

tion and only a partial failure of the consideration ensues no proportionate part of the amount paid can be recovered as money had and received to the payer's use."

These principles it is submitted are equitable. And if the purchaser has no right of action for refund of instalments paid, how does he acquire the right thereto merely by reason of his being the defendant in the suit and the vendor the plaintiff?

V..Inability to pay surely cannot be held to give the purchaser an affirmative right to such a refund. In *Soper v. Arnold*, 14 A.C. 435, Lord Macnaghten, says: "If there is a case in which a deposit is rightly and properly forfeited, it is when a man enters into a contract to buy real property without taking into consideration whether he can pay for it or not."

VI. If the defaulting purchaser were entitled to a refund in such a suit, the practical result would be to make it purely optional with him whether he will carry out his contract or not, while of course the vendor is firmly bound. This point is emphasized in the above mentioned chapter of Mr. McCaul's.

VII. A default by the purchaser after a decree for specific performance should, it is submitted, be regarded much more seriously than mere delay in payment before or apart from such a decree. Halsbury (vol. 25, p. 397, footnote (n)), says: "If after an order for specific performance the purchaser makes default in payment of the purchase money the vendor is entitled to an order for rescission (*Foligna v. Martin* (1853), 16 Beav. 586; *Watson v. Cox* (1873) L.R., 15 Eq. 219; *Hall v. Burnell* (1911), 2 Ch. 551." In *Standard v. Little*, the Saskatchewan Full Court says: "The failure of the purchaser to obey the decree (for specific performance) and pay the money found to be due is a sufficient abandonment or repudiation of the contract to justify rescission without restitution: *Henty v. Schroder* (1879), 12 Ch. D. 666."

VIII. It is submitted that it is inappropriate to apply the term penalty to the position of a purchaser who has been dealt with by the Court as in *Standard v. Little* above. Halsbury (vol. 13, p. 151), speaks of a penalty as "a larger sum to be paid on non-payment of a smaller sum." Neither is it a case of forfeiture. It is simply a case of part performance of fulfillment, of an in-