JAMES W. DAVIDSON (PLAINTIFF) APPELLANT;

AND

JAMES G. NORSTRANT (DEFENDANT) RESPONDENT.

1920
*Oct. 28, 29.
1921
*Feb. 1.

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

Sale—Sale of land—Option under seal—Condition precedent—Consideration—Nominal—Expressed as "now paid"—Non-payment—Specific performance—Subsequent conduct—Parol evidence—Statute of Frauds.

The respondent was purchasing some land from a company of which the appellant was the sales agent for $86,400 and asked the latter to join him in the undertaking. The appellant, before doing so, wished to see personally his principals who were resident in the United States in order to obtain their consent. The respondent then entered into an option agreement under seal whereby in consideration of the sum of $100 "now paid," of which receipt was acknowledged, and of the payment of half of the cash instalments due in virtue of the purchase agreement, he assigned to the appellant an undivided half-share interest in the land. The above sum of $100 was in fact neither paid nor demanded. The respondent then proceeded to complete the original purchase agreement, paid the cash instalments amounting to $10,000 to the owners and sold part of the land at a profit. The appellant, after having obtained the approval of his principals, sent to the respondent the sum of $5,000 with interest thereon within the delay specified in the option; but the respondent returned it and refused to carry out the agreement. The appellant sued for specific performance.

Held, Duff and Mignault JJ. dissenting, that the option agreement was binding upon the respondent. *Cushing* v. *Knight* 46 Can. S.C.R. 555) discussed.

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*PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin and Mignault JJ.

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Per Sir Louis Davies C.J.—The question whether the giver of the option was bound thereby, without the payment of the $100, is entirely one of intention, and, in this case, there was nothing to indicate that it was the intention of the parties that such payment should be a condition precedent to the respondent being bound, both parties understanding that the down payment was immaterial and negligible..

Per Sir Louis Davies C.J.—Upon the evidence, conduct and correspondence of the parties, the option agreement was to become operative only when the consent of the appellant's principals had been obtained; and after such consent there was no unreasonable delay on appellant's part in tendering to the respondent the moneys stipulated in the agreement.

Per Idington J.—When a contract for an option is under seal and purports to bind for a specific time, assented to by the covenantee, its binding effect cannot be affected by any omission to pay the consideration declared to have been received, unless and until actual payment has been demanded and refused.

Per Duff J., Anglin and Mignault JJ.—The actual payment of the sum of $100 was made a condition precedent to the instrument becoming effective as an option, and the consideration cannot be treated as a mere nominal one.

Per Anglin J.—But the subsequent conduct of the respondent has been such as to preclude him from relying upon the non-fulfilment of the condition. Duff J. *contra.*

Per Anglin J.—And parol evidence of the facts warranting this inference is admissible since it does not amount to such a variation of the terms of the contract that verbal proof of it would offend against either the rule in regard to contracts reduced to writing or the Statute of Frauds. Duff J. *contra.*

Per Anglin J.—Assuming that the payment of $100 was a condition precedent to the existence of a binding option, the respondent's offer to sell one-half interest in the lands purchased was not expressly or impliedly revoked before its acceptance by the appellant within reasonable delay.

Per Duff and Mignault JJ. (dissenting).—The payment of $100 was one of the facts which the appellant, relying upon the existence of the option, had to establish in the absence of circumstances dispensing with the performance of this essential condition.

Per Duff J. (dissenting).—The grant of an option has the effect of vesting in the optionee an interest in land, and, if given for valuable consideration, is not revocable; and the giver of the option is not entitled to break it on offering to pay damages.

Judgment of the Appellate Division (15 Alta. L. R. 252) reversed, Duff and Mignault JJ. dissenting.

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APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), reversing the judgment of Simmons J. and dismissing the appellant's action.

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

A. H. Clarke K.C. for the appellant.

C. C. McCaul K.C. for the respondent.

THE CHIEF JUSTICE.—The only question for us to determine is the effect of the non-payment of the $100 at the time the agreement for the purchase by Davidson of the undivided half interest in the lands of the respondent Norstrant was signed by the parties.

The written agreement expresses the sum as being "now paid," that is, at the time of its execution, and it being agreed upon and not in controversy that it was not then paid, the respondent contends, and the Appellate Division found, that this action for the enforcement of the agreement would not lie and dismissed it accordingly.

After careful reading of the evidence and the opinions of the learned judges of the Appellate Division I am of the opinion that the conclusion of the Chief Justice, who dissented from the judgment and concurred with the trial judge, was correct and that this appeal should be allowed and the judgment of the trial judge restored, substituting however for the reference to assess damages as directed by him an order for an accounting.

(1) [1920] 15 Alta. L.R. 252; [1920] 1 W.W.R. 700.

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I am strongly inclined to think, after careful reading of their evidence, that both parties regarded the down payment of the $100 as immaterial and negligible, and looking at the very large sum involved in the sale of the one-half of Norstrant's interests in the lands, the kind and character of the transaction and the conduct of the parties, that the down payment was waived.

I desire however to rest my judgment upon the fact, as clearly proved and not challenged or denied, that at the very time the agreement was being signed by the parties it was agreed and fully understood that it was not to become operative or effective unless and until Davidson, who was the agent for the owners and as such had sold the lands to Norstrant, had seen these owners and obtained their consent to his becoming a part purchaser of the lands with Norstrant.

It is quite clear that without such a consent on the part of the owners it would be alike inequitable and unjust for Davidson to become a part owner with Norstrant to whom, as agent for others, he had sold the lands.

The evidence on this point is clear, undisputed and unchallenged. Davidson's statement, not denied, is as follows:—

> Q. Will you give a history of the matter so as to explain why the agreement was put in a lateral form as it is? A. Well, Mr. Norstrant had been considering for some time the purchase of these lands and I had discussed, I had charge of the sale of the lands, and I had discussed the purchase of the lands with him, at the time when my associates were here a few months prior to this, they had set the price on these lands of around twenty-five dollars an acre. After discussing the subject with Mr. Norstrant he informed me that, as the total amount was some eighty-seven or eighty-eight thousand dollars, that he thought the deal was too large for him, and at his home near Beiseker, when this matter was discussed, he said to me "Don't you want to take a half interest with me in them?" and I informed him at the time that I thought the purchase was a good purchase for him and would be and would interest me, but that owing to the fact that I was operating

the company for the estate and for Mr. Beiseker, I would not agree to close any transaction of that nature without first having an opportunity of consulting with them and getting their approval. I told him, however, that I thought * * that I felt quite sure there would be no trouble, that they would be quite willing for me to take this interest, behause they had already established the price which Mr. Norstrant was paying and that they would have no objection to my going in, and I informed then I * * and I informed him I wanted to take it up with them personally, and I would be going down to Minneapolis in the early spring and that therefore, we could arrange some agreement that would give me until May. That was along the line of the understand.

