollars on a transaction of such magnitude suggests, in such case, that it was within the reasonable expectation of the appellant (Roots) that he should not be long bound until something more was forthcoming than mere acceptance by one who might, for aught he knew, be a man of straw.

But, even if this be not quite clear, surely Roots was entitled, at least, to an absolute acceptance before he could be held bound by the establishment of the relation of vendor and purchaser between him and the respondent. Such relationship has always been held as necessary before the offer can be treated as a concluded dealing to which to apply the principle and authorities upon which courts have proceeded in holding that non-payment on the days named was not necessarily fatal.

If the 31st of January is to be taken as the time fixed for the cash payment, then it clearly would be implied that before any such principle can be resorted to enabling waiver or postponement of such fixed date, there must have been ere that an unconditional and absolute acceptance.

But it may be said that this phrase:—

> Balance to be paid ⅓ on the last day of January each year till paid

has no relation to the cash payment and that, for this, no time was fixed.

I, however, interpret this language so used, under the surrounding facts and circumstances, as clearly pointing to the cash payment of one-third on the 31st of January as being intended thereby.

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And, although the interpretation of the writing cannot be affected by the respondent's opinion, it is satisfactory to find from his evidence that this interpretation does him no injustice. He says:—

Q. You were to pay the money by the 31st of January ?
A. Yes; but there was no discussion about that in that way. * *
Q. When was your money to be paid over ?
A. On the 31st of January.

It may also be fair to infer such was also the understanding of Roots.

In the case of *Morrell* v. *Studd & Millington* (1), at page 658, Astbury J. points out that when a written instrument contains no date parol evidence may be given to shew when it was written and from what date it was intended to operate.

In short, I conclude that, in any case, the appellant, Roots, was undoubtedly entitled to an absolute unconditional acceptance on or before the 31st of January, or to be thenceforward released from his offer.

All he got was the following letter:—

Calgary, Canada, Jan. 20, 1911.

R. Roots, Esq.,
Medicine Hat, Alta.

*Re* Major A. B. Carey and yourself — our file 9,588.

*Dear Sir*,—We are acting for Major A. B. Carey who secured an option from you on the north-east quarter of section twenty (20), Township twelve (12), Range five (5), West of the 4th Meridian.

According to the terms of option, Major Carey has to pay one-third of the purchase price on the last day of January each year till the purchase price is paid in full, the purchase price for the land being at the rate of $25 per acre.

Major Carey is prepared to make payment of one-third of purchase price and we are anxious to close the matter out at once.

We would suggest that rather than give an agreement for sale, you execute a transfer of the land in favour of our client and take

(1) (1913) 2 Ch. 648.

a mortgage back for unpaid balance. We would be obliged if you would let us hear from you at once. We will be pleased to prepare the necessary documents and you can submit same to your solicitor at Medicine Hat.

Yours faithfully,

H.A.A./A.M.C. H. A. ALLISON.

This was received by Roots within the time, but never answered. Can it be said that this forms an acceptance of the offer ? Let us test it by seeing how Roots could have availed himself of it in any way.

Could he have acted upon this and succeeded in an action by him against the respondent for specific performance of the contract ?

It seems to me it would have been impossible for him to have succeeded in such an action; apart altogether from any question of the Statute of Frauds.

The letter is framed in such equivocal terms that it could not be said to evidence a contract, sought to be specifically performed, such as Lord Hardwicke said when remarking that

> every agreement of this kind ought to be certain, fair and just in all its parts. See Fry on Specific Performance (5 ed.), part iii., ch. 3, p. 165.

It may have been the purpose of the solicitor writing this letter, in the event of the non-acquiescence of Roots in all he suggested therein, to recede. It may have been that he intended the perfectly proper suggestion he made to be only tentative. How could any court reading the letter say otherwise ?

How could any court say that the respondent intended thereby, if and when he found this modification impossible, to submit to the obvious risks and embarrassments of carrying out this contract as set forth in the meagre terms of the option.

This letter was, evidently, an effort to extricate

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the respondent from the consequences of his foolish form of contract.

It seems to me clear that no action for specific performance would lie in such a case; even if the requirements of the Statute of Frauds were waived and merely the question of a contract or no contract raised.

I have not only considered the cases cited to us, but also a great many more, in the hope of meeting something like this case. I have failed to find one where such an acceptance has been found effective on such a basis as rested upon herein.

Numerous cases can be found wherein mere notice of acceptance of an offer has been held sufficient.

But, in all these the terms of the contract, either expressly or impliedly, when read in light of the surrounding facts and circumstances, including in many cases the actual dealings of the parties, clearly pointed to notice of acceptance as all that was required to make effective the establishment of the relation of vendor and purchaser as between the parties.

