

CANADA / JUDGMENT

Snell v. Brickles

(1914) 49 SCR 360

COURT

Supreme Court of Canada

DECIDED

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Snell v. Brickles Collection Supreme Court Judgments Date 1914-02-23 Report

(1914) 49 SCR 360 Judges Fitzpatrick, Charles; Davies, Louis Henry; Duff, Lyman Poore; Anglin, Francis Alexander; Brodeur, Louis-Philippe On appeal from Ontario Subjects Sale Decision Content Supreme Court of Canada Snell v. Brickles, (1914) 49 S.C.R. 360 Date: 1914-02-23 William H. Snell (Plaintiff) Appellant; and Charlotte Brickles, Executor of The Estate of Isaac Brickles, Deceased (Defendant) Respondent. 1913: December 3, 4; 1914: February 23. Present: Sir Charles Fitzpatrick C.J. and Davies, Duff, Anglin and Brodeur JJ. ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO. Vendor and purchaser—Contract for sale of land—Payment by instalments—Specified dates—Time of essence—Forfeiture—Penalty—Payment declared to be deposit. An offer to purchase land provided for payment of the price as follows: \$500 “as deposit accompanying this offer” to be returned if offer not accepted, the balance by instalments at specified dates; it also provided that if the vendor was unable or unwilling to remove any valid objection to the title, and purchaser did not wish to accept it otherwise the former could return the deposit and cancel the contract; that the offer if accepted should constitute a binding contract of purchase and sale and “time shall in all respects be strictly of the essence hereof”; and that should the purchaser fail to complete the purchase in the manner and at the time specified the vendor could retain any monies paid on account as liquidated damages, rescind the contract and re-sell the property. Held, reversing the judgment appealed from (28 Ont. L.R. 358), Fitzpatrick C.J. and Anglin J. dissenting, that the \$500 paid “as deposit” was part of the purchase money, that the retention by the vendor of monies paid when the purchase was not completed was only a penalty for failure to make the payments promptly; and that the court could grant the purchaser relief from the consequences of such failure. Kilmer v. British Columbia Orchard Lands ([1913] A.C. 319), followed. APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario[1], reversing the judgment at the trial in favour of the plaintiff. There was but one question of law raised for decision in this appeal, namely, whether or not, where a contract for sale of land to be paid for by instalments at fixed dates, with a forfeiture of instalments paid in case of default in any, time being of the essence of the contract, the stipulation that the initial payment is a deposit takes it out of the rule in Kilmer v. British Columbia Orchard Lands[2], that the

forfeiture of the money is only a penalty and default does not of itself disentitle the purchaser to decree for specific performance. The trial judge granted the decree, but his judgment was overruled by the Appellate Division. Proudfoot K.C., for the appellant. The appellant never had nor indicated any intention of abandoning the contract and his failure to pay on the day stipulated was not his fault. See *Labelle v. O'Connor*[3], at pages 522, 523, 530; *Tilley v. Thomas*[4]. *Kilmer v. British Columbia Orchard Lands*² sets at rest any doubt heretofore existing as to the soundness of the rule in *In re Dagenham (Thames) Dock Co.* [5], that the condition of forfeiture in case of default in a contract of this nature is only a penalty and this rule entitles the appellant to a decree for specific performance. J. E. Jones for the respondent. Making the first payment a deposit takes this case out of the doctrine laid down in *Kilmer v. British Columbia Orchard Lands*². See *Howe v. Smith*[6]; *Hall v. Burnell*[7]. THE CHIEF JUSTICE (dissenting).—I agree with Mr. Justice Anglin. DAVIES J.—I am not able to distinguish this case from that of *Kilmer v. British Columbia Orchard Lands*[8], and, therefore, think that the appeal must be allowed with costs, and the plaintiff's claim for specific performance granted. DUFF J.—I think this case is governed by the decision of the Judicial Committee in *Kilmer v. British Columbia Orchard Lands*⁸. The application of that decision becomes as I think very clear when the real nature of the agreement now before us is once understood. It was constituted by a proposal from the purchaser accompanied by the sum of \$500 on account of the purchase money and an acceptance by the vendee. The proposal and acceptance are as follows:— OFFER OF PURCHASE. Toronto, February 20th, 1912. To G.W. Ormerod, Agent. I hereby make you the following offer, that is to say: I offer to buy that certain parcel of land situate in the Township of Scarboro and County of York and being composed of Lots 1 and 2 according to Registered Plan, Number 412, save and except (1) the portions of said lots heretofore conveyed to the School Board of S.S. No. 12, in the Township of Scarboro for a school site; (2) the most westerly 100 feet frontage on Danforth Road of Lot 2, by a depth of 200 feet, for the price or sum of seven thousand five hundred dollars \$7,500 payable as follows: Five hundred dollars \$500 paid G.W. Ormerod, as deposit accompanying this offer, to be returned to me if offer not accepted; two thousand dollars 2,000 to be paid upon the acceptance of title and delivery of deed and give you back a first mortgage on the property for the remainder, re-payable in 5 years from the date of closing \$5,000 \$7,500 \$7,500 with interest from date of closing at 6 per cent. per annum payable half-yearly, said mortgage to be drawn on the vendor's solicitor's usual form and contain clauses providing for the following:—

