1919
*Oct. 28.
1920
*Feb. 3.

J. J. Davidson (PLAINTIFF).....APPELLANT;

AND

G.B.C. SHARPE (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Sale—Action for rescission—Judgment—Election—New Action on personal covenant.

An action has been instituted in British Columbia by a vendor, the appellant, against a purchaser, the respondent, a resident of Ontario, for the balance of the purchase price and for the cancellation of the agreement for sale of land situated in the Province of British Columbia, for default in payment. Judgment was given for the plaintiff on both grounds. The judgment was not satisfied and a second action was instituted in Saskatchewan against the respondent, then resident there, which was based principally on the respondent's personal obligation on his covenant for payment in the agreement of sale.

Held, Idington J. dissenting, that the obtaining of the judgment in British Columbia amounted to an election on the part of the vendor for cancellation of the agreement of sale and that he was no longer at liberty to sue upon the covenant.

Judgment of the Appeal Court (12 Sask. L.R. 183) affirmed, Idington J. dissenting.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1) affirming the judgment of the trial court, (2) which dismissed the appellant's action.

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*PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

(1) 12 Sask. L.R. 183; [1919] 2 W.W.R. 76; 46 D.L.R. 256.
(2) [1919] 1 W.W.R. 469.

By an agreement in writing dated February 4, 1913, the appellant sold to the respondent certain land in British Columbia for $24,500, payable in instalments. The respondent paid $5,500 cash but made default in paying the first instalment due. The appellant then took an action in British Columbia against the respondent then living in Ontario, asking for an account to be taken of the amount due under the agreement, and for payment of that amount within a time to be fixed, and, in default of payment, that the contract be cancelled and the moneys paid be forfeited to the appellant. The British Columbia court made the order as asked and fixed two months as the delay during which the respondent should pay. The respondent failed to pay, and the appellant entered judgment for the amount due. Later on, the appellant brought the present action in Saskatchewan on the judgment obtained in British Columbia and, in the alternative, on the personal covenant to pay in the agreement. The action on the judgment failed before all the courts because the respondent was not a resident of British Columbia at the time of the institution of the first action.

Schull, for the appellant.

Gregory K.C., for the respondent.

IDINGTON J. (dissenting.)—The appellant, by an agreement dated 4th February, 1913, sold, and respondent agreed to buy, certain lands in British Columbia for the sum of $24,500, of which $5,500 was paid in cash and the balance was to be paid in instalments which the respondent covenanted to pay appellant.

The agreement provided that time was to be of the essence of the contract and that as often as default should happen in making the payments the vendor

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(the appellant) might give the vendee (the respondent) thirty days' notice in writing demanding payment thereof and that in case such default should continue the agreement should, at the expiration of such notice, be null and void and the vendor have the right to re-enter upon said lands, and any payments theretofore made might be retained by the vendor as liquidated damages and the vendor be entitled to re-sell said lands.

It was further provided that this notice should be well and sufficiently given if given the vendee, or mailed at Vancouver post office in British Columbia under registered cover addressed to George B. C. Sharpe, Oak Bay, B.C.

The further payments besides the cash payment fell far short of the requirements of the agreement.

No such notice as thus provided for was ever given.

The respondent left British Columbia without actually moving his household effects into the dwelling house on said lands. The premises were unoccupied by either party thenceforward.

On the 26th October, 1916, the appellant issued a writ of summons from the Supreme Court of British Columbia to recover from respondent the sums then due. And in the special indorsement set forth her claim as follows:—

> The plaintiff's claim is to have an account taken of what is due to the plaintiff for interest, cost, charges and expenses under and by virtue of the covenants contained in certain articles of agreement dated the fourth day of February, one thousand nine hundred and thirteen, whereby the plaintiff agreed to sell to the defendant and the defendant agreed to purchase from the plaintiff that certain parcel or tract of land and premises situate, lying and being in the district of Victoria, in the Province of British Columbia, and known and described as lots 45 and 46 and the south half of lot 41 in 'Block' numbered "D," being subdivision of Block D, section 22, in said Victoria District at the price of $24,500, payable with interest as therein mentioned

and for an order that the defendant do pay to the plaintiff the amount so found due, together with the plaintiff's costs, to be taxed within such time as this court may order.

