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*May 14.
*June 18.

PATRICK D. BOWLEN (PLAINTIFF).....APPELLANT;

AND

THE CANADA PERMANENT TRUST COMPANY AND OTHERS (DEFENDANTS) ..... } RESPONDENTS.

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

Sale of land—Joint purchase—Speculation purposes—Title in the name of one—Failure to transfer title to other—Right to repudiate—Return of moneys.

The appellant acquired an interest in land purchased by H. for purposes of speculation. H. agreed to transfer to the appellant, free from encumbrances, an undivided quarter interest, and he professed to make this transfer by an instrument subsequently executed, in which, moreover, H. agreed, upon demand, to execute such further transfers, assignments and other documents as should protect the interest of the appellant.

Held that the latter instrument left nothing outstanding between the parties except the undertaking for further assurance, which is an independent covenant, and that delay in the performance of it was not a cause for rescission of the executed conveyance and recovery of the purchase money.

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

The material facts of the case are fully stated in the judgment now reported.

C. J. Ford K.C. for the appellant.

Lafleur K.C. and *McL. Sinclair K.C.* for the respondent.

The judgment of the court was delivered by

NEWCOMBE J.—The appellant (plaintiff) alleges an agreement of sale made orally, about 1st April, 1913, with the late Michael Healy, deceased, whereby the latter agreed to sell to the appellant, for $9,500, an undivided quarter interest in three parcels of land at Medicine Hat, each containing two lots, and particularly described as:

Lots twenty-nine (29) and thirty (30), block twenty-four (24), plan 1491, lots one (1) and two (2), block eighty-nine (89), plan 656-m, and

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

(1) [1924] 2 W.W.R. 327.

lots five (5) and six (6), block "D," plan 32,380, all in the city of Medicine Hat in the province of Alberta.

The appellant alleges that he paid the purchase money but failed, notwithstanding repeated demands, to obtain a conveyance of the title, wherefore he repudiated the agreement, and he claims repayment of the money with interest. By the defence the allegations upon which the action is founded are specifically denied.

The appellant testifies to the oral agreement and to the payment of the consideration money in the manner which he describes. He produces a document, dated 1st April, 1913, signed by Mr. Healy, which reads as follows:

I, Michael Healy, contractor, of the city of Toronto, province of Ontario, hereby declare that Mr. P. D. Bowlen, of Elbow, Saskatchewan, owns one-quarter interest in the under-noted lots being: subject to deferred payments of $2,600—twenty-six hundred dollars on lots 1 and 2, block 89, lots 5 and 6, block D. Herald * * *.
and lots 1 and 2, block 89, plan 636m, all in the city of Medicine Hat, Alberta.

This declaration, owing to some confusion, mentions only four of the lots and two of them are named twice, but nothing turns upon this fact. The property remained in the possession of Mr. Healy, who continued to have the management of it. The appellant's cross-examination began as follows:

Q. I think the arrangement you had with Mr. Healy was that using the language of the real estate market he was going to let you in on a quarter interest of the property he had bought in Medicine Hat, wasn't he?

A. Well, he gave me the impression that I was getting a pretty good deal, a good bargain.

Q. I do not want your impressions, but what the result was. I am not going in to what led you or induced you to go into it but what actually was the arrangement; he had bought or was about to buy this property in Medicine Hat. He had bought it?

A. Yes, I understand he had.

Q. And you were discussing it?

A. Yes.

Q. And he said he would let you in on a quarter and you pay a proportion of what it cost him and he was not making any profit on the deal?

