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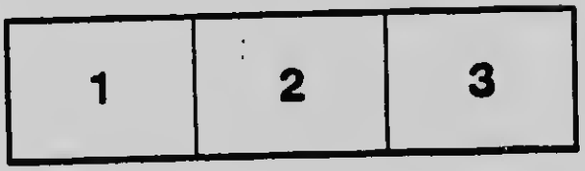

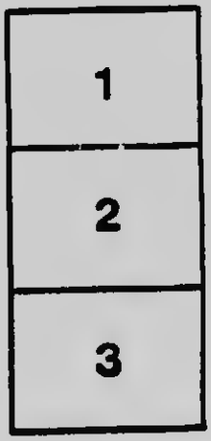

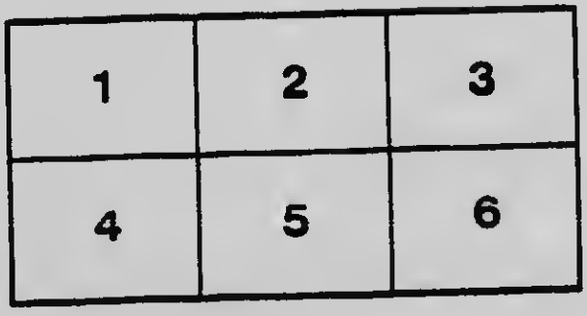

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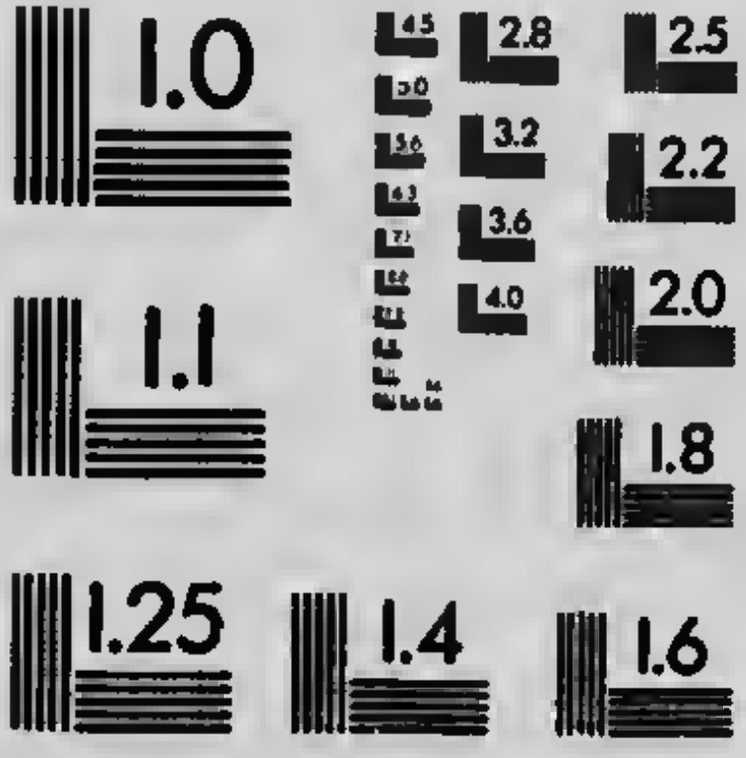

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OF

VENDORS and PURCHASERS

OF REAL ESTATE

With Special Reference to L... ...

P...

ERRATA.

Page 292, Line 25: For "Vendor's" read "Purchaser's."

Page 292, Lines 28, 30 and 31: For "Purchaser's" read "Vendor's."

... C. McCAUL, B.A., K.C.

Of Osgoode Hall, and of the Bars of Alberta, Saskatchewan, and British Columbia

TORONTO:

THE CARSWELL COMPANY, Limited

1915

LONDON:

SWEET & MAXWELL, LIMITED

915

NOTES

ON THE

REMEDIES

OF

VENDORS and PURCHASERS

OF REAL ESTATE

With Special Reference to Instalment-plan Agreements, Recission, Determination, Relief against Forfeiture

SECOND EDITION

By C. C. McCAUL, B.A., K.C.
Of Osgoode Hall, and of the Bars of Alberta, Saskatchewan, and British Columbia

TORONTO:
THE CARSWELL COMPANY, Limited
1915

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915

PREFACE.

(TO FIRST EDITION.)

These "Notes" grew out of an attempt to condense within the compass of a magazine article the subject of Relief against Forfeiture, upon which the cases are so very conflicting. To treat this subject at all intelligently, I found that there was a lot of preliminary ground to cover, if not to break, and that it was essential to a clear understanding of underlying principles to review, compare, and discriminate between the different remedies available to vendors or purchasers on breach of contract by the adversary.

It will be understood that this book does not profess to be a text-book in the usual sense—it is rather an essay, or collection of essays, and I conceive my indulgent reader having Dart, Williams or Fry at his elbow.

There are a great many points upon which the law is not clear, or upon which there are no clear-cut decisions, and I have, with some temerity, in several instances expressed my own views of what the law is, or ought to be. The reader, of course, is at liberty to disagree, but it is hoped that these discussions will, at least, suggest lines of argument, and be of some use in the preparation of briefs and factums.

C. C. McCAUL.

Edmonton, Alberta.
January, 1910.

PREFACE.

(TO SECOND EDITION.)

The first edition of this book was so kindly and favourably received by the members of the profession, that I have had little hesitation in consenting to the wish expressed by the publishers to issue a second edition.

There have been a large number of cases decided since the first edition was issued, and these have, to the best of my ability, been noticed or referred to in the text.

Some few of the chapters and sections of the book have been re-written, and I believe that it is now in a more acceptable form than when it was first issued.

I have to thank Mr. H. G. Menzies, Law Student of Edmonton, for his assistance in revising proofs and in the preparation of the index and table of cases.

C. C. McCAUL.

Edmonton, Alberta,
January, 1915.

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REMEDIES

OF

VENDORS AND PURCHASERS

CHAPTER I.

Introductory.

When a binding agreement for sale of lands is entered into, the immediate effect of the contract is that the purchaser acquires an equitable estate in the land, according to the nature and extent of the estate or interest agreed to be sold,[1] while the vendor retains the legal estate and becomes entitled to the purchase money.

Armour (on Devolution) leans to the view that until the purchase money is paid, the purchaser has an equity merely, not an equitable estate. Other authorities consider that in instalment-plan agreements, an equitable estate vests in the purchaser as against each payment. Thus in *Hartt* v. *Wishart Langen Coy.*,[2] Phippen, J.A., says:—"Upon the purchase-money being paid in full the equitable estate vests in the purchaser. Similarly when the purchase money is payable by instalments, an equitable estate vests as against each payment."

It is submitted, however, that the proposition as above stated, viz., that an equitable estate vests in the purchaser

[1] *Rose* v. *Watson*, 10 H. L. C. 671; *McKillop* v. *Alexander*, 45 S. C. R. 551, Fry, §§ 1391, 1392; Thom. 129.

[2] 9 W. L. R. 519; 18 Man. R. 376.

on the execution and delivery of the agreement—has been so almost universally acted on in working out the rights and remedies of vendors and purchasers, and is so generally enunciated or assumed both in the text-books and in the decisions of the courts, as to have become entrenched in equitable jurisprudence.[3]

Difficulties have been suggested as to the application of this principle to lands under the Torrens System, where, as in Alberta, the statute provides that no estate or interest shall be created except by an instrument duly registered under the Act, and where agreements of sale are not registerable as instruments, but merely by way of caveat. The courts, however, have held the principle applicable.[4] Ever since the decision in *Wilkie* v. *Jellett*[5] the courts have recognized equitable unregistered interests in land under the Torrens System, whether a caveat in respect of such interest is registered or not. The caveat "was designed for the protection of rights, and not for the creation of rights."[6] In the case cited, *McKillop* v. *Alexander*, which was a case dealing with the priorities of purchasers and the effect of registering caveats under the Act, the reasoning of all the judges (not excluding Duff, J., dissenting) is based on the fundamental principle that the purchasers acquired equitable estates under their respective agreements of sale.

It is important to students who have been trained in provinces where the law of real property is governed by the Torrens System, to observe that the courts in dealing with these equitable interests, outside of the Act, apply the principles of the equity jurisprudence of England. Thus when, as we shall see later, the courts hold that there is an analogy

[3] See especially *McKillop* v. *Alexander*, 45 S. C. R. 551; 1 D. L. R. 586; 20 W. L. R. 850.

[4] See especially *McKillop* v. *Alexander*, 45 S. C. R. 551; 1 D. L. R. 586; 20 W. L. R. 850.

[5] 26 S. C. R. 282.

[6] *Per* Duff, J., in *McKillop* v. *Alexander* (*supra*).

between the position of vendor and purchaser on an instalment-plan agreement and the position of mortgagee and mortgagor, and that the purchaser's estate is analogous to the mortgagor's equity of redemption, the courts do not mean that there is any analogy to the position of "mortgagee" and "mortgagor" in a "mortgage" under the Torrens System because the so-called "mortgage" is not a mortgage at all, but merely a charge, and under it there is no such thing as an equity of redemption as understood by the courts of equity in England.

In this connection, however, a warning by Mr. Justice Duff[7] is apposite:—"Doctrines developed under the old system of conveyancing for the protection of equitable rights ought, no doubt, to be applied very guardedly for the purpose of deciding controversies respecting unregistered interests in registered land; and the utmost vigilance ought to be observed to avoid the mistake of yielding a punctilious allegiance to the letter of a rule evolved under widely different conditions, without determining to what extent the principle which underlies the rule is, in the circumstances, properly applicable."

It is sometimes, but not quite accurately, stated that the vendor becomes a trustee for the purchaser.[8] The rule that the purchaser becomes in equity the owner of the estate is generally stated to apply only as between the parties to the contract;[9] and, since he who asks equity must do equity, it follows as a general rule that the purchaser cannot enforce such equities against the vendor, or secure protection of his equitable estate, without at the same time praying or offering specific performance of the contract himself.[10]

[7] *McKillop* v. *Alexander* (*supra*).

[8] Cf. Fry, par. 1395; *McKillop* v. *Alexander*, 45 S. C. R. 551 (per Anglin, J.)

[9] Dart on V. & P. 288.

[10] *Ibid. Cf. Glock* v. *Howard & Wilson Colony Co.*; 43 L. R. A. 199.

From the time the agreement of sala is antered into, the vendor has a lien on the estate for the purchasa money, until it is completely paid, whether befora or after conveyance; unless, of course, he has releasad or waived it (e.g., by taking a mortgage).

Conversely, the purchaser has a lien for the amount of his deposit, and payments mada on account of the purchase money. If the sala goes off, or tha contract is rescinded through no fault of tha purchaser, ha is entitled to recover tha deposit, as well as all purchase-moneys, paid by him, and is entitled for such purposa to enforce his lien against the property.[1]

From these principles—the equitable estate of tha purchaser, and tha co-relative liens of the vendor and of the purchaser—flow important consequences; and a clear conception of them is essential to any discussion of the remedies to which either party is entitled to resort on breach of contract by the other.

An "open" contract means a binding agreement of sale whereby tha parties, the property to be sold and the price are ascertained, leaving the other terms to be implied by law.

An open contract is generally to the advantage of tha purchaser. The forms in common use are generally designed, sometimes unfairly designed, to favour tha vendor. Where a short memorandum of the agreement is drawn by a layman, where a contract is arrived at by correspondence, or where a *mere* option has been given, and by *mere* acceptance becomes an agreement, an "open" contract nearly always results; but where a conveyancer is employed to draw the agreement, it is usual, particularly in the interests of the vendor, to modify by express stipulations the legal incidents of the naked bargain. A standard form of such agreement, "not settled

[1] *Whitbread* v. *Watt* (1901), 1 Ch. 911; 1902, 1 Ch. 835; Cf. *Kilborn* v. *Workman*, 9 Gr. 255; *Burns* v. *Griffin*, 26 U. C. C. P. 61; *McRory* v. *Henderson*, 14 Gr. 271; *Burns* v. *Griffin*, 24 Gr. 451.

exclusively in the vendor's interest," is given in Appendix B to volume II., Williams on Vendors and Purchasers (p. 1350), from which it will be seen that, in addition to stipulations as to the commencement of title, the expense of producing documents and muniments of title, the time limited for delivery of the abstract and making requisitions on title, the principal stipulations are these: (1) requiring the purchaser to make a deposit; (2) reserving to the vendor a right to rescind [2] the contract, if the purchaser should insist upon any requisition or objections to title which the vendor is unable or unwilling, on reasonable grounds, to remove or comply with; (3) fixing a day for completion, i.e., for payment of purchase-money and execution and delivery of the conveyance; (4) apportionment of rents, and (5) for payment of interest by the purchaser in case completion be delayed.[3]

In Canada and the United States, especially in the western parts of both countries, agreements of sale are commonly drawn more exclusively in the interests of the vendor; and, in a great many cases, the purchase-money is made payable by instalments. This form of agreement causes complications, and introduces some modifications in the application of general principles. These will be especially considered in their proper place in the succeeding chapters.

It will be advantageous to state here shortly the terms and incidents implied by law in an open contract.[4]

(1) The interest sold is understood to be an estate in fee simple free from incumbrances, unless otherwise agreed.

[2] This special power of rescission is not dealt with in the present volume. It is rather a matter of conveyancing, and is fully discussed in Dart, Williams, Armour, and other general text books on Vendors and Purchasers.

[3] See Williams on Vendors and Purchasers, p. 93; and cf. the "Ordinary Conditions of Sale" in the Chancery Division (England), R. S. C. Appendix L. No. 15.

[4] See Williams, pp. 41 to 51.

(2) The vendor must show a good title.[5]

(3) The vendor must identify the property.

(4) The vendor must verify the abstract.

(5) The purchaser must examine the title at his own expense, and accept it as soon as a good title is shown.

(6) The purchase shall be completed as soon as a good title is shown, i.e., the purchase-money must be paid, and conveyance (prepared by the purchaser at his own expense)[6] executed and delivered.

(7) The purchaser is entitled to muniments of title.[7]

(8) Each party must do all things necessary on his part toward completion *within a reasonable time.*

(9) From the date of the contract, the property in equity belongs to the purchaser, but the vendor is entitled to rents and profits up to the proper time for completion. The vendor has a lien on the property for the price.

The vendor is entitled to retain possession until completion.

Rents and profits, rates, taxes and outgoings shall be apportioned.

(10) If completion is delayed, the purchaser as a rule is chargeable with "legal" interest; but is entitled as from the proper time for completion to rents and profits, or to a corresponding credit up to actual completion.

In those provinces that have adopted the Torrens System —which has so profoundly modified, and, in many respects,

[5] Armour on Titles, p. 6. In fact the vendor offering an estate for sale without any qualification is considered as asserting that he has a good title and the right to sell. *Brewer* v. *Broadwood*, 22 Ch. D. at p. 107.

[6] Cf. *Stevenson* v. *Davis*, 23 S. C. R. 629; but see *Dysart* v. *Drummond*, 7 Man. R. 68, holding that it is the duty of the vendor to prepare and execute the conveyance and following *Sweeny* v. *Godard*, 4 Allen (N.B.) 300. And cf. L. A. 9 C. L. T. pp. 37-40.

[7] The exceptions to this rule are noted in the standard books, Dart, Williams, Armour, etc.

completely altered, the substantive law of real property[8]—care must be taken in the application of these implied terms and incidents to a contract of sale of land under the system.[9]

That (1) *the interest sold is understood to be an estate in fee simple*[10] *free from incumbrances, that* (2) *the vendor must show a good title,* and (3) *must identify the property,* are, of course, implied terms of an open contract, whether the land is under the system or not.

The term that the vendor must show a good title would in the case of land under the system, apparently require an existing certificate of title in the name of the vendor, coupled with the control of or power to deliver to the purchaser the duplicate certificate of title.

Even in the case of land not under the system, a purchaser could not be forced to accept a conveyance from a third party (no matter how perfect his title), but could always insist on the vendor completing title in himself, and upon a conveyance direct from the vendor to himself.[1] Under the system, this right of the purchaser may become of great importance in connection with payments to the

[8] Cf. *Smith* v. *National Trust Company*, 21 W. L. R. 99; Cf. Hogg, pp. 881, *et seq.*

[9] In *Raymond, etc.*, v. *Knight Sugar Co., Ltd.* (2 A. L. R. p. 167) Stuart, J., says: "The simplicity of our registration system may be admirable, but one must not forget that it is a registration system and nothing more, and that it does not attempt except in the one case of covenants against the right to assign, to modify the ordinary law in respect to agreements of sale." Cf. *McKillop* v. *Alexander*, 45 S. C. R. 557, per Duff, J.

[10] Mr. Hogg leans to the view that the estate in "*fee-simple*" has been abolished, and that under the Torrens System it is replaced by a new statutory estate, more of the nature of *allodium* than of *fee*. However in Alberta and Saskatchewan the usual Certificate of Ownership issued from the Land Title's Office certifies that "A. B. . . . is now the owner of an estate in *fee-simple*, etc., etc."—following the words of the patent.

[1] Williams V. & P. p. 167. *International C. & C. Co.* v. *Evans*. 2 A. L. R. p. 228; *Hulkett* v. *Dudley* (1907), 1 Ch. 590. Fry, par. 879. See *Re Bryant & Barningham*, 44 Ch. D. 218.

Assurance Fund, the percentage of value payable being calculated on every transfer, after the first, "upon the increase in value since the granting of the last certificate of title."[1]

Thus if "V," the vendor, bought the land from "A," the registered owner, who still holds the Certificate of Title, by reason of a transfer from "B" when the sworn valuation of the land was $1,000—and if, now, the value of the land is $20,000—on registration of a transfer from "A," the Registrar will demand the specified percentage for the Assurance Fund on the sum of $19,000. The purchaser, it is submitted, cannot be forced to accept a transfer from "A;" but he can insist on "V" registering the transfer from "A" to himself, and the issue of a Certificate of Title to "A," and so force the vendor to pay all charges accruing to the Assurance Fund. Then in respect of the subsequent transfer from "V" to the purchaser, nothing will be payable to the Assurance Fund, since, in the suggested case, there is "no increase in value since the granting of the last certificate," viz., "V's."

The requirement (4) that *the vendor must verify the abstract,* has not much, if any, application to lands under the system, for the simple reason that the purchaser is not entitled to an abstract at all.[2] The certificate of title takes the place of the abstract, as well as of the muniments of title, and it is the purchaser's right and duty to search the certificate in the Land Title's Office, as well as the register of executions, powers of attorney, etc., since it is only regis-

[1] Alta. L. T. Act, sec. 117. This becomes of greater importance in Alberta since the "Unearned Increment Tax Act" of 1913.

[2] *Mayberry* v. *Williams*, 15 W. L. R. 553—The judgment of Simmons, J., in *Auriol* v. *Alberta Land & Investment Co.*, 1 W. W. R. 787, is not really at variance with the text. The learned judge merely holds that a purchaser is entitled to proper evidence that there are not outstanding taxes or executions against the land; and by a slight misnomer calls certificates to this effect the "abstract of title." This, of course, is not at all what is meant by "abstract of title" as used by English or Ontario conveyancers.

tered instruments that can affect the title, subject, of course, to the exceptions implied by the Statute.[4]

In *Langan* v. *Newberry*,[5] Duff, J., says, distinguishing the position in British Columbia from that where the Torrens System prevails—"The learned trial judge took the view that the law of England, with regard to this matter of the obligation of the vendor of land under an open contract to disclose his title, is not, in its entirety, the law of British Columbia, and that on that ground there was, in this case, no duty on the part of the vendor to furnish that information demanded by the purchaser.

"I quite agree with the learned trial judge to this extent, that the establishment of a statutory system of title to land (such as prevails, for example, in the Province of Saskatchewan), by which the title is not constituted by documents and transactions *inter partes*, but rests upon registration by a public officer, may have the effect of rendering obsolete some of the specific rules governing the reciprocal rights of vendor and purchaser touching the matter in hand. Some of these rules had their origin in the practice of conveyancers in England and others are based upon considerations of convenience or necessity which may cease to apply where the system of titles has been fundamentally changed. Moreover, the rule entitling the purchaser to demand a solicitor's abstract is a rule of comparatively modern origin (Sugden on Vendors and Purchasers, 9th ed.), and I can conceive circumstances (having no special relation to the system of land titles), in which an over-punctilious deference to the letter of the rule as it would, perhaps, be applied in England would, in British Columbia, have consequences that would cause the parties to the contract themselves to stare and gasp. But, on the other hand, the rule that the vendor under a contract for the sale of an interest in land is under an obligation to make a title to that which he is selling, in the absence of express or

[4] Alta., sec. 43.
[5] 3 W. W. R. at p. 432.

implied stipulation (whether it be an obligation resting upon an implied term of the contract, as Baron Parke and Lord St. Leonards seem to think, or an obligation imposed *ab extra,* so to speak, by the law itself), is a rule which nobody has ever doubted, was introduced into British Columbia with the general body of the law of England; and it has, without any specific enactment on the subject, always been regarded as having been introduced in the same way into the other provinces in which the body of the law has been derived from England. If it is the duty of the vendor to make a title, it would seem to follow, as a reasonable corollary in the absence of special circumstances (since the vendor may be supposed to know his title), that the vendor ought to disclose his title, unless he stipulates to the contrary. If the contract arises in circumstances in which it is impossible to suppose that the parties could have contemplated the delivery of a solicitor's abstract, then, in such a case, there could be no difficulty in implying a stipulation of that character. I can quite understand, for example, that a vendor holding land under a certificate of indefeasible title (and proffering his purchaser his certificate) might properly regard a demand for a solicitor's abstract as a purely vexatious demand. But, in the ordinary case of the sale of land under a registered title, there being nothing in the circumstances of a special character, I do not see why the rule should not take effect. A certificate of title under the British Columbia Land Registry Act, not being a certificate of indefeasible title, is only *prima facie* evidence of the title of the holder, and the documentary evidence upon which the certificate rests is not necessarily disclosed by the register. The view expressed by the learned judge has never, I think, been accepted in British Columbia. The difficulty of accepting that view is enhanced in the case where, as here, the vendor's interest is, in whole or in part, unregistered."

The purchase (6) *shall be "completed"*[6] *as soon as a good title is shown—i.e., the purchase-money must be paid,*

[6] As to what is meant by "completion" see Fry (4th Ed.) par. 1286, and see *Mayberry* v. *Williams,* 15 W. L. R. p. 562.

and conveyance (prepared by the purchaser at his own expense) executed and delivered.

This is the general law of England apart from the Statute. It is doubtful, however, whether, in the Canadian Provinces,[7] it is the duty of the purchaser to prepare and tender a conveyance for execution.

Thus, in *Dysart* v. *Drummond*,[8] Taylor, C.J., says: "Their contention is, that by the law of England, the purchaser cannot maintain such an action, unless he has tendered a conveyance to the vendor for execution, and that the same law is in force here. No doubt, it is stated in Dart on Vendors and Purchasers, 1086, 'The purchaser cannot, in general, sue upon the agreement without tendering the conveyance. . . . The rule, in the absence of stipulation, being that the purchaser must prepare and tender the conveyance.' This, however, seems rather a rule of practice of conveyancers than a rule of law, and has prevailed only in comparatively recent times.

"In this Province, as my learned brothers, who have all had an extensive experience, tell me, that rule has not been recognized, at least it has not been the common course of practice to act upon it. On the contrary, the usual, if not indeed, the universal practice here has been, that the vendor prepares and executes the conveyance at his own expense.

"The reasons which led to the adoption of the rule in England, certainly do not exist here. The same question as is now raised, arose, and was disposed of, in New Brunswick nearly thirty years ago, in *Sweeny* v. *Godard*, 4 Allen, 300, and I cannot do better than quote and adopt the language used there by Parker, J., when delivering the judgment of the Court.

[7] But see *Snell* v. *Brickles*, 18 O. L. R. 358; *Stevenson* v. *Davis*, 23 S. C. R. 629; and cf. *Foster* v. *Anderson*, 15 O. L. R. 362.

[8] 7 Man. R. 68.

"The question, and that an important one, is whether it be the duty of the vendor or the vendee to prepare the conveyance in this country. It is, undoubtedly, the general rule in England now, that, unless the contrary is specified in the agreement, it is the vendee's duty to prepare and tender the conveyance for execution, unless it be dispensed with by the vendor. But, when the origin of this rule is considered, that it does not arise from any principle of the common law or any statutory provision, nor did prevail in early times, and was not until very recently, uniform, but has grown out of the practice of conveysncers and the intricacy of titles and necessity of abstracts of title and various inquiries, and that not in general aided by a registry of deeds to refer to; and that it partly depended on another rule, never recognized in this Province, that the expense of the conveyance is to be borne by the vendee, we are all of opinion that the rule forms no part of the law of this Province, where the same reasona do not exist and where there is a registry of deeds in every county, where the forms of conveyances are simple, and where it has been the almost universal practice for the vendor to prepare the conveyance at his expense."

It appears that where the land is under the system, a purchaser, insisting on his strict rights, is entitled to have the agreement "completed" in the Land Titles' Office; so as to be sure that up to the very moment of delivering the transfer for registration, no caveats or instruments have, unknown to him, been filed or registered.[9]

However this may be, it is quite clear that, unless the vendor has protected himself by express terms in the contract of sale, it is his duty to do all things at his own expense, to make the conveyance *effective*. "A proper conveyance means an assurance effectual to vest the whole estate contracted for in the purchaser."[10]

[9] *Auriol* v. *Alberta Land & Investment Co.*, 20 W. L. R. 185. Dart V. & P. (7th Ed.) p. 139; 495 *et seq.*

[10] Williams, 2nd Ed., 46.

Under the Torrens System, "transfer" takes the place of conveyance, and since no transfer can be effectual to *convey* any estate or interest until registered, it would, in an open contract, seem the duty of the vendor to procure the actual registration of the transfer at his own expense.[1]

The purchaser (7) *is entitled to muniments of title.* There are no muniments of title, except the certificate, under the Torrens System; unless the purchaser is buying a leasehold,[2] or an equitable estate: e.g., when the contract is for the purchase of the vendor's interest under an agreement of sale.[3] In such a case, it would seem that the purchaser could demand delivery of all muniments of title. Such transactions are quite outside the system, except, perhaps, so far as the statute may provide for registration by way of caveat.[4]

Rents and profits, rates, taxes and out-goings shall be apportioned. This is, of course, equally applicable to lands under or not under the system; and in practice, the same principle is applied to premiums of fire-insurance. As to whether a purchaser assuming a mortgage is entitled to a similar apportionment of interest, the text books are silent, and there is a dearth of authority. On principle, it would seem he should be.

The vendor (9) *is entitled to retain possession until completion.*[5]

If completion (10) *be delayed, the purchaser as a rule is chargeable with "legal" interest; but it is entitled as from the proper time for completion to rents and profits, or to corresponding credit till actual completion.*

[1] Cf. 9 C. L. T. (L. A.) 37-40. Williams, 2nd Ed., 385. *Quære;* whether he might not also be obliged to procure the issue of a new certificate of title to the purchaser.

[2] *Brewer* v. *Broadwood*, 22 Ch. D. p. 105; *per* Fry, J., quoted in *Langan* v. *Newberry* (*supra*) at p. 431.

[3] Cf. *McIlvenna* v. *Goss*, 21 W. L. R. 180.

[4] Alta. ss. 97, 101.

[5] See note (6), p. 10, *ante*.

The question of possession pending completion is a matter of great importance. "Possession"[6] is an ambiguous word. It may mean merely the *right* to possession. It may mean actual physical possession; or it may mean mere constructive possession. It may mean actual occupancy, or it may mean being put into the receipt of rents and profits. It is sometimes used as practically equivalent to "seisin"—thus an estate "in possession" is contrasted with the reversion or remainder.[7]

As a rule, the vendor's duty to deliver possession on completion is satisfied if he puts the purchaser into receipt of rents and profits; he is not obliged (unless he has so expressly contracted) to put the purchaser into actual occupancy of the premises—especially if the purchaser has notice of existing tenancies.[8]

Apart from the Torrens System, a purchaser is bound to enquire as to the nature of any tenancy or occupancy of the premises. A lease is not an incumbrance.[9]

Under the system (at any rate, in Alberta and Saskatchewan), the land mentioned in any certificate of title is by implication subject to "Any subsisting lease or agreement for a lease for a period not exceeding three years, where there is actual occupation of the land under the same,"[10] and it seems clear that the purchaser would not be bound by a subsisting lease for three or more years, even if, in the absence of fraud, *actual* notice were brought home to him.[1]

Again, the certificate of title is probably no protection against an absolute title acquired by continuous adverse

[6] 22 Halsbury L. of E. 391; Pollock and Wright on Possession, p. 1.

[7] Dart, 5th Ed., 1073.

[8] But see *Larson* v. *Rasmussen*, 4 W. W. R. 53.

[9] Cf. *Polinquin* v. *St. Boniface*, 17 Man. 593.

[10] Alta. L. T. Act, s. 43.

[1] See *Arnot* v. *Peterson*, 21 W. L. R. 157.

possession for twelve years or more under the Statute of Limitations.[2]

In *Wallace* v. *Potter* (No. 2),[2a] Simmons, J., holds that an occupant of lands for twelve years may acquire an estate in fee as against the *registered* proprietor; but that there is no machinery providing for cancellation of the existing certificate of title, and the issue of a new one to the occupant.

The matter of "possession"—pending completion—is of great importance, and especially so in connection with instalment-plan agreements.

The rule is that, in the absence of a special stipulation, the purchaser is not entitled to possession until payment in full of the purchase-money and conveyance of the estate.

Even where the price is payable by instalments and nothing is said as to possession, it would appear that the purchaser is entitled to possession only from the time of paying the last instalment.[3]

But contemporaneous to and collateral with the written agreement, there may, it appears, be an *oral* agreement or understanding that the purchaser is to have immediate possession of the property—and *semble* this may be inferred from surrounding circumstances.

And where the purchaser enters upon possession with the consent of the vendor, the vendor cannot be heard to say that such possession is not authorized under the contract.

[2] See Thom, pp. 66-67; *Re* Anderton, 8 W. L. R. 319; *Bradshaw* v. *Patterson*, 18 W. L. R. 402; *Ogler* v. *Aedy*, 13 V. L. R. 468 (but note—the possession in these cases was not as against a registered owner).

[2a] 4 W. W. R. 738.

[3] Dart V. & P., p. 656; *Kenney* v. *Wexham*, 6 Madd. 355; *Halsey* v. *Marshall* (Man.), 10 W. L. R. 321.

If the purchaser enters into possession when there is no clause in the agreement making such provision, he may find that by so doing he will be held to have waived objections to the title. Although, in most, if not all, the provinces of Canada, investigations of title are not so critical as in England and consequently the act of taking possession is not as a rule regarded as a matter of such serious and solemn import;[4] yet if the purchaser deteriorates or alters the condition of the property, makes permanent improvements, builds on the land, or does other acts precluding him from taking the position that he intended to return the property if the title proved not to be a good one, he will be held to have accepted it.[5]

Possession, however, if taken in accordance with the clear intention of the parties, as evidenced by the terms or subject-matter of the contract or with the consent of the vendor, is not, as a general rule, any waiver of the purchaser's right to a good title. In the latter case, if the contract is rescinded either through defects in title or on account of the purchaser's default, he cannot be sued for use and occupation, but is liable to an account of rents and profits; but if, after the contract is clearly abandoned, he retains possession, he will be liable in respect of such subsequent occupation. It would appear logical that a purchaser taking possession forcibly, or without the consent of the vendor, should be liable to an occupation rent if the possession be beneficial, as well as to an account of rents and profits. It is clear that he may be ejected, and restrained by injunction from re-entry. "Where the contract allows possession to be taken before completion of the title, the Court will not generally order the payment of the purchase-money into Court on

[4] *Micheltree* v. *Irwin*, 13 Gr. at 541; *O'Connor* v. *Beattie*, 2 O. A. R. at 504.

[5] *Wallace* v. *Hesslein*, 29 S. C. R. 171; *Commercial Bank* v. *McConnell*, 7 Gr. 323; *Haydon* v. *Bell*, 1 Beav. 337; *Denison* v. *Fuller*, 10 Gr. 438; and see *post*, ch. vi., sec. iii (*a*); Dart on V. & P., p. 515-6; Armour on Titles, 24 *et seq.* and cf. *Halsey* v. *Marshall* (*supra*) p. 325.

the score of possession."[6] But *aliter* where possession has been taken without the vendor's consent.

But where the vendor has disclosed such a title as the purchaser ought to accept, the vendor is entitled to call on a purchaser in possession to pay the purchase-money into Court.[7] On the contrary, such an application by the vendor will be refused if it is through the laches of the vendor that the title remains incomplete.[8]

Where the purchaser takes possession without the vendor's consent, he will be ordered to pay the money into Court, unless he will go out of possession; and where the purchase-money is payable by instalments, but the purchaser refuses to pay to the vendor, by reason of an incumbrance on the property, the purchaser is entitled, and if in possession the Court will order him, to pay the purchase-money into Court to form a fund for the ultimate discharge of the incumbrance—and *semble,* this would be so whether the purchaser were in possession or not.[9]

Where, however, the price being payable by instalments, the agreement expressly provides that the purchaser shall have possession pending completion of the payment, if the vendor forcibly dispossesses the purchaser, this will be deemed a repudiation of the contract by the vendor, and he will lose his right to specific performance. The right of possession in such case is an integral part of the consideration.[10] But it seems the vendor has an implied right to retake possession upon the purchaser's default in payment of any instalment of the purchase money.[1]

[6] Fry, par. 1466.
[7] Fry, par. 1462.
[8] Fry, par. 1463.
[9] *Armstrong* v. *Auger*, 21 O. R. 98; Williams, p. 165.
[10] *Knatchbull* v. *Grueber*, 3 Mer. 124; cf. *Halsey* v. *Marshall*, 10 W. L. R. 323, and *Irvine* v. *Macauley*, 24 A. R. 446; *Canadian Fairbanks Co.* v. *Johnston*, 10 W. L. R. 579.
[1] *Hill* v. *Spraid*, 11 W. L. R. at p. 683.

If the vendor dispossesses the purchaser, it seems he re-enters *quâ vendor*, and not as a trespasser, and so is not liable in damages. The re-entry and dispossession does not deprive the purchaser of his action for specific performance, if he chooses to demand it.[2]

As to duties of vendor in possession, see *Greenwood* v. *Turner* (1891), 2 Ch. 144; *Irvine* v. *Macauley*, 24 A. R. 446.

Where it is intended that the purchaser should be let into possession prior to completion, in the case of an ordinary contract, or prior to the payment of the last instalment, where the purchase-money is payable by instalments, it is usual, and, of course, prudent that express provision should be made in the contract.

"Where the purchaser is so let into possession before completion, the vendor, of course, retains his legal estate in the property sold until he parts with it by conveyance to the purchaser; but his only beneficial interest in the property is his equitable lien for the price, and in equity he holds his legal estate as security only for the payment of the purchase-money."[3] The position of a purchaser so let into possession resembles that of a mortgagor in possession.[4]

Having now dealt, somewhat cursorily it is true, with the incidents of an open contract, and the more common clauses of a standard agreement, it is proper to remind the student that agreements modifying these clauses, and containing special covenants, provisoes and conditions, especially in regard to the vendor's remedies in case of default, are very common in conveyancing practice.

[2] *Johston* v. *J.*, I. L. R. 3 Eq. 328. There is a distinction, however, between these cases. In the Irish case the purchaser was merely let into possession with the vendor's consent; there was no express stipulation for possession in the agreement.

[3] Williams, pp. 524-5; *Smith* v. *Hibbard*, 2 Dick 730; *Ecclesiastical Commissioners* v. *Pinney*, 1899, 2 Ch. 729; 1900, 2 Ch. 736.

[4] *i.e.*, a mortgagor under a true mortgage (see *ante*, p. 3) Williams, 525. *Fytler* v. *Genung*, 4 W. W. R. 797.

Before considering such special forms of agreement, it is desirable to consider the *standard remedies* that are open to vendor and purchaser respectively on the other's breach or repudiation of the contract.

It is a general rule of the law of contract, and so applicable to vendor and purchaser alike in respect of an agreement for sale of land, that where the mutual stipulations of the parties are inter-dependent—as on an open contract they always are—either party seeking to enforce his rights under the contract must be able to allege and prove compliance with the contract on his part.[5] Thus, generally, the vendor suing on the agreement must have shown a good title and having been able, ready and willing to execute a conveyance in the terms of the contract;[6] and the purchaser, if he is the actor, must either not be in default, or must offer, and be able, ready and willing to remedy it, as may be directed by the Court.

Where a contract is broken by one of the parties to it, so that there is a "complete breach," it is obvious that the other party may either affirm or disaffirm the contract, i.e., he may either say to the party in default: "I hold you to your contract," and so demand specific performance, or damages, or (if a vendor) payment of moneys due under the contract; or treating the breach as a repudiation, he may say: "You have repudiated the contract—I elect to rescind it altogether," and so claim rescission, or if a seller of goods or vendor of real propetry, where the law allows it, resale.

The text books do not seem ordinarily sufficiently to emphasize the essential difference as a general proposition between these two positions, but it is important to observe that they are mutually exclusive, and that the injured party

[5] Cf. Pollock on Contracts, p. 428 et seq.; Williams on V. & P. p. 1079; cf. *Smith* v. *Doan*, 15 U. C. R. 634.

[6] And this, as a rule, on the day fixed for completion if time is of the essence; *Noble* v. *Edwards*, 5 Ch. D. 378 (C. A.); but see *Sword* v. *Tedder*, 13 Man. R. 572.

has, as a rule, a right, and sooner or later is bound, to elect which position he will take.[1] Having once finally made his election to affirm, or to disaffirm, the injured party cannot shift his position: thus, once he has rescinded the contract, he can no longer claim specific performance, or damages, or payment,[2] or any remedy resulting from an affirmation of the contract; and *vice versa*. This will be developed more fully under the head "Election of Remedies;" in the meantime, it is sufficient to notice that this principle is not inconsistent with the right which, for example, a vendor has, after judgment for the contract price, to apply for rescission, in case the writ of execution is returned *nulla bona;* or with the order for rescission to which he may become entitled, if the purchaser fails to comply with a decree for specific performance.

The remedies might also, of course, be classified as (*a*) *judicial*, or (*b*) *extra-judicial*. Thus, re-entry or resale by the vendor, rescission, and perhaps determination, are extra-judicial; actions for debt, damages, specific performance, foreclosure (the word is used advisedly, as will appear later) or to enforce the lien of either vendor or purchaser are judicial remedies.

It is proposed, first, to consider the standard remedies of the vendor.

The remedies that are available to a vendor on breach of an open contract by the purchaser, e.g., on default of payment of the purchase-money, may accordingly be divided into two classes: first, those where the contract is affirmed, and, secondly, those where the contract is disaffirmed. Thus, where the vendor affirms the contract, he may (1) sue for

[1] See chapter on Election of Remedies, *post*.

[2] This seems clear in the case of actual rescission; but it is doubtful where the vendor merely determines the contract, whether he cannot enforce payment of instalments that had become due, and were therefore debts owing to him prior to the determination. Cf. *Robinson* v. *Garland*, 37 W. R. 396.

the *payment of the whole or such instalments* of the *purchase-money* as may be *overdue and unpaid* as a debt due on the contract; (2) sue for *damages*, i.e., the purchaser having made complete breach of contract, and thrown the land back on the hands of the vendor, the vendor can recover the difference in the value of the land remaining on his hands at the date of the breach, and the price agreed to be paid; (3) he may enforce his vendor's *lien;* (4) or he may sue for *specific performance.* (5) He may "*determine*" the contract. Where the contract is disaffirmed by the vendor, he has, (1) the right to rescind the contract, (2) (perhaps) a right of resale.

The expression "determination," as used by the writer and as explained later on, is, perhaps, to be regarded as of the writer's coinage. A sharp distinction is attempted to be drawn between "rescission" and "determination" and this has given rise to an amusing difference of opinion from friendly critics. Some of them (with whom the writer agrees) think this an important and original part of the book; others fail to see any possible line of distinction between what is here called "determination" and the rescission of the contract. One learned judge is reported to have said that he might possibly comprehend the difference if he could find something equivalent to a mediæval monastery to which he could retire for a year's silent and prayerful contemplation.

CHAPTER II.

Vendors' Remedies, where Contract Affirmed.

Section I.—Action for Price.

The vendor may sue for payment of the whole or such instalments of the purchase-money as may be overdue and unpaid as a debt due on the contract.

This—the ordinary action of debt—is obvious enough. It may, however, be observed that the mere giving of possession is not enough to sustain an action for the purchase-money;[1] the vendor cannot recover the whole price at law unless and until he has parted with his legal estate in the land; he can only recover as damages for breach of contract the loss he has actually sustained.[2]

Where the price is payable by instalments, it would appear that a right of action arises in respect of each instalment as soon as it becomes due and payable under the terms of the contract. The vendor, however, must (in general) be able to show a good title in himself, or that he has the right and is in a position to call in the title, if outstanding.[3]

[1] *East London Union* v. *Metropoliton Railway Co.*, L. R. 4 Ex. 309.

[2] *Laird* v. *Pim*, 7 M. & W. 474; *Marcus* v. *Smith*, 17 U. C. C. P. 416.

[3] *Armstrong* v. *Auger*, 21 O. R. 98; Cf. *Graves* v. *Moson*, 1 A. L. R. 250; 8 W. L. R. 542; *Nimmons* v. *Stewart*, 1 A. L. R. 384; *Gamble* v. *Gummerson*, 9 Gr. at 200; *Cameron* v. *Carter*, 9 O. R. at 431; *Townsend* v. *Graham*, 0 B. C. R. 539; *Re Baker*, 1907, 1 Ch. 240; cf. *Hartt* v. *Wishard Longen Co.* 9 W. L. R. 519; *Mayberry* v. *Williams*, 12 W. L. R. 690; *Langan* v. *Newberry* (B. C.) 20 W. L. R. 826; 2 W. W. R. 10; 47 S. C. R. 114; 3 W. W. R. 426; *McIlvenna* v. *Goss*, 21 W. L. R. 180.

As to when a good title is shown, and what are matters of conveyance, and what matters of title—See Armour on Titles, p. 46 *et seq.* Cf. Williams, pp. 1076-1078.

