OREGON SUPREME COURT DICISIONS

(Continued from Page 6.)

volved a mortagge upon a tract of land to secure the payment of a sum of money at certain dates, in which mortgage there was the following provision: 'It is understood and agreed by and between the parties to this istrument that the above described land shall be platted into not less than 100 lots, of uniform size, and that the party of the second part shall release any of the lots in the north half of said land upon the payment of $140 each, and any of the lots, when platted as aforesaid, in the south half of said land upon payment of $85 for each lot." In this case it was determined that the covenant, as to a partial release, ran with the land and inured to the benefit of the grantee of the mortgagor purchasing one of the lots so platted; that the right to a release was not terminated by default in payment of the sum secured by the mortgage, but continued in force until the mortgagee had fully executed the power by sale of the mortgaged premises. In discussing this case, Mr. Justice Mitchell, speaking for the court, declared: "The rule, we think, is universal that the benefit passes with the land to which it is incident. * * * The agreement or covenant is one relating to the rights of the parties in the land. It affects the title, and hence affects the value of the estate of the holder. The release is for the benefit of the owner; in fact no one but the owner could be benefited by it. It would be against reason if it did not inure to the grantee of the covenantee." In considering this question it should be noted that the amount mentioned in the stipulation, to be paid per acre, is so fixed as to equal in the aggregate the principal of the note secured by the mortgage. Under a similar stipulation in Clark v. Fontain, 144 Mass., 287, it was held that the purchaser from a mortgagor, on paying the price mentioned in the mortgage, was entitled to a release of his lot, and that in a suit in equity such a stipulation should be enforced in favor of one holding under a mortgagor. Defendant Raidabaugh having purchased the lots from The Oregon Land Company, obtained a contract therefor and taken possession thereof, a court of equity will decree him a deed from one holding from the vendor, with notice of his equities in the premises, upon payment of the amount stipulated in the mortgage. Cowen v. Loomis, 91 Ill., 132.

On behalf of the defendant, Raidabaugh, it is claimed that upon his payment without interest of the amount of $23.75 per acre, or $475, he is entitled to a release from defendant Virginia Watson's mortgage. The stipulation is not perfectly clear in its terms in regard to the payment of interest. There is, however, a provision that notes and mortgages received from purchasers, to be transferred to Mrs. Watson, should draw interest at eight per cent per annum, and be payable on or before February 1, 1900, but the time from which interest accrues is not stated in the stipulation and this appears to be unnecessary for the reason that the note, set forth in the mortgage, provides the date from which such computation should be made. Vawter v. Craft, 41 Minn., 14, 17. Should a person purchasing one of these lots immediately after the execution of the mortgage, and paying or offering to pay the amount required for a release from the mortgage, be in the same position, and required to pay the same amount as one attempting to obtain such a release 10 years afterwards? That such a construction should be given to the mortgage is not consonant with reason. In construing the stipulation all the contents of the mortagge must be taken into consideration. If upon the payment of the principal amount stipulated the mortgages were compelled to release to a purchaser, then at any time when tendered the amount she might be compelled to release all of the security given for the note, without the payment of any interest. In the absence from the stipulation of any specification regarding interest, it would be implied that in each instance each and every lot should pay accrued interest on its proportionate share of the debt. The stipulation is to be construed in connection with the covenant in the mortgage as to foreclosure and sale in case of default. Vawter v. Craft, supra. To require the mortgagee to release the several lots from her mortgage, and so lose the interest on any one lot would be an injustice, and we think it was not the intention that such should be the case. If intended that no interest was to be paid on the amount required for the release, the stipulation would, in effect, indeed be vicious as there would then be no inducement for the purchaser to make payment and obtain a release until the mortgage should be foreclosed, and one purchasing subject to the mortgage in 1892 could allow the matter to remain unpaid until just before the time of the commencement of this suit, more than 10 years afterward.

The testimony on the part of defendant Raidabaugh was taken by deposition, which deposition appears to have been lost since the trial of the cause. From a reference to the testimony, found in the transcript, it seems that Raidabaugh's contract for the purchase of these lots was attached to his deposition, and we are informed by counsel that his receipts for payment, and written evidence of his transactions with The Oregon Land Company, were lost therewith. The circuit court found in substance that D. M. Smith and subsequent purchasers of the lots in question, knew of Raidabaugh's contract, of his equities in the premises, that the allegations of his answer were true, and that they, therefore, were not innocent purchasers. As the evidence concerning Raidabaugh's rights in the premises is not all before us, we are not in a position to review these findings of fact, and they will not be disturbed. Wyatt v. Wyatt 31 Or., 531, 535; Morrison's Estate, 48 Or., 612, 614; Neal v. Roach, (Or.) 107 Pac., 475. It is claimed in behalf of defendant Raidabaugh that his receipts and the contract attached to his deposition having been lost or mislaid, to have the cause remanded, would work an injustice upon him, while counsel for the other defendants suggests that the cause should be remanded for the purpose of taking the deposition of witnesses in substitution of those lost. It does not appear, however, either from the record or from the briefs or arguments of counsel, that, if such a remand should be made, any different state of facts from those found by the trial court would be disclosed.