A. Well a very small profit.

Q. He was letting you in to the extent of a quarter interest in his deal?

A. Yes.

Two agreements were introduced by the appellant. The first is dated 12th April, 1916, between the appellant as party of the first part, and Mr. Healy as party of the second part, and it contains the following recitals:

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Whereas the party of the first part is indebted to the party of the second part in the sum of four thousand five hundred and ninety-three ($4,593.69) dollars and sixty-nine cents and interest thereon from the 20th day of December, A.D. 1915, at the rate of eight (8) per cent per annum under and by virtue of a certain promissory note for four thousand five hundred and ninety-three ($4,593.69) dollars and sixty-nine cents now deposited in the Union Bank of Canada, Toronto, Ontario;

And whereas the said indebtedness is now over due and entirely unpaid;

And whereas the said party of the second part has demanded payment of the said indebtedness;

And whereas the said party of the first part is unable to make payment of the said indebtedness;

And whereas the said party of the first part is the owner of the northeast quarter of section thirty-one (31), in township twenty-two (22), in range nine (9), west of the third meridian, in the province of Saskatchewan, free from all encumbrances and will be the owner of a one-quarter undivided interest in a certain three parcels purchased by himself and Michael Healy in the city of Medicine Hat, in the province of Alberta, if the payments herein provided for are made in the manner herein provided for;

And whereas the party of the first part has agreed to give as security a transfer of the said northeast quarter of the said section thirty-one (31) upon the terms and conditions hereinafter set forth;

This agreement proceeds to witness that in consideration of the premises the appellant agrees to transfer to Mr. Healy the northeast quarter of section 31, mentioned in the recital, to be held in trust by the latter as security for the recited indebtedness and interest, and that Mr. Healy is to retransfer upon payment to him by the appellant, on or before 1st February, 1917, of the sum of $4,593.69 and interest from 20th December, 1915, at 8 per cent, being the amount of the indebtedness due from the appellant to Mr. Healy; the agreement also provides that:

The party of the first part further agrees that upon default being made in the payment of the amount of the said indebtedness on the said first day of February, A.D. 1917, that he will release and hereby releases all his right, title and interest in certain properties in the city of Medicine Hat, in the province of Alberta, being three parcels in which the said party of the first part has a one-quarter undivided interest with the said party of the second part, and hereby for that purpose releases and quit claims all his right, title and interest in the said parcels, and agrees to execute upon request by the party of the second part, any further quit claim deed or other instrument required to vest the said parcels in the party of the second part for his sole use and benefit but such request by the party of the second part shall in no way be construed as an acknowledgment by the said party of the second part that the said party of the first part has any further interest in the said property after the said first day of February, A.D. 1917.

It is, however, agreed between the parties hereto that should the party of the first part pay to the party of the second part on or before the first day of February, A.D. 1917, a sum equal to the difference between

the sum of $4,593.69 and interest thereon from the 20th day of December, A.D. 1915 at eight per cent per annum and the sum of $3,200 being the agreed value of the said quarter-section, then and in such case the party of the first part shall receive a one-quarter undivided interest in the said parcels situate in the city of Medicine Hat, in the province of Alberta, and such said payment of the said difference shall be payment in full for his one-quarter undivided interest in the said property.

It appears, according to the appellant's evidence, that the promissory note for $4,593.69 was paid by credit of $3,200 for the northeast quarter of section 31, and the balance by the appellant's cheque, which was paid through Mr. Trainor, his solicitor.

Subsequently another agreement, dated 10th March, 1917, was made between Mr. Healy and the appellant, the material provisions of which are as follows:

Whereas the party of the first part is the registered owner of three parcels of land in the city of Medicine Hat in the province of Alberta free from all encumbrances.

And whereas the party of the second part has at different times paid different sums of money to the party of the first part for an equitable interest, which the party of the second part holds in the said three parcels of property.

And whereas the party of the second part was owing the party of the first part a further sum of money in respect of the said three parcels of property in the city of Medicine Hat, Alberta.

And whereas the party of the first part and the party of the second part entered into an agreement dated the 12th day of April, 1916, whereby an agreement was reached with respect to the amount owing by the party of the second part to the party of the first part on the three parcels of land in Medicine Hat.

And whereas in pursuance of the agreement entered into between the parties hereto on the 12th day of April, 1916, the party of the second part did transfer to the party of the first part the northeast quarter of section thirty-one (31), township twenty-two (22), range (9), west of the third meridian.

