PROTECTING THE PURCHASER – VINDICATING THE VENDOR

*L. W. TAYLOR**

*A. VRISAKIS***

In 1934 the late Percy Watts wrote that "the economic depression has brought in its train many serious problems for the legal profession. One of the most serious is the problem of the defaulting purchaser."[1] This problem has by no means been confined within the repercussions of the post-World War I depression; being, as it is, an inherent hazard of conveyancing it has increased in importance as Post-World War II prosperity and commercial expansion have led to vastly increased dealings in land. Despite the fact that the problem of the defaulting purchaser is at least as serious as at the time when Mr. Watts was writing, it seems to have become accepted as being as perennial as the commodity to which it essentially relates. This is not an apology for increasing the already voluminous legal literature on the subject of the defaulting purchaser. The writers take comfort here in the fact that, despite the attention given this topic generally, an adequate exposition of Clause 14 of the New South Wales Real Estate Institute Form of Contract of Sale, is still lacking, though sufficient case law has now accumulated to permit an assessment to be made. Clause 14 is as follows:

> If the Purchaser shall fail to comply with these conditions or any of them, or with the Terms of Sale, all moneys, bills and promissory notes which the Purchaser shall have paid or given to the Agent or to the Vendor on account of the purchase shall be absolutely forfeited to the Vendor, and the Vendor shall be at liberty to rescind the Contract or to sue the Purchaser for breach of contract or without any notice to the Purchaser, to resell the property by public auction or private contract, together or in lots for cash or on credit, and upon such other terms and conditions as he may think proper, with power to vary or rescind any contract of sale, buy in at any auction and resell, and the deficiency (if any) arising on such sale and all expenses of and incident to any such sale or attempted sale shall be recoverable by the Vendor from the Purchaser as liquidated damages.

The clause, then, endows a vendor with four remedies for his purchaser's default; the first is expressed to be conjunctive with the remaining three, which

* B.A., LL.B., Solicitor of the Supreme Court of New South Wales. Challis Lecturer in Conveyancing, University of Sydney.

** B.A., LL.B., Solicitor of the Supreme Court of New South Wales. Student Editor, *Sydney Law Review*, 1957-58.

[1] P. R. Watts (ed.), *The Problem of the Defaulting Purchaser* (1934) 1, (hereinafter referred to as *P.D.P.*).

in turn appear to be disjunctive one from the other. It is not proposed to consider here what are the conditions precedent to the exercise of the vendor's rights,[2] nor, at this stage, what remedies a vendor has at common law apart from Clause 14. The present purpose is to dissect Clause 14 and examine each limb *seriatim*.

I. FORFEITURE

Clause 14 gives the vendor an absolute right, on his purchaser's default, to claim forfeiture of all moneys paid by the latter "on account of the purchase". It is not necessary, in the immediate context, to distinguish a deposit from an instalment of purchase price. It has been held, in a long line of authority[3] that a deposit is forfeited on the purchaser's default, apart from any stipulation in the contract; for this reason alone it would be fruitless to argue that a deposit is not comprehended in the expression "all moneys . . . paid . . . on account of the purchase".

Whilst it may be confidently stated, by virtue of Clause 14 (and also so far as any deposit is concerned, apart from Clause 14), that all moneys paid on account of the purchase belong in law to the vendor on the purchaser's default, it is submitted with equal confidence that Equity does not let the matter rest there. In the writers' view, there is now ample authority to support the proposition that Equity will, in a proper case, intervene at the suit of the defaulting purchaser and relieve him from the forfeiture provided for by the contract; excepting, however, the forfeiture of a "genuine" deposit.[4] The general principle was stated quite unequivocally by Dixon, J. (as he then was) in *McDonald* v. *Dennys Lascelles Ltd.*[5]

> It is now beyond question that instalments already paid may be recovered by a defaulting purchaser when the vendor elects to discharge the contract. Although the parties might by express agreement give the Vendor an absolute right at law to retain the instalments in the event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved. . . . *Kilmer* v. *The British Columbia Orchard Lands* ((1913) A.C. 319) . . . *Steedman* v. *Drinkle* ((1916) 1 A.C. 275) and *Brickles* v. *Snell* ((1916) 2 A.C. 599) . . . establish the purchaser's right to recover the instalments other than the deposit, although the contract is not carried into execution.

A subsequent, and somewhat reactionary decision of Farwell, J. in *Mussen* v. *Van Dieman's Land*[6] was unfortunately to cast doubts on the simplicity of the position as stated above. Any such doubts, however, must now have been dispelled by the decision of the Court of Appeal in *Stockloser* v. *Johnson*,[7] and particularly by virtue of the fact that in this case Romer, L.J. echoed the narrow view of the equitable jurisdiction taken by Farwell, J. and this view was rejected by the majority of the court.[8]

---

[2] On this point see *Tilley* v. *Thomas* (1867) L.R. 2 Ch. App. 61, *Solomons* v. *Halloran* (1907) 7 S.R. (N.S.W.) 32, *Smith* v. *Hamilton* (1950) 2 All E.R. 929.

[3] Of which the leading case is *Howe* v. *Smith* (1884) 27 Ch. D. 88.

[4] See *infra*.

[5] (1933) 48 C.L.R. 457.

[6] (1938) 1 Ch. 253.

[7] (1954) 1 Q.B. 476.

