[HIGH COURT OF AUSTRALIA.]

CHARLES HENRY GARDINER . . APPELLANT;
PLAINTIFF,

AND

RICHARD BEAUMONT ORCHARD . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 12, 13, 16.

Griffith C.J., O'Connor and Isaacs JJ.

Vendor and purchaser—Conditions of sale—Rescission clause—Objection to title—Error or misdescription—Compensation—Unreasonable exercise of power of rescission—Sale of land and buildings—Subject matter of contract.

A contract of sale provided for the sale by the defendant to the plaintiff of a parcel of land "having a frontage of 26 ft. 2 in. to George Street by a depth of 60 ft. along Valentine Lane, . . . together with premises occupied by City Bank and store at rear." The conditions of sale provided that the vendor should deliver an abstract of title: that objections to title should be made within seven days from delivery of the abstract: (5) that no error or misdescription should annul the sale, but compensation should be made or given: and (8) that if the vendor should be unable or unwilling to remove any objection which the purchaser should be entitled to make, the vendor might rescind the contract. After delivery of the abstract, to which no objection was made by the purchaser, it was found that the frontage to George Street occupied by the bank buildings was 25 ft. 9 in. instead of 26 ft. 2 in. as stated in the contract. The purchaser having claimed compensation for this deficiency, the vendor rescinded the contract.

Held, by *Griffith* C.J., and *O'Connor* J., that the subject matter of the contract was the land the frontage of which was actually occupied by the bank premises.

Held, also, by *Griffith* C.J. and *O'Connor* J., that the term "objection" in clause 8 applied only to objections to title; that the claim for compensation

by the purchaser was not an objection to title, and that the vendor was therefore not entitled to rescind the contract, but that the purchaser was entitled to compensation.

Semble, *per Griffith* C.J.—If the subject matter of the contract was an area having, in fact, a frontage of 26 ft. 2 in. to George Street, in which case the objection would be that the vendor could not make title to all the land agreed to be sold, it was the intention of the parties that such an objection should be the subject of compensation, and should not be a ground of rescission.

Per Isaacs J. — (1) That the frontage of 26 ft. 2 in. was an essential part of the description, and the shortage constituted a defect of title ; (2) that the purchaser was entitled to compensation ; and (3) that assuming "objection" in clause 8 applied to objections to title, the vendor had in the circumstances acted unreasonably in cancelling the contract, and the attempted cancellation was therefore ineffectual.

Decision of *A. H. Simpson*, Chief Judge in Equity, (*Gardiner* v. *Orchard*, 10 S.R. (N.S.W.), 150), reversed.

APPEAL by the plaintiff from the decision of *A. H. Simpson*, Chief Judge in Equity, upon the hearing of an originating summons whereby it was declared that the defendant was entitled to rescind a contract for the purchase of certain land by the plaintiff from the defendant.

The facts are sufficiently stated in the judgment of *Griffith* C.J.

Knox K.C. and *Maughan*, for the appellant. The purchaser's claim for compensation was not an objection within clause 8 of the conditions of sale. "Objection" in that clause only applies to objections to title. It refers to the objections dealt with in clauses 2 and 4. What the vendor sold was the bank buildings and the store at the rear. There is no question in this case as to the identity of the subject matter of the contract, or as to the vendor's title to it, but there is an error in the description of it. "Objection" is not an apt word to describe a claim for compensation by a purchaser who wishes to complete the contract. Clause 8 is really a proviso to clause 4. Clauses 5 and 8 are mutually exclusive, otherwise the words "or given" in clause 5 are meaningless. The object of clause 8 is to avoid the contract, and of clause 5 to keep it alive. If a right is given to the purchaser by clause 5, it should not be held to be taken away by clause 8. If the respondent's contention is upheld, a purchaser