The conclusion, and I think the only reasonable conclusion, to be drawn from the evidence is that, while the terms on which Davidson was to purchase the half interest were agreed upon, put into writing and signed by the parties, it was at the same time clearly understood and agreed that, inasmuch as Davidson had acted as the agent of the owners in selling the lands to Norstrant, he could not purchase back a half interest in the same lands from Norstrant without the consent of those for whom he had acted in selling the lands.

As Davidson said in his evidence, he could not "close the transaction" without such consent.

The signed agreement, therefore, was merely a tentative one depending for its coming into effect and becoming operative upon Davidson obtaining the consent of those for whom, as agent, he had acted in selling Norstrant the lands.

Davidson, accordingly, went to Minneapolis, obtained the necessary consent of the parties spoken of, and without any delay, on his return home, on the 14th March, 1918, wrote respondent defendant, Norstrant, that he had, a week before, "returned from the States," and that the parties whose consent

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was necessary to his becoming a purchaser of a half interest in the lands were quite agreeable to his becoming such a purchaser and asked respondent whether he should send his cheque for the $5,000 (which included the down payment of $100) to Norstrant's residence or deposit it to his credit in some bank in Calgary.

On the 19th March, not having received any reply to the letter of the 14th, Davidson again wrote enclosing the cheque for $5,066.16, the $66.16 being interest at 7% up to date.

On March 23rd Norstrant replied to Davidson's letter of March 14th, explaining the delay as having been caused by the "miscarriage somewhere" of Davidson's letter and further stating that he

> had plenty of cash on hand * * * having made arrangements to get $10,000,

and on the 9th April replied to Davidson's letter of the 19th March forwarding him the cheque for $5,066.16, returning the cheque and saying:

> I don't need the money now as I have to pay interest on the money which I borrowed when the deal was made anyway, and this money would only be idle here.

On 23rd April, Davidson again wrote Norstrant formally notifying him that he accepted the offer contained in the agreement of December 8th and was

> prepared to pay him forthwith the $5,000 and interest and the other amounts specified

for the purchase of the undivided half share of the lands and enclosing marked cheque for $5,100.91, being the $5,000 with interest from Dec. 4th, 1917. In this letter he also asks for an accounting of any of the lands Norstrant has sold.

On the 25th April, Norstrant replied simply returning the marked cheque, having in his previous letter stated why he did not want the money, and saying he "would be in at your meeting the first of the month."

Other correspondence followed but not the faintest hint was given by Norstrant at any time or in any letter or otherwise that he repudiated the agreement or claimed it was not binding on him because of the non-payment of the $100 at the time of the signing of the agreement.

I repeat that the proper conclusion, and I think, the only proper conclusion to be drawn from the evidence, conduct and correspondence of the parties is that they mutually had agreed at the time the agreement was signed, it was not to become operative or effective unless and until Davidson had obtained the consent of the necessary parties to his entering into it.

In this view of the case, the non-payment of the $100 on the date of the signing of the agreement, 5th Dec., 1917, was not imperative or necessary. The "transaction was not closed" and was agreed not to be closed, nor was the agreement to become operative, unless and until such consent was obtained. When it was obtained, there was no unreasonable or undue delay on Davidson's part in notifying Norstrant or in tendering to him the necessary money stipulated by the agreement, including the down payment of $100 and interest.

Under these circumstances and for these reasons, I would allow the appeal with costs here and in the Appeal Court and restore the judgment of the trial judge, with the substitution of an accounting for the reference to assess damages.

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IDINGTON J.—The appellant sues upon an option agreement under seal whereby the respondent agreed to give appellant the opportunity of bearing half the burden and reaping half the profits to be derived from a contract he, the respondent, was entering into for the purchase of five sections of land in Alberta.

The total price on the basis fixed of $27.00 an acre, amounted to $86,400, of which $10,000 had to be paid in cash. The respondent was almost appalled at the magnitude of the undertaking and the appellant, on behalf of his employers, was endeavouring to induce him to make the purchase, when respondent asked him if he would join him in the undertaking.

The appellant in answer properly said he could not do so without the express assent of his employers, who were in Minneapolis, and he would not be able to explain to them fully, without a personal interview, all that might bear on such a question, for which he could not hope till visiting Minneapolis in the early spring.

To overcome that these parties hereto agreed that the respondent should give the appellant an option until the 1st of May following, to become a partner in the purchase by paying the respondent meantime the half of the cash payment and assuming in all other respects the burdens, direct and incidental to the carrying out of the contract.

A Calgary solicitor drew up for them a long written agreement, providing for everything that might be likely to arise in the carrying out of such a contract.

That was dated 8th of December, 1917, and made between said parties, and began by witnessing that

> in consideration of the sum of $100, one hundred dollars, of lawful money of Canada now paid by the purchaser to the vendor, receipt whereof is hereby acknowledged, the vendor covenants and agrees

to and with the purchaser to sell and assign to the purchaser on or before the 1st day of May, 1918, one undivided one-half share or interest in sections fourteen (14), fifteen (15), nine (9), ten (10) and eleven (11), in township twenty-eight (28), in range twenty-eight (28), west of the fourth meridian, in the province of Alberta, subject to the covenants and conditions contained in the agreement of sale thereof from the Calgary Colonization Company, Limited, to the vendor, for the price or sum of five thousand $5,000 dollars, on which shall be credited the sum of one hundred ($100) dollars, with interest at six (6%) per cent per annum from December 4th, 1917, and an undivided one-half (½) share or interest in all necessary equipment purchased by the vendor for the operation of the said farm prior to the first day of May, 1918, for the price or sum equivalent to one-half (½) of the actual cash paid for or on account of same by the vendor, subject to the payment of any unpaid purchase money remaining against the same, together with a sum equivalent to one-half the cash paid by the vendor prior to the said first of May, 1918, in the cultivation of the said lands together also, with one half-of the actual cash cost of any necessary buildings which may be erected by the vendor on the said lands prior to the said date.