[8] Denning, L.J. said, at 490, 492: "Where there is a forfeiture clause, or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause) then the buyer in default cannot recover the money at law at all. He may, however, have a remedy in equity, for despite the express stipulation in the contract, equity can relieve the buyer from

It has been contended that "the existence of a condition of forfeiture in a contract for the sale of land does not entitle the purchaser to the return of any part of his instalments if he has had possession under the contract".[10] Let it suffice, without canvassing the intricacies of such an argument, to state here that such a contention was expressly rejected by the Victorian Supreme Court in *Real Estate Securities Ltd.* v. *Kew Golf Links Estates Pty. Ltd.*,[11] where Lowe, J. said:[12]

> The purchaser, if he is entitled to sue at law seeks to recover what he has paid on a failure of consideration, but if he comes to equity he seeks relief against forfeiture. Where he sues at law it may be contended that he cannot recover, because the consideration has not wholly failed, since he has had possession under the contract. But when he sues in equity . . . the fact that the purchaser has been in possession can be no answer.

It is to be noted, however, that where a purchaser has been in possession of land, the court, in granting him equitable relief from forfeiture, will set-off against the return of instalments an amount covering a reasonable occupation fee.[13]

In light of the foregoing, would it not be realistic to recognise the existence of a purchaser's "equity of restitution" in any clause in a contract of sale dealing with the rights of the parties on the purchaser's default? The Newcastle Law Society has apparently thought so; in the Contract of Sale approved by this Society, Clause 18, after following in substance our Clause 14, adds the following proviso:

> Provided, however, that in relation to a sale by instalments the right of forfeiture shall extend only to the deposit and moneys paid by way of interest but the vendor may retain all other moneys until a resale is effected and completed as security for any deficiency arising on such resale or for any damages or compensation which may be awarded to him for the purchaser's default provided in such latter case that proceedings for the recovery thereof be commenced within twelve months of such default.

Of course, such a provision would not be welcomed by the profiteering vendor, who, on his purchaser's default, resells the subject property at a profit, at the same time claiming to forfeit all instalments paid, secure in the knowledge that the purchaser has not the means to invoke his equitable remedies.[14] The expression of this attitude, however, far from being a moral or legal justification for leaving Clause 14 as it is, points to the practical inadequacy of the bare existence of equitable remedies, and the consequent desirability of reform along the lines pioneered by the Newcastle Law Society.

---

forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. . . . In a proper case there is an equity of restitution which a party in default does not lose simply because he is not able and willing to perform the contract. Nay, that is the very reason why he needs the equity. The equity operates not because of the purchaser's default, but because in the particular case it is unconscionable for the seller to retain the money."

Romer, L.J. came to the conclusion that after rescission by the vendor, relief would only be given if there were some special circumstances, such as fraud, sharp practice, or other unconscionable conduct, and, remarkably, that before rescission a buyer would only get relief if willing and *able* to complete. (*Supra*, at 493-503.) At all events, it is submitted that *Mussen's Case* must be taken on its own peculiar facts and so treated, and is not authority for the wide propositions which have been attributed to it.

[9] *Supra*, at 490, 492.

[10] *P.D.P.* 121.

[11] (1935) V.L.R. 114.

[12] At 120.

[13] *Pitt* v. *Curotta* (1931) 31 S.R. (N.S.W.) 77. And see *infra*.

[14] Of course, a purchaser who has not the money to keep up the payments under his contract will not be in a position to invoke the most expensive jurisdiction of all.

It will be noticed that the Newcastle condition does not provide for relief against the forfeiture of a deposit. When considering the right of a purchaser to relief against forfeiture the distinction between a deposit and other moneys paid "on account of the purchase" becomes of primary importance. As indicated above, a deposit is forfeitable apart from any stipulation in the contract, and thus there is no contractual penalty against which equity will grant relief, as in the case of instalments. In *Soper* v. *Arnold*[15] Lord Macnaghten stated[16] that a deposit is "a guarantee that the purchaser means business; and if there is a case in which a deposit is rightly forfeited it is . . . where a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not."[17] It is now clear, however, that "the vendor cannot forestall (the purchaser's) equity (of restitution) by describing an extravagant sum as deposit".[18] An illustration of this principle is afforded by the case of *Smyth* v. *Jessep*.[19] Here, the purchaser had paid deposits amounting to forty *per centum* of the purchase price; the vendor "rescinded" the contract for the purchaser's default and claimed forfeiture of the deposits. The purchaser invoked equitable relief against this as a forfeiture. Monahan, A.J. held that the deposits in this case were penal in nature, involving the forfeiture of a very large sum for the non-payment of a very small sum and that it would be unconscionable to allow the vendor to retain it. The purchaser was granted his equitable relief and it is noteworthy that he was relieved against forfeiture of the *whole* of the deposits paid. His Honour said:[20]

> Where similar forfeiture provisions relating to instalments of purchase price have been made in contracts for the sale of land, I think it may now safely be said that it has become settled law that such provisions are in the nature of a penalty and so equity may relieve against their forfeiture by the vendor. Is the deposit to be treated differently because it is called a deposit?

A "genuine" deposit, then, once forfeited, is not recoverable in equity, *aliter* an "extravagant sum" called a deposit, but in effect a "penalty". Where, however, is the dividing line to be drawn? The courts have been singularly unwilling to commit themselves in this regard and the result has been quite anomalous. In *Smyth* v. *Jessep*[21] the defaulting purchaser who paid a deposit amounting to forty *per centum* of the purchase price, recovered it all; no apportionment being made between "genuine" deposit and "penalty". Yet if the deposit, in that case, had been only five *per centum* of the purchase price, this sum would, undoubtedly, have been lost to the purchaser.