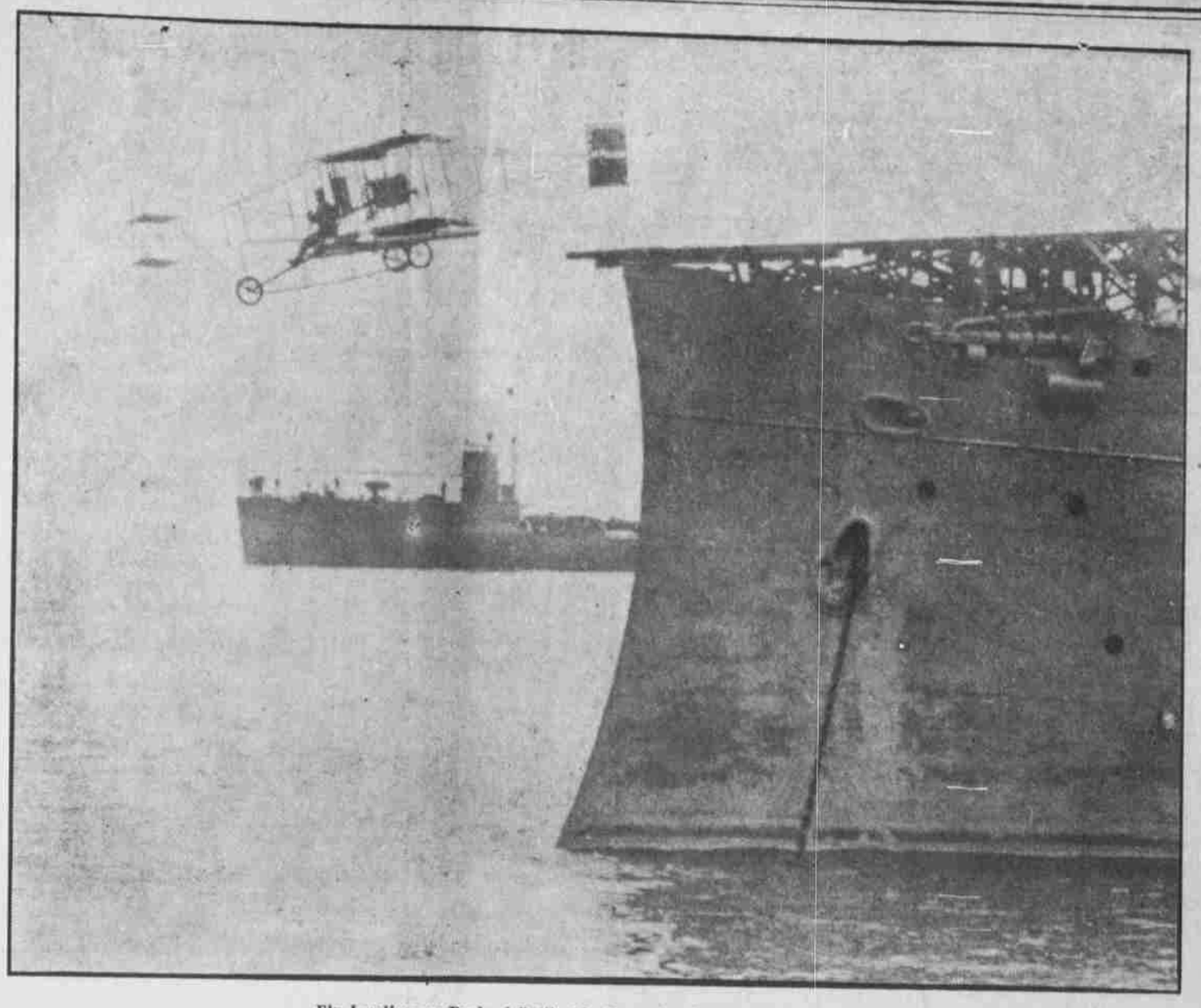
Contention is made by counsel for defendant D. M. Smith, and those obtaining title to the lots through him, upon the facts shown by the record and found by the court that on account of the failure of defendant Raidabaugh to pay the amount due on his contract, his rights in the premises were forfeited, and that defendant Smith elected to, and did, rescind the contract for the conveyance of the lots and take possession thereof. None of the defendants claim to have tendered to defendant Raidabaugh a deed of conveyance to the lots in question. Neglect to pay on a stipulated payday will not of itself produce a forfeiture, if the creditor has not considered time as of the essence of the contract. Davis v. Wilson, 106 Pac. (Or.) 795; Graham v. Merchant, 43 Or., 294, 305; Shafer v. Niver, 9 Mich., 253; Linscott v. Buck, 33 Me., 530; Clark v. Lyons, 25 Ill., 105. Regarding this point Mr. Justice Bean, in Frink v. Thomas, 20 Or., 265, says: "When the vendor by his contract to convey has not affirmatively provided that time shall be of the essence of the contract, a court of equity will ordinarily infer that interest on the deferred payments would be a sufficient compensation for the delay. Compensation, and not forfeiture, is a favorite maxim with a court of equity. (Citing Knott v. Stephens, 5 Or., 235; Brock v. Ridy, 13 Oh. St., 306; King v. Buckman, 20 N. J. Eq., 316) * * * * Although there is no stipulation in the contract that time shall be essential nor anything in the nature or circumstances of the agreement to make it so, it could nevertheless have been so made by a tender of performance on the part of the plaintiff and demand of payment. * * * * As a general rule, the party who asks for the rescission of a contract for the sale of real estate must be himself without fault, and when as in this case the payment of the purchase money and the making or tender of the deed are to occur simultaneously, they are regarded as mutual and concurrent acts, which disable either party from putting an end to the contract without performance or a valid offer to perform on his part; and so far as the question of time is concerned, both parties, after the day provided for the consummation, may be considered equally in default and neither can hold himself discharged from the obligation of complete performance until he has tendered performance on his own side and demanded it on the other."

