[HIGH COURT OF AUSTRALIA.]

NIESMANN . . . . . APPELLANT;
DEFENDANT,

AND

COLLINGRIDGE . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1921.

SYDNEY, *April* 12; *May* 2.

KNOX C.J., RICH and STARKE JJ.

Specific Performance—Sale of land—Contract—Formation—Option of purchase given for value—Acceptance—Terms of contract—Written contract contemplated—Statute of Frauds (29 *Car. II. c.* 3), *sec.* 4.

By a written document signed by the defendant he purported to give to the plaintiff "the firm offer" of certain land, described in it, with a house thereon, at a specified price payable as to a certain sum "on the signing of contract," as to a certain other sum three months afterwards and as to the balance three years after the signing of the contract, at a certain rate of interest. The document concluded "Value received for option sixpence," and that sum was in fact paid by the plaintiff to the defendant after he signed the document. A week afterwards the plaintiff verbally communicated his acceptance of the offer contained in the document to the defendant.

Held, that upon such acceptance a binding contract for the sale of the property was constituted, that the plaintiff was entitled to a decree for specific performance of the contract, and that the first step in carrying out that decree was the settlement and execution of a proper contract.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Collingridge* v. *Niesmann*, 37 N.S.W.W.N., 224, affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit in the Supreme Court in Equity was instituted by William Edmund Collingridge against Hubert Niesmann, in which by his

H. C. OF A. 1921.

NIESMANN v. COLLINGRIDGE.

statement of claim the plaintiff claimed specific performance of a contract for the sale by the defendant to the plaintiff of certain land with a house thereon. The plaintiff having died, the suit was revived by his executrix, Mary Elizabeth Collingridge. The suit was heard by *Harvey* J., who gave judgment for the plaintiff, and ordered specific performance: *Collingridge* v. *Niesmann* (1).

From that decision the defendant now appealed to the High Court.

The material facts are stated in the judgment of *Knox* C.J. hereunder.

Langer Owen K.C. (with him *R. K. Manning*), for the appellant. The option to purchase given by the document of 29th December 1919 was not intended to constitute with a simple acceptance of it a binding contract for the sale of the property. It was merely a step in the negotiations. There is nothing in the option which would bind the respondent, and after his acceptance he could set up the *Statute of Frauds*. The parties contemplated a formal written contract being entered into which should constitute the binding contract between them. The offer was conditional upon a written contract being entered into. That is borne out by the fact that no time is fixed for the giving of possession, that nothing is said as to the title, that the provision for payment of the purchase money is made dependent upon the signing of a written contract, and that nothing is said as to the *Moratorium Regulations*. The only respect in which the respondent bound himself was that he would not sell the property until the appellant had an opportunity to purchase it. [Counsel referred to *May* v. *Thomson* (2); *Winn* v. *Bull* (3); *Von Hatzfeldt-Wildenburg* v. *Alexander* (4); *Coope* v. *Ridout* (5); *Rossdale* v. *Denny* (6); *Farmer* v. *Honan* (7).]

Innes K.C. (with him *L. S. Abrahams*), for the respondent. The option and the parol acceptance of it together created a valid contract for the sale of the land of which the Court will grant specific

(1) 37 N.S.W.W.N., 224.
(2) 20 Ch. D., 705, at p. 716.
(3) 7 Ch. D., 29.
(4) (1912) 1 Ch., 284, at p. 288.
(5) (1920) 2 Ch., 411, at p. 415.
(6) (1921) 1 Ch., 57, at p. 59.
(7) 26 C.L.R., 183.

performance. The fact that no time is fixed for the signing of the formal contract is unimportant, for the law implies that it will be signed within a reasonable time (*Meynell* v. *Surtees* (1)).

[STARKE J. referred to *Jones* v. *Daniel* (2).]

