Supreme Court of Canada
Simson v. Young, (1918) 56 S.C.R. 388
Date: 1918-03-25

James Simson and John Macfarlane (Plaintiffs) Appellants;

and

Eileen Young (Defendant) Respondent

1918: March 5, 25.

Present:—Sir Charles Fitzpatrick C.J. and Idington, Anglin and Brodeur JJ.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA.

Sale of land—Foreign vendor—Agreement for sale—-Place of completion—Time essence of agreement—Extension of time—Waiver.

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Y., residing in Ireland, through an agent in Calgary listed land there for sale with a real estate broker. An agreement by S. to purchase this land, signed by the broker for Y., provided for a part payment in cash to be forfeited to the vendor and the contract to be null and void if the balance was not paid in one year time to be of the essence of the contract. When the balance became due March 1914, S. went to the broker to complete the purchase but was told that the conveyance had to be sent to Ireland for execution and to return in six weeks which he did and found the situation the same Subsequent inquiries succeeded no better and in December 1914, he formally tendered the money to the broker and shortly after wrote to Y. at Belfast repudiating the agreement and demanding the return of the money paid under it. Receiving no reply, in January, 1915, he took an action for rescission and repayment of the money in which Y. by counterclaim asked for specific performance. In February Y. tendered a conveyance of the land to S.

Held, that while' no place was named in the agreement for completion of the purchase it was to take place at Calgary and as Y. was to prepare the conveyance it was her duty to have it there for delivery to S. at the appointed time.

Held, also, that the assent by S. to the request of the broker to wait after the time of completion for the conveyance could not be considered an agreement for extension nor evidence of an intention not to rescind.

In the agreement the address of the vendor was given as Belfast, Ireland, instead of Dublin where she lived and the vendee's letter of repudiation sent to Belfast was not delivered

Held, Fitzpatrick C.J. dissenting, that this and other circumstances absolved the vendee from the duty of giving notice fixing a reasonable time within which the purchase must be completed or the contract be at an end.

Held, per Anglin J.—The stipulation in the agreement that "time shall be the essence of this agreement" was binding on both parties though the vendee alone was to be penalized for its non-observance.

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APPEAL from a decision of the Appellate Division of the Supreme Court of Alberta[1] reversing the judgment on the trial in favour of the plaintiff.

The material facts of the case and the circumstances on which the issues depend will be found in the above head-note.

Geo. H. Ross K.C. and *Barron* for the appellants.

The vendor was to prepare and tender the conveyance and her default as to this precludes her from setting up the vendee's default as to payment. *Foster* v. *Anderson*[2]*, per* Anglin J. at p. 574.

In a contract such as this if either party make default specific performance will not be decreed. *Steedman* v. *Drinkle*[3]*, Brickies* v. *Snell*[4]*.*

The provision that time should be the essence of the agreement applies, to both parties. *Foster* v. *Anderson*[5]*.*

The tender of the conveyance was too late to have effect. *In re Head's Trustees*[6].

The contract was to be carried out in Calgary and the vendor's duty was to be in a position to complete the purchase there. *Tasker* v. *Bartlett*[7]*,* at p. 363.

J. A Ritchie and A. B. Mackay for the respondent. The broker had no authority to do more than procure a purchaser. See Bowstead on Agency (5th ed.) pp. 79 and 101.

Plaintiffs by conduct waived the rights to claim that time was the essence of the agreement. See

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Drinkle v. Steedman[8], *Macarthur v. Leckie*[9], *McDonald v. Garrett*[10], at p. 611.

THE CHIEF JUSTICE (dissenting)**.—**The respondent is a married woman resident in Ireland; she had a brother, one Robinson, who, prior to the occurrence leading up to this action, was for some time in Calgary, engaged in the office of Messrs. Wilkinson & Boyes, real estate agents in that city. Probably through this brother of hers, though I do not think the fact appears from the record, Mrs. Young contracted for the purchase of the city lots in question in this suit; at any rate, he listed them for resale with Messrs. Wilkinson & Boyes. It was, of course, a speculative purchase.

Mr. Wilkinson approached the appellants who were then carrying on business as building contractors in Calgary and eventually effected a sale which was carried out by the agreement of the 8th of March, 1913. The appellants paid the $1,550 on the execution of

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[1] 10 Alta. L.R. 310.
[2] 16 Ont. L.R. 565.
[3] [1916] 1 A.C. 275.
[4] [1916] 2 A.C. 599.
[5] 16 Ont. L.R. 565; 42 Can. S.C.R. 251.
[6] 45 Ch. D. 310.
[7] 59 Mass. 359.
[8] [1916] 1 A.C. 275.
[9] 9 Man. R. 110.

the agreement to Wilkinson who applied it in payment of the balance of the purchase money still due to Mrs. Young's vendors. Robertson had by that time returned to England.