In so far, then, as the deposit paid is "genuine", the Newcastle condition is, rightly, safeguarding the vendor's rights in not providing for relief against its forfeiture. By the same token, the condition does derogate from the purchaser's rights to the extent that the deposit forfeited is "penal". It is respectfully submitted that whilst the Newcastle proviso is a most desirable adjunct

---

[15] (1889) 14 App. Cas. 429.

[16] At 435.

[17] There is considerable dispute as to the true nature of a deposit. (See (1957) 31 *A.L.J.* 510 at 520 and authorities there cited.) One of the most important aspects of this dispute lies in the question whether a deposit is to be brought into account, together with forfeited instalments, in calculating the damages to which a vendor is entitled on his purchaser's default. Despite the decision in *Essex* v. *Daniel* (1875) L.R. 10 C.P. 528, it seems established now that a vendor in claiming damages must bring any deposit into account. (*Ockenden* v. *Henley* (1858) E1. B1. & E1. 485, *Shuttleworth* v. *Clews* (1910) 1 Ch. 171, *Harold Wood Brick Co.* v. *Ferris* (1935) 2 K.B. 198, *Holland* v. *Wiltshire* (1954) 90 C.L.R. 409, *Cooper* v. *Ungar* (1958) 32 A.L.J.R. 157.)

[18] *Per* Denning, L.J. in *Stockloser* v. *Johnson* (1954) 1 Q.B. 476 at 491.

[19] *Smyth* v. *Jessep* (1956) A.L.R. 982.

[20] *Id.* at 984.

[21] *Supra* n. 19.

to Clause 14, it could be well amended in this respect. In view of the unwillingness of the courts, it is for the contracting parties to offer guidance in the delineation of a "genuine" deposit; and it is here suggested that a deposit of ten *per centum* of the purchase price is sufficiently usual to warrant the line being drawn there. In the present submission, therefore, the Newcastle condition should protect a deposit from forfeiture, to the extent that the same exceeds ten *per centum* of the purchase price, in all such sales and in like manner as it now protects instalments.[21a]

It was stated above that where a purchaser has been in occupation of the subject property, the court will, in restoring forfeited instalments, allow to the vendor a reasonable occupation fee. The vendor is likewise entitled to receive from the defaulting purchaser any rents or profits taken by him from subject property. The Newcastle condition permits the vendor to retain forfeited instalments as security for any deficiency arising on a resale "or for any damages or compensation which may be awarded to him for the purchaser's default". It may be argued that the words "damages or compensation" are sufficiently wide to comprehend any allowance to be made to the vendor by way of occupation fee or for rents and profits received, or both. Nevertheless, it would seem wise, *ex abundante cautela*, and having regard to the maxim "*expressio unius est exclusio alterius*" to make specific reference to these matters.

II and III. RIGHT OF RESCISSION, AND RIGHT TO DAMAGES

The extent of the right of rescission and its interrelation with the right to damages seem certainly to constitute the most vexatious aspects of the law regulating the rights of vendor and defaulting purchaser and thus of Clause 14, as was made clear in the work first cited. The substantial question, in New South Wales at all events, has been whether a vendor who has "rescinded" his contract for the purchaser's default is entitled to sue for damages suffered in consequence thereof. In view of this it is felt necessary to take the second and third limbs of Clause 14 together.

The substantial controversy, and indeed confusion, here centres on the various meanings attributed to the word "rescind".[22] It has been contended, both judicially[23] and by as well-known a text-book as Williams,[24] that a vendor who exercises his common law right of "rescinding" the contract for breach by the purchaser of some essential provision thereof, rescinds the contract *ab initio*, and that any claim for damages, being founded on the contract, is inconsistent with the claim to treat the contract as never having existed. "Having once elected to rescind the contract, (the vendor) can no longer claim to treat it as subsisting and recover damages for its breach".[25] Another leading text,[26] however, distinguishes rescission of a contract for some invalidating cause, such as fraud, from so-called "rescission" for breach of some essential stipu-

[21a] Of course the equity court would in no way be bound by the parties' delineation of a "genuine" deposit. It is submitted, however, that for the contracting parties to take the initiative in this respect is a vast improvement on the present uncertain, and anomalous position.

[22] See *P.D.P.* 46-47, and L. C. Voumard, *Sale of Land* (1939) 499.

[23] *Ward* v. *Ellerton* (1927) V.L.R. 494, 498-500, *McGifford* v. *O'Brien* (1932) V.L.R. 71.

[24] W. J. Williams, *The Contract of Sale of Land* (1930) 119-123, and *id.*, *Vendor and Purchaser* (3 ed. 1923) 1019.