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can never obtain specific performance with compensation, except in cases where the vendor is precluded by his own conduct from setting up clause 8. The appellant accepted the title, and made no requisitions, and makes no claim for the two inches encroachment on Valentine Lane. Further, if this is an objection within clause 8, the cancellation of the contract is not a reasonable exercise of the vendor's powers under this clause. It practically eliminates all the benefit the purchaser may obtain under clause 5. [Reference was made to *Webster's Conditions of Sale*, 3rd ed., p. 269; *Ashburner* v. *Sewell* (1); *Mawson* v. *Fletcher* (2); *In re Turner and Skelton* (3); *Bennett* v. *Stone* (4); *Palmer* v. *Johnson* (5); *Painter* v. *Newby* (6); *Heppenstall* v. *Hose* (7); *Sale* v. *Lambert* (8); *In re Weston and Thomas's Contract* (9); *In re Jackson and Haden's Contract* (10); *Rodrick* v. *City Mutual Life Assurance Society* (11); *Debenham* v. *Sawbridge* (12).]

Langer Owen K.C. and *Harvey*, for the respondent. The subject matter of the contract was a particular piece of land with buildings upon it, and the survey shows that the defendant has no title to a portion of the land he purported to sell. The objection taken by the purchaser goes to the question of title and description. Clause 8 is not limited to objections to title. A vendor can sell on any terms he chooses to impose, and clause 8 is wide enough to cover any objection to carrying out the contract which the purchaser is not precluded from taking. The vendor in effect says, if the purchaser for any reason objects to pay the full price for the land sold, he reserves his right to cancel the contract. "Objection" is an apt word to apply to a misdescription by shortage of area: *In re Terry and White's Contract* (13). The clause is intended to be for the benefit of the vendor: *Cordingley* v. *Cheeseborough* (14); *Vowles* v. *Bristol &c. Building Society* (15).

(1) (1891) 3 Ch., 405.
(2) L.R. 6 Ch., 91.
(3) 13 Ch. D., 130.
(4) (1903) 1 Ch., 509, at p. 525.
(5) 13 Q.B.D., 351.
(6) 11 Ha., 62.
(7) 51 L.T., 589.
(8) 43 L.J. Ch., 470.
(9) (1907) 1 Ch., 244.
(10) (1906) 1 Ch., 412.
(11) 18 N.S.W. L.R. (Eq.), 128.
(12) (1901) 2 Ch., 98.
(13) 32 Ch. D., 14.
(14) 4 DeG. F. & J., 379.
(15) 44 Sol. J., 592.

Nothing in the compensation clause can affect the rescission clause so long as the latter clause is not exercised arbitrarily. Clause 8 is a special right which the vendor reserves to himself as a protection against unforeseen emergencies. Clause 8 is to be read as a proviso to clause 5. The vendor is acting reasonably if he rescinds on the present facts, in order to avoid an expensive and troublesome inquiry. Further, in this case there is an objection to title. The objection was as to five inches of the frontage. Two inches were occupied by the defendant's buildings by encroachment on Valentine Lane. He therefore contracted to sell two inches of the lane. That is clearly a defect of title. The contract refers to the starting point as the corner of the *de facto* alignment. The defendant contracted to sell 26 feet 2 inches "as occupied by the City Bank," and he has therefore sold 5 inches to which he cannot make title. It was not a sale of the specific buildings. In city properties it is the frontage and not the buildings which is important. The sale was by description by metes and bounds, which are plainly material. The frontage sold was the actual frontage of the buildings. It is immaterial that the purchaser asks for compensation. The vendor can treat this as an objection to title if in fact it is so. If the objection falls both within clause 5 and clause 8, the latter clause prevails. "Error in misdescription" means an error in the physical description of the property. Clause 4 only applies to objections to the abstract. [They also referred to *In re Deighton and Harris's Contract* (1); *In re Jackson and Oakshott's Contract* (2); *Farrer, Conditions of Sale*, 2nd ed., p. 95; *Flight* v. *Booth* (3); *Dart, Vendor and Purchaser*, 7th ed., 681.]

Knox K.C. replied.

Cur. adv. vult.

May 16.