On or shortly before the 1st March, 1914, the date for completion of the purchase, the appellant, Simson, went to Wilkinson and offered to give him a cheque for the balance of the purchase money if he had the transfer there. Wilkinson replied that he had not got the transfer but would have to write to Ireland; he said he would make out a transfer and send it along, it would be back in five or six weeks. Simson returned in six weeks but Wilkinson said he had had no reply. Simson subsequently continued his inquiries of Wilkinson but always with the same result.

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On or about the 3rd December, 1914, Simson went with his solicitor to see Wilkinson and made a tender of the balance of the purchase money but Wilkinson was still without the transfer. Thereupon, on the 7th of the same month the appellant's solicitors wrote a letter to the respondent, formally repudiating the agreement and on the 15th January, 1915, the present action was begun. On the 15th February, 1915, the respondent's solicitor tendered a transfer of the property.

The judgment of the Appellate Court proceeds on the ground that the appellants were bound to communicate with the respondent personally before attempting to rescind. I do not think this can be supported; where a payment has to be made there is a distinction between the obligation in case the party to whom it is to be made is out of the country; thus in Viner's Abridgment, Tender, G. 4, we read:—

> If the obligee, etc., be out of the realm of England, the obligee, etc., is not bound to seek him or to go out of the realm unto him; and because the feoffee is the cause that the feoffor cannot tender the money, the feoffor shall enter into the land as if he had duly tendered it according to the condition. Co. Litt. f. 210 b.

See also *Hale* v. *Patton*[11], and *Dockham* v. *Smith*[12]. The rule of the civil law is, where, as in this case, the sale is of a definite ascertained thing on credit and the place of payment is not agreed upon by the contract, then the payment must be made at the place where the subject matter was at the time the contract was entered into. Arts. 1152 C.C. and 1533 C.C.

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[10] 7 Gr. 606.
[11] 60 N.Y. 233 at p. 236.
[12] 113 Mass. 320.

The vendor being out of the Dominion was, I think, bound to appoint someone to whom payment could be made.

That does not, however, dispose of the matter. The purchasers clearly waived the condition for com-

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pletion of the purchase on the date originally fixed. They were, as they themselves say, willing to complete at any time up to the first days of December, 1914; if they then came to the conclusion that the matter had been allowed to stand over long enough they were allowed to give notice of this to the vendor and name such reasonable time within which the purchase must be completed or, failing that, the contract be at an end. Yet immediately, that is on the 7th December, they gave notice to put an end to the contract. This I do not think they could do. If they had given a notice fixing such a date for completion as would allow of communication with the vendor in the meantime, then, if they had obtained no satisfaction by the appointed time, they would have been justified in withdrawing from the agreement; but they could not, after allowing the matter to remain open till December, suddenly demand immediate completion and on failure to obtain it put an end to the contract; this, of course, more especially under the circumstances when to their knowledge the vendor was residing in a distant country.

In the case of *Taylor* v. *Brown*[13], Lord Langdale M.R. said:—

> The question which has been discussed in this case is, whether the defendant remains under any obligation to perform the agreement. He says he does not, and that he has ceased to be under any obligation from the 13th of July, 1836. Now, as I have before stated, where the contract and the circumstances are such that time is not in this court considered to be of the essence of the contract—in such case, if any unnecessary delay is created by one party the other has a right to limit a reasonable time within which the contract shall be perfected by the other. It has been repeatedly so considered in this court; and where the time has been thus fairly limited, by a notice stating that within such a period that which is required must be done or otherwise the contract will be treated as at an end, this court has very frequently supported that proceeding; and bills having been afterwards filed for the specific performance of the contract, this court has dismissed them with costs.

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The appellants not having attempted to give any notice, it is unnecessary to decide to whom notice could have been given under the circumstances. It is, however, to be noted that the whole transaction so far as the appellants were concerned was conducted on behalf of the vendor through Wilkinson. The vendor's brother, admittedly her agent, was in

[13] 2 Beav. 180.

his office, listed the property for sale with him on his return to England and left with him instructions for carrying out the sale. Wilkinson received the first payment on account of the purchase money and applied it in payment of the purchase money due to Mrs. Young's vendors, completed her title and sent the certificate of title to Robertson, who, he supposes, turned it over to the respondent; he prepared the transfer to the appellants and sent it for Mrs. Young's execution. When the respondent did at last think of taking any steps in the matter it was to Messrs. Wilkinson & Boyes that her husband wrote on the 12th September "to know why the appellants had not paid the balance of the purchase money." She had the reply which Mr. Wilkinson wrote to her husband stating that he had prepared and sent the transfer for her execution; that the money had been tendered to him when originally due and was available upon surrender of the transfer. It was not until the 15th February, 1915, that the tender of the transfer was made. The respondent at no time gave to the appellants or evidently to Mr. Wilkinson himself the slightest intimation that he was not authorized to act on her behalf in the matter. I do not think it can be doubted that he was so authorized and I do not think the respondent could under such circumstances he heard in any court to repudiate his authority.

