NOTES ON "THE CONTRACTS OF SALE OF LAND ACT OF 1933"

The Contracts of Sale of Land Act of 1933 is ground in the Statute Book where the angels have been discreetly reluctant to tread. It has been the subject of few reported decisions; and the attitude of the profession to the Act may be described as uneasy awareness of its existence coupled with a prudent practice of steering clear of it as far as possible. A learned judge has said that "the construction of this Act is by no means easy and the extent to which the Act operates is a matter of some importance."[1] A recent decision of the Full Court, discussed below, focuses attention on the Act and justifies some tentative remarks.

"Contract of sale of land" is defined in s.3 as "An agreement for the sale and purchase of land where the terms of the sale provide that the payment by the purchaser for the land shall be extended over a period of time: the term also includes any such sale of land where the instrument of sale is not a registrable instrument under *The Real Property Acts,* 1861 to 1887".

In *Morris v. Forrester-Jones*[2] a deposit of £100 was paid on 25th March, 1949, in respect of the sale of certain land by the plaintiffs to the defendant. A contract of sale was executed on 28th March, 1949, subject to the consent of the Commissioner of Prices. It set out the consideration as £1050 and provided for the payment of the balance £950 in exchange for a registrable transfer free of all encumbances not later than fourteen days from the consent of the Commissioner. The defendant entered into possession on 31st March, 1949. The consent was given on 8th April and notified to the purchaser's agent on 9th April, 1949. The defendant did not pay the balance £950 not later than fourteen days thereafter. Macrossan C.J. (Mansfield S.P.J. concurring) held that the agreement was not one within the first part of the definition of "Contract of sale of land." He said, at p. 261, "(The agreement in question) provided for payment of a deposit and for payment of the balance not later than fourteen days from the giving of the consent of the Commissioner of Prices to the sale. It was only because of the legal necessity of obtaining the consent of the Commissioner of Prices to the transaction that the agreement provided for any interval of time between payment of the deposit and payment of the balance of the purchase price. I do not think that this is properly to be called an agreement where the terms of sale provide that the payment shall be extended over a period of time." (The judgment of the learned Chief Justice gives authority to the widely held opinion of the profession on this point). Indeed, it may be arguable that the agreement in a case such as this, in effect if not in terms, recites rather than provides for the payment of the deposit. And this is frequently the position. However his Honour held that the agreement was caught by the second

1. F. A. Douglas J. in *Re Priebbnow* [1941] St.R.Qd. at p. 150.
2. [1950] St.R.Qd. 252.

part of the definition, although strictly speaking there was no instrument of sale. "The document does not in its terms purport to sell anything. It records that the plaintiffs have sold to the defendant the subject property for the sum of £1050 upon the terms set out in the document. But a perusal of *The Contracts of Sale of Land Act of* 1933 shows that many terms are used therein with different meanings to those which a conveyancer would give to them." He gives instances from s.18 of the Act and then says that the document "although it is not an instrument of sale in any strict sense, is an instrument which records a sale and is the only instrument which records the sale of the subject property. It is not, of course, a registrable instrument under the Real Property Acts . . . On the whole I am of the opinion that the Legislature intended such a transaction as the one under consideration to be within the category of a contract of sale of land created by the Statute." Now with the greatest respect to the learned Chief Justice, it would appear arguable that insufficient force has been given to the word "such" in the second part of the definition. It must refer back to some antecedent and it is submitted that the antecedent is clearly the type of sale of land set out in the first part of the definition.

The most recent authoritative discussion of the grammatical consequences of the word "such" is to be found in the High Court's decision in *H. Jones and Co. Pty. Ltd. v. Kingsborough Municipality*.[3] A local authority, to justify certain conduct, claimed that the watercourses within a certain water district were vested in it. The statutory provision on which it relied gave it the "care control and management of every water district which heretofore has been controlled and managed by the council of a rural municipality . . ." and vested in it "every river . . . within the limits of every *such* water district." Now the relevant water district was constituted after this enactment and therefore did not *prima facie* fall within the terms of the only antecedent to the word "such" to be found in the provision. Latham C.J., in holding that the relevant water district was outside the provision remarked (at pp. 297-8) that it was highly probable that the Legislature had not said what it meant to say, but that the function of the court was limited to interpreting and applying what the Legislature had in fact said, whether it meant to say it or not. "The Court", he said, "must take the provisions of the statute as it finds them and cannot amend the statute in order to accord with what is thought to be, however reasonably, the real intention of Parliament". Fullagar J. concurred in the result but not in the reasoning of the Chief Justice. He agreed that at first impression the relevant water district appeared to be excluded from the operation of the statute. However in the light of the collocation of this provision with others contemplating the creation of water districts in the future, his Honour thought (at p. 338) that the word "such" should in this case be read as referring back only to every water district within the municipality. (N.B.—No such limited antecedent can, it is respectfully submitted, be found for the word "such" in s.3 of the Queensland statute under consideration. *Aliter* if the second part of the definition read "any such sale" simply instead