The remainder of the contract provided for numerous details, needless to repeat as not now in dispute.

The parties executed this agreement under their hands and seals. The respondent then proceeded to complete the original proposed purchase agreement and paid $10,000.

The hundred dollars was never in fact paid or afterwards referred to until the appellant tendered the $5,000 in March, and repeated it in April following, in more formal terms.

The appellant had gone, as expected, to Minneapolis in March, and wrote after his return from there on 14th March, 1918, to respondent as follows:—

March 14th, 1918.

James Norstrant, Esq.,
Rockyford, Alberta.

Dear Jimmie:—

I returned a week ago from the States, and consulted with Mr. Beiseker and Mr. Smith of the estate, and they are quite agreeable to the contract which I made with you in regard to the purchase of half interest in the five sections.

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Please inform me whether you desire me to send you my check for $5,000 to Rockyford, or shall I place it to your credit in some bank in Calgary.

If you are not coming in to Calgary again within a week or so, wish you would let me know some day that I could meet you at Rockyford, and I will run out to see you.

Yours truly,
(Sgd.) James W. Davidson.

Getting no reply he wrote him again on 19th March, enclosing his cheque for $5,066.16, to cover the $5,000 and interest at 7%.

On 23rd March, 1918, respondent wrote saying as follows:—

Rockyford, Alberta.

Mr. J. W. Davidson,
Calgary, Alta.

Dear Mr. Davidson:—

Received your letter of March 14th. This letter must have been mislaid somewhere, and then the roads have been so very bad, our teams have not been to town this last week.

I have plenty of cash on hand. I made arrangement at Drumheller, to get ten thousand dollars.

Mr. Davidson, if you could let me know about a week ahead and I will meet you at Rockyford, or I expect to be in the 29th March for the bull sale, if that will be satisfactory to you. Kindly let me know.

Yours truly,
J. G. Norstrant.

And on the 9th April he wrote as follows:—

Rockyford, Alberta,
April 9th, 1918.

Mr. J. W. Davidson,
Calgary, Alta.

Dear Mr. Davidson:—

Enclosed find your cheque for $5,066.16 which I am returning. I don't need the money now as I have to pay interest on the money which I borrowed when the deal was made anyway, and this money would only be idle here.

Am very busy getting at the seeding now. Will try and get in to see you as soon as I can find a few days to spare.

Yours truly,
(Sgd.) J. G. Norstrant.

Respondent not having appeared as promised, appellant wrote, enclosing a marked cheque for $5,100.71, explaining at length what it was for and desiring information on the subject of what had been done relative to the land, and to this the respondent replied as follows:—

Rockyford, Alta., April 25th, 1918

Mr. Jas. W. Davidson,
Calgary, Alta.

Dear Sir:—

Enclosed find your cheque which you left with me yesterday. I will be in at your meeting the first of the month.

Yours truly,
(Sgd.) J. G. Norstrant.

The appellant wrote on 30th of April, 1918, a long letter recounting the history of their dealing and also returning the cheque.

In my view of this case this correspondence, apart from being evidence of the tender or waiver thereof, is only of importance in regard to an aspect of the case which I will refer to presently.

No dispute arises here or below, so far as I can see, as to the tender.

The learned trial judge gave judgment for the appellant after having heard both him and respondent as to such collateral or subsidiary facts as were relevant or irrelevant.

The Appellate Division, by a majority, reversed that judgment, the Chief Justice dissenting and upholding the judgment of the learned trial judge.

The majority of the court seem to hold, notwithstanding the contract being under seal, that unless and until the hundred dollars named therein as consideration had been paid, the contract was void. I wholly dissent, with great respect, from such view of the law.

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I agree that a unilateral offer of an option without consideration can be revoked at any time, unless under seal as this contract was.

I am of the opinion that if the offer is made under seal and not accepted it may be withdrawn within a reasonable time and that the measure of such time might under certain circumstances be very brief indeed.

I am further of opinion that, if there is no other consideration than mutual promises, an agreement for an option without seal may be enforceable.

Such promissory consideration may be in shape of a promissory note, or a promise to give one, or something else of value. And when the contract for an option, as here, is under seal and purports to bind for a specific time, assented to by the covenantee, it binds without the payment of any consideration.

And the binding effect thereof cannot be affected by any mere omission to pay what is named as the consideration which has been declared to have been received, unless and until the offerer has demanded from him bound to pay such consideration, and been refused.

None of the said several propositions of law for the most part need, I respectfully submit, any citation of authority to support them or any of them.

The distinction between the efficacy of contracts under seal and those not, so far as consideration therefor is concerned, still stands good, I think.

The man contracting under seal to give an option to the other party thereto, and stipulating for a consideration named, is entitled to have it paid, but even if it is not paid, it stands as a debt due and, by oral evidence, can be so shown despite the acknowledgment of its receipt.

That debt, or price of consideration, remaining due and owing by virtue of the bargain attested by such debtor executing the contract, is sufficient consideration even if he owing it never accepts the option.

That alone would uphold the validity of the contract even if a mere simple contract not under seal so far as the elements of need of consideration for such like contract is concerned. How can its being made under seal render it less?

There is presented in argument here, as has been elsewhere, what, if I may be permitted to say so with respect, seems to me a mere metaphysical train of thought, which suggests its payment is a condition precedent, inherent in the contract so framed, to render its becoming at all operative. Where is that condition precedent to be found? It certainly is not expressed. And I repeat it never has been successfully invoked in the case of a simple contract.

I have not found in the numerous English and Canadian and other authorities cited, anything to support such a proposition. I find in the judgment of Cowen J. in the case of *McCrea* v. *Purmort* (1), at foot of p. 113 and top of p. 114, two sentences which express more neatly than I have seen elsewhere what is my own view of the relevant law on the subject, as follows:—

> Looking at the strong and overwhelming balance of authority, as collectable from the decisions of the American courts, the clause in question, even as between the immediate parties, comes down to the rank of *prima facie* evidence, except for the purpose of giving effect to the operative words of the conveyance. To that end, and that alone, is it conclusive.