Certainly the position would have been very different if the appellants had given to Mr. Wilkinson

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notice calling for the completion of the purchase at a date within a reasonable time. They, however, gave no such notice either to the respondent or any one else on her behalf.

It is not without some regret that I arrive at these conclusions, because I think that the respondent was much to blame for the delay. She had had the agreement for a year and it provides that the transfer is to be prepared by the vendor. She is therefore not entitled to say, as she does in her affidavit, that Mr. Wilkinson's letter was the first intimation she had received of any transfer requiring execution by her. Moreover, it is common knowledge that a conveyance of some sort by a vendor is required on every sale of lands, more so in the United Kingdom than in this country. That she was really aware of this fact is shewn by her previous statement in the affidavit that

> shortly before the balance of the purchase money became payable under the said agreement, my husband wrote to my brother to remind him of the fact and to arrange that the sale should be completed.

Though, as she says, repeated letters to her brother met with no response, the time for completion was allowed to go by and nothing was done until the 12th September, when

her husband wrote to Mr. Wilkinson "to know why the appellants had not paid the balance of the purchase money." Though Mr. Wilkinson's letter was received in October, 1914, it was not until the 15th February following that the transfer was tendered, within two weeks of a complete year from the date when it should have been ready.

The appellants under the circumstances could, I do-not doubt, have claimed damages for the delay. Damages can be recovered by a purchaser from his vendor for delay in completing the purchase occasioned by the vendor not having used reasonable diligence to perform

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his contract. *Jones* v. *Gardiner*[14]*.* The appellants, however, have treated the contract as at an end and I do not see therefore how they can recover anything.

The appeal should, I think, be allowed to the extent that the appellants are not liable to pay interest on the balance of the purchase money; but otherwise the judgment should be confirmed. There should be no costs of the appeal.

IDINGTON J.—This is an appeal from the judgment of the Appellate Division of the Supreme Court for Alberta, directing, under the circumstances I am about to set forth, specific performance of an agreement to purchase some land in Calgary.

The respondent, who lived in Ireland, having an agreement for purchase of said land listed it for resale with one Wilkinson carrying on in Calgary the business of a real estate agent.

He sold it on her behalf to appellant for $3,150 of which $1,550 was paid him in cash and the balance with interest at 8% was to be paid a year later.

The agreement was reduced to writing dated 8th March, 1913, and executed in duplicate by appellants and said Wilkinson, who signed his own name, writing thereunder the words "for Eileen Young."

He does not say whether or not he sent the duplicate copy he signed to respondent, or any one for her. He does say that the other two copies were sent to respondent in Dublin to have her execute them and that they were returned executed, "and one was handed to Mr. Simson and one was sent to Dublin to Mrs. Young."

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[14] [1902] 1 Ch. 191.

Simson, the appellant, denies ever seeing such second copy and the learned trial judge seems sceptical of Wilkinson's recollection of the facts relative thereto.

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I agree with him in that regard without doubting in the slightest the integrity of Mr. Wilkinson who seems to have given his evidence fairly.

The execution or non-execution of such second agreement is not of the slightest consequence in my view, but the attendant circumstances are of some value.

The respondent was described in the first writing as of Belfast, Ireland, but how in the second we know not.

If she saw herself so described and it was not according to the fact, how did she come to sign such a misleading document?

And if "one was sent to Dublin to Mrs. Young" how could she imagine, or her husband imagine, that a transfer was not required?

The document is not a long one and has plainly written therein that she was to have a transfer prepared.

Passing these curious incidents the appellant Simson went with the money to meet the second and last payment, to Wilkinson's office, either on the 1st March, 1914, when it was due, or the day before, and offered to pay him same.

He replied that he had not the transfer and preferred Simson to keep the money till it arrived, and assured him there would be no interest running upon the money in the meantime.

He mentioned to Simson that he had sent a transfer for execution. Indeed Simson seems to think he mentioned doing this twice, but Wilkinson only speaks of sending it once, about two weeks before the money was due.

He further says that that was sent to Robinson, a brother of respondent who had, whilst in Calgary, been her agent in listing the land with him (Wilkinson) and was the medium of the communication through

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whom the terms of sale had been settled by a cabling of messages that passed in the first few days of March, 1913, before Wilkinson signed the agreement.

Robinson seemed indifferent for some reason or other that remains unexplained.

Appellants were remarkably persistent and patient in waiting for the transfer and jogging Wilkinson's memory.

On the 13th October, 1913, Wilkinson wrote the husband of respondent at Dublin, Ireland, explaining what had transpired as above stated and urging a return of transfer duly executed.

Respondent tells in her affidavit that the letter was received on the 28th October, 1914. One would have supposed that it should, under the circumstances, have occurred to respondent or her husband to go to a solicitor or notary in Dublin and get him to draw up a transfer, get it executed and returned forthwith to Calgary, or at all events to acknowledge the receipt of the letter and explained or given excuse for the delay. Nothing of the kind happened.