In other words, the purchaser cannot be called upon to pay any moneys on the purchase-price unless and until the vendor shows a good title;[4] and *semble*, that the purchaser can even rescind, or at least repudiate the contract, at any time before completion, if he ascertains that the vendor has not a good title.[5]

The purchaser is entitled to be *shown* the vendor's title before payment of any instalment of the purchase-money; and if the vendor refuses to produce proper evidence showing a good title, and the purchaser refuses on this ground to pay, the vendor cannot resist an action for specific performance on the ground that the purchaser has failed in his payments, whether time is expressly of the essence of the contract or not.[6]

In a subsequent section, the distinction between "deposit" and "instalment" will be emphasized, but the decision of the Supreme Court of Canada in *Knight* v. *Cushing*,[7] as to the meaning of "*cash*" or "*down*" payment and the vendor's right to insist upon it before disclosing a good title, may usefully be referred to here.

The facts in *Knight* v. *Cushing* are very fully and clearly stated by Beck, J., in his reasons for judgment,[8] allowing the appeal to the Court en banc (Alberta). Shortly—Knight

[4] *Cameron* v. *Carter*, 9 O. R. 431; *McDonald* v. *Murray*, 11 O. A. R. 101; but see *Armstrong* v. *Auger*, 21 O. R. at p. 102; *Townsend* v. *Graham*, 6 R. C. R. 539; *Auriol* v. *Alberta Land, &c., Co.*, 20 W. L. R. 185; *Quail* v. *Beatty*, 4 W. W. R. 55.

[5] Fry, par. 1369; *Forrer* v. *Nash*, 35 Beav. 167; *Brewer* v. *Broadwood*, 22 Ch. D. 105; *Bellamy* v. *Debenham* (1891) 1 Ch. 412; Dart on V. & P., 7th Ed., pp. 1065-7; *Nimmons* v. *Stewart*, 1 A. L. R. p. 388; *Groves* v. *Mason*, 8 W. L. R. 542. But see rescission by Purchaser, *post*. See *Halkett* v. *Dudley* (1907) 1 Ch. 590.

[6] *Langan* v. *Newberry*, 47 S. C. R. 114; 3 W. W. R. 420; affirming C. A. for B. C., 2 W. W. R. 10; 20 W. L. R. 826, and distinguishing *Knight* v. *Cushing*, 46 S. C. R. 555; 2 W. W. R. 704; 22 W. L. R. 220.

[7] 20 W. L. R. 28; 4 A. L. R. 123.

[8] 2 W. W. R. 704; 22 W. L. R. 220; 46 S. C. R. 555.

agreed to buy from Cushing a parcel of land—Whiteacre—for $33,750—paying down a deposit of $100. Rolfe & Kenwood, brokers, acted for Knight, as well as for the vendor. They made the deposit and took a receipt from Cnshing in the following terms:—

"Received from Rolfe & Kenwood the sum of one hundred dollars ($100), being deposit on the north half of lots 61 and 60, river lot 5 of the City of Edmonton. Price to be $33,750. Terms: $10,000 cash; $10,750 in one year; $8,000 in two years; and $5,000 in four years from date hereof; with interest at 7% per annum. With privilege of paying the whole amount off at any time. A. T. Cushing." Beck, J., says: "This represents the real and complete agreement between Kenwood on behalf of the defendants and the plaintiff." Subsequently, "a formal agreement was in fact drawn up embodying exactly the same terms, with some other usual provisions." This was dated 12th September. It was executed by both parties, and contained the usual formal acknowledgment of the receipt of the "down" or "cash" payment, $10,000; though this had not, as a matter of fact been paid. Knight's solicitor took exception to the title, and declined to pay over the $10,000 until his objections were met. The objection was that there was a mortgage for $15,000 which was not payable until after the expiration of the four years, and which included not only Whiteacre, but also the adjoining land, Blackacre. Some correspondence took place between Knight's solicitor and the vendor, with a view of arranging the difficulty, the solicitor suggesting a severance of the mortgage, so that Whiteacre and Blackacre would each bear a proportionate part of the encumbrance; or an undertaking from the vendor to eventually discharge it. Beck, J., says "Mr. Wallbridge's suggestion as to the means of doing this (i.e., adjusting the title) were reasonable."

On the 22nd September, the vendor wrote Knight's solicitor that he would do nothing to adjust the difficulty

until the $10,000 was paid over; and unless it were paid by 26th September, the transaction would be at an end. It was not paid; Cushing refused to go on, and Knight sued for specific performance. The action was dismissed by the trial judge;[9] the appeal to the Court en banc was allowed and specific performance decreed,[10] Scott, Stuart and Beck, JJ., giving very full reasons for allowing the appeal, Harvey, C.J., dissenting.

On appeal to the Supreme Court of Canada, the judgment of the trial judge was restored.[1] Idington, J., says: "The respondent knew of this mortgage when he sigued the agreement. The plain language of thc agreement required payment of $10,000 contemporaneously with the execntion of the document. And when the respondent refused to comply with such express language binding him, he gave the appellant the right to treat such explicit refusal as an abandonment or at all events repudiation of the agreement entitling him to rescind it." Duff, J., put it on a different gronnd—"I think the appeal should succeed on the gronnd that the cash payment of ten thousand dollars not having been made, the appellants' obligation to sell (and consequently their obligation to show a good title) did not become absolute." Anglin, J., says:—

"In my opinion, on a proper interpretation of the contract for the specific performance of which the plaintiff sues, the consideration for the payment by him of the sum of $10,000 "cash on the signing of this agreement" was the execution of the agreement itself—the constitution of the relationship of vendors and purchaser between the parties—the promise or undertaking of the vendors to sell and convey. The plaintiff was not entitled to require the vendors to show

[9] 18 W. L. R. 524.

[10] 20 W. L. R. 28; 4 A. L. R. 123.

[1] 2 W. W. R. 704; 22 W. L. R. 220; 46 S. C. R. 555. An application to the Judicial Committee of the Privy Council for leave to appeal was refused.

their title to the land in qnestion before payment of this sum of money; the agreement specially provides otherwise."

The judgment of the Supreme Court of Canada in this case does not really make so great an inroad on the rule (i.e., that the purchaser need not pay any part of the pnrchase-money until the vendor clears his title), as would appear at first sight. The Court held in effect that the payment of the $10,000 was a condition precedent to any agreement coming into effect at all—and if the appellant were under no obligation to sell, it is so obvious as to be a mere truism, that he was under no obligation to show a good title—in fact, *cadit questio.* In a later case,[2] two of the learned judges of the Supreme Court of Canada took occasion to explain just how far the decision in *Knight* v. *Cushing* was intended to go. Davies, J., says: "The defendant, appellant, relied upon *Cushing* v. *Knight,* 46 S. C. R. 555 (2 W. W. R. 704) lately decided in this Court. That case was a very different one from the present and turned entirely upon the terms of the agreement there in question, the construction of which we held demanded the payment of the instalment of the purchase-money contemporaneously with, if not before, the execution of the written contract by the vendors, and that, there having been defanlt in such payment, the obligation on the vendor's part to sell and convey the lands had not been created."

While Anglin, J., adde: "This case is entirely distinguishable from the case of *Cushing* v. *Knight,* 46 Can. S. C. R. 555 (2 W. W. R. 704), much relied upon by the appellant. We have here a contract of sale, with a provision in the nature of a condition subsequent for defeasance in the event of non-payment at the stipulated times; whereas, in *Cushing* v. *Knight,* it was held that, on the true conetruction of the contract there in qnestion, the relationship of vendor and purchaser, with its incidental rights, would not

[2] *Langan* v. *Newberry,* 47 S. C. R. 114.

come into existence until actual payment of the money in respect of which there had been default."

Even with this explanation, it is difficult, however, to reconcile *Knight* v. *Cushing* with the holding of the Court, that where moneys are payable simply on account of and as part of the purchase-money, "such moneys will not be regarded as merely deposit;"[5] especially in this case, where a deposit of $100 had previously been paid, and a receipt taken which, as Beck, J., says, in the Court below, represented the real and complete agreement between the parties.

One difficulty in the way of plaintiff in *Knight* v. *Cushing* succeeding in getting specific performance, is not dealt with by any of the judges—in fact not raised. If a purchaser finds an incumbrance against the vendor's title, is he not bound either to take it or leave it? i.e., Can he say "there is a fatal objection to your title, an incumbrance which cannot be paid off until after the time for completion has expired; but *I elect* to treat this as a matter of conveyance and demand *specific performance* with some equitable adjustment and protection which you the vendor must arrange." It is clear a purchaser cannot demand specific performance with an indemnity. (Fry, par. 1281.)

Where the purchaser objects to pay the purchase money, or instalments of the purchase money, on the ground of defects in the vendor's title, it is important to distinguish between objections that are matters of title, and objections that are merely matters of conveyance.[6] The principle is very clearly stated by Leach V.-C. (after consultation with Lord Eldon) in *Esdaile* v. *Stephenson*,[7] "where a necessary party to the title was neither in law nor equity under the

[5] *March* v. *Banton* (S. C. of C.) 20 W. L. R. at p. 324; 45 S. C. R. 338; 1 W. W. R. 544; and see the discussion by Galt, J., in *Manson* v. *Pollock*, 4 W. W. R. at p. 218, 219.

[6] Dart, p. 176.

[7] 6 Mad. 336.

control of the vendor, but had an independent interest, unless there was produced to the Master a legal or equitable obligation on the part of the stranger to join in the sale, the Master ought to report against the title; otherwise where a necessary party to the title was under the legal or equitable control of the vendor as a mortgagee, there the Master might well report that upon payment of the mortgage a good title could be made."[8]

It is only when objections go to *title* that a purchaser has a right to repudiate; matters of *conveyance* are always subject to equitable adjustment. Thus an encumbrance, which the vendor has a right to pay off and discharge before the purchase-money is all payable, is a matter of conveyance; but otherwise, where the encumbrance cannot be discharged, *as of right*, before the purchase-money is all payable. It is said that even though the amount of the encumbrance exceed the purchase-money, this will not be generally a conclusive defence to the vendor's suit for specific performance;[9] and the same principle would, since the Judicature Act, seem to apply to an action for the purchase money.[10] The amount necessary to discharge the encumbrance can either be deducted from the purchase-money, or if it is payable in instalments, the instalments can be paid into Court to form a fund for the eventual discharge of the encumbrance. Instalments will also be ordered to be paid into Court where there are defects in title, if the purchaser is *in possession*, unless he will go out of possession.

[8] Cf. *Ex. p. Winder*, 6 Ch. D. at p. 704; *Hartt* v. *Wishard-Langen Co.*, 9 W. L. R. 519; and see *Douglass* v. *L. & N. W. Ry.*, 3 K. & J., 178; *Nimmons* v. *Stewart*, 1 A. L. 384; *Gregory* v. *Ferrie*, 3 Sask. L. R. 191; *McLorg* v. *Merryman*, 5 W. W. R. 407.

[9] Dart, p. 1068; *Duke of Beaufort* v. *Glynn*, 3 S. & G. 213; Conv. Act, 1881, s. 5; *Armstrong* v. *Auger*, 21 O. R. 98. Williams, p. 165.

[10] "Which two remedies" (i.e. to recover the last instalment or for specific performance) "though different, perhaps, in form, must, I think, in the long run amount to the same thing." *Per Stuart, J.*, *Graves* v. *Mason*, 8 W. L. R. 542. See *Armstrong* v. *Auger*, 21 O. R. at p. 103.

It would seem that where the Torrens System of registration of titles is in force, under which no instrument is effectual to convey an estate or interest in the land until registered, objections that might otherwise be matters of conveyance, may more readily be deemed matters of title—and thus, where a vendor had no certificate of title to the land, and was not in a position to call for a transfer, and to procure its registration, the cancellation of the outstanding certificate, and the issue of a new one to himself, his action for over-duo purchase-money was dismissed, but with liberty to commence another action,[1] and in *Nimmons* v. *Stewart*,[2] an action by the purchaser claiming specific performance, or alternatively tho enforcement of the purchaser'a lien for moneys paid on the price, the learned judge (Beck, J.), while holding, in effect, that the purchaser had the right to repudiate the contract on the ground that the title was outstanding, and the vendor could not compel its transfer to himself—and holding also that the purchaser was entitled to specific performance, adds: "I suggest that the plaintiff should pay the present ownera of the land the amount necessary to secure a clear title, and that he should accept a personal order against the defendant for that amonnt, less the balance which he himself owes. I will make any necessary order, including an order adding parties, for the purpose of vesting title in the plaintiff."

It is suggested that the effect of the liberty to commence a new action in the one case, and of the order suggested in the other, can be fully explained by the rule that the Court will ordinarily allow time for the completion of the title, i.e. generally the inquiry is whether the vendor can make a good title, not whether he could do so at the date of the contract[3] and accordingly where there has not been unreasonable delay, and time is not material, the Court will allow time for the completion of the title.[4] And in

[1] *Graves* v. *Mason*, 8 W. L. R. 542.
[2] *Nimmons* v. *Stewart*, 1 A. L. R. 384.
[3] Fry, par. 1366.
[4] See *Williams* v. *Wilson*, 3 B. C. R. 613.

such a case, since the Judicature Act, it would appear that pending completion of the title, whether the price be payable by instalments or not, the vendor is entitled to have the purchase-money paid into Court—at any rate where the purchaser is in possession—unless it is through the laches of the vendor that the title remains incomplete.[5] But "where the contract allows possession to be taken before completion of the title, the Court will not generally order the payment of the purchase-money into Court *on the score of possession.*"[6]

But if there is an incumbrance the discharge of which the vendor is not entitled to compel before the time for completion arrives, the Court cannot compel the purchaser to accept an indemnity against it.[7] Nor, on the other hand, can the purchaser insist upon specific performance, with an indemnity from the vendor against the defect.[8]

Though the tendency of modern decisions is to hold payment and conveyance to be reciprocal and concurrent acts, yet agreements, of course, can be, and sometimes are, so drawn that it is only upon payment of the purchase-money that the vendor is obliged to show a title or convey.[9] But this must be very clearly and explicitly expressed to displace the general rule.[10] Where the purchase money is payable by instalments, since the purchaser is not obliged to

[5] Fry, pp. 702 et seq; *O'Keefe* v. *Taylor*, 2 Gr. 305; *Thompson* v. *Brunskill*, 7 Gr. 542; *Chantler* v. *Ince*, 7 Gr. 432; *Wardell* v. *Trenouth*, 24 Gr. 465; *Cameron* v. *Carter*, 9 O. R. 426; *Greenwood* v. *Turner*, 64 L. T. N. S. 261; *Armstrong* v. *Auger*, 21 O. R. 98; but see *Graves* v. *Mason*, 8 W. L. R. 542; and compare *Brandon Steam Laundry Co.* v. *Hanna*, 9 W. L. R. 576, with *Hartt* v. *Wishard-Langen Co.* Ib. at p. 544.

[6] Fry, par. 1466.

[7] In *re Weston* v. *Thomas* (1907), 1 Ch. 244, Fry, par. 1225.

[8] Fry, par. 1281.

[9] See *Yates* v. *Gardiner*, 20 L. J. Ex. 327; *Foot* v. *Mason*, 3 B. C. R. 377; *Sword* v. *Tedder*, 13 Man. R. 572; *MacArthur* v. *Leckie*, 9 Man. R. 110; *McDonald* v. *Murray*, 2 O. R. 573; *MaCrae* v. *Buckner*, 9 O. R. 1.

[10] Armour, p. 8.

pay any portion of his purchase-money until the vendor shows a good title, and can even repudiate the contract if he ascertains that the vendor has not a good title, a question might be raised in a case where the purchaser has paid one or more instalments without objection, whether he had not waived the defect—more especially where titles are simplified by a complete system of registry.[1] But in *Darby* v. *Greenless*,[2] Mowat, V.-C., held that such was not the case. (See Chap. VI., sec. iii. (a).)

By taking a judgment for the price the vendor does not lose his right of rescission so long as the judgment remains unpaid.[3]

It has been held in Alberta (*Schurman* v. *Ewing*, 7 W. L. R. 610), and also in Saskatchewan (*Landes* v. *Kusch*, 28 W. L. R. 915) that the plaintiff is not entitled to a personal judgment, and also to a decree for specific performance or for "foreclosure" or "cancellation." *Quære*, however, as to the correctness of these decisions.[3a]

If the vendor having taken a judgment against the purchaser for the amount of the purchase-money, or for overdue instalments, afterwards *rescinds*, it would appear logical that the judgment should be vacated, and moneys (if any) paid on it returned, but it has been held that no such result is occasioned by cancellation subsequent to judgment where the contract expressly provided for forfeiture of all moneys paid on the purchase-price in the event of cancellation,[4] though equity will restrain enforcement of the judgment as to costs.[5]

[1] *Commercial Bank* v. *McConnell*, 7 Gr. at p. 331.

[2] 11 Gr. 353.

[3] *Utterson Lumber Co.* v. *Petrie*, 17 O. L. R. 550; *Zimmer* v. *Karst* (Sask.), 15 W. L. R. at p. 60.

[3a] See "*Election of Remedies*" *post*.

[4] *Jackson* v. *Scott*, 1 O. L. R. (C. A.) 488; followed in *Zimmer* v. *Karst*, *supra*.

[5] *Zimmer* v. *Karst*, *supra*.

Section II.—Action for Damages.

"If the purchaser break the contract . . . by failure to pay the price before the vendor has parted with his estate in the land, the vendor cannot recover the whole price as damages, but is limited to the loss which he has actually sustained, i.e. the difference in the value of the land as remaining on his hands at the date of the breach and the price agreed to be paid." [1]

This remedy, however, is only applicable where the failure to perform goes to the root of the contract,[2] where, in fact, it is such as disentitles the purchaser to specific performance. The action is in all essential respects the same as for breach of contract relating to chattels. "Two men enter into a contract and one of them breaks it. The other one is entitled to claim damages and recover them if he can. That is the case and nothing else. It is a contract to buy an estate. There can be no difference, that I know of, which will distinguish the subject of the contract so as to apply a different law to it. It was argued that the law relating to contracts for land differed in its nature from contracts for bales of goods. I cannot follow that distinction." [3]

If the vendor elects the remedy by way of damages, and so affirms the contract, the position is the direct antithesis to that resulting from true rescission,[4] and, though regaining his land, he cannot declare the deposit forfeited, but it, as well as the instalments paid on account of purchase money, must be taken into account, to the purchaser's credit, in

[1] Williams on V. & P., p. 1063; cf. Civil Code, California, par. 3307.

[2] *Marcus* v. *Smith*, 17 U. C. C. P. 416; *Mersey Steel and Iron Co.* v. *Naylor*, 9 A. C. 434.

[3] *Per* Bacon, V. C. in *Noble* v. *Edwards*, 5 Ch. D. at p. 384.

[4] See "Election of Remedies," *post*.

fixing the damages.[5] On the other hand, once having elected to rescind the contract he can no longer affirm it and recover damages for its breach.[6]

Here again, if time were of the essence of the contract, as it always was at common law prior to the Judicature Act, it is clear that the vendor must have had a good title and been ready and willing to convey on the day fixed for completion to sustain this form of action;[7] and it would appear proper since the Judicature Act, to apply the same rule, where time is expressly made of the essence, as this is not a case of relieving against penalty or forfeiture—inasmuch as the vendor gets back his land. In this connection the case of *Halkett* v. *Dudley*[8] requires consideration. It was there held that repudiation by the purchaser on the ground of absence of title prior to the time for completion, was a good defence *in equity* to the vendor's action for specific performance; but that if the vendor had perfected his title prior to the time for completion, it would not afford a defence to his common law action for damages.[9]

This decision is adversely criticised in Williams,[10] with whom the learned authors of the article on Sale of Land in Halsbury's Laws of England[11] agree. They say, "and in

[5] Williams, V. & P., pp. 1063-1064; *Smith* v. *Mitchell*, 3 B. C. R. 450. But see *Harvey* v. *Wiens*, 16 Man. R. 230; 4 W. L. R. 410.

[6] *Henty* v. *Schroeder*, 12 Ch. D. 666; *Horvey* v. *Wiens*, 4 W. L. R. 410; 16 Man. R. 230; where, after cancellation, the vendor was held entitled to recover damages, can be reconciled on the principle that the vendor determined, rather than rescinded, the contract. See *post*, p. 61, *et seq.*

[7] *Noble* v. *Edwards*, 5 Ch. D. 378; cf. *Koster* v. *Holden*, 17 U. C. C. P. 650.

[8] (1907), 1 Ch. 590.

[9] See *post*, "Rescission by the Purchaser."

[10] P. 185, note (1).

[11] 25 Halsbury, 404, note (s).

Halkett v. *Dudley* (*Earl*) Parker, J., treated the purchaser's immediate right of repudiation for defect of title as an equitable right only, leaving him liable on the contract, if the vendor makes a good title at the time fixed for completion. But this overlooks the special obligation of the vendor of land to make out his title prior to completion so as to enable the purchaser to rely on and prepare for completion, and the better opinion seems to be that the right of repudiation is a legal as well as an equitable right."

When the price is payable by instalments the question arises whether failure to pay one or more instalments is such a breach as goes to the root of the contract. It is submitted if the purchaser will not or cannot pay the instalment over-due—at any rate within a reasonable time—that this amounts in effect to repudiation,[a] and the vendor can at once bring his action for damages. The principle would appear to be the same as in a sale of goods to be delivered by instalments and separately paid for. (See Sale of Goods Act, s. 31). "If the default in payment be made with the manifest intention of repudiating the contract, or under circumstances showing an absolute incapacity to perform it so that the party in default cannot be regarded as ready in future to perform his part, the seller is discharged from future deliveries."[b]

It might at first sight appear that where the purchaser had paid instalments of the purchase-money, the Court, on the principle of relieving against forfeiture, would not permit the vendor to treat a mere default in payment of a subsequent instalment as a complete breach enabling the vendor to resume possession of the land and sue for damages. There does not appear to be express authority on the point, but it

[a] Cf. *Smithnescki* v. *Wiltsie*, 12 W. L. R. 533.

[b] Bullen & Leake—Precedents of Pleadings, 6th Ed., p. 277: *Morgan* v. *Bain*, L. R. 10, C. P. 15; Ex. p. Chalmers, L. R. 8 Ch. 289; *Mersey Steel Co.* v. *Naylor*, 9 A. C. 434; *Cornwall* v. *Henson* (1900), 2 Ch. 298.

must be remembered that this is a common-law action,[4] and that the purchaser is entitled to have the deposit and instalments paid on account set off against the damages; and if there were no damages, as practically there would not be unless the estate had depreciated in value, he would recover all these payments. This, as will be seen later, does not militate against the rule that the "deposit" is a guaranty for performance and so forfeited on breach of contract by the purchaser; and where the parties have expressly agreed upon a sum of money as "liquidated damages" in case of a substantial breach of contract as distinguished from a *penalty*—it appears to be the rule that the Court will not grant relief.[5]

In Ontario and Manitoba, however, the Courts are expressly empowered by statute to relieve even against liquidated damages. (See "Relief against Forfeiture," *post.*)

The measure of damages is the difference between the agreed purchase-money and the estimated saleable value of the land at the time of the breach. In addition to this, however, if the purchaser has been let into possession the vendor is entitled to recover interest on the purchase-money,[6] but he is not entitled to rents and profits as well. Knight Bruce (then) V.-C. is quoted by Sir Edward Fry[7] as saying in a case arising out of the sale of some slob lands in Chichester Harbour, "You cannot have both money and mud." And so neither party can at the same time be entitled both to interest and to rents.[8] And so in the case of

[4] See *Noble* v. *Edwards*, 5 Ch. D. at p. 392, et seq.

[5] *Wallis* v. *Smith*, 21 Ch. D. 243; *per* Fry, J., at p. 249.

[6] Williams, p. 1063; *Laird* v. *Pim*, 7 M. & W. 474; *Anderson* v. *Phinney*, 38 N. S. R. 393.

[7] Fry, par. 1399.

[8] Cf. *Tavender* v. *Edwards*, 1 A. L. R., at p. 335; and note that in this case the purchaser was charged with an *occupation* rent—which is not in accordance with the English authorities.

the purchaser: "To give him this would be to take from the vendor the fruits both of his estate and the purchase-money, and would be little less than confiscation."[9] The estate and the purchase-money are things mutually exclusive.

The deposit, if there has been one, is to be set off against the vendor's damages; it is not regarded as a sum fixed by way of liquidated damages unless it is expressly so stated.[10] It follows that the purchaser cannot by repudiating the contract, and forfeiting his deposit, escape from his liability, if the vendor's damages exceed the amount of the deposit.

It sometimes happens that exactly the same amount may be named in the contract, both as a deposit—i.e., a guaranty for the purchaser's performance—and as liquidated damages in case of breach, as in *Catton* v. *Bennett*.[1]

If, however, there are no, or only nominal, damages the purchaser is not entitled to a return of his deposit. It is only where the contract goes off without any fault of the purchaser,[2] or the contract is rescinded by mutual consent, that the purchaser can recover his deposit,[3] and in the latter case it is only by the generosity of the vendor that the purchaser, in default, can get the benefit of rescission.[4]

From a practical standpoint, where a deposit only, as distinguished from an instalment,[5] has been made, unless he

[9] *Per* Strong, C.J., in *Hayes* v. *Elmsley*, 23 S. C. R. 623 (19 O. A. R. 291).

[10] *Hinton* v. *Sparke*, L. R. 3 C. P. 161; *Tavender* v. *Edwards*, 1 A. L. R. 333; cf. *Barton* v. *Capewell Continental Patents Co.*, 68 L. T. 857.

[1] 51 L. T. 70.

[2] *Whitbred* v. *Watt* (1901), 1 Ch. 911; (1902), 1 Ch. 835; *Wrayton* v. *Naylor*, 24 S. C. R. 295.

[3] Fry, par. 1478.

[4] *Glock* v. *Howard & Colony Co.*, 43 L. R. A. 199.

[5] See *post*, p. 84.

wishes to proceed for specific performance, the vendor's better course, where his damages do not exceed the amount of the deposit and where nothing else has been paid on account of the purchase-money, would appear to be simply to rescind the contract, and declare the deposit forfeited

The parties can, of course, stipulate in the contract that a certain sum of money shall be fixed as liquidated damages in case of breach. Thus in *Wallis* v. *Smith*,[7] where the contract stipulated that a deposit of £500 should be paid on execution of the contract, together with £4,500 within seven months, to the joint account of the plaintiff and defendant in a bank, it was provided that if the plaintiff could not make title he was to return the deposit of £500, and to pay the defendant £5,000 as liquidated damages; and if the defendant should commit a substantial breach of the contract, that "the deposit" (sic) of £5,000 should be forfeited, or if it had not been paid the defendant should forfeit and pay to the plaintiff £5,000 by way of liquidated damages. The defendant did not pay the deposit of £500 and completely failed to carry out his contract. It was held that plaintiff was entitled to recover the £5,000 as *liquidated damages*—that the condition as to forfeiture did not apply to the £500.

It is submitted that the same result would have been arrived at if the deposit of £500 had been paid—on the principle that where the vendor is awarded damages the purchaser is entitled to have the amount of the deposit set off against the amount of the verdict; and it matters not, in applying this principle, that the damages are "liquidated" by the contract of the parties.

It remains to add that since the Judicature Act the Court can give damages:[8]

[6] See Williams, 1055, 1056, especially note (f).

[7] 21 Ch. D. 243.

[8] See *Elmore* v. *Pirrie*, 57 L. T. 333.

(1) In substitution for specific performance where there is a case for specific performance, under Lord Cairns' Act.[9]

(2) Where there is no case for specific performance, under the Judicature Acts.

(3) In addition to specific performance in whole or in part—under Lord Cairns' Act, and probably also under the Judicature Acts.

Accordingly, a plaintiff may now come to the Court and say: Give me specific performance, and with it give me damages, or in substitution for it give me damages, or if I am not entitled to specific performance give me damages as at Common Law by reason of the breach of the agreement.[10]

The damages under (2) are, however, essentially different to damages under either (1) or (3), and the party suing for *common-law* damages under (2) must be careful to state a case for them,[1] and claim them specifically; otherwise his claim for damages may be treated as if it were merely made in substitution for the equitable remedy of specific performance, and may be defeated by anything which would bar his right to specific performance.[2]

[9] Cf. "Specific Performance," *post*.

[10] Fry, par. 1306; *Helkett* v. *Dudley* (1907), 1 Ch. 590.

[1] *Davy* v. *Garrett*, 7 Ch. D. 473.

[2] Williams, p. 1073 (*note*); and see "Specific Performance," *post*.

Section III.—Vendor's Lien.*

It has already been mentioned that from the time a binding agreement of sale is entered into the vendor has a lien on the property for the purchase-money until it is completely paid. This lien is implied by law, and as is generally stated, it is by virtue of it that, unless the contract contains an express or implied stipulation, that the purchaser shall have possession prior to completion, the vendor is entitled to hold possession until the whole purchase-price is paid. If the purchaser be let into possession before he has paid the whole of the purchase-money, a like lien will be implied in equity in favour of the vendor, until the whole of the purchase-money is paid, and will continue to exist even after the actual conveyance of the property to the purchaser.[1]

The existence of the lien is so strongly favoured both in law and in equity, that it will be presumed to exist and to continue unless there is a clear intention on the part of the vendor to the contrary, even though the vendor himself should have no positive intention that it should; and the onus of showing that it has been waived or discharged is upon the party who so asserts.[2] Thus the lien will not be deemed to have been waived, even though the vendor had not an actual intention of retaining it, from the mere fact of his taking promissory notes for the purchase-money; or from his suing and recovering judgment for the amount.[3] It will, however, of course, be waived if the vendor take a mortgage for the whole amount of the purchase-price

*This subject is fully discussed in Dart, ch. xiv., sec. 1.

[1] As to effect of registration of conveyance see *Kettlewell* v. *Watson*, 26 Ch. D. 501.

[2] *High River Meat Market* v. *Routledge*, 1 A. L. R. 405.

[3] *Flint* v. *Smith*, 8 Gr. 339.

remaining unpaid. *Bond* v. *Kent*[4] is usually cited for the proposition that an intention to abandon the vendor's lien will be implied where he takes a mortgage for part of the purchase-money. It is, however, pointed out by Beck, J., in *High River Meat Market* v. *Routledge*,[5] that this case is an authority only that from such a state of affairs the inference of fact *may* be drawn, that it was intended to exclude the lien; but that it will depend upon all the circumstances of the case whether such inference should be drawn or not.[6]

It is clear that the vendor has a lien in the absence of stipulation to the contrary where the price is payable by instalments.[7] In the last cited case (*Nives* v. *Nives*) it is pointed out that, where an action is brought by the vendor for specific performance of an agreement, the price being payable by instalments, it is especially appropriate to join a claim to enforce the vendor's lien, and the form of decree given in the report of this case is instructive.[8]

The vendor's lien does not in itself give the vendor either a right to resume possession, or a right of resale; but if he wishes to enforce it it appears that his only remedy is to apply to the Court for a declaration of charge, and an order to raise the amount due by sale. The sale so ordered is like a sale made by a pledgee of goods to reimburse himself: any surplus of price obtained on resale belongs to the purchaser, and conversely, the purchaser is liable on the con-

[4] 2 Vern. 281; cf. *McDonald* v. *McDonald*, 16 Gr. 678; *Grant* v. *Mills*, 2 Ves. & B. 306; *Collins* v. *Collins*, 31 Beav. 347; *Capper* v. *Spottiswoode*, Tamlyn, 21; *Driffil* v. *McFall*, 41 U. C. R. 313; *Anderson* v. *Trott*, 19 Gr. 619,—but *aliter*, if it appeared that the note and not the money represented by it was the very thing the vendor had bargained for. *Re Albert Life Assce. Co.*, L. R. 11 Eq. at 179. *Brandon Steam Laundry Co.* v. *Hanna*, 9 W. L. R. at 577.

[5] 1 A. L. R. 405.

[6] Cf. Dart, ch. xiv., sec. 1.

[7] *Nives* v. *Nives*, 15 Ch. D. 649.

[8] See this decree extended in Seton on Decrees, p. 2290.

tract in damages to the extent of the loss if a deficiency results.[9] If the order for sale prove ineffectual the Court may then make an order directing possession to be restored to the vendor;[10] such order is in the nature of *foreclosure*, and not by way of rescission of the contract involving *restitutio in integrum*.[1]

It has been pointed out that it is proper in some instances to join a claim for the enforcement of the vendor's lien in an action for specific performance, and where such lien exists a vendor obtaining judgment for specific performance may also obtain a declaration of the lien with a clause giving him liberty to apply to the Court for its enforcement.[2] If such decree is made then if default in payment under the judgment occurs the vendor may have an order for sale,[3] of the property, or an injunction operating to restore to him the possession of the property.[4]

In *Canadian Pacific Ry.* v. *Meadows*,[5] the vendors under a special clause in the agreement providing that on default in payment of the purchase-money the vendors could cancel the agreement without any right on the part

[9] Cf. *Sanderson* v. *Burdett*, 18 Gr. 417; *Skelly* v. *S.*, Ib. 495.

[10] Cf. Seton, p. 2290; *Skelly* v. *Skelly*, 18 Gr. 495; *Nives* v. *Nives*, 15 Ch. D. 649.

[1] Williams, p. 1058; See *Allgood* v. *Merrybent, &c., Ry. Co.*, 33 Ch. D. 571, and compare the criticism on this case in Williams, p. 1058, note T.

[2] Seton, 6th Ed., p. 2290; *Walker* v. *Ware, &c., Ry. Co.*, L. R. 1 Eq. 195; *Wing* v. *Tottenham, etc., Ry. Co.*, L. R. 3 Ch. 740; compare *Sedgwick* v. *Watford, &c., Ry. Co.*, 36 L. J. Ch. 379, where an immediate sale was directed. And see "Specific Performance," *post*.

[3] See *Munns* v. *Isle of Wight Ry. Co.*, L. R. 5 Ch. 414; *Ware* v. *Aylesbury, &c., Ry. Co.*, 21 W. R. 819; *Lycett* v. *Stafford, &c., Ry. Co.*, L. R. 13 Eq. 261.

[4] Fry, par. 1176. *Ware* v. *Aylesbury, &c., Ry. Co.*, 21 W. R. 819, and see the final order, Seton, 6th Ed., 2291; compare also *Allgood* v. *Merrybent Ry. Co.*, 33 Ch. D. 571.

[5] 1 A. L. R. 344.

of the purchaser to any reclamation or compensation for moneys paid thereon, claimed that as against the purchaser in default they were entitled to a judgment (in effect) fixing a day for payment of arrears and costs; and in default of payment cancellation of the agreement, forfeiture of moneys already paid, possession, and foreclosure of the equitable interests of the purchaser. Beck, J., holding that the Court should, if in the interests of all parties, refuse a form of relief to which the plaintiff is *prima facie* entitled, and give him some other form of relief, declined to make such a decree; but offerd the plaintiffs judgment "in the usual form for specific performance;" adding the rider, that in case of default in payment on the day fixed by the judgment, a motion to rescind (or cancel) should be refused and the plaintiffs be confined to their remedy by sale, i.e., (apparently) to the enforcement of the vendor's lien by sale in the usual way.

On rehearing by the Court en banc, Scott, J., arrived at practically the same result, but by a slightly different course of reasoning. Agreeing with Beck, J., that it is within the province of the judge to confine the plaintiff to such form of relief as may best conserve the interests of all parties concerned, be held that the judgment (i.e., for specific performance) should in itself specify the relief to which the vendor is entitled in case of such default; but that as the Court is specially authorised by the Alberta statute to relieve against "all penalties and forfeitures," the plaintiff's consequential relief on such default should be confined to an order for sale, as "rescission . . . will in some cases, if not in all, constitute a forfeiture of the purchaser's interest in the land." Sifton, C.J., and Harvey, J., concurred in the result; as also did Beck, J., though maintaining his former reasons and opinion. Stuart, J., dissented, holding that such an order of sale was quite as effectual a forfeiture as "rescission" or foreclosure and suggested "relief" on the principle of *restitutio in integrum*.

As will be pointed out more fully when the subject of forfeiture is discussed, the judgments of Scott, J., and Stuart, J., both appear to proceed on a mistaken notion of the method in which equity relieves against forfeiture. The "relief" is granted when the Court extends the time for payment—thus affording the purchaser a *locus pœnitentiæ*. Attention is drawn to the case here because the judgment of Beck, J,. in effect confines the vendor to judgment to enforce his lien—and, it is submitted, that the Court practically holds by its judgment that the vendor has no right to elect [6] which one of several remedies to which he may be entitled, he will adopt—even where as in this case, the defendant, the purchaser, does not appear in the action.[7]

If necessary for the purpose of protecting the interest of the vendor in the property the Court, in an action to enforce the vendor's lien, may appoint a receiver, either on interlocutory application before decree;[8] or by the decree itself [9] or by subsequent order;[10] but it seems it does not grant an interlocutory *injunction*, except after an abortive sale.

A vendor by procuring a declaration of lien is not thereby deprived of any right he might otherwise have to rescission.[1]

[6] See Chapter on "Election of Remedies," *post*.

[7] English O. 51, r. 1, Cf. N. W. T. Rule 449, which empowers the Court to order a sale of real estate when "necessary or expedient," is "not intended to enable the Court to sell real estate when otherwise it had no power to do so." *Re Robinson*, 31 C. D. 247.

[8] *Pell* v. *Northompton, &c., Ry. Co.*, L. R. 2 Ch. 100.

[9] *Bishop of Winchester* v. *Mid. Hants Ry. Co.*, L. R. 5 Eq. 17.

[10] *Munns* v. *Isle of Wight Ry. Co.*, L. R. 5 Ch. 414; *Lycett* v. *Stafford, &c., Ry. Co.*, L. R. 13 Eq. 261.

[1] *Baker* v. *Williams*, 62 L. J. Ch. 315.

SECTION IV.—SPECIFIC PERFORMANCE.

It is almost unnecessary to say that anything like an exhaustive treatment of the subject of specific performance is out of the question in this short treatise. Beyond stating some general points that require to be emphasized in connection with the plan of treatment adopted, it is proposed to confine this section mainly to the *method* in which this remedy operates, and the way in which it is practically enforced.

The books point out in classic, if not traditional, language, why damages are not an adequate remedy either for the purchaser or the vendor—for the purchaser because "no other piece of land on earth could duplicate that which the purchaser desired;" for the vendor, as Lord Eldon points out,[1] since "the result of experience is that, where a man having contracted to sell his estate is placed in this situation —that he cannot know whether he is to receive the price when it ought to be paid—the very circumstance that the condition is not performed at the time stipulated may prove his ruin, notwithstanding all the Court can offer as compensation."

The books do not, however, point out that from a practical point of view, often the most potent reason why a verdict for damages is an "inadequate remedy" is that the defendant may be financially wortbless—execution-proof—and the land depreciated in value.

Again, so far as Western Canada is concerned, where, for the past few years, speculation in real estate has been rife, and where numerous "subdivisions" have been laid off and offered in lots for salo to the public, it is quite obvious that it would be absurd to state that "no other piece of land on

[1] *Hill* v. *Barclay*, 18 Ves. Jr. 59; cf. *Glock* v. *Howard & Wilson Colony Co.*, 43 L. R. A., at p. 202.

earth could duplicate that which the purchaser desired." In fact, in ninety-nine cases out of a hundred, it does not make the slightest difference in the world to the purchaser whether he purchases "lot 1 in block 10" or "lot 10 in block 1," and for all practical purposes in many of these cases there is not very much difference between the buying and selling of town lots and the buying and selling of bales of goods.

It is submitted that, in many instances, the Courts have allowed their better judgment to be overcome by the traditional notion that interests in land must always be treated as something sacred, and have, not infrequently, granted specific performance to the purchaser when the true justice of the case would have been amply satisfied by a judgment for a very small sum by way of damages.

The expression "specific performance" at once indicates the nature of the remedy; it means that the court will decree the actual execution of the contract according to its terms and stipulations, and if the party in default disobeys the order the Court will visit him with the consequence of his contempt; or cause that which the defaulter was ordered to do to be done in some other way,[2] e.g., by a vesting order.

It is pointed out by Stuart, J.,[3] that in the long run, as against a purchaser whose only default is non-payment of the purchase-money, there is not a great deal of difference between an action of debt for the last instalment of the purchase-money (or for the matter of that for the whole purchase-money, if the whole be due), and an action for specific performance at the same stage. This is in a measure undoubtedly true—on a judgment recovered in either case execution may issue; but the results of a judgment for specific performance are much more comprehensive than a

[2] Cf. (Eng.) Order 42, s. 30.

[3] *Graves* v. *Mason*, 8 W. L. R. 542; cf. *Armstrong* v. *Auger*, 21 O. R. 98.

simple judgment for the debt, although the latter does not divest the vendor of his lien, which he can still enforce in the event of the judgment not being paid. Especially is this the case where the purchase-money is payable by instalments, and only the first, or one or more *intermediate* instalments, are overdue; in such case the decree for specific performance is much more effective, as will be obvious when we come to consider its effect. It is true that since the Debtors Act, 1869, an ordinary judgment for the payment of money cannot be enforced by committal for contempt, or it seems by sequestration,[4] but if, as would be the case in a decree for specific performance, the judgment limits a time[5] for payment of the moneys, or directs payment into Court,[6] a writ of sequestration may issue, if the judgment is not obeyed. Where this writ is available it would appear to have many advantages, as it seems to combine in itself some of the characteristics of ordinary execution, with at least some of the advantages of garnishee and receiver order.[7]

Since the granting or withholding of specific performance is discretionary, the rule that the plaintiff must be able, ready and willing to perform his part of the agreement is especially enforced in respect of this form of action. The remedy must be mutual. But unless the purchaser has repudiated the contract for want of title in the vendor,[8] it appears that, if the vendor can procure the concurrence of the necessary parties, at or prior to the inquiry as to title, specific performance will not be refused—at any rate where the vendor has acted *bona fide*, and has not deliberately made the sale knowing that he did not have any title.[9]

[4] *Hulbert* v. *Catheart* (1894), 1 Q. B. 244.

[5] Order 43, r. 6 (England), Rule 859 (Ontario).

[6] *Willcock* v. *Terrell*, 3 Ex. D. 323; A. P. (1914), pp. 747-8.

[7] (See A. P. (1914), pp. 748-9. Vol. 5 Encl. Laws of England, 2nd Ed., 496-7). Cf. Holmested & Langton's J. A. (Ontario), 1113-1118.

[8] See "Rescission by purchaser," *post*.

[9] See the discussion in Dart, p. 1064, et seq., and cf. *Halkett* v. *Dudley* (1907), 1 Ch. 590.

The remedy by way of specific performance is an equitable remedy—consequently, wherever there is anything in the position or conduct of the parties that renders it inequitable to grant it—whether at the suit of the vendor or purchaser—the Court will refuse this form of relief.

