

## PRATT v. THE SHERIFF and SMITH

SUPREME COURT (Smith, C.J.): October 4th, 1952  
(Civil Case No. 183/48)

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- [1] **Civil Procedure—execution—land—sale by sheriff prima facie for ready money and immediate delivery—where provision made for payment of part only of price, purchaser cannot choose own time for completion:** *Prima facie*, a sheriff's sale of land is to be considered to be for ready money and immediate delivery; and even if there is an agreement which makes provision for part only of the purchase price to be paid within a specified time, the nature of the sheriff's duties are such as to preclude any inference that the purchaser from him can choose his own time and convenience for paying the balance and completing the sale (page 256, lines 25-32). 10
- [2] **Contract—implied terms—contract for sale of land—time not of essence unless expressly stated or implied from surrounding circumstances:** In a contract for the sale of land, time is not of the essence of the contract unless it is specifically provided for in the contract or it can be implied from the surrounding circumstances (page 256, lines 5-8). 15
- [3] **Contract—performance—payment—deposit in contract for sale of land—deposit forfeited only if purchaser repudiates his part of contract:** Repudiation of a contract for the sale of land by the purchaser is not a necessary precondition of the loss of his equitable remedy of specific performance, though it is a precondition of enabling the vendor to retain the purchaser's deposit; and therefore where a purchaser fails to perform his part of the contract within a time which is reasonable or stipulated, the court will refuse specific performance, whereas it will not allow the vendor to retain the deposit unless the purchaser's conduct also amounts to a repudiation of his part of the contract (page 256, line 33—page 257, line 28). 20
- [4] **Contract—performance—time of performance—contract for sale of land—time not of essence unless expressly stated or implied:** See [2] above. 25
- [5] **Contract—specific performance—application of decree—contract for sale of land—repudiation by purchaser not precondition of refusal of specific performance—sufficient that purchaser delays performance unreasonably or beyond stipulated time:** See [3] above. 30
- [6] **Land Law—conveyancing—implied terms of contract—time not of essence unless expressly stated or implied from surrounding circumstances:** See [2] above. 35
- [7] **Land Law—conveyancing—time of completion—purchaser's failure** 40

to perform in reasonable or stipulated time precludes specific performance—deposit forfeited only if purchaser repudiates his part of contract: See [3] above.

5 [8] Land Law—conveyancing—time of completion—time not of essence unless expressly stated or implied: See [2] above.

[9] Time—performance—contract for sale of land—time not of essence unless expressly stated or implied: See [2] above.

10 The plaintiff brought an action against the defendants for specific performance of a contract for the sale of land, and an injunction to restrain the first defendant from selling the property in question.

15 A writ of *fi. fa.* was issued by the first defendant (the Sheriff) in respect of the property of the second defendant, a judgment debtor. The property was seized and advertised for sale to the highest bidder, with half of the purchase price to be paid immediately and the rest within seven days. The plaintiff offered the judgment creditor £300 to stop the sale but he was referred to the Sheriff; the Sheriff accepted the money but would not postpone the sale. The property was sold for £520 to a person who subsequently claimed to be acting as agent for the plaintiff; but no money was paid. The plaintiff, within seven days of the sale, paid £220 to the Sheriff and obtained a receipt which stated it was paid on account of the writ of *fi. fa.* The Sheriff advertised a second sale of the property because the purchase price had not been paid according to the conditions of sale, but the judgment creditor instituted garnishee proceedings against him to prevent any return of the £220 to the plaintiff. The Supreme Court (Beoku-Betts, J.) held that the Sheriff was bound to appropriate the £220 towards the amount collectable under the writ of *fi. fa.*, and refused an order. When the Sheriff advertised the property for sale for the third time, the plaintiff instituted the present proceedings for specific performance.

25 The plaintiff contended that when he paid the balance of the purchase price within seven days of the sale in accordance with the conditions of sale, he had an agreement which he was entitled to specifically enforce against the defendants, and that he had subsequently showed no intention to repudiate which would entitle the Sheriff to rescind the agreement and retain the deposit.

30 The Sheriff admitted that the £220 paid to him by the plaintiff was paid as part of the purchase price and not on account of the writ of *fi. fa.*; but the defendants maintained that the surrounding

circumstances of the case implied that time was of the essence, and that the plaintiff's failure to make immediate payment under Schedule A to the Execution against Real Property Ordinance (*cap.* 75) entitled the Sheriff to retain the deposit and rescind the agreement.

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#### Cases referred to:

- (1) *Aldred v. Constable* (1844), 6 Q.B. 370; 115 E.R. 142, *dictum* of Lord Denman, C.J. applied.
- (2) *Howe v. Smith* (1884), 27 Ch.D. 89; [1881-5] All E.R. Rep. 201, *dicta* of Cotton, L.J. applied.
- (3) *Lock v. Bell*, [1931] 1 Ch. 35; [1930] All E.R. Rep. 635, applied.