If the case presented were a mere simple contract expressed to be in consideration of the promise to pay one hundred dollars it would be *prima facie* binding.

(1) [1836] 30 Am. Dec. 103; 16 Wend. 460.

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And if the acknowledgment of its receipt were therein expressed that could not be held to be in any way destructive of the vitality of the contract.

It might well be that if and when payment had been demanded and refused such refusal would end the force of the contract.

Such being, as I take it, the condition of things under a simple contract, I repeat, how is it changed by adding a seal? It seems, I respectfully submit, a confusion of thought which should not have existed if the common use of such a form of expression had been borne in mind.

I respectfully submit that this alleged implication of a condition has no foundation in law to rest upon in any aspect of the case.

And the citation in support of respondent's case, of decisions such as *Dickinson* v. *Dodds* (1), or *Davis* v. *Shaw* (2), in which respectively an unaccepted offer of an option for which there was no consideration was properly held null or revocable at will, does not help to commend the curious theory of an implied condition precedent in a case where the offerer is bound both by his seal and the acceptance of a promised consideration which he never demanded before his breach of contract. Had he done so and been refused payment, I should have held him released.

In truth there is no English or Canadian authority, or American either when correctly interpreted, directly supporting such a proposition of an implied condition precedent, as claimed herein.

On the contrary we have the dictum I quote above from the judgment in the *McCrea Case* (3) neatly expressing the law, as I view it, applicable to this case.

(1) [1876] 2 Ch. D. 463. (2) [1910] 21 Ont. L.R. 474.
(3) 30 Am. Dec. 103

The case of *Cushing* v. *Knight* (1) has in it the element of demand and refusal, on unjustifiable grounds, of payment. Then we have the insurance cases, beginning with *Xenos* v. *Wickham* (2), followed by numerous English decisions as well as many American cases which in principle seem to refute this theory of an implied condition precedent as operative, unless and until payment of the consideration.

Of the latter numerous cases, *Basch* v. *The Humboldt Mutual Fire and Marine Ins. Co.* (3), is typical.

The decision in *Morgan* v. *Pike* (4), holding that the covenantee was entitled to recover on a deed although obviously the consideration therefor was his covenant in same deed, which he had never executed, seems to cover the whole ground.

And when we come to the actual facts surrounding the contract and the conduct of the parties in relation thereto, so fully illuminated by the correspondence above quoted, there seems not the slightest ground for reliance upon such a theory, and, if it ever had a possible existence, seems to have been clearly waived.

I would therefore, allow the appeal with costs. I agree, however, with Mr. Justice Beck's suggestion that a judgment for an account would be much more appropriate than an assessment for damages, for this is an action for the sale of a share in the contract. If the parties, or either of them, desire such an amendment it should be granted as the judgment the court should have given.

DUFF J. (dissenting).—I am unable to perceive any difficulty in the point of construction which was the principal point argued and the principal point

(1) [1912] 46 Can. S.C.R. 555.
(2) [1867] L.R. 2 H.L. 296.
(3) [1872] 35 N.J.L.R. 429.
(4) [1854] 14 C.B. 473.

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discussed in the court below. The contract of the 8th Dec., 1917, professes to create an option, to vest an option in the appellant and it is a long settled rule that in the exercise of an option for the purchase of land the terms as to time of payment and otherwise of the contract under which it is created must in all respects be strictly pursued. *Master* v. *Willoughby* (1); *Brooke* v. *Garrod* (2).

In the contract now before us it is, I think, quite clear that the sum mentioned, $100, as the consideration for the option is a sum the payment of which is one of the essential conditions of the constitution of the option, one of the facts which the plaintiff, relying upon the existence of the option, must establish in the absence of circumstances dispensing with the performance of the condition. It is not necessary to consider the effect of *Cushing* v. *Knight* (3). I see no reason to depart from the view I expressed there or indeed to reconsider the subject, but the arguments in favour of the view that the sum nominated to be paid upon the execution of the instrument is a condition of the constitution of the vendor's obligation are much stronger here than in that case by reason of the circumstance that the instrument we are here dealing with is a unilateral instrument, and I repeat, I can entertain no doubt that the payment of the sum mentioned is, by the terms of the instrument, a condition precedent upon the performance of which at the time specified any right of the appellant derived from the instrument alone must rest. I can only add that I am unable to agree with the suggestion that the consideration named can be treated as a merely nominal consideration.

(1) [1705] 2 Bro. Parl. Cas. 244. (2) [1857] 2 deG. & J. 62.
(3) 46 Can. S.C.R. 555.

The question which occupied much attention on the argument—it now proves not to be open as I shall explain presently—is one which does not appear to have been considered in the courts below, and it is this: Has the conduct of the parties been such as to preclude the respondent from relying upon the non-fulfilment of the condition precedent, the point upon which he succeeded in the Appellate Division?

The appellant's contention is twofold: 1st, it is said, the whole of the consideration of the purchase, the sum of $5,000 with interest from the date of the agreement was paid by the appellant and accepted by the respondent and this I shall consider after discussing the second branch of the argument; 2nd, it is said the respondent by his conduct waived the stipulation of the contract requiring the immediate payment of $100 as a condition of the option. It should be noticed that the payment is not a condition of the instrument going into effect; the instrument was unquestionably validly executed and went into effect as a deed but the payment was a condition named in the deed upon the performance of which the appellant's rights under the deed are based. It seems quite clear that the option if validly created would vest in the optionee an interest in land. The decision of the Court of Appeal in *London and South-western Railway Co.* v. *Gomm* (1), seems to be conclusive. Each one of the three judges, Sir George Jessel, Sir James Hannen, and Lindley L.J. explicitly hold that the grant of an option has the effect of creating an interest in land and these opinions are not mere dicta; they are the foundation of a distinct ground upon which the judgment of the court was based.

(1) [1882] 20 Ch. D. 562.

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It has often been held that where the judgment of a court is based on two distinct grounds it is not competent to another court bound by that decision to disregard one of them as being unnecessary to the decision.