It is commonly said that the plaintiff must have shown himself not only able and ready, but eager to perform the contract on his part.[10] Thus delay in performance of the terms of the contract on his part, or in the institution of an action to assert his rights, or in the prosecution of the action, may amount to such laches as to disentitle the plaintiff to specific performance.[1] The principle upon which the Court acts is well stated by Duff, J., in *Bark Fong* v. *Cooper*.[2] "The doctrine of laches, it has been frequently said, is not a technical doctrine, and in order to constitute a defence there must be such a change of position as would make it inequitable to require the defendant to carry out the contract, or the delay must be of such a character as to justify the inference that the plaintiffs intended to abandon their rights under the contract, or otherwise to make it unjust to grant specific performance." Each case must stand on its own particular circumstances, and the measure of what is sufficiently "inequitable" or "unjust" will, in many instances, be found proportionate to the length of the Chancellor's foot. A number of recent cases on the subject are collected in the footnote.[3]

If the purchase is a purely speculative one the Court is not disposed to assist the purchaser by way of specific per-

[10] Cf. *Wallace* v. *Hesslein*, 29 S. C. R. 171.

[1] Fry, par. 1100; *Mills* v. *Haywood*, 6 Ch. D. 202.

[2] 5 W. W. R. 633 at p. 638.

[3] *Hall* v. *Turnbull*, 10 W. L. R. 536; *Banton* v. *March*, 12 W. L. R. 598; *Major* v. *Shepherd*, 10 W. L. R. at p. 290; *Battell* v. *H. B. Coy*, 1 Sask. 160; *McCready* v. *Clark*, 14 W. L. R. 480; *Evans* v. *Norris*, 22 W. L. R. 818; 5 A. L. R. 320; *Frederiksen* v. *Stanton*, 24 W. L. R. 891; *Hicks* v. *Laidlaw*, 19 W. L. R. 525; *White* v. *Riverview Realty Co.*, 19 Man. 746.

formance.[4] Specific performance will not generally be granted unless the Court can enforce the contract as a whole.[5]

Lord Romilly says in *Merchants' Trading Co.* v. *Banner*,[6] "The Court cannot specifically perform the contract piecemeal, but it must be performed in its entirety if performed at all." As to enforcement of contract with abatement; compensation or indemnity, the reader is referred to Fry.

Curious attempts to enforce the *cyprés* doctrine will be found in *Boudreau* v. *Renault* (3 A. L. R. 333), and *Meighen* v. *Couch* (4 W. W. R. 64).

Where the action for specific performance is brought to enforce payment of the purchase-money, either in whole or in instalments, it is usually advantageous to join with it a claim to enforce the vendor's lien.[7]

Perhaps the simplest way to a clear understanding of the operation of the remedy in such a case is to consider at once the form and substance of a typical decree. From *Seton on Decrees*,[8] we can gather the following:—

> "Declare that the agreement dated the day of in the pleadings mentioned ought to be specifically performed and carried into execution and order and adjudge the same accordingly.
>
> "Let an account be taken of what is due to plaintiff for principal and interest in respect of purchase-money. Let the defendants pay the amount (together with

[4] *Wallace* v. *Hesslein*, 29 S. C. R. 171; *Bark Fong* v. *Cooper*, 24 W. L. R. 294.

[5] *Major* v. *Shepherd*, 10 W. L. R. at p. 300, and cases there cited.

[6] L. R. 12 Eq. at p. 23.

[7] *Nives* v. *Nives*, 15 Ch. D. 649. See Seton, 2292, 2293, and cf. *Brandon Steam Laundry Co.* v. *Hanna*, 9 W. L. R. at 577.

[8] Pp. 2206, 2290-1.

plaintiff's costs to be taxed) within ____ months from the certificate,

(*and thereupon conveyance to be executed.*)[9]

"Declare the plaintiff entitled to lien upon said hereditaments for such purchase-money, interest and costs,

(*and for the future instalments mentioned in said agreement together with interest as therein provided.*)[10]

"The plaintiff to be at liberty to apply in case the defendant shall not pay what shall be so certified to be due from him (or any future instalment of the said purchase-money).

"Liberty to apply generally."

The advantage of practically having judgment in advance for the subseqnent instalments as they fall due is sufficiently obvious; and "*the liberty to apply*" is applicable alike whether the purchase-money be wholly or only partially in arrear—and in the latter case to the sums that may become subsequently overdue ae well as to amonnt certified to be in arrear. As each snbsequent instalment falls due, and is unpaid, the plaintiff can make a simple motion to fix a day for payment—when if default is made he has the same liberty to apply as if default were made in payment of the snm originally certified for principal, interest and costs.

In either case, if on the date fixed the defendant (pnrchaser) makes default in payment the following courses are open to the plaintiff (vendor)

(*a*) He can issue ordinary execution;

(*b*) He can issue a writ of sequestration;

[9] Where the whole purchase-money is due.

[10] Where instalments or part of purchase-money is to accrue due subsequently.

(*c*) He can apply for and obtain rescission of the contract.[1]

(*d*) He can have an order for sale to realize his lien—followed by a judgment in case of deficiency against the defendant, who, *per contra*, is entitled to the surplus if any. (See Vendor's Lien, sec. iii. *ante*).

(*e*) If the sale prove abortive he can have an injunction (e.g. to restrain a railway company from operating the railway over the lands[2]) and an order for possession—which will operate as a foreclosure.[3]

It will be noticed that numbers (*a*), (*b*), and (*c*) are the ordinary ways of enforcing specific performance; numbers (*d*) and (*e*) are appropriate to enforce the vendor's lien—and it would seem will only be granted where the pleadings have asked for enforcement of the lien, and the decree declared the plaintiff entitled to it.[4] The plaintiff is not obliged to issue execution under either (*a*) or (*b*); he can have rescission (*c*) in the first instance; or in the alternative, and it seems at his election, an order for sale (*d*); but it seems that he cannot have the injunction, and order for possession operating as foreclosure under (*e*) unless he proceeds to a sale under (*d*) and the sale prove abortive.[5] Where, however, the land is unsaleable, to save the needless expense of attempting to sell, the Court may grant an injunction in the first instance.

[1] *Baker* v. *Williams*, 62 L. J., Ch. 315. For form of order see Seton, p. 2288. Cf. *Olde* v. *Olde* (1904), 1 Ch. 35.

[2] Seton, p. 2291.

[3] See Vendor's Lien, sec. iii., *ante*.

[4] But if the declaration be omitted from the decree it may be supplied on petition (*Heriot* v. *L. C. & D. Ry. Co.*, 16 L. T. 473); unless subsequent encumbrances are affected, when it seems a supplemental action is necessary. (*A. G.* v. *Sittingbourne, &c., Ry. Co.*, L. R. 1 Eq. 636).

[5] Seton—Notes 2293-2294. As the ordinary conditions of sale (R. S. C. appendix L. No. 15) provide for a reserve bid, an "abortive" sale would result if the reserve price was not bid. *Semble*, that the parties to the action may have leave to bid. (A. P. 1914, pp. 376-7)

In *Jackson* v. *De Kadich*,[7] Farwell, J., refused to make an order that the vendor was entitled to retain the deposit where rescission was directed in consequence of the purchaser's default under a decree for specific performance. In *Griffiths* v. *Vesey*,[8] where the purchaser had failed to comply with the decree, it was held (Swinfen Eady, J.) that the vendor is entitled, if the contract contained a clause forfeiting the deposit, and giving the vendor power to proceed to a fresh sale, to an order declaring the deposit forfeited, and for payment of any deficiency on a fresh sale, and costs; instead of the usual order rescinding the contract.

In *Shuttleworth* v. *Clews*,[9] where the contract provided for forfeiture of the deposit, power to the vendor to resell and to recover any deficiency in price, in an action for specific performance, the vendor (relying on *Griffiths* v. *Vesey*, *supra*) moved for a declaratory order forfeiting the deposit and for liberty to resell, and in case of a deficiency that the purchaser should pay the amount thereof to the vendor. Joyce, J., gave the following judgment: "It is quite clear that, in calculating the deficiency to be paid by the purchaser on a resale, credit must be given by the vendor for the amount of the deposit which he has received. I do not understand how the order in *Griffiths* v. *Vesey* came to be drawn up in the form in which it appears in the report, but the point raised here appears not to have been brought to the attention of the Court in that case."

In *Hall* v. *Burnell*,[10] Eve, J., held that whether there is or is not a clause in the contract for the forfeiture of the deposit, and whether the deposit has been paid to a stakeholder or direct to the vendor, the vendor obtaining rescission owing to default in completion by the purchaser is entitled to the deposit.

[7] (1904) W. N. 168.
[8] (1906), 1 Ch. 796.
[9] (1910), 1 Ch. 176.
[10] (1911), 2 Ch. 551. See Williams on V. & P., Vol. ii. p. 1055.

In a previous section (sec. ii., *ante*), it is pointed out that either party may sue for specific performance, and in the alternative for damages—stating each cause of action separately, and making separate claims for the alternative relief. But, in addition to, and distinguished from, the alternative claim to such common-law damages, the plaintiff may claim damages, since Lord Cairns' Act, *in substitution* [1] for specific performance even when entitled to the latter; or *in addition* to specific performance, in whole or in part. In *Elmore* v. *Pirrie*,[2] Kay, J., says of the powers of the Court under the Judicature Acts: "The Court has now a much larger power than it had under the Lord Cairns' Act, for under that Act the plaintiff had first to make out that he was entitled to an equitable remedy before he could get damages at all;" and, the learned judge finally decided as follows: "I say this is a case where the Court has jurisdiction, and the plaintiffs are entitled to some relief, partly by way of specific performance and partly by way of damages, or at any rate, by way of damages, instead of specific performance in whole or in part.[3]

Where, however, the plaintiff wholly fails to make out a case for equitable relief, the Court cannot grant him damages in lieu of specific performance,[4] e.g., where the subject matter has come to an end[5] or specific performance is impossible on account of lapse of time.[6] But it will be understood that common-law damages may nevertheless be granted if properly claimed in the alternative, notwithstanding the fact that the plaintiff cannot establish a title to equitable relief,[7] but not

[1] *Wilson* v. *Northampton, &c., Ry. Co.*, L. R. 9 Ch. 279.

[2] 57 L. T. 333.

[3] See cases collected in A. P. (1914), 846-847.

[4] *Bellamy* v. *Debenham* (1891), 1 Ch. 412; Fry, par. 1301.

[5] *Re Northumberland Avenue Hotel*, 33 Ch. D. 16.

[6] *Lavery* v. *Pursell*, 39 Ch. D. 508.

[7] See *Ryan* v. *Mutual Tontine, &c.* (1892), 1 Ch. 427; (1893), 1 Ch. 116; *Cornwall* v. *Henson* (1900), 2 Ch. 298; *Casey* v. *Hanlon*, 22 Gr. 445; *Gough* v. *Bench*, 9 P. R. 431; *Smith* v. *Mitchell*, 3 B. C. R. 450.

where, after action brought, the plaintiff has by his own act rendered specific performance impossible.[8] *Wellwood* v. *Haw*[9] is an example of the award of common-law damages, where the Court was unable to decree specific performance.

As examples of the award of damages, in addition to judgment for specific performance, reference may be made to *Jaques* v. *Miller*,[10] where the purchaser was awarded £250 damages for profits lost by the vendor's delay in completion; *Jones* v. *Gardiner*,[1] where delay in completion was attributable to the vendor's neglect and carelessness; and similar principles would seem to apply to a vendor who had suffered damage by the purchaser's delay in completion; he could have specific performance and damages in addition;[2] though, as a rule, he is only entitled to his purchase-money plus interest.

Since the principal ground upon which the jurisdiction of a Court of Equity to decree specific performance is founded is the presumed inadequacy of the remedy by damages, it follows that where a judgment for damages will afford an adequate remedy, the Court will refuse specific performance. Moreover, as the granting or refusal of specific performance is entirely discretionary, if the Court is of opinion that justice can be better done by an enquiry as to damages, the judgment will so direct, and specific performance will be refused.[3]

[8] *Hipgrave* v. *Case*, 28 Ch. D. 356.
[9] 10 W. L. R. 41.
[10] 6 Ch. D. 153.
[1] (1902), 1 Ch. 191.
[2] Cf. *Wallace* v. *Hesslein*, 29 S. C. R. 171.
[3] *Wilson* v. *Northampton, &c., Ry. Co.*, L. R. 9 Ch. 279.

Section V.—Determination.

"Determination" is not usually referred to in the text-books as one of the remedies open on affirmation of the contract. As the subject is a controversial one, it will be convenient to postpone the discussion of it at least until after we have considered rescission; and perhaps it can be better dealt with after we have also considered agreements having express stipulations for determination.[1]

As this remedy—if it is to be properly classed as a remedy under an open contract—is based on the affirmance of the contract, it seemed only methodical to give it, at least, a local habitation and a name in its proper sequence.

[1] See chapter V., *post*.

CHAPTER III.

Vendor's Remedies where Contract Disaffirmed.

Section I.—Resoission.

Of the remedies open to the vendor on disaffirmance of the contract, perhaps rescission is the most important.

We have already seen that where the purchaser fails to comply with a decree for specific performance, the vendor can apply for and obtain rescission of the contract; and it is familiar knowledge that a contract may be rescinded on account of misrepresentation or fraud.

In this section, however, we are dealing with the vendor's right to rescind—*extra-judicially*, on account of the purchaser's default repudiation, or abandonment. Fraud and misrepresentation, and the remedies consequent thereon, are not dealt with in this book at all.

There is no essential difference in the principles governing the rescission of a contract for the sale of land and those governing the rescission of other contracts.[1] Equally applicable to sale of land is the rule of law laid down by Lord Blackburn, in *Mersey Steel & Iron Co.* v. *Naylor*,[2] in respect to a sale of goods: "Where there is a contract in which there are two parties, each side having to do something, if yon see that the failure to perform one part of it goes to the root of the contract, it is a good defence to say: I am not going on to perform my part of it, when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct."

[1] Fry on S. P., par. 1060; *Freeth* v. *Burr*, L. R. 9 C. P. 208; cf. Chalmers, Sale of Goods Act, 1893, pp. 70-1.

[2] 9 A. C. 434.

Rescission, in its true sense, indicates the entire cancellation or abrogation of the contract—it is as if it had never existed—and *ex vi termini* connotes the relegation of the parties to the original position they were in before the contract was made.[3]

"The effect of the rescission of a contract is to place the parties in the same position as if it had never been made; and all the rights which are transferred, released or created by the agreement are revested, restored or discharged by the avoidance." The essential requisite condition to, and logical consequence of, rescission, therefore, is *restitutio in integrum;* in that it is to be radically distinguished from the *determination* of the contract, as will be pointed out later on. Thus, it is a general rule that the reception of any benefit under a contract will preclude its *rescission* for default in performance by the other party,[4] unless the benefit is capable of restoration in kind or by way of compensation.[5] Nor where other parties have acquired rights under the contract can it be rescinded.[6]

Rescission has been spoken of as an extra-judicial remedy. It is submitted that the Courts will not *order* rescission as a substantive remedy in the first instance—that at most they may make a *declaration* that the plaintiff is entitled to rescind, or has properly rescinded, i.e., rescission in the sense now discussed results from the act of the parties. In *Mills* v. *Marriott*,[7] Irving, J. (dissenting), says: "As to the $250 paid down, I would order that to be refunded and the contract *to be rescinded.*" With all respect, it is submitted that if this had been the judgment of the Court, it would have

[3] Cf., Per Bowen, L.J., in *Boston, etc., Co.* v. *Ansell*, 39 C. D., at p. 365.

[4] *Hunt* v. *Silk*, 5 East 449; *Blackburn* v. *Smith*, 2 Ex. 783.

[5] Fry, par. 744; *Lindsay Petroleum Co.* v. *Hurd*, L. R. 5 P. C. 221; *Clough* v. *London & N. W. Ry.*, L. R. 7 Ex. 26.

[6] Kerr on Fraud, etc., 340-1.

[7] 20 W. L. R. 917.

been improper. If the circumstances in this case were such as to justify rescission, the vendor could himself have exercised his right to rescind; he did not require to go to the Courts for any order or judgment; and in the purchaser's action, the purchaser being in default, it is proposed to decree rescission against the vendor, who was affirming, not disaffirming, the contract. The notice of "forfeiture" was given in pursuance of the contract, and was not a disaffirmance, as will be explained at length in a future section.

Of course, when disputed facts have to be proved to establish the right to rescind, or the right is doubtful in law, the vendor may have to resort to the Court for a declaration, and decrees have frequently been made equivalent to rescission. This from an examination of the cases cited in the note, appears to be what Sir Edward Fry means in the passage:[8] "It remains to remark that the plaintiff, bringing an action for the specific performance of a contract, may claim in the alternative that, if the contract cannot be enforced, it may be rescinded and delivered up to be cancelled, provided that the alternative relief is based on the same state of facts, though with different conclusions as to law."

Thus, in *King* v. *King*,[9] where a party had contracted to purchase and had been eight years in possession of the premises to which the vendor was unable to make a good title, and refused either to abandon the agreement or accept such title as the vendor could give, having paid no part of the purchase money and no rent, the Court, on the vendor's bill, directed the agreement to be delivered up to be cancelled, and the rents and profits received by the purchaser to be accounted for, and ordered the purchaser to pay the costs of the suit.

It will be observed, on reading the full report of this case, that the notice given by the vendor prior to filing his

[8] Fry on S. P., par. 1058.

[9] 1 My. & K. 442.

bill, was equivalent to notice of rescission, and the decree only enforced the consequences of rescission against the recalcitrant defendant.

In the ultimate analysis, rescission—true rescission—may perhaps be reduced to a matter of mutual agreement, either as the result of a provision in the original contract in anticipation of a breach; or, subsequent to the breach, as the result of the consent of the party not in default. This view is adopted by Lamont, J., in *Banton* v. *March Bros.*[10] He says: "The rescission of a contract, like its formation, requires the consent of both parties, except in certain cases where misrepresentation, fraud, mistake, want of mutuality, or statutory provision, entitles one party to exercise the right of rescission. That consent may be contained in the agreement itself, in the form of a power to rescind reserved to one party or the other, or it may be implied, as in the case of abandonment by one of the parties, and it is to be noted that breach of the contract which goes to the root of the whole consideration constitutes an abandonment or repudiation of it. But, whether express of implied, the consent of both parties to rescind must, generally speaking, exist."

The party in default can never insist upon rescission unless under a power to rescind by such anticipatory agreement, or by the subsequent consent of the adversary; and the adversary not in default is never obliged to rescind the contract unless he has so bound himself by the original contract, or to consent to its rescission, unless his generosity prompts him to do so.

If the vendor has no title at all, he cannot escape his liability for damages by purporting to rescind the contract.[1]

Even a provision in an agreement that upon breach, the contract *shall* become null and void is construed to mean

[10] 5 Sask. L. R. at p. 65.

[1] Fry, par. 1311; *Bowman* v. *Hyland*, 8 Ch. D. 588, and cf. *Keinholts* v. *Hansford*, 10 W. L. R. 534.

that upon such breach the party not in default may at his election rescind the contract.[2] Bnt, on the other hand, a provision that the vendor (or purchaser) may rescind on the happening of a certain event—even his own default or inability to comply with the contract—gives him, of course, the power to rescind it independently of the wish of the other, e.g., the power commonly reserved in a standard agreement of sale to the vendor to rescind if the purchaser insists upon an unwelcome requisition.

It may at first sight seem that when the vendor rescinds on defanlt of payment by the purchaser, this is not a matter of consent; but the principle is that the purchaser, guilty of a complete breach, has by his very act of repudiation, signified his consent to rescission, which only ripens into actual rescission when tho vendor on his part agrees so to accept and consider it. Similarly in a case of fraud: the guilty party may be considered as consenting, or at any rate, being bound in law to consent, to rescission upon his adversary so electing. At all events, this proposition seems indisputable—that a contract can never be rescinded without the consent of the injured party.

There is one—and apparently only one—exception to tho rule that rescission involves *restitutio in integrum*. Where the pnrchaser has paid a deposit, he is not entitled to recover it npon rescission,[3] but even this exception is more apparent than real, since the deposit is regarded as a guaranty; and if the contract goes off, it loses its double character of being also a payment ou the pnrchase-money. Moreover, where the contract is rescinded without any fault on the part of the pnrchaser, the vendor is obliged to restore the deposit to him.[4]

[2] Fry, par. 1046.

[3] Williams, p. 1054; *Howe* v. *Smith*, 27 Ch. D. 89; *Soper* v. *Arnold*, 14 A. C. 429; *Sprague* v. *Booth* (1909), A. C. at p. 578-580; *Stinson* v. *Hoar*, 4 W. W. R. 1273.

[4] *Whitbread* v. *Watt* (1901), 1 Ch. 911; (1902), 1 Ch. 835.

When, and under what circumstances, the deposit is forfeitable, where rescission is directed as consequential relief in an action for specific performance is discussed in Ch. I., sec. 4.

The effect, therefore, of rescission of a contract of sale—for the purchaser's default—is that the vendor becomes entitled to the land (with the deposit, if any); and the purchaser to any sums he may have paid on account of purchase-money.[5] By the rescission, all rights of action for the purchase-money, or for damages,[6] or for specific performance[7] are put an end to. The vendor's lien is, of course, extinguished; the purchaser's lien, on the contrary, persists until he is repaid his purchase-money.[8]

The incidental results of rescission are that each party must restore to the other all benefits received under the contract.[9] Thus, where the purchaser becomes entitled to a return of the deposit, he is generally entitled to interest on it as well;[10] and the same rule would seem to apply to the purchase-money[11] conversely, if the purchaser has been in possession, he must restore rents and profits received by him to the vendor. It seems, however, he cannot be charged with an occupation rent.[12] This appears rather illogical, at any rate, where the occupation has been beneficial. In the case of a vendor remaining in personal possession pending completion of title, he is chargeable with an occupation rent to

[5] *Parent* v. *Bourbannière*, 13 Man. R., 172; *March* v. *Banton*, 20 W. L. R. at 324.

[6] *Henty* v. *Schroder*, 12 Ch. D. 666; but see *Harvey* v. *Wiens*, 16 Man. R. 230.

[7] *Smith* v. *Mitchell*, 3 B. C. R. 450.

[8] *Whitbread* v. *Watt* (*supra*); *Rose* v. *Watson*, 10 H. L. C. 672.

[9] Cf. Williams, p. 1054.

[10] *Whitbread* v. *Watt* (1901), 1 Ch. 911; (1902), 1 Ch. 835; cf. *Day* v. *Singleton* (1899), 2 Ch. 320.

[11] Cf. Williams, p. 1052, note (p).

[12] *Hutchings* v. *Humphreys*, 54 L. J. Ch. 650.

be set off against interest payable by the purchaser;[3] and it is difficult to see why the same principle should not apply to the purchaser who has been in possession prior to rescission. But a purchaser who continues in possession after rescission must pay an occupation rent.[4]

As the result of rescission is to remit the vendor to his former position as full owner of the land, he has, of course, the right to resell as *owner*, i.e., for his own benefit and at his own risk exclusively—he can keep the surplus, and has no right to recover any deficiency arising on such resale.[5] Such a resale, therefore, must be distinguished from a resale, under the implied power of resale discussed in the following section; and from a sale directed by the Court to enforce the vendor's lien (*ante*, p. 40).

The expression "Rescission" is often loosely applied to a state of affairs where one of the parties is actually basing his whole claim to relief upon the affirmation of the contract (Cf. *Benjamin on Sales*, 5th ed., p. 935). This is a good example of the tyranny of words, and the neglect of the distinction has been a fruitful source of confusion in the decisions of the Courts. "Rescission" immediately directs the mind to *restitutio in integrum*, and consequently sometimes, restitution being, in reality, impossible, the plaintiff is either refused relief altogether, or some fanciful method of "restitution," perhaps resulting in making an entirely new contract between the parties, is decreed in an attempt to work out the logical consequences of true rescission.

The reasons for judgment given by the learned judges of the Court of Appeal in Manitoba in *Handel* v. *O'Kelly*,[7] it is submitted, with respect, illustrate the inaccurate use of the expression *rescission*. In this case, the down payment

[3] Fry, par. 1440; *Dyer* v. *Hargrave*, 10 Ves. 505.
[4] Williams, p. 1058.
[5] Williams, p. 1059.
[7] 22 Man. R. 562; 22 W. L. R. 407.

was $25, and the balance of the purchase-price ($1,000) was payable in three monthly payments of $20, to be followed by 32 monthly payments of $10 each, and the balance at a later date. The purchaser continued his payments until he had paid in all, apparently, $157. The Court of Appeal unanimously held on the facts, the plaintiff, the purchaser, suing for specific performance, that it was not a case for specific performance, and that the vendor was entitled to consider the contract at an end, and to resell, as he had done, without being liable to the purchaser for damages.

Richards, J.A., holds that there had been *rescission* of the contract. Then, he adds, "as a result of the above holding, the plaintiff would not be entitled to recover back the $157 paid."

Cameron, J.A., says: "There arose a new agreement . . . to the effect that the original agreement should be disregarded and in fact discharged and *rescinded*," and he adds, "as to the plaintiff's claim to be repaid the amounts paid by him on the agreement, it would seem singular if he could, by his own default, put himself in a position to recover these from the vendors who lawfully own them."

Quite so; because the vendor had lawfully *determined* the contract; but this is not *rescission* at all. If the contract had been rescinded, the vendor must necessarily make *restitutio in integrum*, and the purchaser restoring the land to the vendor was entitled to have his purchase-money restored to him.

It may all seem only a question of terminology; but surely one can see a clear distinction between the two notions, and if there is a real distinction, the definition of terms becomes important. The vendor, on the purchaser's default or abandonment, has clearly the right to *rescind*, i.e., to return the purchase-money and take back the property. Subject to the Court's intervention by way of relief against forfeiture, on

the purchaser's repudiation or abandonment, he may have a right to *determine* the contract, i.e., to take back the property, and to *retain* the purchase-money paid, as in the case under consideration.

By whatever names you choose to give to those two positions, the distinction is surely quite plain. The distinction is very clearly put by Lamont, J., in *Zimmer* v. *Karst*.[7a]

The Courts do not, as a general rule, grant relief against *rescission* by the vendor; they can, and constantly do, grant relief against the vendor's attempt to *determine* the contract.

As a practical remedy—under the usual circumstances of depreciation in value—rescission is generally the vendor's *dernier resort*. It cannot be forced upon him by the defaulting purchaser; nor, it is respectfully submitted, by the Court in the interest of the purchaser. The vendor's consent to rescission, in the interest of the purchaser, seems solely to depend upon his grace and generosity.

"Rescission," then, which results from the *disaffirmance* of the contract is to be carefully distinguished from "Determination"[8] *where the vendor is not disaffirming, but expressly standing on the contract, and basing his rights upon its express or implied terms, covenants and conditions.*

This distinction is pointed out by Bowen, L.J., in *Boston, etc., Co.* v. *Ansell*[9]—a case of master and servant. He says:

"Some confusion always arises, as it seems to me, from treating these cases between master and servant as instances of a rescission of the original contract. It is not a rescission of the contract in the way in which the term is ordinarily used, viz., that you relegate the parties to the original posi-

[7a] 15 W. L. R. 58; 3 Sask. R. 304.

[8] Cf. *Zimmer* v. *Karst*, 15 W. L. R. 58.

[9] 39 Ch. D. 365.

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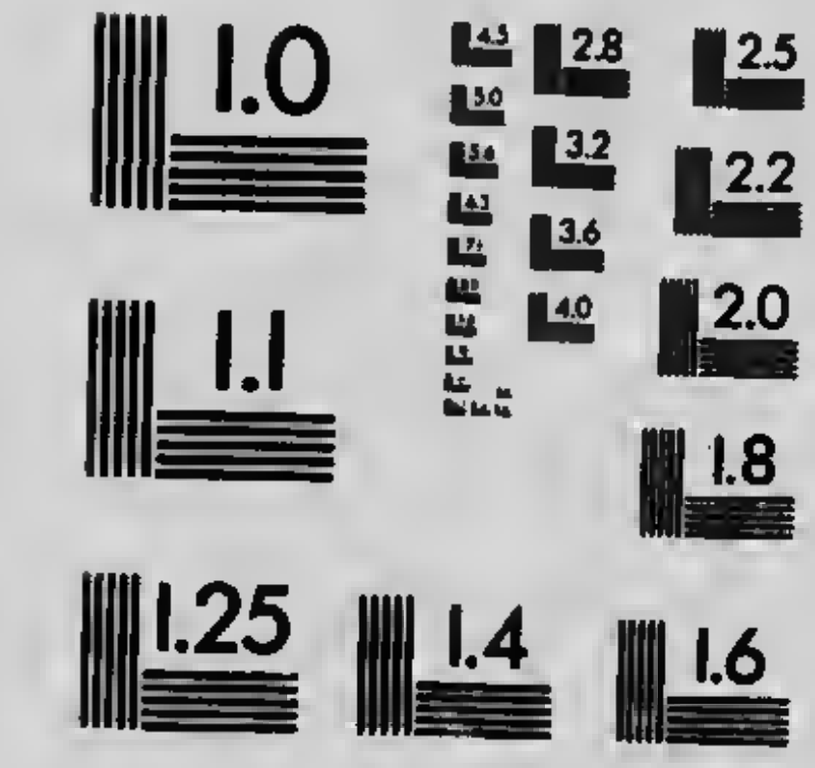

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tion they were in before the contract was made. That cannot be, because half the contract has been performed. It is really only a rescission in this sense that an act which determines the relation—for the future—you may regard it under the *more general law, which is not applicable to contracts of service alone*—you may treat it as the wrongful repudiation of the contract by one party being accepted by the other, and *operating as a determination of the contract from that time,* that is, from the time the party who is sinned against elects to treat the wrongful act of the other as a breach of contract, which election on his part emancipates the injured party from continuing it further."

Thus, when a plaintiff comes into Court asking that a contract for sale of goods by instalments, some of which instalments have, let us say, been delivered and paid for, be put an end to on the ground of the refusal of the purchaser to accept and pay for future instalments, he is not asking for *rescission* at all, and it is idle to attempt to apply the doctrine of *restitutio in integrum* to the case.

Similarly, when a vendor of land, having received instalments of purchase-money under a contract providing that in case of determination he may retain the instalments, comes into Court asking that the contract be put an end to on account of repudiation by the purchaser, or defanlt in payment of the balance, he is not asking for *rescission*—because so far as the instalments already paid are concerned, he is asking the Court to *affirm,* not to *rescind,* the contract—and hence, it is submitted that here again a discussion of the principle of *restitutio in integrum* is beside the issue. This is well put by the Supreme Court of California in *Glock* v. *Howard & Wilson Colony Co.*,[10] where it is stated: "But while it is essentially true that in case of a rescission, the vendee may demand that he be restored to his original condition, it does not follow that a vendor who refuses to convey

[10] 43 L. R. A. at p. 205.

after such breach by the vendee thereby rescinds. To the contrary, in refusing to convey after the vendee's default, he is not treating the contract as at an end, but is expressly standing upon it, and basing his rights upon its terms, covenants, and conditions."

True, under such *determination* of the contract, questions of the equity to relief against penalty or forfeiture *may arise*, but they cannot be decided, it is submitted with due deference, on the principle of *restitutio in integrum*—as the *necessary* condition to and consequence of *rescission*. To attempt so to decide them is in reality begging the question.

Keeping in view this distinction between "*rescission*" and "*determination*," the classification given by Sir Edward Fry (par. 1020) of the cases of rescission may be tabulated as follows:—

A contract may be rescinded:

A. By subsequent mutual agreement:
   1. Simple agreement between the parties;
   2. An agreement to new terms which puts an end to the old contract;
   3. Novation.

B. By exercise of a *power* reserved by the contract to one or both of the contractors.

C. By exercise of a *right*;
   1. Resulting from misrepresentation, fraud or mistake;
   2. Resulting from the other party's absolute refusal to perform, or unreasonable delay in performance;[1]

[1] Cf. *Frith* v. *Alliance Investment Co.*, 4 W. W. R. 88.

3. Resulting from the other party having made performance impossible;

4. Resulting from want of mutuality.

D. In exercise of a statutory power in case of bankruptcy.

This tabulation emphasizes the distinction between the exercise of a *power* expressly reserved by the contract, and the exercise of a *right* arising by operation of law, which is too often lost sight of.

It is beyond the scope of this work to discuss, except incidentally, cases of rescission arising from,

(A) subsequent mutual agreement, or under (C) resulting from fraud, mistake, etc.; or under (D) in case of bankruptcy; so that practically the only cases within our purview are cases of rescission or determination arising.

(1) By the exercise of a *power* to rescind (or determine) reserved by the contract; and

(2) By the exercise of a *right* to rescind (or determine) resulting from the other party's absolute refusal to perform, or unreasonable delay in performance, or from want of mutuality.

The first class can obviously be more fully dealt with when the subject of special agreements is reached; and as to the second, we have already seen that there is no essential difference in principle as to the right of *rescission* whether the sale be of land or of goods. The question of the *right to determine* may also be advantageously postponed for discussion, until after the subjects of relief against forfeiture, special agreements, etc., have been considered.

SECTION II.—RESALE.

Whether a vendor has a general right of resale on complete breach of an agreement for sale of land by the purchaser, apart from express stipulation, and apart from resale directed to enforce the vendor's lien, or the liberty to resell after rescission, is a doubtful proposition. *Noble* v. *Edwards*,[1] a decision of Bacon, V.C., but to some extent *obiter*, is usually cited and relied on in support of the assertion that the vendor has the same common law right of resale in respect of land, as a seller of goods has in respect of goods on the purchaser's default. The reader is referred to the criticism on this case, and the discussion of the question in Williams on V. & P. (pp. 51-65). The learned author concludes that the better opinion is that the right of resale does not exist apart from the liberty to resell arising on rescission or directed to enforce the vendor's lien, unless expressly reserved by the contract. *Noble* v. *Edwards*, however, is approved and followed by Beck, J., in *Moodie* v. *Young*,[2] and in *Merriam* v. *Paisch*.[3]

However this may be, it is by no means clear that, whether if this right of resale be exercised by the vendor, he sells *quâ* owner,[4] or whether he can recover the deficiency if there is a loss; and is co-relatively liable to restore the surplus, if the resale results in an excess.

Mr. Williams (pp. 5[illegible]) states that *as in a case of goods* it appears that such resale does not rescind the original contract,[5] and so that not only may the vendor recover any

[1] 5 Ch. D. 378.

[2] 8 W. L. R. 310; 1 A. L. R. 337.

[3] 8 W. L. R. 340; 1 A. L. R. 262, and see Dart V. & P. (7th) 179; Davidson, Prec. Cons. (5th), 476; Mayne on Damages (8th), 248; *McCready* v. *Clark*, 14 W. L. R. 480.

[4] See Williams, p. 1059.

[5] And cf. *Sawyer* v. *Pringle*, 18 O. A. R., at p. 227; *Moodie* v. *Young*, 1 A. L. R. 337.

deficiency of price occurring on the resale, but that the purchaser may recover any surplus realized on the resale over the amount of the original price.

In the last edition of *Benjamin on Sales*,[6] the cases, "*as in a sale of goods*," are reviewed, and their effect is summarized as follows (p. 935): "If the buyer repudiates the contract before the goods have been delivered, the seller may, if he chooses, treat the contract as *rescinded*, (sic) resell the goods and recover any loss occasioned by the buyer's breach of contract." As to the buyer's right to recover the price paid, and what amount (e.g., whether the seller may deduct expenses of sale), the present position of the matter is summarized as follows (p. 955):—

"These questions must remain for the present unanswered, but it is submitted that there is no authority inconsistent with the view that where there is a profit on a resale the buyer, although in default, may be entitled to recover his purchase-money or part of it."

Now it would appear that the present editors of Mr. Benjamin's work have fallen into the very confusion resulting from the ambiguous use of the term "rescind" against which they caution the reader (pp. 934-5). For, if as pointed out at p. 955, rescission logically results in a *restitutio in integrum*, it follows that the purchaser *must* be entitled to recover his purchase-money, and the vendor having rescinded can have no claim under the contract to recover any deficiency by way of damages—i.e., that after rescission he can only sell *quâ owner* (see p. 932).[7] Consequently if this right of resale carries with it the right to sue for and recover the deficiency it cannot be a true rescission of the contract; but as there seems some doubt as to whether the purchaser is not entitled to recover his purchase-money, less perhaps the costs of resale, the remedy, if in truth it

[6] 5th Ed., by Messrs. Ker & Butterfield, 1906.

[7] And cf. Williams, p. 1053.

exists, has for this, and other reasons, been classed as resulting from disaffirmance of the contract. Perhaps it might provisionally be called a case of *quasi-rescission*.

Noble v. *Edwards* is cited and applied by Gregory, J., in *McCready* v. *Clark*.[8] In this case, the agreement contained no provision for resale, nor for determination. The purchase-price was $1,600, of which $400 was paid down; the balance was payable in four semi-annual instalments of $300 each. The purchaser paid none of the subsequent instalments. In May, 1908, the purchaser, who had in previous letters explained he was unable to pay, wrote asking the vendor to "make a big effort to sell" the property "and relieve the situation."

In July, the vendor gave the purchaser 30 days' notice of sale, stating that he would look to the purchaser to make up any deficiency. The vendor did not succeed in selling until February, 1910, when he sold for $1,500. On the 4th April, 1910, the property in the meantime having suddenly increased very much in value, the purchaser paid the balance due under the terms of the agreement into a bank to the credit of the vendor; the vendor having refused to accept it, the purchaser sued for specific performance.

Having regard to the delay, the purchaser's conduct, and other circumstances, the Court refused specific performance. Gregory, J., holds that the vendor was entitled to resell; that the purchaser was not entitled to the return of the $400, treating it as a "deposit," but that since the vendor's notice claimed from the purchaser the deficiency (if any) on the resale, the purchaser was entitled to the surplus (if any) crediting him with the $1,500 realized on resale, *plus* the $400, after deducting the vendor's expenses of resale and costs of action.[9]

[8] 14 W. L. R. 480.

[9] *McCready* v. *Clark*, 14 W. L. R. 480.

Whether the vendor, exercising this right of resale, is bound to give notice or not is discussed later in Chapter VII.

It will be useful here to recapitulate and distinguish the different cases in which the vendor can resort to a sale. These are:—

(a) Under an *implied power* of resale, where there is no express stipulation in the contract. The power is doubtful, but assuming it, it is also doubtful whether the vendor so selling, sells *qua* owner or not—(p. 67).

(b) Resale to enforce *vendor's lien*, in which case the vendor sells for and on account of the purchaser, who is liable for any deficiency, and entitled to any surplus (p. 41).

(c) Sale, after *default in judgment for specific performance*, which seems, in effect, the same as resale to enforce vendor's lien (p. 50).

(d) *Possibly*—a *sale ordered by the Court* in lieu of determination or rescission as directed in *C. P. R.* v. *Meadows* (*q. v.*). (See Ch. IV., Sec. II. (2)).

(e) *Resale after rescission*, where vendor sells *qua owner* (p. 61).

(f) Resale under *express power*, which operates as rescission (?), but *semble* the vendor may recover any deficiency, though not accountable for surplus. (See Ch. IV., Sec. III.).

CHAPTER IV.

Vendor's Remedies—Special Conditions.

Section I.—General Considerations.

If we assume that the land which is the subject matter of the contract has depreciated in value and that the purchaser is not financially responsible—an assumption which is amply justified in the majority of cases where the purchaser makes default in payment—none, and no combination, of the remedies heretofore considered seems entirely satisfactory. It is, perhaps, a mere truism to say that the object of the vendor in making the sale was to get rid of the land and to secure, presumably, the largest possible sum of money in exchange. To sell to one particular purchaser, the vendor may have refused other advantageous offers; during the time that the purchaser has been in good standing, the vendor might, perhaps, have sold at a large advance, if he had not parted with this right to the purchaser; probably the purchaser has been for a longer or shorter period in actual possession. It is quite common, especially in sales of railway lands, to make the purchase-money payable in six, eight or ten equal annual instalments with interest, giving the purchaser immediate possession. If now at the end of four or five years there comes a "slump" and the purchaser repudiates his agreement, what is the position of the vendor?

An action for the price is of no use since *ex hypothesi* the purchaser is execution-proof. A judgment for damages is equally of no value, though if the payments on account have been considerable, since the vendor can retain these, setting them off against the damages—which is the difference between the contract price and the present value of the land which is thrown back on his hands, plus interest and costs, it is obvious that in some cases this is a very effective

remedy, and it seems curious that, under such circumstances, it is not more often resorted to. In such a case, however, if the payments on account be in excess of the damages, interest and costs, the vendor would have to make good the difference to the purchaser—and vendors seem to have a rooted, and not altogether unnatural, antipathy to parting with the money paid to them; while, on the other hand, if the moneys in the vendor's hands were less than the damages, the vendor must in reality suffer the loss, having a worthless judgment against the purchaser for the difference.

To procure a sale to enforce the vendor's lien, with judgment for the deficiency, involves a more or less troublesome, and, perhaps, expensive action, and here again the judgment is valueless.

It is obvious that in ninety-nine cases out of a hundred, the vendor does not want to rescind—to take back the land and return the money, with the shadowy "remedy" of an account of rents and profits, probably involving the expense and annoyance of a reference. By joining a claim to enforce the vendor's lien with an action for specific performance, the vendor, it is true, may eventually get an order for possession operating as a foreclosure; but we have seen that this is a very roundabout and tedious business.[1]

Under these circumstances, it is not surprising that the ingenuity of conveyancers should have been directed towards evolving a form of agreement that would give the vendor more effective remedies in case of the purchaser's default, especially where the time for payment has been extended over a term and the purchase-money made payable by instalments. The object aimed at is clear—it is simply to enable the vendor on the purchaser's default to *determine* the agreement—thus avoiding the undesirable effects logically resulting from *rescission*, to resume possession of the land, and to retain not only the deposit, but also all instalments paid to him on account of the purchase-money; or to

[1] Cf. per Bacon, V.C., in *Noble* v. *Edwards*, 5 Ch. D. at 385.

enable the vendor to proceed to a resale "out of Court," in analogy to the exercise by a mortgagee of the power of sale under a mortgage.

These agreements assume a great variety of form and expression, many are no doubt very inartistically and clumsily drawn, but the general object of them all is in effect as stated above.

