1913
*Nov. 4.
1914
*Jan. 21.

SAMUEL W. D. FRITH (PLAINTIFF) . . APPELLANT;

AND

THE ALLIANCE INVESTMENT COMPANY (DEFENDANTS) . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA.

Sale of lands—Contract—Agreement for re-sale—Novation—Rescission — Specific performance—Defence to action—Practice—Evidence—Statute of Frauds—Principal and agent—Agent purchasing—Disclosure—Findings of fact.

In a suit for specific performance of a contract for the sale of lands an agreement for the re-sale of the lands may be set up as a defence notwithstanding that such re-sale agreement does not satisfy the requirements of the 4th section of the Statute of Frauds. Judgment appealed from (10 D.L.R. 765) affirmed.

Such an agreement for re-sale affords a sufficient reason for refusing a decree for specific performance of the original contract for sale.

The Supreme Court of Canada refused to review the finding of the courts below that the defendants, while agents for the sale of the property in question, when purchasing it themselves under the contract for re-sale, had discharged their duty towards the plaintiff in regard to disclosure of material facts relating to the value of the property.

Per Davies and Idington JJ. — Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together the effect of the second agreement is to rescind the first.

APPEAL from the judgment of the Supreme Court of Alberta (1), affirming the judgment of Harvey C.J., at the trial (2), by which the plaintiff's action was dismissed with costs and the counterclaim of the defendants was disallowed without costs.

The action was brought by the appellant for speci-

(1) 10 D.L.R. 765. (2) 4 Alta. L.R. 238.

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fic performance of an agreement by the company to sell certain lots in Calgary, Alta., to him. Being dissatisfied with the situation of the property the plaintiff had listed it for sale with the company which, being unable to secure a purchaser, offered to buy the property back and, owing to what took place between them, the defence of the company was that the appellant had re-sold the property to them and they relied upon this also by counterclaiming for specific performance of the alleged agreement by the appellant to re-sell the property to them. At the trial Chief Justice Harvey dismissed the plaintiff's action with costs, and, on account of the agreement for re-sale being ambiguous and not available as a memorandum in writing within the Statute of Frauds, the counterclaim was disallowed without costs. It was also contended, on the appeal, that the defendants were in a fiduciary relationship towards the appellant; that they had information as to increased value of the property which they did not communicate to the appellant, and that, on the whole evidence, there should have been a decree for specific performance of the agreement to sell to him.

W. B. A. Ritchie K.C. and *J. Leslie Jennison K.C.* for the appellant.

Aimé Geoffrion for the respondents.

THE CHIEF JUSTICE.—I have had an opportunity of reading the notes of Mr. Justice Anglin and I agree that this appeal should be dismissed for the reasons stated by him.

DAVIES J.—I concur in dismissing this appeal for the reasons stated by Mr. Justice Idington.

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IDINGTON J.—The appellant bought from the respondent, for $641.25, some property, of speculative value, paid part of the price, complained of its being unprofitable, listed it with respondent to re-sell at $900, and, respondent's officials, concluding it was good value at that, decided on behalf of respondent to offer the appellant this price on the terms in his listing, but varied the terms so as to please him, and, so varied, he accepted the offer.

The first transaction is in writing, and so is the last also, but ambiguously so, by reason of the cancellation of some words in the receipt rendering it doubtful if it fulfils the requirements of the Statute of Frauds.

This defect arose from the effort of the respondent to so vary it as to meet appellant's views.

He seeks specific performance of his contract to purchase, whilst repudiating his contract to re-sell to his vendor; after having for a month $50 of respondent's money in his pocket and having enjoyed its forbearance during that month and many previous months in regard to his overdue payments under the contract he sues on.

The parties, instead of simplifying matters by striking a balance between them and making one transaction of these two, let each contract take care of itself, and thus left it open for appellant, by way of experimental litigation, to claim that he was entitled to specific performance of his contract, in April, when the last payment should fall due thereunder, and that respondent could not set up this contract of re-sale to his vendors either as rescission of the first or an answer to the claim for specific performance.