- (1) A discharge of such portions of said lands as may be required for public streets, upon the payment of \$1,500 upon the mortgage;
- (2) A discharge of any portion of said lands upon a further payment of \$2 per foot frontage on any street;

- (3) The right to pay off the whole mortgage at any time, by giving three months' notice or paying three months' advance interest. Rent, fire insurance premiums, taxes, rates of assessments, local or otherwise, to be proportioned and allowed to date of closing, which shall be 15th March, 1912. The purchaser shall take the property subject to existing tenancies. The vendor shall not be bound to produce any abstract of title or any title deeds or evidence of title except such as he may have in his possession, nor to furnish a surveyor's plan or description or proof that the buildings stand wholly within the limits of the said lands. The purchaser shall search the title at his own expense and shall have ten days from said date of acceptance to examine the same, and if no written objection be made within that time he shall be deemed to have accepted the title. If any valid objection be made within that time the vendor shall have reasonable time to remove it, and if he be unable or unwilling so to do, and the purchaser is unwilling to accept said title subject to the objections, he, notwithstanding any intermediate negotiations, may cancel the contract and return the deposit, and neither party shall have any claim on the other for damages or expenses. This offer, if accepted as aforesaid, shall with such acceptance, constitute a binding contract of purchase and sale, and time shall in all respects be strictly of the essence hereof. Should the purchaser make default in completing the purchase in the manner and at the time above mentionel, any money theretofore paid on account shall at the option of the vendor be retained by the vendor as liquidated damages, and the contract shall, at the option of the vendor, be at an end and the vendor shall be entitled to resell the said land without reference to the purchaser. The vendor is to have the right to remove raspberry canes, currant bushes, asparagus and rhubarb roots, up to 1st November, 1912. Signature of Purchaser—W.H. Snell. Purchaser's Occupation—Baker. Purchaser's Address—156 Main Street. Purchaser's Solicitor—Proudfoot, Duncan, Grant & Skeans. I hereby accept the above offer. February 20th, 1912. (Sgd.)G.W. ORMEROD. The above acceptance is hereby confirmed and I agree to pay G.W. Ormerod a commission of 5 per cent. on the sale price. (Sgd.)ISAAC BRICKLES. Vendor's Solicitor—DuVernet, Raymond, Ross & Ardagh. Amount received, \$500. Date received, February 20th, 1912. The important provisions bearing on the point in dispute are these:— This offer, if accepted as aforesaid, shall with such acceptance, constitute a binding contract of purchase and sale, and time shall in all respects be strictly of the essence hereof. Should the purchaser make default in completing the purchase in the manner and at the time above mentioned, any money theretofore paid on account shall at the option of the vendor be retained by the vendor as liquidated damages, and the contract shall, at the option of the vendor, be at an end and the vendor shall be entitled to resell the said land without reference to the purchaser. There can be no doubt as to the application of this last paragraph to the sum of \$500 paid on the acceptance of the offer. It is true that this sum is said to be "deposited" pending the acceptance, but it is plainly described as and unquestionably was paid as part of the purchase money. In *Ockenden v. Henly*[9], at page 492, Lord Campbell speaking for the court adopted the statement of law in Sugden, Vendors and Purchasers:— It is well settled that by our law following the rule of the civil law a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase money, and not as a mere pledge. Whatever disputes might have arisen in the absence of express provision on the