Thus, it is generally expressly provided that time shall be of the essence of the contract; sometimes there is no such express provision: some of these agreements have elaborate provisions for notice to the purchaser of determination, etc., some have none, or very simple provisions; some provide that upon default the agreement shall be "null and void;" some that the vendor may "rescind" or "cancel;" some that payments made shall be "forfeited;" some that the vendor may "retain" such payments; others that the purchaser shall not have any right of "reclamation" or "revendification" (whatever this may mean) and so on. The substantial effect aimed at in all these cases is, however, as before stated, the same—viz., *that on default in payment by the purchaser the vendor shall have the right to "determine" the contract, and to retain all instalments already paid on the purchase-price.*

It is impossible to discuss these different forms of agreement in detail here,[2] but assuming the general import and object to be as stated, the following questions invite inquiry:—

(a) Is there any good reason why the parties should not be allowed to make such a contract, or why the Courts should not enforce it?

[2] Cf. Chitty, J., in *Ashburner* v. *Sewell* (1891), 3 Ch., at p. 410: "Cases on the law of vendor and purchaser are often extremely complex, and require minute investigation, and although from some of them general principles may be evolved, they often result in the judge's opinion on the particular contract actually before him."

(h) If there is not, what is the true relation between the parties under such an agreement? and in what method will the Courts enforce it? To what extent and how will relief against forfeiture be extended to the purchaser?

The discussion of these questions is more particularly applicable to the "determination" and "forfeiture" clauses; but it seems that to some extent the same considerations apply to the power of sale, since the latter is said to operate as a rescission and the purchaser is not entitled to the surplus, even though liable for the deficiency:[a] though, of course, the agreement may expressly stipulate to the contrary.

(a) *Is there any good reason why the parties should not be allowed to make such an agreement, and why the Courts should not enforce it?*

Generally speaking, parties entering into a contract may introduce into it any terms—however harsh, however foolish or absurd—that they choose, or may, on the one hand or the other, be obliged to submit to. Provided that such terms do not involve illegality, contravention of public policy, or impossibility of performance, the Courts will, as a rule, hold the parties to their bargain. Equity, no more than law, prevents a man from taking advantage of the necessities of his neighbour, however contrary to the moral law, the dictates of conscience, or the code of honour. It is true that, when it comes to the method of enforcing the contract, equity may grant some measure of relief; but never by annulling the contract: it *relieves* against the method of enforcing the penalty or forfeiture, it does not *remit* it: it disregards the *letter*, but enforces the *spirit*.

Mr. Justice Beck, of the Supreme Court of Alberta, has held such a provision for determination in an agreement of sale as we are considering merely "*in terrorem*," "bad,"

[a] Williams, p. 69; but see per Stuart, J., *C. P. R.* v. *Meadows*, 1 A. L. R., at p. 354.

and "void;"[4] and in a later decision[5] seems inclined to the opinion that a clause making time of the essence of the contract is, in this connection, equally "bad" and "void." It is respectfully submitted that this is true only in a metaphorical or rhetorical sense. Because the Court may relieve against the method of enforcing such a provision, it does not by any means follow that the clause is "*bad.*" *The Clyde Engineering, etc., Co.* v. *Castaneda*[6] and *Wallis* v. *Smith*,[7] which are cited as authorities for "*in terrorem*," and "bad," "void" respectively, certainly do not go to the extent of holding such a provision to be actually bad, void, or merely "*in terrorem.*" In fact, in the latter case, Jessel, M.R., even in the class of cases he is discussing, takes exactly the opposite view (see pp. 256-7).

In *Wallis* v. *Smith*, Jessel, M.R., is discussing the question of penal provisions, and among others, "where a sum of money is stated to be payable either by way of liquidated damages, or by way of penalty for breach of stipulations," but even in this class of cases, he states (pp. 256-7) that: "It is certainly open to the parties . . . to stipulate that on failure to perform, a fixed sum shall be paid by way of compensation."

There is, of course, no question that, so far as *rescission* is concerned, the parties may stipulate that, upon certain contingencies arising, the contract shall be "null and void."

Sir Edward Fry says: "Such stipulations are frequent in contracts for the sale of land."[8]

"When a contract stipulates that on the happening of a certain event, it shall be void, the construction put upon

[4] *Great West Lumber Co.* v. *Wilkins*, 1 A. L. R. 155, 7 W. L. R. 166.

[5] *Moodie* v. *Young*, 1 A. L. R. 337; 8 W. L. R. 310.

[6] 91 L. T. 666.

[7] 21 Ch. D., at p. 256.

[8] Fry, par. 1045.

it by the Courts generally is, that it may in this event be rescinded by the party injured by such event. Thus a proviso that in case the vendor of an estate cannot deduce a good title, or the purchaser shall not pay the money at the appointed day, the contract shall be void, has been held to mean that in the former case the purchaser, and in the latter the vendor, may avoid the contract, and not that the contract is utterly void."[9]

Now, of course, *rescission* does not involve a *penalty* at all; though it may effectually work a *forfeiture* of the purchaser's equitable estate in the land (a subject discussed later). But why may not the parties, if they choose, stipulate that, under certain circumstances, the vendor may *determine* the contract, retaining the moneys paid under it, *leaving it to the Courts to relieve against the forfeiture (if any) if a proper case is made out for relief?*

At common law, a mortgage in effect works a forfeiture of the mortgagor's estate, and payments made for principal and interest, if he fails to pay the balance remaining due at maturity. The mortgage is not, therefore, "bad" or "void;" but equity will relieve against the forfeiture.

Similarly, it is submitted that such a provision in an agreement of sale as we are considering is not "bad" or "void," or merely "*in terrorem;*" simply because the Courts will grant similar relief, *if a proper case for relief is made out.*

Just the same question was raised as to an express stipulation that time should be of the essence. It was urged that in equity such a stipulation in a contract was void. But nothing seems clearer than that it is entirely open to the parties expressly so to stipulate; "and accordingly express stipulations rendering time of the essence have repeatedly been maintained as valid and binding in equity, in respect,

[9] Fry, par. 1046.

for, instance, of covenants for the renewal of leases, and stipulations as to time for payment of the deposit, or the balance of the purchase-money."[10]

"Whether a person is not at liberty to make a contract in which time shall be introdnced as one of the terms of the contract . . . and . . . to say that he should not be allowed to insist on such stipulation forming part of the contract would be going far beyond any of those cases in which thc Court has regarded time as *not* of the essence of the contract. It would go to this extent that a person might not contract that time should be of the essence of the contract."[1]

The fact of the matter seems to be tbat there is no difference in the actual construction of the words in a contract in a Court of Equity from the construction in a Court of law. In *Tilley* v. *Thomas*,[2] Sir John Rolt says: "Now, as a matter of construction merely, I apprehend, the words must have the same meaning in equity as in law. *The rights and remedies contingent on that construction* may be different in the two jurisdictions, but the grammatical meaning of thc expression is the same in each. And if this be so, time is part of thc contract, and, if there is a failure to perform within the time, the contract is broken in equity no less than at law. But in equity, *there may be circumstances* which will induce the Court *to give relief* against the breach, and sometimes, even though occasioned by the neglect of the suitor asking relief. Not so at law. The legal consequence of the hreach must here be allowed strictly to follow. The defendant is entitled to say that the contract is at an end, and it is in this sense I apprehend that in such cases it is said that time is of thc essence of the contract at law, *though not necessarily so in equity.*"

[10] Fry on S. P., par. 1076.

[1] *Honeyman* v. *Marryat*, 21 Beav. 14, per Sir J. Romilly, at p. 24; cf. also *Lloyd* v. *Collett*, 4 Bro. C. C. n. (3) 469. See note to *Harrington* v. *Wheeler*, 4 Ves., at p. 691.

[2] L. R. 3 Ch. 61.

To a very similar effect is the language of Harlan, J., delivering the judgment of the Supreme Court of the United States, in *Cheney* v. *Libby* (134 U. S. 68). He says: "The parties in this case in terms too distinct to leave room for construction not only specify the time when each condition is to be performed, but declare that 'time and punctuality are material and necessary ingredients' in the contract, and that it must be 'strictly and literally' executed. However harsh and exacting the terms may be . . . they do not contravene public policy, and, therefore, the refusal to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves. . . . But there are other principles founded in justice which must control the decision of this case. Even where time is made material by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subsequently performed without unreasonable delay, and no circumstances have intervened which would render it unjust or inequitable to give such relief."

Consequently, it is submitted that a clause providing for determination and forfeiture of payments made to the vendor is perfectly *valid;* but it by no means follows that the Courts will and must enforce the contract between the parties in accordance with the strict letter, or that the application of an equitable method of *relief* against forfeiture (of which more hereafter) is thereby excluded, under all circumstances.

Assuming, then, that it is open to the parties to stipulate for determination by what is commonly called a "forfeiture" clause, it becomes necessary to enquire whether equity will grant any relief, to what extent and in what manner. In this discussion, we shall have to take up the distinction between a "deposit" and an "instalment," the definition of "forfeiture," the effect of a clause providing that time shall

be of the essence, how far the distinction between "penalty" and "liquidated damages" affects the question, and finally the nature and method of the "relief" extended by the Courts.

Since as soon as the parties have entered into a binding agreement of sale, the purchaser acquires an equitable estate in the land, it is a mere truism to say he is entitled to have that estate protected in a Court of Equity. The question, in each case, is under what circumstances, to what extent, and in what method the Court will afford protection.

Cases may arise:—

1. Where nothing has been paid by the purchaser either by way of deposit, or on account of the purchase money.

2. Where a "deposit" only has been paid by the purchaser.

3. Where sums of money, one or more instalments, have been paid on the purchase price.

Other important considerations are:—Whether the purchaser has been let into possession or not, and if he has, whether he has been in receipt of rents and profits or not; whether the land is of permanent value—presumably acquired as a permanent investment, or for actual residence or occupation—or rather of a speculative value,[3] e.g., mining rights, or land bought for a prospective rise merely—and there are many other circumstances that the Court may properly inquire into.[4] In every case, a proper case for the interference of equity must be made; relief is not granted as a matter of course; it rests in the judicial discretion of the Court. The party asking relief must be prompt; he must come with clean hands, etc., etc.[5]

[3] Cf. *Manson* v. *Howison*, 4 B. C. R. 404; *Hudson* v. *Temple*, 29 Beav. 536, 543; *Tadcaster Brewing Co'y* v. *Wilson* (1897), 1 Ch. 705, 711.

[4] *Jones* v. *Gardiner* (1902), 1 Ch. 191, 196.

[5] Cf. for example: *Zimmer* v. *Karsh*, 15 W. L. R. 58; *Smeaton* v. *Lynn*, 4 Sask L. R., per Lamont, J., at 190-191.

Section II.—Where No Deposit or Payment Made.

Where a binding agreement of sale has been entered into, but nothing has been paid either by way of deposit, or on account of the purchase money, and the contract is repudiated by the purchaser, or default is made in payment of the purchase money, a case for "determination" does not arise in the proper sense. The vendor can, of course, affirm the contract, in which case he can have recourse to his action for the price, for damages, or for specific performance; but if he wishes to disaffirm, his proper course would appear to be to *rescind* or perhaps to resell.

It has already been suggested that such rescission or resale may in effect work a forfeiture of the purchaser's equitable estate, and consequently, *under very special circumstances,* the Court may even in the class of cases we are now considering relieve the purchaser from the full consequences of his default. If the purchaser could show, for example, that he had been in possession, had made improvements, that the land was essential to the enjoyment of adjoining property, that he had entered into binding contracts on the faith of acquiring it—some or all of these, or similar facts may, coupled with some reasonable explanation of default, induce the Court to extend to the purchaser a *locus pœnitentiæ*—the usual form of relief against forfeiture—without infringing upon well-settled principles of equity, in fact such relief (in the discretion of the Court) would appear to be in entire accordance with equitable principles.

Thus, in *Pierson* v. *Canada Permanent*, although the Court upheld the "rescission" and the "forfeiture" of the down payment, Hunter, C.J., says: "There is no doubt the case is one of hardship. . . . If the corporation had known that the plaintiff had entered ir , possession and expended all these moneys on the property, then it would have been the duty of the Court to rigorously scrutinize

the circumstances surrounding the forfeiture of the property in the hope of finding some ground of relief."[1]

In *Atkinson* v. *Ferland*, the purchaser made default in payment of the first instalment of the purchase-money, $6,000, "on or before 6th August, 1907." Between the 8th and the 29th August, on which latter date a formal tender of the $6,000 was made, the purchaser unsuccessfully endeavoured to get the vendor to accept the payment. It is noted that at the time of the execution of the agreement for sale, payment on the exact date fixed had not been regarded as material, and that a very reasonable explanation of the delay was furnished. Mulock, C.J., taking this into consideration, *along with other circumstances*, held the purchaser entitled to specific performance; but as an alternative remedy, the vendor having resold the property, gave him damages instead.[2]

This judgment was subsequently reversed by the Divisional Court; but, on the ground that the nature of the subject-matter was such, coupled with the fact that the payment was made to synchronise with payment to be made to the outgoing partners, that it was inequitable to grant an extension of time for payment. Boyd, C., says:—"This is not merely a transaction as to the purchase of land; it is essentially a transaction of partnership for the acquisition of lands, license, goodwill and chattels for the purpose of trade and gain between the partners. The circumstances indicate that expedition was the prominent note of time. . . . The very fact that a day of two extra time was mentioned by Sutherland indicated that the date fixed was material and important. It was a day not named arbitrarily; it was the same day as that on which the outgoing partners wanted their first payment of $6,000, and the money to make this was expected from the incoming partners, the plaintiff." (12 O W. R., at pp. 1256-7.)

[1] 11 B. C. R. 139.
[2] 12 O. W. R. 598.

Section III.—Where Deposit Only.

Where a "deposit" merely has been paid, it seems fairly well settled that, unless a case for relief could be made out, of the same nature as under sec. II. in case of default in the payment of the purchase-money, equity will not relieve[1] against its "forfeiture."

The deposit, being in the nature of a guaranty for the performance of the contract, when the purchaser makes default, is forfeited; and this, whether express provision is made for its forfeiture by the contract or not.[2] Thus, Lord Macnaghten says:[3] "Everybody knows what a deposit is. The purchaser did not want legal advice to tell him that. The deposit serves two purposes—if the purchase is carried out, it goes against the purchase-money—but its primary purpose is this, it is a guaranty that the purchaser means business; and if there is a case in which a deposit is rightly and properly forfeited, it is, I think, when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."

Bowen, L.J., in *Howe* v. *Smith*,[4] states that "In the absence of any specific provision, whether the deposit is to be forfeited depends on the intent of the parties to be collected from the whole instrument."

The general rule, however, is expressed by Lord St. Leonards, quoted by Cotton, L.J., in *Howe* v. *Smith, supra.* "Where a purchaser is in default, and the seller has not parted with the subject of the contract, it is clear that the

[1] *Pierson* v. *Canada Permanent*, 11 B. C. R. 139.

[2] *Ex parte Barrell*, L. R. 10 Ch. 512; *Hart* v. *Porthgain Harbour Co'y* (1903), 1 Ch., at p. 693; Williams on V. & P., pp. 26-27. Howe & Smith, 27 C. D. 89; *Catton* v. *Bennett*, 51 L. T. 70.

[3] *Soper* v. *Arnold*, 14 A. C. 429; cf. *Barton* v. *Capewell Continental Patents Co'y* (per Wills, J., 68 L. T., at p. 859).

[4] 27 Ch. D. 89.

purchaser cannot recover the deposit; for he cannot by his own default acquire a right to rescind the contract."

In *Howe* v. *Smith*, the vendor had already rescinded the contract, and resold *quâ* owner; hut, as said by Cotton, L.J., "The mere resale of the estate after the purchaser's defanlt caunot in any way affect the right of the vendor to retain the deposit."

Howe v. *Smith* (*supra*) is followed, and applied in a very full and instructive judgment hy Eve, J., in *Hall* v. *Burnell*,[5] and the cases are reviewed by Gregory, J., in *McCready* v. *Clark*.[6]

It will be noted that in the above, the vendor sold *quâ* owner *after rescission;* not under a clause in the contract. The distinction is important: "If he act under the clause, he must bring the deposit into account in his claim for the deficiency; if he sells as owner, he may retain the deposit, but loses his claim for the deficiency nnder the clanse."[7]

These rules as to forfeiture of the deposit apply equally where the deposit is in the hands of a stakeholder.[8] In *Jackson* v. *DeKadich*,[9] Farwell, J., held that the vendor was not entitled to retain the deposit on rescission; hut as pointed ont hy Eve, J.,[10] the true facts in *Howe* v. *Smith* had not been brought to the attention of the learned Judge.[1]

In *Hall* v. *Burnell* (*supra*), there had been judgment for specific performance; the defendant failed to complete according to the terms of the judgment, and the plaintiff moved, on notice, for an order that the agreement be rescinded and the deposit forfeited. Eve, J., after reviewing the case, made the order as asked.[2]

[5] 1911, 2 Ch. 551.
[6] 14 W. L. R. 480.
[7] Per Fry, L.J., in *Howe* v. *Smith* (*supra*).
[8] Williams on V. & P. (2nd), 1055.
[9] 1904, W. N. 168.
[10] *Hall* v. *Burnell* (*supra*).
[1] Cf. Williams, 1035, *note* (f).
[2] See *ante;* Chap. II, Sec. II. Specific Performance; Consequential Relief.

In the case of a verbal contract, if the vendor resists the purchaser's action on the plea of the Statute of Frauds, he is liable to return the deposit as money had and received;[3] but if it is the purchaser who sets up the statute, he cannot recover the deposit.[4]

Distinction between Deposit and Instalment.

It is, however, important further to define this word "*deposit.*" While a deposit is to be distinguished from an instalment paid on account of the purchase-money, it is not like a sum of money paid for an option—which is nothing more than the consideration actually paid for the option—even though it may be mutually agreed that it be applied on the purchase-money in case the option is exercised affirmatively.[5]

A deposit is, as a rule, in fact both a guaranty and a part payment.

The difference between the practice in England and in Western Canada in respect to agreements for sale has already been pointed out. In England, it appears that almost invariably in sales by auction, and not infrequently on sales by private contract, on execution of the agreement of sale, a sum of money—not necessarily an aliquot part of the purchase-price—is paid either to the vendor, or to a stakeholder, as a security and guaranty of performance by the purchaser; the same practice obtains in Canada almost invariably in cases of sale by auction, or under sales by order of the Court.

Curiously enough, none of the cases seem to recognise the palpable fact that the deposit is essentially in the nature of a *penalty*—nay it is a penalty—an arbitrarily fixed *penal* sum which is forfeited whether damages result or not from

[3] *Gosbell* v. *Archer*, 2 Ad. & El. 500.
[4] *Thomas* v. *Brown*, 1 Q. B. D. 714, and see Williams (2nd), p. 365.
[5] 21 A. & E. Encl., p. 926.

non-completion by the purchaser. This, then, is one of the cases of a penalty against which, as the cases show, equity will not relieve.[6]

In the agreement of sale on what is called the instalment plan, where the purchase-money is divided into a number of instalments, if, as is usually the case, there is a "down" payment—especially if it is an aliquot part of the purchase-price—it partakes more of the nature of an "instalment" than the "deposit" in the English form of transaction. It becomes, in many cases, an essential matter to determine whether the "down" payment is not properly rather to be deemed an "instalment," than a "deposit." It is clear that the mere fact that it is to be applied on the purchase-price[7] —and probably even the mere fact that it is an aliquot part of the purchase-price—is not conclusive against the "down" payment being held a deposit. But, on the other hand, cases do arise in which it would be clearly inequitable not to hold the "down" payment an instalment as distinguished from a deposit.

In *McCready* v. *Clark*,[8] Gregory, J., says that he can find no such distinction in *Howe* v. *Smith*, or *Sprague* v. *Booth*, and he can see no difference in principle.

In *March Bros.* v. *Banton*,[9] Sir Louis Davies (Duff, Anglin and Brodeur, JJ., concurring), says: "I take it as clear that in all cases the question of the right of the purchaser to the return of the moneys paid by him—whether by way of deposit only or 'by way of deposit, and as part payment of

[6] Exactly the same amount as the deposit may be fixed by the parties as "liquidated damages"—as in *Catton* v. *Bennett*, 51 L. T. 70; but it will be noted that this case expressly recognizes the distinction between forfeiture of the deposit, and the recovery of the amount by way of liquidated damages; cf. *Barton* v. *Capewell Continental Patents Co.*, 68 L. T. 857.

[7] Cf. *Kilmer* v. *B. C. Orchard Lands Ltd.*, 17 B. C. R., at p. 247, 20 W. L. R., at p. 901.

[8] 14 W. L. R., at p. 489.

[9] 45 S. C. R. 338; 20 W. L. R., at p. 323.

the purchase,' or as part payment of the purchase money, is a question of the conditions of the contract, and the intention of the parties as expressed in or to be implied from these conditions."

* * * * * *

"The reason, however, for holding that moneys paid either as a deposit, simply . . . cannot be recovered back . . . has no application to the case where moneys are paid simply on account of and as part of the purchase money."

* * * * * *

"In the case now under consideration, in my opinion, the agreement did not contain any language from which such an intention could be drawn."

The Court consequently dismissed the appeal, affirming the judgment of the Supreme Court of Saskatchewan.[10] In this latter Court, Lamont, C.J., says, after quoting *Howe* v. *Smith*:

"It follows from this that, where a sum of money has been paid down on the execution of a contract for the sale of land, and the balance is payable by instalments, whether the down payment is to be regarded *as a deposit or an instalment* of the purchase money depends on the intention of the parties as expressed in the agreement."

In *B. C. Orchard Lands Co.* v. *Kilmer*,[1] Irving, J., says: "But where as here, the word 'deposit' is not mentioned, it becomes a question to be determined, upon the circumstances of the case, whether the down payment is to be regarded *as a deposit or an instalment* of the purchase money," and he holds that one circumstance to be considered is the proportion that the down payment bears to the whole purchase price.

[10] 16 W. L. R. 337; cf. 12 W. L. R. 599.
[1] 20 W. L. R., at p. 901.

It is submitted that, from these, and other cases which follow, the question whether the down payment is to be regarded as a "deposit," or as an "instalment" depends on the language and construction of the agreement, and the surrounding circumstances. Thus, Harvey, J., in *Skinner* v. *Shirkey*,[3] speaking of the down payment, says: "But the amount both absolutely and relatively to the purchase-price, is so large as to indicate that it was not a deposit, and there is nothing in the contract to indicate that it was to be considered other than part of the purchase-price pure and simple." In *Tavender* v. *Edwards*,[2] Stuart, J., says: "The question seems to be largely one of the intention of the parties, and I can find nothing in the agreement which would indicate that the cash payment was intended to be looked upon as in any way different from other succeeding payments. The question has not yet come up on appeal in this Court; but there have been several individual decisions by members of the Court, and I think it is fairly well settled now that in the case of a purchase and sale agreement where purchase-money is payable by instalments, and a cash payment is made and referred to in the agreement, that payment is not to be looked upon as a deposit, and therefore forfeitable, unless there is something specifically stated in the agreement to that effect."

In *Re Dagenham (Thames) Docks Co.*,[3] the down payment (£2,000) was one half of the purchase-price—it was not there seriously contended that it was to be regarded as a deposit—a guaranty for performance. In *Pierson* v. *Canada Permanent*,[4] the purchaser on 22nd March, 1904, entered into an agreement to buy certain lands for $950—"down" payment $100, balance on or before 1st July, 1904. Time was expressly of the essence of the contract,

[2] Cf. *Labelle* v. *O'Connor*, 15 O. L. R. 519; *Tavender* v. *Edwards*, 8 W. L. R. 308, 1 A. L. R. 333.

[3] L. R. 8 Ch. 1022.

[4] 11 B. C. R. 139.

which further provided that on non-observance of the stipulations, the vendor might "treat the contract as cancelled and all payments forfeited and may resell without notice, &c." The plaintiff did not pay the balance on the 1st July, and on July 18th, the vendor notified him of cancellation and that they had resold the property. Although the plaintiff had been in possession and expended a considerable sum of money on the property, Hunter, C.J., though with some reluctance, upheld the cancellation and forfeiture of the "deposit."

Now, though the decision is based on the ground that, "the agreement having made time of the essence allowed the corporation to rescind if payment was not made as stipulated," it is submitted, on the authorities, that the decision can only be supported on the principle that the "down" payment was properly regarded as strictly a "deposit." In fact this case is so treated by Beck, J., (in *Great West Lumber Co.* v. *Wilkins*[5]) who says it "is a case of forfeiture of the deposit only, and the decision might properly have been given independently of a forfeiture clause." If, in this case, the purchase-money had been divided into eight instalments of $100 each, and one of $150 (making the $950) and the down payment had been the first of these instalments, it would seem that the Court, taking into consideration all the other circumstances in favour of relieving the purchaser, might very properly have seen its way to regard the down payment rather as an "instalment" than as a deposit, and so have given relief as suggested by Collins, L.J., in *Cornwall* v. *Henson*,[6] "as was done in *Re Dagenham (Thames) Dock Co.*"[7] Take a case where the purchase-price is $10,000, "down" payment $2,500, balance in three equal annual instalments of $2,500 each. Is the "down" payment of one quarter to be regarded, as, of

[5] 1 A. L. R., at p. 169.
[6] 1900. 2 Ch. 293.
[7] L. R. 8 Ch. 1022.

course, a "deposit"—and so properly forfeitable without any *locus pœnitentiæ*, if the purchaser makes default in payment of the next instalment? It would seem that in such a case very slight circumstances would be sufficient to enable the Court to hold it rather an "instalment" than a "deposit."

As an example of the converse, where the down payment seems meant to have been a deposit, but was treated as an instalment—"following in *Re Dagenham (Thames) Dock Co. & Cornwall* v. *Henson*,"—reference may be made to *Crawford* v. *Patterson*.[10] The facts, simplified, were in effect, that the purchaser in August, 1905 agreed to buy certain farm-lands for $2,400, down payment $200; and the balance by yearly payments of one-half of the crops: to break 35 acres for the next year's crop in 1906, build house and b. ..le, not to sell or remove the crop then on the land, but to keep the same for feed and seed the following year—with a proviso for determination by the vendor for breach of stipulations. The purchaser removed all the 1905 crop; did not erect any buildings, did not do any breaking that year; the acreage broken the next year fell far short of 35 acres, was not properly done, such crop as was sown was not properly sown, and no buildings were erected. Notice of cancellation was given on July 26th, 1906, and the vendor resold. It was held in an action by the assignee of the purchaser that they were entitled to be refunded the $200, and to recover $250 damages, "the proceeds of the resale in excess of the original purchase money," with costs of action. It is submitted that in this case the distinction between "deposit" and "instalment" was disregarded, and *Re Dagenham (Thames) Dock Co.* and *Cornwall* v. *Henson* misapplied, and that it was essentially a case for the application of the rule in *Howe* v. *Smith*.[1]

[10] 7 W. L. R. 183, 1 A. L. R. 27.

[1] 27 Ch. D. 89.

Section IV.—Where One or More Instalments Paid.

(a) *General.*

But it is in the third group of cases where an instalment or instalments (as distinguished from a deposit) have admittedly been paid on account of the purchase-price, and the vendor assumes, or applies, to determine the contract and to retain or "forfeit" the moneys paid, under a clause in the agreement providing for determination or cancellation, that there has been the most appalling conflict in judicial opinions.

On the one hand we find a line of decisions declaring such a clause merely "*in terrorem*," "bad," "void,"[1] (even that a clause making time of the essence of the contract is equally "bad," "void," etc.);[2] on the other we find it laid down that the parties are bound by the *ipsissima verba* of the contract; that they have made their bargain and must abide by it; that the Courts cannot interfere.[3] In one group of cases "relief" to the purchaser is suggested by directing the vendor to refund all moneys received—less a "fair rental"[4] (i.e., attempted *restitutio in integrum*); in the other absolute and immediate forfeiture enforced, without any *locus pœnitentiæ* or hope of redemption; without any regard to the surrounding circumstances, e.g., possession, improvements or the like.

It has already been argued that such a clause cannot be considered void; the holding, carried to its extreme in

[1] *Great West Lumber Co.* v. *Wilkins*, 1 A. L. R. 155; 7 W. L. R. 166.

[2] *Moodie* v. *Young*, 8 W. L. R. 310; 1 A. L. R. 337.

[3] *Steele* v. *McCarthy*, 7 W. L. R. 902. Cf: *Hole* v. *Wilson*, 10 W. L. R. 153; *Midgeley* v. *Bacon*, 4 Sask. L. R. 152.

[4] *C. P. R.* v. *Meadows*, 8 W. L. R., at p. 814; 1 A. L. R. 344. Cf. *Hall* v. *Turnbull*, 10 W. L. R. 537; *Banton* v. *March*, 12 W. L. R. 599; and *contra*, see *Zimmer* v. *Karst*, 15 W. L. R. 58; 3 Sask. R. 304.

Steele v. *McCarthy*, and subsequent cases in Saskatchewan following it, that the parties are bound by the *ipsissima verba* of their contract, overlooks the power and statutory duty of the Courts to relieve against penalties and forfeiture; the direction to refund to the purchaser the money he has paid to the vendor on the price is based on a misconception of the principles and method governing the granting of relief by a Court of Equity.

In *Zimmer* v. *Karst*,[5] Lamont, J., says: "The moment an instalment of purchase money is paid it becomes the absoluto property of the vendor. It is paid to him under an obligation to that effect contained in the contract, and once it is paid the purchaser has no interest in or claim to it. It is the sole and absolute property of the vendor. How then can the retaining of what is his own property by the vendor be any loss or disadvantage imposed on the purchaser, or deprive him of any property which up to that time belonged to him? The only right which a purchaser has in reference to the instalments of purchase money after they are paid is the right to have them returned to him in case of a *rescission* of the contract by the vendor, as distinguished from a *determination* of the contract under an express provision to that effect in the agreement itself,"[6]

The cardinal principle involved is that equity, neglecting the strict *letter*, will nevertheless enforce the contract according to its *true spirit*. Equity on the one hand, will not permit a party to exact his "pound of flesh" when he is only fairly entitled to a pound of money; nor, on the other, permit either party to evade the consequences of his contract. Equity does not make a new contract between the parties—does not, for example, convert an agreement for sale into a lease with an option of purchase—but moderates

[5] 3 Sask. R., at p. 310.

[6] This does not conflict with the decision in *March Bros.* v. *Banton*, where the defendants claimed the agreement was at an end and *rescinded*. See per Davies, J., 45 S. C. R., at p. 343.

the rigonr of the common law in determining the rights of the parties according to the letter of the bond by granting to the party oppressed such measure of relief as may not interfere with the substantial contractual rights of the would-be oppressor. However elementary, the restatement of this principle seems not superfluous in view of the state of the decisions on the snbject.

(*b*) *Definition of Forfeiture.*

Here again the necessity of a clear definition of terms presents itself. Relief against *forfeiture*? Forfeitnre of what? Is it the money that has been paid to the vendor and which he seeks to retain that is "forfeited," or is it the equitable estate of the purchaser, or both?

In *C. P. R.* v. *Meadows*,[1] Stuart, J., says:—

"At law the money had to be paid on the day named, but as long as the purchaser came in in a reasonable time and was not guilty of laches he could get specific performance if he went into equity. In granting specific performance at the suit of the vendor, the Courts always fixed a day for the payment of the money necessarily much later than the date fixed in the agreement, and there are numerous cases where although the purchaser did not pay on that day, a new day was given. Surely this is relieving against a forfeiture. Moreover, such a course is, in my view, the only thing that can in strictness be called relieving against a forfeiture, I mean the course of preserving by postponement after postponement the rights of the purchaser under the agreement. What, it must be asked, is the right of the purchaser nnder the agreement which the Conrt will endeavour as long as possible to preserve from destruction. The right is simply to have a conveyance of the land upon payment of the purchase-money. The Court, I grant, will struggle to preserve

[1] 1 A. L. R. 344.

that right for the purchaser as long as it possibly can, and does so by naming new days for the payment. But if the purchaser will not or cannot pay there comes a time when it is impossible to preserve his rights, simply because he is, in the last resort, the only one who can preserve them and that only by exercising them. The purchaser who has paid some money under an agreement of sale has, as I conceive it, two interests, first, *an interest in the property* to the extent of the money paid; second, a right to receive a title when he pays the balance. I agree that the Court may and ought, with certain limitations presently to be mentioned, to preserve the first from forfeiture. I agree also that it will, as long as possible preserve the second right by postponement of the day for completion, but I cannot agree that when the Court lays its own hands upon the property and orders a sale, calling in a new purchaser and forcing a new agreement, it is thereby merely preserving from destruction the purchaser's rights under the agreement, which, as I have said, are merely that he may pay the purchase-money and receive a title. This latter alone can, in my view, be called a relief from forfeiture. By ordering a sale the Court gives the purchaser something vastly different from his rights under the agreement. Instead of preserving his right to pay the purchase-money and get a title, it allows a new party to pay, not the purchase-money, but other purchase-money, under a new agreement, and to get a title, and it gives the original purchaser not his rights under the agreement, but the proceeds of the sale. By ordering a sale the Court is not relieving against a forfeiture, it is actually enforcing one. Once the property is sold under a decree the purchaser's right to get that property upon payment of money is forever gone, and instead he may have a judgment against him enforceable by execution if there happens to be a balance still due after the application of the proceeds. This only makes it clearer that it is impossible in the nature of things to avoid a forfeiture in the long run if the purchaser will not or cannot

exercise his rights by payment. In my view it is no answer to say that the Court gives him or preserves him his rights by giving him the benefit of the proceeds of the sale. The purchaser has, as I have said, a pecuniary interest in the property to the extent of payments made. He has no pecuniary interest beyond that, he has simply a right to get the title if he pays the balance. That is a different thing altogether, in my view, from a pecuniary interest in the property over and above the amounts paid, and it is this non-existent pecuniary interest that the Court gives him when it hands over to him or to his benefit the proceeds of the sale beyond what he has paid."[8]

No doubt it is right in a sense to speak of the moneys so retained by the vendor as being "forfeited," and, indeed, the conveyancer frequently so expresses it in drawing the agreement,[9] and sometimes even the statement of claim in the vendor's action asks a declaration that the moneys are "forfeited;" but is the expression quite accurate? We all know what is meant when we say that equity relieves against the penalty on a bond—it is simply that the Court will not allow the obligee to enforce payment of the penal sum according to the letter of the bond, where there is only a smaller sum due, or ascertainable as damages. Similarly relief against forfeiture, primarily at any rate, in the old Court of Chancery referred to forfeiture of an estate or interest in land, freehold or leasehold. Thus in *Cary* v. *Bertie*,[10] Lord Holt says: "And a Court of Equity may relieve to prevent *the divesting of an estate*, etc." The forfeiture against which equity relieves for breach of condition in a lease is clearly the forfeiture of the term, it has no relation to moneys paid for rent; and so with mortgages. "The

[8] This assumes that the vendor, so selling, sells, not *qua* owner, but for, and on account of, the purchaser; but see *post*, s.s. (e).

[9] Perhaps it may more truly be said that the word frequently occurs in the printed forms of agreement so commonly used by inconsiderate or non-professional conveyancers.

[10] 2 Vern. 339.

absolute forfeiture *of the estate* at common law on breach of ths condition was, in the eye of equity, an injustice and hardship;" [1] and it was against this the Court relieved; the expression "forfeiturs" was nsver applied to moneys paid to ths mortgagee whether on account of principal or interest.

Ths Court, no doubt, by preserving the mortgagor's equity of redemption incidentally preserves to him the benefit of all payments previously made, provided hs pays the balance: and in like manner, when the Court relieves against forfeiture by preserving the purchaser's equitable estate, it incidentally preserves to him ths benefit of the instalments of purchase-money already paid, provided he pays arrears on the day named, and keeps up his future payments.

The matter is dealt with in an illuminating passage by Lamont, J.[2] He says: "And 'forfeiture' is defined as 'the losing or becoming liable to deprivation of property, life, office, right, etc., in consequence of crime, offence, or breach of agreement.' The idea underlying a forfeiture for breach of condition in a contract is that, in consequence of the breach, some property interest or right which up to the time of the breach belonged to the party making default is lost to him, and becomes vested in the other party to the contract." Then he proceeds to point out (as already quoted) that the purchaser has no *property interest* or *right in* or to moneys paid over by him to the vendor on acconnt of ths purchase money.

This consideration of the exact definition of tbs term "forfeiture" is by no means so merely academic as it may seem at first sight—it is a conception that is radical and basic. Again, it is submitted that the discussion in some of ths cases, whether instalments paid on the purchase-money are claimed on determination by the vendor by way of

[1] Coote on Mortgages, p. 11.

[2] *Zimmer* v. *Karst*, 3 Sask. R., at pp. 309-310; and cf.: *Heinsborough* v. *Peck*, 5 Wall. 497.

penalty or by way of "liquidated damages," is misleading and contributes only to confusion of thought, which is largely due to this very lack of definition of terms.

(c).—*Penalty or Liquidated Damages.*

In some forms of these instalment-agreements in common use, the draftsman (*pro majore cautela* apparently) has used some such expression as "the vendor may retain all moneys previously paid *as and by way of liquidated damages*," but these words, if not merely surplusage, only lead to misconception and confusion.

One can understand the relevancy of the discussion of the rules for distinguishing between penalty and liquidated damages in a case like *Wallis* v. *Smith*,[3] cited by Beck, J., in *Great West Lumber Co.* v. *Wilkins*.[4] There the agreement was of a peculiar kind—"a sort of partnership between the plaintiff and the defendant"—and the question was whether an arbitrarily fixed sum of £5,000, neither paid nor deposited, became payable on the defendant's breach of contract. The case, it is submitted, does not affect the subject under discussion; in fact Jessel, M.R., expressly states that the rules he is discussing "do not apply to deposits." *A fortiori*, do they not apply to instalments?

This question arises "in cases where there *is added* to the contract a clause for the *payment* of a sum of money in the event of non-performance,"[5] e.g., that on the purchaser's default "he shall forfeit the deposit and the vendor shall be at liberty to resell and recover as liquidated damages the *deficiency* on such resale and the expenses." But a case of this class does not seem to throw much light upon the question as to whether the vendor can retain moneys paid in pursuance of the contract. The vendor is not claiming *damages* for breach of contract, and setting up that the

[3] 21 Ch. D. 243.
[4] 1 A. L. R. 155.
[5] Fry on S. P. (5th ed.) par. 140.

measure and extent of these damages has been fixed by agreement between the parties, as in *Barton* v. *Capewell Continental Patents Co.*,[6] but on the contrary is *ex hypothesi*, claiming determination of the agreement and a return of the property. It is difficult to understand how moneys actually paid under the contract (in respect of which the purchaser has a lien) can be brought within the concept of either penalty or liquidated damages. They would appear to belong to an entirely different category. The fact is the money paid to the vendor by the purchaser in discharge, or part discharge, of his obligation under the contract becomes the property of the vendor, and, it is submitted, remains his property, without any consideration of forfeiture, penalty, or liquidated damages affecting the matter at all, *so long as the contract is affirmed, that is, until it is rescinded*, which, as has been insisted upon, is exactly what the clause in question is designed to prevent. In *Glock* v. *Howard & Wilson Colony Co.*,[7] Harrison, J., says: "The plaintiff had agreed to pay the money to the defendant as a condition precedent to his right to demand a conveyance of the land, and as the consideration for the defendant's agreement to make the conveyance, and he could not by his mere default become entitled to repossess himself of the money which he had paid under this express agreement. Whether the money thus paid was styled by the parties as penalty or forfeiture or liquidated damages, is *immaterial* . . . the money therein referred to was money that had been paid by the plaintiff in discharge of an obligation which he had assumed, and the right of the defendant to receive and retain it was not impaired by the terms in which it was styled in the agreement."

This statement of the law of California, it is submitted, is equally true as a general statement of English and Canadian law.[8]

[6] 68 L. T. 857.

[7] 43 L. R. A., at page 207.

[8] Cf. *Zimmer* v. *Karst*, 15 W. L. R. 58; 3 Sask. R. 304.

(*d*) *Time of the Essence.*

In most of the agreements we are considering, it is expressly stipulated that time shall be of the essence of the contract; and in some jurisdictions the question of relief against forfeiture is summarily disposed of on the principle that the parties having made their bargain should be held to the *ipsissima verba* of the contract and that the Court cannot interfere.[9]

This also, to some extent, seems a confusion of two ideas. It is submitted that the equity to relief against forfeiture is something quite distinct from the question whether time is of the essence of the contract. This, it is submitted, is in effect what is meant by Sir John Rolt, in *Tilley* v. *Thomas*,[10] and Harlan, J., in *Cheney* v. *Libby*,[1] in the passages quoted at pages 77, 78, *ante*.

At law, where days or dates were named for payment, &c., time was always of the essence of the contract. So far as the *construction* of the contract is concerned, there is no difference between law and equity in this respect; but this did not prevent equity granting relief where the circumstances warranted it.

The construction put upon the condition or redemption clause in a mortgage accordingly was and is exactly the same in equity as in law: thus, in *Parkin* v. *Thorold*,[2] Lord Romilly says:—

"The contract between the mortgagor and mortgagee is *precise;* if the money and interest is not paid on the day twelve-month on which the mortgage is made, the estate is

[9] Cf. *Steele* v. *McCarthy*, 7 W. L. R. 902; *Pierson* v. *Canada Permanent*, 11 B. C. R. 139; *Labelle* v. *O'Connor*, 15 O. L. R., at p. 539, per Anglin, J.; *Jackson* v. *Scott*, 1 O. L. R. 488.

[10] L. R. 3 Ch. 61.

[1] 134 U. S. 68.

[2] 1852, 16 Beav. 59.

to be the property of the mortgagee; the contract is *positive* and *unambiguous*, but a Court of Equity will not permit the contract to be enforced, and will restrain the parties from enforcing it at law. It treats . . . that part of the contract which gives the estate to the mortgagee as mere form; and, accordingly, *in direct violation of the contract*, it compels the mortgagee, so soon as he has been paid his principal and interest and the costs he has been put to to restore the estate, &c., &c."

Now will anyone suggest that the insertion in a mortgage of the words "time shall be in all respects of the essence of this contract," makes the contract any more "precise," any more "positive," any more "unambiguous"? And with what degree of patience would any Court listen to counsel having the temerity to contend that the insertion of such words deprived the Court of its power to fix a day for redemption, and in default of payment, and only then, to order final foreclosure.

Would not the obvious position of the Court be that the argument is only a palpable and specious attempt to oust its equitable jurisdiction? If such a construction were binding, the document might just as well have contained a clause to the effect (as indeed does appear in some contracts in the United States) that no Court of Equity shall have power to relieve against the terms of the contract. The Court will not, it is submitted, permit its jurisdiction to be thus ousted. "Otherwise, how could there be a decree for redemption of a mortgage?"[3]

"There is no more intrinsic sanctity in stipulations by contract, than in other solemn acts of parties, which are constantly interfered with by Courts of Equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed

[3] Lord Justice Knight-Bruce in *Roberts* v. *Berry*, 3 D. M. & G. 284.

merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to divert it to a different and oppressive purpose, as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury."[4]

It would, surely, seem an anomaly if by the mere insertion of words making time of the essence "the whole system of equity jurisprudence" could be set at defiance.

