SECOND DIVISIONAL COURT. FEBRUARY 18TH, 1919.

HARRISON v. WRIGHTS LIMITED.

Vendor and Purchaser—Agreement for Sale of Land—Purchaser to Choose Particular Lot—Price not Mentioned in Writing—Oral and Unenforceable Contract—Statute of Frauds—Vendor Willing to Convey Lot Chosen—Sale-deposit—Action to Recover—Finding of Fact of Trial Judge—Appeal.

An appeal by the plaintiff from the judgment of DENTON, Jun. Co. C.J., at the trial, dismissing an action brought in the County Court of the County of York to recover $171.22 and interest. The $171.22 was claimed as the "amount received by the defendants . . . part purchase-price" of a certain lot.

The learned County Court Judge, in his reasons for judgment, said that the plaintiff contended that, when a certain statement prepared by the defendants was read to him, he understood it to mean that he was to be credited in the defendants' books with the sum of $178.78, and that if he did not choose a lot he could have this balance at the end of the year. The plaintiff, the learned Judge found, knew that the money was to be credited to him on the purchase-money of the lot that he might choose within 12 months, and that he did not understand that he was to be entitled to the money if he did not choose a lot.

But the plaintiff contended that he was entitled to judgment because the money in question was credited in the defendants' books as a deposit on a contract unenforceable at law—if the plaintiff had chosen a lot within a year and had notified the defendants, they probably could not have been compelled to carry it out, because the price at which the lot was to be taken was not given, and the Statute of Frauds would be a complete defence.

The plaintiff relied upon the general proposition of law that, where a deposit is paid upon an oral or unenforceable contract for the purchase of land, and the purchaser declines to carry out the purchase, he is entitled to the return of his deposit.

Carson v. Roberts (1862), 31 Beav. 613, has not been followed in this Province. See Kinzie v. Harper (1908), 15 O.L.R. 582.

The defendants in this case were ready and willing, and always had been, to convey to the plaintiff a lot that he might select. While the price was not mentioned in writing, the parties were agreed as to the price.

If the plaintiff should choose a lot, and the defendants should refuse to convey on the ground that the contract was not binding on them, then, and not till then, the plaintiff would be entitled to his money.

The learned Judge, therefore, dismissed the action with costs.