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#### Legislation construed:

Execution against Real Property Ordinance (Laws of Sierra Leone, 1946, *cap.* 75), s.2:

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"The houses, lands and other hereditaments and real estate . . . , belonging to any person whatsoever indebted, shall be liable to, and chargeable with, all just debts, dues and demands . . . , and shall be and are hereby made chattels for the satisfaction thereof . . . ."

- s.9: "Where executions shall issue under the provisions of this Ordinance against the goods and chattels, land and tenements of any defendant, if such defendant shall have goods and chattels which . . . satisfy such debt, . . . the lands and tenements of the said defendant shall not be levied upon; and when there shall not be goods and chattels sufficient to satisfy such debts, . . . the lands, tenements and real estate shall be taken in execution . . . ."

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- s.10: "Before any sale shall be made by virtue of this Ordinance by any sheriff . . . of the houses, lands, hereditaments or other real estate of any person, . . . he shall first advertise . . . the time and place of such intended sale at least three months before he shall make the same . . . ."

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Schedule A: "To the Sheriff of the Colony of Sierra Leone Greeting.

We command you that of the personal estate of \_\_\_\_\_ in your Bailiwick, if the same shall be sufficient, and if not, then of the personal estate, lands, tenements, hereditaments and other real estate of \_\_\_\_\_ you cause to be made the sum of £ \_\_\_\_\_ and also interest thereon at the rate of £4 per centum per annum from the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, which said sum of money and interest were lately before us in our said Supreme Court aforesaid in a certain action wherein \_\_\_\_\_ is plaintiff and \_\_\_\_\_ is defendant, by a judgment of our said Court, bearing date the \_\_\_\_\_ day of \_\_\_\_\_ 19 \_\_\_\_\_, adjudged to be paid by the said \_\_\_\_\_ to \_\_\_\_\_ together with certain costs in the said judgment mentioned, and which costs have been taxed and allowed by the Master and Registrar of our said Supreme Court at the sum of \_\_\_\_\_

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£ s. d., as appears by the certificate of the said Master and Registrar, dated the day of 19 .

And that of the said personal estate, lands, tenements, hereditaments and other real estate of the said in your Bailiwick, you further cause to be made the sum of £ s. d., together with interest thereon, at the rate of £4 per centum per annum from the said day of 19 , and that you have that money and interest before us in our said Supreme Court immediately after the execution hereof, to be paid to the said in pursuance of the said judgment.

And in what manner you shall have executed this our writ make appear to us in our said Supreme Court immediately after the execution thereof, and have there then this writ.

Witness His Honour at Freetown, the day of in the year of our Lord, 19 .

(Signed)

Master of Supreme Court."

Miss Wright for the plaintiff;  
M.C. Marke for the defendants.

SMITH, C.J.:

The plaintiff in this case claims specific performance of a contract made on September 12th, 1947, to sell to her No. 15 Circular Road, Freetown, and an injunction restraining the Sheriff from selling the premises to any other person.

From the admissions in the pleadings and the evidence I find the following facts: In April 1947 one Bull obtained judgment in this court against the second defendant and others for the sum of £1,853. 14s. 11d. and costs, and this judgment was registered as a charge on certain properties belonging to the defendant, including No. 15 Circular Road. A writ of *fi. fa.* was issued and the Sheriff seized the property and advertised its sale to take place on September 12th, 1947. The only conditions of sale specifically made were:

"1. The highest bidder shall be the purchaser who shall sign the bidding memorandum.

2. One-half of the purchase money is to be paid on the spot and the balance within seven days after the date of the sale."

The day before the sale the plaintiff approached the judgment creditor and offered him £300 in order to stop the sale. The judgment creditor referred the plaintiff to the Sheriff, and on September 12th, shortly before the sale took place, the plaintiff paid the £300 to the Sheriff without succeeding in getting the consent of the

judgment creditor or the Sheriff to a postponement or suspension of the sale.

Mr. H.R. Pratt, another judgment debtor, attended the sale and was declared the highest bidder at £520, and he signed the memorandum but made no further payment of any money that day. On September 13th, Mr. Pratt wrote the Sheriff that he had bid as the plaintiff's agent, and ended his letter: "Incidentally, I should mention that the matter of the deposit against the sale is being separately dealt with."

On September 16th, 1947, the plaintiff executed a conveyance of the property to one Mabel Smith, purporting to grant her the fee simple free from encumbrance, and on September 17th the plaintiff paid £220 to the Sheriff and obtained a receipt which stated that it was paid on account of the writ of *fi. fa.*, but which the Sheriff now admits was paid on account of the purchase money for the property.