This notion seems largely traceable to the remarks of Lord Eldon, in *Hill* v. *Barclay*,[5] which are effectively criticised in the note to Story's Equity Jurisprudence.[6]

However, as so many cases have been decided on the principle that where time is expressly stipulated to be of the essence of the contract, the long arm of the Court is stayed in its effort to extend relief, it becomes necessary to consider them in detail.

In *Labelle* v. *O'Connor*,[7] Anglin, J., says: "Where, as here, in a contract prepared by his own solicitor, time is expressly declared to be of the essence of the agreement, the plaintiff, who comes forward to prove that he did not intend to commit himself to such a bargain, undertakes an almost impossible task. Until he shews conclusively that this provision crept in by mistake or inadvertence, the inquiry whether the other features of the contract and the circumstances in which it was made, including the nature of the property which is its subject, indicate that time was originally of the essence of the contract, seems to me quite super-

[4] Story's Equity Jurisprudence (2nd Eng. Ed.), paragraph 1316; cf. *Barlow* v. *Williams*, 16 Man. 164.

[5] 18 Ves. 59-60.

[6] (2nd Eng. Ed.), paragraph 1316.

[7] 15 O. L. R. p. 539.

erogatory. Excluding fraud, accident and mistake, I cannot see upon what principle the Court may be asked to infer from surrounding circumstances and conduct of the parties that they intended to make a bargain in any respect different from that which they have so clearly and explicitly stated."

In this case, it was held that the purchaser, upon default, lost the right to demand specific performance, but the vendor was held only to be entitled to *rescind*, returning the down payment, which was treated as an "instalment" and not a "deposit." The Court states that: "The right of a purchaser to specific performance is one thing; his possible equity to relief from forfeiture* of purchase money paid on account, though not entitled to the extraordinary and discretionary remedy of specific performance, is quite another."

In *Pierson* v. *Canada Permanent*,[8] Hunter, C.J., says:— "He has entered into an agreement which called for the payment of the balance of the purchase money on a day certain, and the agreement having made time of the essence allowed the corporation to *rescind* if payment was not made as stipulated," and specific performance was refused, and the deposit forfeited, although the plaintiff had been in possession, and "lost the advantage of the expenditure of a considerable sum of money on the property."

Scott v. *Milne*[9] is another case where the vendor in his agreement with the plaintiff stipulated by "apt and express words that time should be of the essence," and the Court affirming the judgment of the trial Judge, refused specific performance, upheld rescission, there being no hardship, "insomuch as the plaintiff gets thereby (i.e., the judgment) a return of his deposits (*sic*) already made."

* Note the use of the word "forfeiture" applied to an instalment paid to the vendor. The result of the decree was "forfeiture" of the purchaser's equitable estate.

[8] 11 B. C. R. 139.

[9] 8 W. L. R. 23.

In *Steele* v. *McCarthy*,[10] the agreement of sale dated 22nd May, 1905, covered a section (640 acres) of land; price $9,600 in three annual instalments of $3,200 each, beginning 1st November, 1907; possession delivered to plaintiff, who agreed to pay interest in advance beginning 1st November, 1905; and also to break 400 acres in 1905, and 220 acres in 1906. The interest due 1st November, 1905 ($672), was paid, the plaintiff broke 325 acres, and in February, 1906, deposited the sum of $300 with the defendant as "security" in lieu of breaking the remaining 75 acres. The payment of interest due on 1st November, 1906, was not made, and on the *next day*, the defendant notified the plaintiff that the "agreement is void." This notice was not received by the plaintiff until 28th November, and on the 30th the plaintiff's agent tendered the full amount of overdue interest. During the year 1906, the plaintiff had broken only 100 of the 220 acres to be broken during that year, and in March, 1907, he again tendered the defendant the interest ($672), plus an allowance for breaking not done, in all $1,135.35. The defendant having refused to accept, plaintiff paid the amount into Court and asked for a declaration that the cancellation was ineffective, and the contract in full force and effect. The total value of the improvements made by the purchaser and moneys paid to the defendant are stated by Lamont, J.,[1] to have been over $4,000. The agreement provided that "time shall be in every respect of the essence," that "in default of payment of said moneys or interest, or performance . . . of stipulations . . . the vendor shall be at liberty to determine . . . and to retain any sums paid . . . as and by way of liquidated damages."

Newlands, J., the trial Judge, says: "I am of opinion that time was of the essence of the agreement in this case, and that as the plaintiff did not make the payment at the

[10] 6 W. L. R. 396; 7 W. L. R. 902. Cf.: *Hole* v. *Wilson*, 10 W. L. R. at 152.

[1] 7 W. L. R., at p. 920.

time agreed, defendant has tha right to cancel the agreement"—with tha result to tho pleintiff of forfaiture of his equitabla estata in the land, the loss of all moneys paid, or expended in making improvements; although the learned Judge, rather illogically, directed a return of the $300 deposited as security for the acreage not broken in 1905.

This judgment was affirmed on appeal,[2] (by Wetmore, C.J., Prendergast and Johnstone, JJ., concurring, Lamont, J., dissenting),—solely on tho principle thet time being, by express agreement, of the essence of the contract, there was nothing mora to be said.

Wetmore, C.J., says: "It was contended in tho first place on the part of the plaintiff that time was not of tho essence of tha agreement. I may dispose of that matter very shortly, because tha agreement specifically provides that time shall be of the essence of the contract, and, that being the agreement of the parties, the cases seem to me to be all to the effect that it must be given effect to as a matter of agreement" (at p. 906).

"The only question remaining is: What is the effect of tha provision in the agreement authorising the defendant to be at liberty to determine and put an end to tha agreement, and of his giving the notice in pursuance of such provision? Does it have the effect of cancelling the agreement? And *if it does, can the Court grant relief against it?* No question arises here with respect to forfeiture of deposit, because no deposit was paid or provided for when this agreement was entered into. *The simple question is: Was the provision that time should be of the essence of the contract,* and that on default of keeping the covenants and making the payments provided for, the defendant could give notice cancelling the agreement and render it void, *a matter of agreement or a provision respecting a penalty?*[3] I am of opinion that it

[2] 7 W. L. R. 902. The italics are the writer's.

[3] See now—*Kilmer* v. *B. C. Orchard Lands* (1913), A. C. 319.

was distinctly a matter of agreement and not a provision creating a penalty. I am quite at a loss to understand how the term "penalty" can apply to a provision of the sort I am discussing. If a provision merely related to the forfeiture of payments made, I can quite understand how the Court might construe the payment proposed to be forfeited in the nature of a penalty; but here is an agreement by which the parties have mutually agreed that on default of the performance of certain covenants or the making of certain payments by one party to the other party, such other party may determine and put an end to the agreement, and if parties choose to insert such a clause, that is distinctly a matter of agreement in a contract, they must be held to it. This Court *cannot make an agreement for them,* or alter the agreement they have made. It is stated in some of the books that it is *a question of intention whether time shall be of the essence of the contract or not. When the parties have expressly provided in their agreement that it shall be, I see no way by which the Courts can, on any principle known to me, escape giving effect to their mutual agreement"* (at page 908).

In *Stringer* v. *Oliver,*[4] where the purchase-price was $950, of which $350 was paid on execution of the agreement (18th January, 1906), $300 on the 18th April, 1907; but the purchaser not having made the third payment promptly on its due date, 18th July, the vendor gave notice of cancellation on 26th July, and shortly afterwards, after some negotiations between the parties, the purchaser tendered the vendor the moneys overdue with interest. In an action by the purchaser for specific performance, it appeared in evidence that the property "is now worth two or three times as much as it was at the time of default, and as the defendant's real reason for defending the action is beyond question because he

[4] 6 W. L. R. 519.

Note.—In *Green* v. *Sevin,* 13 Ch. D., at p. 602, Fry, J., says: "The object therefore thus disclosed was to squeeze Mr. Sevin out of his bargain. This does not appear to me to be an object to which the Court ought to lend its assistance."

wished to make a better sale of the property than that entered into with the plaintiff, it seems to me that the defendant has clearly suffered no damage whatever, but will be in a better position than he would have been if the plaintiff had carried out his bargain;" and accordingly the learned Judge, treating the cancellation as equivalent to rescission, directed a return of the $650 and dismissed the action.

At to time being expressly of the essence of the contract, the learned Judge (Stuart, J.), says: "At law, time was of the essence of the contract, even if nothing more was stipulated than a date for completion. Equity relieved against this, and it became a rule that, unless there was something to shew that the parties really intended time to be of the essence of the coutract, then completion within a reasonable time was sufficient.[5] This rule is well understood, but the mistake must not be made of applying it to the case where the parties have by their agreement not merely stipulated for a definite time for payment, but have also expressly declared their intention in so many words that time shall be of the essence of the contract. There could, I should think, be no better means of ascertaining the real intentions of the parties than by reading what they have said and solemnly agreed to. It is true that in many cases where the agreement has contained this special clause where the agreement has contained this special clause or something similar the Courts have discovered something in the surrounding circumstances or in the acts of the parties to indicate that the parties really did not mean what they had said. But it will be observed that where nothing more than a time for payment is expressed the presumption in equity is that this was not intended to be essential, and the burden of proving the essentiality of time is thrown upon the party seeking to take advantage of it. On the other hand, where the parties have expressly declared their intention in so many words, the presumption is, I think, that they meant what they said,

[5] Cf. *Massey* v. *Walker*, 23 Man. R. at 568-9.

and the burden of proving that time is not essential is thrown upon the party seeking to escape from the express provision of the contract. Authorities, therefore, which apply clearly to the first case cannot be relied upon to any great extent where the second case which I have stated has to be dealt with.[6] It is for this reason that I doubt whether the authorities cited by Perdue, J., in *Barlow* v. *Williams*,[7] the case chiefly relied upon by the plaintiff, are quite sufficient to uphold the conclusion drawn from them in this case."

"In any event, there were special circumstances there, such as possession, etc., which do not exist in this case; and therefore I do not think that the case cited can be of much assistance to the plaintiff."[8]

What the learned Judge means by the statement, that in many cases, the Courts have discovered something in the surrounding circumstances or in the acts of the parties to indicate that they did not really mean what they had said, is illustrated in Fry, sec. 1077, *et seq.* "In order to render time essential, it must be clearly and expressly stipulated, and must have been really contemplated and intended by the parties that it shall be so." So, in *Lowther* v. *Heaver*,[9] Lindley, J., says: "The agreement provides that time shall be of the essence of the contract, but time never was of the essence of the contract as between the parties. No time was observed."

Now, in all these cases, with the possible exception of *Steele* v. *McCarthy*, there were not only special circumstances, but these are particularly noted in the decisions as a reason for the strict interpretation of the stipulation as to time.

[6] But see *Lowther* v. *Heaver*, 41 Ch. D. at 268, and cf. *Handel* v. *O'Kelly*, 22 Man. R. 562, 22 W. L. R. at 407.

[7] 4 W. L. R. 233.

[8] 6 W. L. R. 521.

[9] 41 Ch. D. at 268. Cf. *Hole* v. *Wilson*, 2 Sask. R. 59; 10 W. L. R. 145; *Crawley* v. *Hamley*, 11 W. L. R. at 577: *Campbell* v. *McKinnon*, 11 W. L. R. at 729.

In *Labelle* v. *O'Connor*,[10] "the time for the payments of the plaintiff's purchase money was arranged to correspond with the time when the defendants were required to make payments to one 'R.,' from whom they had purchased the land, with the object that they should be able to pay 'R.' with the money which the plaintiff should have paid them."

In *Scott* v. *Milne*, a similar state of affairs is emphasized. *Pierson* v. *Canada Permanent* was a case where a deposit only had been made, and no instalment paid. In *Stringer* v. *Oliver*, the payments were made to synchronize with the due dates of promissory notes made by the vendor in payment of the price to a former owner. Stuart, J., says:[1] "There was evidence tending to show that the plaintiff knew of these obligations of the defendant, and that the dates of payment by the plaintiff were so fixed as to enable the defendant to meet them."[2] And in none of these cases was an actual forfeiture of instalments paid on account of the purchase price permitted; in *Labelle* v. *O'Connor*, *Scott* v. *Milne*, and *Stringer* v. *Oliver*, repaymen[illegible]h moneys to the purchaser was directed. The Court in [illegible] tance sought support for enforcing the stipulation as to [illegible]e from the special circumstances,[3] and only in *Steele* v. *McCarthy* and *Pierson* v. *Canada Permanent* was the decision based solely upon the express agreement of the parties.

The cases are reviewed by Harvey, C.J., delivering the judgment of the Court en banc (Alberta), in *Chadwick* v. *Stuckey*.[4] He points out that, in *Whitla* v. *Riverview Realty Co.*,[5] the learned Judges of the Court of Appeal in Manitoba unanimously dissent from the principle laid down in *Steele*

[10] See the criticism of this case by Cameron, J. (Man.), in *Canadian Fairbanks Co.* v. *Johnston*, 10 W. L. R. at 578.

[1] 6 W. L. R., at p. 520.

[2] Cf. *Hole* v. *Wilson*, 10 W. L. R., at 152-153.

[3] See also *Atkinson* v. *Ferland*, 12 O. W. R., at 1256-7.

[4] 22 W. L. R. 787; 5 A. L. R. 145.

[5] 19 Man. R. 746.

v. *McCarthy;* that in *Canadian Pacific Ry. Co.* v. *Meadows,*[6] the Court en banc, though, in the agreement under discussion, time was declared to be of its essence, afforded relief to the purchaser in default; and in the case then at bar, the Court decreed specific performance in an action by the purchaser in default, though here again the agreement declared time to be of its essence.

In *Handel* v. *O'Kelly,*[7] Richards, J.A., says: "The agreement contains a provision that time shall be strictly of the essence of the contract, and, it seems to me, it may well be argued that, with that in the agreement, non-payment at the time of payment, would work a forfeiture at law in the nature of a penalty against which the equitable rules might relieve, if the action were brought without laches."

So that it would appear that even where the parties have stipulated in express terms that time shall be of the essence of the contract, there is some room for further inquiry: that is not the end of the matter.

Of English authorities, Dart on Vendors and Purchasers (7th ed., 495), is quoted to the effect that "the doctrine (i.e., the equity rule) has no application where time has been made of the essence of the contract by express agreement," *Honeyman* v. *Marryat,*[8] being cited for the proposition. Now *Honeyman* v. *Marryat* is rather an authority the other way. In that case, no agreement for sale had been entered into. In the course of negotiations, which had very nearly resulted in an agreement by correspondence, the intending vendor insisted upon a deposit of £1,500 by a certain fixed day *before he would sign a contract;* and the plaintiff not having made the deposit, the defendant declared the treaty at an end. Sir John Romilly, M.R., says: "The case is complicated from this circumstance—that the term relates

[6] 1 A. L. R. 344; 8 W. L. R. 806.
[7] 22 Man. R. at 565.
[8] 21 Beav. 14.

to the time when the deposit shall be paid, and the Court of Chancery does not, except in very special cases, allow time to be of the essence of the contract: *Parkin* v. *Thorold*.[9] But the distinction between this case and the cases which relate to time being of the essence of the contract is this: that in the latter cases there is a *concluded agreement, a contract actually entered into*, and then the Court considers it inequitable that, by reason of a slight delay, one party to the contract should not have the benefit of that for which he has contracted. But that is a totally different matter from this: whether a person is not at liberty to make a contract in which time shall be introduced as one of the terms of the contract . . . *whatever might be the effect of such a contract when once entered into*, to say that he should not be allowed to insist on such a stipulation forming part of the contract would be going far beyond these cases, etc." One has only to read the whole paragraph to see that all it means is that it is open to the parties to insert such a clause —but that when it comes to enforcing it, the Court will only give such effect to it as not to contravene its own principles: and it is submitted that in this respect Sir John Romilly must have intended to qualify and explain his previous dicta in *Parkin* v. *Thorold*.[10]

This case and *Barclay* v. *Messenger*,[1] are cited in Fry on Specific Performance, par. 1076.

In *Barclay* v. *Messenger*, time was not expressly declared to be of the essence, but inasmuch as the lease (the assignment of which was the subject-matter of the contract) was defeasible by notice in case the vendors did not complete certain buildings by a fixed date, "the purchasers being fully

[9] 16 Beav. 59.

[10] This is the more likely because between the date of the decision in *Parkin* v. *Thorold* (1852), and that in *Honeyman* v. *Marryat* (1855), the former case had been criticised by Lord Justice Knight-Bruce in *Roberts* v. *Berry* (1853), 3 D. M. & G. 284.

[1] 22 W. N. 522; 43 L. J. Ch. 449.

aware of the contents thereof," and having assumed "every liability of every description whether in relation to the buildings or otherwise;" the purchasers having made default both in commencing the buildings and in payment of the purchase money, which default was continued up to within three months of the date for completion of the buildings, it was not unnaturally held that time was of the essence of the contract so as to enable the vendors to determine the contract under a clause which provided "that if the purchaser shall fail to pay . . . the £1,000 on the 31st July, 1873, or *upon such deferred date as the parties might agree upon,* all money paid previous to such default being made shall be absolutely forfeited, and this contract become null and void," particularly in view of the fact that the time for payment was extended to 26th August, 1873, when the purchasers again defaulted, and continued in default up to 2nd October, 1873, when notice of cancellation was given, and even then made no offer to pay the £1,000 until they filed the bill on the 8th January, 1874. Thus Jessel, M.R., in dismissing the bill, says: "They refused to perform it (the contract) in the only essential particular, namely, the payment of £1,000; and that for a considerable period before the filling of the bill, when time was, as they knew and as the defendants knew of the greatest possible importance, etc., etc."[2] See also per Meredith, C.J., in *Labelle* v. *O'Connor,*[3] and note that although the purchaser's bill for specific performance was dismissed, it was without prejudice to any action at law to recover the moneys already paid.

In *Patrick* v. *Milner,*[4] there are expressions indicating that the learned Judges, Grove, J., and Lopes, J., assumed the rule to be that time is not of the essence "unless it is made so by direct stipulation or necessary implication;" this, however, appears to be *obiter,* as in this case there was no

[2] Cf. *Atkinson* v. *Ferland,* 12 O. W. R., at p. 1256-7.

[3] 15 O. L. R. 524.

[4] L. R. 2 C. P. D. 342.

such stipulation; and *Parkin* v. *Thorold*,[5] which is cited for the proposition, is explained in *Honeyman* v. *Marryat*.[6] More correct appears the expression of Grove, J.: "This question depends on the nature of the property, upon the construction of the contract, and upon the objects which the parties had in entering into it, or, as it may be better expressed, *upon what must be judicially assumed to have been their intention;* for that may sometimes be different from their actual[7] intention."

Thus supposing we admit that a Court of equity will construe an express stipulation, making time of the essence as "a matter of agreement," this appears to have very little bearing on the doctrine that equity will relieve against penalties and forfeitures.

In *Labelle* v. *O'Connor*,[8] Meredith, C.J., points out: "In none of the numerous cases cited . . . was it determined that, in such a case as this, the mere failure of the purchaser to pay at the appointed time one of several instalments of the purchase money, a substantial part of it having already been paid, and the time for completion not having arrived, was an answer to his claim for specific performance of the contract." In *Roberts* v. *Berry*,[9] decided the year after *Parkin* v. *Thorold*,[10] Lord Justice Knight Bruce says: "Courts of equity judge of the materiality of *stipulations* as to time differently from the Courts of law. Otherwise, how could there be a decree for redemption of a mortgage?" Then in *Honeyman* v. *Marryat*,[1] we find Sir John Romilly stating

[5] 1852, 16 Beav. 59.

[6] 1855, 21 Beav. 14.

[7] "Expressed"? And cf. Beal's Cardinal Rules, &c., 24, 25; *Lohre* v. *Atkinson*, 3 Q. B. D., at p. 561-2; *In re Rosher*, 26 Ch. D., at p. 821-2.

[8] 15 O. L. R., at p. 523.

[9] (1853), 3 D. M. & G. 284.

[10] (1852), 16 Beav. 59.

[1] (1855), 21 Beav. 14.

that it is open to the parties to insert in the contract an express stipulation as to time—"*whatever might be the effect of such a contract when once entered into.*" In 1867, in *Tilley* v. *Thomas*,[2] Lord Cairns, L.J., it is true, says: "A Court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract . . . if it can do justice between the parties, and if . . . there is nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it *inequitable* to interfere with and modify the legal right;" but Sir John Rolt, as already quoted, in the same case, explains: "Now, as a matter of construction merely, I apprehend, the words must have the same meaning in equity as in law. *The rights and remedies contingent on that construction* may be different in the two jurisdictions, but the grammatical meaning of the expression is the same in each. And if this be so, time is part of the contract, and if there is a failure to perform within the time, the contract is broken in equity no less than at law. But in equity *there may be circumstances* which will induce the Court *to give relief* against the breach, and sometimes even though occasioned by the neglect of the suitor asking relief. Not so at law. The legal consequences of the breach must there be allowed strictly to follow. The defendant is entitled to say that the contract is at an end, and it is in this sense, I apprehend, that in such cases it is said that time is of the essence of the contract at law, *though not necessarily so in equity.* The language of Lord Redesdale in *Lennox* v. *Napper* (2 Sch. & Lef. 682), cited by Lord Justice Knight Bruce in *Roberts* v. *Berry* (3 D. M. & G. 284), fully explains my views in this part of the case."

And to quote again the judgment of the Supreme Court of the United States in *Cheney* v. *Libby*: "The parties in this case in terms too distinct to leave room for construction,

[2] L. R. 3 Chy. 61.

not only specify the time when each condition is to be performed, but declare that 'time and punctuality are material and necessary ingredients' in the contract, and that it must be 'strictly and literally' executed. However harsh and exacting the terms may be . . . they do not contravene public policy, and, therefore, the refusal to give effect to them, according to the real intention of the parties, is to make a contract for them which they have not chosen to make for themselves. . . . But there are other principles founded in justice which must control the decision of this case. *Even where time is made material by express stipulation, the failure of one of the parties to perform a condition within the particular time limited will not in every case defeat his right to specific performance, if the condition be subsequently performed without unreasonable delay, and no circumstances have intervened which would render it unjust or inequitable to give such relief.*"[3]

In the Judicature Act of 1873 (s. 25, s.-s. 7), in England, and in all those colonies that have copied it (e.g., Judicature Ordinance (N.W.T.), s. 10, s.-s. 6), it is provided that: "Stipulations in contracts, *as to time or otherwise*, which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of equity, shall receive in all Courts the same construction and effect as they would have heretofore received in equity."[4]

It is submitted, therefore, as a result of this analysis, that the statement that it is not of much consequence, so far as the jurisdiction to relieve against forfeiture is concerned, whether time is expressly *declared* to be of the essence or not, is supported by the "reason and spirit" of the cases.[5]

[3] 134 U. S. 68.

[4] As to the bearing of the words "or otherwise," see Annual Practice (1914), p. 1942.

[5] Cf. Cameron, J. (Man.), in *Canadian Fairbanks Co.* v. *Johnston*, 10 W. L. R. 571.

Probably this is all that is meant by Beck, J., in his statement that: "I do not think that the defendant is prevented from insisting upon his right to specific performance by reason of his being in default and of the provision in the contract that time is to be of the essence of the agreement. . . . As a matter of law, I think the provision that time should be of the essence of the contract constituted an integral part of the forfeiture clause which I have quoted above, and which I have held to be void in its entirety. If my construction of the agreement in this respect be incorrect, and the words purporting to make time of the essence of the contract are held to apply as a matter of construction to the terms of payment for all purposes, I am of opinion that where the purchase price is payable by instalments, such a provision is penal, and, constituting as it would a right of forfeiture, is one from the effects of which the Court ought to relieve a purchaser so as to grant him in a proper case specific performance if he has remedied, or offered to remedy, his default with reasonable promptitude."[6]

Finally, in *Kilmer* v. *B. C. Orchard Lands*,[7] in which the agreement expressly declared time to be of the essence, the Privy Council paid little or no attention to the provision (though citing it in full); and Lord Macnaghten says: "The circumstances of this case seem to bring it entirely within the ruling in the *Dagenham Dock Case*."[8]

It is suggested that the effect of a stipulation making time of the essence of the contract, so far at least as it affects the power of the Court to relieve against forfeiture, cannot be expressed more strongly than that such express stipulation will be noticed by the Court among other circumstances (including the subject matter of the contract) in

[6] *Moodie* v. *Young*, 8 W. L. R., at p. 312, 1 A. L. R. 337.

[7] 1913. A. C. 319.

[8] L. R. 8 Ch. 1022.

considering the equity to relief against forfeiture.[9] It would seem, too, to be, perhaps, deducible from the authorities that the Court will not in any event strictly enforce the stipulation as to time, except in cases where it is also possible to enforce *restitutio in integrum* without injustice to either party.[10]

This suggestion is in no way inconsistent with the rule that the Court does not deem it equitable to grant relief against forfeiture in those cases where there has been great delay, or negligence, or where the *subject matter* of the contract is such that injustice would result from giving an extension of time, e.g., where the object of the contract is a commercial enterprise, such as the sale of a public house as a going concern;[1] or relates to mines,[2] and under other similar circumstances.[3] Thus it would appear in this connection to be quite proper for the Court to take into consideration whether the purchaser's object was to occupy the land immediately as a place of residence;[4] or merely to speculate on a rise in value or price.[5] And as before pointed out, if it is clear that expedition and promptness of payment is from the circumstances the dominant or prominent note of time, the Court will not prevent the vendor from availing himself of the stipulation making time of the essence.[6]

[9] Approved by Cameron, J., in *Hondel* v. *O'Kelly*, 22 Man. R., at 571; 22 W. L. R. at 415.

[10] Cf. *Borlow* v. *Williams*, 16 Man. R. 164; *Cheney* v. *Libby*, 134 U. S. 68.

[1] *Doy* v. *Lukhe*, L. R. 5 Eq. 336; *Cowles* v. *Gale*, L. R. 7 Chy. 12; *Todcaster Tower Brewery Co.* v. *Wilson* (1897), 1 Ch., at p. 711.

[2] *Clegg* v. *Edmonson*, 8 DeG. M. & G., at p. 814; *Hudham* v. *Llewellyn*, 21 W. R. 570, 786; *Glossbrook* v. *Richardson*, 23 W. R. 51.

[3] See Fry, par. 1079-1091.

[4] *Gedye* v. *Duke of Montrose*, 26 Beav. 45; *Tilly* v. *Thomas*, L. R. 3 Ch. 61; cf. *Word* v. *Smith*, 11 Price 119; *Jaques* v. *Miller*, 6 Ch. D. 153.

[5] Cf. Fry, par. 1080.

[6] Cf. *Per* Boyd, C., in *Atkinson* v. *Ferlond* (12 O. W. R. at 1256-7) cited ante Chap. IV. sec. II.

But, apart from cases of this exceptional nature, it is submitted that to a very large extent the discussions indulged in in so many of the cases, as to the effect of an express stipulation that time shall be of the essence of the contract, only tend to distract attention from the real point in issue, which is whether the case is *under all the circumstances* one in which the Court should exercise its power to grant relief against forfeiture or not. It is submitted, with all due respect, that the Court will not permit the parties to paralyse its arm in this respect by the mere insertion of such a stipulation in the contract.

Power of Granting Relief.

Having, it is trusted, to some extent laid the ghost of the bugaboo—"Time of the essence"—we come to the question of the power and method of the Courts to relieve against forfeiture.

The general principles of equity in granting relief against penalties and forfeitures are dealt with in all the text-books on equity jurisprudence. Thus Story[6] states: "So if a sale was made of an estate, to be paid for at a particular day, if the money was not paid at the day, the right of the vendee to enforce a performance of the contract at law was extinguished. On the other hand, if the vendor was unable or neglected, at the day appointed, to make a conveyance of the estate, the sale, as to him, became utterly incapable of being enforced at law. "Courts of equity did not hold themselves bound by such rigid rules;[7] but they were accustomed to administer, as well as to refuse, relief, in many cases of this sort, on principles peculiar to themselves; sometimes refusing relief, and following out the strict doctrines of the common law . . . and sometimes granting relief upon doctrines wholly at variance with those held at common law."

[6] (2nd Eng. Ed. p. 896).

[7] And see Ontario J. A. s. 57, s.s. 3. 7 Edw. VII. (Alberta) C. 5 s. 7. Supreme Court Act (B.C.) s. 20, s.s. 7.

We have already seen that in some of the Provinces of Canada (notably in Saskatchewan, following on the decision in *Steel* v. *McCarthy*) the Courts have declined to exercise this jurisdiction in cases where default had been made by a purchaser in meeting his payments to the vendor in strict accordance with the terms of the contract. But since the decision of the Privy Council, on appeal from the Court of Appeal of British Columbia, in *Kilmer* v. *British Columbia Orchard Lands, Limited*,[8] the power and duty of the Courts to grant relief, under proper circumstances, must be considered confirmed and settled, in all provinces of Canada, where the English system of equity jurisprudence prevails. The headnote in this case summarizes the law as follows: "An agreement for sale by the respondent company of lands in British Columbia to be paid in instalments at specified dates, contained a clause of forfeiture both of the agreement and of all payments of past instalments of purchase-money in case of default of punctual payment of any one instalment; *and time was declared to be of the essence* of the agreement. Default having been made, the company sued to enforce the forfeiture; the appellant paid into Court the instalment due, and counterclaimed for specific performance. Held, that by the law of British Columbia, as well as by English law, the condition of forfeiture was in the nature of a penalty from which the appellant was entitled to be relieved on payment of the purchase-money due."

The trial judge[9] (Gregory, J.) had dismissed the action and decreed specific performance on the counterclaim. The Court of Appeal (Galligher, JJ.A., dissenting) declared the agreement null and void,[10] and that there was no ground on which the Court could grant relief against the express provision making time of the essence.

[8] (1913), A. C. 319.
[9] 17 B. C. R. 230.
[10] *Ib.* 238 *et seq.*

Lord Macnaghten, who, shortly prior to his lamented death, had prepared the judgment of the Privy Council (delivered by Lord Moulton), expressly bases the decision on *In re Dagenham (Thames) Dock Co.*,[1] a decision which had all along been consistently followed by the Courts in Alberta and Manitoba.

In Ontario, *Labelle* v. *O'Connor*;[2] in British Columbia, *Pierson* v. *Canada Permanent Mortgage Corporation*;[3] and in Sakatchewan, *Steele* v. *McCarthy*;[4] illnstrate the misconception of the Courts in the application of this principle of relief against forfeiture in the class of cases we are considering. These cases, it is submitted, must now be considered overruled.

It is not to be concluded, however, that in every case a purchaser in default can get relief. The granting of relief is in the discretion of the Conrt, and there must always be established an equity on the part of the purchaser. If the pnrchaser had repudiated or abandoned his contract,[5] or shown great and persistent delay,[6] or if the other circumstances are such as to defeat his action for specific performance, the Court considers it inequitable to deprive the vendor of his right to appropriate to himself the advantages it wss stipnlated should be his upon the purchaser's default.[7]

In *Massey* v. *Walker*,[8] Macdonald, J. (Manitoba), holds that where the agreement for sale contains an express stipulation providing and agreeing to a means[9] by which the agree-

[1] L. R. 8 Ch. 1022.

[2] 15, O. L. R. 519.

[3] 11, B. C. R. 139.

[4] 7, W. L. R. 902.

[5] Cf. *Smithnescki* v. *Wiltsie*, 12 W. L. R. 533.

[6] Cf. *Smeaton* v. *Lynn*, 4 Sask. R. 187.

[7] *Smeaton* v. *Lynn* (*supra*); see "Delay," "Waiver," &c., Ch. VII, *post*.

[8] 4 W. W. R. 557.

[9] e.g. the nsual 30 days notice of "cancellation."

ment may be put an end to, the rule in *Kilmer* v. *British Columbia Orchard Lands*, does not apply. He says: "It is not an automatic conclusion resulting from default, but the result of a deliberate agreement by which the cancellation is arrived at." This decision is at variance with the Manitoba and Alberta cases, and it is respectfully submitted that the case falls within the general principle laid down by the Privy Council in the B. C. Orchard case.

It would change the character of this book—from a text-book into a digest—to cite all the cases in which the Courts have applied this doctrine of relief against forfeiture to the relations between the vendor and the defaulting purchaser. In any particular case in which counsel may be engaged, it may be useful to study the special circumstances of these cases as considered by the Courts; but it would be tedious and unprofitable to discuss and differentiate them here.

Special Statutory Provisions.

It must be remembered, however, that in Ontario, Manitoba, Alberta and British Columbia, there is express statutory provision in respect to the power (and, therefore, the *duty*) of the Courts to relieve against *all* penalties and forfeitures.

Thus, by 7 Edw. VII. (Alberta), c. 5, s. 7,[10] it is enacted, "Subject to appeal, as in other cases, the Court shall have power to relieve against all penalties and forfeitures, and on granting such relief to impose such terms as to costs, damages, compensation, and all other matters as the Court sees fit."

This is referred to by Beck, J., in *Great West Lumber Co.* v. *Wilkins*.[1] Of the corresponding clause in the British Columbia statute, Clement, J., says:[2] "Our Supreme Court Act . . . clothes this Court with power to relieve against

[10] Cf. Ontario J. A. s. 57, s.-s. 3; Supreme Court Act, B. C. s. 20, s.-s. (7). King's Bench Act (Manitoba) s. 38 (c).

[1] 1 A. L. R. at p. 166.

[2] *Huntting* v. *Macadam*, 8 W. L. R. at p. 216-7.

all penalties and forfeitures, and the power carries with it, of conrse, the duty to exercise it in all proper cases. It is useless, I suppose, to protest against such paternal interference with men's bargains, etc., etc." Further on, he says: "However, it is not necessary, nor would it be proper to attempt here any forecast as to how far our legislature's radical extension of this Court's jurisprudence will carry us, or any general statement of the principles on which the Court should act."

It is clear that Clement, J., is far from considering the provision as merely declaratory of the equitable principle of relief against penalties and forfeitures, and as to how far this "radical extension" of the Court's jurisdiction has carried it, reference may be made to *Mason* v. *Meston*.[3] This was a *qui tam* action brought to recover penalties under the disqualification clause of the Municipal Clauses Act, and came before the full Court on appeal from Irving, J., who had given judgment in favour of the plaintiff. The judgment of the Court was delivered by Hunter, J., who says: "I must come to the conclusion that the defendant has brought himself within the disqualifying provisions of the statute. However, as far as I can see, there is no evidence of bad faith on the part of the defendant, and that being so, I think the power of the Court to relieve agsinst penalties—which jurisdiction, so far as I know, exceeds that of any other jurisdiction,[4] as it is given in sweeping and absolute terms—ought to be invoked." The Court accordingly remitted the penalty, but upon condition "that the defendant pays the costs." This is certainly a radical extension of the power of the Court to relieve against (not to remit) penalties and forfeiture. A more reasonable view is taken hy Stuart, J., in *C. P. R.* v. *Meadows*.[5]

[3] 9 W. L. R. 113.

[4] The Manitoba and Ontario statutes *in consimili casu* are even more "sweeping."

[5] 8 W. L. R. p. 806; 1 A. L. R. 344.

"It is said that, because the legislature of Alberta, by statute, 7 Edw. VII., c. 5, s. 7, s.-s. 2 (8), enacted that, "subject to appeal, as in other cases, the Court shall have power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, compensation, and all other matters as the Court sees fit," therefore, this Court has power to do something in this case which the Courts of England never had power to do. I am sorry to say that I find myself unable to assent to this proposition. It is true that no such provision is contained in the English Judicature Acts, and *it is, therefore, probably also true that this Court may be able to relieve against a forfeiture in cases in which the Courts of England have never yet assumed to exercise that power,* but, however that may be, I am of the opinion that the Courts of equi' in England, long before the Judicature Act, did exercise the power of relieving against forfeitures incurred through non-payment of money."

Just exactly what the learned judge means by "it is, therefore, probably also true that this Court may be able to relieve against a forfeiture in cases in which the Courts of England have never yet assumed to exercise that power," is not clear. It is to be noted, however, that the statute uses the words "*relieve against,*" which is a very different thing from "*remit.*" It may be that the Courts may hold that the statute carries the jurisdiction to the length of enabling the Court absolutely to ignore time as being of the essence, and so to give "relief," e.g., in the case of an option, where the acceptance is after time, but moneys have been paid on it—a case in which, except in exceptional circumstances,[6] the Courts in England could not grant relief.[7]

The corresponding clause in the Manitoba Act (and also in the Ontario Act) has, after the words "power to relieve

[6] Cf. *Bruner* v. *Moore*, 1904. 1 Ch. 312-313.

[7] Cf. *Jones* v. *Morris*, 12 W. L. R. 651.

against all penalties, forfeitures," the words "*and agreements for liquidated damages,*" and of this clause, Howell, C.J.A., says:[8] "To my mind, the legislature by this clause did add to the powers of the Court to grant equitable relief. Before that clause was enacted, there was clearly no power to relieve against liquidated damages, but the language of the clause is so clear that no other view, to my mind, can be entertained than that the Court may, in the spirit of justice, now relieve where the agreement merely creates a case of liquidated damages. Can any one say that the legislature intended that only certain penalties and certain forfeitures should be relieved against when such wide remedial language is used?"

The corresponding provisions of the Ontario Statute, which have this same clause as to liquidated damages, are considered in *Johnston* v. *Dominion of Canada Guarantee Co.*,[9] and in *Webb* v. *Box*;[10] but neither of these cases concern the laws of vendor and purchaser, except, perhaps, by way of analogy. In *Townsend* v. *Toronto H. & B. Ry.*,[1] Meredith, C.J., granted relief against a clause fixing liquidated damages, by assessing the actual damages sustained, a much smaller amount than the liquidated damages. A case *sui generis* is *Empire Savings Co.* v. *McRae*,[2] where relief against forfeiture was granted, under peculiar circumstances, though the statute is not referred to.

Nature and Method of Relief Granted.

The Courts then having the power, and with it the correlative duty, to grant relief to a defaulting purchaser where the vendor is attempting to determine the contract and to

[8] *Whitla* v. *Riverview Realty Co.*, 14 W. L. R. at p. 377.

[9] *Johnston* v. *Dominion of Canada Guarantee Co.*, 17 O. L. R. 483.

[10] *Webb* v. *Box*, 19 O. L. R. 544.

[1] 28 O. R. 195.

[2] 5 O. L. R. 710.

enforce a forfeiture, what is the nature of the relief to be granted, and what method should the Court adopt to enforce it? Relief under the circumstances we are considering has been granted

(*a*) By cancelling the contract, and directing the vendor to return all moneys paid on the purchase price to the purchaser;

(*b*) By decreeing specific performance in favour of the purchaser;

(*c*) By restricting the vendor to a decree for specific performance;

(*d*) By appointing a day for redemption, and in default (1) foreclosure, or (2) sale (as on resale to enforce the vendor's lien, see Chap. III., s. 2, *ante*).

(*a*) If the Court directs the vendor to return the moneys paid on the purchase price to the purchaser, the Court in effect is forcing *rescission* on the vendor in the interests of the purchaser in default. We have seen that the purchaser in default cannot rescind; and that the moneys paid on the purchase price are the property of the vendor. In *Butchart* v. *McLean*,[3] where the purchaser sued for specific performance, he was greatly in arrear in payment of his instalments, he had delayed two years in bringing his action, and in the meantime the vendor had given, under the terms of the agreement, a thirty days' notice of cancellation, and had resold the property. Hunter, C.J., held that the plaintiff could not have specific performance; but holding that the cancellation clause was in the nature of a penalty, against which the Court had statutory power to relieve, and the vendor having resold at a large profit, ordered the return, not of the $1,000 deposit, but of the $14,000 first payment. This judgment was reversed by the Court of Appeal,[4] not so much on the logical ground that the nature of the relief offered was

[3] 15 W. L. R. 224.
[4] 17 W. L. R. 432.

wrong in principle, but on account of the *laches* of the plaintiff, though Galliher, J.A., was of opinion that from the nature of the agreement and the surrounding circumstances, it was not a case for relief, citing the decision in *Steele* v. *McCarthy*.

In *Canadian Pacific Ry. Co.* v. *Meadows*,[5] the action was for payment of over-due instalments of purchase money, or in default of payment, for "a declaration that payments already made be forfeited and the agreement *rescinded* (sic), possession, directions, and costs." What the draftsman meant by "*rescission*" is evidently *determination*, as instead of *restitutio*, he proposed to retain all the purchase-money already paid, and it was evidently in this light that the Court read the statement of claim.

The majority of the Court held that the defendant was entitled to relief, and fixed a day for payment, or in default, that the lands should be sold.

Stuart, J., dissenting, suggested a reference to fix the sum due for principal, interest and costs; to fix a day for payment; and on non-payment an order for rescission *upon the plaintiff's paying into Court the purchase-moneys* received by them, less the rental value[6] of the premises, to be ascertained and fixed by the clerk. Now this has the effect of treating the agreement as if it had given the purchaser an option to treat the moneys paid under the agreement, either as instalments on the price, or as security for rent—to hold the vendor to his agreement if the land increases in value, or to treat it as a lease at a "fair rental" if values fall, and to throw the land back on the vendor's hands.

The agreement contained one of the usual "cancellation" clauses, and by such a decree the Court is not relieving

[5] 8 W. L. R. 806.

[6] In case of true rescission the vendor is not entitled to charge the purchaser in possession with an occupation rent. He is only entitled to an account of rents and profits. (Fry).

against the forfeiture, it is *remitting* it altogether, and is in very truth and effect treating the clause in the contract as if not merely penal, but *void*—wiping it out of existence entirely.

In *Zimmer* v. *Karst*,[1] Lamont, J. (Saskatchewan), says: "It would be most inequitable to allow a person to purchase land, make one payment thereon, and then refuse to make any further payments until he saw whether or not it was going to be a good speculation; then, if the land increased in value, to pay up and keep the land, but if the value decreased, to throw it back on the vendor's hands and claim a return of the money paid. The purchaser cannot come into a Court of equity relying on his own default."

