

The judgment of the Court was read by FERGUSON, J.A., who said that the action was brought for moneys due under an agreement in writing, dated the 15th September, 1919, wherein the defendant gave to the plaintiffs an order for a machine, and agreed to pay therefor \$487.50.

At the time of giving the order, the defendant made an advance payment of \$48.75. The balance was to be paid in instalments, and the title to the machine was not to pass until payment in full. There were provisions, in the event of default, for acceleration of payments, forfeiture of deposit, etc. The machine was shipped by the plaintiffs and received by the defendant, but some weeks later was reshipped to the plaintiffs by the defendant, because he thought he would be unable to make his subsequent payments.

The trial Judge found that the plaintiffs refused to take it back, but said that they would hold it subject to the defendant's order, and that they were so holding it.

The defendant contended that, as he had returned the machine, the plaintiffs' remedy was limited to declaring a forfeiture under clause 4 of the agreement, of the \$48.75 paid as a deposit. Clause 4 provided that any advance payment made by the purchaser, at the time of the execution of the order, should be forfeited as liquidated damages to the plaintiffs if the purchaser failed to complete the contract.

The trial Judge did not agree with the defendant's contention, and in that the Judge was right.

As stated by Hagarty, C.J.O., in *Sawyer v. Pringle* (1891), 18 A.R. 218, at p. 221: "This agreement cannot properly be called 'a contract of sale.' It is an executory agreement for a future sale on performance of certain conditions by the defendant."

Shipment and delivery to the defendant entitled the plaintiffs to payment in the sum and at the times stated in the agreement: *Tuft v. Poness* (1900), 22 O.R. 51; and default in payment gave them the right to have the future payments accelerated. The plaintiffs were not obliged to take advantage of the defendant's default; but, if they chose to do so, they might, as they did, take advantage of it for the purpose of accelerating the payments. Neither were the defendants obliged to take advantage of the breach for any other purpose. They might still have the right, if they chose to exercise it, to terminate the contract and apply the payments made at the time of termination on account of rental, or to forfeit the \$48.75 advance payment and sue for the purchase-price.

In the circumstances, it was not necessary to decide what would be the rights of the parties in case the plaintiffs elected to