True, the interest of the optionee is not the same as that of a purchaser but it is real and substantial and is not revocable and here I must take leave to dissent from the observation made by the learned trial judge in the course of the proceedings to the effect that the giver of the option might lawfully disregard it and pay damages. An option given for valuable consideration is not revocable. *Bruner* v. *Moore* (1); *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (2). And in *South Wales Miners Federation* v. *Glamorgan Coal Co.* (3), Lord Lindley points out that to break a contract it is an unlawful act and that in point of law a party to the contract is not entitled to break it on offering to pay damages. Any attempt on the part of the grantor to withdraw the option would be disregarded by a court administering equitable principles.

Since the option, if validly constituted, vested in the optionee an interest in land the contract embodied in the instrument under discussion was a contract within the 4th section of the Statute of Frauds; and it is, I think, settled law that neither the plaintiff nor the defendant could at law avail himself of a parol agreement to vary or enlarge the time for performing a "contract previously entered into in writing" and required so to be by the Statute of Frauds; and moreover that in equity when a contract falling within the Statute of Frauds is once made no conduct or verbal waiver can be relied upon to substitute a different

(1) [1904] 1 Ch. 305 at p. 309. (2) [1900] 2 Ch. 352 at p. 364.
(3) [1905] A.C. 239 at p. 253.

agreement from the one appearing in the contract itself unless the case can be brought within the equitable principles on the subject of part performance. *Stowell* v. *Robinson* (1); *Morris* v. *Baron* (2). It does not at all follow that one of the parties to the contract may not estop himself by his conduct or by his conduct put himself in a position in which he is precluded from denying that the other party has observed in a particular case the time or manner designated by the contract for the performance of one of its stipulations. *Hartley* v. *Hymans* (3).

Where one party to a contract is under an obligation to pay the other is under a correlative and concurrent obligation to accept and if the party in whom the obligation inheres prevents the performance of it by failure to observe his own concurrent obligation or otherwise by any wrongful act, he will not be allowed to take advantage of the non-performance of the first party; and this principle is comprehensive enough to prevent any person on whom the incidence of the contractual obligation falls justifying or excusing his default in performance of it by setting up the promisee's non-performance of a condition precedent where the promisee's non-performance is due to the conduct of the promisor which makes it unjust or inequitable that the promisor should rely upon such non-performance. *Mackay* v. *Dick* (4). These principles have been applied in a series of cases relating to contracts for the sale of goods where at the request of the buyer or seller there has been a forbearance to deliver at the time named for delivery in the contract. Where

(1) [1837] 3 Bing. N.C. 928, at pp. 936 and 937.
(2) [1918] A.C. 1 at pp. 16 and 17.
(3) [1920] 36 Times L.R. 805 at pp. 810 and 811.
(4) [1881] 6 A.C. 251 at pp. 263 and 270.

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the postponement of delivery took place at the request of the buyer made before the date fixed for delivery, it was held in *Hickman* v. *Haynes* (1), that the buyer was estopped from averring that the seller was not in truth ready and willing to deliver on the contract date. (Page 607). And the principle of the decisions which are summed up in the judgment of Lindley L. J. in the case just mentioned was stated in the judgment of Brett J. in *Plevins* v. *Downing* (2), in these words:—

> It is true that a distinction has been pointed out and recognized between an alteration of the original contract in such cases, and an arrangement as to the mode of performing it. If the parties have attempted to do the first by words only, the court cannot give effect, in favour of either, to such attempt, if the parties make an arrangement as to the second, though such arrangement be made only by words, it can be enforced. The question is what is the test in such an action as the present, whether the case is within the one rule or the other.
>
> Where the vendor, being ready to deliver within the agreed time, is shown to have withheld his offer to deliver till after the agreed time in consequence of a request to him to do so made by the vendee before the expiration of the agreed time, and where after the expiration of the agreed time, and within a reasonable time, the vendor proposes to deliver and the vendee refuses to accept, the vendor can recover damages. He can properly aver and prove that he was ready and willing to deliver according to the terms of the original contract. He shows that he was so, but that he did not offer to deliver within the agreed time because he was within such time requested by the vendee not to do so. In such a case it is said that the original contract is not altered, and that the arrangement has reference only to the mode of performing it. But, if the alteration of the period of delivery were made at the request of the vendor, though such request were made during the agreed period for delivery, so that the vendor would be obliged, if he sued for non-acceptance of an offer to deliver after the agreed period, to rely upon the assent of the vendee to his request, he could not aver and prove that he was ready and willing to deliver according to the terms of the original contract. The statement shows that he was not. He would be driven to rely on the assent of the vendee to the substituted time of delivery, that is to say, to an altered contract or a new contract. This he cannot do so as to enforce his claim. This seems to be the result of the cases which are summed up in *Hickman* v. *Haynes* (1).

(1) [1875] L.R. 10 C.P. 598.

(2) [1876] 1 C.P.D. 220 at pp. 225 and 226.

There appears, it is true, to be some point in the criticism upon this judgment made in a note at pp. 690-1 of the last edition of Benjamin on Sales, to the effect that the distinction drawn by Brett J. between a postponement at the request of the plaintiff and a postponement at the request of the defendant is not consistent with the decision in the *Tyers case* (1), and that the view of Blackburn J. expressed arguendo in that case gives the true rule, namely, that a postponement of delivery by a seller in consequence of the assent of the buyer to his request stands in the same position as a postponement at the request of the buyer. In neither case, it is suggested, does the plaintiff rely upon a binding contract to postpone delivery but upon a voluntary forbearance brought about by the conduct of the other party and in either case, it is suggested, the plaintiff, if in truth he would have performed the condition, had he not been induced to refrain from doing so by the conduct of the other party, is in a position to aver and prove his readiness and willingness to perform it.

This criticism, it will be observed, really leaves untouched the principle stated in the judgment of Brett J.; it is rather directed to his concrete application of it by which it may at least be plausibly contended the scope of the principle is not adequately recognized.

The principle upon which courts of equity have acted is stated by Lord Cairns in *Hughes* v. *Metropolitan Rly. Co.* (2), in a passage applied by Farwell J. in *Bruner* v. *Moore* (3), to the effect that stipulations as to time in a contract constituting an option may be

(1) [1875] L.R. 10 Ex. 195. (2) [1877] 2 A.C. 439.
(3) [1904] 1 Ch. 305.

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waived by conduct having the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced "where to enforce them would be inequitable having regard to the dealings which have * * * taken place between the parties."