subject, the terms of this agreement are perfectly unambiguous upon the point that in the event of the vendee making default in respect of any of the things necessary for completion on the day named the vendor may terminate the agreement and retain the moneys theretofore paid. If any part of the sum of \$2,000 should remain unpaid on the 15th of March, 1912, the consequences mentioned were to ensue by the express language of the contract. Now, the decision in *Kilmer's Case*[10] as I understand it is that such a clause must be read as providing for a penalty against which the court will relieve. In that case their Lordships of the Privy Council adopted and acted upon the principle of *In re Dagenham*[11], as that principle is explained in the judgment of Lord Macnaghten delivered by Lord Moulton at pp. 79 and 80 of 82 L.J., in the following passage: In the case of *Dagenham Thames Dock Co.*; *In re Hulse's Claim*[11], Lord Justice Mellish expresses himself as follows: "I have always understood that where there is a stipulation that if, on a certain day, an agreement remains either wholly or in part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty." That was a case like this of forfeiture claimed under the letter of the agreement met by an action for specific performance. Lord Justice James seems to have been of the same opinion. "In my opinion," he says, "this is an extremely clear case of a mere penalty for non-payment of the purchase money." He ends by stating that he agreed with the Master of the Rolls (Lord Romilly) that it was a penalty from which the company were entitled to be relieved on payment of the residue of the purchase money with interest. No doubt the learned Lord Justice referred in detail to the special circumstances of the case, but it appears to their Lordships that that reference was made in answer to the arguments which had been addressed to the court on behalf of the appellants. As regards the ground of his decision the two Lord Justices seem to have been in perfect accord. This passage contains the ratio decidendi of their Lordship's judgment and is, of course, an absolutely authoritative exposition (and—need I add—by one of the greatest of the English Equity judges) not only of the effect of the decision of the Lord Justices in *Re Dagenham*[12], but of the law upon the point in question; and the agreement now in controversy as I construe it, is well within the rule here laid down. Two points in Mr. Jones' most ingenious argument ought to be noticed. He says first that the effect of adopting this view must be virtually to abrogate the principle that time may by agreement be made of the essence of a contract for the sale of land. This argument is founded on a misapprehension; the view involves no such consequence. Where the effect of a stipulation that time is of the essence of the agreement is expounded in express terms by the agreement itself and according to that exposition that stipulation gives the vendor a right to rescind the contract on failure to pay an instalment of purchase money whether it be the last instalment or not at the exact hour named for such payment by the contract and to forfeit the moneys already paid, then these stipulations are treated as constituting a penal clause for securing the punctual payment of the purchase money and the penalty is relieved against. That, as I understand it, is the effect of *Re Dagenham*[12] as explained by the judgment and the decision in *Kilmer's Case*[13]. It may be observed that, before the decision in *Kilmer's Case*[13], *Re Dagenham*[12], although it appears to have been overlooked by English text writers and some

English judges (it is not mentioned in Fry, Specific Performance, 1911, or in the last edition of Dart, Vendors and Purchasers, or in Williams' Vendors and Purchasers, or in Halsbury under Specific Performance or Sale of Land and in Talbot and Fort's Index only two references are noted, both in 1900, it was not mentioned either in Wallis v. Smith[14] or in Howe v. Smith[15] was correctly appreciated (i.e., in accordance with the interpretation afterwards adopted in Kilmer's Case[16]) in Whitla v. Riverview Realty Co.[17], a decision of the Manitoba Court of Appeal, and in Chadwick v. Stuckey[18], a decision of the full court of Alberta both of which courts in effect adopted the views expressed by Meredith C.J. in his dissenting judgment in Labelle v. O'Connor[19]. The other point is perhaps the same argument in another form. The respondent, it is said, is not exercising the power of rescission given by the agreement. But he has professed to put an end to the agreement and he has retained the moneys paid; and he does not, of course, pretend that he has kept the moneys inadvertently, but asserts his right to them. He does not really argue that in the circumstances he could have kept these moneys except under some stipulation express or implied to that effect; and he finds such a stipulation implied in the use of the word "deposit." As I have said above, the presence of the express stipulation excludes any implication which might otherwise have arisen in respect of the precise matter upon which that stipulation makes provision; and it is pursuant to this stipulation that the vendor must be taken to have acted. Although in the view above expressed it is not strictly relevant, I think it is not improper to add that I am far from satisfied that even in the absence of the express stipulation the plaintiff would have been entitled in the circumstances to terminate the agreement and retain the moneys already paid. He had always been anxious to carry out his contract and personally was in a position to do so on the appointed day, the 15th of April. The responsibility for the delay, such as it was, lay with his solicitor; and on the 20th of April the purchase money, a properly executed mortgage and a deed prepared for execution were tendered. The action was brought on the 23rd. It is contended that in these circumstances, even in the absence of express stipulation, the respondent could refuse to execute the conveyance and retain that part of the purchase money already paid. And this is said to result from the fact that the sum of \$500 being denominated a "deposit" is to be treated as security for the performance by the vendee of his contract with the consequence that "time being of the essence" of the agreement his failure to complete on the day named, the 15th of April, entitles the vendor to retain the moneys so placed in his hands as security. Now it has been many times laid down and it is undoubtedly law that where an instalment of purchase money is declared by the contract to be paid as a "deposit," and there is no modifying context, it is thereby implied that this sum besides being a part payment of the purchase money stands as security for the completion of the purchase. But, what is the consequence of this where the contract contains a provision that time is the essence of it and the vendee fails, let us say, through the carelessness of his solicitor, to make the final payment? Does it follow that the vendor becomes instantaneously entitled to refuse to transfer the property and at the same time retain the moneys in his hands? There are, no doubt, dicta to this effect. But I think there is no decision, and I think it is very questionable whether the dicta are consistent with principle. Certainly the difficulties of reconciling the dicta with the

