

## [HIGH COURT OF AUSTRALIA.]

RYAN . . . . . APPELLANT;  
PLAINTIFF,

AND

FERGERSON . . . . . RESPONDENT.  
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

*Vendor and purchaser—Contract for sale of land—Concealment of material fact—  
Property subject to mortgage—Refusal by vendor to discharge mortgage—  
Rescission—Constitution of printed conditions—Originating summons.*

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SYDNEY,  
August 6, 9.

Griffith C.J.,  
O'Connor and  
Isaacs JJ.

In construing a contract containing terms of which some are in writing, and others printed in a common form, if there is any doubt as to the meaning of the whole, greater weight should be given to the written portion, inasmuch as it embodies the language and terms selected by the parties themselves as best suited to express their meaning.

Rule stated by Lord *Ellenborough* C.J. in *Robertson v. French*, 4 East., 130, at p. 136, and adopted by Lord *Halsbury* L.C. in *Glynn v. Margetson & Co.*, (1893) A.C., 351, at p. 358, applied.

One of the printed conditions of a contract for the sale of land provided that the purchaser should within seven days after receipt of particulars of title tender for execution a memorandum of transfer in proper form, and that from completion the purchaser should be entitled to the rents and profits. A written term provided that the purchaser should pay a deposit in cash and the balance of the purchase money at the end of 3 years with interest in the meantime, with the option of paying off the whole at any earlier period. The purchaser paid the deposit, and went into possession with the consent of the vendor. After receipt of particulars of title the purchaser discovered that the property was subject to a mortgage which the mortgagor was entitled to pay off at any time. The mortgagee had assented to the sale. The purchaser without tendering a transfer or offering to pay the balance of

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the purchase money called upon the vendor to discharge the mortgage. The vendor refused to do so unless the purchaser paid the balance of purchase money.

On a vendor and purchaser summons taken out by the purchaser asking for a declaration that he was entitled to rescind, and for an order for rescission and repayment of the deposit:

*Held*, that the purchaser was not entitled to rescind. On a fair construction of the whole contract, the purchaser was not entitled to insist upon a discharge of the mortgage and execution of a transfer by the vendor before payment of the balance of the purchase money.

*Per Griffith C.J.*—The Equity Court had no jurisdiction on a vendor and purchaser summons to entertain a claim for rescission on the ground of concealment of a material fact.

*Per Isaacs J.*—Whatever was the true construction of the provision as to payment of the balance of purchase money, the purchaser was not entitled to claim to have the mortgage discharged until he had tendered a transfer in proper form for execution.

Decision of *A. H. Simpson C.J.* in Equity (2nd March 1909) affirmed.

APPEAL from a decision of *A. H. Simpson*, Chief Judge in Equity of the Supreme Court of New South Wales, on an originating summons by a purchaser.

The appellant entered into a contract with the respondent by which the respondent agreed to sell to the appellant a piece of land with improvements for the sum of £475. One of the printed conditions of sale was, so far as is material, as follows:—1. That the purchaser shall, within seven days from receipt of the particulars of vendor's title, at his own expense, tender to the vendor or his solicitor for execution a memorandum of transfer in conformity with the provisions of the *Real Property Act*, and from the completion of the purchase the purchaser shall be entitled to the rents and profits of the land. There were other printed conditions which are not material to this appeal. Portion of the contract was in writing, including a provision for the amount of the purchase money, £475; and under the heading, Terms of Sale, a clause in the following words:—"The purchaser shall pay into the hands of the vendor or auctioneer a cash deposit of £75 and the balance at the end of 3 years from 24th September 1911 with the option of paying

off the whole at any earlier period. Interest shall be paid on the balance at the rate of 5 per cent. payable quarterly from the date of the signing of the contract (24th September 1908)." The purchaser paid the deposit, and with the consent of the vendor entered into possession on 17th October. Shortly afterwards particulars of title under the *Real Property Act* were furnished by the vendor, and the purchaser on search discovered that the property was subject to a mortgage to secure £225. Correspondence then took place between the parties, the purchaser claiming to have the mortgage discharged and the vendor refusing to do so unless the balance of the purchase money was paid. The purchaser was informed by the vendor that the mortgagee had consented to the sale. Finally, the purchaser demanded immediate discharge of the mortgage and transfer of the land free of encumbrances, but did not offer to pay the balance of the purchase money. This request being refused, the purchaser purported to cancel the contract, and demanded the return of the deposit less certain deductions for rent, &c., and took out an originating summons asking to have it declared that he was entitled to rescind the contract, and that it might be rescinded accordingly, and asking for an order for the return of the deposit subject to the deductions mentioned, and for certain costs and expenses and consequential relief. *A. H. Simpson*, Chief Judge in Equity, held that the purchaser was not entitled to insist on a discharge of the encumbrance until he was prepared to pay the balance of the purchase money, and dismissed the summons (2nd March 1909). From this decision the present appeal was brought.