And for an order that in default of payment of the amount so found due within such time that the agreement be declared null and void and cancelled.

And that all moneys paid thereunder be forfeited to the plaintiff and that the said defendant do stand absolutely barred and foreclosed of all right, title and interest of in and to the said lands and agreement.

And also in the event of such default, for such damages as the plaintiff may have suffered by reason of the defendant's failure to perform the said agreement.

That writ of summons was duly served by personal service on respondent in Toronto in Ontario.

There was no appearance entered by the respondent.

An exemplification of judgment was got and admitted as evidence herein at the trial hereof which is an action in the Supreme Court of Saskatchewan to recover on said judgment the amount thereof or alternatively to recover on the said agreement the amount due for unpaid instalments. Omitting the formal parts of the exemplification that judgment is expressed in the following terms:—

IN THE SUPREME COURT OF BRITISH COLUMBIA.

Between:

JOSEPHINE JULIE DAVIDSON,
WIFE OF JOHN L. DAVIDSON,
Plaintiff,

and

GEORGE B. SHARPE,

of the City of Toronto, in the Province of Ontario.
Defendant.

B.C. L.S.
$1.00.
Dated the 15th day of June, A.D. 1915.

In pursuance of the Order of the Honourable the Chief Justice made the 1st day of February, 1915, and in pursuance of the Registrar's Certificate herein dated the 4th day of March, 1915.

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IT IS ORDERED AND ADJUDGED that the plaintiff do recover against the defendant the sum of $14,185.15, together with costs taxed at the sum of $131.95.

By the Court,

A. B. POTTINGER,
District Registrar.

Upon that judgment I respectfully submit that the appellant was entitled to recover in the Supreme Court of Saskatchewan judgment herein.

It is urged by respondent that the court in British Columbia so entering judgment had no jurisdiction by reason of the respondent having left the province of British Columbia at the time of service of said writ.

Inasmuch as the parties hereto were in British Columbia when the contract was made and was to be performed and hence breach there and that it was made in respect of land there, I have no doubt of the jurisdiction or of the right to assert it by service of writ beyond the jurisdiction.

I should have preferred in such a case, however, to have evidence that Order XI of the Rules of the Supreme Court of British Columbia had been duly complied with by leave of a judge of that court having been duly obtained.

However, I think that the presumption exists and must prevail that all that was duly complied with and none the less so, because the objection, as presented here, was not relative to any defect in that regard but upon broader grounds which I hold untenable in this case.

The more serious question raised is that upon which the courts below proceeded in dismissing the action.

It is this, that upon an application, in course of the proceedings, to the learned Chief Justice of the Supreme

Court of British Columbia he made an order of reference to the registrar of the court to take the accounts between the parties and directed that judgment might be entered against the defendant for the amount so certified to be due to the plaintiff—and then proceeded to declare as follows:—

> And this court doth further order that upon the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid within two months after the date of the Registrar's Certificate at such time and place as shall thereby be appointed the plaintiff do convey the lands, hereditaments and premises comprised in the said Agreement for sale free and clear of and from all encumbrances done by her or any persons claiming by, from or under her and deliver up all deeds, writings, in her custody or power relating thereto, to the defendant or to whom he shall appoint;
>
> But in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid by the time aforesaid that the defendant thenceforth do stand absolutely barred and foreclosed of and from all right, title, interest and equity of redemption, of in and to the said agreement and of, in and to the said lands, hereditaments and premises, and that the said agreement be thereupon cancelled and ended and all moneys paid thereunder forfeited to the plaintiff and that the defendant do deliver to the plaintiff possession of the said lands, hereditaments and premises which are set out and described in the said agreement.