This peculiarly ambiguous form of option now in question does not lend itself to such a method of dealing.

I think it called for an express and absolutely unconditional acceptance of the proposal to make it effective.

And it is to be observed that the solicitors of the respondent in this case, when it came to a question of closing the matter, adopted, by tendering an agreement executed by the respondent, this very method.

The tender thus made was, I must hold, too late.

It is not necessary to decide whether or not the acceptance must, in such a case as this, comply with the requirements of the Statute of Frauds and bind the

acceptor in that sense. I incline to think the acceptance in such a case as this should so comply. All I am, however, holding is that a contract is needed and here there was none.

I have purposely abstained from heretofore entering upon the conduct of the appellants in going through the form of Roots selling to Brown.

It seems to me that this cannot have anything to do with the disposal of the merits of the case.

I can conceive of such conduct having influenced one in the position of the respondent, and thus become an element to consider.

But the respondent frankly says, in regard thereto, as follows:—

Q. When did you discover that the defendant Brown had intervened ?

A. It was after the last day of January, but I cannot give you the date without reference to correspondence.

Certainly he was not influenced, within the time limit in question herein by such transactions as the appellant entered into.

It appears that the respondent had, on 3rd December, after getting this option on the 26th of November, registered a caveat to protect it. And, on the 26th of January, Brown's solicitor mailed to the respondent's solicitors a notice calling upon them to proceed to enforce same.

So far from that being an excuse for not acting more promptly, it seems to me it ought to have operated, if properly heeded, as an incentive to take steps to make the acceptance of the option by respondent fall within the time which I hold he was limited to.

The conveyance to Brown was subject to the rights of the respondent. A tender of acceptance of the

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option and of the cash payment ought (as best answer to Brown's solicitor) to have been made to Roots and, possibly, as a precaution, also to Brown as his assignee. There was ample time (if mail, as is to be presumed, in due working order) to have done something on or before the 31st of January, but nothing was done. And there is no evidence that the respondent's solicitors knew of the transaction between the appellants. For aught that appears, the claim by Brown might have rested on an independent title altogether.

We may surmise they searched the registry, but, if so, they acted rather as if abandoning any claim for their client than otherwise. In this whole phase of the matter we are left entirely to conjecture.

I submit, therefore, we are bound to look to the actual knowledge of the respondent and the time thereof relative to any contention on his behalf founded upon the conduct, or misconduct, if you will, of the appellants, as dispensing with anything implied in the contract. That, I repeat, was after the respondent's rights had ceased. I am unable to see what right any one can rest upon the misconduct of another unless by way of clear proof that it has misled him.

I may respectfully observe that the judgment providing for interest or possession seems to savour of making a contract and not that exercise of discretion the court has in such cases.

I think the appeal should be allowed with costs.

DUFF J.—I have come to the conclusion that the rights of the respondent lapsed on the 31st of January, 1911, for non-compliance with the conditions of the memorandum signed by the appellant in November, 1910. From the beginning the respondent has put

forward and acted upon the view that this memorandum constituted an offer by the appellant which was to be open for acceptance until the end of January, 1911; and the basis of his case is that this offer was accepted by a letter addressed to the appellant on the 20th of January. As his case was presented both in the courts below and here it must fail, if that letter was not an unqualified acceptance of the appellant's offer. The memorandum of November is in the following terms:—

Exhibit 1.—In consideration of a payment of $10 I agree to give to Major A. B. Carey the option of my ¼ section, N.E. ¼ of 20, Tp. 12, Medicine Hat, at the rate of $25 per acre. Balance to be paid ⅓ on the last days of January each year till paid.

E. H. ROOTS.

Construing this memorandum as the respondent construes it, as expressing an offer to enter into a contract of sale and purchase on the terms stated, it seems to me that the letter of the 20th of January was not an acceptance of that offer. I take it to be indisputable that an acceptance, in order to be effective, must be an unconditional acceptance in the sense that the person to whom the offer had been made declares his intention presently to enter into a contract with the offeror in the terms of the offer.

Now, the last paragraph of the letter in question is in the following terms:—

We would suggest that rather than give an agreement for sale, you execute a transfer of the land in favour of our client and take a mortgage back for unpaid balance. We would be obliged if you would let us hear from you at once. We will be pleased to prepare the necessary documents and you can submit same to your solicitor at Medicine Hat.

Yours faithfully,

H.A.A./A.M.C. H. A. ALLISON.