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*S. A. Thompson*, for the appellant. The contract was for the sale of a property free of encumbrances. There was no reference in the contract to the existence of a mortgage. The purchaser went into possession on that basis without prejudice to his rights, and should not now be compelled to accept something less than what he agreed to purchase. If the vendor is in default under the mortgage the purchaser is at the risk of losing the land for which he has already paid in part, or of having to pay off the mortgage to save himself from loss, whereas under

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the contract he is not bound to pay the balance before the end of three years. If a transfer in proper form were tendered for execution, the vendor would be bound to execute it without payment of the balance. That is the "completion" referred to in the contract, entitling the purchaser to the rents and profits thereafter. As the purchaser is entitled to a transfer at once he is entitled to insist upon an immediate discharge of the mortgage, in order that the property may be transferred free of encumbrances as the contract requires. The refusal of the vendor entitles the purchaser to rescind at common law. The vendor knew the circumstances, and could have provided for them in the contract. [He referred to *In re Marsh and Earl Granville*, (1); *Real Property Act* 1900 (N.S.W.), sec. 72.]

[GRIFFITH C.J.—Your ground of rescission is fraud, concealment of a material fact. I have great doubt as to the jurisdiction of the Court to entertain a vendor and purchaser summons for rescission on that ground.]

The Court has power to entertain a summons for the decision of any question arising out of the contract, not being a question affecting the validity of the contract. This is a question of construction of the contract, it is not based on fraud. [He referred to *Equity Act* 1901 (N.S.W.), No. 24 Sched.]

[ISAACS J. referred to *Dart, Vendor and Purchaser*, 7th ed., vol. II., p. 105; *In re Walker and Oakshott's Contract* (2).]

The question is whether the purchaser was on the proper construction of the contract entitled to rescind under the circumstances which have arisen.

*W. J. E. Davies*, for the respondent, was not called upon.

August 9.

GRIFFITH C.J. This is an appeal from an order of the learned Chief Judge in Equity dismissing a summons purporting to be taken out under the provisions of the vendor and purchaser provisions of the *Equity Act* 1901. I entertain very grave doubt whether the Equity Court had jurisdiction to entertain the application under the circumstances. The plaintiff agreed to buy from the defendant a piece of land through the medium of an agent. The

(1) 24 Ch. D., 11.

(2) (1901) 2 Ch., 383.

contract was partly in print and partly in writing. The terms of sale were that the purchase money should be £475, of which £75 was to be paid in cash and the balance at the end of three years, with the option of paying it off at an earlier period, the purchaser in the meantime paying interest at the rate of 5 per cent. on the unpaid purchase money. One of the printed conditions of the contract was that the purchaser should within seven days from receipt of the particulars of the vendors' title, at his own expense tender to the vendor or his solicitor, for execution, a memorandum of transfer in conformity with the provisions of the *Real Property Act*.

It is gravely argued that under that condition the purchaser is entitled at once, without payment of any more of the purchase money than the amount of the deposit, to a conveyance of the property free of encumbrances, leaving as the only protection to the vendor, when the transfer is registered, any right he may have to lodge a caveat against the purchaser's dealing with the land before payment of the balance of the purchase money. So far as the summons can be regarded as an application to the Court to have this declared to be the true construction of the contract, it is probably within the jurisdiction of the Equity Court to entertain it. And such a construction is gravely argued. In my opinion it is incapable of serious argument, when the conditions are considered. It is true that one condition is that the purchaser is to tender a memorandum of transfer within seven days. But it is quite clear that it was never the intention of the parties to a contract of this sort that the purchaser should get a clear title until he had paid the full purchase money. The rule applicable to such cases was laid down by Lord *Ellenborough* C.J. in *Robertson v. French* (1), in a passage cited by Lord *Halsbury* L.C. in *Glynn v. Margetson & Co.* (2). That was an action on a policy of insurance, in which, as his Lordship pointed out, the greater part of the printed language was invariable and uniform and had acquired a known and definite meaning. With respect to policies of this sort which are commonly in print with a certain portion in writing, Lord *Halsbury* said:—"The words super-added in writing (subject indeed always to be governed in point

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(1) 4 East., 130, at p. 136.