doctrine of *Re Dagenham*, as interpreted in *Kilmer's Case*, are not trifling. In *Howe v. Smith*[20] the decision proceeded upon the ground that the vendee had so acted "as to repudiate his contract," as Cotton L.J. put it; "to recede from his bargain," as Bowen L.J. put it. The vendee had "accepted the repudiation," treated the agreement as dissolved in consequence of the vendee's conduct, and sold the property. The vendee in such circumstances, demanding the return of his deposit, was met with the answer that "this sum was paid as security by you for the performance of your contract, and having deliberately elected not to perform it and your election having been so acted upon that it is now impossible to carry it out, you cannot get back your security." In the agreement in question in that case, time was not declared to be of the essence of the contract; and the decision has no direct bearing upon the effect of such stipulation. The same observation may be made with regard to *Ex parte Barrell*[21], which was cited and relied upon in *Howe v. Smith*[20]. Indeed, the judgment of Lord Justice James contains two sentences which sum up the point of both decisions. They are: "The money was paid to the vendor as a guarantee that the contract should be performed. The trustee (vendee) refuses to perform the contract and then says: Give me back the deposit." In *Hall v. Burnell*[22], Mr. Justice Eve states the principle upon which he proceeds (p. 554) in these words:— Such being the nature of the deposit and the implied terms upon which it was paid, is there any sufficient reason why I should not, as against a purchaser who has receded from and persistently refused to perform the contract, declare that the deposit has been forfeited and belongs to the vendor, who has been in no way in default and has done everything in his power to force the purchaser to carry out his bargain? I think not. In *Sprague v. Booth*[23] the purchaser was also refusing to carry out his contract. I have not found any decision and I do not think there is one in which the vendee's default being merely the technical default of failing to pay at the hour named, there being in fact admittedly the intention as well as the ability on his part to carry out his contract, and an offer to perform it made almost immediately after the default has occurred, there being no equity against the vendee or in favour of the vendor, except such as may be created by the existence of the formal stipulation making time the essence of the contract and technical default in exact performance—I say I have found no decision and I do not think one can be found—that a vendor in such circumstances is on equitable principles entitled to terminate the agreement and retain the moneys paid on the sole ground that such moneys are declared by the agreement to be paid as a "deposit." As to whether such a decision could be justified on principle there are two observations which appear to me to be of weight. It ought to be noted that in the traditional view of courts of equity the vendor's interest in the contract of sale has been considered to lie in the right it gives him to demand and enforce the payment of the purchase money. This has been compendiously put by saying that the estate in equity was considered to have passed to the vendee or that the vendor was considered to be a trustee of the land for the purchaser subject to the interest he had in it as security for the purchase money. Expressions of this kind, of course, may easily be misunderstood by people who leave out of sight the manner in which the doctrine they are intended to epitomize is applied by courts of equity; but one may say, I think, with entire accuracy that the Court of Chancery looked at such contracts