It is to be observed that the certificate of the registrar fixing the amount due was dated, as appears from the recital in the judgment of which exemplification is adduced in evidence, on the 4th of March, 1915, and that the judgment sued upon is entered the 15th June, 1915, a month or six weeks after this declaratory order of the Chief Justice, if adhered to and operative, must have put an end to any further right to proceed.

How can we say that this latter judgment sued upon was a nullity as in effect the courts below have done?

What right have we to impose, without an appeal in due course, our notions of law and fact, upon the appellant and his judgment and declare it was and is a mere nullity?

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How do we know that nothing was done in the meantime to rectify the possible mistake of such an alleged election or that the purpose of the appellant was to elect to rescind the agreement?

Had there been evidence adduced of the entry having been, according to the practice recognized by the courts there, (or argument adduced herein to shew that as matter of law it was) a mere error on the part of those concerned, the way might have been made open to us to apply our view of the election alleged to have been made, as a final determination of the matter.

That however could not enable us to be quite sure of the facts as to whether or not there had been any amendment to the original order of reference enabling the plaintiff to revoke the alleged election. It would have been quite competent for the court there, for any good reason, to have made such an amendment.

Can there be a doubt that the judgment sued upon stands in full force and is exigible in British Columbia?

I respectfully submit that, so long as it is so, it seems to me absurd to hold that upon the production of an exemplification thereof it cannot be recoverable in other provinces.

I am unable to understand how we can herein declare that the provision for rescission of purchase stood valid and conclusive despite the later record of the court quite inconsistent therewith if we have regard to the maxim of *omnia præsumuntur rite et solenniter esse acta.*

Moreover the parties chose by their agreement expressly to provide a mode by which it should become null and the consequence thereof, and that mode was not followed or anything like it which we should be able to say was a substantial compliance therewith.

The decision of the Supreme Court of Saskatchewan in the case of *Standard Trust* v. *Little* (1) relied upon below does not seem in this regard to be in point.

Whether there was in fact incorporated in the agreement of purchase there in question a specific mode as here existed of terminating the vendee's rights, does not appear. For all that appears the court had to proceed upon the relative rights of the vendor and purchaser, before the court, when default made and that the court adopted the not unusual mode of dealing with a defaulting purchaser according to general principles of law. Moreover the order or judgment was one consistent complete whole not leaving it open to surmise of what the court had determined. Here the alleged intention has to be gathered from the separate and inconsistent pieces of judicial proceedings of which the latest is a complete judgment which does not put appellant to an election.

Again there is much reason for saying that a lien such as a vendor's lien might be looked upon as a mortgage has been by courts of equity, and therefore, a charge of that kind which might be foreclosed and that a decree *nisi* of foreclosure was what was intended.

If that was the conception of the court in using the word "foreclosed" in the order above quoted, then there was no final order and there remained the option of the plaintiff prosecuting a foreclosure suit to abandon his proceedings therefor and follow his remedy on the personal obligation.

These are only surmises of what may have developed as law in the local court.

I prefer assuming some such kind of development to that of construing this foreclosure judgment as a final

(1) 8 Sask. L.R. 205; 31 W.L.R. 769.

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rescission of the agreement and especially so when we find the same court ignoring what had transpired and pronouncing the complete, self-contained, comprehensive judgment herein sued upon, which was recovered after the lapse of time given by the earlier order had expired.

The cases cited are beside the question.

I prefer holding that the court which, after all that it had declared was to take place in two months and which if effective could not permit of a judgment such as sued on being entered over three months later, has in doing so found good reason, either on new facts presented or something otherwise said or done which, within its practice, enabled it, if it saw fit, to proceed to enter judgment, and that its doing so was deliberate.

There is nothing in the evidence to warrant any one in holding otherwise and the presumption is in favour of the judgment being duly entered and meaning what it says.

I therefore conclude that the appeal should be allowed with costs throughout and the judgment be entered accordingly.