3. 82 C.L.R. 282.

of "any such sale of land.") Dixon J. dissented in both the reasoning and the result of the Chief Justice. He examined some authorities and suggested (at p. 319) that the solution of the difficulty in this case lay in recognizing that a draftsman, in using the word "such" might not have in mind all the precise qualities which by an adjectival phrase he might have attributed to his antecedent in an earlier part of the text. Here his Honour thought that the truth was that the draftsman desired to confine the provision made to water districts within municipalities. It is emphasized that in *Morris's Case* no choice among the qualities attributed to the antecedent seems open. One of the authorities cited by Dixon J. contains the following passage: "At the same time it must be admitted that every relative ought to be referred, perhaps not to the next antecedent 'which will make sense with the context' but to that to which the context appears properly to attract it."[4] This clearly indicates that some antecedent must be found. In Dixon J.'s phrase, the word "such" is a not inflexible relative word the application of which the Courts are prepared to mould so that the intention to be gathered from the context will not be defeated. But it cannot, with respect, be altogether ignored. In the absence of a reasonable limited antecedent it would appear that the words of Latham C.J. cited above are very much in point.

If the Legislature intended the construction adopted by the learned Chief Justice in *Morris's Case* then it has used more than usually infelicitous language. The intention which the majority succeeded in spelling out of the definition is not one which will appeal to the profession, for it means that virtually all agreements for sale of land are within the Statute and strikes vitally at the efficacy of the deposit as an earnest of performance.

Generally, the vendor is entitled, upon rescinding for the purchaser's breach or renunciation, to retain the deposit, which was paid partly as a guarantee for the purchase's due performance. And he is equally entitled to it if it is held by a stake holder without special provision for its application. The rule, of course, applies only to money paid as a deposit, that is in earnest or as a guarantee and does not extend to other sums paid on account of purchase money: Williams on *Vendor and Purchaser* (4th Edition) pp. 1006-8.

In *Howe v. Smith*[5] Fry L.J. said, "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed . . . The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee." It is conceived that the statements in the books that a pecuniary deposit upon a purchase is to be considered as payment in part of the purchase money and not as a mere pledge[6] are subject to qualification in terms of this passage. The learned Chief Justice cited this passage in his reasons for judgment in *Morris's Case*, but it is submitted with the greatest respect that he failed to give due weight to the distinctions propounded by Fry L.J. The purchaser

4. *Eastern Counties Railway Co.* v. *Marriage* (1860) 9 H.L.C. at p. 74; 11 E.R. at p. 655; per Lord Chelmsford.
5. 27 Ch. D. 89 at p. 101.
6. See *e.g.*, Sugden on *Vendor and Purchaser* (14th Ed.) Chapter 1, Section III, Article 18.

in *Morris's Case* did not perform the contract, as is clear from the decision at p. 263 that his failure to pay the balance £950 within fourteen days of the consent entitled the vendors to give notice of rescission. If the contract was not performed by the purchaser the deposit moneys should not have been brought into account; and if they were not to be brought into account as part of the purchase moneys how could it be said that the purchaser had "paid off an amount from the consideration," the credit side of the accounts, as it were, being blank?

If the decision is correct, it is highly inconvenient. As a matter of social policy, vendors should be fairly entitled to provide against an abortive sale by a modest deposit forfeitable on breach by the purchaser. If they are to be remitted to proceedings under this Statute, they will probably prefer, in many cases, to write off their losses rather than play doormouse at the Mad Hatter's Tea Party of litigation at which they may lose more in solicitor and client costs than the compensation they are awarded.

The procedure for and consequences of rescission for the purchaser's default are set out in detail in s.13 of the Act, which applies "where the purchaser has paid off an amount from the consideration for the sale of the land concerned." The vendor may give notice of intention to rescind "in the prescribed form or according to the practice of the Court" (and notice of rescission is a sufficient compliance: *Morris's Case* at p. 263).[7] Such rescission does not take effect until the expiration of thirty days from the date of the notice, within which time the purchaser may make good his default. But if the purchaser fails so to do "the vendor may rescind." (Presumably, the notice previously given then takes effect.) Important aspects of the vendor's rights on rescission are contained in s.13 (5). He may:—

(a) retake possession on fair and equitable payment to the purchaser, after taking into consideration certain specified matters and all such other relevant matters and factors as the court deems fit;

OR

(b) retake possession and resell by public auction, provided that if the land will not realise the amount owing together with the reasonable expenses *incidental to repossession and resale*, he may resell by private contract. From the proceeds of such resale the vendor may deduct *such expenses* and the unpaid balance including *outgoings payable under the contract by the purchaser* and shall pay the balance to the purchaser.