The whole line of reasoning in this decision seems, at first sight, quite at variance with the remarks of the same learned judge in *Enkema* v. *Cherry*,[2] where he says: "In *Hall* v. *Turnbull* (1909), 2 S. L. R. 89, my brother Newlands, under the circumstances of that case, exercised the equitable jurisdiction of the Court and granted a return of the money paid, where the contract had been *determined* by the vendor, and this decision was quoted with approval by my brother Johnstone in *Banton* v. *March Bros. and Wells* (1909), 2 S. L. R. 484. In view of these authorities, as I stated in *Hole* v. *Wilson* (1911), 16 W. L. R. 352, I am of opinion that the clause works a forfeiture of the purchaser's *right to restitution* against which the Court has jurisdiction to relieve. The Court having jurisdiction, the next question is, under what circumstances ought it to exercise that jurisdiction, and *grant relief by directing a return of the moneys paid?*"

The return of the moneys to the purchaser can only be demanded by him, it is submitted, where the contract has been *rescinded*. This, perhaps, is all the learned Judge means,

[1] 3 Sask. R. at 311.
[2] 5 Sask. R. 61. at p. 66.

because at a previous page,[9] in the same judgment, he says: "This rule (i.e., *restitutio in integrum*) only applies where there has been a *rescission* of the contract, apart from agreement in the contract that it may be *determined*. But it can have no application in a case where the parties by their contract have expressly agreed that upon breach by the purchaser, the vendor may determine the contract and retain the moneys paid. Such a stipulation shows that the parties have agreed that upon such breach and determination the principle of restitution shall not apply."

Similarly, the return of the moneys directed in the *Banton* v. *March* case depended on the *rescission*, not the determination of the contract. In that case, no proper notice of "cancellation," as required by the contract, was given, and Davies, J.,[10] says: "Moneys so paid have not the character of a guarantee, and upon *rescission* of the contract . . . restitution must be made;" and again: "These moneys, not having been paid as a deposit and not having been forfeited under the agreement, and the defendants being unwilling to accept the balance of the purchase-moneys and convey the land on the ground claimed by them that the agreement was at an end, and *rescinded* . . . the judgment . . . awarding him (i.e., purchaser) a return of the $600 paid by him was correct."

It may safely, then, it is submitted, be stated that, though the Court may find the purchaser entitled to relief against a forfeiture, the relief will *not* take the form of rescission of the contract, and the return to the purchaser of moneys paid to the vendor, *except it be with the vendor's consent.*

Relief granted by way of (*b*) *decreeing specific performance in favour of the purchaser;* or (*c*) *by restricting the vendor to a decree for specific performance,* may conveniently be dealt with together. A decree for specific performance

[9] 5 Sask. R., p. 65.
[10] 45 S. C. R. p. 341.

enurea to the benefit of both parties. In either case, the Court will appoint a day for payment of the purchase-money and delivery of the executed conveyance and title-deeds (or duplicate certificate of title), and in case of default by either party, the adversary may have rescission of the contract, while if the purchaser makes default in payment, the vendor may have execution or may apply for and obtain an order to enforce the vendor's lien for unpaid purchase-money, interest, and costs of action, by sale of the property.

Kilmer v. *B. C. Orchard Lands Co.*[1] appears an authority for granting the purchaser relief by way of specific performance. But the circumstances of that case are peculiar. The purchase-price was $75,000; a down payment of $2,000 was made; the vendors extended the time for payment of the first instalment, $5,000 and interest from the 14th June to the 7th July, and then on default, served notice of "cancellation" on 9th July, and three days later resold the property. Negotiations seem to have continued, even after this for a reinstatement of the purchaser; but the company began their action to enforce the forfeiture on August 1st, and on August 12th, the defendant tendered the amount of the over-due instalment and interest ($7,672) and counter-claimed for specific performance. On the opening of the trial, the money was paid into Court. So far as the reports of the case go,[2] no suggestion seems to have been made that if the defendant was entitled to relief, as *In re Dagenham (Thames) Dock Co.*, it should be, as in that case, relief analogous to a judgment in a foreclosure action; and, indeed, the over-due purchase-money and interest being already in Court, such a judgment would have been absurd; and if the decree for specific performance took the shape suggested, *ante*, at p. 48, declaring him entitled to a lien for future instalments, with liberty to apply to enforce it, in case of subsequent default in payment, the vendor would not be in very hard case.

[1] (1913) A. C. 319.

[2] 17 B. C. R. 230; (1913) A. C. 319.

This is the form of relief generally adopted in Alberta. A form of decree (applicable generally in ordinary cases of specific performance as well) settled for general use by Beck, J., in 1909, [illegible] his notes to the same, is given in the appendix.

But unless we are to regard the cancellation clause as illegal and void in its entirety (as suggested by Beck, J.[3]), does not such a decree deprive the vendor of his right to enforce determination in case of a subsequent default, amounting (for the sake of argument) to repudiation by the purchaser? Does it not in effect wipe out the clause, and throw the vendor back on his ordinary right to specific performance, to which he is entitled as a matter of course, on a mere *open* contract?

If the vendor is entitled to take proceedings "corresponding to proceedings by a mortgagee for *foreclosure* or sale, a right he undoubtedly has,"[4] and if it is true that "the vendor may deal with the property and payments as if the contract had never been made," if the purchaser has abandoned or repudiated the contract; and if the purchaser's right to specific performance is gone where he has delayed an unreasonable length of time in fulfilling the terms of the contract, surely these rights should be protected, and reserved to the vendor?

The fact is that where a purchaser is in default in respect of one or more instalments, and there are subsequent instalments to accrue due, all that the purchaser, upon remedying his default, appears entitled to, is to be *re-instated* under his contract. To give him, at this stage, a decree for specific performance is, it is submitted, *restricting* the vendor to that particular remedy, and depriving him of his right to elect what remedy he will adopt, in case of subsequent breach.

[3] *Gt. W. Lumber Co.* v. *Wilkins*, 1 A. L. R. at 168.
[4] *Ibid.* at 167.

Kilmer v. *B. C. Orchard Lands Co.* is followed by Lamont, J., in *Fredericksen* v. *Stanton*,[5] "but," he adds, "although the Court has jurisdiction to relieve a purchaser from consequences arising from his failure to carry out the terms of his contract, it will not exercise that jurisdiction and grant *the equitable relief of specific performance*, unless a proper case is made out for its interference."

And he adds that it must appear that such relief can be granted without injustice to the vendor, the purchaser must have offered to perform his contract within a reasonable time, and he must be prompt in making his application for relief against the penalty provided for in the contract.

(*d*) Relief may be granted: *By appointing a day for redemption, and, in default,* (1) *foreclosure;* or (2) sale *(as on resale to enforce the vendor's lien).*

In Alberta, where the Court finds the purchaser entitled to relief against the determination of the contract, the practice has been adopted, in some instances, to appoint a day for redemption, and by the same judgment or decree *to order a sale* in case of default in payment by the purchaser of the amount found due for principal, interest and costs.[5a]

This form of relief may be open to even greater objections than the decree for specific performance, a subject already dealt with. But if the order for sale on default is made with the vendor's consent, or at his request, it amounts to judgment for specific performance, and an *election* by the vendor to adopt the sale by way of consequential relief.

In *C.P.R.* v. *Meadows*,[6] the plaintiff (vendor) asked for a decree fixing the amount due for principal, interest and costs, to be paid within three months; and that in default of

[5] 24 W. L. R. 891. Cf. *Smeaton* v. *Lynn*, 4 Sask. R. 187.
[5a] See *Lee* v. *Scheer* in Appendix.
[6] 1 A. L. R. 344.

payment, the agreement be declared cancelled, payments already made forfeited, possession, and *foreclosure*. The defendant did not appear. Beck, J., to whom the application was made in the first instance, says: "I think the form of prayer for relief is sufficient to entitle me, though the motion is *ex parte*, to give a judgment in the usual form for specific performance, and I will do so if the plaintiff is ready to accept judgment in that form. In the event of default in payment, however, I am of opinion, in view of the likelihood . . . that the land is worth probably twice the original purchase-price . . . that a motion for an order to rescind should be refused, and the plaintiff *be confined to his remedy by sale.*" On appeal, this judgment was in effect affirmed (Stuart, J., dissenting, only as to the order of sale); though Scott, J., in delivering the majority judgment, expressly states: "It is unnecessary upon this reference to consider the effect of the provision in the agreement which authorizes the plaintiff company, in case of defendant's default to cancel the agreement and forfeit the money paid on account of the purchase-money."

It would seem reasonably clear that, in this case, the vendor would have been better off, if he had simply expunged the "cancellation" clause from his agreement, and brought an action, as on an *open contract* for specific performance; for, then, in case of default in payment on the day appointed, he would have had the right *to elect* what form of consequential relief he would adopt. Has the Court power against the vendor's wish, in an action for specific performance, to restrict him to an order for sale by way of consequential relief, on the failure of the purchaser to pay at the day appointed?

This order for sale, however, may work out to the vendor's advantage when the property has depreciated in value, since on a sale to enforce the vendor's lien (which such a sale is in effect), the purchaser remains liable for any deficiency resulting.

The Alberta Courts do not grant a judgment for foreclosure in the first instance. It is the rule only to grant foreclosure after an abortive sale.

In Manitoba (and, if we are properly informed as to the usual practice *now* in force, also in Saskatchewan and British Columbia), the general method of granting relief against *determination* of the contract by the vendor, is to frame the judgment in exact analogy to the usual decree in a foreclosure action, i.e., by fixing a date (generally three months from the decree or master's certificate[1]) for payment, and, in default, that the purchaser be *foreclosed*, etc.

It will be remembered that in *Great West Lumber Co.* v. *Wilkins*,[2] Beck, J., says: "It must not be supposed that, if the view I take of the law is correct, a vendor has no remedy against a defaulting purchaser, other than a proceeding in Court, corresponding to proceedings by a mortgagee for foreclosure or sale, a right which he undoubtedly has."

Fry, on Specific Performance (par. 1072), states: "Courts of Equity, discriminating between those formal terms of a contract, a breach of which it would be inequitable in either party to insist on as a bar to the other's rights, and those which were of the substance and essence of the contract, *and applying to contracts the principles which governed the interference of those Courts in relation to mortgages*, held time to be *prima facie* non-essential, and accordingly granted specific performance of the contracts after the time for their performance had been suffered to pass by the party asking for the intervention of the Court, if the other party had not shown a determination not to proceed."

[1] The Court may, of course, fix either a shorter or longer period; and may, on special application, abridge or extend the period already fixed.

[2] 1 A. L. R. at 166.

In *Parkin* v. *Thorold*,[8] which, on the point of time being of the essence, is explained in *Roberts* v. *Berry*,[10] and *Hoeyman* v. *Marryat*,[1] Lord Romilly says: "The jurisdiction of equity in the execution of the specific performance of contracts accordingly is eminently discretionary; it will not enforce a contract where doing so would be productive of peculiar hardship on one party to it." Then, after referring to the equitable doctrine as to essentiality of time, he proceeds: "It is, I apprehend, *on a similar principle* also, that the whole doctrine relating to equities of redemption as administered by this Court, is founded. The contract between the mortgagor and mortgagee is *precise;* if the money and interest is not repaid on the day twelve-month on which the mortgage is made, the estate is to be the property of the mortgagee; the contract is positive and unambiguous, but a Court of Equity will not permit the contract to be enforced, and will restrain the parties from enforcing it at law. It treats the substance of the contract to be a security for the repayment of money advanced, and that part of the contract which gives the estate of the mortgagee as mere form; and, accordingly, *in direct violation of the contract,* it compels the mortgagee, so soon as he has been paid his principal and interest and the costs he has been put to, to restore the estate, etc., etc."[2]

In *Pomeroy's Equity Jurisprudence*,[3] which is quoted with approval by Beck, J., in *Great West Lumber Co.* v. *Wilkins*,[4] the rule is thus stated: "Equity in relieving against a forfeiture in a contract of sale, and thus declining to acknowledge the express terms of a contract, points to *the*

[8] 1852, 16 Beav. 59.

[10] 1853, 3 D. M. & G, 284.

[1] 1855, 21 Beav. 14.

[2] Cf., the similar comparison to the doctrine of the equity of redemption by Lord Eldon, in *Seton* v. *Slade*, 7 Ves., at p. 273—a case in which *Mr.* Romilly was for the plaintiff.

[3] Vol. 6, par. 816.

[4] 1 A. L. R. p. 167.

analogy of the mortgage. It does not regard the forfeiture clause of the substance of the contract. *Neither will it on a sale of land.* It assumes that the real intention of the parties was to create a security and not a forfeiture, and equity relieves against any forfeiture or penalty inserted for the purpose of enforcing the contract."

Without multiplying authorities and quotations, can a closer analogy to a mortgage be found than such an instalment-plan agreement as we are discussing? Apart from the form, is not the effect of the transaction almost the same as if the vendor had conveyed, and taken a mortgage back? Especially is this the case where, as is perhaps usual, the purchaser is let into possession. The vendor retains his legal estate, but holds it only as security for payment of the purchase-money;[5] while the position of the purchaser resembles that of a mortgagor in possession.[6]

If this be so, surely a *method* analogous to that in which equity relieves against forfeiture in a mortgage action is the *method* applicable to a contract of sale. This was essentially the method of relief adopted in *Re Dagenham (Thames) Dock Co.*[7]

Cornwall v. *Henson,*[8] so often, curiously enough, quoted as an authority for the *restitution* of instalments of purchase-money to the vendor, expressly approves *Re Dagenham.* Collins, L.J., says: "If the contract had contained an express stipulation that on non-payment of any instalment, the purchaser should forfeit all the instalments which he had previously paid, I think the Court would have regarded that

[5] *Smith* v. *Hibbard,* 2 Dick. 730; *Ecclesiastical Cammrs.* v. *Pinney,* 1899, 2 Ch. 729; 1900, 2 Ch. 736.

[6] *Crockford* v. *Alexander,* 15 Ves. 138; *Humphreys* v. *Harrison,* 1 J. & W. 581; *King* v. *Smith,* 2 Hare 239; *Goadman* v. *King,* 8 Beav. 379.

[7] L. R. 8 Ch. 1022.

[8] (1900) 2 Ch. 298.

provision as a penalty, and would have relieved him from it, *as was done in Re Dagenham (Thames) Dock Co.*"

This case, which merely granted an extension of time to the purchaser to remedy his default, a *locus pœnitentiæ*, was followed and applied in *H. B. Co.* v. *MacDonald*,[9] cited by Beck, J., in *Great West Lumber Co.* v. *Wilkins*.[10]

It is difficult to follow the criticisms of the *Dagenham Case* by Anglin, J., in *Labelle* v. *O'Connor*,[1] especially in view of the final paragraph: "Under this agreement, the purchasers acquired an estate in the lands, and the provision for default was in the nature of a condition subsequent or defeasance. Against such conditions, Courts of Equity have always asserted jurisdiction to relieve." Surely on *every* agreement of sale of land, the purchaser, in equity, "acquired an estate (or at least an equity) in the lands," and it was to protect this estate or equity, and the purchaser's lien for moneys paid to the vendor, that Courts of Equity granted relief, as was done in *Re Dagenham, etc.*"

The cases are very ably reviewed by Cameron, J., in a recent case.[2] He says: "After consideration of the authorities (which it is impossible to reconcile), this case must, in my judgment, be governed by *In re Dagenham (Thames) Dock Co.* and *Cornwall* v. *Henson*." Further on, he proceeds: "What is the plaintiffs' remedy? It seems to me that it is at least open to them to proceed in accordance with the judgments of two distinguished Chief Justices of the Court in the case of *Hudson's Bay Co.* v. *Macdonald*. 'One party to the contract may file a bill asking that a time may be fixed within which the other party may perform it, and that in default of such performance, it may be rescinded.' per Killam, J., p. 240.

[9] 4 Man. R. 237, 480.

[10] 1 A. L. R. at p. 166; cf. *In re Dixon* (1900) 2 Ch. 561.

[1] 15 O. L. R. at p. 542.

[2] *Canadian Fairbanks Co.* v. *Johnston*, 10 W. L. R. 571.

In *Lysaght* v. *Edwards*,[3] Jessel, M.R., says: "The position of the vendor is something between what has been called a naked or bare trustee, or a mere trustee (that is, a person without beneficial interest) and a mortgagee who is not in equity (any more than a vendor), the owner of the estate . . . . Their positions are analogous in another way. The unpaid mortgagee has a right to foreclose, that is, he has a right to say to the mortgagor: "Either pay me within a limited time, or you lose your estate," and in default of payment, he becomes the absolute owner. So . . . the vendor has a similar right in a Court of Equity; he has a right to say to the purchaser: "Either pay me within a limited time, or lose your estate."

What is this but *foreclosure?*

In *West* v. *Lynch*,[4] Bain, J., says: "The principle upon which the Court acts in decreeing cancellation of these agreements, is, as I understand it, practically the same as that on which foreclosure of a mortgage is decreed."

"A mortgagee whose mortgage is payable in instalments has not to wait for foreclosure till the last instalment is past due; default in payment of any instalment, either of principal or interest, gives him the right to foreclose, etc.," and he proceeds to apply this principle to an agreement of sale.

So, in *Tytler* v. *Genung*,[5] Galt, J., says: "The relationship between a vendor and purchaser is very similar to that between a mortgagee and a mortgagor. The principle upon which the Court acts in decreeing cancellation of an agreement of sale is practically the same as that on which foreclosure of a mortgage is decreed."

In *Hargreaves* v. *Security Investment Co.*,[6] Elwood, J., delivering the judgment of the Court *en banc* (Saskatche-

[3] 2 Ch. D. at 506.
[4] 5 Man. R. at 169-170.
[5] 4 W. W. R. at 803—reversed on appeal, 6 W. W. R. 191.
[6] 29 W. L. R. 317.

wan), says: "The analogy of some of the remedies under an agreement of sale to those under a mortgage was referred to on an argument, but I have been unable to find any case, except as above stated, where that analogy has been carried so far as to order a personal judgment and foreclosure at the same time;"[6a] but the learned Judge distinctly recognizes the right of the vendor to a decree for foreclosure as in a mortgage action, and in the end the Court put the vendor to his election between a personal judgment and "an order directing the defendant to pay the amount sued for and costs into Court to the credit of this action, within six months, and in default of such payment, *the right, title, and interest of the defendant, or of any one claiming through or under it, to the said land be absolutely barred and foreclosed*, etc., etc."

A perusal of the reports of cases heard and decided in the Western provinces of Canada within the last three or four years, will show that in this class of cases the rights of the parties are being more and more worked out on the analogy of mortgage proceeding, and, in fact, the action for "determination" or "cancellation," since the purchaser's right to claim relief against forfeiture has become generally recognized, is constantly spoken of and referred to as an action for *foreclosure*.

If we assume, then, that the vendor has the same right of foreclosure as a mortgagee, how far have the Courts jurisdiction to refuse foreclosure, and in lieu direct a sale without the consent of the vendor, or against the wish of the purchaser; since it is obvious that a sale may be objectionable to either or both?

Here again, it is submitted, the question should be worked out by analogy to mortgage proceedings; not, of course, the charge, misnamed "mortgage" in the Land Titles Acts, under which the term "foreclosure" is quite inapplicable: but mortgage as understood in a Court of Equity in England.

[6a] See *Lee* v. *Scheer* in Appendix.

In England, it apparently required a statute to give the Court discretionary power to direct a sale instead of foreclosure, even in a mortgage action, whether at the instance of the mortgagee or of the mortgagor. Prior to 15 & 16 Vict., c. 86, s. 48 (and see now the Conveyancing Act, 1881 (s. 25)), "no sale could be had against a mortgagee without his consent." While even under the Act, it is not an order to which the mortgagor is entitled *ex debito justitiæ*, and a very strong case would have to be made to induce the Court to order a sale if opposed by the mortgagee.[7]

Even on the application of the mortgagee, though the Court *may* order a sale in the absence of the mortgagor,[8] it will generally require notice to be given to him,[9] the reason being, of course, that[10] a sale may be much more oppressive to the mortgagee than foreclosure, because the mortgagee so selling sells for and on account of the mortgagor, who is, therefore, liable for any deficiency. And so in Ontario, a defendant, not otherwise desiring to defend a foreclosure action, if he desires a sale of the property, must file a memorandum, "I desire a sale of the mortgaged premises, instead of foreclosure," with a deposit of $80 to meet the expenses of the sale,[1] and he may be required to conduct the sale at his own expense.

The English rule 1, of Order 51 (R.S.C.), which is the same as the Alberta rule, which empowers the Court to order a sale of real estate when "necessary or expedient" is "not intended to enable the Court to sell real estate when otherwise it had no power to do so."[1a]

[7] See *Merchant Banking Co.* v. *London and Hanseatic Bank*, 55 L. J. Ch. 479; Coote on Mortgages, 1057; Chitty's Statutes (5th Ed.), notes to 44 and 45 Vict. c. 41, s. 25. Vol. II., p. 103.

[8] *Wade* v. *Wilson*, 22 Ch. D. 235.

[9] *Western District Bank* v. *Turner*, 47 L. T. 433.

[10] Cf. *per* Stuart, J., in *C. P. R.* v. *Meadows*, 8 W. L. R. at p. 809; 1 A. L. R 344.

[1] Con. Rule 381.

[1a] *Re Robinson*, 31 Ch. D. 247.

SECTION V.—EXPRESS POWER OF RESALE.

As already mentioned, in many instances the agreement provides for an express power of resale on the purchaser's defanlt. This is often an alternative to the determination we have hcen discussing.

If, as is usual, the agreement provides that, if the purchaser makes default in payment, or fails to comply with the conditions, the vendor may rescll and recover from the purchaser any deficiency in price resulting from such resale, the resale, it is commonly stated, operates as a *rescission*[1] of the original contract, and the vendor is entitled to retain for his own benefit any excess over the original contract price that may be realised on the resale.[2]

In this respect it is to be contrasted with the sale to realise the vendor's lien, where the vendor sells for and on behal[illegible] of the purchaser, and not *qua* owner (ante chap. II., sec. iii.).

If the contract is to be regarded as strictly speaking "rescinded," it would follow that the purchaser, if a surplus is realised, would be entitled to have all moneys paid on the purchase-price refunded; and, if a deficiency, to have them taken into account to his credit against his liability for such deficiency. This use of the word "rescission," however, does not seem entirely accurate; for, if the vendor after resale can sue the purchaser in respect of any resulting deficiency, to this extent he is affirming, not disaffirming, the contract. The remarks in Chapter III. on "Resale" appear equally applic able to resale under an express power.

The question arises how far the principle of relief against forfeiture applies to the exercise of this power of resale. In *Howe* v. *Smith*,[3] Fry, L.J., says: "Whether the clause

[1] Cf. *Parent* v. *Bourbonniere*, 13 Man. R. 172.

[2] Williams, p. 69, citing *Ex p. Hunter*, 6 Ves.. 94; *Lamond* v. *Davall*, 9 Q. B. 1030.

[3] 27 Ch. D. at 105.

giving the right to resell and collect deficiency, etc., gives a power of resale for default on the very day, it is not necessary to inquire. There has been such default as justifies the vendor in treating the contract as rescinded; it affords the vendor an alternative remedy, so that he may either affirm the contract and sell under this clause, or rescind the contract, and sell under his absolute title. If he act under the clause, he must bring the deposit into account in his claim for the deficiency; if he sell as owner, he may retain the deposit, but loses his claim for the deficiency under the clause."

It will be seen that Fry, L.J., avoids dealing with the question whether the Courts will grant relief against the exercise of this express power of resale.

If the purchaser be entitled to recover moneys paid on the purchase-price, or to have them taken into account to his credit, there would not seem to be so strong an equity for relief, as in the case of determination where the vendor asserts his right to retain such moneys. But Stuart, J., in *C. P. R.* v. *Meadows*,[4] points out that a resale may be just as serious a forfeiture of the purchaser's *equitable estate* as a determination with foreclosure.

However, if we turn to the analogy of the mortgage, we find that equity, anxious as it is to preserve to the mortgagor his equity of redemption, will not interfere to prevent the mortgagee from exercising his power of sale, even though the mortgagor is willing to pay what is due in order to avert it; unless there is fraud or collusion, or such wilful or reckless impropriety as to be tantamount to fraud, even though the sale be very disadvantageous, unless indeed, the price is so low as of itself to be evidence of fraud.[5] The Court, however, will interfere where the sale is oppressive or irregular, or where

[4] 1 A. L. R., 344.

[5] Coote, p. 920; *Warner* v. *Jacob*, 20 Ch. D. 220; *cf. Winters* v. *McKinstry*, 14 Man. 294.

the power is exercised after a tender of principal and interest.[6] But even in such cases an injunction will, as a general rule, only be granted on actual tender or payment into Court of the amount claimed to be due;[7] the commencement of an action for redemption is not sufficient.[8]

The mortgagee is liable in damages if from want of care and reasonable diligence the property has been sold at an undervalue.[9] The mortgagee, selling under the power of sale, is not allowed to purchase.[10] Having due regard to the introductory paragraphs of this chapter, these principles seem equally applicable to the exercise of an express power of resale by a vendor of lands.

The agreement of sale usually provides that the power of sale shall only be exercised after notice to the purchaser. In such case its provisions must be strictly complied with.[1] In Alberta, since we have no statutory provision relating to resale by the vendor under an agreement of sale similar to Lord Cranworth's Act, s. 13, in relation to mortgage sales (*cf.* Conveyancing Act, 1881, s. 21 (2)), providing that the purchaser's title should not be liable to be impeached by reason of no case for sale having arisen, or no notice having been given, or on account of other irregularities, but that the remedy of any person damnified should be in damages, it would seem prudent that the vendor's solicitor should incorporate into the agree-

[6] Coote, 921; *Jenkins* v. *Jones*, 2 Giff. 99; *Hosken* v. *Sincock*, 11 Jur. N. S. 477.

[7] Coote, 922; *Warner* v. *Jacob*, *supra*.

[8] *Macleod* v. *Jones*, 24 Ch. D. 289.

[9] *National Bank of Australasia* v. *United Hand-in-Hand, &c., Co.*, 4 A. C. 391; cf. *Forrar* v. *Farrars, Ltd.*, 40 Ch. D., at p. 411; *Vanstone* v. *Scott*, 8 W. L. R. 919; *Aldrich* v. *Canada Permanent, &c.*, 24 O. A. R. 193; *Latch* v. *Furlong*, 12 Gr. 303; *Richmond* v. *Evans*, 8 Gr. 508.

[10] Coote, 923.

[1] Coote, 908 *et seq.*; *Great West Lumber Co.* v. *Wilkins*, 1 A. L. R. 155; *Moodie* v. *Young*, 1 A. L. R. 337, and see chapter VII., *post*, on "Notice," &c.

ment the effect of sec. 21 (2), Conveyancing Act, 1881, so as to provide that the validity of the resale shall not be dependent on notice,[2] etc. The provision for notice should be by a covenant of the vendor that notice shall be given, and the repurchaser should be expressly relieved from the necessity of enquiry into the regularity of the sale proceedings.[3]

It would seem that the Court will restrain the mortgagee (or vendor) from exercising the power of sale improperly,[4] but not because in the notice demanding what is due a mistake is made as to the amount actually due.[5]

[2] This must be very clearly expressed, *Re Cotter*, 14 Man. 485.

[3] Cf. Armour on Real Property, 197.

[4] *Gill* v. *Newton*, 14 W. R. 490; cf. Anon. 6 Madd. 10.

[5] *Deverges* v. *Sandeman, &c.* (1902), 1 Ch. 579, but see *Great West Lumber Co.* v. *Wilkins*, 1 A. L. R. 155.

CHAPTER V.

Determination Apart from Express Stipulation.

The reader will remember that among the remedies of the vendor *on an open contract* where he affirms the contract, it was suggested that "determination" might be included. Having discussed this remedy, where it is expressly stipulated for in the contract, we are now in a position to consider whether it is open to the vendor in the absence of such express stipulation. As the subject is of much importance, and does not seem to be discussed, except incidentally, in the text books, some repetition may be necessary, and, it is hoped, pardonable.

It is clear that if the contract is to be deemed *rescinded*, moneys paid on the purchase-price must be returned to the purchaser, who, in turn, if he has been in possession, is accountable for rents and profits—but not chargeable with an occupation rent—i.e., *restitutio in integrum*. It is also supported by authority that if the vendor resells under a power of resale reserved by the contract, he is entitled to the surplus, if any, although the purchaser is liable for any deficiency—and, in the latter case, as a matter of course, instalments paid on account of the purchase-price must be credited to the purchaser in taking the account.[1]

"Rescission," however, is usually the last thing the vendor wants; and it has been suggested that the purchaser in default has no right to force rescission upon the vendor, or the Court to force upon him the remedy by damages. We have seen that in the ultimate analysis, rescission is a matter of mutual

[1] Williams on V. & P., p. 68; *Ex. p. Hunter*, 6 Ves. 94; *Lamond* v. *Davall*, 9 Q. B. 1030; but see *McCready* v. *Clark*, 14 W. L. R. 480.

agreement—it may be provided for in the original agreement of sale in *anticipation* of default by the purchaser, but whether there is such a clause or not in the agreement, how can the defaulting purchaser—the party repudiating the contract,[3] at his own election, force rescission, or abandon his contract by himself electing to pay damages, in lieu of performance? In *Glock* v. *Howard & Wilson Colony Co.*,[4] Henshaw, J., delivering the opinion of the Supreme Court of California, says, after recapitulating the vendor's remedies against a purchaser in default: "Finally, *if his generosity prompts him so to do, he may agree* with the vendee for a mutual abandonment and rescission, in which last case, and in which last case alone, the vendee in default would be entitled to a repayment of his money."[5]

In Alberta, the tendency of the Courts has been to deny the vendor the power of determining—"still resting upon the contract to remain inactive, yet retain to his own use the money paid by the vendee, so that it is no moment whether or not the contract declares that such moneys shall upon the breach be forfeited as liquidated damages,"[6] at any rate, unless there is an express power to determine contained in the agreement.

This, as we have seen, is a very different thing from relieving against forfeiture—which is in effect permitting the purchaser—who though in default comes forward within a reasonable time, and offering to pay all arrears and interest, undertakes to perform the contract in the future—to be reinstated under his contract—reserving to the vendor all his original rights and remedies in case of subsequent default.

In *Labelle* v. *O'Connor*,[6] Anglin, J., says: "In the absence of an express provision for forfeiture, restitution is a

[3] See *Marcus* v. *Smith*, 17 U. C. C. P. 416.
[4] 43 L. R. A. 199.
[5] Cf. *Zimmer* v. *Karst*, 15 W. L. R. 58.
[6] *Glock* v. *Howard*, etc., etc., *supra*.
[6] 15 O. L. R. at 551.

natural consequence," and this is cited and followed in Saskatchewan in *Zimmer* v. *Karst*[7] (per Lamont, J.).

The Courts almost unanimously hold that where the agreement does contain a "cancellation" clause, the vendor cannot determine the contract, without conforming exactly to the terms and conditions of the clause.

Thus in *Bonton* v. *Morch*,[8] Davies, J., says: "This clause, I think, fairly expresses the intention of the parties to have been that there should not be a forfeiture unless and until the expiration of the . . . notice . . . provided to be given to the purchaser."

One can readily accept this, on the principle *expressum facit cessare tacitum*, without interfering with the argument in favour of the vendor's right to determine where there is no express provision at all, to this effect, in the contract.

The English and Ontario cases relied on for the proposition that the purchaser making default, and repudiating the contract, is entitled to be refunded instalments already paid, are: *Cornwall* v. *Henson*:[9] but all this case decides is that relief will be granted as in *Re Dogenham (Thames) Dock Co.* It is not an authority for restitution. *Lobelle* v. *O'Connor*[10] is expressly put on the ground of *rescission*. In *Barclay* v. *Messenger*,[1] where the purchasers' action for specific performance was dismissed "without prejudice to the right of the plaintiffs to bring such action as they may be advised to recover the £1,000," the very point is carefully avoided. Jessel, M.R., says: "If they are entitled to keep the £1,000, as to which I give no opinion—I am not asked to give any opinion—and I do not intend to prejudice anything that may

[7] 15 W. L. R. 58.
[8] 45 S. C. R. 338.
[9] (1900), 2 Ch. 298.
[10] 15 O. L. R. 519.
[1] 43 L. J. Ch. 449.

be decided at law either one way or the other." *Clark* v. *Wallis*[3] is put on the express ground that *restitutio* is a necessary consequence of rescission.[3] *Barton* v. *Capewell Patents Continental Co.*,[4] was a case dealing with the sale of patent rights—not land—and the case properly depended on the distinction between penalty and liquidated damages (and moreover was also a case of rescission). In *Mackreth* v. *Marler*,[5] the action was expressly brought for *rescission*. *Jackson* v. *De Kadich*,[6] was a case of rescission after default by the purchaser under a decree for specific performance. It was held that the vendor taking an order for *rescission* could not retain the deposit: "The contract contained no provision for the disposal of the deposit in case there should be a completion."[7]

If, instead of rescission, the vendor is forced to take the remedy by way of damages, retaining the land which the purchaser throws back on his hands, he recovers the difference between the contract price and the present value, and can, of course, retain the amount of his damages[8] out of the instalments of purchase-money in his hands, returning the surplus, if any, to the purchaser. But why should *the purchaser* be given in effect this right of election? "It will be apparent that damages will not place the vendor in the same situation as if the contract had been performed: for he then would have

[3] 35 Beav. 460.

[3] See Williams on V. & P., note (*m*), p. 1051.

[4] 68 L. T. 857.

[5] 1 Cox 259: 29 E. R. 1156.

[6] 1904, W. N. 168.

[7] Cf. *Hall* v. *Burwell* (1911), 2 Ch. 551; *Shuttleworth* v. *Clews* (1910) 1 Ch. 176.

[8] In *Tavender* v. *Edwards*, 8 W. L. R. 308, the vendor was allowed to set-off a fair rental value of the premises, as well as damages, against the instalments of purchase-money ordered to be refunded to the purchaser.

got rid of the land and all the burdens and liabilities attaching to it, and would have the purchase-money in his pocket; whereas, after an action for damages, he still has the land, and, in addition, damages—representing in the opinion of a jury, the difference between the stipulated price and the price which it would probably fetch if resold, together with incidental expenses and any special damages which he may have suffered." [9]

Why should not *the vendor* be entitled to say to the purchaser, "Unless you are prepared to go on and complete your payments, I shall *determine* the contract and you can have no right to a return of the moneys paid to me *under your contract*."

We are not discussing questions of mere delay or laches on the part of the purchaser, but assuming a case of abandonment or repudiation. "If the purchaser has not merely delayed, but abandoned or repudiated the contract, all his rights under it are gone, and the vendor may deal with the property and payments on account as if the contract had never been made." [10] Does this mean "determination" or "rescission?"

To take again the ordinary case of a sale of railway lands, where the price is payable in six equal annual instalments, and assume the purchaser makes default or repudiates at the end of three years. By an annual payment of one-sixth of the price the purchaser has each year, and from year to year, had the exclusive right of speculating in the land—he alone would reap the whole benefit of a rise in prices—probably he bought solely with this in view; while the vendor in the meantime has put it out of his power to entertain any other offers for the land, no matter how much more advantageous, has abandoned all possibility of benefit from increase in value. Why, if the speculation involves a loss, should the purchaser

[9] Fry, par. 72.

[10] *Great West Lumber Co.* v. *Wilkins*, 1 A. L. R. at 166-7.

be entitled to throw the land back on the vendor's hands? to say "*I elect* to rescind thia contract, to have my money back, less your damages?"

Is it not more reasonable to hold that *the vendor* has the right of election, and, at any rate, after reasonable notice to the purchaser to remedy his default, that he may determine the contract and retain the money already paid?

Suppose the vendor, having determined the contract, does not choose to sue—how can the purchaser establish a right of action for a return of his purchase-money or any part of it?[1]

The contract has not been *rescinded;* and it seems contrary to all principle that the purchaser, repudiating and in default, can come into Court, and without an averment that he has been and is *able, ready and willing* to perform his part of the contract, ask to be refunded payments that he has made *under the contract.*[2]

Of course if he is asking specific performance, different principles apply; but "the vendee must always show equitable grounds for relief before equity will interpose. When an equitable showing is not made to excuse the breach, the vendor has the right in equity, as he always has in law, to retain the moneys paid by the vendee. Therefore we have said that it matters not in such contracts that the parties have declared that the vendor may retain the moneys paid as stipulated damages. The name which the parties so give does not alter the fact nor change the vendor's remedies. Thus in *Heinsbrough* v. *Peck* (5 Wall. 497), the Supreme Court of the United States having under consideration this identical question, says: "No rule in respect to the contract

[1] In *Barton* v. *Capewell Continental Patents Co'y* (68 L. T. 857) where the purchaser did recover moneys paid, the vendors "had *rescinded* the contract and refused to supply the machines." There was a complete failure of consideration.

[2] Cf. *Hole* v. *Wilson*, 10 W. L. R. 154; *Zimmer* v. *Kerst*, 15 W. L. R. 58.

is better settled than this: that the party who has advanced money or done an act in part performance of the agreement and then stops short, *and refuses to proceed to its ultimate conclusion,* the other party being ready and willing to proceed and fulfil all his stipulations according to the contract, will not be permitted to recover back what has thus been advanced or done. In precise illustration of the proposition may be quoted the language of the learned Chancellor Walworth in *Egerton* v. *Peckham* (11 Paige 352): "The contract, it is true, contains a general provision that, if default shall be made in either of the payments, Strobeck shall forfeit all the previous payments, and give up the possession of the premises. *This, however, is but the legal effect of the contract without such a provision;* for, if no such provision had been contained in the agreement, the defendant might have brought an action of ejectment to recover the possession of the premises,[3] which ejectment suit this Court would not have restrained, except upon the terms of paying the balance of the purchase money and the costs of suit. Nor could the payments already made pursuant to the terms of the contract have been recovered back if the vendee had refused to complete his purchase, *even if this clause of forfeiture had not been inserted in the contract.* The question here presented, then, is whether this clause was intended by the parties to deprive the purchaser of all legal and equitable right to the premises, or to the previous payments, if for any cause the last payment should not be made at the precise moment when it became due and payable; and, if so, whether it is not the duty of this Court to relieve against such a forfeiture.

"But while it is essentially true that in case of a rescission the vendee may demand that he be restored to his original condition, it does not follow that a vendor who refuses to convey after such breach by the vendee, thereby rescinds. To the contrary, in refusing to convey after the vendee's default, he is not treating the contract as at an end, but is

[3] Cf. *Wallace* v. *Hesslein*, 29 S. C. R. 171.

expressly standing upon it, and basing his rights upon its terms, covenants, and conditions."[4]

The question, in short, seems to be part of the broader general question—when can money paid on a contract be recovered back?

In the absence of fraud, mistake or the like, it is only where there is a total failure of consideration or a true case of rescission, that, in general, money paid can be recovered back. Thus where the plaintiff paid money to the defendant under a contract which he could not enforce by reason of the Statnte of Frauds, it was held that he could not merely on that account recover it back.[5] Although the last case was a "deposit" case, the decision does not turn especially on that point, and the language of Mellor, J., is apposite: "Now is there anything unconscientious in the defendant keeping that money? I can see nothing. The breaking off of the agreement was not in any sense the fault of the vendor. He was always ready and willing to complete the purchase and execute a conveyance, but the vendee chooses to set up this question about the Statute of Frauds, and to say, 'Although I can have the contract performed, if I please, I repudiate it.' Under these circumstances, I think it would be quite monstrous if the plaintiff could recover."

In order to entitle the plaintiff to recover money paid under a contract, the failure of consideration must be complete.[6] *Barton* v. *Capewell Continental Patents Co.*[7] is no exception to this rule. How, when the purchaser has had the equitable title to the land, the right of sale to the exclusion of the vendor, and in the majority of cases the possession

[4] *Glock* v. *Howard & Wilson Colony Co.*, 43 L. R. A. at pp. 204-5.

[5] *Sweet* v. *Lee*, 3 M. & G. 452; *Thomas* v. *Brown*, 1 Q. B. D. 714. Cf. *Barber* v. *Armstrong*, 6 U. C. R. (O. S.) 543.

[6] *Hunt* v. *Silk*, 5 East. 449: *Anglo-Egyptian Navigation Co.* v. *Rennie*, L. R. 10 C. P. 271; *Nicholson* v. *Ricketts*, 29 L. J. Q. B. 55; and cf. *Hole* v. *Wilson*, 5 Sask. R. 28.

[7] 68 L. T. 857.

—all for a longer or shorter period—can it be suggested that on determination of the contract by his default and repudiation there has been a *complete* failure of consideration? In *Mulholland* v. *Holcolm*,[8] Richards, J., after quoting Chitty on Contracts, to the effect that the action for money had and received will not lie if the contract has been in part performed, and the plaintiff has derived some benefit, and by recovering a verdict the parties cannot be placed in the exact situation in which they stood, says: "It cannot be said that the plaintiff did not derive some benefit from the contract; he went into possession of the land, and retained possession of it nearly a year." In *Blackburn* v. *Smith*,[9] where the plaintiff so far took possession of the land "as to put up a notice thereon offering to sell or let part of it," Crompton says, *arguendo*: "Who can say here what the value of the occupation by the defendant and the power of selling or endeavoring to sell was?" Parke, B.: "Whether it was of value to the plaintiffs or not, at all events the defendant was deprived during that time of the power of making use of the land"—and it is on this ground, not on the principle of forfeiting the deposit, that the judgment of the Court is based, refusing the plaintiffs a refund of the £150 paid by them.

This is only another way of stating that one of the requirements to the recovery of money paid under a contract, on the ground of failure of consideration, is that it must be possible to replace the parties in *statu quo;* and this is exactly what is impossible in the majority of the cases we are considering. But after all said and done, is there any case in which the plaintiff, alleging his own breach of contract, has been heard to complain of a *failure* of consideration on the part of the defendant, who has always been able, ready and willing to perform the contract on his side?

[8] 6 U. C. C. P. 520.

[9] 18 L. J. Ex. 187.

In *Bourne* v. *Phillips* (*No. 2*) [10] Murphy, J. (B.C.), holds that the express clause for cancellation or determination in an agreement is for the vendor's benefit, and does not affect his right to apply for an order for *foreclosure*, without giving the notice (in this case a 30-days' notice) provided for in the clause.

If this right of determination, apart from express agreement, does really exist, its exercise will, of course, be subject to the powers of the courts to relieve from forfeiture, just as where determination is attempted to be enforced under the express clause.

[10] 4 W. W. R. (1215)

CHAPTER VI.

Purchasers' Remedies.

Section I.—Introductory.

In discussing the remedies of the vendor, so much has necessarily been said of the co-relative remedies of the purchaser, that their separate treatment need not occupy much space.