I am discussing, it will be observed, the waiver of conditions precedent. As regards waiver of conditions subsequent somewhat different considerations apply, in the majority of cases at all events, as usually the right affected by the condition is made defeasible at the option of the party entitled to enforce the condition. In such cases the right continues to subsist until the party has declared his election to avoid it which he may of course do by unilateral act, the matter being entirely in his own hands. In dealing with conditions precedent where the act designated is one of the things which enter into the constitution of the right the existence of which is in dispute and consequently if the act is not performed no right arises under the strict terms of the contract, obviously something more than a declaration of intention either by words or by conduct is required to fill the gap. Obviously also the gap is filled if the party entitled to enforce the condition is either estopped by law or on equitable principles precluded from disputing that the other party has done everything required to be done on his part; and there seems to be no reason in principle why the estoppel or the corresponding equitable claim should not be rested upon facts or upon conduct subsequent to the time fixed for the performance of the condition. As Lord Chelmsford said in *Roberts* v. *Brett* (1):—

(1) [1865] 11 H.L.Cas. 337 at p. 357.

I have no difficulty in saying that in such a case the party who may avail himself of the non-performance of the condition precedent but who allows the other side to go on and perform the subsequent stipulations has waived his right to insist upon the unperformed condition precedent as an answer to the action.

Bentsen v. *Taylor* (1); *Panoutsos* v. *Hadley Co.* (2); *Hartley* v. *Hymans* (3); *Leather Cloth Co.* v. *Hieronimus* (4).

Always observing, however, that in those cases in which the Statute of Frauds comes into play the plaintiff must fail if in substance he is relying not upon the written agreement but upon a verbal agreement or an agreement by conduct substituted for the written agreement in whole or in part. *Stowell* v. *Robinson* (5); *Noble* v. *Ward* (6); *Bruner* v. *Moore* (7); *Corn Products Co.* v. *Fry* (8); *Morris* v. *Baron* (9); and subject always, moreover, I repeat, to this, that the plaintiff has been put in a position by the conduct of the other party to aver that he was at the time designated (when the provision as to time is imperative) ready and willing to perform his part of the contract. With the plaintiff "readiness and willingness" where he is seeking to enforce an obligation in which he is involved concurrently with the defendant is always a condition precedent, and this is so even in a case in which if he had been the defendant he might have succeeded in resisting the claim against him on the ground that he was absolved from performance by the conduct of the other party.

Whichever party is the actor

said Lord Halsbury in *Forrestt* v. *Aramayo* (10)

(1) [1893] 2 Q.B. 274.
(2) [1917] 2 K.B. 473.
(3) [1920] 36 T.L.R. 805 at pp. 810-811.
(4) [1875] L.R. 10 Q.B. 140.
(5) [1837] 3 Bing. N.C. 928.
(6) [1867] L.R. 2 Ex. 135.
(7) [1904] 1 Ch. 305 at pp. 312-13.
(8) [1917] W.N. 224.
(9) [1918] A.C. 1.
(10) [1900] 83 L.T. 335 at p. 338.

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and is complaining of a breach of contract he is bound to show, as a matter of law, that he has performed all that was incident to his part of the concurrent obligations. The averment that he was always ready and willing to perform his obligation is a necessary averment. *Hickman* v. *Haynes* (1); *Plevins* v. *Downing* (2); *Hartley* v. *Hymans* (3).

Applying these principles to the circumstances disclosed in the present appeal I should be disposed, as I intimated more than once in the course of the argument, to think that a vendor and purchaser accustomed to deal with one another and on such a footing as the parties to this appeal were having executed an instrument such as that before us and having separated without a word being said as to the payment of the consideration for the option, the sum being comparatively trifling, there was sufficient *prima facie* evidence of a request for forbearance and compliance with that request to constitute an estoppel within the meaning of the cases discussed in *Hickman* v. *Haynes* (1). One circumstance, however, deprives this view of relevancy; the evidence shows quite plainly that the appellant's attention was not drawn to the circumstance that this sum of $100 was to be paid on the execution of the instrument and points rather directly to a similar conclusion as touching the respondent's state of mind. The appellant who never thought of the condition precedent as he states himself, cannot, of course, be heard to say that his default was due to anything done by the respondent who, as far as one can see, was in the same state of inattention as himself. Not only does he not aver readiness and willingness; such an averment if made would be conclusively negatived by his own evidence.

(1) L.R. 10 C.P. 598. (2) 1 C.P.D. 220.
(3) 36 Times L.R. 805.

The subsequent conduct of the parties gives no additional support to the appellant's contention on this point and indeed a perusal of the case makes it quite clear that neither estoppel nor the corresponding equitable principle is a ground of claim which the appellant is entitled to rely upon in this court. There is no suggestion of it in the pleadings, it was not touched upon by either the trial judge or the judges of the Appellate Division, it was barely mentioned in the appellant's factum and the cross-examination which at first sight might seem to have been directed to it appears on a closer examination to have been aimed at the respondent's plea of mistake on his part and overreaching on part of the appellant.

As to the contention that the purchase price was accepted by the respondent the correspondence establishes that the respondent had no intention of accepting the appellant's cheque and there was nothing in the respondent's conduct calculated to convey to the mind of the appellant the idea that such was his intention. I concur with the comment of Stuart J. as regards the appellant's knowledge of the sales made by the respondent. I do not doubt that the appellant was aware of these sales when he wrote the letter of the 19th March. In making the sales the respondent had committed himself to a series of contracts involving a repudiation of any obligation to sell to the appellant; *Manchester Ship Canal Co.* v. *Manchester Racecourse Co.* (1), and *Metropolitan Electric Supply Co.* v. *Ginder* (2); he was asserting openly (and there is no doubt with the knowledge of the appellant acquired anterior to any offer of payment) his right to deal with the property as owner; and I can find in the appellant's conduct thencefor-

(1) [1901] 2 Ch. 37 at p. 51. (2) [1901] 2 Ch. 799 at p. 807.

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ward only a persistent though unsuccessful effort to coax or trick the respondent into a position in which he could aver that his cheque had been accepted. The appeal should be dismissed with costs.

ANGLIN J.—A defence of misrepresentation having failed at the trial, the only question now before us is the effect on the rights of the parties of the non-payment by Davidson at the time the agreement sued upon was executed of the sum of $100, receipt whereof is thereby acknowledged as the consideration for the vendor's covenant to sell.