After twelve days wasted in some useless and fruitless inquiries as to Robinson (which ended nowhere that we are told of) it occurred to respondent's husband to write solicitors in London to act on her behalf with a view to the completion of the sale. And they, on the 13th January, 1915, sent her a duplicate transfer which she actually executed before a notary public on the next day.

When or how that was sent to America is not explained but evidently, if Wilkinson is correct, in March or April following he had a letter from respondent. Nor is there any explanation of why it took from the 7th of November till the 13th of January for London

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solicitors to prepare a transfer for which less than an hour's labour is needed.

Meantime appellants' wonderful stock of patience had become exhausted and they consulted a solicitor in the beginning of December, 1914, who seems to have advised and brought about a tendering of the money to Wilkinson who could do nothing. He says, speaking of things at that stage "I am quite well satisfied that if the title was there they would have paid."

The solicitors prepared and, on the 7th December, 1914, on behalf of appellants, mailed a letter to respondent repudiating the contract on account of her failure to deliver title, although appellants had repeatedly tendered the money and demanded the same. They, by same letter, demanded a return of the money already paid and of the taxes which they, the appellants, had paid as the agreement bound them.

Copies of that were mailed to respondent and to Wilkinson but brought no response. Wilkinson got his but evidently, by reason of the respondent's treatment of his appeals to her husband and brother, could do nothing.

Respondent's copy had been addressed to Belfast which, according to the agreement, was quite proper and was returned as uncalled for.

The appellants, after a six weeks' wait, instituted an action on the 15th January, 1915, for recovery of the moneys paid and so demanded to be returned.

The service of that on respondent on the 1st of February, 1915, seems to have prompted some response.

The defence to the declaration consists of a denial of its allegations and an averment of willingness and readiness at all times to fulfil the contract, followed by a counterclaim asking for specific performance of the agreement.

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This the court below, has, as stated above, granted.

The question raised thereby is whether or not a remedy which cannot be got by a suitor seeking relief to use the oft-quoted language of Lord Alvanley M.R., "unless he has shewn himself ready, desirous, prompt and eager" is open to one conducting her business in the manner of respondent.

I cannot think so. And when we examine the agreement and consider the duties cast thereby in express terms upon respondent to observe same, there is no excuse which is presented that should avail her in seeking to enforce such a remedy.

The agreement specifically provides that the "transfer shall be prepared by the vendor at the expense of the purchaser."

The appellants were entitled to have that ready for delivery in Calgary (and not in Ireland) to them upon payment of the balance of the purchase money.

The case does not permit of giving effect to the side issues raised, as excuses for the gross failure on respondent's part.

The defence alleging readiness is unfounded in fact.

The suggestion that appellants knew they were contracting with a vendee in Ireland loses all its force when the fact that Wilkinson (her local agent) seemed to be so held out by the vendee as possessing the power to receive about half of the purchase money and apply it in the way he did which was far beyond the usual power of a mere real estate broker.

The presumption was that he would be continued and be duly authorized, or armed, when the time came, with an effective transfer, ready to complete the sale when the time came.

Be all that as it may, I have no doubt the vendee, under such circumstances, is not bound to go either to

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Ireland or China to present the payment and demand the transfer in any case. I confess I have been unable to find any decisions expressly dealing with such a situation and am not surprised at the absence of an illustration on the part of any suitor.

The general principles of law governing the respective duties and rights of debtor and creditor do not indicate such contention as maintainable in any ordinary case, much less in a case dependent upon the application of the principles governing cases of specific performance.

Again the express language of the agreement provides as follows:—

> Time is to be considered as the essence of this agreement, and unless the payments are punctually made at all times and in the manner above mentioned, these presents shall be null and void and of no effect and all moneys paid thereon shall be absolutely forfeited to the vendor, and the vendor shall be at liberty to peaceably re-enter upon and resell the said land, together with all the buildings thereon, without notice to the purchasers, and purchasers covenant not to remove any buildings whatsoever that may be erected on said land.

I construe this clause as making time the essence of the agreement.

The subsequent part of the clause after the word "agreement" probably was intended for another sentence, but however that may be it in no way impairs the force of the express language declaring that

time is to be considered the essence of this agreement.

It is further to be observed that there was only one payment to be made and that the transfer was to be ready to deliver contemporaneously with that payment and impliedly thus bound the vendor to observe the necessity of being ready, otherwise the vendee could not safely pay.

In that view the decisions of the court above in the case of *Brickles* v. *Snell*[15], and *Steedman* v. *Drinkle*[16]*,*

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seem to put an end to the contentions set up herein by first depriving the party in default, in a time of the essence agreement, of any right to specific performance and in the next place by giving the right to the purchaser to recover the moneys paid on account of the purchase.