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This paragraph seems clearly enough to amount to a statement that the writer considers something more must be done before any of the purchase money is to be paid. It implies very plainly indeed that Roots is to be called upon to execute an agreement for sale. And there can be no manner of doubt that this was entirely in accordance with the expectation of Carey and with the advice which Mr. Allison, the writer, had given to Carey already. It is stated by Carey in his evidence in the most unmistakable way that he did not expect any part of the purchase money to be paid until some further document had been signed by Roots. The memorandum in his possession, he says, was not, as evidence of his interest, sufficiently complete for the purpose of enabling him to dispose of that interest with facility, and he was, of course, as he admits, buying the property only with the object of selling it again at a profit in the immediate future. Carey saw Mr. Allison the day after the memorandum was signed and the subsequent correspondence between them shews that Carey's views were understood by Allison at the time and shared by him. In a letter written on the 21st of January, Allison says:—

Exhibit 10. January 21, 1911.

Major A. C. Carey,
209 Lendrum St.,
Winnipeg, Man.

*Dear Sir,*—Referring to your letter of the 11th inst. and my reply thereto, I beg to say that I infer from your letter that you do not desire to pay for land in full, especially as option does not say anything in regard to interest, and that you only desire to pay one-third of the purchase price and enter into an agreement for sale, or accept title and give a mortgage for unpaid balance.

The subsequent proceedings shew that Mr. Allison fully realized the importance of getting from Roots

a document more precise and more serviceable for Carey's purposes than the one he already had.

To return to the letter of the 20th of January: The last paragraph being such as it was, let us read the preceding paragraph in connection with it.

> Major Carey is prepared to make payment of one-third of purchase price and we are anxious to close the matter out at once.

The writer, in this paragraph, does not declare in terms that he accepts the offer or that he there and then binds himself to a contract in the terms of the offer. Then, is an acceptance of the offer necessarily implied in the statement that Carey is prepared to pay one-third of the purchase price, and that the solicitors are anxious to "close the matter out" at once? There seems to be no such implication. The letter is not accompanied by a cheque for the instalment of the purchase money which, assuming the offer accepted, would be payable on the 31st of January, and the letter does not appear to have reached its destination until the 24th of January. In the circumstances "we are anxious to close the matter out at once," especially when taken with the paragraph to which I have just referred, would seem calculated to convey an intimation that, in the view of the respondent's solicitors, the payment of one-third of the purchase money to which the letter refers was a part only of some operation described as "closing out the matter," which operation would involve the execution of some additional document. In a word, I do not think this letter does express unequivocally an intention to assume *simpliciter* the obligations involved in the acceptance of the offer, viz., to pay the residue of the purchase money according to the terms stated; and, looking at all the circumstances, I think

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the proper inference is that it was not intended to do so.

On this ground alone, I think the appeal ought to be allowed.

There is, however, another possible construction of the memorandum of November on which, perhaps, something ought to be said. It seems capable of being read as intended to embody a present agreement in consideration of the payment of ten dollars on the part of Roots to convey to Carey the lands mentioned, on the payment of the purchase price according to the terms stated. According to this view, the document would express the terms of a concluded bargain under which Carey had assumed no obligation for the future. On this construction of the document, punctual performance by Carey of the conditions as to payment according to the letter of the agreement would be an essential condition of his right to demand a conveyance; and as the payment due on the 31st of January was not made, it would be incumbent upon the respondent to establish facts precluding the appellant from insisting upon the strict performance of the condition. The learned trial judge appears to have held that, inasmuch as Roots had, in December, conveyed the land to the defendant Brown, he had thereby disabled himself from carrying out the contract and that this would be sufficient to excuse the respondent from the strict performance of the condition. It may very well be that on discovery of the conveyance to Brown, the respondent could have treated the execution of the conveyance as a breach of the contract embodied in the memorandum of November and have sued for damages; but the respondent comes into court declaring that he has a subsisting and binding agreement of sale

and purchase; and non-performance of one of the essential conditions of his rights under that contract must be fatal to him unless he can establish some valid ground of dispensation. The fact that the appellant has made default in the performance of his obligations even though it should be of such a character as to entitle the respondent to treat the agreement as rescinded, does not afford such a ground unless the respondent can also shew that he was thereby prevented from performing the condition in respect of which he is in default himself. The respondent has made no attempt to shew that. We do not know even that he was aware of the fact of the conveyance having been made before the 31st of January. If he did, as Chief Justice Harvey appears to assume, receive notice of the conveyance, there was nothing to prevent him paying the money to Brown, as he clearly would have been entitled to do. *Ex parte Rabbidge*(1), at p. 370; *Re Taylor*(2), at page 573. If he was not aware of it, then there is no explanation of his failure to pay Roots which would have been perfectly safe, of course, in absence of any intimation from Brown that he had become the owner of the property. In my opinion, the truth is, as I have already intimated, that, on the 31st of January, when the first instalment of the purchase money became due, the respondent had no intention of taking up the option unless he obtained some further instrument which would afford entirely satisfactory evidence of a concluded agreement of sale and purchase, having regard to the object he had in view, viz., a re-sale of the property at the first favourable opportunity.

