

Div. Court.]

FOLEY V. MURRAY.

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which is gathered into it. If it be sufficiently constructed, the liability is only a question of negligence. The proprietor is not liable if the water escapes beyond the observance of due care proportioned to the danger of injury from the safety and mode of construction of the reservoir.⁹—*Central Law Journal*.

⁹ *Grey v. Harris*, 107 Mass. 492; *New York v. Bailey*, 2 Denio, 433.

REPORTS

ONTARIO.

(Reported for the LAW JOURNAL.)

IN THE SIXTH DIVISION COURT, COUNTY OF ONTARIO.

FOLEY V. MURRAY.

Defence setting up reformation of a contract involving a sum beyond the jurisdiction—Practice.

Although a defence may be established which would, in a Court of competent jurisdiction, reform or rescind a contract, the amount of which is beyond the jurisdiction of the interior Court, the proper course is to find for the plaintiff, payable within such time as to enable the defendant to take such action in another Court as he may be advised, to establish his rights, either by the reformation or rescission of the contract, or to damages for its non-fulfilment.

[Whitby, March 31st, 1883.]

DARTNELL, J.J.—The plaintiff sues for the first instalment of \$160, upon an agreement in writing whereby he agrees to sell, and the defendant agrees to purchase, a lot in Mara for the sum of \$1,800, a deed to be given and a mortgage taken when the first four instalments are paid. Nothing is said in this document about possession.

The defendant asserts and the plaintiff denies that there was any agreement about possession. I find the weight of evidence is overwhelmingly in favor of the defendant's contention that the plaintiff undertook to give him possession. It is submitted that this evidence is inadmissible, as varying or contradicting the written contract.

The defendant relies upon the verbal agreement. The plaintiff admits that there is a tenant upon the place under a lease which may or may not be a valid one. The real defence is that the plaintiff is estopped, or should be restrained, from enforcing his agreement, because he is unable to carry out the true agreement between him and the defendant. He also contends that this Court has no jurisdiction, as the title to land is in question.

I overrule this latter objection. There is no dispute as to the title to the land. The defence rests entirely upon the other objection to the plaintiff's right to recover.

Where property is sold, and the price is payable by instalments, and nothing is said about possession, it would appear that the vendee is not entitled to possession until payment of the last instalment: *Dart on V. & P.* 581; *Kenney v. Wexham*, 6 Madd. 335. *Omerod v. Hardman*, 5 Vesey, 722, is an authority to show that an additional parol stipulation as to the time for delivery of possession is inadmissible: (*Dart on V. & P.* 953). But, assuming it to be admissible, in order to give it effect, I am asked, in conceding to the defendant's contention, to vary, or reform, or rescind a written agreement, the subject matter of which involves a sum far beyond the jurisdiction of the Division Courts. Under these circumstances, I think it is my duty to find for the plaintiff for such sum as he may be entitled to, payable in 40 days, in order to give the defendant an opportunity, should she be so advised, to commence an action against the plaintiff. In such action she could claim a reformation of the contract, so as to accord with the true agreement between the parties, or a rescission thereof, if it should be shown the plaintiff is not in a position to carry it out; and also such damages as she may be able to show she has sustained by reason of its non-fulfilment. In the same action, the Court above could restrain all proceedings in this Court until such time as these questions could be determined. Or the defendant may, under the 78th sect. of the Judicature Act, apply for an order "that the whole proceeding be transferred from this Court to the High Court, or any division thereof."

The plaintiff claims interest on the unpaid purchase money. This is inequitable, as the purchaser is not in possession, and the plaintiff has in fact received the rent. Under all the