The suggestion that appellants, by listening to the appeal of the agent of the respondent to await return of the transfer sent for execution, waived this provision or any right under the agreement, does not seem to me entitled to any very serious consideration.

They did nothing and said nothing and merely acted the part of unusually fair minded men desirous of avoiding litigation or appearance of sharp practice or attempting to evade their obligations. All they did or submitted to was conditional and limited to the time needed to get a reply to the letter which they were assured had gone forward with a transfer to be filled up and executed.

See the decision of Jessel M.R. in *Barclay* v. *Messenger*[17]*,* holding that an express enlargement of the time was not, unless fulfilled, a waiver.

The case sometimes does arise where the vendee or vendor, as the case might be, has entered into a more or less complicated arrangement for carrying out the completion of a sale and very properly have been held estopped thereby from breaking off abruptly the due execution of the mutual arrangement and falling back upon time being of the essence unless they gave due notice of such intention.

Then they would be required to fix a term or specify that within a reasonable time they would do thus and so as the agreement entitled them.

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[15] [1916] 2 A.C. 599.
[16] [1916] 1 A.C. 275.
[17] 22 W.R. 522; 43 L.J. Ch. 449.

The peculiarly amusing feature of this case is the

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argument in respondent's factum which disclaims Wilkinson as an agent of respondent and then falls back upon what happened between appellants and this man on the street or off the street when destitute of any sort of authority to represent the respondent.

How can she avail herself of anything passing between strangers? I am not at all sure, though coming from the respondent in support of her claim it is absurd, but that the facts, if fully investigated, would have borne out the suggestion that Wilkinson had no standing as representative of anybody. Assuredly appellants assumed they were dealing with one respondent had held out as her agent.

Then alternatively I am of the opinion that even if there is no effect to be given the clause as to time being the essence of the agreement, yet on general principles by the failure of the vendor to prepare and tender within a reasonable time the transfer she was to have prepared, she has lost her right to specific performance, especially under the conditions of a speculative market such as had developed in Calgary.

She seemed to have had no regard for others, or consideration for the situation, however cruel it might have been, in which her conduct for nearly a year might have placed the vendees.

It is no answer to say that in this instance as things turned out it might not have made much difference to appellants. Not even they can perhaps yet guess whether or not, had the respondent's transfer been got on 1st March, 1914, the result would have been better for them or otherwise.

The question is whether or not a vendor, situate as respondent was, is entitled by law to treat vendees, situate as these appellants were, in relation to the

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bargain in question, as she has done and still claim specific performance.

I submit with some confidence she is not, even if time had not been of the essence of the contract, but much more so when she insisted on having so rigourous a term imposed upon the vendees under circumstances which could only relate to one payment when her transfer was to be ready for delivery.

I have treated the case thus far as relative to the validity of the judgment for specific performance. I think not only is that the true test of the right to appeal, and succeed in such an appeal, but also incidentally a good test of the appellant's right to treat the contract as rescinded, as they did in repudiating it and bringing this action.

If the situation created by respondent's conduct is such a breach of the contract as to disentitle her to specific performance thereof, then, if not before, she becomes clearly liable at common law for the breach of the contract in failing to have the transfer ready for delivery at the time named and to repay the money paid her or paid on faith of her contract, as to meet the tax bills, for example.

She has no answer to such a claim unless in equity of which the right of specific performance is the test.

Thus, I submit, rescission with all its incidents is in the net result of the operation of law and equity but the counterpart as it were, to the claim for specific performance.

Such, I submit, is the net result of the latest development of the law as exemplified in the cases I have cited above.

The counsel for respondent claimed that the mistake in the agreement in describing the respondent as of Belfast which evidently misled appellants in address-

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ing the notice of renunciation to her there, could have been rectified by an inspection of the transfer to her of the land in question in the registry office. And he seems to have tendered a certificate of title to prove this, but it does not appear in the printed case and I am assured by the officer in charge of the exhibits that no such document is on file.

In my view of the law governing the rights of the parties to the agreement, the result cannot be affected by the mistake, but if anything could be expected to flow from the possibility of the registry being inspected, proof should have been given of the fact.

I think the appeal should be allowed with costs and the judgment of the learned trial judge be restored.

ANGLIN J.—The plaintiffs sue for the rescission of a contract to purchase some building lots in Calgary because of the vendor's default in making ready to complete the contract on the date fixed by it and for many months thereafter. The defendant resists that

action and counterclaims for specific performance, alleging in excuse of her own default that the plaintiffs did not apprise her of their readiness to carry out their purchase and pay the balance of their purchase money.

The trial judge granted rescission, holding that the plaintiffs had done all that could reasonably be expected of them and that the defendant was clearly and inexcusably in default. The Appellate Division reversed this judgment on the ground that the plaintiffs had failed to make reasonable efforts to inform the defendant of their readiness to complete, that her duty to convey would have arisen only when they had done so, and that she had always been ready, eager and wiling to carry out her contract.