(1) 8 Ch. D. 367.

(2) (1910) 1 K.B. 562.

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It ought further to be observed that the respondent does not by his pleadings allege that he was prevented from performing his condition by the act of the appellant or that the appellant's conduct was such as to preclude him from alleging non-performance of the condition. He alleges a contract concluded by the acceptance (so called) of the 20th of January. The paragraphs of the statement of claim bearing upon this point are paragraphs 4, 5, and 6, as follows:—

4. Prior to the 31st of January, A.D. 1911, the plaintiff duly accepted the said option or agreement.

5. The said defendant Roots refused to carry out the terms of the said option or agreement, and, by transfer bearing date the 3rd day of December, A.D. 1910, transferred said land to the said defendant Brown, which said transfer was registered in said land titles office on the 17th day of December, at 12.40 p.m., as 1,659 AF., and the defendant Brown thereby became and still is the registered owner of said land.

6. On the 21st day of March, A.D. 1911, the plaintiff tendered the defendant Roots an agreement for sale and purchase in duplicate, covering the said lands and embodying all the terms of said option or agreement, both copies of which said agreement for sale and purchase were duly executed by the plaintiff, and, at the same time, tendered to the said defendant Roots the sum of $1,347.19 and demanded execution of said agreement for sale and purchase, and the said defendant Roots thereupon refused to execute said agreement and to accept the said sum of $1,347.19.

No amendment was asked for at the trial and I am unable to find, from a careful perusal of the record, that it was suggested at the trial that any act done by the appellant had prevented the performance of the condition by the respondent. It is important to note this for this reason. In the court of appeal, the learned Chief Justice appears to have considered he was justified in inferring that the notice sent by Brown to the respondent was the cause of the failure on the part of the respondent to pay the purchase money. I have already said that, in my opinion, such

is not the proper inference from all the evidence. What I now desire to emphasize is that no such inference ought to be drawn unless it were clear that all the material evidence was before us, as the point was neither pleaded nor was the evidence directed to it at the trial.

In these circumstances I think the appeal should be allowed and the respondent's action dismissed with costs.

ANGLIN J. (dissenting).—I regard the plaintiff's solicitor's letter of the 20th of January, 1911, as an unconditional acceptance of the option given to the plaintiff by the defendant. The mere suggestion that the transaction should be carried out by the exchange of a deed and mortgage did not make the acceptance conditional. The contention that it did is purely an afterthought.

It was not so regarded at the time. As the defendant, Roots, himself admitted on his examination for discovery, he proceeded, on a statement of Brown, to whom he had resold the land before the 20th of January, that the option given Carey was no good, and he adds that his sole ground for repudiating his contract with Carey was that he was obtaining $1,000 more for the land from Brown.

Payment of the money due on the 31st of January, 1911, was not a condition of a valid acceptance under the terms of the option. From the time of the receipt by the defendant of the letter of the 20th of January, the relation of vendor and purchaser subsisted between the parties.

Time was not expressly made of the essence of the agreement so constituted. But if, for any reason, it

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should be deemed to be so, I am of the opinion that the defendant waived tender of the instalment due on the 31st of January. He handed over to Brown the plaintiff's letter of the 20th of January telling him that it was his business to attend to it. Brown, on the 26th of January, caused a notice to be sent by mail to Carey requiring him to take proceedings within sixty days to establish his right to maintain a caveat which he had lodged. The Chief Justice, sitting in full court, expressed the view that Brown's notice reached the plaintiff's solicitors on or about the 28th of January. That notice informed the plaintiff that Roots had transferred his interest in the land to Brown and that the plaintiff's rights under his own option were contested. It was tantamount to a repudiation of Roots's contract with the plaintiff and, under the circumstances, may well be regarded as the act of Roots himself. I think the plaintiff's right of action accrued immediately upon this notice being given and that he was not obliged to make tender before bringing it. Tender was in fact made on the 20th of March. The reason for the delay is not explained though it is more than suggested that an explanation might have been given by the plaintiff's solicitor, who was, unfortunately, ill and not available as a witness.

In my opinion there was a binding contract, and no good reason has been shewn why it should not be carried out.

I would dismiss the appeal with costs.

*Appeal allowed with costs.*

Solicitors for the appellants: *Mahaffy & Blackstock.*
Solicitors for the respondent: *Clarke, McCarthy, Carson & Macleod.*