In so far as shown by the findings of the court and the record, this language is peculiarly applicable to the case now under consideration. It was incumbent upon defendant Smith, when he insisted that Raidabaugh was in default to such an extent as to entitle him to have the contract rescinded, to allege and prove that he had tendered Raidabaugh a deed of conveyance of the land, according to the terms of the agreement, and demanded performance on the part of the latter. Frink v. Thomas, supra. Smith should also have notified Raidabaugh that unless the money was paid within a reasonable time the contract would be rescinded, and defendant Raidabaugh was entitled to reasonable time after notice in which to make the required payments. Graham v. Merchant, 43 Or., 305. To describe the matter briefly, the affairs of The Oregon Land Company were in a chaotic state, and the real trouble is that Raidabaugh paid the company too much. It was his right and duty to protect himself by withholding from the contract price a sufficient amount to pay Mrs. Watson for the release of her mortgage upon the lots according to the terms thereof, and his failure to do this was undoubtedly on account of relying upon the Land Company to convey title to him, according to its agreement expressed in the contract of sale. Having knowledge of the mortgage, this he did at his peril. Jackson v. Conduct, 57 N. J. Eq., 522.

The mortgage from defendant D. M. Smith to The Oregon Land Company was given, it is shown for the purpose of being transferred to Mrs. Watson, and as the amount thereof is less than that due upon Raidabaugh's contract, it should be cancelled. The total amount due upon the land should be applied in payment of defendant Virginia Watson's mortgage. The lots in question should not be burdened with the principal of, or interest on the mortgage debt apportioned to the other lots. Mutual Mills Ins. Co. v. Gordon, 121 Ill., 366.

Upon payment to the clerk of $475, together with interest thereon at eight per cent per annum from the date to which the interest on Mrs. Watson's mortgage has been paid, which from the note in evidence appears to be about June 20, 1897, and $50 attorney's fees, within 60 days from the date of entry of decree in the lower court defendant Raidabaugh is entitled to conveyances of title to said lots in fee simple, free from all incumbrance, including Mrs. Watson's mortgage, from plaintiff Charles Scott as assignee, and from defendants holding title thereto through D. M. Smith namely, to lot 39 from Robert McGilchrist and Belle McGilchrist, and to lot 40 from defendants Albert Smith, J. E. Smith, Cora Smith, Frank E. Smith and Lois Jory, by Cora Smith, her guardian, substituted for Abe Smith and Martha Smith, deceased. And in the case of the failure to make either of such conveyances to defendants, the decree shall stand as and for such conveyances, or either of them and be recorded as such. In the event of Raidabaugh's failure to so make such payments, defendant Virginia Watson's mortgage shall be foreclosed, and the lots sold, in the manner provided by law, and said real property sold upon execution, and the proceeds thereof applied: (1) To the payment of the costs and expenses of making such sale, and the costs and disbursements of this suit; (2) To the payment of the said sum of $475 and interest and attorney's fees, as above indicated, to defendant Virginia Watson; (3) In case any balance of said proceeds remains after making such payments, that the same be paid to the defendant Raidabaugh.

The decree of the lower court shall be modified as herein indicated, as to interest. Neither party to recover costs upon this appeal.



Ely Landing on Deck of Battleship Pennsylvania.

Men may legislate on women's apparel, but those who try to enforce the law find what real trouble is like.

In the Wake of the Measles.

The litle son of Mrs. O. B. Palmer, Little Rock, Ark., had the measles. The result was a severe cough which grew worse and was so severe he could not sleep. She says: "One bottle of Foley's Honey and Tar Compound completely cured him and he has never been bothered since." Croup, whooping cough, measles cough, all yield to Foley's Honey and Tar Compound. The genuine is in the yellow package. Refuse any substitute. Red Cross Pharmacy.