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I would add to the statement of the material facts given in the opinion of Mr. Justice Stuart[18], merely that the agreement provided that the transfer or conveyance should be prepared by the vendor at the expense of the purchasers and should be delivered to the latter "immediately" upon payment of the second and final instalment of their purchase money. If not overlooked, these two features of the contract would seem not to have been given the weight to which they are entitled in the Appellate Division.

Moreover, between the 1st of March, 1914, the date fixed by the contract for closing the sale, and the 15th of January, 1915, when this action was begun, there had been a most material change in the desirability of the property and in the position of the plaintiffs. They were a firm of builders and required the land for use, at first as a stone cutting yard, and eventually as a site for an apartment block which they proposed to erect. After March, 1914, building ceased in Calgary and the plaintiffs had no further use for the land. They dissolved partnership shortly afterwards. War began in August, 1914. At the date of the trial (April, 1916) one of the former partners had enlisted for service overseas and the other was residing in Scotland. It is obvious that to compel the plaintiffs now to take and pay for the property would entail upon them substantial hardship, although probably not such as would in itself have afforded a defence to an action for specific performance (Fry, on Specific Performance, 5th ed., pars. 418-9, 426-7; 27 Hals. Laws of England, Nos. 61 and 65) had the defendant been entirely free from fault—had she done everything that could reasonably be expected of her

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[18] 10 Alta. L.R. 310.

towards carrying out her contractual obligation and enabling the plaintiffs to fulfil theirs. Yet the hardship, such as it is, is a circumstance that may be taken into account in so far as the granting or withholding of specific performance may be in the discretion of the court. *Harris* v. *Robinson*[19]*, Colcock* v. *Butler*[20], at pages 313-4; Fry, at page 19.

Notwithstanding that the provision of the contract that "time shall be of the essence of this agreement" is followed by a statement of the consequences of default by the purchasers, I am not disposed to accept the view that it should therefore be held to apply only to the purchasers' obligation. I prefer to give to the words "of this agreement" their literal and natural meaning covering the contractual undertakings of both parties, and to assume that the silence of the contract as to the consequences of default by the vendor merely indicates an intention that they should be such as the law imposes. *Foster* v. *Anderson*[21]*, Seaton* v. *Mapp*[22]*.*

It is contended however that the plaintiffs by their visits to and inquiries of Wilkinson, notwithstanding his lack of authority to represent the defendant, manifested an intention not to rescind because of her un-readiness to complete punctually on the 1st of March, 1914, with the result that the contract should be treated as if the condition as to time being of its essence were eliminated from it. *Kilmer* v. *British Columbia Orchard Lands*[23]*,* as explained in *Steedman* v. *Drinkle*[24], at pages 279-80. The case at bar differs from the *Kilmer Case*[23]*,* however, in that there was in that case

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a definite extension of time by agreement—a new contract as to the time of performance (*Goss* v. *Lord Nugent*[25]*,* at pages 64-5; *Earl Darnley* v. *London, Chatham and Dover Railway Co.*[26], at page 60, discussed in Ewart on Waiver Distributed, at pages 133-6; see, however, *Morrell* v. *Studd and Millington*[27]), in which the stipulation making time of the essence was held not to apply. Here there was no alteration by express contract of the time fixed for performance, and under the circumstances, I think a parol agreement for an

[19] 21 Can. S.C.R. 390.
[20] 1 Desaussure 307.
[21] 16 Ont. L.R. 565, at pp. 568-70; 42 Can. S.C.R. 251.
[22] 2 Coll. 556, at p. 564.
[23] [1913] A.C. 319.
[24] [1916] 1 A.C. 275.
[23] [1913] A.C. 319.
[25] 5 B. & Ad. 58.
[26] L.R. 2 H.L. 43.
[27] [1913] 2 Ch. 648.

extension should not be implied from the conduct of the parties, as it was in the *Morrell Case*[27].

But it is said there was an election by the purchasers not to rescind their contract for the vendor's default but to continue it in force and that the right to take advantage of the stipulation as to time being of the essence having been thus relinquished, that term was in effect eliminated. Whether there could be such an election binding upon the purchasers without communication of it to the vendor; (*Scarf* v. *Jardine*[28]*,* at pages 360-1; see discussion by Mr. Ewart in his Treatise on Waiver Distributed, at pages 88 and *seq.)*; whether the letter from Wilkinson to the vendor's husband of the 13th of October should be regarded as such a communication; whether there was not a mere waiting or a suspension by the purchasers, when they found themselves unable to make a tender for their purchase money and were probably in uncertainty as to their legal position, of an exercise of their rights; (*Clough* v. *London & North Western Rly*[29], at page 34; *Moel Ship Co.* v. *Weir*[30]), but unequivocal conduct evidencing an election to treat the contract as unaffected by the vendor's

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default, are interesting questions upon which I find it unnecessary to express a definite opinion in this case. While strongly inclined to think that an election not to insist upon the right to terminate the contract for the vendor's default is not sufficiently established, I shall proceed on the assumption that it is.

