

Fry in *Howe v. Smith*, 10 Ch. Div., pp 101 and 102. Its primary object is to ask the purchaser to shew his good faith by putting at stake something of value which he will lose if he does not carry out his bargain. Usually the contract provides that a deposit shall serve two purposes. "Its primary purpose is that it is a guarantee that the purchaser means business," but "if the purchase is carried out it goes against the purchase money," Lord Macnaghten in *Soper v. Arnold*, 14 A.C. 429, p. 435. In other words, it is a forfeit while the contract is executory, it becomes a payment on account when the contract is being completed. This being so there seems to be no doubt that under certain circumstances the vendor may keep it. What then are those circumstances? Broadly, the answer is: "Even where there is no clause in the contract as to the forfeiture of the deposit, if the purchaser repudiates the contract he cannot have back the money as the contract has gone off through his default," Mellish, L.J., *Ex. p. Barrell*, 10 Chy. App. 512, p. 514. This repudiation need not be express. Inability to pay the balance of the purchase money is a sufficient repudiation to work a forfeiture: *Soper v. Arnold*, *supra*, and the purchaser even "may appear to be insisting on his contract, in reality he has so conducted himself under it as to have refused and has given the other side the right to say that he has refused performance. He may look as if he wished to perform but in reality he has put it out of his power to do so": *Howe v. Smith*, 27 Ch. D. 89, p. 99. This case was followed in an appeal from our own Courts where \$250,000 had been paid as a deposit and the purchaser being in default failed to recover: *Sprague v. Booth* (1909), A.C. 576. The fact that the deposit is in the hands of stakeholders does not prevent the vendor from recovering it if the contract is rescinded; *Hall v. Burnell* (1911), 2 Ch. 551. This being the nature of the deposit the question arises whether a purchaser in default can ask relief against its forfeiture? It must be borne in mind that the vendor cannot forfeit and claim specific performance or treat the contract as existing. He must rescind or acquiesce in the purchaser's repudiation: see *Williams Vendor and Purchaser*, 1055, and *Hall v. Burnell*, *supra*. In *Fraser v. Ryan*, 24 A.R. 441, at