from a point of view which brought into relief the interest of the vendor in the payment of the purchase money as his substantial interest in the contract. See the judgment of Jessel M.R. in *Cave v. Mackenzie*[24], at page 219, and of Mowat V.C. in *Parke v. Riley*[25], at page 230. The second observation is this:—The English doctrine of the equity of redemption is only a particular application of the principle governing the law as to penalties and forfeitures. The Lord Chancellor in *G. and C. Kreglinger v. New Patagonia Meat and Cold Storage Co.*[26], at page 35, says that the equitable jurisdiction in personam over mortgagees was merely a special application of a more general power to relieve against penalties and to mould them into mere securities. In the light of these observations some of the results of the contention I am now considering appear rather singular. First, this sum that is to stand as security for the performance of the vendee's obligations which in their substance consist in making the payments mentioned on the stipulated days, is, according to the contention, to become the absolute property of the vendor on the vendee's failure to pay on the exact hour named and against this forfeiture the courts have no power to relieve; and this consequence is not only not prevented by the fact that the intention of the parties was that the sum mentioned was to stand as security only, it is expressly on the ground that it was intended to be and is a security for the payment of the purchase money that (according to the argument) the court is powerless to afford relief. The process referred to by the Lord Chancellor is reversed. Instead of a penalty being moulded into a security and relieved against a security is turned into a penalty and forfeited as a penalty. Secondly, the effect of declaring the initial payment to be a "deposit" coupled with a stipulation that time is of the essence of the contract being to raise an implied agreement that the vendor shall upon default of punctual payment be entitled to terminate the agreement and retain the moneys deposited and these stipulations giving rise to this implied agreement being (according to the respondent's argument) sanctioned and enforceable according to the doctrine of the court; nevertheless, it is indisputably the law as laid down in *Re Dagenham*[27] and in *Kilmer's Case*[28], that if such an agreement be stated in express terms on the face of the contract, that is to say, if it be declared in so many words that in the event of non-completion on the day named the contract of sale may be re-scinded and the initial payment forfeited, that is a stipulation which the courts will relieve against as a penalty. A stipulation stated in plain terms is a penal stipulation; a stipulation precisely the same in effect is not penal when stated in terms which can only be understood by lawyers. This, presumably, is regarding substance rather than form. The difficulties arising from conflict among views from time to time expressed by distinguished lawyers and judges in relation to this subject are, no doubt, considerable. I am inclined to think it will be found, if the decisions themselves be looked at as distinguished from the expressions of individual judges, that most of the apparent difficulties disappear. In the meantime the case before us seems to me, as I have already said, to be governed by the decision in *Kilmer's Case*[29], according to which I think the appellant is entitled to be relieved from the exigency of the penalty and to have judgment for specific performance. On the other points in the case I express no opinion. ANGLIN J. (dissenting).—The material facts of this case are as follows:— On the 20th February, 1912, by accepting a written offer of purchase from William H. Snell, Isaac Brickles agreed to sell to

him, for \$7,500, certain land in the Township of Scarborough. The purchase money was payable, \$500 as a deposit accompanying the offer, \$2,000 on acceptance of title and delivery of deed; and \$5,000 by the purchaser giving a mortgage "to be drawn on the vendor's solicitors' usual form." Provision was made for the return of the deposit if the offer should not be accepted, or if, after acceptance of the offer, the vendor should be unable or unwilling to remove any objection to the title on which the purchaser should insist. The agreement provided for payment of a commission of 5% to the vendor's agent, who received and still retains the deposit of \$500. One of the terms of the agreement was that the transaction should be closed on the 15th March, 1912, and it provided that time shall in all respects be strictly, of the essence hereof. The agreement also contains this clause:— Should the purchaser make default in completing the purchase in the manner and at the time above mentioned, any money theretofore paid on account shall, at the option of the vendor, be retained by the vendor as liquidated damages, and the contract shall, at the option of the vendor, be at an end, and the vendor shall be entitled to resell the said land without reference to the purchaser. The agreement is silent as to the preparation of the deed and the mortgage. The solicitors for the vendor on the 21st of February, 1912, sent to the solicitors for the purchaser a draft deed for approval. The purchaser's solicitors did not return this draft deed or signify approval of it, although, on February 27th, the vendor's solicitors wrote asking its return. The purchaser's solicitor admits that he received the draft deed and states that he found difficulty in settling the description. In his evidence he says:— On the 12th, Mr. Ross phoned to me and said Mr. Brickles was in his office and that the 15th was the date of closing and his client was very anxious to close * * * He asked me for the return of the draft deed and I said I would return it. Then that was, I think, on Tuesday, and next morning I was going to return the draft deed, but in the afternoon I had brought the deed to send it back, that was on Wednesday, and then I discovered that there was not anybody in to dictate a letter to, and so left it over till Thursday morning. His Lordship: That would be the 14th? A. Yes, my Lord. Mr. Proudfoot: Then what happened? A. I was not down either on the 14th or the 15th or the 16th. I was sick the last three days of that week. Q. Were you confined to your home? A. Oh, yes, I was not out of the house the last three days of the week. Q. Then the draft deed was not returned? A. No. Q. What took place on the Monday, that would be the 18th? A. The deal should have been closed on Friday, and then there was Saturday morning. Monday I came down, and the first thing I took up was this matter. I had it on my desk and it was the first thing I attended to. I phoned to Mr. Ross and asked him if we could close the matter. I said we were ready and would like to get the matter closed. Mr. Ross then told me that his client had been in, and as the matter had not been closed on the 15th that his client refused to carry it out. * * * I prepared the mortgage on that day and had it executed, and asked Mr. Snell for a cheque, and got a cheque, and then called Mr. Ross up again and asked him if there was any possibility of closing and he said there was not; and I spoke about tender on that occasion; and he said that his client would not do anything in the matter. Then I asked him if there was any possibility of settlement in any way, and he said that he did not think so, but he would write to his client. Before these telephone interviews occurred the vendor's solicitors, apparently, had already written a formal letter to the purchaser's

