

divisible consideration, full performance or fulfillment of which is a condition precedent to the party being entitled to anything. In *La Belle v. O'Connor*, 15 O.L.R. 519, Anglin, J., describes payment in full as a "condition precedent" and adds "against conditions precedent it is well settled that there is no equitable jurisdiction to relieve."

In *Kerfoot v. Yeo*, 20 M.R. 133, Macdonald, J., says: "Had he not abandoned the contract, and had he expressed himself as ready and willing to carry out the terms, and sought specific performance of it, he might be entitled to a return of the moneys paid by him."

In *Hole v. Wilson*, 10 W.L.R. 154, Prendergast, J., says: "Nor do I see that it matters (and this has reference to the defendant's claim for a return of the \$2,000) whether the forfeiture clause is in the nature of a penalty. Supposing it were? The return of the \$2,000 could only be decreed against the plaintiff as an alternative left to her between that and the performance of her part of the agreement. In order to have a standing before this Court the defendant must at least be in a position to say: 'I am ready and willing to perform my part of this agreement, I ask the Court to compel the plaintiff to perform hers; and if she does not do so, I claim the return of the \$2,000.'"

The terms "penalty" or "forfeiture" are no more appropriate in this connection in the case of a sale of land than in the case of the sale of chattels. Halsbury (vol. 25, p. 279), after speaking of the right of the buyer to recover money paid as on a failure of consideration says: "Secus where the buyer only is in default, see *Pitt v. Casenot*, 4 M. & G., and *Thomas v. Brown*, 1 Q.B.D. 714."

IX. The positions of vendor and purchaser under an agreement of sale are commonly and fairly considered as closely analogous for most purposes to the positions of mortgagee and mortgagor. The judgment for foreclosure in a mortgage action makes no provision for refund or return of the moneys, paid by the mortgagor; and such judgments of equity Courts though established for centuries do not appear to be criticized as unjust for lack of such a provision.

Winnipeg.

F. HEAP.