DUFF J.—This appeal should be dismissed with costs.

ANGLIN J.—Practically conceding that the personal judgment of the Supreme Court of British Columbia, on default of appearance against the defendant, who appeared on the face of the proceedings in that court to have been a resident of Ontario and was served there with process, is of no avail outside of British Columbia, counsel for the appellant rested his appeal on the ground that his alternative cause of action—the defendant's personal obligation on his covenant

for payment in the agreement for sale—is open to him in Saskatchewan. I agree that merger cannot be pleaded as a defence; *Smith* v. *Nicolls;* (1) *Bank of Australasia* v. *Harding* (2). But the appellant is met by the order of the Chief Justice of British Columbia, pronounced in the action brought in that province granting the relief there sought by him, viz., the taking of accounts, a personal judgment for the amount to be certified thereon as due by the defendant, an order for conveyance by the plaintiff on payment thereof within two months, and in default foreclosure absolute and cancellation of the agreement. It has been held by the courts of Saskatchewan that by accepting this order the appellant elected to take the remedy of cancellation in the event of default of payment within the time fixed by the order and that he thereby relinquished all right thereafter to recover any part of the purchase money. Counsel for the appellant on the other hand contends that the order taken in the Supreme Court of British Columbia was in the nature of an order *nisi*, similar in its effect to the ordinary judgment granted in a suit for foreclosure of a mortgage after trial to be followed by a final order before the equity of redemption is extinguished. This latter view however seems to ignore the essential difference between a judgment for foreclosure in a mortgage action and an order or judgment for cancellation of an agreement for sale due to the difference between a mortgage and such an agreement.

The trial judge after the conclusion of the trial offered the plaintiff an opportunity to obtain evidence on commission.

(1) 5 Bing. N.C. 208.
(2) 9 C.B. 661.

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to ascertain the law in British Columbia as to whether the order or judgment cancelled or has the effect of cancelling the agreement therein referred to or does such an order or judgment preclude the plaintiff from enforcing her judgment or suing for the purchase money under the said agreement, default having been made by the defendant in the payment of the amount found due.

The plaintiff declined to take advantage of the indulgence thus extended. The learned judge was therefore justified in assuming that the order of the Chief Justice of British Columbia would have the same effect in that province as the like order made by an Alberta Court would have within its jurisdiction. Nothing has been brought to our attention, nor am I aware of anything, that indicates a difference in this respect between the law which obtains in British Columbia or the practice of its courts and the law and practice of the English courts or of the courts of other provinces of Canada whose juridical systems are based on English law.

The relations of mortgagor and mortgagee in English courts of equity are anomalous. *Platt* v. *Ashbridge* (1). "Once a mortgage always a mortgage" is a doctrine so deeply rooted in our system of equity that after the period for redemption fixed by an ordinary judgment for foreclosure has expired the mortgagor's right to redeem *de plano* still subsists until a further and final order of foreclosure has been obtained. Even after such final order has been made our courts of equity regard the mortgage as still unextinguished and unsatisfied so long as the mortgagee retains the land. He may at any time enforce the personal obligation of the mortgagor on his covenant, thereby opening the foreclosure and revesting in the mortgagor his right to redemption

(1) 12 Gr. 105, at p. 106.

as it was before the judgment; and the courts maintain a corresponding jurisdiction to allow the mortgagor after final order, under exceptional circumstances raising an equity in his favour, to redeem on proper terms. When the mortgagee in any way as owner alters his relation to the land he elects to take it and foregoes his debt—but not until then. Sir George Jessel states the doctrine very clearly in *Campbell* v. *Holyland* (1); see too *Trinity College* v. *Hill* (2). *Mutual Life* v. *Douglas* (3), is a recent instance of the mortgagee's right after foreclosure to enforce the covenant being upheld. The development of the equity jurisdiction in regard to the foreclosure of mortgages is outlined by Griffith C.J. in *Fink* v. *Robertson* (4).