The doctrine of the equitable estate and the purchaser's lien furnishes the philosophic basis for a proper understanding of the purchaser's remedies. Like those of the vendor, they can be divided into remedies based on the affirmance of the contract, on the one hand, and on its disaffirmance on the other. Since under the contract all that the purchaser is entitled to is the land, or rather the conveyance of the legal estate (which gives the right of possession), if he affirms the contract he has only two remedies: he can bring an action to compel the vendor to convey, i.e., for specific performance: or if the vendor is unable or unwilling to convey he can sue him for damages. If he disaffirms, he has, under certain circumstances, the right to rescind: an action to recover the deposit (under certain circumstances), and sums paid on account of the purchase-money; and for such purposes to enforce his purchaser's lien. Here, again, the general principle, of course, applies—it is a condition precedent to the enforcement of the remedy, whether on affirmance or disaffirmance, that the purchaser is not himself in default. The right that the purchaser has to recover his purchase-money on *rescission* by the vendor for the purchaser's default is only an apparent exception: here we are dealing with the *positive* remedies of the purchaser on his own initiative, by action or counterclaim.

SECTION II.—CONTRACT AFFIRMED.

(a) *Purchaser's Action for Damages* (1).

Where the vendor is unable to complete owing to a defect in title, the purchaser is not as a rule (in the absence of fraud) entitled to recover damages for the loss of his bargain.[1]

The liability of the vendor of land to pay damages to the vendee for the loss of his bargain, has lately been authoritatively settled by the decision of the House of Lords in *Bain* v. *Fothergill*.[2] Till that decision, there had always been a struggle to bring each particular case within the general ruling in *Flurean* v. *Thornhill*,[3] or the exception to that ruling in *Hopkins* v. *Grazebrook*.[4] The general ruling was that such damages were not recoverable (in the absence of fraud) where the contract went off through a defect of title. The supposed exception was, that they were recoverable where the vendor had no title at all, and knew he had none, or knew he had a different title from that which he contracted to sell. But *Hopkins* v. *Grazebrook*, and all the cases which depended upon it, are now overruled. "The rule as to the limits within which damages may be recovered upon the breach of contract for the sale of real estate must be taken to be without exception. If a person enters into a contract for the sale of real estate, knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of

[1] The subject is excellently treated in Mayne on Damages (6th Ed.) 205 *et seq.*

[2] L. R. 7 H. L. 158; 43 L. J. Ex. 243.

[3] 2 W. Bl. 1078.

[4] 6 B. & C. 31.

the contract; he can only obtain other damages by an action for deceit."[5]

This exception to the ordinary common law rule as to damages is based on the exceptional nature of the contract for sale of real estate, where "there must always be some degree of uncertainty as to whether a good title can be effectively made by the vendor"—which is assumed to be understood by both vendor and purchaser. Since this reason is not generally applicable in those jurisdictions where the Torrens system of certified titles is in force,[6] and the land is under the system, the rule, in such cases, might not seem necessarily to apply,[7] *cessante ratione cessat ipsa lex;* unless indeed the vendor is, in fact, unable to make title owing to "difficulties" of the nature referred to—e.g., restrictive covenants, reservations, etc.

Thus, in *O'Neill* v. *Drinkle,*[8] Lamont, J., says: "In this province, however, the reasons for the adoption of this exception to the common law rule as to damages do not exist. Instead of the complicated law as to the title of real estate which they have in England, we have a very simple system of land transfer, under which a person having a certificate of title holds an indefeasible title to his land, which is not subject to those uncertainties and defects which led to the exception as laid down in *Flureau* v. *Thornhill*, and as was said by Cockburn, C.J., in *Engel* v. *Fitch*,[9] "The limit of the exception is to be found in the reason on which it is based; the reason ceasing, the rule should also cease.' Therefore, I am

[5] Mayne on Damages, 207. Per Lord Chelmsford. *Bain* v. *Fothergill*, L. R. 7 H. L. 158; see per Blackburn, J., *Gray* v. *Fowler*, L. R. 8 Ex. 249, 282; 42 L. J. Ex. 161, 177: *Gas Light & Coke Co.* v. *Towse*, 35 Ch. D. 519; 56 L. J. Ch. 889; *Rowe* v. *School Board of London*, 36 Ch. D. 619; 57 L. J. Ch. 179.

[6] Cf. *Commercial Bank* v. *McConnell*, 7 Gr. at 351.

[7] In Australia, however, no such distinction seems to be observed. Hogg, p. 272.

[8] 1 Sask. R. 402.

[9] L. R. 3 Q. B. 314.

of opinion that the conditions being entirely different here, and the reasons which led to the establishment of the rule being entirely absent, there is no reason why a different principle should be adopted in assessing damages for breach of contract for the sale of land than that adopted for the breach of other contracts."

This decision has not, however, met with approval in Alberta, though the same simplicity of title obtains as in Saskatchewan. To quote the most recent and authoritative Alberta decision: Beck, J., in *Stephen* v. *Banning*[10] (Simmons, J., concurring), says: "I agree with the learned Chief Justice that the English rule as to damages in the case of breach of contract for the sale of land should be applied in this jurisdiction, notwithstanding that we have here the Torrens system of Land Titles."

Where the vendor's breach of contract is occasioned by some other reason than want of title, the ordinary common law rule, of course, applies, and the purchaser is entitled, so far as money can do it, to be placed in the same position with respect to damages as if the contract had been performed.[1] Thus, where the vendor could have cured the defect in title, but refused on account of the expense, the purchaser was given general damages.[2]

Whether the rule in *Bain* v. *Fothergill* would apply in a case where the purchase-money is payable by instalments, and the purchaser has been let into possession, and the defect in title is only discovered after one or more instalments had been paid, does not seem to have been considered by the Courts. It seems at any time on discovering the defect in

[10] 6 A. L. R. at p. 431. Cf. *McAndie* v. *Jackson*, 1 W. W. R. 10.

[1] *Hadley* v. *Baxendale*, 9 Ex. 341; *Robinson* v. *Harman*, 1 Exch. 850; *Singleton* v. *Day* (1899), 2 Ch. 320.

[2] *Engel* v. *Fitch*, L. R. 4 Q. B. 659; *Singleton* v. *Day*, *supra*; Cf. *Williams* v. *Glenton*, L. R. 1 Ch. at p. 209; *Royal Bristol, &c., Soc.* v. *Bomash*, 35 Ch. D. 390; *Godwin* v. *Francis*, L. R. 5 C. P. 295; *Jones* v. *Gardiner* (1902), 1 Ch. 191.

title—i.e., the impossibility of performance by the vendor—he may rescind the contract, and recover the money already paid under it.[3] But this would appear to be a very good reason why he should not recover damages; for though possession when taken under the terms of the contract will not, as a rule, be deemed a waiver of defects in title, the purchaser could and should have satisfied himself as to title before paying any instalments of the purchase-money.

It might indeed at first sight seem reasonable that by paying instalments of the purchase-money, coupled with possession, the purchaser should be held to have waived defects in title, and so not only to be not entitled to damages, but to have actually lost his right to rescind; and it is submitted this would clearly be so where there had been great delay in investigating the title,[4] or where the purchaser had actual knowledge of the defect;[5] and where the Torrens system of registered titles is in force, the principle of constructive notice might, perhaps, properly be extended to such a case. Otherwise the purchaser might lie by, until he saw whether his bargain were a good one or not, and then elect either to affirm and recover damages, or disaffirm and recover his purchase-money—as his interest might prompt him (but see *Darby* v. *Greenlees*, cited in Sec. III. *post*—where this subject is more fully discussed). In the last-mentioned case (an action for specific performance), a reference as to title was directed, and since the enquiry is usually as to whether the vendor can show a good title, not whether he could at the time the contract was entered into,[6] it would appear to be a good answer to the purchaser's action for damages to

[3] Cf. Pollock, p. 429, and *post*, "Rescission by Purchaser."

[4] *Pegg* v. *Wisden*, 16 Beav. 239; *Sibbald* v. *Lowrie*, 18 Jur. 141; *Wallis* v. *Woodyear*, 2 Jur. N. S. 179; *Port of London Assurance Case*, 5 DeG. M. & G. 465.

[5] *Re* Gloag & Miller's Contract, 23 Ch. D. 320.

[6] Fry, paragraph 1366. Dart, pp. 1065, *et seq.*; but see *Graves* v. *Mason*, 8 W. I. R. 542.

show at the trial, or on a reference, that the vendor was then able to make a good title.

But since the action for damages is a common law action, where time is of the essence, the principle of *Noble* v. *Edwards*[7] might apply.[8]

The rule in *Bain* v. *Fothergill*[9] probably does not apply where the vendor has expressly or impliedly represented that his title is good, knowing the representation to be false; at least, it seems the vendor would be liable in an action of damages for deceit.[10] Another exception is where the vendor agrees to convey, at a future date, for a consideration to be immediately given, and it appears on the face of the agreement that he has not yet acquired a sufficient title. If he is unable to perform when the time comes, he is liable to full damages.[1] There would seem no reason why this principle should not be extended to the case where the price is payable by instalments.

Where the purchaser is entitled to damages for loss of his bargain, the measure is the difference between the contract price and the value of the land at the time of the breach.[2] If the land has been resold at an advanced price, the amount of the advance will *prima facie* represent the purchaser's damages;[3] but this is not conclusive.[4]

It has been questioned whether damages may not be calculated up to the time the action is brought, or even up to trial, and, so that the highest value of the land from the

[7] 5 Ch. D. 392, *et seq.*

[8] Cf. *Halkett* v. *Dudley* (1907), 1 Ch. 590.

[9] L. R. 7 H. L., at p. 207.

[10] *Gray* v. *Fowler*, L. R. 8 Ex. at 282.

[1] *Wall* v. *City of London Real Property Co.*, L. R. 9 Q. B. 249.

[2] *Engel* v. *Fitch*, L. R. 4 Q. B. 659.

[3] Ibid.; *Crawford* v. *Patterson*, 1 A. L. R. 27.

[4] *Dunn* v. *Callahan*, 1 A. L. R. 179.

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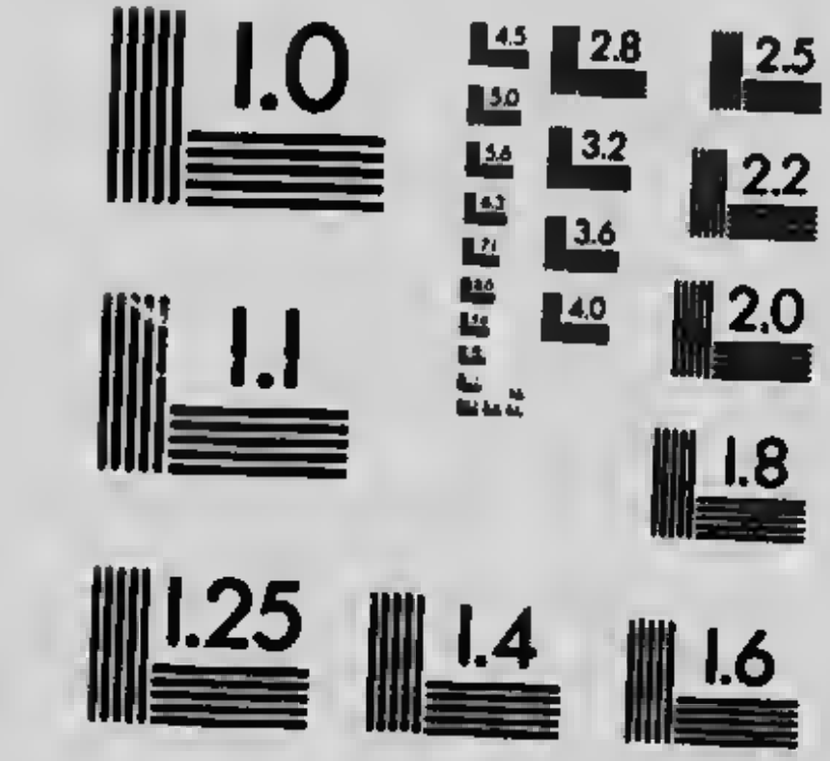

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making of the contract up to the trial should be taken in assessing the damages,[5] as under the special circumstances in *Robertson* v. *Dumaresc.*[6] And it seems that under certain circumstances, the date when the purchaser was to be let into possession—"which corresponds most nearly to the date of delivery of goods in a contract for the sale of goods, and there is no evidence of any increase in value after that date"[7] —may control.

The purchaser may also recover any special damages he may have suffered, e.g., loss of trade by being kept out of the premises.[8]

The general rule is that, after the completion of the transaction by conveyance, the purchaser cannot claim damages, compensation, or other relief.

"If parties have made an executory contract which is to be carried out by a deed afterwards executed, the real completed contract between the parties is to be found in the deed, and you have no right whatever to look at the contract, although it is recited in the deed, except for the purpose of construing the deed."[9]

The cases on this subject—i.e., when and under what circumstances, after conveyance, the purchaser is or is not entitled to relief—are very fully reviewed by Mathers, J. (Man.), in *Foster* v. *Stiffler.*[10]

[5] Per Beck, J., in *Dunn* v. *Callahan*, 1 A. L. R. at 183-4.

[6] 2 Moo. P. C. (N.S.) 66.

[7] *Dunn* v. *Callahan*, *supra*.

[8] *Ward* v. *Smith*, 11 Price, 19; *Jaques* v. *Miller*, 6 Ch. D. 153.

[9] James, L.J., in *Leggott* v. *Barrett*, 15 Ch. D. at 309. Cf. Fry, L.J., in *Palmer* v. *Johnson*, 13 Q. B. D. at 359.

[10] 12 W. L. R. 60.

(*b*) *Purchaser's Action for Specific Performance.*

The purchaser, of course, has a co-relative action to the vendor for specific performance, and the same general principles apply. This claim to specific performance can be advanced either by way of counterclaim to an action by the vendor, or on the purchaser's initiative—and, where otherwise appropriate and applicable, will generally prevail, provided the purchaser has not precluded himself from this form of equitable relief by great delay or other circumstances, and either is not in default, or offers to remedy his default within a reasonable time. In *Wallace* v. *Hesslein*,[1] Sir Henry Strong, C.J., says: "In order to entitle a party to a contract to the aid of a Court in carrying it into specific execution, he must show himself to be prompt in the performance of such of the obligations of the contract as it fell to him to perform, and always ready to carry out the contract within a reasonable time, even though time should not have been of the essence of the agreement."[2]

The fact that the purchase is purely a speculative one may also be seized on by the Court as a ground for refusing specific performance.[3]

When in the vendor's action to enforce a "forfeiture" for the purchaser's default in payment, the Court appoints a future day for payment of arrears, and provides that only in default of payment shall the purchaser's equitable estate be forfeited, this may be regarded to some extent as a form of specific performance in favour of the purchaser. But in

[1] 29 S. C. R. 171.

[2] Cf. *Bark Fong* v. *Cooper*, 24 W. L. R. 294; *McCready* v. *Clark*, 14 W. L. R. 480; *Whitla* v. *Riverview Realty Co.*, 19 Man. R. 746; *Fredericksen* v. *Stanton*, 24 W. L. R. 891; *Hicks* v. *Laidlaw*, 19 W. L. R. 525; *Evans* v. *Norris*, 22 W. L. R. 818; *Hall* v. *Turnbull*, 10 W. L. R. 536; *Banton* v. *Morch*, 12 W. L. R. 598; *Major* v. *Shepherd*, 10 W. L. R. at 299; *Battell* v. *H. B. Co.*, 1 Sask. R. 169.

[3] *Wallace* v. *Hesslein* (*supra*); *Bork Fong* v. *Cooper*, 24 W. L. R. 294 (per Martin, J.).

an instalment-plan agreement, where subsequent instalments are to accrue, it is not quite the same thing for either party as has been pointed out (*ante*, pp. 128-143). As specific performance by the vendor necessitates the exhibition of a good title and the conveyance of the property, it is obvious that it cannot, properly speaking, be executed until all the purchase-money is paid: or, at least, until the time for its payment has arrived, and the purchaser is able, ready and willing to pay. Nor, where the price is payable by instalments, can the purchaser anticipate the dates of payment without the vendor's consent, even though he offers, by way of bonus, to pay the full amount of interest that would accrue to the vendor under the agreement.[4]

But if the vendor, in pursuance of a clause in the agreement, had declared the whole purchase-money due and payable on the purchaser's default in payment of an instalment, or had demanded, or taken steps to compel, payment (e.g., retaking possession of the premises), the purchaser, if relieved from the forfeiture, may also be held to be entitled to the option to pay off the whole principal, and demand an immediate conveyance—in analogy to the rule between mortgagor and mortgagee under corresponding circumstances.[5]

Though, as a rule, the purchaser, seeking specific performance, must not be in default, since mere lapse of time in payment of the purchase-money may generally be recompensed by interest and costs,[6] the plaintiff, tendering or paying into Court all arrears and interest, will not generally be refused specific performance, unless the delay has been excessive, or the subject-matter or surrounding circumstances

[4] *Rutherford* v. *Walker*, 1 A. L. R. 122; citing *Brown* v. *Cole*, 14 Sim. 427; *Bovill* v. *Endle* (1896), 1 Ch. 648: *Burns* v. *Boyd*, 19 U. C. R. 547.

[5] *Bovill* v. *Endle* (1896), 1 Ch. 648; *Cruso* v. *Bond*, 1 O. R. 384, and see *Tytler* v. *Genung*, 4 W. W. R. 797.

[6] *Vernon* v. *Stephens*, 2 P. Wms. 66.

of such a nature as to make prompt payment essential.[7] The discussion in Chapter IV., as to time of the essence, and as to delay, etc., in Chapter VII., is applicable here as well as in the case of the vendor.

The purchaser must further satisfy the Court that he is ready and willing to do all matters and things on his part thereafter to be done. In short, the purchaser must satisfy the Court that the "equities" are in his favour; he must come with clean hands, etc., etc.[8]

The rules as to granting damages in lieu of or in addition to specific performance already mentioned (*ante* Chap. II., sec. IV.), apply equally to the purchaser's action.

A typical decree in the purchaser's action is as follows:—

"Declare that the agreement in the pleadings mentioned ought to be specifically performed and carried into execution and order and adjudge the same accordingly. Let an inquiry be made—what damages have been sustained by the plaintiff by reason of the defendant not having specifically performed the said agreement.

"And upon the plaintiff paying to the defendant the balance of the purchase-money for the lands comprised in said agreem with interest on such balance at the rate of five per cent. per annum from the ..... day of ..... to the day of completion, let the defendant execute a proper conveyance of the said lands to the plaintiff or whom he may appoint, such conveyance to be settled, etc. Provision for costs, liberty to apply."[9]

This form of decree is applicable where the whole purchase-money is due, or the purchaser is entitled to pay it off;

[7] Fry, par. 1079, *et seq.*

[8] See *Henderson* v. *Thompson*, 41 S. C. R. 445.

[9] Seton (6th ed.) 2206, 2244.

but, as before pointed out, the purchaser cannot very well have an anticipatory decree where there are instalments not yet matured, although he gains a certain amount of reciprocal benefit from such a decree as that in *Nives* v. *Nives* in the vendor's action. The corresponding action by the purchaser, supposing the vendor, ing wrongfully or prematurely determined the contract, refused to accept further payment, would seem to be practically for *reinstatement*, and it is suggested the decree might take some such form as the following:—

"Declare that the plaintiff is entitled to have the agreement, etc., specifically performed by the defendant upon the plaintiff's paying to the defendant the sum of $, for principal and interest now in arrear, less the plaintiff's costs to be taxed (*or that an account be taken, etc., etc.*), on or before the ..... day of ..... and order and adjudge, etc.

"And upon the plaintiff's paying to the defendant all subsequent instalments of principal and interest as the same shall fall due under the terms of the said agreement, let the defendant execute a proper conveyance, etc. But, in case the plaintiff shall make default in any such payments, liberty to the defendant to apply for such order, etc. General liberty to all parties to apply. Injunction (if necessary); Costs."

A consideration of these forms of decrees and a comparison with the form at p. 48, *ante*, will give the student a more practical insight into the machinery of specific performance than pages of commentary.

As to specific performance with compensation, and the application of the *cyprés* doctrine, see, in addition to Fry, Williams, etc., 25 Halsbury, 406-407; and cf. *Boudreau* v. *Renault*, 3 A. L. R. 333.

SECTION III.—CONTRACT DISAFFIRMED.

(a) *Rescission by the Purchaser.*

The general principles of rescission which have been discussed among the vendor's remedies in Chapter III., the cases for rescission, its general effect, the doctrine of *restitutio in integrum*,[1] are all equally applicable to rescission by the purchaser. It is very unusual for an express *power* of rescission to be reserved to the purchaser by the contract, but a *right* to rescind arises from the vendor's incapacity, refusal (or unreasonable delay, which in effect amounts to refusal) to perform; from the vendor having made performance impossible, and, as is generally stated, from want of mutuality.[2]

It is this last ground—want of mutuality—that is the basis of the proposition that the purchaser is entitled to *rescind*[3] as soon as he discovers defects in the vendor's title, i.e., defects in matters of title,[4] since defects that are merely matters of conveyance can always be equitably adjusted.[5]

In *Re Hucklesby and Atkinson's Contract*,[6] the abstract traced a perfect title to B., from whom the vendor claimed as purchaser. The purchaser's solicitors required the subsequent title (from B.) to be abstracted and deeds produced. The vendor's solicitors replied that by the vendor's direction B. would convey to the purchasers. Of this state of

[1] Cf. *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A. C. 1218.

[2] See 25 Hals. p. 402.

[3] *Nimmons* v. *Stewart*, 1 A. L. R. 388; *Hartt* v. *Wishard-Langen Co.*, 9 W. L. R. 519; Fry, par. 1369; Dart. 1065-7; and cases cited; cf. *Erlanger* v. *New Sombrero Phosphate Co.* (*supra*).

[4] As to the distinction between matters of conveyance and matters of title see Dart, 319, 320; Armour on Titles (3rd ed.), 46-49; *Esdaile* v. *Stephenson*, 6 Madd. 366; *Hartt* v. *Wishard-Langen Co.*, 9 W. L. R. 519; *Byrnes* v. *McIvor*, 10 W. L. R. 492.

[5] *Cameron* v. *Carter*, 9 O. R. 431; *Armstrong* v. *Auger*, 21 O. R. 98; *Gregory* v. *Ferrie*, 14 W. L. R. 219.

[6] 102 L. T. 214.

affairs, Eve, J., says: "Now, the whole question on this originating summons turns on this: Whether on the date of that letter the purchaser was entitled to repudiate the contract. This case is different from that class of cases in which the vendor has no title at the date of the contract, and has no power to clothe himself with the title. I think that it is abundantly clear that if the vendor has not a title in himself and cannot compel third parties to supply him with the title, the moment the purchaser becomes aware of that fact, he is entitled to repudiate the contract, and he is under no obligation to give the vendor time to make good a title which is so imperfect at the date of the contract; but I do not think that class of cases applies to a state of things in which the vendor has a complete title or the power to make a complete title at the date of the contract, and the only default of which he is guilty is in not having satisfied the purchaser by showing this title. In this case, the vendor had a complete equitable title under the contract with Mr. Bowles, and he had a right to compel the person with the legal title to supply him with it; and the default of which he had been guilty on the 18th October, 1909, was that he had not put the purchaser in possession of the information which would have satisfied the purchaser as to his right to convey. In that position of affairs, is there any case which says that the purchaser can repudiate the contract *brevi manu?* I do not think there is. The cases cited come to this: that, if the vendor has no title and no power to get it in, the purchaser can repudiate, but they do not establish the proposition that, if the vendor has the control of the title, the purchaser has any right to repudiate."

Whether this right which the purchaser has to withdraw or repudiate, on discovering defects in title, carries with it the common-law right of rescission is considered by Parker, J., in the much-discussed case of *Halkett* v. *Dudley*,[1]

[1] (1907), 1 Ch. 590.

In *Bellamy* v. *Debenham*,[1] Lindley, L.J., while holding that a repudiation by the purchaser on account of the defective title, before the time for completion had arrived, was a good defence to an action for specific performance, had added (p. 420): "Now, as to damages, I am not sure that the repudiation on the 20th of May is by itself an answer to the plaintiff's claim for damages. The plaintiff had . . . a time allowed for completion which did not expire until the 24th June, and, if he had been ready and willing on the 24th June to complete his contract and to give to the defendant such a conveyance as the defendant was entitled to, I am not prepared to say that the defendant would not have been liable to damages if he refused to complete."

This is referred to by Parker, J., in *Halkett* v. *Dudley*. On the general question, he says: "Now, I think it is reasonably clear, on the authorities quoted to me, that, before decree, a purchaser who becomes aware of a defect in the vendor's title, which defect cannot be removed without the concurrence of a third party, whose concurrence the vendor has no power to require, may . . . repudiate his contract, and that such repudiation will be a bar to any relief being subsequently given by way of specific performance at the vendor's instance, even though the defect has been removed before the trial. I do not think that this right is more than an equitable right affecting the remedy by way of specific performance. If the vendor contracts that he will, at a future date, convey to a purchaser land which does not at the date of the contract belong to him, but to which he acquires title before the day upon which, according to the contract, the purchase is to be completed, I do not see why, in principle, he should not be able to recover damages for breach of contract if the purchaser fail to complete at the date fixed for completion. *If this be so*, the right of repudiation in question must be distinguished from the common right of rescission, and arises out of that want of

[1] (1891), 1 Ch. 412.

mutuality which, unless waived, is generally fatal to relief by way of specific performance."[9]

This decision is criticized in Williams on V. & P.,[10] and in 25 Halsbury's Laws of England,[1] where, in reference to the above, it is stated: "Parker, J., treated the purchaser's immediate right of repudiation for defect of title as an equitable right only, leaving him liable on the contract, if the vendor makes a good title at the time fixed for completion. But this overlooks the special obligation of a vendor of land to make out his title prior to completion so as to enable the purchaser to rely on and prepare for completion, and the better opinion seems to be that the right of repudiation is a legal, as well as equitable, right." And the learned authors of the article quoted state ([1a]): "Rightful repudiation by the purchaser is available as a defence to an action by the vendor for specific performance, and in this aspect, it depends on the doctrine of mutuality in the contract; but it appears also to operate as a rescission of the contract at law, so as to entitle the purchaser to maintain an action for a declaration of rescission and the return of the deposit, and to be available as a defence to the vendor's action for breach of contract on non-completion at the proper time."

This right of repudiation must be exercised as soon as the defect is discovered. "If, after ascertaining the defect, the purchaser still treats the contract as subsisting, he does not retain the right to repudiate at any subsequent moment he may choose."[2]

It is sometimes stated that it is too late for the purchaser to *repudiate* on this ground, after the vendor has begun an action for specific performance, and that the vendor will be entitled to a decree if he can show a good title

[9] (1907), 1 Ch. at 596-7.
[10] p. 185 note (L.)
[1] p. 404 (note s.)
[1a] 25 Hals., par. 654, p. 404.
[2] *Halkett* v. *Dudley* (1907), 1 Ch. at 597.

at the trial, or on the reference: but if the defect is not discovered until after the action has been begun, and subject, of course, to prompt and unambiguous repudiation, there appears no reason why the purchaser may not then repudiate, and, with the leave of the Court, even after decree.[3]

Where the defect is discovered after the decree, the purchaser wishing to repudiate should move to be discharged from the contract.[4]

It is important to practitioners accustomed to cases of specific performance arising where the vendor has a "Torrens" title to distinguish between what may be termed a *conditional* decree, and an *absolute* decree, for specific performance.

The conditional form of decree is in common use in England, and runs:[5] "Declare that the agreement, dated, etc., in the pleading mentioned ought to be specifically performed . . . *in case a good title can be made* to the premises comprised therein, etc., etc.," and the note is added in Seton: "In an action by the purchaser the words 'in case a good title can be made, etc., etc.,' should be omitted, as he can always waive the enquiry."

In Alberta, Saskatchewan, etc., where all lands are under the Torrens System, the decree in an action for specific performance, whether vendor or purchaser is plaintiff, is, in nine cases out of ten, an *absolute* decree, i.e., the words "in case a good title can be made to the premises, etc.," do not appear.[5a]

The distinction is important in respect of the purchaser's right to repudiate, or move to be discharged from the contract, subsequent to decree. If, e.g., under the conditional

[3] *Ibid.*

[4] *Halket* v. *Dudley* (*supra*), at 601; *Lee* v. *Scheer*, (S. C. Alta; Dec. 1914, not yet reported).—but see Appendix.

[5] Seton on Decrees (7th ed.), 2137.

[5a] *Lee* v. *Scheer* (supra).

decree, the defect in title only appears on the reference as to title, the purchaser's equity to then repudiate, is clearly much stronger than where he has obtained or submitted to an absolute decree.[6]

Neither *Bellamy* v. *Debenham* nor *Halkett* v. *Dudley* appear to have been referred to in *Hart* v. *Wishard-Langen Co.*[7] before the Court of Appeal in Manitoba. This last case is very typical of a class of cases that arises during or after a period of land speculation. A. having an estate in fee, sells to B. on an instalment-plan agreement: B., before all his instalments have matured, sells to C.: C., under like terms and conditions, sells to D., and so on. If the transactions are carried out by a series of assignments of B.'s contract with A., then there will be privity of contract between A. at one end and D., or the last assignee, at the other. But, if, as in *Hart* v. *Wishard-Langen Co.*, "the transactions between the various vendors and purchasers are straight sales of land, and are not assignments of agreements for sale or purchase,"[8] very different considerations arise. It is obvious that the lower down we get in the chain, the weaker is the title of the last vendor. It seems reasonably clear that "C." could not succeed in an action for specific performance against D., until he had got in all the prior interests;[9] nor, until then, could he recover, by action, overdue instalments, nor would he, it would seem, be entitled to have the moneys paid into Court, because there being no privity of contract between C. and A., there is no certainty that he can eventually procure a conveyance from A., and so transfer a good title to D., when the time for completion arrives. Perdue, J.A., says of this position: "I should be prepared to go further, and to hold that the vendor company had only a weak equitable title, and that there were equitable

[6] See *Lee* v. *Scheer* (supra).

[7] 9 W. L. R. 519.

[8] *Ibid*, at p. 540.

[9] *Esdaile* v. *Stephenson*, 6 Mad. 366.

interests in the land superior to their interests, and still outstanding," and there does not appear to be any case in which purchase moneys have been directed to be paid into Court, except in respect of an incumbrance or interest of which the immediate vendor was entitled to the control before the time for completion. But what would appear to have been the main question in *Hartt* v. *Wishard-Langen Co.*, viz., whether the last purchaser, having ascertained this state of facts, was entitled to rescind, does not seem to be squarely met, except perhaps by Perdue, J.A. It is true that Phippen, J.A., says: "While, to my mind, the point has not been satisfactorily determined, it is possibly the right of the purchaser, on the production by the vendor of an abstract or its equivalent, showing absence of title, to rescind the contract, and claim a return of his payments."[10] And while Howell, C.J.A., says: "It seems to me reasonably clear on the authorities that if, before the defendant had procured this release, the plaintiff had objected to his title because of these exceptions, and had demanded back his money which he had already paid, it would have been no answer to a suit for the recovery of this money for the defendants to state that, after this objection had been taken, and after the plaintiff had rescinded the contract, he had got in and perfected his title," both the learned Judges are referring to other defects in title (reservations) than these we are discussing.

Perdue, J.A., however, with whom Richards, J.A., concurs, says: "The result of the authorities appears to me to be that the Court will not force a purchaser to take an equitable estate except where the vendor has the whole equity in the land, and controls the legal estate in such a way that he can readily procure it:" and, accordingly, on the ground that the vendors had only a weak equitable title, he, in effect, upheld *rescission*, and the purchaser's claim to be refunded the purchase money he had already paid, upon discovering the defects in title. But, of course, where the vendor has the

[10] 9 W. L. R. at 532.

right to get in the legal estate before the time for completion arrives, it is otherwise.[1]

It will be observed that all the learned Judges seem agreed that if, after abstract or its equivalent has been delivered, the purchaser discovers real or material defects in the title, that he has an immediate right, not merely to repudiate, but to *rescind* the contract. The case has been referred to at some length because of the great practical importance of the questions discussed (and there are a number of minor points that have not been mentioned), and because, in the present connection, it appears at variance with *Halkett* v. *Dudley*. In fact, the decisions seem quite in line with the statements of law quoted above from the article in 25 Halsbury's Laws of England.

But whether, on discovering defects in the title, the purchaser has an immediate right of rescission, or merely this right of repudiation, it is clear that the right, whatever it may be, may be lost by delay, at any rate, if the purchaser, after discovering the defects, continues to deal with the vendor as if the contract were still subsisting; and it may also be waived in other ways.[2]

The purchaser must repudiate promptly after acquiring knowledge of the defect. "Knowledge" would appear to include *constructive* knowledge or notice, and a purchaser who has neglected to examine the title within the proper time will be affected with constructive notice of all that a proper examination would have disclosed;[3] consequently, it would seem to follow that he would lose his right to repudiate, if, after this period had elapsed, he had continued to act on the basis of a subsisting contract.

Since a purchaser is clearly affected with notice of everything appearing on the abstract, and since under the Torrens'

[1] Cf. *Erlanger* v. *New Sombrero Phosphate Co.*, 3 A. C. 1218.

[2] Cf. *Mayberry* v. *Williams*, 12 W. L. R. 689.

[3] Dart. 881: 887-8: 890-1.

system of registered titles the register probably takes the place of an abstract,[4] and it appears to be the purchaser's duty to search there, he would seem to be affected with notice of everything that a search of the register would have disclosed. If this be so, where land is under the system, the purchaser would appear to be affected by notice of all defects, either within the time limited by the contract, or where there is no such limitation, within a reasonable time, whether he searched the register or not. This has an important bearing in connection with instalment-plan agreements.

It has been held in Ontario that taking possession under the contract and paying instalments of the purchase money is no waiver of a defect in title;[5] but it may well be that such facts might be held to constitute a waiver of this special and technical right of repudiation, which, if exercised, would be a bar to the vendor's action for specific performance. This would turn upon *when*, in such a case, it became the duty of the purchaser to investigate the title. It is true that the vendor is, as a rule, not obliged to perfect his title until the time for completion arrives; but since the purchaser can decline to pay instalments until the vendor exhibits a good title, it would seem only reasonable that, if the purchaser chooses to make such payments, he should lose this right of repudiation (which after all seems a very technical one), although, of course, it would not thereby necessarily follow that he would be deemed to have accepted the title. This would especially apply where the land was under the Torrens System, and the defendant had neglected the obvious precaution of a search.

But, though the purchaser may have lost this immediate right of repudiation, upon discovering defects of title, it by no means follows that he has, therefore, lost his right of common law rescission, or deprived himself of his defence

[4] Hogg, p. 167; Williams, p. 1166.

[5] *Darby* v. *Greenlees*, 11 Gr. 351.

to an action for specific performance on the ground of want of title. If the vendor has rendered performance impossible, or if, when the time for completion arrives, he is unable to convey, the purchaser has a right to rescind, subject possibly to this, that if the vendor commences an action for specific performance, the Court may allow him a reasonable time for perfecting his title. "A decree for specific performance enures for the benefit of both parties, and on the reference as to title a vendor is not confined to showing such title as he had at the date of the decree, much less to such title as he had at the date of the contract, but may perfect his title at any time before certificate."[6] Parker, J., says: "It is not necessary for me to go so far as to hold that, by not repudiating promptly, the purchaser lost his right of repudiation altogether; but it seems to me that by treating the contract as subsisting after the discovery of the defect, he did preclude himself from exercising a right of repudiation at a subsequent time, before giving the vendor a reasonable time to cure the defect, and that, therefore, his only safe course was to limit the time within which the defect must be removed, and a title made out, if the contract was to go through."[7]

But even this ultimate right of rescission may be waived, and his defence to specific performance lost, if the purchaser does acts which are deemed to evince an intention to accept the title. The mere taking of possession, when contemplated by the contract, or with the assent of the vendor, is not generally deemed a waiver of defects in title; but possession, coupled with other acts, such as payment of the purchase money, alterations, or repairs and improvements to the premises, etc., is *evidence* from which waiver may be, and generally will be, implied.[8]

[6] *Halkett* v. *Dudley* (1907), 1 Ch. at p. 601.

[7] Ibid. at p. 600.

[8] Williams, 188-191; Dart, 512, *et seq.*; Fry, par. 1343, *et seq.*; *Margravine of Anspach* v. *Noel*, 1 Madd. 310; *Commercial Bank* v. *McConnell*, 7 Gr. 323; *Wallace* v. *Hesslein*, 29 S. C. R. 171.

These statements may have to be qualified where the purchase money is payable by instalments, and the purchaser is let into possession under the contract. Thus, in *Darby* v. *Greenless*,[9] Mowat, V.-C., says: "Some reliance was placed on the circumstance of payments having been made on account of the purchase money: but payments are no waiver where the contract contemplates immediate possession, and provides for payment by instalments." No authority is cited, and, with great respect, the difficulty appears to be this: The purchaser might lie by for two or three years, when finding his investment unprofitable he could insist upon some defect (e.g., a servient easement or restrictive covenant), that, if the land had largely increased in value, he would gladly have waived. It must be remembered that the purchaser is not obliged to make any payments until he has approved the title, and particularly under the Torrens System the question of title is usually a very simple one, and if under this system the purchaser is to be held affected by constructive notice after a reasonable time from the making of the contract, he would appear to come under the following principle, viz.: If the purchaser takes, or remains in, possession and pays instalments after knowledge of the defect, he will be held to have accepted the title.[10]

In *Commercial Bank* v. *McConnell*,[1] where the purchase money was payable in five annual instalments, Spragge, V.-C., held that taking possession, paying an instalment (apparently merely the down payment), coupled with the fact that the purchaser had made alterations in the premises, constituted an acceptance of title; and a decree for specific performance was made, and the reference as to title refused.

[9] 11 Gr. 351.

[10] *Re Gloag & Miller's Contract*, 23 Ch. D. 320. In *Hartt* v. *Wishard-Langen Co.*, 9 W. L. R. at 541, Perdue, J.A., qualifies this, stating that if the payment is made under a threat of forfeiture it will not be voluntary, so as to constitute a waiver of objections. Cf. *Ellis* v. *Rogers*, 29 Ch. D. 669.

[1] 7 Gr. 323.

In the course of his judgment, the learned Vice-Chancellor says: "In the English cases, it generally appears that an abstract of title had been delivered before the act relied upon as an acceptance of title; and I concede that there is more room to infer an acceptance of title when the title is disclosed than when it is not. In this case, there does not appear to have been any abstract delivered or demanded. If a purchaser choose to assume the title to be good, or act upon his own knowledge or opinion without seeing, and without asking to see, how the title is made out by the vendor, I should think he would be bound by such acts as are shown in this case; and I say this, having in view the circumstances of this country, the comparative simplicity of titles, and the absence in very many cases of the formalities which attend the transfer of property in England."

Although in this case the purchaser had made alterations, it is submitted that it goes a long way towards fixing the purchaser with constructive notice of all defects that would be disclosed on searching a *registered* title. In this connection, it must be remembered that the Ontario registry system is a register of *deeds;* the Torrens' system is a register of *titles,* and "the comparative simplicity of titles" is much more marked under the latter than under the former—the system referred to by the learned Vice-Chancellor.[2]

Again, unless it is held that it is reasonable for the purchaser to delay his investigation until he has paid all his purchase money, and become entitled to demand a conveyance, it is difficult to see why the rule, that long delay in raising objections may be evidence of waiver,[3] should not apply where the price is payable by instalments; though, no doubt, the length of time that should have such effect would depend on all the circumstances, including the consideration whether an abstract had been delivered, or the *title* registered,

[2] And cf. *In re Gloag & Miller's Contract*, 23 Ch. D. 320.

[3] Williams, 190.

or not; the number of payments, the value of the land, whether depreciated or not, etc., etc.

Where the contract is thus rescinded without any fault of the purchaser, he is entitled to recover his deposit[4] and moneys paid on the purchase price, together with "legal" interest; but since rescission is inconsistent with the affirmation of the contract, the principle of *Henty* v. *Schroder*[5] would seem to apply—and, if so, he could not have damages as well.

Though the vendor may have lost his right to specific performance, still, if he has not been guilty of any actual breach of contract, the purchaser cannot get his deposit back.[6]

It does not seem that the mere fact that the land may have depreciated in value will be held to prevent *restitutio in integrum*, where the purchaser is otherwise clearly entitled to it; but it is submitted that this fact might well be taken into consideration where the purchaser has been guilty of great delay in repudiating the contract.

[4] Cf. *Byrnes* v. *McIvor*, 10 W. L. R. 492.

[5] 12 Ch. D. 666.

[6] *Re Davis, &c.*, 40 Ch. D. 601, 607. *Re Scott et al* (1895), 2 Ch. 603; *Re National Provincial Bank* (1895), 1 Ch. 190.

PURCHASER'S LIEN.

The purchaser has an equitable lien for all sums paid by him on account of the agreement of sale (together with interest) against the vendor's interest in the land.

To secure repayment of such moneys, the purchaser can enforce his lien by action. It will be noticed, however, that whereas the action to enforce the vendor's lien is essentially based on affirmation of the contract, and so can be joined with a claim for specific performance, the action to enforce the purchaser's lien is only appropriate where the contract has been rescinded, and cannot be joined with a claim for specific performance, except by way of alternative (and inconsistent) relief. Pending the trial the Court will protect the purchaser in his lien by interim injunction or receiver. It is submitted that, in *Christie* v. *Fraser*,[7] where the Court refused this interim injunction—the plaintiff having rescinded a contract of sale on account of fraud—the principle of the purchaser's lien and its enforcement was not sufficiently considered by the majority of the Court. The plaintiff might have succeeded at trial only to have found himself with a worthless judgment, and the property in question (timber-limits, timber, etc.), dissipated or resold to a *bona fide* purchaser without notice.[8]

The purchaser, obtaining damages in lieu of specific performance, is not entitled to any lien for such damages.[9]

[7] 10 B. C. L. R. 291.

[8] Cf. per Drake, J. (dissenting). There was no registration of title or deeds in this case, and the law of *lis pendens*, where no certificate can be registered, is of doubtful application. Cf. Williams, p. 523, *et seq.*

[9] *Cornwall* v. *Henson* (1900), 2 Ch. 298; 305.

Nor, it seems, will a purchaser be entitled to a lien for moneys expended in improvements, if the contract afterwards goes off by reason of defects in title.[10]

In some of the provinces, however, there are statutory provisions in respect of improvements made under mistake of title, which may, perhaps, cover the above case.

[10] *Ridgway* v. *Roberts*, 4 Hare 106.

CHAPTER VII.

