him from asserting, when further default occurred, that such default was a breach of the agreement, and that—time still being of the essence—the result specified in the agreement followed.

The plaintiff had the right to terminate the agreement when the defendant failed to make the agreement which fell due in June. He did not give the defendant formal notice of his election until after the tender of all the money due; but that was not of importance. The defendant's rights under the agreement come to an end on the 2nd July, 1920; and the plaintiff was entitled to judgment

The agreement did not provide that, upon its termination for default, payments already made should be forfeited. The plaintiff therefore had no right to retain the $475, and that sum must be returned to the defendant: see Brown v. Walsh (1919), 45 O.L.R. 646. The defendant must pay an occupation-rent for the time he had been in possession, and there should be a reference to fix the amount, unless the parties could agree upon it.

A tender by the plaintiff of the $475 was not a necessary part of the exercise of the option to terminate the contract: see Ewart's "Waiver Distributed," p. 241 et seq. No tender would have been necessary even if the defendant had been entitled to the whole of the $475; and, as he was not entitled to the whole of that sum, but only to that sum less the occupation-rent, the amount of which had not been ascertained, it was impossible for the plaintiff to know exactly how much he had to repay.

There did not seem to have been any breach of the defendant's contract as to keeping up fire insurance on the building.

The defendant must pay the costs of the action down to trial. The costs of the reference should be reserved until after the report. If the plaintiff desired immediate possession, he must pay the $475. If he preferred to wait until the sums payable by the defendant were ascertained, he might do so, and then might have possession upon paying the amount, if any, by which the $475 exceeded the amount ascertained to be due to him.

KELLY, J. JANUARY 5TH, 1921.

ROBSON v. FLEWELL.

Vendor and Purchaser—Agreement for Sale of Land—Breach of Contract by Vendor—Failure to Give Possession at Time Stipulated for—Evidence—Return of Moneys Paid on Account of Purchase-price—Damages—Expenses and Loss Sustained by Purchaser—Counterclaim for Specific Performance—Dismissal.