I think it is quite possible to hold that, in light of

all that transpired between the parties, rescission is, in truth, what they intended, subject merely to this, that the ultimate result of the financial adjustment (balancing accounts as the respondent's payments fell due and were made) should be left to work itself out in the few months that they had to run.

Such conditional rescission might well be treated as a complete answer to the claim for specific performance.

For purposes, not involving the bringing of an action, a contract falling within the fourth section of the Statute of Frauds is valid if otherwise binding and not illegal.

Such a contract may and has often been held a complete answer by way of defence to an action for specific performance, and the cases so maintaining were cited in argument before us and relied upon herein and in the courts below.

It is urged, however, with some force, that, however that may be, when the new contract involves rescission, it cannot be so in a case where the parties contemplated the continued existence of the contract.

It is always desirable to look at the substance of what the parties in litigation had in view in their transactions out of which the litigation has arisen, and to discard, if possible, the mere form of expression, if clearly but a mere form of expression.

It is upon this or something like this principle that the legal rights of these parties must be decided.

It is laid down in Fry on Specific Performance (4 ed.), section 1031, thus:—

> Where the parties to a contract come to a fresh agreement of such a kind that the two cannot stand together, the effect of the second agreement is to rescind the first. This is one form of *novatio* in Roman law.

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He then reviews a number of authorities and in conclusion, in section 1039, says, as follows:—

> But where the new contract is relied on only as an extinguishment of the old one, the mere fact that it is not in writing, and so could not be put in suit, seems to be no ground for denying its effect in rescinding the original contract. The Statute of Frauds does not make the parol contract void, but only prevents an action upon it; and it does not seem to be necessary to the extinction of one contract by another that the second contract could be actively enforced. The point has never, it is believed, been matter of decision. But, in point of principle, it seems to stand on the same footing as a simple agreement to rescind.

I think his conclusion fits this case and puts the principle on which it must be decided in its true light.

Again, let us assume the receipt in question herein constitutes a compliance with the Statute of Frauds, and the appellant's action was resisted upon no other ground than thus furnished: Does any one believe that a court proceeding upon the fundamental principles upon which the right to specific performance rests, would listen to such a claim for a moment — as to enforce a conveyance in April when clearly there must be a re-conveyance in August following ?

Such a thing, I imagine, would be treated by a court so appealed to as most palpably trifling.

Then, if the written contract of re-sale is a bar, so must the oral one, or partly written partly oral, be a complete defence upon the authority of the cases cited.

And, as to the question springing from the relation of principal and agent, I do not think on the evidence before us there is anything open to the appellant herein.

There was no concealment by respondent, no failure on respondent's part to disclose anything known

to it, but unknown to appellant. Each used his own judgment. The respondent's may have been better than that of the appellant, but that is always liable to happen.

The law has not pushed the principles governing the relation of principal and agent so far as to preclude that sort of thing, or it would render it impossible for an agent ever to buy from his principal.

The dealing must be fair, but is not impossible.

And the evidence of the opinion of others next day in regard to values in a highly speculative market can be of no value, standing alone, as a test of what is fair.

The appellant was a speculator himself and his opinion is just as good. See *Kelly* v. *Enderton*(1).

The appeal should be dismissed with costs.

DUFF J.—I have come to the conclusion that, in the absence of any defence based upon the 4th section of the Statute of Frauds, the respondents would be entitled to enforce against the appellant the agreement of the 18th of February. The real question is whether (there being no memorandum sufficient under that enactment) that agreement was an answer to the appellant's action. At the date of the trial, 7th February, 1912, the respondents would have been entitled under the terms of the agreement of February, 1911 (assuming that agreement enforceable) to demand an assignment of the appellant's interest in the lands on payment of the purchase price; and, in these circumstances, I think the Chief Justice of Alberta was right in refusing specific performance of the earlier agreement.

(1) [1913] A.C. 191.