One of the terms of the contract embodied in the option and its acceptance is that a formal contract shall be executed, and another is that the first of the payments of purchase money shall then be made and the others at the stated periods thereafter. The term that a formal contract should be executed might be waived by the parties, and the more readily because its only object appears to be to fix the dates for payment. It not having been waived, but the appellant having repudiated, equity will regard that as done which ought to have been done, and will treat the matter as if the written contract had been executed within a reasonable time after the acceptance of the option. The signing of a written contract is not a condition precedent to there being a binding contract, and, if it were, the respondent would be entitled to rely on the repudiation of the contract by the appellant. The language of the option indicates that, if accepted, it was to fix the rights of the parties, and is opposed to the view that no result was to follow upon the acceptance. The contention that the option merely meant that the appellant would not sell to anyone else for a certain time is opposed to the decision in *Goldsbrough, Mort & Co.* v. *Quinn* (3). [Counsel also referred to *Granville* v. *Betts* (4); *Woodall* v. *Clifton* (5); *Worthing Corporation* v. *Heather* (6); *Rossiter* v. *Miller* (7).]

Langer Owen K.C., in reply.

Cur. adv. vult.

May 2.

The following written judgments were delivered :—

KNOX C.J. This is an appeal from the judgment of *Harvey* J. granting a decree for specific performance of a contract for the sale of a property at Westmead. I take the relevant facts from the judgment of *Harvey* J. The vendor, the present appellant, had

(1) 3 Sm. & G., 101.
(2) (1894) 2 Ch., 332.
(3) 10 C.L.R., 674.
(4) 18 L.J. Ch., 32.
(5) (1905) 2 Ch., 257.
(6) (1906) 2 Ch., 532.
(7) 3 App. Cas., 1124.

H. C. OF A. 1921.

NIESMANN v. COLLINGRIDGE.

KNOX C.J.

placed his property in the hands of Messrs. Tobin & Lyne, auctioneers and agents, for sale by them. They got into communication with Collingridge, and gave him particulars. On 29th December 1919 Collingridge and his brother visited the defendant, who was then living on the property the subject of the alleged sale. He inspected the property, and after some negotiations a document was drawn up by Collingridge and signed by the appellant in the following terms:— "Deskford, Westmead, 29/12/1919.—I, Hubert Niesmann, do hereby give William E. Collingridge the firm offer of my property situated at the above address, consisting of about 26 acres 1 rood 4 perches, with a house thereon, on the following terms: Price £2,800, payable, namely, £1,000 on the signing of contract, £500 three months afterwards, and the balance in three years' time from the date of signing contract, at or bearing interest at the rate of 6 per cent. per annum. Value received for option sixpence.—(Sgd.) H. Niesmann." Sixpence was, in fact, paid by Collingridge to Niesmann after he signed the document. This document was signed somewhere about midday on 29th December, which was a Monday. On the following Monday Collingridge rang up Tobin & Lyne, and informed them that he wished to purchase the property on the terms of the option, and asked them to communicate that fact to Mr. Niesmann. In the afternoon of the same day Mr. Lyne saw the defendant and informed him of Collingridge's acceptance. The defendant then said it was too late, that the option was only to remain open for a week, that his recollection was that this was provided for in the option itself, and that the time for accepting the offer had expired at noon that day. Thereupon the plaintiff instituted this suit for specific performance. Since the suit was originally instituted the purchaser has died, and the suit has been revived by his executrix, who is the respondent in this appeal.

The question for decision is whether a binding agreement for the sale of the property was constituted by the verbal acceptance of the written offer set out above. The respondent contends that there is a binding agreement. The appellant, on the other hand, contends that the reference in the offer to the signing of a contract had the effect of making the execution of a formal contract a condition precedent to the existence of a binding agreement between the parties.

It is clear that the question which of these contentions is correct depends wholly on the construction of the document of 29th December, and the question of construction to be solved is whether upon the true construction of that document the execution of a further contract is a condition or term of the bargain or whether it is a mere expression of the desire of the parties as to the manner in which the transaction already agreed to will go through (see per *Parker* J. in *Von Hatzfeldt-Wildenburg* v. *Alexander* (1)).