As Mr. Justice Stuart has well said:

> The whole dispute has arisen on account of a considerable delay on the part of the defendant in furnishing to the purchasers the title as agreed at the time agreed.
>
> The chief issue is as to where responsibility for that delay should rest.

Upon the facts in evidence I entertain no doubt whatever that the failure to carry out the contract on the date fixed and for many months thereafter is entirely attributable to the neglect of the defendant, resident abroad, to provide for the fulfilment of her obligation to be in readiness to convey at the date fixed for closing by either coming herself to Calgary or nominating a representative there clothed with the necessary authority to receive the purchase money and to deliver a transfer, and furnished with the means of carrying out his

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[27] [1913] 2 Ch. 648.
[28] 7 App. Cas. 345.
[29] L.R. 7 Ex. 26.
[30] [1910] 2 K.B. 844, at p. 855.

mandate and notifying the purchasers of such appointment, and in having allowed the mistake of an agent, whose acts she adopted, in misstating her address in the agreement of sale (Belfast instead of Dublin) to remain unrectified. Indeed in the peculiar circumstances of this case, had the vendor's address been correctly given, I gravely doubt that it would have been incumbent on the plaintiffs to seek her out and notify her that they were prepared to make payment before she would be required to put herself in readiness to deliver to them the transfer to which they would be entitled "immediately" upon payment.

With respect, I fail to find in the record evidence

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warranting the view expressed in the Appellate Division and said to be "the turning point of the case" that, when the plaintiffs "really wanted to find her (the defendant) they were quite able to do so." On the 7th of December, 1914, they mailed a letter addressed to her at Belfast, Ireland—the address given in the contract, and there is nothing to shew that in doing so they did not act in perfect good faith. How their solicitors learned in January, 1915, that her correct address was Dublin does not appear. It may be surmised that they discovered it by examining the transfer to her registered in the Land Titles Office. The fact that they did so scarcely warrants the assumption that the plaintiffs themselves could readily have ascertained the correct address months before, or that they were remiss in having failed to do so. I rather agree with the learned trial judge that the purchasers "acted in good faith" and tried to "locate * * * the vendor and failed."

Moreover, the defendant was apprised by Wilkinson's letter of the 13th October, 1914, received by her on the 28th, that the purchasers had "tendered money against documents" to him on or prior to the 1st of March. (Incidentally it may be remarked that this shews the understanding of the man who prepared the agreement of the purchasers" conception of their rights and their attitude.) Yet no tender of a transfer was made to them until the 15th of February, 1915—a month after this action was begun, a fortnight after the service of the statement of claim on the defendant, and eleven and a half months after the date fixed by the agreement for completion. Nor was there any communication before the 15th of February, 1915, to the purchasers of their vendor's intention to carry out her contract. The delay from the 28th of October to the 15th

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of February was, under the circumstances, in my opinion unreasonable, making every proper allowance for difficulties of communication.

The obligation of the purchasers to pay and that of the vendor to deliver a transfer were to be performed at the same time. They were dependent undertakings. The circumstance of the vendor's residence abroad as well as the form of the contract make it clear that the consideration moving each party was performance by the other and not a mere promise. The purchasers looked to obtaining the actual transfer of the land on payment and not merely a remedy more or less adequate against their vendor. A vendor seeking to enforce liability upon the purchasers' obligation under such a contract must shew punctual performance or an offer to perform his own undertaking although it be not certain that he was obliged to do the first act. 1 Wm's. Saunders (1871 ed.) 566. In addition to cases there cited reference may be had to *Large* v. *Cheshire*[31]*,* and *Marsden* v. *Moore*[32]*.* Especially is this so where the remedy sought is specific performance. The plaintiff must shew that he was "ready and prompt" as well as "desirous and eager." *Millward* v. *Earl Thanet*[33]*; Mills* v. *Haywood*[34]*,* at page 202; *Wallace* v. *Hesslein*[35]*,* at page 174; Fry (5th ed.), 457.

Even if, upon a construction of the contract most favourable to her, the vendor,' had she been present in Calgary personally or by agent, might have been entitled to defer having the transfer prepared until actual payment or tender of the balance of the purchase money, and, by delivering it on the same or the following day or even within a day or two thereafter

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might have met the requirement that delivery of it should be made "immediately" upon payment, the agreement certainly did not contemplate that the purchasers should, after paying their purchase money, be obliged to wait for their transfer until it could be obtained from Ireland, remaining for a month or longer without title and with a right of action against a "foreigner" as their only security.

In my opinion the place of performance of this contract, no other being stipulated in it, was at Calgary. The ordinary rule of English law that a promisor is bound to seek his promisee, if ever applicable to a case where there are mutual obligations to be fulfilled concurrently, only governs

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[31] 1 Vent. 147.
[32] 4 H. &N. 500.
[33] 5 Ves. 720 *n.*
[34] 6 Ch. D. 196.
[35] 29 Can. S.C.R. 171.