It is evident that the plaintiff or Mr. Pratt on her behalf had in the meantime been trying to get the judgment creditor and the Sheriff to agree that the £300 paid before the sale should be credited to the purchase price; and on September 18th, 1947, Mr. Pratt wrote a letter to Mr. Rogers-Wright, the judgment creditor's solicitor, repeating this request. Mr. Rogers-Wright replied the same day refusing consent to this.

On September 23rd, the Sheriff wrote Mr. Pratt to the effect that as the purchase money had not been paid in accordance with the conditions of sale he was going to exercise his right to put the property up again for sale by public auction. This second sale was advertised to take place on December 30th, 1947, but in the meantime the judgment creditor, presumably in order to forestall any claim by the plaintiff to have the £220 returned to her, started garnishee proceedings against the Sheriff and the proposed sale did not take place.

Beoku-Betts, J. gave his decision in the garnishee proceedings on February 17th, 1948, and held that he could not make the order on the Sheriff, because the Sheriff, having received the money while he had a writ of *fi. fa.* against the plaintiff, was bound to appropriate that money towards the moneys collectable under the writ and the Sheriff therefore was not a debtor to the plaintiff.

The Sheriff then advertised the sale of the property for a third time, but before that could take place the plaintiff commenced this action.

The question I have to decide is whether, in the events that have happened, the Sheriff is entitled to repudiate the contract of sale made on September 12th. Counsel on each side have addressed very helpful arguments to me and have cited a number of authorities.

5 These authorities made it clear that in contracts of sale of land the general rule is that time is not of the essence of the contract, but this term may be specifically provided for in the contract, or it may be implied from the surrounding circumstances.

10 The contract in this case contains no specific provision other than providing that one-half of the purchase money shall be paid on the spot and the balance within seven days thereafter, but Mr. Marke for the defendant has argued that the surrounding circumstances are such that this term must be implied.

15 He has referred me to the Execution against Real Property Ordinance (*cap.* 75), s.2 of which provides that lands are chargeable with debts and may be taken in execution and sold in the same way as chattels; but under s.9 land may not be sold unless there are insufficient chattels, in which case under s.10 three months' notice of the sale must be given, and the form of the writ in Schedule A  
20 requires the Sheriff to have the money and interest before us in the Supreme Court immediately after the execution thereof to be paid to the judgment creditor, and he is required to make an immediate return to the writ.

25 In *Aldred v. Constable* (1), Lord Denman, C.J. said (6 Q.B. at 382; 115 E.R. at 146): "We also think that, *primâ facie*, a sheriff's sale is to be considered to be for ready money and immediate delivery . . . ." While that *prima facie* presumption is partially excluded in this case by the provision that half the purchase money is to be paid within seven days, the nature of the duties which the  
30 Sheriff has to perform in execution of the writ precludes any inference that the purchaser from him can choose his own time and convenience for paying the purchase money and completing the sale.

35 But even if this be so, Miss Wright still argues that the Sheriff is not entitled to rescind the contract unless the purchaser so conducts himself as to show that he intends to repudiate: see 29 *Halsbury's Laws of England*, 2nd ed., at 375, which cites *Howe v. Smith* (2). But on reading the judgment in *Howe v. Smith* I find  
40 that the court decided two things. Firstly, it decided that because of the purchaser's delay in completing he had lost his right to claim for specific performance; secondly, whether he was nevertheless entitled to claim a return of his deposit was then debated and

considered at length, and it was in giving judgment on this second question that Cotton, L.J. made the statement which is quoted in *Halsbury*, and a full reference to his judgment puts a rather different construction on what he said. He made it quite clear that there could be circumstances in which the court would refuse specific performance, but at the same time refuse to allow the vendor to retain the deposit. He stated (27 Ch. D. at 95; [1881-5] All E.R. Rep. at 205):

"It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to the ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser has repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract."

This quite clearly shows that the learned Lord Justice was saying that while repudiation of the contract by the purchaser was necessary to render him liable to forfeit his deposit, it was not a necessary condition to preclude him from getting specific performance.

Furthermore, in *Lock v. Bell* (3), where it was held that time was of the essence of the contract and the purchaser lost the right to have specific performance through failing to perform his share within time, I can find nothing to suggest that the learned judge considered that it was necessary that the purchaser should actually or impliedly have repudiated the contract.

I therefore hold that the Sheriff was entitled to repudiate, and that the plaintiff cannot have the remedies she seeks. The question of the £220 deposit has already been settled by the judgment of Beoku-Betts, J. in the garnishee proceedings. There will be judgment for the defendants with costs.

*Judgment for the defendants.*