And whereas according to the terms of the agreement dated the 12th day of April, 1916, entered into between the parties hereto, there was due as to the 1st day of February, 1917, to the party of the first part, the sum of fifteen hundred and ninety-six dollars and eighty cents ($1,596.80).

And whereas the said amount of money has been paid by the party of the second part to the party of the first part.

And whereas it was agreed that on the payment of the said sum of fifteen hundred and ninety-six dollars and eighty cents ($1,596.80) the party of the first part would transfer to the party of the second part an undivided one-quarter interest free from all encumbrances in the three parcels of land now held by the party of the first part in his own name in the city of Medicine Hat.

Now therefore in consideration of the premises and the sum of fifteen hundred and ninety-six dollars and eighty cents ($1,596.80) now paid by the party of the second part to the party of the first part (the receipt whereof is hereby acknowledged), the party of the first part transfers, assigns and sets over to the party of the second part free from all encumbrances an undivided one-quarter interest in the three parcels of pro-

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perty in the city of Medicine Hat in the province of Alberta now standing in the name of the party of the first part.

And the party of the first part agrees upon demand to execute such further transfers, assignments and other documents as shall protect the interest of the party of the second part.

After the execution of the latter agreement Mr. Healy, on 27th October, 1917, wrote to Mr. Trainor, stating that he would be in Calgary on 8th November and would like to meet the appellant at the solicitor's office

in connection with a transfer he made of a quarter section of land;

but on 1st November Mr. Healy wrote the solicitor that his trip would be postponed for the present. A series of letters followed between the appellant's solicitor on the one hand and Mr. Healy's solicitors on the other, in which the appellant urged that the title of the Medicine Hat property should be transferred to him. No objection was stated on behalf of Mr. Healy. In a letter of 28th December, 1917, his solicitors said:

Mr. Healy has instructed us to prepare a transfer to Mr. Bowlen of his interest in this property.

It appeared however that Mr. Healy had lost or mislaid the duplicate certificate of title to two of the parcels and that this caused some delay; then Mr. Healy went to California; the duplicate certificate was found with his solicitors at Toronto, but could not be handed over without an order from Mr. Healy; there was also a mortgage to be discharged, which covered one of the parcels. Mr. Healy's solicitors wrote on 15th June, 1920, that although they had written him several times in order to have the matter adjusted, they had received no instructions for nearly a year and a half, but that they were writing him again, and, on 19th June following, they wrote that they had received a letter from Mr. Healy to the effect that he expected to be at Calgary the following week and would see them in connection with the matter; but he did not see them, and here ends the correspondence which took place in Mr. Healy's lifetime. The appellant however tells of a conversation between him and Mr. Healy in the fall of 1921. He says:

A. I went there to see him. I went to Swift Current where I thought I would find him, that is where he made his home.

Q. What was your object in going to Swift Current?

A. My object in going to Swift Current was to meet Mr. Healy and talk this matter over with him.

Q. Talk it over for what purpose?

A. For the purpose of getting my transfer or getting my money back. That was in 1921.

Q. You did not see him in Swift Current?

A. No, I did not see him at Swift Current but I came back then to Gull Lake and went out to his farm and saw him there.

Q. What discussion did you have with Mr. Healy on that occasion?—A. Well I talked this matter over with him and I told him I had gone to a lot of expense and trouble and I am sure I wrote a lot of letters or had a lot of letters written.

Q. Your solicitor had been acting for you?

A. Yes.

Q. He will give that evidence.

A. And I told him, well I do not remember just exactly what I told him, but I told him I was down there for the purpose of getting my transfer or getting my money back, that I had put a lot of confidence in him and I had waited on him a number of years to get the transfer, words to that effect, that is the impression that I gave him, that I was there and I had gone to a lot of expense and a lot of trouble and I was disappointed. I told him I wanted my transfer or my money back.