Now it is obvious that the rescinding vendor is in a better position if his rights are determined under s.13 (5) (a) than under s. 13 (5) (b). Thus in *Morris's Case*, where s. 13 (5) (a) was held to operate, the purchaser's occupation without payment between 31st March, 1949, and the date of judgment in the appeal, i.e., 9th May, 1950, was clearly regarded as a circumstance disentitling the pur-

7. A form of notice of intention to rescind is prescribed in the Contracts of Sale of Land Regulations of 1934. The notice in *Morris's Case* was given by registered letter (*see* p. 260 of the report) which presumably was not in the prescribed form. This appears to have escaped the attention of the Court (*quaere* however, whether such notice was not, nevertheless, given "according to the practice of the (Supreme) Court" which would not require any particular form.

chaser to repayment of the deposit of £100. Had the rights of vendor and purchaser been determinable under s. 13 (5) (b) such a factor would have been irrelevant and it is at least doubtful whether interest on the unpaid purchase money would have been deductible. (*Quaere* whether interest if provided by the agreement, would be deductible under sub-section 5 (b) as an "outgoing . . . payable under the contract of sale by the purchaser to entitle him to the full ownership of the land.") Again, the rescinding vendor may anticipate a better bargain on the resale than on the original sale. Under the general law he would be entitled to retain any excess of price obtained on such resale beyond that fixed by the contract. But if his rights fall to be determined under s. 13 (5) (b) not he but the defaulting purchaser will obtain the advantage. If the vendor resells under a power reserved to him in the contract to resell and to recover from the purchaser as liquidated damages any deficiency on resale, then, again the deposit is brought into account.[8] But if for a breach thereunto entitling him the vendor rescinds, then the deposit, not coming into account, is forfeitable, but of course the rescinding vendor cannot have damages in addition. The vendor's rights under the general law are alternative. He may rescind and sell as owner, retaining the deposit; or he may sell under the contract in which case he is entitled only to realise the contract price and must bring the deposit into account. The effect of the Act, if the rescinding vendor's rights fall to be determined under s. 13 (5) (b), at least, is to confine the vendor to his rights as upon resale under a power at law while, it would appear, depriving him of his right to damages in addition which would have been open to him had he resold under a power without rescinding. It has been decided that s. 13 is not an exhaustive or definite statement of the remedies of which the vendor may avail himself on breach. Thus a claim for specific performance is open.[9] s. 13 merely regulates the vendor's rights on rescission. It should always be carefully considered therefore whether rescission is the best step for the vendor. It has never been decided whether provision in a contract of sale for resale on default without rescission is an attempt to contract out. *Semble* it is not.

A nice question which will frequently arise is whether the agent's commission, which he will have deducted from the first moneys which came into his hands is chargeable against the defaulting purchaser. Of course, in most cases, it will probably not be strictly payable to the agent, the sale having proved abortive—but if the moneys are in the agent's hands, the efforts of the innocent vendor to recover them may be fraught with difficulty and exasperation.

S. 13 (6) should not be forgotten. If the vendor has repossessed and does not resell within six months he is deemed to have received "the sum representing the price which the land might reasonably have been expected to have realised if it had been sold" and is, it appears, liable to account as under s. 13 (5) (b). Thus, it is submitted, a rescinding vendor who desires to avoid the operation of s. 13 (5) (b) would be well advised to take steps to have his rights conclusively

8. *Ockenden* v. *Henley* (1858) E.B. & E. 485; 120 E.R. 590 (*semble* on the footing that he has affirmed the contract).
9. *Priebbnow* v. *Green* 66 C.L.R. 137.

determined under s. 13 (5) (a) by a judgment before six months have elapsed from repossession. However a procedural difficulty arises. S. 13 (8) provides that "if the parties have failed to arrive at an agreement in respect of the amount (if any) paid (*sic*—presumably 'to be paid') by the owner to the purchaser pursuant to the provisions of s. 13 . . . the *purchaser* may apply to the court requesting that the amount be determined by the court." The Act does not provide for application by the vendor. However, in *Morris's Case*, which was an action for a declaration of rescission, for recovery of possession and certain other relief with a counter-claim for specific performance, the Full Court in upholding a judgment with costs for the plaintiff on both claim and counter-claim, considered, as has been indicated, the rights of the parties under s. 13 (5) (a). It is submitted that the correct procedure for a vendor who desires to have his rights determined under s. 13 (5) (a) is to institute an action for declarations of rescission and of his rights as aforesaid.

Lastly there are some miscellaneous problems. What, *e.g.*, of the case of the rescinding vendor who resells immediately by private contract. The Act clearly contemplates a prior attempt at sale by auction. Is the resale illegal and a nullity? Could it be restrained by injunction? Is the defaulting purchaser's "equity" enforceable against the purchaser upon resale, and if so in what circumstances? The writer has no intention of embarking upon such inquiries. It is enough, at this stage to say that they are obviously problems which will arise now that the profession has been reminded of the existence of this inelegant piece of legislation and now that its scope has been extended in so unforeseen a fashion.

What is the precise ambit of s. 15 which avoids contracting out?

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