In a matter of this kind decided cases are of assistance only so far as they indicate the matters to be considered and the tests to be applied in ascertaining the true construction of the document under consideration. The speeches in the House of Lords in the case of *Rossiter* v. *Miller* (2) afford assistance in this direction. At pp. 1143-1144 Lord *Hatherley* says :—" If you can find the true and important ingredients of an agreement in that which has taken place between two parties in the course of a correspondence, then, although the correspondence may not set forth, in a form which a solicitor would adopt if he were instructed to draw an agreement in writing, that which is the agreement between the parties, yet, if the parties to the agreement, the thing to be sold, the price to be paid, and all those matters, be clearly and distinctly stated, although only by letter, an acceptance clearly by letter will not the less constitute an agreement in the full sense between the parties, merely because that letter may say, We will have this agreement put into due form by a solicitor. . . . Both parties may desire that it shall be put into a formal shape by a solicitor who, in that case, will not be able to vary the agreement either on one side or the other, but only to put into a more formal and professional shape the agreement which had been completely formed with unity of purpose with reference to the sale and purchase by the two parties to the contract." At p. 1149 Lord *O'Hagan* says :—" If any prospective contract, involving the possibility of new terms, or the modification of those already discussed, remains to be adopted, matters must be taken to be still in a train of negotiation, and a dissatisfied party may refuse to proceed. But when an agreement embracing all the particulars essential for finality and completeness, even though it may be desired

(1) (1912) 1 Ch., at p. 288. (2) 3 App. Cas., 1124.

H. C. OF A. 1921.

NIESMANN v. COLLINGRIDGE.

KNOX C.J.

to reduce it to shape by a solicitor, is such that those particulars must remain unchanged, it is not, in my mind, less coercive because of the technical formality which remains to be made." At p. 1151 Lord *Blackburn* says :—" The mere fact that the parties have expressly stipulated that there shall afterwards be a formal agreement prepared, embodying the terms, which shall be signed by the parties does not, by itself, show that they continue merely in negotiation. It is a matter to be taken into account in construing the evidence and determining whether the parties have really come to a final agreement or not. But as soon as the fact is established of the final mutual assent of the parties so that those who draw up the formal agreement have not the power to vary the terms already settled, I think the contract is completed."

Bearing in mind the principles laid down in these speeches, I proceed to consider the document in the present case. It contains (1) the names of the parties ; (2) a sufficient description of the property ; (3) the amount of the purchase money, and (4) the terms of payment. It is expressed to constitute a " *firm offer* " of the property, and it is supported by valuable consideration. The only reference to a contract as an independent document is in the provision fixing the dates for payment of the purchase money—in other words " the signing of contract " is referred to only as fixing a point of time. The offer made is not expressed to be " subject to " or " conditional upon " the execution of a formal contract. It does, however, necessarily import that it was in the contemplation of both parties that a formal contract should be signed by the parties, and I agree with *Harvey* J. in thinking that the meaning of the parties was that acceptance of the offer should be followed by the execution by both parties of a written contract.

In considering the question of construction of the offer, the form of acceptance is of course immaterial ; it is also immaterial whether it is the vendor or the purchaser who asserts that the contract effected by the acceptance of the offer is binding, for at that stage it is binding on both or on neither.

The appellant's contention in effect is that the acceptance by Collingridge (even if it had been made in writing) conferred no legal right on him and imposed no legal obligation on the appellant—the

position being, according to the argument, that both parties had the right after acceptance to continue or to withdraw from negotiations, and that there was nothing binding unless after acceptance both parties agreed on all the essential terms, including those apparently settled by the offer, and embodied the result of that agreement in a formal contract. In other words, it is argued that if Collingridge duly accepted the offer the parties were exactly in the same position as if the offer had never been made, except for the transfer of sixpence from one to the other. It follows from this argument that the so-called " offer " was not open to " acceptance " by Collingridge in any real sense of that word. It is said that what Collingridge obtained under the offer was the right to insist that the vendor should abstain for a reasonable time from withdrawing the offer either expressly or by selling the property to some other person ; but it is apparent that the right to insist on the continuance of an offer which is incapable of being converted by acceptance into a contract is entirely illusory. I find it impossible to entertain the idea that the parties intended that this so-called " firm offer " should be so futile a proceeding as the appellant now contends. In my opinion the intention disclosed by the document itself is that if Collingridge within a reasonable time intimated his acceptance of the offer the property described should be sold to him for £2,800, and that the only reason for introducing the reference to the signing of a contract was to fix the date of payment of the first and subsequent instalments of purchase money. I am confirmed in this view by the fact that the evidence shows clearly that the appellant himself regarded the offer as giving Collingridge the right to purchase the property for £2,800 if he accepted the offer in time. When informed of Collingridge's acceptance he said that it was too late, that he was sorry he gave the option at that price as he could get more for the property. During the period between the giving of the offer and its acceptance he informed a proposing purchaser that he was " tied up till Monday," referring to the offer he had given to Collingridge, and subsequently told the same person that he could have the property for £2,800 if Collingridge did not take it. I find it impossible, in view of the defendant's evidence, to believe that he ever intended that if Collingridge accepted the offer the whole