Notice, Delay and Waiver

(a) *Notice.*

"Notice" is used in two meanings: (1) in its primary meaning equivalent to notification, "formal intimation," e.g., notice of dishonor of a bill of exchange; (2) in a secondary sense, an intimation that after the lapse of a period of time[1] some act will be done, or some right accrue, e.g., notice to quit. Thus where it is stated by Sir Edward Fry,[2] when a contract provides for its rescission by the vendor on account of the purchaser's objections to title, that "the person entitled to rescind is not bound to give notice of his intention so to do, nor to afford a *locus pœnitentiæ* to the other side," he is referring only to "notice" in the second meaning. It is obvious that the vendor must in some way intimate to, or notify the purchaser of, his election to rescind. It may be observed, *en passant*, that it is now usual expressly to provide in such cases for notice in the secondary sense, i.e., allowing the purchaser a *locus pœnitentiæ* to withdraw the objection.[3]

If the purchaser make default in payment of the purchase money, the vendor may rescind the contract. How? Since in case of such default the vendor can elect either to affirm or to disaffirm the contract, it would appear essential that he must in some way notify the purchaser if he intends to rescind. Thus in *Hill* v. *Spraid*[4] Stuart, J., says: "But noth-

[1] Cf. *Brighty* v. *Norton*, 32 L. J. Q. B. 38.

[2] Fry, par. 1047.

[3] Williams, 60, 64, 1351-1352.

[4] 11 W. L. R. 683.

ing was revealed in the evidence which constituted any repudiation or rescission of the contract by the vendor, and I think he should at least have given some formal notice of some kind before he could proceed on the basis of the rescission of the agreement."

The following passage from Kerr on Fraud seems equally applicable to rescission for default: "If a party elects to rescind, he must manifest that intention by communicating to the other party his intention to rescind the transaction and claim no interest under it. The repudiation need not be formal provided it is distinct and positive repudiation of the transaction. The true question in determining whether there has been a rescission is whether the acts and conduct of the party evince an intention to rescind." The same principles would seem to apply to "determination" as distinguished from rescission.[5]

In *Hartt* v. *Wishard-Langen Co.*,[6] Perdue, J.A., holds that no notice of rescission, or demand for return of his deposit, is necessary before commencement of suit by the purchaser, basing his claim to rescission, etc., upon the absence of title in the vendor. "The commencement of a suit for the money already paid is the strongest kind of demand and of notice of rescission."[7]

In the absence of express stipulation, no formal or even written notice is required; it is sufficient if the rescission or determination is clearly, positively and unambiguously intimated to the other party; though it is obviously only prudent to give notification in writing.[8]

[4] *Czuack* v. *Parker*, 15 Man. R. 456.

[5] 9 W. L. R. at p. 543—followed in *Laycock* v. *Fowler*, 15 W. L. R. 441.

[7] Ibid, citing *Want* v. *Stallibrass*, L. R. 8 Ex. 175; cf. *Reeve* v. *Mullen*, 25 W. L. R. 445.

[8] But see *Hill* v. *Spraid*, *supra*.

The general principle, which is laid down in *Jones* v. *Carter*,[9] in relation to landlord and tenant, viz.: "The first unequivocal act indicating the intention of the lessor determines his option," would seem to apply to the like cases between vendor and purchaser. Some applications of this principle will be noticed when we come to deal more particularly with waiver.

It is not so clear that the vendor, exercising the *right* or the *power* of resale, is bound to give notice to the purchaser, in the absence of express provision. In *Moodie* v. *Young*,[10] Beck, J., says, in respect of the implied power of resale; "But for the valid exercise of that right I hold that the vendor must first give a perfectly distinct notice of his intention to resell, and allow the purchaser a reasonable time within which to remedy his default before he actually resells. I think the law in such cases is the same as in the corresponding case between a vendor and purchaser of goods. (See Sale of Goods Ordinance, C. O. (1908), c. 39, s. 46, s.-s. 3)." In respect to sale of goods where the property has passed, but before delivery, Benjamin [1] leans to the opinion that notice is not necessary. The writer, however, is inclined to think that almost all analogies drawn from the law applicable to sales of goods are apt to be false analogies when applied to the relations between vendors and purchasers of lands; partly from the difference in the inherent nature of the two, and of their *ownership* on the one hand, and *tenure* on the other; partly from the fact that sales of goods rarely, if ever, come within the purview of courts of equity, so that we have only common law rules and decisions to guide us. If we must look for analogies, it seems that they can be better found by turning to mortgages, in respect to which equitable rules and principles have been so fully developed.

[9] 15 M. & W. 718.

[10] 1 A. L. R. 337.

[1] (5th Ed., 950.)

From *Cockburn* v. *Edwards*,[2] it would appear that a mortgagee, unless restricted by express provision to the contrary, may sell on the mortgagor's default under the power of sale without notice; but in *Craddock* v. *Edwards*,[3] NORTH, J., considered such a sale not authorized "so as to make it binding as between mortgagor and mortgagee." In *Pooley's Trustee* v. *Whetham*,[4] there was an express power to sell without notice, and it was held that the sale could not be impeached on the ground that it was not authorized by the common power. But in all three of these cases, the question is complicated by the fact that they were transactions between solicitor (as mortgagee), and client (as mortgagor). However, the inference is that, in ordinary cases, unless the contract expressly provides for notice, the power of sale can be exercised without notice, whether so expressed in the contract or not.

In *Smith* v. *National Trust Co.*[5] Anglin, J., says: "But I am also of opinion, in the absence of any condition as to notice being annexed to it, the express power of sale conferred by the mortgage may be exercised without notice."

Since, however, the power of sale is "usually" exercisable only after notice to the mortgagor, the Courts will construe a clause enabling the mortgagee to sell, without notice, very strictly.[6] It is an "unusual" clause. The same objection, however, does not seem to apply to a clause enabling the mortgagee to sell without notice, being a condition precedent (so as to relieve the purchaser, at such sale, from enquiry), where the mortgagee covenants to give notice,[7] leaving the party damnified to his action for damages.

[2] 18 Ch. D. 449.

[3] 53 L. J. Chy. 968.

[4] 33 Ch. D. 111.

[5] 21 W. L. R. at p. 127.

[6] Cf. *Czuack* v. *Parker*, 15 Man. R. 456.

[7] Armour on Real Property, 199-200.

Where the contract stipulates for notice (whether of sale, determination, or rescission), and prescribes its methods, its provisions must be strictly complied with;[6] but a mere mistake in stating the amount due will not, necessarily, invalidate the notice.[7] To be effective, a notice to rescind, to determine, or to resell, must be positive and free from ambiguity.[10] Thus if it be stated that the notice is "without prejudice" it will be bad;[1] and a notice stating that the vendor will do some subsequent, positive act, to rescind or determine, is not, in itself, a notice whereby the rescission or determination[2] is effected; i.e., when a direct, positive notice is required, a *conditional* notice is not effective.[3]

When the condition of the contract requires "one month's" notice, it is not satisfied by giving "thirty days'" notice.[4]

Where there are blanks in a printed form intended to be filled in with the numbers of days, months, etc., for notice, and these are not filled in, *semble*, that the clause may be entirely disregarded.[5]

It has been before pointed out that where the agreement requires a notice for "cancellation," (whether the form and time of notice is prescribed or not) it does not follow that the

[6] *Great West Lumber Co.* v. *Wilkins*, 1 A. L. R. 155; *Johnson* v. *Lyttle's Iron Agency*, 5 Ch. D. 687; *Jackson* v. *Northampton, etc.*, 55 L. T. 91; *Can. Fairbanks Co.* v. *Johnston*, 10 W. L. R. 574, and *cf. Steele* v. *McCarthy*, 7 W. L. R. 903-4; *Timmins* v. *Smith*, 14 W. L. R. 503; *Mills* v. *Marriott*, 3 W. W. R. 841; *Massey* v. *Walker*, 24 W. L. R. 168; *Marsh* v. *Banton*, 20 W. L. R. 322.

[7] *Deverges* v. *Sondeman, &c.* (1902), 1 Ch. 579.

[10] *Bartlett* v. *Jull*, 28 Gr. 140.

[1] *In re Weston & Thomas's Contract* (1907), 1 Ch. 244.

[2] *Great West Lumber Co.* v. *Wilkins*, 1 A. L. R. 161.

[3] *Constantino* v. *Dick*, 26 W. L. R. 741.

[4] *Hicks* v. *Laidlaw*, 19 W. L. R. 525; 20 W. L. R. 479; *Le Neveu* v. *McQuarrie*, 21 Man. R. 399.

[5] *Hicks* v. *Laidlow* (*supra*).

vendor may not have a right to determine or foreclose, as on *an open contract*, quite independently of the clause.

It is important to observe that the giving of an ineffective notice by the vendor may be deemed to amount to a repudiation by him of the contract, and thus enable the purchaser to claim rescission, and recovery of moneys paid;[6] or to accelerate the time for payment of the balance of the purchase-money as before pointed out.[7]

On the other hand it has been urged that the giving of notice, even if ineffective, may make it clear that the vendor is not acquiescing in delay, but is insisting on strict performance.[8]

In all these cases, where it is provided that notice of intention to exercise the power to rescind, determine or resell shall be given, the party in default has a *locus pœnitentiæ* during the interval that the notice is current, whether so expressed or not.[9]

DELAY, WAIVER, ETC.

The principle that the first unequivocal act indicating his intention will be taken to determine a party's option has been referred to, *ante*, p. 178. Thus, where a right to rescind or determine the contract has arisen by reason of the adversary's default, there does not appear to be any necessity of notice giving a *locus pœnitentiæ*, unless it is expressly provided for in the contract; but since the exercise of the right depends upon the election of the injured party, it would seem, in general, necessary that there should be some notification, either by express words, or by unambiguous acts or

[6] *March* v. *Barton*, 20 W. L. R. 322.

[7] See ante, p. 160.

[8] Cf. *Hicks* v. *Laidlaw*, 19 W. L. R. 525.

[9] See *Paget* v. *Bennetto*, 17 Man. R. 356. Cf. *Brighty* v. *Norton*, 32 L. J. Q. B. 38.

conduct, to shew whether the injured party elects to affirm or to disaffirm, the contract, to determine or continue it.[10]

Thus, if the vendor wishes to take advantage of a clause giving him power to rescind if the purchaser shall make any requisition or insist on any objection which the vendor may be unwilling to remove, he must give notice of rescission promptly: continuing to negotiate will be deemed a waiver of the right to rescind.[1] and, conversely, the purchaser's right to repudiate,[2] on discovering that the vendor's title is defective, must be exercised promptly, if it is desired to prevent the vendor completing his title, so as, for example, to be able to shew a good title at trial, or on reference, in an action for specific performance. In *Halkett* v. *Dudley*,[3] the Earl of Dudley attempted to repudiate, after the usual decree, for specific performance and reference as to title, on the ground that the plaintiff had not title when the decree was made; but it was held that as the vendor could, in fact, show title (although, even after decree, the Court has power, on motion, to grant leave to repudiate), the attempt was too late.

The question of the purchaser waiving his right to rescind, where the defect of title is irremovable, has been discussed under the subject of waiver of defects.[4]

Whether a vendor will lose his right to rescind, determine or resell, by mere delay, is questionable.[5] If he has not stood by and allowed the purchaser to make improvements,

[10] *McCord* v. *Harper*, 26 U. C. C. P. 96; *Parent* v. *Bourbonniere*, 13 Man. R. 172; *Czuack* v. *Parker*, 15 Man. R. 456; cf. Pollock on Contracts, p. 619.

[1] Fry, paragraph 1054. *Crabbe* v. *Little*, 14 O. L. R. 631; 9 O. W. R. 551.

[2] See *ante* "Rescission by purchaser."

[3] (1907), 1 Ch. 500.

[4] See "Rescission by purchaser," Chap. VI., *ante*.

[5] See *McCready* v. *Clark*, 14 W. L. R. 485; *Campbell* v. *McKinnon*, 2 Sask. R. 345.

etc.,[6] or, expressly or impliedly, by his acts, evinced an intention of continuing the contract,[7] the purchaser, making no effort to remedy his default, would not seem to have any just cause of complaint if the vendor choose simply to remain inactive,[8] i.e., the purchaser has it in his own power, at any time, to force the vendor to elect, to affirm or disaffirm, simply by offering to remedy the default, e.g., by tender of purchase money in arrears. It is clear that, as between landlord and tenant, mere lying-by will not amount to waiver of a forfeiture—some positive act must be done by the lessor, amounting to an acknowledgment of the continuation of the tenancy at a later period.[9]

But it is equally clear that, if the vendor does any acts inconsistent with the position that the contract is at an end, he will waive his right to rescind or determine; and this principle, of course, is equally applicable to rescission by the purchaser. Thus Anglin, J., says: "There can be no doubt that by doing any act, after the default, which involves or implies the continued existence of the contract, the party entitled to rescind waives such right. He may lose his right as well by acquiescing in the defaulter assuming a position consistent only with the subsistence of the contract."[10]

In *Dunlop* v. *Bolster*,[1] the purchase price was $20,000. The purchaser had only paid $50 (deposit?) and had made, and continued in, default in payment of the first instalment, $4,950. The agreement contained an acceleration clause,

[6] But see *Wallace* v. *Hesslein*, 29 S. C. R. 171.

[7] Cf. *Crawley* v. *Hamley*, 11 W. L. R. 574; *Timmins* v. *Smith*, 14 W. L. R. 503.

[8] Cf. *Glock* v. *Howard, &c., Colony Co.*, 43 L. R. A. 199.

[9] Woodfall (19th Ed.), 376.

[10] *Labelle* v. *O'Connor*, 15 O. L. R. 547; cf. Fry, par. 1054; cf. *Barlow* v. *Williams*, 16 Man. R. 164; *Crawley* v. *Hamley* (*supra*); *Timmins* v. *Smith* (*supra*); *Devlin* v. *Radkey*, 22 O. L. R. 390; *Dunlop* v. *Bolster*, 21 W. L. R. 695.

[1] 2 W. W. R. 550.

whereby "in the event of default being made in the payment of principal, interest, etc., etc., or any part thereof, the whole purchase money shall become due and payable."

The vendor commenced an action for the whole purchase money; but afterwards discontinued it, and gave notice of determination. Walsh, J. (delivering the judgment of the Court en banc), points out that but for the commencement of the action the purchaser could not have insisted on performance by the vendor, since the purchaser "had placed upon this contract all the ear-marks of abandonment."

But the vendor having, by the commencement of the action, invited the purchaser to carry through the purchase, he could have tendered the vendor the full amount then unpaid for principal and interest, and then insisted upon specific performance. "Instead, however, of doing this he simply tendered the overdue instalment of the purchase money with interest, notwithstanding the acceleration clause.

It was held that such a tender was not sufficient, and the purchaser was refused specific performance.

In *Handel* v. *O'Kelly*,[2] the Court of Appeal (Manitoba), held that rescission may be inferred by acts of abandonment on the one side, and an acceptance of such abandonment on the other. And that a vendor having accepted and acted on such abandonment, the purchaser could neither recover damages, nor the moneys he had paid.

Thus, where money is payable by instalments, and there is a power to rescind or determine on default in payment, the receipt of money due on a subsequent instalment is a waiver of the right to rescind or determine in respect of a previous default. It is, perhaps, doubtful whether the receipt of

[2] 22 Man. R. 562; cf. *Frith* v. *Alliance Investment Co.*, 4 W. W. R. 88; *Fox* v. *Reid*, 4 W. W. R. 200; *Edmonton Construction Co.* v. *Maguire*, 4 W. W. R. 1062; cf. *McCready* v. *Clark*, 14 W. L. R. 480.

moneys, in respect of an instalment due prior to actual rescission or determination, if subseqnently accepted by the vendor, must, necessarily, be deemed a waiver of the *determination*. *Hunter* v. *Daniel*[3] is quoted in *Forfar* v. *Sage*,[4] as authority for an affirmative answer. But *Hunter* v. *Daniel* was a case where the vendors claimed to have *rescinded* the contract; and even so, Sir James Wigram bases his judgment on the analogy to the law of Landlord and Tenant: "There is no stronger reason for holding that the forfeiture of a lease is waived by the acceptance of rent subsequently accruing, than there is in this case for holding that the acceptance of an instalment of purchase money (which was not due unless the agreement was to be continued) is a waiver of the right to rescind the agreement."

In *Massey* v. *Walker*,[5] where a notice of cancellation had been served, and before the expiration of 30 days provided for, the vendor accepted part of the purchase moneys on account, these moneys having been remitted by the purchasers before the notice of cancellation had been served, it was held by Macdonald, J. (Manitoba), citing *Keene* v. *Biscoe*, 8 Ch. D. 201, that the vendor might well accept any portion during the running of the 30 days in expectation of the balance being paid, and that such acceptance did not amount to condonation of the default. On the other hand, in *Chadwick* v. *Stuckey*,[6] the learned Chief Justice of Alberta, delivering the judgment of the Court en banc, after citing *Hunter* v. *Daniel*, says: "It would appear from this" (i.e. acceptance of money on an overdue instalment) that the defendant may in fact have waived his right to consider time of the essence in respect of this instalment; I do not rely on this view, but it does appear to me that it would be most inequitable to permit the defendant to receive the money, which would only be paid on the

[3] 4 Hare, 420.

[4] 5 Terr. L. R. 255.

[5] 4 W. W. R. 557.

[6] 22 W. L. R. 795-6.

supposition that the defendant was not insisting on his right to cancel, and then immediately, or as soon as he saw fit, to cancel the agreement in respect of the default."

But if a default subsequently takes place, the receipt of moneys in the meantime, although a waiver of the right to rescind in respect of the prior default, will not prevent a new right of rescission or determination arising,[7] but *quære*, even if moneys are received after such second default, but which are appropriated to the prior default, whether the second default would be thereby necessarily waived or not.

Although there is an obvious difference between the relationship of landlord and tenant and that of vendor and purchaser, the law relating to waiver of forfeiture under analogous circumstances between landlord and tenant, is worth noting. A forfeiture for non-payment of rent on breach of condition in a lease, is waived by the acceptance of rent accruing due after the forfeiture, but the subsequent receipt of rent due prior to the forfeiture is no waiver.[8] In this case, Martin, B., says: "A receipt of rent to operate as a waiver of a forfeiture must be a receipt of rent which has become due after the forfeiture was incurred, and the mere receipt of the money afterwards, the rent having become due previously, is of no consequence, and for the very plain reason that the entry for a condition broken does not at all affect the right to receive payment of a pre-existing debt. I entirely agree with what my Lord has said, and that we ought to prevent any technical construction being put upon acts which really were never intended to waive conditions at all."

It is clear that a distress for rent, whether due before, or accruing due after, the forfeiture, will amount to a waiver.[9] It is stated in Woodfall on the authority of *Dendy*

[7] *Forfar* v. *Sage*, 5 Terr. L. R. 255.

[8] *Price* v. *Worwood*, 4 H. & N. 511; 28 L. J. Ex. 329.

[9] *Cotesworth* v. *Spokes*, 10 C. B. N. S. 103; 30 L. J. C. P. 220.

v. *Nicholl*,[10] that the commencement of an action for rent due after the forfeiture will also amount to a waiver, although a mere demand for such rent may not be so considered. In the case cited, however, the action seems to have proceeded to judgment, and the monies due for rent had actually been paid over in accordance with the order of the Judge.

The general principle, which would appear to be equally applicable as between vendor and purchaser, is laid down in *Jones* v. *Carter*,[1] to the effect that "the first unequivocal act indicates the intention of the lessor and determines his option."

The general principle followed by Courts of Equity, in respect to delay and laches, is stated by Sir Edward Fry,[2] in the following terms:

"The Court of Chancery was at one time inclined to neglect all consideration of time in the specific performance of contracts for sale, not only as an original ingredient in them, but as affecting them by way of laches. But it is now clearly established, that the delay of either party in not performing its terms on his part, or in not prosecuting his right to the interference of the Court by the institution of an action, or, lastly, in not diligently prosecuting his action, when instituted, may constitute such laches as will disentitle him to the aid of the Court, and so amount, for the purpose of specific performance, to an abandonment on his part of the contract."

Apart from the consideration whether time is expressly declared to be of the essence of the contract or not—the purchaser may by delay, non-completion or ineffectively

[10] 4 C. [illegible] N. S. 376; 27 L. J. C. P. 220.

[1] 15 [illegible] . 718

[2] Fry. , [illegible]100.

offering to complete, lose his equity to relief against forfeiture.[3] This result may, however, depend largely on the circumstances and the subject-matter of the contract. The general rule may be stated to be that where from the subject-matter of tho contract, or the surrounding circumstances, it appears that punctual performancc was, in reality, a predominant consideration, and within the contemplation of the parties, the purchaser will be held to strict performance in respect of the articles or stipulations as to time.[4]

In *Morton* v. *Nicholls*,[5] Hunter, C.J., after referring to the passage from Lord Cairns' judgment in *Tilley* v. *Thomas*,[6] quoted *ante* p. 112, says: "Now I nnderstand that to mean simply this, that where it is apparent, from the stipulation itself, from the nature of the contract, such as I think to be the case in this suit, or where it appears, from the surrounding circumstances, that there was an express understanding between the parties that time was to be of the essence, the Court has no power to interfere, unless the performance of the covenant is deliberately made impossible by the act of the covenantee." This case is one of the familiar class of cases relating to *mining* properties—which are notoriously of constantly fluctuating value and speculative character.[7] The same principle applies to sales of trade premises, especially to taverns and public houses,[8] to dwelling houses intended for

[3] Cf. *Smithneseki* v. *Wiltsie*, 12 W. L. R. 533; *Fredericksen* v. *Stanton*, 4 W. W. R. 1224; but see *Hall* v. *Turnbull*, 10 W. L. R. 536; *Banton* v. *March*, 12 W. L. R. 598. As to delay in making "cash" payment: see *Knight* v. *Cushing*, 46 S. C. R. 555; *Quail* v. *Beatty*, 4 W. W. R. 55; *Manson* v. *Pollock*, 4 W. W. R. 212.

[4] *Atkinson* v. *Ferland* (D. C.), 12 O. W. R., p. 1256.

[5] 12 B. C. R. at p. 15.

[6] L. R. 3 Chy. at p. 67.

[7] *Clegg* v. *Edmondson*, 8 De G. M. & G., at p. 814; *Huxham* v. *Llewellyn*, 21 W. R. 570, 766; *Glasbrook* v. *Richardson*, 23 W. R. 51.

[8] *Day* v. *Luhke*, L. R. 5 Eq. 336; *Cowles* v. *Gale*, L. R. 7 Ch. 12; *Tadcaster Tower Brewery Co.* v. *Wilson* (1897), 1 Ch. at 711. See Fry, par. 1080-1091.

immediate occupation,[9] and, perhaps, to and bought solely for speculation.[10]

But even where there is nothing peculiar about the nature of the property, delay, coupled with other circumstances, may deprive the purchaser of his right to rescind, on the one hand, or disentitle him to specific performance on the other—e.g., where the payment of the purchase-money is made to synchronize with payments to be made by the vendor,[1] or where he has taken possession, and disregarded a notice or request to carry out his contract;[2] or perhaps where after default the time for payment has been extended, and he again makes default.[3] All these cases come within the principle that the parties must have understood, from the nature of the contract, or the circumstances of the case, that punctuality of payment was the "predominate note." It does not follow that a purchaser who, by reason of delay, has lost his right to specific performance, may not establish a claim to the return of his deposit,[4] i.e., it does not follow that the delay that will prevent the purchaser obtaining specific performance in all cases amounts to *abandonment;* he may still be entitled to his action for damages. Cf. *Hicks* v. *Laidlaw,* 19 W. L. R. 525.

[9] *Gedye* v. *Duke of Montrose,* 26 Beav. 45; *Tilley* v. *Thomas,* L. R. 3 Ch. 61; cf. *Ward* v. *Smith,* 11 Price 119; *Jacques* v. *Miller,* 6 Ch. D. 153.

[10] Cf. Fry, par. 1080.

[1] See *Atkinson* v. *Ferland* (*ante* p. 81); *Labelle* v. *O'Connor; Scott* v. *Milne; Stringer* v. *Oliver* (*ante* p. 107).

[2] *Wallace* v. *Hesslein,* 29 S. C. R. 171.

[3] Cf. *Barclay* v. *Messenger* (*ante* p. 109).

[4] *Levy* v. *Stogdon* (1898). 1 Ch. 478, (1899), 1 Ch. 5.

CHAPTER VIII.

Election of Remedies.[1]

Upon breach of contract the party who is not in default is, as a rule, entitled to elect of several available remedies that to which he chooses to resort; and it would seem as between inconsistent remedies he is not only entitled but *must*, sooner or later, make such election.

A good deal of the old law on the subject,[2] has, to a great extent, been rendered obsolete by the Judicature Acts. Thus, a party could not proceed, both in law and equity, on the same cause of action; and in Chancery an order, of course, went to put the party to his election.[3] But, even so, a plaintiff was not bound to make his election until the defendant had answered, and so disclosed the nature of his defence.[4] Actions and suits on mortgages, however, were exceptions to the general rule; and it is familiar law that a mortgagee might pursue all his remedies concurrently; he could, e.g., sue at law on the covenant, and at the same time sue in equity for foreclosure. It must not be forgotten, however, that if, after final foreclosure, the mortgagee sued on the covenant, the mortgagor's right of redemption was revived, or, as the saying is, the foreclosure was "opened."

While the learning on the subject is, no doubt, to some extent obsolete, the principles are still important; because, although a plaintiff may now bring his action for all the relief to which, on a given state of facts, he may be entitled, and may claim relief in the alternative, there must, in nearly

[1] See the article under this title in 15 Cyc. 252.

[2] *E.g.*, see Tidd's Practice (9th Ed.), p. 9.

[3] *Anon.*, 1 Ves. Jun. 91.

[4] *Jones* v. *Earl of Stratford*, 3 P. Wms. 79.

every case, come a point at which he is bound to elect what form of judgment he will adopt; or, possibly, the Court may restrict him to a particular remedy out of several to which he might otherwise be entitled.[5]

The two leading principles are:—

(1) That a party is entitled to the choice of one or more co-existing, remedial rights arising out of the same facts.[6]

(2) That, as a rule, he must elect between two inconsistent remedies.

Thus, it is a commonplace that on breach of contract for sale of lands the adversary, not in default, could sue at law for damages, or proceed in equity for specific performance: a mortgagee, at his election, could sue at law on the covenant, proceed to sale under the power of sale, or sue in equity for foreclosure; and it imports nothing that he could proceed, concurrently, at law and equity. The Courts never assumed to restrict the plaintiff's choice of remedy. The rule that the plaintiff must elect between two inconsistent remedies is only an application of the maxim—"*allegans contraria non est audiendus.*" Thus, if a man having the right to proceed either by action of tort or by action *ex contractu*, elects the latter, he will generally be held to have waived the tort; but an intention to waive the tort will not be assumed where, under the present practice, he sues in the alternative.[7] *Rice* v. *Reed*,[8] is an instructive and interesting case on this point.

A man cannot at once affirm and disaffirm a contract; and so it seems that the remedies which result from the affirmation of the contract on the one hand, and from its dis-

[5] *C. P. R.* v. *Meadows*, 1 A. L. R. 344.
[6] Cyc., vol. 15, 252.
[7] Benjamin (5th Ed.), 86-87.
[8] (1900), 1 Q. B. 54.

affirmance on the other, are mutually exclusive.[9] Thus, we have seen that if the vendor rescinds he cannot have damages,[10] or retain purchase-money,[1] and rescission is, necessarily, the antithesis of specific performance,[2] notwithstanding that after decree, if the defendant fails specifically to perform, the plaintiff may, at his election, have the contract rescinded. Again, where a vendor has given notice of his intention to resell, he is precluded from afterwards claiming specific performance.[3]

And where a party, with knowledge of the facts, has definitely adopted one or other of two or more inconsistent remedies, he will be bound by his election.[4] This is well stated by the Supreme Court of Iowa:[5] "Let us first consider what is meant in law by 'an election of remedies.' It not infrequently happens that for the redress of a given wrong, or the enforcement of a given right, the law affords two or more remedies. Where these remedies are so inconsistent that the pursuit of one necessarily involves or implies the negation of the other, the party who deliberately and with full knowledge of the facts, invokes one of such remedies, is said to have made his election, and cannot, thereafter, have the benefit of the other."

A qualification, or rather a corollary, of this rule is: "That, if the party has in fact only one remedy, but in the mistaken belief that he has another attempts to enforce it, the doctrine of election is inapplicable, for no choice was

[9] Cf. *Cornikam* v. *Thomson*, 111 Mass. 270.

[10] *Henty* v. *Schroder*, 12 Ch. D. 666.

[1] The right to retain the "deposit" depends on a different principle.

[2] See *Smith* v. *Mitchell* [illegible] C. R. 450; *Gardom* v. *Lee*, 3 H. & C. 651.

[3] *Royou* v. *Paul*, 28 L. J. Chy. 555.

[4] *Robb* v. *Vos*, 155 U. S. 13.

[5] *Zimmerman* v. *Robinson*, 128 Iowa 72.

ever open to him." [6] But it appears that the doctrine of election of remedies does not preclude a person who has pursued one of two co-existent remedies to judgment which he has been unable to collect from subsequently resorting to the other remedy.[7] Familiar instances of this occur in mortgage proceedings, and we have seen that, in the vendor's action for specific performance in case of default in payment by the purchaser of the amount certified to be due on the appointed day, the vendor can obtain rescission of the contract.[8] Nor does the vendor, by procuring a declaration of lien, become deprived of his right to rescission.[9]

But it is not only between such mutually exclusive remedies—which logically are founded, not on the same, but on a different state of facts, i.e., whether as *a fact* the contract is affirmed or disaffirmed—that this principle of imperative election applies; it applies to *inconsistent remedies*. Thus a man cannot have general damages for breach of contract with a decree for specific performance—"the injured party electing to affirm the agreement, has the alternative of suing at law for damages for breach, or suing in equity for specific performance of the contract. Under the present practice he can pursue these remedies in one action claiming alternative relief; but his recovery of judgment for damages will bar his right to enforce the contract specifically, as that is a conclusive election to adopt the legal remedy,[10] and the other party's obligation, under the contract, is then merged in the judgment." [11]

It is clear, then, that for a complete breach the adversary not in default, has, subject to the discretionary power of the

[6] Ibid.

[7] Cf. *Standard Sewing Machine Co.* v. *Owings*, 140 N. Car. 503.

[8] Chap. II., sec. 4.

[9] Chap. II., sec. 3. *Baker* v. *Williams*, 62 L. J. Ch. 315.

[10] *Cornwall* v. *Henson* (1900), 2 Ch. 298.

[11] Willia[illegible], 1073. *Orme* v. *Broughton*, 10 Bing. 533; *Sainter* v. *Ferguson*, 1 Mac. & G. 286, 290.

Court, to grant or refuse specific performance, the right to elect to proceed by separate action:

The Vendor:—

(1) to recover purchase-money as a debt,

(2) for damages,

(3) for specific performance (with consequential relief in case of the purchaser's default after decree),

(4) to enforce his lien by sale (and if sale abortive by order for possession in the nature of foreclosure),

(5) for a combination of the remedies under (3) and (4), with a further right of election for consequential relief,

(6) still resting on the contract, for *determination*, or *foreclosure*,

(7) Rescission, involving *restitutio in integrum* (except as to "deposit"),

The Purchaser:—

(1) for damages,

(2) for specific performance (with consequential relief in case of the vendor's default in complying with the decree),

(3) Rescission—with the right to enforce the purchaser's lien for moneys paid for or on account of the purchase-money.

It is clear that a plaintiff cannot in the same action get a judgment based on the disaffirmance of the contract (e.g., rescission) combined with a judgment based on its affirmation. But, the plaintiff affirming the contract may be given a judgment combining two or more remedies based on such affirmation. He may have specific performance with damages in addition;[2] though as before pointed out he cannot of course have general common-law damages for entire breach of contract, and at the same time specific performance: between these remedies he *must* elect. If the vendor recovers a judgment for the debt, and the execution is returned *nulla bona*, he can obtain rescission.

[2] Fry, Eq., 1306-1309.

The question whether the vendor is entitled to a personal judgment for unpaid purchase-money, and at the same time to judgment for determination or foreclosure (as in a mortgage action) has been discussed in a number of recent cases.

In *Schurman* v. *Ewing*,[3] Beck, J., says: "I do not think he is entitled to an order for payment, and also at the same time to an order for the purpose of proceeding to cancel the agreement. By taking a personal order for judgment he would be continuing to demand payment of the moneys payable under the agreement on the basis of its being in force."

But, it must be remembered that a foreclosure decree is based on *affirmation* of the agreement; and requires the purchaser to pay on the day named for redemption "on the basis of its being in force."

Schurman v. *Ewing* was followed by Elwood, J., in *Landes* v. *Kusch*.[4] He states: "Except in *Goodacre* v. *Potter*, above cited, I cannot in any case find it held that the vendor is at the same time entitled to both a personal judgment and an order for rescission.[5]

* * * * * * * *

In the case at bar the six months for redemption is fixed. During the whole of that period the plaintiff has the right to issue execution, and it might be that on the very last day of the period he might make under the execution the whole of his claim with the exception of one dollar. Under the terms of the judgment he would then be entitled to obtain the rescission, and would be entitled, I apprehend, to retain the moneys realized under the execution." But if, as would appear only proper and just, the Court were to follow the analogy to mortgage proceedings no such results would be arrived at. The receipt by the mortgagee (or vendor), of

[3] 7 W. L. R. 610.

[4] 6 W. W. R. 1309.

[5] "Rescission" is used as equivalent to judgment for foreclosure.

any moneys payable under the judgment would prevent him obtaining final order of foreclosure, or sale; a new account would be taken, and a new period fixed for redemption by the mortgagor (or purchaser).

The Court en banc in Saskatchewan considered the whole question in *Hargreaves* v. *Security Investment Co.*,* and it is there unanimously held that a personal judgment for the amount due and foreclosure should not be ordered at the same time, the rights of the parties under an agreement for sale being quite different from the rights under a mortgage, and the plaintiff was put to his election between the two forms of relief.

While this section of this chapter was going through the press, the Appellate Division of the Court in Alberta, had the question under consideration in a case *Lee* v. *Scheer*, in which the Court has since given its judgment. The judgment is reported in 7 W. W. R. p. 927 and 30 W. L. R. p. 273. The judgment is of the greatest importance in this connection, but it is unfortunately too late to enlarge upon it now.*

In some cases it has been held that this right of election is a qualified, or conditional right, and that the Courts can restrict the plaintiff in the exercise of it.

Now it is respectively submitted that a party taking advantage of the right given by the Judicature Acts to claim alternative relief upon separate allegations in the same action, cannot be deprived of his right to elect which remedy he will take, by the Court or Judge assuming the power of dictating which alternative remedy it will adopt. In this connection it is important to remember that the plaintiff *must*, if he begins an action, claim all the remedies to which

*29 W. L. R. 317.

NOTE.—This paragraph has been added after the revised proof had been completed and was ready to return to the printers.

he may wish to resort, if he claims only one remedy, and his action is dismissed, it seems he cannot begin a new action claiming another remedy on the same state of facts.[7]

The statute is an enabling statute, and the benefit it extends to the plaintiff seems to be to enable him to defer his election until all the evidence is in, and the case closed (thus extending the old Chancery privilege of deferring election until after the answer to the bill), at the same time enabling him, if he fails to make a case for the relief preferred, to obtain judgment for such other relief as may be warranted by the facts.[8]

In this connection, the case of *C. P. R.* v. *Meadows*,[9] a judgment of the Full Court in Alberta requires very careful consideration.

Beck, J., says: "I think the Court ought, in every case, to consider the interests of all parties who may be affected by its judgment, and, if it can do so without injustice to the plaintiff, it has power and ought to exercise it to refuse a form of relief to which the plaintiff is *prima facie* entitled, and give him another form of relief to which he is also entitled, if, by so doing, the interests of the other parties will thereby be better conserved."

And Scott, J., adds: "It was contended, on behalf of plaintiff company, that, as the defendant had not appeared, the Court should not be astute to discover or grant him any relief which he has not claimed. In my view, the effect of the defendant not appearing is that he leaves it to the Court to grant to the plaintiff only such relief as, under the circumstances of the case, he is reasonably entitled. Upon an application to a Judge for judgment in default of appearance in an action such as this, he may not consider it his duty, but

[7] A. P. (1914), 356. *Serrao* v. *Noel*, 15 Q. B. D. 549.
[8] Cf. *Child* v. *Stenning*, 7 Ch. D. at 414.
[9] 1 A. L. R. 344. Cf. *Excelsior Life* v. *Prestniak*, 1 Sask. R. 215.

it is certainly within his province to enquire into the circumstances relating to the subject-matter of the action, and the interests of the parties therein, and to take those matters into consideration in determining the form and effect of the judgment to which the plaintiff is entitled." These dicta, if the foregoing views be correct, it is, with great respect, submitted, cannot be supported. The plaintiffs did not ask to enforce the vendor's lien—on the contrary, they declined to accept such a judgment, though, no doubt, entitled to it—and the judgments of Beck and Scott, JJ., tacitly admit that a case had been made out for *foreclosure*, which the plaintiffs did claim. Even if the statutory right to order sale in lieu of foreclosure, which the Court has in *mortgage actions*, could have been invoked, it is doubtful if it could have been exercised against the plaintiff's opposition, and without the defendant's consent or expressed desire; while it is clear that the general power under Rule 449 (cf. Eng. O. LI.), to order sale where "necessary or expedient," does not cover the case.[10] Now, however, it will be remembered that the Courts in Alberta have, in granting relief against forfeiture, definitely adopted the rule not to give judgment for foreclosure, but, in effect, to decree specific performance.

Unless, indeed, special stipulations giving the vendor power to determine or foreclose the contract and retain moneys paid on account; or power to resell, etc., for default in payment of the purchase-money, are to be declared merely "*in terrorem* and void," it is difficult to understand why the vendor should not be entitled to choose the special remedy so provided, just as freely as he is entitled to his election in regard to the standard remedies, always subject, of course, to the principle of relief against forfeiture.

[10] Cf. *Re Robinson*, 31 Ch. D. 247.

APPENDIX.

I.

Lee v. *Scheer.* This case is referred to in the foot notes as being reported in the appendix, but while the final revises were going through the press, the judgment has been fully reported in 7 W. W. R. p. 927, and 30 W. L. R. p. 273, consequently, it is unnecessary to reprint it here.

This judgment is of great importance. It practically settles for Alberta that in an action by a vendor against a purchaser, where an order for specific performance or for foreclosure is made, a personal order for payment of the balance of the purchase money may be included in the same order. Exactly the reverse has been held by the Court *en banc* in the Province of Saskatchewan, as noted in the text.

The case also is important in that it follows *Halkett* v. *Earl of Dudley*, permitting the purchaser to move to be discharged from [illegible]tract on account of defects in title, even after a decree [illegible] made for specific performance or foreclosure and a final order of sale not only made, but after the property had been actually advertised for sale. It also emphasizes the objections pointed out in the text at pages 128-130, that where the decree for specific performance embodies an order for sale, in case of default in compliance with the judgment, the Court virtually restricts the vendor to that particular remedy, depriving him of his right of election in respect of consequential relief.

II.

CASH PAYMENT.

In connection with the terms "cash," "cash payment," and "cash down," each constantly occurring in the cases, the following memorandum of cases may prove useful for reference:—

McIntyre v. *Hood*, 9 S. C. R. 565.
Gilmour v. *Simon*, 15 Man. R. 205, 37 S. C. R. 422.

Higginbotham v. *Mitchell*, 13 W. L. R. 649.
Mackenzie v. *Champion*, 12 S. C. R. 649.
Boyle v. *Grassick*, 6 N. W. Terr. R. 232.

III.

MEMO.—On form of judgment in action for specific performance.

[Form settled, with annotations, by Mr. Justice Beck in 1909.*]

1. This Court doth declare that the agreement dated the day of , made between the plaintiff of the first part and the defendant of the second part on the pleadings mentioned, ought to be specifically performed and carried into execution, and doth order and adjudge the same accordingly.

And it appearing that according to the terms of the said agreement, there is owing by the defendant to the plaintiff for purchase money the sum of $, and for interest thereon the sum of $, and that the plaintiff's costs have been taxed by the Clerk of this Court at Edmonton, at the sum of $, making in all the sum of $.

IT IS ORDERED AND ADJUDGED that upon the defendant paying within months from this date to the plaintiff or into Court to the credit of this cause the said sum of $, together with interest thereon at the rate of per cent. per annum, from this date until the date of payment, the plaintiff shall, at the request and at the cost and charges of the defendant, deliver to the defendant, or to whom he may appoint, a proper transfer or other conveyance (to be settled by a Judge in case of dispute) of the lands in question, sufficient to pass the said lands free of all incumbrances, except such as shall have been made or

* See *Lee* v. *Scheer*, 7 W. W. R. 927, 30 W. L. R. 273.

suffered by the defendant, and deliver to the defendant the duplicate certificate of title for the said lands.

With liberty to any party hereto to apply in chambers as he may be advised.

NOTES:—(1) A vendor is not entitled to an absolute judgment for specific performance unless he has a good title, which has been admitted or proved: in which case there should be a recital to that effect.

(2) If a good title has not been admitted or proved, (*a*) there should be inserted in the first paragraph of the judgment after the words "carried into execution" the words "in case a good title can be made to the premises comprised therein;" (*b*) there should be a reference as to title according to Seton tit. Spec. Perf'ce. C. L. 2 ii. (1) 2; (*c*) the judgment adjourns the further consideration Seton tit: Usual directions. C. xiv. s. 1. 1, and the judgment there ends.

(3) If a good title has been admitted or proved the order—and where shown on a reference a subsequent order—will either fix the amount owing by the defendant to the plaintiff for principal, interest, &c., and costs, as in the above form, or will refer it to the Clerk to ascertain the amount, and in the latter case the order will provide for the payment to the plaintiff, or into Court, of the amount which shall be certified.

(4) If the order to the above effect is not complied with the plaintiff may apply for an order to rescind or to sell (see *C. P. R.* v. *Meadows*, 1 A. L. R. 347), or to issue execution, but an order for leave to issue execution will be made only upon the execution of a transfer and the deposit of the transfer and duplicate certificate of title with the Clerk in escrow (See *Robinson* v. *Garland*, 37 W. R. 396: *Morgan* v. *Briscoe*, 32 Ch. D. 192—Seton 2240 *et seq.*)

(5) As will be inferred from the foregoing, a personal order for payment will not be made in the first instance (See also *Schurman* v. *Ewing & Moore*, 7 W. L. A. 614.)

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