By taking a foreclosure judgment the mortgagee does not take the property for his debt. The judgment, notwithstanding its absolute form, is construed as merely authorizing him to do so. The foreclosure judgment in the mortgage action is merely a means of enforcing the mortgage contract, which it deals with as subsisting; whereas the judgment for rescission or cancellation of a contract between vendor and purchaser is a judgment not for the enforcement but for the extinguishment of the contract. When the vendor sought and obtained a judgment fixing a period for payment and providing that on default

> the agreement shall be cancelled and at an end and all moneys paid thereunder forfeited to the plaintiff,

he elected in my opinion, on that event happening, to take the property in satisfaction of so much of the purchase money as then remained unpaid. If he had

(1) 7 Ch. D. 166.
(2) 10 Ont. App. R. 99, at pp. 109-10.
(3) 57 Can. S.C.R. 243.
(4) 4 Com. L.R. 864.

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intended to reserve his right of election until after default had been made, his proper course would have been to ask, in lieu of the relief granted by the order in that event, for a reservation of liberty to apply for further relief. (Seton on Decrees (7 ed) pp. 2171 and 2220-1).

Instead of waiting until default had occurred under the judgment ordering the defendant to perform his contract and then applying for its rescission the plaintiff sought and obtained in advance the order usually made after such default—which may be for immediate rescission, *Clark* v. *Wallis* (1), or for rescission after the lapse of a further short period and may in the latter event apparently issue at the time of the application, *Simpson* v. *Terry* (2), or only on the expiry of the further time so allowed. *Foligno* v. *Martin* (3). The order in the case at bar, although issued in the first instance instead of after default in payment under a judgment of the court, is similar in form to that pronounced in *Simpson* v. *Terry* (2), and I cannot doubt that, on default happening under it, it operated to put an end to the agreement just as the order in *Simpson* v. *Terry* (2) did.

Mr. Justice Lamont states the law very clearly and accurately, if I may say so, in delivering the judgment of the Court en Banc in *Standard Trust* v. *Little* (4).

The anomalies introduced by courts of equity in regard to the relations between mortgagor and mortgagee do not exist in regard to vendor and purchaser. A judgment or order declaring that on the happening of a certain event an agreement for sale shall be

(1) 35 Beav. 460.
(2) 34 Beav. 423.
(3) 16 Beav. 586.
(4) 8 Sask. L.R. 205.

cancelled and at an end means precisely what it says and not merely that the plaintiff shall thereupon be entitled to have it cancelled and put an end to. When the purchaser under the order of the learned Chief Justice of British Columbia made default the agreement ceased to exist and the foundation for any right of personal recovery from the purchaser (except for costs) was gone. The purchaser thereafter had no further right to the land and the court has no jurisdiction to restore him to his former position. The vendor has the land. He cannot have the purchase money also.

Should the plaintiff attempt to recover under the personal judgment of the Supreme Court of British Columbia which he issued after default in payment under the Chief Justice's order, I have little doubt that the defendant could on application have his right to do so restricted to the costs of the action. *Jackson* v. *Scott* (1). Indeed it would seem to be altogether probable that what was intended by the learned Chief Justice of British Columbia was that personal judgment against the defendant should issue forthwith upon the amount due being ascertained and certified and should be enforceable as to the debt and interest during the two months allowed for payment by the purchaser, and that if the matter had been brought to his attention he would not have sanctioned the issue of the judgment taken out from the Registrar's office after the two months allowed for payment had expired and purporting to be in pursuance of his order.

The appeal, in my opinion, fails and should be dismissed with costs.

(1) 1 Ont. L.R. 488.

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Brodeur J.

BRODEUR J.—An action had been instituted in British Columbia by a vendor against a purchaser for the balance of the purchase price and for cancellation of the deed of sale in case of default of payment.