Q. What did he say?

A. He said he would come to Calgary in a short time and would arrange matters with me satisfactorily. We talked the matter over.

Q. And that is the way you left it?

A. Yes, I told him I was disappointed.

Q. You left it as you have stated, that he would come to Calgary?

A. Yes.

Q. Did he come to Calgary?

A. No.

Q. The court: You did not see him? He may have come?

A. No, I did not see him.

Q. Mr. Ford: Did he interview you later at Calgary?

A. I never saw him afterwards.

Mr. Healy died on 31st January, 1923. The respondents are his executors. On 29th May, 1923, the appellant's solicitor wrote them, enclosing copy of the agreement of 10th March, 1917, and saying:

this agreement is repudiated by me and return of the moneys paid demanded, which, with interest, amount approximately to $11,743.

On 30th July, 1923, the solicitor wrote again to the respondent company, asking what they were prepared to do, and saying that unless the claim were admitted he would have to take action. On 16th August, 1923, he wrote again urging a settlement. The manager of the company said in reply that the estate could not recognize responsibility for the claim, and that the case was in the hands of their solicitors. Finally, on 11th October, 1923, the appellant wrote the respondents as follows:

I hereby repudiate the agreement in writing entered into between myself and the late Michael Healy, which agreement was dated the 10th day of March, A.D. 1917.

I repudiate the said agreement on the grounds that the late Michael Healy had undertaken therein to deliver to me a one-quarter undivided interest free from all encumbrances in the three parcels of property in

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the city of Medicine Hat, Alberta, but both the late Michael Healy and you, as executors, have failed to deliver such title free from all encumbrances.

The learned trial judge found, and it was not disputed, that the title to two of the lots had been in Mr. Healy's name since November, 1912; to two others, since May, 1914, and to the remaining two, since July, 1914, also that the two latter were, when Mr. Healy acquired them, subject to a mortgage which was discharged in 1917, although the discharge was not registered until 1923. The mines and minerals in two of the lots were by the grant from the Crown reserved, but no question arises as to this, and, subject to a claim for taxes, it was found that Mr. Healy had, since the dates of the respective certificates, the title in fee simple. The conclusion at the trial was that the plaintiff had effectively repudiated the contract, and was entitled to recover the various sums paid by him to Mr. Healy, with interest at the contract rate of 8 per cent from the dates of the respective payments. In this disposition of the case the judge was influenced by the decision of this court in *Simson* v. *Young* (1), which he thought could not be distinguished. In that case there was a purchase of land in a speculative market. A part of the purchase money was paid at the time of the execution of the contract and the balance, $1,600, was to be paid on a fixed date one year later. Time was declared to be of the essence of the contract. When the time for payment of the balance arrived, the vendor, who lived in Ireland, was not ready with her conveyance and there was a long period of delay in the preparation of it, by reason of which it was held that she could not have specific performance, and, moreover, that the purchasers were entitled to rescind, either because time continued to be of the essence of the contract, or because, in view of the special circumstances of the case, the purchasers were entitled to be placed in the same position as if they had given notice of intention to rescind conditional upon the vendor not delivering the conveyance within a named reasonable time. It is unnecessary further to review the facts, which are very fully explained in the report; a perusal of them serves to convince me that *Simson's*

(1) [1918] 56 Can. S.C.R. 388.

Case (1) differs from the present one in every particular which is contested, or might be thought to create a difficulty in the latter.

Upon appeal it was considered that the testimony and exhibits did not evidence a sale and purchase, but were more consistent with the view that the transaction was in reality a joint purchase; that the property was bought for purposes of speculation with the intention that Mr. Healy should hold the title until a profit could be realized, a purpose which was defeated owing to the war and the depression which ensued. The judgment was pronounced by the Chief Justice, the other members of the court concurring, except Stuart J., who would have preferred to adopt the reasoning of the trial judge, but did not dissent.

