

The action was tried without a jury at Haileybury.

F. L. Smiley, for the plaintiff.

H. L. Slaght, for the defendant.

ROSE, J., in a written judgment, said that the plaintiff sold to the defendant, at a price payable in instalments, for which promissory notes secured by a chattel mortgage were given, the stock in trade contained in a shop; and by an agreement in writing, dated the 17th February, 1920, agreed to sell him the shop for \$2,000. Of the purchase-price of the shop, \$475 was paid in cash. The balance was to be paid in equal monthly instalments of \$35 each, and interest was to be paid half-yearly. Time was to be considered the essence of the agreement, and unless the payments were punctually made the agreement was to be null and void and the vendor at liberty to resell.

As the payments in respect of the stock in trade fell due, the plaintiff sent the defendant drafts for the amounts, which were duly accepted and paid; but the defendant did not draw for or demand the instalments of the purchase-price of the shop, and the defendant did not pay such instalments; at the end of May there were three of them overdue.

On the 28th May, 1920, the plaintiff wrote a letter to the defendant demanding \$400; at that time what was really due amounted to only \$207.25. On the 31st May, the plaintiff drew on the defendant for \$183. On the 1st July and afterwards, tenders were made to the plaintiff, but the defendant insisted that the plaintiff's rights were at an end.

There was not here any forfeiture against which relief could be granted; but it was said that the plaintiff "waived" or otherwise lost his right to declare the contract at an end.

The plaintiff did not waive the benefit of the time-clause, in the sense contended for. In May, default having been made, he had the right (subject to what was to be said about estoppel) to elect whether he would, because of that default, put an end to the agreement, or would keep the agreement in force and insist upon payment of the sums to which, according to its terms, he was then entitled. He was not at that time put to any further election; and he did not at that time in fact make any election other than the one which he was then called upon to make. There was no evidence that he intended to effect any alteration in the respective rights and obligations of himself and the defendant as to rights in futuro, or that he did anything which reasonably led the defendant to think that he was not to be required to make his future payments on the appointed days, or which otherwise estopped