A decree was pronounced by the British Columbia courts declaring that the judgment should be entered against the purchaser for a certain amount which he should pay within two months and that

> in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid by the time aforesaid that the defendant thenceforth do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of in and to the said agreement and of in and to the said lands, hereditaments and premises and that the said agreement be thereupon cancelled and ended and all moneys paid thereunder forfeited to the plaintiff and that the defendant do deliver to the plaintiff possession of the said lands, hereditaments and premises which are set out and described in the said agreement.

The purchaser has made default in payment.

A new action, which is the present one, has been instituted on the covenant, in Saskatchewan, and it is contested by the purchaser on the ground that, the agreement having been cancelled by the British Columbia judgment, no claim can be made by the plaintiff for the payment of the purchase price.

On the other hand it is contended by the vendor that the judgment was not a final order or foreclosure but rather an order *nisi*.

The Saskatchewan courts held that the British Columbia judgment amounted to an election on the part of the plaintiff to take cancellation or to a rescission in the event of default in payment.

The decree is absolute in its terms. It provides that the deed is cancelled if within two months the purchaser does not pay the amount due.

The original action might have demanded only the amount due without asking for cancellation and if

the plaintiff had been unable to recover his debt then he could have asked for the cancellation of the agreement. But his action, as instituted before the British Columbia Courts looks to me as an election on his part to take back the property sold, unless the defendant pays the purchase price.

The authorities say that if a contract provides that on the happening of a certain event it shall be void and that it may be rescinded by the party injured, that the contract is not void for both parties, but simply voidable at the request of the party that suffers. Fry, Specific Performance, (5th ed.,) sec. 1046.

The stipulation in a contract of sale that the deed would become null and void if the buyer failed to make any payment is exclusively in the interest of the seller, who has a right to choose between the rescission of the contract and its execution.

But when a judgment has been rendered on such a clause pronouncing that the failure to pay within two months would bring about the rescission of the contract; and when such a decree has been taken by the vendor himself it seems to me that it constitutes on his part an election of his right to cancel. He could not then later on proceed to collect the amount which had been originally promised to him by the covenant, since he has agreed that the agreement was cancelled.

The appeal should be dismissed with costs.

MIGNAULT J.—The whole question is as to the effect of a judgment obtained in British Columbia by the appellant against the respondent.

The appellant had made an agreement with the respondent for the sale of certain lands in British

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Columbia, and on this agreement, in October, 1914, the appellant took against the respondent, who then lived in Ontario and made default, an action in British Columbia, in which her claim is stated as follows:—

The plaintiff's claim is to have an account taken of what is due to the plaintiff for interest, cost, charges and expenses, under and by virtue of the covenants contained in certain articles of agreement dated the fourth day of February, one thousand nine hundred and thirteen, whereby the plaintiff agreed to sell to the defendant and the defendant agreed to purchase from the plaintiff that certain parcel or tract of land and premises situate, lying and being in the District of Victoria in the Province of British Columbia and known and described as lots 45 and 46 and the south half of lot 41 in Block numbered D, being Subdivision of Block D, section 22, in said Victoria District, at the price of $24,500, payable with interest as therein mentioned; and for an order that the defendant do pay to the plaintiff the amount so found due together with the plaintiff's costs to be taxed within such time as this court may order.

And for an order that in default of payment of the amount so found due within such time that the agreement be declared null and void and cancelled.

And that all moneys paid thereunder be forfeited to the plaintiff and that the said defendant do stand absolutely barred and foreclosed of all right, title and interest of in and to the said lands and agreement.

And also in the event of such default, for such damages as the plaintiff may have suffered by reason of the defendant's failure to perform the said agreement.

On this action the following order was made on the first of February, 1915, which in every respect agrees with the claim stated by the appellant:

Upon the application of the plaintiff herein and upon hearing counsel in support of the application and upon hearing read the affidavit of Mr. M. C. Caple sworn and filed herein:

This court doth order that the following accounts be taken by the Registrar of this court namely:—

1. An account of what is due to the plaintiff under and by virtue of the agreement for sale in the pleadings mentioned and for her costs in this action, such costs to be taxed by the taxing Master.