[25] W. J. Williams, *Vendor and Purchaser, supra.*

[26] J. W. Salmond and P. H. Winfield, *Law of Contract* (1927).

lation.[27] In the latter case, the authors say[28] that the rescission is "not retrospective rescission *ab initio*, but merely prospective rescission *in futuro*", so that it is by no means inconsistent with a claim for damages arising out of the breach occasioning it. Williams' view, and the decision of the Full Court of Victoria in *Ward* v. *Ellerton*,[30] adopting it, have been criticised as based on a misconception of the case of *Henty* v. *Schroeder*.[31] The judicial *imprimatur* to this criticism was given by Swift, J. in *Harold Wood Brick Company Ltd.* v. *Ferris*.[32] The learned judge held that *Henty* v. *Schroeder* turned on a point of procedure only and by no means prevented him from giving damages to a vendor who had "rescinded" his contract for the purchaser's default. The Court of Appeal affirmed this decision.[33]

The following position seems now to have been clearly established by authority. So-called "rescission" at common law for breach of an essential term of a contract is to be distinguished from rescission arising out of some vital factor. In the latter case, the contract is void as from its inception and the parties are restored as far as possible to the position they occupied before entering into the contract. The rescission is *ab initio* and there is no doubt that the right to claim damages is inconsistent with such a rescission. The injured party must elect either to have the contract held void, or to treat it as still subsisting and claim damages under it—both he cannot do. In the former case, however, the injured party merely terminates the contract as to the future while retaining his rights under it up to the time he elects to treat himself as no longer bound; the writers would indeed most strongly urge that the word "rescission" be not used in this sense at all. Of the abundant authorities on this matter, let it suffice to refer to two cases decided by the Privy Council and three by the High Court of Australia. In *Mayson* v. *Clouet*[34] (which dealt substantially with the claim of a defaulting purchaser to relief against forfeiture of instalments) Lord Dunedin, in delivering the Board's judgment said:

> The law is quite plain. If one party to a contract commits a breach then if that breach is something that goes to the root of the contract, the other party has his option. He may still treat the contract as existing and sue for specific performance; or he may elect to hold the contract as at an end—that is, no longer binding on him—while retaining the right to sue for damages in respect of the breach committed.[35]

In *Hirji Mulji* v. *Cheong Yue Steamship Co.*[36] (this case, it may be noted, was not in respect of a contract for the sale of land, but a charter party), Lord Sumner said:[37]

> Rescission (except by mutual consent or by a competent Court) is the right of one party arising upon conduct by the other by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option and . . . is given by the law in vindication of a breach. . . . Though a party may exercise his right to treat the contract as at an end as regards obligations *de futuro* it remains alive for the purpose of vindicating rights already acquired under it on either side.

---

[27] *Id.* at 283ff.
[28] *Id.* at 285.
[29] *Op. cit. supra* n. 1, at 46ff.
[30] (1927) V.L.R. 494.
[31] (1879) 12 Ch. D. 666.
[32] (1935) 1 K.B. 613.
[33] (1935) 2 K.B. 198.
[34] (1924) A.C. 981.
[35] *Id.* at 987.
[36] (1926) A.C. 497.
[37] *Id.* at 509-510.

The first case in what, it is submitted, is now a firm line of Australian authority was *McDonald* v. *Dennys Lascelles Ltd.*[38] where a purchaser "rescinded" for his vendor's breach. Starke, J. said:[39] The rescission of the contract, however, did not operate to extinguish it *ab initio*, but *in futuro*, so as to discharge obligations under it unperformed.[39a] Dixon, J. (as he then was) also stated the position quite unequivocally in saying:[40]

> When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding on him (it is noteworthy that His Honour here avoided using the word "rescind"), the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally[40a] acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach.[41]

Rich, J. and McTiernan, J. agreed with the judgment of Dixon, J. in *Holland* v. *Wilshire*[42] where Dixon, C.J. again expressed the same view. In this case a vendor resold on his purchaser's default and claimed damages in respect of the deficiency arising on the resale. The learned Chief Justice said:[43]

> Everything points to (the vendor) having treated the contract as discharged by breach and as having sold in the exercise of his right as owner unfettered by the contract. . . . The vendor proceeded . . . on the footing that the purchaser had discharged him from the obligations of the contract. It follows that he is entitled to sue for unliquidated damages. Some suggestion was made for the purchaser that once the contract was treated by the vendor as discharged he could not recover for breach. This notion is based on a confusion with rescission for some invalidating cause. It is quite inconsistent with principle and has long since been dissipated.[44]

Finally, in *Cooper* v. *Ungar*[45] in dealing with Clause 14 of the New South Wales Real Estate Institute Form of Contract of Sale the High Court[46] said (after referring to the right therein contained to "rescind" the contract):

> Then there is an alternative. It is to sue the purchaser for breach of contract. That I imagine, was introduced into this clause, which is an old one, at a time when there was a notion that after a rescission at common law for breach of contract a cause of action for damages no longer con-

---

[38] (1933) 48 C.L.R. 457. [39] *Id.* at 469-470. [39a] Salmond and Winfield, *op. cit.* 320.

[40] *McDonald* v. *Dennys Lascelles Ltd.*, *supra* n. 38, at 476-77.

[40a] It is submitted, with respect, that the use of the word "unconditionally" may here introduce a tautology into the argument.

[41] His Honour referred *inter alia* to the judgment of Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co.* (1926) A.C. 497.

[42] (1954) 90 C.L.R. 409. [43] *Id.* at 416.

[44] Monahan, A.J. in *Smyth* v. *Jessep* (1956) A.L.R. 982, 984, took this statement of Dixon, C.J.'s as "finally rejecting" Williams' view above referred to.

[45] (1958) 32 A.L.J.R. 157.