> where no place of performance is specified either expressly or by implication from the nature and terms of the contract and the surrounding circumstances.—7 Halsbury, Nos. 857-8.

Here all these circumstances as well as the nature and the terms of the contract furnish unmistakable indicia that the intention of the parties was that performance should take place at Calgary. The contract was entered into there. *Weyand* v. *Park Terrace Co.* [36]. In making it the vendor acted through an agent resident there. It concerned land there. The transfer was to be delivered immediately upon payment of the balance of the purchase money. Title would pass to the purchasers only on the registration of the transfer in the Registry Office there. (6 Edw. VII. ch. 24, sec. 41.) Mr. Justice Stuart, who spoke for the Appellate Division, seemed inclined to the opinion that the purchasers were entitled to have the actual delivery of the transfer and payment of their purchase money take place contemporaneously in the Registry Office itself, citing Hogg on "Ownership and Incumbrance of

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Registered Land" at page 187. In view of the provisions of the "Land Titles Act" already adverted to, not a little may be said for that view (see Williams on Vendor and Purchaser (2nd ed.) 1186)—but it is unnecessary to determine the point in the present case. Yet, although of the opinion that

> the purchasers were not bound to go to Ireland and pay her (the vendor) the money there

and that

> the Land Titles Office at Calgary was the only place where they could safely part with their money,

that learned judge thought they were

> bound to communicate with her and notify her that they were ready and that if she did not produce title within a reasonable time the agreement would be repudiated.

In the first place the presence of the vendor in person or by authorized agent at Calgary being necessary for the fulfilment of the purchasers' duty to pay or tender their purchase money (if to do so should be regarded as a condition of the vendor's obligation to put herself in readiness to transfer the land), its performance would be excused by her absence. Comyn's Digest, "Condition," L. 5. The giving notice of intention to rescind if completion should be delayed beyond a named reasonable time having likewise been made impracticable by the act of the vendor's agent in stating a wrong address in the agreement (the only information the purchasers had) and her subsequent neglect to rectify

that error, she cannot insist on that condition of the right of rescission, ordinarily applicable where time is not of the essence originally or has ceased to be so. A notice addressed to her at Belfast would in fact have been futile, as is proved by the return of letters sent to that address. Although the purchasers did not know that it would have been so, the vendor cannot

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complain because they did not attempt to give her a notice there. *Lex neminem cogit ad vana seu inutilia.* The giving of notice of intention to rescind having been thus rendered impossible through the fault of the vendor, the purchasers were not bound to wait indefinitely for her to fulfil her contract.

Having regard to all the circumstances, the nature of the contract, its terms, the failure of the vendor to put herself in readiness to carry out her obligation, the fact that time was originally of the essence and probably remained so, and if not, that notice of intention to rescind unless the contract should be completed within reasonable time could not be given owing to fault ascribable to the vendor, that her delay both before and after she became aware of the purchasers' readiness to complete was gross and inexcusable, and that if obliged to take and pay for the property now the purchasers would be subjected to great hardship—I am, with respect, of the opinion that this is not a case for specific performance and that the right to rescission has been established. No doubt the granting of rescission does not ensue as of course because the relief of specific performance is denied; *Gough* v. *Bench* [37]*.* The circumstances sometimes make it proper to leave the parties to their common law remedies. But if, as seems probable, time continued to be of the essence of the contract, the plaintiffs' right to rescission is unquestionable. If, on the other hand, time ceased to be of the essence of the contract, having regard to the circumstances, I think the purchasers are entitled to be placed in the same position as if they had duly given notice of intention to rescind should the vendor fail to deliver a transfer within a named reasonable time. Since they

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have paid a substantial sum on account of purchase money, recovery of which they would otherwise be obliged to seek by way of damages, and are themselves free from blame, equity and an application of the maxim *ut sit finis litium,* alike require that rescission and

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[36] 202 N.Y. 231; 25 Am. & Eng. Ann. Cas. 1010.
[37] 6 O.R. 699.

the return of the money paid on account of the purchase price, and for taxes should be decreed.

The circumstances, however, are not such as warrant a judgment for damages beyond the return of the money paid with interest. Indeed with rescission the plaintiffs are probably better off than they would have been had the defendant carried out her contract.

The judgment of the learned trial judge should be restored and the appellants should have their costs in this court and in the Appellate Division.

BRODEUR J.—The appellants should succeed. They have done all in their power to carry out the agreement in question and to complete the sale. On the other hand, the respondent was too late to claim specific performance, since the purchaser had then rescinded the contract.

For reasons given by my brother Idington, I would allow the appeal with costs of this court and of the Appellate Division and I would restore the judgment of the trial judge.

Appeal allowed with costs.