The learned Chief Justice of Alberta in his analysis of the opinions delivered in this court in *Cushing* v. *Knight* (1), so much relied on for the respondent, has, I think, satisfactorily distinguished that decision from the case at bar. Yet, if the question now presented were merely one of interpretation of the written agreement, while an implied promise by the respondent to pay the sum of $100 to the appellant as the consideration for which the latter undertook to keep his offer of sale open from the 8th December, 1917, to the 1st of May, 1918, may be found in it, I should think it also clear that actual payment of that sum was thereby made a condition precedent to the instrument becoming effective as an option. Nor do I find in the terms in which it is couched any latent ambiguity in this respect such as might justify resort to evidence of conduct or negotiations to aid in construction.

I cannot assent to the contention that the facts that the agreement is under seal, and that it contains a recital of the payment of the sum of $100 are conclusive in the appellant's favour. Neither can I regard that sum as merely a nominal consideration.

(1) 46 Can S.C.R. 555.

But as Baron Bramwell said in *White* v. *Beeton* (1)

> that which was at one time a condition precedent (may) by my own conduct become no condition precedent. * * The performance of an act may be at one time a condition precedent and not at another.

The reasonable inference from the circumstances immediately following the execution of the agreement and the subsequent letters of the respondent—unless we are to attribute to him bad faith in writing them amounting almost to dishonesty—seems to be that, without relinquishing his right to insist upon actual prepayment of the $100 he voluntarily forbore doing so and made it apparent that he was satisfied to rely upon the undertaking or liability of the appellant to pay that sum either as part of the $5,000 payable on the 1st of May or before the time for making that payment should expire. Parol evidence of the facts warranting this inference is admissible since it does not amount to such a variation of the terms of the contract that verbal proof of it would offend against either the rule in regard to contracts reduced to writing or the Statute of Frauds. It does not involve the substitution of a promise to pay for actual payment as the consideration. Such a case would present great difficulty. *Vezey* v. *Rashleigh* (2). It is merely a withholding by the respondent of the exercise of his right to insist upon the performance at the date thereby fixed of a promise to pay stipulated in the written contract, *Tyers* v. *Rosedale & Ferryhill Iron Co.* per Martin B. (3)—a substituted mode of performance assented to without release of the original obligation; *Leather Cloth Co.* v. *Hieronimus* (4); *Plevins*

(1) [1861] 7 H.&N. 42, at p. 50.
(2) [1904] 1 Ch. 634.
(3) [1873] L.R. 8 Ex. 305, at p. 319; L.R. 10 Ex. 195.
(4) L.R. 10 Q.B. 140, at p.146.

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v. *Downing* (1). The principle taken from Lord Cairns' judgment in *Hughes* v. *Metropolitan Rly. Co.* (2), as applied in *Bruner* v. *Moore* (3), may perhaps also be invoked. That the appellant assumed liability to pay the $100 is, I think, sufficiently evidenced by his execution of the agreement which would otherwise seem to have been purposeless. I incline to the view that there was a binding option, if not from the execution of the instrument, from the 14th of March, or, at all events, from the date of the tender in April.

In any event, however, the document of the 8th December, 1917, may, in my opinion, be regarded as an offer to sell a one-half interest in the lands in question upon the terms therein stated. There was never any express revocation of that offer and nothing had transpired that would imply a revocation before the appellant intimated his intention to accept and tendered the amount which would be due to the respondent on the 1st of May, including the $100 and interest thereon.

Resale of the land was contemplated by the parties. Resale at a profit was the chief object of the venture. The sales made by Norstrant did not imply a revocation of his offer to sell to Davidson an undivided one-half interest in his purchase from the Calgary Colonization Company. Knowledge of those sales by Davidson, therefore, would not amount to notice of revocation of that offer such as would preclude an effective acceptance of it. Moreover Davidson was in fact unaware of Norstrant's sales when he sent the letter of the 14th of March, 1918, intimating his intention to carry out the agreement. No other act of revocation is suggested. Davidson might have some recourse

(1) 1 C.P.D. 220. (2) 2 App. Cas. 439.
(3) [1904] 1 Ch. 305, at p. 312.

in damages against Norstrant if he exceeded his authority and his sales were unsatisfactory. But he can in any event hold Norstrant accountable for his share of their proceeds.

Assuming in favour of Norstrant that the prepayment of the sum of $100 remained a condition precedent to the document becoming binding as an option and, that it was therefore open to him at any time before acceptance of the offer to sell to have withdrawn it, communication of such a withdrawal to the appellant was necessary in order to terminate his right of acceptance and preclude him by exercising it from converting the offer into a firm contract of sale.

While the delay in Davidson's acceptance might, apart from the special circumstances, have been so unreasonable as to render it inefficacious, the evidence here shows that such delay as was required to enable the appellant at his convenience in the early spring to interview the members of the firm of Beiseker and Davidson at Minneapolis was contemplated and provided for. Davidson communicated the result of that interview to the respondent by his letter of the 14th March, written promptly on his return from the trip on which it took place, and informed him of his intention to take up the option and become the purchaser of a one-half interest in the lands. He formally accepted Norstrant's offer and tendered all the money due on the 1st of May by his letter of the 23rd of April, receipt of which in due course has been proved.

I would, for these reasons, with great respect, allow this appeal and restore the judgment of the learned trial judge, substituting however for the reference to assess damages directed by him an order for an accounting as indicated by Mr. Justice Beck.

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MIGNAULT J. (dissenting).—That this case presents some features of considerable difficulty is shewn by the division of opinion in the courts below. And the respondent, who lost in the first court but succeeded in the Appellate Division, the learned Chief Justice of Alberta dissenting, relies on legal principles of an elementary character, the great difficulty not being as to the principles themselves but rather on the question whether a proper case has been made out for their application.