[46] Dixon, C.J., McTiernan, Williams, Fullagar and Taylor, JJ.

tinued in the vendor. It was a view based perhaps on a confusion between a rescission for some extrinsic collateral cause, such as misrepresentation, and one for breach.[46a]

Although it seems incontrovertible that a vendor "rescinding" his contract for the purchaser's breach, in exercise of his common law right, is not rescinding *ab initio*, but retains his right to recover damages, may not the position of the parties still be differently regulated by the terms of the contract adopted by them? In his *The Sale of Land in Victoria*[47] L. C. Voumard adds the following caution to the general rule above stated:

> It is to be remembered, however, that a condition giving a right to "rescind" may be so worked as to show that the right of the vendor on a breach by the purchaser is to "rescind" the contract *ab initio*; and if the vendor exercises this right, he will not then be entitled to sue for damages for the loss of his bargain. Instances of conditions of this nature will be found in *Pitt* v. *Curotta* and in *Jeeves Ltd.* v. *Rogers*.[48]

Pitt v. *Curotta*[49] as the only direct decision as to the meaning of the right to rescind given by Clause 14 of the New South Wales Real Estate Institute Form of Contract of Sale is worthy of careful examination. The vendor there contracted to sell certain land to the purchaser on payment of a deposit of ten *per centum* of the purchase price and the balance by instalments. The purchaser defaulted in payment of his eighth instalment whereupon the vendor purported to "rescind" the contract under Clause 14 and to retain all moneys paid "on account of the purchase". The purchaser then invoked the equitable jurisdiction, praying for relief against the forfeiture and at the same time submitting to such terms as the court thought meet. Long Innes, J. had no difficulty in granting the purchaser relief against forfeiture of the instalments he had paid (the deposit was of course forfeited as a "guarantee for the performance on the plaintiff's part of his contract"). The difficult question, however, was what terms the court should impose on the purchaser as a condition of relief. His Honour said: "It seems to me that, as the plaintiff comes into equity asking to be relieved from the consequences of his own contract and from forfeiture, he must be put upon terms of himself doing equity."[50] The purchaser had been in occupation of the subject property for almost two years and His Honour first considered whether he should not be charged with an amount covering his use and occupation of the land for that time as well as any rents and profits. This question was decided in the affirmative. The next point to be considered was whether the defendant was entitled to a set-off for damages for the purchaser's breach of contract. His Honour, however, did not consider himself in a position to decide this question as it had not been fully argued before him, but before relegating its determination to the Master he made the following observation:[51]

> As a general proposition it is no doubt true that a person cannot rescind a contract and at the same time in effect affirm it by claiming damages for the breach thereof; but, as was pointed out by Harvey, C.J. in Equity in *Shenstone* v. *Hewson* ((No. 2) (1929) 29 S.R. 39 at 46) it is at least open to doubt whether the term "rescind" in such a clause as Clause 14 in the present case is a strict use of language and whether it may not merely

---

[46a] See *McDonald* v. *Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457, 469, 470, 476-78.

[47] L. C. Voumard, *The Sale of Land in Victoria* (1939) 498, at 499 n.(4). *Cf.* W. T. Charles *P.D.P.* 112.

[48] *Infra* nn. 49, 62.

[49] (1931) 31 S.R. (N.S.W.) 477.

[50] *Id.* at 481.

[51] *Id.* at 482.

> mean put an end to, or determine, the contract, and not rescind *ab initio*;[52] and the *dictum* of Lord Dunedin in *Mayson* v. *Clouet* ((1924) A.C. 908, 987) . . . at least suggests that in a case where the vendor does determine the contract under such a clause as Clause 14 in the present case he still retains a right to sue the purchaser for damages for breach of contract.

In the absence of the Master, the question left open by Long Innes, J. came before Harvey, C.J. in Equity. This learned judge decided that the purchaser was not entitled to a set-off for damages. He stated his view thus:[53]

> In my opinion, where a vendor takes advantage of (Clause 14) to rescind the contract, he is then in the same position as if a rescission is made under an order of the Court where a purchaser fails to comply with a decree for specific performance. Rescission in this clause must mean "rescind the contract *ab initio*". The clause is not "rescind and sue for breach" but "rescind or sue for breach"—as to which see Williams *Vendor and Purchaser* 3rd. Ed., p. 1014. It is an alternative right and contrasted with a right to sue the purchaser for breach of contract. He can either rescind the contract and so put an end to the contract, in which case both parties are to be put back into their original positions so far as is then possible[54] with the exception of course, that the vendor is entitled to retain the deposit . . . or, if the vendor does not choose to exercise that right, he can keep the contract on foot and sue the purchaser for breach of contract. . . . That I think, is the true construction of this clause and . . . I hold, as a matter of law, as in this case the vendor rescinded the contract, that he is not entitled to any damages for breach of contract, because that is to affirm the contract which he has already elected to rescind.

It is the writers' respectful submission that *Pitt* v. *Curotta* was wrongly decided by Harvey, C.J.; that Clause 14 cannot be treated, as suggested by Mr. Voumard[55] as altering the vendor's common law right of rescission on breach by the purchaser, to a right to rescind "*ab initio*" precluding recovery of damages. It has been held in three Victorian cases[56] that in the Victorian equivalent to Clause 14, the word "rescind" merely means to put an end to the contract.[57] The argument leading to such a conclusion was stated thus by Mann, J. in delivering the Full Court's judgment in *Ward* v. *Ellerton*:[58]

---

[52] The remarks of Harvey, C.J. referred to were made in connection with the Victorian Full Court's decision in *Ward* v. *Ellerton* (1927) V.L.R. 494. The condition of sale, subject of that decision was, as pointed out by Mr. Watts (*P.D.P.* 42n.) different from Clause 14 of the N.S.W. contract. Yet the present writers submit that the argument based on the wording of that clause, and accepted by the Victorian court, is equally applicable to the N.S.W. condition (see *infra*).