H. C. OF A. 1921.

NIESMANN v. COLLINGRIDGE.

KNOX C.J.

matter should be open for negotiation and either party should be at liberty to withdraw his assent to the terms specified in the offer. If the fact had been that Collingridge had accepted in writing I think he would have had no defence to a suit by the appellant to compel him to execute a contract embodying the terms set forth in the offer and no other terms, but, according to the contention of the appellant, Collingridge would in that event have been bound to nothing. Having accepted the offer in writing, he might have declined to proceed unless the purchase money or rate of interest was reduced or he was given extended time for payment, or he might simply have refused to discuss the matter further or to do anything. Such a position appears to me to be inconsistent with the express terms of the offer. I can attach no meaning to the words "the firm offer" except that acceptance should make a binding contract between the parties, and a contract to enter into negotiations or to sign a contract all the terms of which are not agreed on creates no binding obligation. So, too, the fact that valuable consideration is given for an offer seems to me the strongest ground for holding that the offer was intended to be turned into a contract by acceptance.

For these reasons I agree with the conclusion at which *Harvey* J. arrived. I agree also with my learned brothers *Rich* and *Starke* that the first step in carrying out the decree made by *Harvey* J. should be the settlement and execution of a proper contract.

RICH AND STARKE JJ. We also agree that the appeal must be dismissed.

It seems to us that the parties did conclude an agreement in the terms of the offer. The plaintiff made a firm offer, for a small consideration, in which all the essential terms of the bargain were stated, and it was not expressed to be conditional or subject to acceptance in writing or the execution of a contract in writing, but simply that the purchase money should be paid at or within certain times from the date of signing a contract. This unconditional offer the plaintiff duly accepted, and so concluded the agreement. The provision for payment of the purchase money on the signing of the contract was not, however, in our opinion, a mere expression of the desire of the parties as to the manner in which the transaction already agreed to

would in fact go through (*Von Hatzfeldt-Wildenburg* v. *Alexander* (1)) nor was it a condition of agreement. It was a "term of the bargain." Thus, the purchaser could not be compelled to pay the purchase money unless the contract was signed. It was a condition of the obligation to pay. But, when the parties had concluded such an agreement, the necessary implication is that each of them will sign a contract in accordance with the terms of the agreement. If the parties had concluded an agreement for the grant of a lease, it is clear that the agreement would not then be conditional upon the grant of the lease and that the lease would not be the mere expression of the desire of the parties as to the form of their agreement. It is a term of the bargain which can be specifically enforced. So here, where the parties made the signing of a contract a term of their bargain, there is no difficulty, in our opinion, in decreeing specific performance of the agreement, and so compelling the performance of a stipulation of the agreement necessary to its carrying out and due completion (see *Sporle* v. *Whayman* (2)). Such an agreement is not obnoxious to the provisions of the *Statute of Frauds*.

"The question whether or no there is an implication in executory contracts, in favour of the insertion in the executed contract of all such stipulations as are usually inserted" in contracts of the description proved in this case, does not now call for decision (see *Fry on Specific Performance*, 6th ed., p. 176, par. 376; *Conveyancing Act* 1919 (N.S.W.), Part IV). That matter will be settled in the Master's Office.

Harvey J. was therefore right in decreeing specific performance of the agreement, but the first step, in our opinion, in carrying out that decree should be the settlement and execution of a proper contract.

Appeal dismissed with costs.

Solicitors for the appellant, *Shipway & Berne*.

Solicitors for the respondent, *Heydon & Heydon*.

B. L.

(1) (1912) 1 Ch., at p. 289.

(2) 20 Beav., 607.