solicitor notifying him that their client would not carry out the contract. Elsewhere in the evidence of the purchaser's solicitor there is the following passage referring to his conversation with the vendor's solicitor on the 12th March: Q. It is entered in your docket that he telephoned you up and insisted on closing on the 15th? A. Yes. Negotiations for settlement ensued, but they proved abortive. On the 20th of April the purchaser's solicitor made a tender of \$2,000, and of a mortgage for \$5,000 executed by his client and he presented the deed for execution by the vendor, which was refused. He brought this action for specific performance on the 23rd of April. Falconbridge, C.J., who tried the action, decreed specific performance with costs. The executrix of the defendant, in whose name the action had meantime been revived, appealed and her appeal was unanimously allowed by the Appellate Division. From that judgment the present appeal is taken. Two questions present themselves for decision: (a) whether the vendor was in default in regard to the conveyance of the property and cannot on that ground take advantage of the provision making time of the essence of the contract in all respects; and (b) whether, notwithstanding that provision, the purchaser, although in default, is entitled to specific performance. The first point presents little difficulty. The agreement being silent as to it, the duty of preparing the conveyance fell upon the purchaser. "An ordinary contract of sale is not only to convey to the purchaser, but to convey as the purchaser shall direct": *Earl of Egmont v. Smith*[30], at page 474. The rule, in the absence of a stipulation, is that the purchaser must prepare and tender the conveyance. *Dart on Vendors and Purchasers* (7 ed.), p. 1002. This rule of English law is well recognized in the courts of Ontario: *Bolton v. Hugel*[31], at page 407; *Mooney v. Prevost*[32], at page 419; *Stevenson v. Davis*[33], at page 633. With very great respect for the learned Chief Justice of the King's Bench, I agree with Sutherland J., that there appears to be nothing in the agreement before us which makes it inapplicable. The fact that the vendor's solicitors actually prepared and submitted a draft deed for the approval of the purchaser's solicitors did not change the legal rights or duties of the parties. If the vendor unnecessarily assumed the burden of drafting the conveyance it was at least the duty of the purchaser's solicitor to peruse and return it approved in due time to permit of its being engrossed and executed by the vendor and ready for delivery on the day fixed for closing. That he failed to do. It was also the duty of the purchaser's solicitor to prepare a draft mortgage and to submit it to the vendor's solicitor for approval in time to have it properly considered and returned for engrossment and execution before the day fixed for closing. It was his business to ascertain what was the vendor's solicitors' usual form of mortgage, and if they had no special form to submit a draft mortgage in the statutory form. The purchaser introduced the provision for a mortgage into his offer for his own benefit and convenience. In so doing he undertook to bear the additional conveyancing expense thus entailed: *Fahner v. Ran*[34]; and that fact cast on him the duty of preparing the instrument: *Foster v. Anderson*[35]. On the 16th of March the draft deed had not been returned, the draft mortgage had not been submitted and the \$2,000 due on the 15th had not been tendered. There was the clearest default on the part of the purchaser and I find none on the part of the vendor. On the contrary his solicitor appears to have been unnecessarily diligent. He had prepared and submitted a draft conveyance. He had written on the 27th of February asking its return; and