[53] (1932) 49 W.N. (N.S.W.) 107 at 107-108.

[54] Of course, the feature of rescission *ab initio* is that the contract is treated as never having existed and there is *restitutio in integrum*. It is interesting to note, however, that whilst Long Innes, J. ventured the tentative view that in Clause 14 "rescission" merely meant "put an end to the contract" and not "rescission *ab initio*" (*supra*). His Honour went on to speak as if there was to be a *restitutio in integrum*, saying, "I am not satisfied at present that there can be a complete *restitutio in integrum* unless such damages are given." Harvey, C.J. in Equity based his refusal of damages on the ground that there was a rescission *ab initio* carrying therefore with it a *restitutio in integrum*. Obviously both of these notions of *restitutio* cannot be appropriate in the identical context.

[55] *Op. cit. supra* n. 47.

[56] All decisions of the Supreme Court, and the last two of the Full Court; *Grassmere Estate Co. Ltd.* v. *Illingworth* (1915) V.L.R. 687, *Ward* v. *Ellerton* (1927) V.L.R. 264, 494, *Berry* v. *Mahoney* (1933) V.L.R. 314.

[57] The relevant portions of this clause read as follows: "If the purchaser shall fail to comply with the above conditions . . . his deposit money . . . shall be forfeited to the vendor who shall be at liberty without notice to rescind the contract . . . and to resell . . . and the amount of (any) deficiency and expenses shall be recoverable by the vendor as and for liquidated damages."

[58] *Supra* at 498.

> When a vendor has rescinded he wants no power of sale, and to recover damages is to enforce a contract and not to rescind it. The clause seems to illustrate a not uncommon use of the word "rescission" to mean an election to treat oneself as no longer bound to performance. The use of the word "and" instead of "or" in Clause 6, after the words "rescind the contract' seems to show that the draftsman used the word 'rescind' in this latter sense, and if so its presence would appear to have no operative effect.[59]

An application of this argument to Clause 14 is illuminating. It must be borne in mind that Clause 14 provides that on the purchaser's default all moneys paid by him on account of the purchase shall be forfeited *and* the vendor may rescind or resell, etc. Mann, J.[60] relied on the incompatibility of an express power of sale and a right to recover damages with a rescission *ab initio,* in order to arrive at his interpretation of the word "rescind" in Clause 6 of the Victorian contract. The present writers now make the point that the incompatibility of forfeiture of instalments of purchase price with a rescission *ab initio* may be similarly relied upon to reach the same conclusion in construing the N.S.W. Clause 14. Williams states, as the consequences of rescission *ab initio*[61] that "the vendor is to be restored to his former position as absolute owner of the land, but subject to the obligation of refunding to the purchaser all sums of money (the deposit excepted) which the latter has paid on account of the purchase." And Harvey, C.J. relied on this statement, insisting that on rescission "both parties are to be put back into their original positions so far as is then possible". Yet, of course, the forfeiture of instalments of purchase money is quite inconsistent with such "*restitutio in integrum*". It is suggested then that the above consideration must negative the implication drawn by Harvey, C.J. from the disjunctive terminology of Clause 14.

The decision in *Jeeves* v. *Rogers*[62] also proceeded on the basis that the contract provided for a rescission operating *ab initio,* so that the vendor where he exercised his rights under the contract, was deprived of his right to recover damages from the defaulting purchaser. In that case, however, the contract stipulated:

> If the sale . . . shall not be completed within four calendar months . . . the vendors shall . . . be at liberty by notice in writing to the purchasers to . . . rescind this agreement and thereupon the said deposit of £100 and all other moneys (if any) paid by the purchasers to the vendors in respect of this agreement or the sale hereby agreed to be made shall be absolutely forfeited to the vendors and the vendors shall thereafter hold the property hereby agreed to be sold for their own benefit *as if this agreement had never been entered into.*[63]

Maughan, A.J. had little hesitation in holding that the parties had made an express agreement "varying the common law rights". His Honour said:

---

[59] This approach is open to criticism. For instead of starting from the premiss that a rescission by a vendor on his purchaser's default is merely the terminating of the contract by him, and then proceeding to enquire whether the parties have by their contract altered the common law right of rescission, as by providing for a rescission *ab initio* (as Voumard does (see *supra*)), it works in reverse. It assumes that rescission by the vendor on his purchaser's default is a rescission *ab initio.* In the present writers' view, however, such a criticism does not affect the value of the argument as a test of the meaning of the word "rescission" in a given clause; for this purpose the starting-point of the argument is irrelevant, it is its substance that is important.

[60] *Ward* v. *Ellerton* (1927) V.L.R. 264, *supra.*

[61] *Op. cit.* (3 ed. 1923) 1014ff.

[62] (1936) 36 S.R. (N.S.W.) 430.

[63] Italics supplied.