From the foregoing relation it is apparent that the appellant encounters formidable difficulties. The transaction was oral, the writings produced do not necessarily point to a sale; it is a remarkable fact that neither the declaration of 1st April, 1913, nor the agreements of 12th April, 1916, and of 10th March, 1917, contain any statement or recital of a sale by Mr. Healy to the appellant. By the declaration it is said that the appellant owns one quarter interest in the lots. By the agreement of 1916 it is recited that the appellant is indebted to Mr. Healy, and provision is made looking to the discharge of the indebtedness, and, in the event of default, that the appellant will release his interest in the Medicine Hat properties, which are described as three parcels in which the appellant has a one-quarter undivided interest with Mr. Healy, while on the other hand it is stipulated that, if the indebtedness be paid, the appellant shall receive a one-quarter undivided interest; Mr. Healy thus recognizing merely that the appellant has or shall receive that interest upon payment of the indebtedness as provided. Then, finally, by the agreement of 1917, whereby Mr. Healy is admitted to be the registered owner of the three parcels, subject to an equitable interest for which the respondent has paid, the former acknowledges the payment and his obligation to transfer an undivided one-quarter interest free from encumbrances. Upon these

(1) [1918] 56 Can S.C.R. 388.

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recitals, and in consideration of the payments, Mr. Healy in the words of the agreement,

transfers, assigns and sets over to the party of the second part (the appellant) free from all encumbrances, an undivided one-quarter interest in the three parcels now standing in the name of the party of the first part.

The covenant for further assurance follows. Consideration of these documents in the light of the oral testimony in my opinion justifies the conclusion that the latter agreement was intended to satisfy Mr. Healy's obligations to the appellant, except as to the covenant for further assurance. The appellant acquired the equitable title, and the covenant was meant to provide for any more particular description, if necessary, and as well for conveyance of the legal title, if required; the agreement thus operated as a settlement between the parties, leaving nothing outstanding in the transaction except the undertaking for further assurance, to be performed according to its terms upon demand. But this is an independent covenant, and delay in the performance of it, which is really the only ground upon which the action rests, is not a cause for rescission of the executed conveyance and recovery of the purchase money. *Gibson* v. *Goldsmid* (1). This conclusion is decisive of the case, but I would add the following observations.

The property was speculative, consisting of building lots at Medicine Hat, some of which were built upon and occupied, others vacant. It was the admitted understanding that Mr. Healy was to manage the properties, collect the rents and pay the taxes. The appellant had a ranch at Cochrane and he lived there, except when he was at Calgary. His occupation was ranching. These facts suggest the improbability that he was acquiring an undivided interest in city lots at Medicine Hat otherwise than for purposes of speculation. The original oral arrangement was made in 1913. The war intervened; this would not unnaturally render hopeless or would interfere with any project of speedy sale, and when the appellant had succeeded in discharging his commitments to Mr. Healy, as evidenced by the agreement of 1917, it would seem that the provisions of that agreement were naturally responsive to the situation in which the parties found themselves, with speculative property in hand, which they had acquired

(1) [1854] 5 DeG. M. & G. 757.

jointly, and opportunity for realization postponed. Then there is the appellant's testimony at the trial, to which I have referred, which articulates with the circumstantial evidence. It must be remembered too that Mr. Healy in his lifetime was never faced with any demand on the part of the appellant which pointed to the sale of an undivided interest as distinguished from a joint enterprise in which the parties were mutually concerned. This statement I think need not be qualified by reason of the conversation at Gull Lake in 1921, according to the evidence of which the appellant told Mr. Healy that he had come for the purpose of getting a transfer or a return of his money. Moreover, the case was carefully considered by the learned judges of the Appellate Division who came to a conclusion, which is not shown to be wrong; and of course, in view of Mr. Healy's death, and the fact that the action is against his executors, who have no knowledge of the transaction except as derived from the documents and the appellant's version, the proof ought to be very closely scrutinized.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Trainor & McGee.*

Solicitors for the respondent: *Lougheed, McLaws, Sinclair & Redman.*