he had notified the purchaser's solicitors three days before the time fixed for closing the transaction that his client expected punctuality. The appeal, therefore, fails on the first point. Nor do I see how it can succeed on the second point unless we are to consider a point in the law of specific performance which has been settled for over half a century (27 Halsbury's Laws of England, p. 67) to have been overturned by the recent decision of the Privy Council in *Kilmer v. British Columbia Orchard Lands*[36], on which the appellant chiefly relies, and to hold that, as a result of that judgment, it is no longer possible for parties by explicit terms to make time of the essence of a contract for the sale of land. I do not understand that to have been the intention of their Lordships of the Judicial Committee, nor to be a consequence fairly deducible from their decision. That case differs in many important particulars from the one now before us. There \$2,000 had been paid, not as a deposit, but as an instalment of the purchase money; there had been an extension of time for payment of the second instalment (although that is not always material, *Barclay v. Messenger*[37]; and the subsequent insistence on the provision making time of the essence rather took the purchaser by surprise; a forfeiture clause, applicable although the entire purchase money except a small fraction had been paid, was invoked by the vendors; provision was also made for subdivision of the property to which the vendors were bound to assent on receiving three-fourths of the money for which the subdivided lots might be sold, and the right of forfeiture was reserved in regard to money paid in respect of these subdivided lots. Here no instalment of the purchase money had been paid, but merely a deposit; there had been no extension of time; on the contrary the purchaser had been notified that punctuality would be exacted; the vendor does not invoke the forfeiture clause in the agreement; he says that the \$500 deposit had not become "money paid on account" within the purview of that clause; and there is no provision for subdivision such as there was in the *Kilmer Case*[38]. That decision, as I understand it, leaves untouched the familiar doctrine laid down in such authorities as *Howe v. Smith*[39], and *Hall v. Burnell*[40], in regard to cases where there has been default by a purchaser who has paid nothing except a deposit. In *Howe v. Smith*³⁹ the purchaser had paid \$500 which has stated in the contract to be paid "as a deposit and in part payment of the purchase money." Cotton L.J., at p. 94, cites *Collins v. Stimson*[41], where Baron Pollock said:— According to the law of vendor and purchaser the inference is that such a deposit is paid as a guarantee for the performance of the contract, and where the contract goes off by default of the purchaser, the vendor is entitled to retain the deposit. In *Ex parte Barrell*[42], Lord Justice James, who had presided at the hearing of the *Dagenham Case*[43], upon the authority of which *Kilmer v. British Columbia Orchard Lands*³⁸ was disposed of, says, speaking of a deposit paid on a contract for the sale of land by a purchaser who had become bankrupt and whose trustee sued to recover it:— The trustee in this case had no legal or equitable right to recover the deposit. The money was paid to the vendor as a guarantee that the contract should be performed. As Lord Justice Cotton says in *Howe v. Smith*[44], at page 95:— The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes

in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then according to Lord Justice James, he can have no right to recover the deposit. I do not say that in all cases where this court would refuse specific performance, the vendor ought to be entitled to retain the deposit. It may well be that there may be circumstances which would justify this court in declining, and which would require the court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance but which would make his conduct amount to a repudiation on his part of the contract. In the same case, Fry L. J., said:— Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must, therefore, inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract. As shortly put by Bowen L.J.:— A deposit is * * * a security for the completion of the purchase. In the recent judgment of Eve J., in *Hall v. Burnell*[45], the nature of a deposit is fully considered and the doctrine laid down in *Howe v. Smith*[46] is applied. A divisional court of which I was a member, had occasion, a few years ago, to review the authorities bearing upon a contractual stipulation that time shall be of the essence in a contract for the sale of land, in *Labelle v. O'Connor*[47], to which I refer for a convenient collection of the cases. My conclusion then was that an express stipulation making time of the essence of a contract for the sale and purchase of land is efficacious in equity as well as at law and that, where clearly established and there is no ground for suggesting fraud, surprise, accident or mistake, it will be enforced unless there has been waiver by the party claiming the benefit of it. I have had no reason to change my opinion. There are certainly no circumstances from which waiver can be inferred in this case and, unless we are to hold that such a stipulation should be disregarded, however clear and explicit, I am unable to see how the purchaser can obtain specific performance. In claiming to retain the deposit the vendor does not invoke or rely upon the clause of the agreement which expressly provides for the forfeiture of purchase money paid on account. The deposit becomes part payment, or money paid on account, only “if the sale goes on.” If not, it remains “an earnest” or “security.” It may well be that had the \$2,000, or some part of it, been paid on or before the 15th of March, the court would have relieved against the consequences of default for which that clause provided. The present case might then have been brought within the authority of the *Dagenham Case*[48] and the *Kilmer Case*[49] as to the purchaser’s right to be relieved from the forfeiture of purchase money paid on account. But I should require to consider very carefully whether, even in that case, he would be entitled to specific performance—which was accorded in the