> In my judgment upon the true construction of this clause the word 'rescind' means put an end to the contract as if it had never existed; and not put an end to the contract as from the date of such notice as it does in some cases. Therefore the vendor cannot sue the plaintiff for damages, having once rescinded under Clause 18 and the parties having used the word 'rescind' as they did must be presumed to have so intended.[64]

Of course, the clause in this case was very different from Clause 14 of the Real Estate Institute Form of Contract; however, it did contain a conjunctive provision for rescission and forfeiture which invites the argument used above to impugn the decision of Harvey, C.J. in *Pitt* v. *Curotta*.[65] At all events, the importance of *Jeeves* v. *Rogers* for present purposes, lies rather in the subsequent part of the judgment. For, having taken away the vendor's right to recover damages with his right hand, His Honour gave it back with his left. The plaintiff had instituted the instant suit for relief against forfeiture of instalments paid to the vendor; Maughan, A.J. in granting the relief prayed for imposed the following term:

> But as a term of the equitable relief from the forfeiture that Clause 18 would otherwise have effected I will direct an enquiry as to damages sustained by the defendant by the plaintiff's breach of contract. Counsel for the plaintiff urges that as Clause 18 contemplated a rescission *ab initio* and was availed of by the defendant, the plaintiff should not be ordered to pay any damages for breach. That would be a very good argument if his client had adhered to the terms of Clause 18; but as it is his client which (*sic*) has reopened the matter and thrown overboard the provisions of Clause 18 by asking for relief from forfeiture it is not for him to object to the rights of the parties under that clause being reopened in other respects. It is obvious that the parties viewed the forefiture of the deposit and the other moneys to the vendor as equivalent to giving the vendors damages for the purchaser's breach of contract. As the court is taking these moneys away from the vendor, I think the court should in lieu thereof award to the vendor such damages as it has suffered by the purchaser's default.

It is a pity that His Honour did not advert to the decision of Harvey, C.J. in *Pitt* v. *Curotta*,[66] which was, of course diametrically opposed to his own. The vendor there was not suing the purchaser for damages at law; he was rather seeking to obtain damages as an equitable term of the purchaser's relief against forfeiture. It is noteworthy that in the Victorian case of *Berry* v. *Mahoney*[67] the Full Court in directing an inquiry into damages sustained by the vendor as a term of the defaulting purchaser's relief against forfeiture, and ordering a set-off of these against instalments to be restored, distinguished *Pitt* v. *Curotta* on the ground that the New South Wales court was exercising only equitable remedies, whereas the Victorian court was giving both legal and equitable relief. Mann, J. characterised it as[68] "a case . . . of the application of Sir Leo Cussen's aphorism that 'he who seeks equity must do common law'." In the light of *Jeeves* v. *Rogers* it will be seen that it is not this version, but the original version of the maxim that is really applicable in this State, and this, despite the failure of Harvey, C.J. in Equity to recognise it. This is that "he

---

[64] *Supra* n. 62.
[65] (1931) 31 S.R. (N.S.W.) 477.
[66] *Ibid.*
[67] *Berry* v. *Mahoney* (1933) V.L.R. 314. In this case the rescission clause was substantially similar to that in *Ward* v. *Ellerton* (*supra* n. 60).
[68] (1927) V.L.R. 264, 322.

who comes to equity, must do equity." In *Jeeves* v. *Rogers* Maughan, A.J. gave equitable recognition to a principle of law stated thus by Dixon, J. in *McDonald* v. *Dennys Lascelles Ltd.*[69] "A vendor may, of course, counterclaim for damages in the action in which the purchaser seeks to recover the instalments"; and by Stable, J., when he said in *Dies* v. *British and International Corporation,*[70] that the seller can "set off his claim for damages against the claim for the return of the purchase price". Thus equity, here again "follows the law".

Pitt v. *Curotta* has, however, never been overruled. It seems undesirable, therefore, to leave such everyday matters surrounded by the doubts affecting the decision of Harvey, C.J. in Equity in that case. Nor is it a satisfactory answer to say that the express provision for "rescission" in Clause 14 does not deprive a vendor of his common law right of "rescission", which carries a right to damages. Although this proposition is well-established by authority,[71] it is a matter of considerable difficulty to determine, in a given case, whether the vendor has elected to "rescind" in the special sense provided for in the contract, or has rested on his common law rights. The precariousness of a reliance on the vendor's common law right of rescission is well illustrated by the learned observation that "the distinction seems to have often depended on small differences in language rather than on substance and one may suppose the cases would be easier to harmonise if all had been decided by the same Court."[72] It is suggested then that the most satisfactory way of clarifying what is surely a confused position, is by amendment of the clause itself. In the first place, it would seem advisable to dispense with that most troublesome word "rescind" and to substitute for it a less ambiguous word such as "terminate"; and secondly, there seems no reason at all for maintaining the disjunctive "or" between the right to "rescind" and the right to sue for breach of contract. Of course, in most cases the vendor will, on his purchaser's default, proceed to resell and any claim for damages would come under the last limb of the clause. It is felt, however, that the vendor should have the right upon terminating the contract to sue for damages without having to resort to a resale, the measure of damages here would presumably be that applicable to contracts generally.[73]

IV. RIGHT TO RESELL

The right to resell is the least troublesome limb of Clause 14. Where a vendor invokes this provision "he sells not as owner but under the contract which still remains on foot for the purpose of enabling him to exercise his power and that power must be exercised in strict accordance with the terms of this clause".[74] In fact, however, it seems that the terms of the clause are so wide that the power conferred is in no way narrower than that which the vendor would have as owner, unhampered by the contract.[75] In the recent case of *Cooper* v. *Ungar*[76] an attempt was made to restrict the ambit of the right of