2. An account of the rents and profits of the hereditaments comprised in the said agreement for sale received by the plaintiff or by any other person or persons by the order of or for the use of the plaintiff or which without the wilful default of the plaintiff might have been so received.

And let what shall appear to be due on taking account No. 2 be deducted from what shall appear to be due to the plaintiff on account No. 1 and let the balance be certified by the said Registrar, and let judgment be entered against the defendant for the amount so certified to be due to the plaintiff.

And this court doth further order that upon the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid within two months after the date of the Registrar's certificate at such time and place as shall thereby be appointed the plaintiff do convey the lands, hereditaments and premises comprised in the said agreement for sale free and clear of and from all incumbrances done by her or any person claiming by, from, or under her, and deliver up all deeds or writings in her custody or power relating thereto to the defendant or to whom he shall appoint.

But in default of the defendant paying to the plaintiff what shall be certified to be due to her as aforesaid, by the time aforesaid, that the defendant thenceforth do stand absolutely debarred and foreclosed of and from all right, title, interest and equity of redemption of, in and to the said agreement, and of, in and to the said lands and hereditaments and premises, and that the said agreement be thereupon cancelled and ended, and all moneys paid thereunder forfeited to the plaintiff and that the defendant do deliver to the plaintiff possession of the said lands, hereditaments and premises which are set out and described in the said agreement.

An account of moneys due by the respondent to the appellant having been taken, the appellant obtained on the 15th June, 1915, a judgment against the respondent for $14,185.15 and costs, which judgment was rendered in pursuance of the order of the 1st February, 1915.

The respondent did not pay this amount to the appellant within the two months mentioned in the order, nor at any time since, and the appellant now sues the respondent in Saskatchewan, where he resides, claiming the amount of the judgment of the 15th June, 1915, and in the alternative sues on the agreement for sale for the amount due thereunder. The respondent claims that no action lies for the purchase price, because the agreement is now cancelled by virtue of the order of the 1st February, 1915, the appellant having elected to have the agreement cancelled in default of payment.

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Brodeur J.

Looking at the matter from every possible angle, I fail to see how the appellant can escape from the effect of the order she obtained and of her election for cancellation of the agreement in default of payment. I do not think that she can answer the contention of the respondent by referring to the effect which is given to a covenant for cancellation inserted in an agreement for sale when the purchaser fails to pay the purchase price. Such a covenant in an agreement for sale, I take it, gives the vendor the right to elect either to claim cancellation of the agreement or the payment of the purchase price, but until the vendor has elected to have the agreement cancelled, his right to claim the price is not taken away. Here, on the contrary, the appellant elected to have the agreement cancelled by her action and by the order she obtained from the British Columbia Court, should the respondent not pay the amount found to be due to the appellant within two months from the date of the registrar's certificate. The rule *una via electa non datur regressus ad alteram*, sometimes expressed as follows: *quod semel placuit in electionibus amplius displicere non potest*, which is the principle contended for by the respondent, precludes the appellant from now obtaining judgment for the purchase price.

The appellant argues that the order she obtained is no more than a rule *nisi*, calling upon the respondent to shew cause why the agreement should not be cancelled should he fail to pay within two months. I do not think this construction can be placed on the order, for by its very wording the agreement is thereupon (that is to say on the default of the respondent) cancelled and ended.

I may add that in so far as the appellant's action

upon the personal condemnation she obtained against the respondent in British Columbia is concerned, she cannot enforce this condemnation against the respondent in Saskatchewan inasmuch as the respondent was not domiciled in nor a resident of British Columbia when the action was taken there, and did not appear therein or in any way acquiesce in the jurisdiction of the British Columbia Court. See Halsbury, Laws of England, Vo. Conflict of Laws, No. 422.

In my opinion, the appeal fails and should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Christie & Co.*

Solicitors for the respondent: *Seaborn, Pope, Gregory & Kent.*