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I shall assume that, under the law of Alberta, the appellant, by virtue of the agreement of April, 1910, acquired before the second agreement was entered into an interest in the lands in question that would be an "interest in lands" within the meaning of the Statute of Frauds (4th section). The law of England is clear enough that a purchaser under an agreement for the sale of lands still *in fieri*, the circumstances being such that on the performance of his obligations he would be entitled to a decree for specific performance of it, has such an interest in the land; but the interest is an equitable interest and it rests upon the fact that there is an agreement of sale in respect of which a court of equity would decree specific performance. The existence of an agreement enforceable by action at law only would not vest in him an interest in the land. Primarily the equitable rights were rights *in personam*, but the peculiar nature and efficacy of the remedies available in the Court of Chancery for the enforcement of such rights together with the effect of the equitable doctrine of notice, in enormously widening the field over which rights *in personam* would otherwise have been enforceable, eventually led in certain cases to such rights being regarded as *jura in re* and protected as rights of ownership. But every merely equitable right of ownership or interest in the property owes its vitality to the jurisdiction of the Court of Chancery.

The question to be determined here is whether, notwithstanding the agreement of February, 1911, the appellant is entitled to demand the exercise of that jurisdiction by way of decreeing specific execution of the contract of April, 1910. I concur with Har-

vey C.J. in thinking that the existence of the subsequent agreement is a proper ground for refusing the equitable remedy.

All the other points resolve themselves in questions of costs in regard to which this court ought not to intervene.

ANGLIN J.—There is much in the circumstances under which the defendants procured from the plaintiff the contract for the re-sale of the property in question that is calculated to arouse a suspicion that they failed to make to him that full disclosure of material facts which is incumbent on agents for sale when they themselves become purchasers. But the trial judge has said that it was

established to my entire satisfaction that the plaintiff knew he was dealing with the defendants as purchasers, and that no advantage whatever had been taken of him.

Although, in appeal, Mr. Justice Walsh expressed his dislike of

at least one incident in connection with the dealings between the parties on this re-sale,

he accepted, as did Mr. Justice Scott and Mr. Justice Simmons, "the findings of fact adverse to the plaintiff." While not satisfied that, if I had been presiding at the trial of this action, I should, upon my present appreciation of the evidence, have reached the conclusion that the defendants had fully discharged their duty to the plaintiff as his agents, I am not prepared to reverse the concurrent finding of two courts upon that point, which must to a considerable extent, in the case of the learned trial judge, have rested upon the view taken by him of the credibility and weight of the testimony of the several witnesses.

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On the other branch of the case, while, in my opinion, the contract of re-sale did not effect and was not intended to effect a rescission of the original contract — the terms of the re-sale contract, the conduct of the parties in regard to the payments and the retention by the defendants of the purchase money paid on the original contract make that very clear — I do not think the plaintiff is entitled to invoke the exercise of the equitable jurisdiction of the court to decree specific performance. He made a contract of re-sale which is unenforceable by action only because an ambiguity in the receipt which he gave for the first instalment of the purchase money renders it insufficient as a memorandum to satisfy the requirements of the fourth section of the Statute of Frauds. Under that contract, if enforceable, the defendants would be entitled on their counterclaim to a decree for specific performance of it and a re-conveyance to them of the property in question concurrently with the decree which the plaintiff claims requiring the defendants to convey the same property to him. Under such circumstances the court should not, I think, decree specific performance in favour of the plaintiff. While not available to support an action, the contract of re-sale may be used as a defence. To that the Statute of Frauds offers no obstacle. Given as a defence the effect which it would have had in an action upon it, if properly evidenced, the contract of re-sale affords a sufficient answer to the plaintiff's claim to a decree for specific performance.

Whatever may be thought of the conduct of the defendants, the plaintiff's own course of dealing in

this matter was not such as to entitle him to any special consideration from a court of equity.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

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Anglin J.

Solicitor for the appellant: *W. R. McLaurin.*
Solicitor for the respondent: *W. T. D. Lathwell.*