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of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, to have a greater effect attributed to them than the printed words, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a general formula adapted equally to their case and that of all other contracting parties upon similar occasions and subjects." I think that it is impossible to contend that under this contract the purchaser is entitled to a transfer until he has paid the whole of the purchase money. The appellant therefore must fail in so far as the summons rests upon that contention, for it asks in substance for a declaration that the purchaser is entitled to an immediate transfer. Then the case is put by the appellant in another way. It turns out that the land is subject to a mortgage for £225, and the purchaser says that he is entitled to a conveyance of the land freed from that encumbrance, or at any rate to enjoy the possession of it free from the risk of any interruption by the mortgagee. For it is only by the mortgagee that he could be put out. He is clearly entitled, when he has paid the purchase money, to get a clear title, and no doubt if he pays it he will get such a title, for the mortgage debt may be paid at any time. The only point then is that he is exposed to the risk of ejection or something of that nature during the three years. Now it appears in evidence that the mortgagee was aware of and consented to the sale, so that that risk does not exist in fact. If it did, the only consequence would be that the purchaser might be entitled at common law to rescind the contract upon the ground that he had been induced to enter into it by the concealment of a material fact, and upon no other ground. But that point cannot be raised on a vendor and purchaser summons. The proceeding was in my opinion entirely erroneous, and the learned Judge had no course open to him but to dismiss the summons.

O'CONNOR J. I am entirely of the same opinion. I do not see how the learned Judge of the Court below could have come to any other conclusion than that at which he has arrived. I do

not think it necessary to add anything to what my learned brother the Chief Justice has said.

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ISAACS J. I agree that this appeal should be dismissed. The provision for payment of purchase money required the purchaser to pay a cash deposit of £75, and the balance at the end of three years, with interest in the meantime at the rate of 5 per cent. payable quarterly, and with the option of paying off the whole at any earlier period. That portion of the contract is in writing, and, in accordance with the rule stated by my learned brother the Chief Justice, and followed time after time in the Courts both in England and America, that must have greater weight than any printed provision inconsistent with it. Well, the reasonable and ordinary implication from such a provision is that the conveyance is to be concurrent with the payment in full of the purchase money. The appellant relies upon the first clause of the printed conditions, and he says that that entitles him to a conveyance of the property, notwithstanding the ordinary and legal presumption referred to, and notwithstanding that no portion of the purchase money has been paid except the deposit of £75. That clause provides that the purchaser shall, not may, but shall, within 7 days after the receipt of particulars of title, at his own expense, tender for execution a transfer in conformity with the *Real Property Act*, and from the completion of the purchase the purchaser shall be entitled to the rents and profits. There is no express provision in that that the vendor shall immediately execute and hand over to the purchaser this transfer duly executed and permit him to take it away and register it, notwithstanding the non-payment of the purchase money, and it does not in its terms profess to give the purchaser any benefit at all except the right to the rents and profits of the land after completion of the purchase, whatever that means. But it puts an obligation upon the purchaser. It limits him as to his freedom of action. He must, within 7 days after receipt of particulars of title, tender for execution a memorandum of transfer. If he is going to accept the title he must accept it in that way. He has to tender a memorandum of transfer in proper form for execution. If he

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makes any objection or requisition under the fourth condition, then the vendor is to be at liberty to rescind the contract if unable or unwilling to comply with the requisition. But if he accepts the title then it seems to me that, reading that condition with the provision for payment of the purchase money, it means reasonably construed, that he is then, *i.e.*, when the title is accepted by the purchaser, entitled to the rents and profits. Further if, having accepted the title, he pays the purchase money, he is entitled to have the property handed to him free of encumbrance on his tendering a transfer ready for execution. No time is fixed for the execution, and none for delivery up to the purchaser, and therefore there is nothing, in my opinion, to displace the reasonable presumption arising from a consideration of the terms of the provision as to payment of the purchase money, namely, that the two are to be coincident. That is sufficient to dispose of the matter. But there is another question and that is, that the time has not arrived for the purchaser to complain. He is entitled to have his transfer immediately on its being tendered for execution, and if that is done he gets the right to everything else. But if not, he fails. Upon these grounds I think that the appeal should be dismissed.

*Appeal dismissed, with costs.*

Solicitors, for the appellant, *Vindin & Littlejohn.*

Solicitor, for the respondent, *A. B. Davies.*

C. A. W.