[69] (1933) 48 C.L.R. 457, 479.
[70] (1939) 1 K.B. 724, 744.
[71] See *Ward* v. *Ellerton* (1927) V.L.R. 494, *Berry* v. *Mahoney* (1933) V.L.R. 314, *Vincent* v. *Marks* (1931-1932) 5 *A.L.J.* 157.
[72] *Cf.* Mr. Piesse, in *P.D.P.* 62.
[73] See *Hadley* v. *Baxendale* (1854) 9 Exch. 341.
[74] *Pitt* v. *Curotta* (1931) 31 S.R. (N.S.W.) 477, *per* Harvey, C.J. at 108.
[75] For this reason, the question which could arise under Clause 14 as it stands, whether the vendor in reselling is exercising his rights as owner following the "rescission" of the contract or his contractual right of resale, would appear academic.
[76] (1958) 32 A.L.J.R. 157.

resale given by Clause 14. It was contended on behalf of the plaintiff defaulting purchaser that there was to be implied in Clause 14 a term that the sale, for which the latter part of the clause provides, shall take place within a reasonable time. The High Court by-passed this point in finding that on the facts of the case there could be no breach by the vendor of such a term even if the plaintiff's contention were right. It will be recalled that the Newcastle clause[77] provides that on a sale by instalments the vendor's right to set-off instalments against damages awarded to him applies only where he commences proceedings for the recovery of such damages within twelve months of the default. It seems obviously necessary to place a time limit on the vendor's right to retain instalments as security against damages; in the writers' view such a time limit should apply equally to the vendor's right of setting off instalments against any deficiency arising on a resale, which is also conferred by the Newcastle clause. It would then be a short and desirable step in all cases to limit in point of time the vendor's right of resale under the contract; firstly for the sake of uniformity, and secondly to forestall such arguments as arose in *Cooper* v. *Ungar*.[78] In this regard, a mere stipulation that the right of resale must be exercised within a reasonable time would not serve the desired purpose as "What is a reasonable time is of course a question of fact".[79] It is submitted then that Clause 14 should be amended in this respect by providing that in all cases the vendor must exercise his right of resale within twelve months of the default if he is to recover damages for that default.

V. CONCLUSION

The critical reader may, at this stage, well ask why a contract for sale should contain a condition in the form of Clause 14 at all. On the breach by a purchaser of a stipulation going to the root of the contract the following consequences ensue in any case at common law; any deposit paid is forfeited to the vendor who is at liberty to terminate the contract and recover damages for the breach; the vendor is in the position of owner of the land and can resell as such, unhampered by the contract. Certainly the right of forfeiture at common law does not extend beyond the deposit; but then it has been seen that equity will, in most cases, relieve against forfeiture of instalments under the contract. Clause 14 as it stands is, in the present view, far from being any improvement on this situation, rather a source of confusion and litigation.

Some condition of sale governing the rights of the parties is, nevertheless, desirable for the following reasons:

1. The vendor's rights arise at common law on the breach by the purchaser of a stipulation going "to the root of the contract". Any uncertainty in this regard is obviated by a clause expressing which breaches by the purchaser will give rise to the vendor's rights.

2. The Newcastle condition in allowing a vendor to retain instalments as security against damages, provides a useful right not existent at common law.

3. For the reasons given above it is thought desirable to impose a time limit on the right of a vendor to resell so as to retain a right of recovering

---

[77] *Supra.* [78] (1958) 32 A.L.J.R. 157.

[79] *Per* Dixon, C.J., McTiernan, Williams, Fullagar and Taylor, JJ. in *Cooper* v. *Ungar*, *supra* n. 78, at 160.

damages for any deficiency arising on such resale.

4. Whilst a deposit, as such, is forfeitable apart from any stipulation in the contract, it is thought desirable to limit expressly the right of forfeiture so far as the deposit exceeds ten *per centum* of the purchase price, as is done by the Newcastle clause in relation to instalments.

5. From the lay point of view it is desirable that a written contract be explicit as to the salient rights and liabilities of the parties.

It is accordingly the writers' view that to protect the purchaser, whilst still vindicating the rights of the vendor on the purchaser's default, Clause 14 of the New South Wales Real Estate Institute Form of Contract should be re-written.[80]

[80] The following new text is suggested: "If the purchaser shall fail to comply with these conditions or any of them, or with the Terms of Sale, all moneys, bills and promissory notes which the purchaser shall have given to the agent or to the vendor shall, subject as hereinafter provided, be absolutely forfeited to the vendor who shall be at liberty to terminate the contract and to sue the purchaser for breach of contract or without any notice to the purchaser to resell the property by public auction or private contract, together or in lots, for cash or on credit and upon such other terms and conditions as he may think proper with power to vary any contract for sale, buy in at any auction and resell and the deficiency (if any) arising on such sale and all expenses of and incident to any such sale or attempted sale shall be recoverable by the vendor from the purchaser as liquidated damages provided that proceedings for the recovery thereof be commenced within 12 months of the purchaser's default.

"The right of forfeiture hereinbefore conferred on the vendor shall not apply to any deposit to the extent that the same exceeds ten *per centum* of the purchase price or to any instalments paid in a sale by instalments, but the vendor may retain any deposit to the extent aforesaid and any such instalments as security for any deficiency arising on a resale or for any damages or compensation (including any allowance by way of occupation fee or for rents and/or profits from a purchaser who has been in possession of the property or in receipt of the rents or profits thereof) awarded to him for the purchaser's default provided that proceedings be commenced within 12 months of such default for the recovery of such damages or compensation."