The agreement signed by the parties on the 8th December, 1917, gave rise to this litigation. This agreement, in so far as is material to the present controversy, states that in consideration of the sum of $100 "now" paid by the appellant to the respondent, the receipt of which is acknowledged, the respondent agrees with the appellant to sell and assign to him, on or before the 1st of May, 1918, one undivided half share or interest in certain farm land which the respondent purchased on the same day from the Calgary Colonization Company, subject to the covenants and conditions contained in the agreement of sale from the latter company to the respondent, for the price of $5,000 on which was to be credited the said sum of $100 with interest at 6% per annum from December 4th, 1917, and an undivided one-half share or interest in all necessary equipment purchased by the respondent for the operation of the farm prior to May 1st, 1918, for a price equivalent to one-half of the actual cash paid for the same by the respondent, subject to the payment of any unpaid purchase money remaining against the same, together with a sum equivalent to one-half the cash paid by the respondent prior to May 1st, 1918, in the cultivation of the said lands, together also with one-half the

actual cash cost of any necessary buildings erected by the respondent on the said lands prior to the above date. In the event of the appellant availing himself of the respondent's agreement, certain stipulations were made as to the farming operations to be carried on by the respondent which are not material to the present inquiry. The document witnessing the contract was made under seal and was signed by both parties.

Although by this instrument the respondent acknowledged receipt of $100 stated to be the consideration of the agreement, it is common ground that this sum was not paid nor was it ever demanded by the respondent. The reason the appellant desired to obtain an agreement in this form, was that one Davidson, then deceased, and one of whose executors the appellant was, had had an equitable interest in the property, and the appellant very properly did not wish to enter into the venture before consulting his co-executors, which he expected would require some time. He went to Minneapolis with this object in view, and after his return he wrote, on March 14th, 1918, to the respondent informing him that he had obtained the consent of his co-executors and asking the respondent if he desired that he should send him a cheque to Rockyford or place the money to his credit in a bank in Calgary. On March 19th, the appellant sent the respondent his cheque for $5,066.16, being the half of the cash payment made by the latter to the Calgary Colonization Company with interest at 7 per cent from January 10th. The respondent answered on March 23rd, acknowledging receipt of the letter of March 14th, stating however that he had plenty of cash on hand. On April 19th, the respondent wrote to the appellant returning the cheque for $5,066.16 saying that he did not need the money then as he had

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to pay interest on the money which he had borrowed when the deed was made, and the appellant's money would only be idle in his hands. The appellant wrote again, on April 23rd, insisting on the respondent's acceptance of the half of the cash payment made by him, notifying him that he accepted the offer contained in the agreement of December 8th, and enclosing a marked cheque for $5,100.71, being the $5,000 with interest from December 4th. This cheque the respondent returned without assigning any reason on April 25th.

When this action was taken by the appellant, the respondent contested it, denying the tender of $5,100.71 and any notification of acceptance by the appellant of the offer contained in the agreement of December 8th. It was only at the trial that the respondent amended his statement of defence by setting up total failure of the consideration mentioned in the agreement.

It is on this plea of failure of consideration that the Appellate Division dismissed the appellant's action.

Reliance was placed in the Appellate Division on the decision of this court in *Cushing* v. *Knight* (1), but it seems to me that the fact that in that case a demand was made for the money consideration, which had not been paid although its receipt was acknowledged in the agreement, with notification that if it were not paid within four days, the contract would be treated as rescinded,—sufficiently distinguishes *Cushing* v. *Knight* (1) from the present case where no such demand was made.

Some discussion took place at bar and in the courts below on the question whether the $100 mentioned as consideration could be regarded as a purely nominal

(1) 46 Can. S.C.R. 555.

consideration, the more so as the agreement was under seal and therefore, it was contended, would stand without consideration. Independently of the question whether the sealing of the agreement rendered it enforceable without consideration, I have not been able to satisfy myself that failure of consideration, where a valuable consideration is requisite for the existence of a contract, can be met by saying that the consideration mentioned in the contract is a merely nominal one and can therefore be disregarded. For this would be equivalent to holding that although consideration is required, no consideration at all is necessary. In other words, if this contention is sound, where the parties mention a merely nominal consideration, instead of a substantial one, the contract would stand without payment of this consideration, and, if so, it would be valid without any consideration. If the sum mentioned as consideration be so insignificant that it can be disregarded, then there is no consideration whatever. I may add that even were it open to the appellant to urge that a nominal consideration can be disregarded, here the sum of $100 appears sufficiently substantial, the more so as it was to be credited on the purchase price, to prevent us from holding that it was in any way purely nominal.

Nor is it any answer to say that the agreement being under seal no consideration at all is necessary, for the agreement itself states that it was entered into in consideration of the then and there payment of $100, and if this sum was not paid, the sealing of the agreement would not protect it from the total failure of the consideration it expressly mentions.

Coming now to the objection that the sum of $100 was not paid and therefore that the agreement sued on is void for want of consideration, I think it must be

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conceded, on the construction of the agreement, that the payment of this sum was a condition precedent to the existence of any contract of option between the parties. It is said that the respondent waived this stipulation as to the mode or time of performance, but I have been unable to find any evidence of such waiver. It is true that when the appellant sought to tender the sum which had to be paid before May 1st, the respondent alleged that he was not then in need of money to carry out his purchase from the Calgary Colonization company. But while the respondent may have thought that he was bound by the agreement, still the fact remains that he could not be bound unless the money consideration mentioned in the deed was paid. I cannot see my way to find in the agreement both an option contract conditioned on the prepayment of the consideration and, if the consideration failed, an offer open to acceptance so long as it was not withdrawn. The agreement is either an option contract binding on the respondent from its date, or it is no contract at all, certainly not a mere offer which the appellant could accept before May 1st, 1918, provided the offer had not been withdrawn before that date. The intention clearly was that the respondent should be bound until the first of May to sell a half share of the property to the appellant, if he accepted the option, but the respondent could not be so bound unless the money consideration mentioned in the deed was paid, for the granting of the option to purchase was based on this payment. The answers made by the respondent to the appellant's letter are consistent with the fact, which I think probable, that, not having, as he swore, a copy of the agreement, he was unaware of the existence of the clause requiring the pre-payment

of the $100, and the appellant himself says that he read over the contract without noticing this clause. But then if the respondent was without such knowledge, it certainly cannot be said that he waived this stipulation. The position in fine appears to me to be this. The appellant sues on this agreement and must therefore shew that he fulfilled the condition subject to which it was entered into. This he has not done and he has consequently not made out a case entitling him to succeed.

I would therefore dismiss the appeal with costs.

Appeal allowed with costs.

Solicitor for the appellant: *E. A. Dunbar.*

Solicitor for the respondent: *F. C. Moyer.*