Kilmer Case⁴⁹ but was apparently not sought in the Dagenham Case, so far as the report in 8 Ch. App. 1022 shews, although in the Kilmer Case⁴⁹ it appears to have been assumed that it was. The present case is simply one of default under a contract, of which the parties have expressly stipulated that time shall be of the essence, by a purchaser who has paid merely a deposit. There is no excuse for the default; no case of fraud, surprise, accident or mistake has been suggested; and there has been no waiver of the stipulation. No authority has been cited, and I am satisfied that none can be, found, which would support a decree for specific performance under such circumstances. Wide as the powers and discretion of a court of equity are, they do not extend to making new contracts for suitors. *Hipwell v. Knight*^[50], at page 416; *Seaton v. Mapp*^[51], at page 564; *Honeyman v. Marryat*^[52], at page 24. The plaintiff does not ask for a judgment rescinding the contract. At bar his counsel asserted and relied upon the right of his client to rescind without curial assistance. A return of the deposit has not been asked for by the plaintiff. It could not in any case properly be granted except as to the balance of \$125 over and above the agent's commission, which amounts to \$375, and to which he is clearly entitled. But, having regard to the very short default—three days—and to the circumstances in which it occurred, I think the defendant should return this \$125. The purchaser did not refuse to perform his contract and his conduct did not amount to a repudiation of it. On the contrary he is and always has been anxious to carry it out, though he neglected to comply with its terms. In dismissing this appeal I should be disposed to give the respondent his costs in this court only on condition that this sum of \$125 is returned to the plaintiff or that the respondent should agree to credit it upon such costs: *Howe v. Smith*^[53], at page 95; *Gee v. Pearse*^[54]. If this is done, however, it must be on the basis that the contract is to be deemed rescinded. If the appellant should decline so to treat it, the appeal will simply be dismissed with costs. BRODEUR J.—I am of opinion that this appeal should be allowed for the reasons given by my brother Duff. Appeal allowed with costs. Solicitors for the appellant: Proudfoot, Duncan & Grant. Solicitors for the respondent: Rowan, Jones, Somerville & Newman.

[1] 28 Ont. L.R. 358.

[2] [1913] A.C. 319.

[3] 15 Ont. L.R. 519.

[4] 3 Ch. App. 61.

[5] 8 Ch. App. 1022.

[6] 27 Ch. D. 89.

[7] [1911] 2 Ch. 551.

[8] [1913] A.C. 319.

[9] E.B. & E. 485.

[10] [1913] A.C. 319.

[11] 8 Ch. App. 1022.

[12] 8 Ch. App. 1022.

[13] [1913] A.C. 319.

[14] 21 Ch. D. 243.

[15] 27 Ch. D. 89.

[16] [1913] A.C. 319.

[17] 19 Man. 746.

[18] 5 Alta. L.R. 145.

[19] 15 Ont. L.R. 519.

[20] 27 Ch. D. 89.

[21] 10 Ch. App. 512.

[22] [1911] 2 Ch. 551.

[23] [1909] A.C. 576.

[24] 37 L.T. 218.

[25] 3 E. & A. 215.

[26] [1914] A.C. 25.

[27] 8 Ch. App. 1022.

[28] [1913] A.C. 319.

[29] [1913] A.C. 319.

[30] 6 Ch. D. 469.

[31] 35 U.C.Q.B. 402.

[32] 20 Gr. 418.

[33] 23 Can. S.C.R. 629.

[34] 1 Ch. Ch. 246.

[35] 15 Ont. L.R. 362, at p. 371; 16 Ont. L.R. 565, at pp. 570, 574; 42 Can. S.C.R. 251

[36] [1913] A.C. 319.

[37] 43 L.J. Ch. 449.

[38] [1913] A.C. 319.

[39] 27 Ch. D. 89.

[40] [1911] 2 Ch. D. 551.

[41] 11 Q.B.D. 142.

[42] 10 Ch. App. 512.

[43] 8 Ch. App. 1022.

[44] 27 Ch. D. 89.

[45] [1911] 2 Ch. 551.

[46] 27 Ch. D. 89.

[47] 15 Ont. L.R. 519.

[48] 8 Ch. App. 1022.

[49] [1913] A.C. 319.

[50] 1 Y. & C. Ex. 401.

[51] 2 Coll. 556.

[52] 21 Beav. 14.

[53] 27 Ch. D. 89.

[54] 2 DeG. & Sm. 325.

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