Privy Council Appeal No. 26 of 1914.

James Pringle Steedman - - - - *Appellant,*

v.

William R. Drinkle and another - - - *Respondents.*

FROM

THE SUPREME COURT OF SASKATCHEWAN.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 21ST DECEMBER 1915.

Present at the Hearing.

VISCOUNT HALDANE. LORD PARKER OF WADDINGTON.
LORD SUMNER.

[*Delivered by* VISCOUNT HALDANE.]

This is an appeal from the Supreme Court of Saskatchewan reversing the judgment of Mr. Justice Newlands, who had dismissed an action for specific performance. The facts were shortly these: James Campbell White agreed by writing, dated 9th December 1909, to sell 160 acres of land in the province to one Loveridge for 16,000 dollars, of which 1,000 dollars were paid on signing the agreement, and the balance was payable in annual instalments on the 1st December in each year. Loveridge entered into the agreement on behalf of the respondent John C. Drinkle, who, along with one Hair, was the real purchaser. In January 1910 the interest of Hair under the agreement

was acquired by the respondent W. R. Drinkle, and on 24th January 1910 Loveridge assigned the agreement to the respondents. Just before this date White died intestate. On 18th April 1910 letters of administration to his estate were granted to Steedman, the appellant, in the province of Ontario, and on 25th May 1911 the grant was re-sealed in the province of Saskatchewan. On 22nd July 1910 the appellant, as administrator, purported to approve the assignment.

The material provisions of the agreement, in addition to those already stated, were that the instalments of purchase money and interest thereon were payable at Hamilton, in the province of Ontario; that the purchaser would cultivate the land in manner specified, and would pay the instalments as they fell due on the days mentioned. It was further provided that on any default the whole of the principal and interest secured by the agreement should at once become due and be payable, or the contract should be forfeited and determined, at the option of the vendor. On payment of the sums of money mentioned, with interest, the vendor was to convey to the purchaser, who was to have possession on the execution of the agreement, the purchaser holding the premises as tenant to the vendor at a yearly rent equivalent to and applicable in satisfaction of the instalments.

It was further agreed that in case the purchaser should make default in any of the payments to be made the vendor should be at liberty, without notice, to cancel the agreement and declare it void, and to retain any payments made on account of it as and by way of liquidated damages, and to retain all improvements made on the premises, or else to proceed

to another sale, any deficiency in price, with costs, charges, and expenses to be borne by the purchaser. In case the vendor thought fit to declare the contract void under these provisions, he might make a declaration by notice to the purchaser, addressed to a post office mentioned. It was also provided that time was to be considered as of the essence of the agreement. No assignment was to be valid unless approved by the vendor or his agent.

The first deferred instalment, falling due on 1st December 1910, was not paid. The appellant thereupon, by his solicitors, gave notice cancelling the agreement. The respondent, W. R. Drinkle, thereupon, on 21st December, tendered the amount due, but the appellant declined to receive it, and repeated this refusal, whereupon another and formal tender was made a few days later.

The respondents then brought the action in which this appeal arises, claiming specific performance, and in the alternative relief from forfeiture under the terms of the agreement. Mr. Justice Newlands thought that the appellant was entitled, under the terms of the agreement providing that time should be of its essence, to cancel it on the default which had been made. He was willing to relieve the respondents from the forfeiture of the amount paid under the agreement. The respondents, however, did not accept this offer, and appealed. The Supreme Court held that the case was governed by the decision of this Board in *Kilmer* v. *The British Columbia Orchard Lands Company* (1913, A.C., 319), in which it was held on a somewhat similar agreement that the stipulation that payments already made of instalments might, on forfeiture, be retained, was really a stipulation for a penalty and should be relieved

against. In that case, under the circumstances, specific performance was also granted, notwithstanding a provision that time was to be of the essence. The Supreme Court followed what it believed to have been laid down by this Board, and decreed specific performance in addition to relief from forfeiture.

As to the relief from forfeiture, their Lordships think that the Supreme Court were right in holding, for the reasons assigned in the former decision of this Board, that the stipulation in question was one for a penalty, against which relief should be given on proper terms. But as regards specific performance they are of opinion that the Supreme Court were wrong in reversing Mr. Justice Newlands' judgment. Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply, by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach.

In the case referred to this appears to have been what happened. For *Kilmer* v. *The British Columbia Orchard Lands Company* was an appeal in which the facts were that the company had sold land for a price to be paid in instalments at specified dates, with a clause of forfeiture, in default of punctual payment, both of all rights under the agreement and of all payments already made. Time was, as in the present

case, declared to be of the essence of the agreement. Default in punctual payment having occurred the company claimed a declaration that the agreement was at an end, and for their strict rights under its terms. Kilmer, who was the purchaser, counter-claimed for specific performance. This Board held that as regards the company's claim, the stipulation for forfeiture on which it was founded was in the nature of a penalty, against which relief ought to be granted on terms.

So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships' opinion so far it governs the present case. But the Board went on to decree specific performance. As time was declared to be of the essence of the agreement this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board, it appears that their Lordships proceeded on the view that this was so. The date of payment of the instalment which was not paid had been extended, so that the stipulation had not been insisted on by the company. The learned counsel who argued the case for the purchaser contended that when the company had submitted to postpone the date of payment they could not any longer insist that time was of the essence. Their Lordships appear to have adopted this view, and on that footing alone to have decreed specific performance as counter-claimed.

In the present case there has been no such agreement to extend time, nor anything that amounts to waiver of the right to treat time as of the essence. While, therefore, the court below was, in the present case, right in holding

that the appellant could not insist on forfeiture in accordance with the strict terms of the agreement, their Lordships are of opinion that there was no justification for decreeing specific performance. They think that the respondents should, even at this late stage, be relieved from forfeiture of the sums paid by them under the agreement as proposed by the learned judge who tried the case. For this purpose the respondents should have liberty to apply to the court of first instance. For the rest, the judgment of the Court of Appeal should be reversed, and the claim for specific performance dismissed, the appellant to have his costs here and in the courts below. Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

JAMES PRINGLE STEEDMAN

v.

WILLIAM R. DRINKLE AND ANOTHER.

DELIVERED BY VISCOUNT HALDANE.

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