GRIFFITH C.J. The question for determination in this case arises upon the construction of a contract dated 17th September 1908, by which the respondent by his agents agreed to sell to the appellant a parcel of land described as follows:—"All that piece or parcel of land situate in City of Sydney, State of New South

(1) (1898) 1 Ch., 458. (2) 14 Ch. D., 851. (3) 1 Bing. N.C., 370.

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Wales, having a frontage of 26 feet 2 inches to George Street, by a depth of 60 feet along Valentine Lane, and the eastern boundary line has a length of about 55 feet, subject to a 4 foot right of way about 32 feet from George Street, leading from Valentine Lane, together with premises occupied by City Bank and store at rear. Purchase money £6,000."

The first question to be determined is what was the subject matter of the contract. Was it an area of land at the corner of George Street and Valentine Lane extending for an actual distance of 26 feet 2 inches from the corner, or was it the block of land on which the premises occupied by the City Bank and the store at the rear actually stood, with some intervening land not covered by buildings? In my opinion the subject matter was the land actually occupied, and the words "having a frontage of 26 feet 2 inches to George Street" are matter of description only. This was not, indeed, seriously controverted on either side.

The next question arises upon the conditions of sale, which provided, amongst other things; (2) That the vendor should deliver an abstract of title, and that no objection should be made to any deed appearing to be made under power of attorney; (4) That all objections "which under these conditions the purchaser can take to the title" should be made within 7 days from the delivery of the abstract; (5) "That no error or misdescription shall annul the sale but a compensation shall be made or given as the case may require, by the usual mode of arbitration"; (8) That if the vendor should be unable or unwilling to remove any objection which the purchaser should be "entitled to make" under the conditions, the vendor should be at liberty to rescind the contract.

An abstract of title was duly delivered, and no objections arising upon it were made by the purchaser. But, upon a survey of the property being made, and upon comparison of the actual facts with the documents of title, it was reported to him by the surveyors that the bank building in fact occupied a frontage of 25 feet 9 inches only to George Street instead of 26 feet 2 inches as stated in the contract. His solicitor thereupon wrote to the vendor's solicitor stating that there was a shortage of 5 inches in the frontage to George Street, in respect of which they claimed

compensation. After some further correspondence the vendor's solicitor wrote stating that the vendor rescinded the contract.

The questions raised by the originating summons are:— (1) whether the plaintiff was entitled under the conditions of sale to compensation for the deficiency in frontage; and (2) whether under the circumstances the defendant was entitled to rescind. While the summons was pending the purchaser's surveyors made a further examination of the property, and found that the actual frontage of the bank building to George Street was 25 feet 11 inches, of which, however, 2 inches represented an encroachment upon Valentine Lane. The fact that, as between the frontage stated in the contract and the frontage to George Street occupied by the bank building up to the true line of Valentine Lane, there was a discrepancy of 5 inches was not affected by this discovery. No claim has ever been made, nor any objection taken in respect of the two inches; the discrepancy was not discussed before the learned Chief Judge, and Mr. *Knox* emphatically disclaimed any wish to take advantage of it.

The only question, therefore, that arises is as to the effect of the claim for compensation in respect of the shortage of 5 inches in the frontage to George Street.

The appellant contends that clause 8 of the conditions of sale relates only to objections to title, and that a claim for compensation under clause 5 in respect of an error in or misdescription with regard to the property the title to which is accepted is not an objection to title.

The respondent contends that a claim for compensation is in substance an objection to title to part of the property agreed to be sold, and that, whether it is or not, clause 8 is not limited to objections to title, but extends to all objections offered by the purchaser to carrying out the contract in its literal terms.

The learned Judge thought that the claim for compensation was an objection to title within clause 8, and dismissed the summons.

Several cases were cited to us, but I find myself unable to derive any assistance from them, since they all turned upon the construction of the terms of particular documents. The present

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case must be determined upon the construction of the contract before us.

I agree that a claim for compensation, if founded upon an inability of the vendor to make title to a substantial part of the subject matter of the contract, may in some cases be in effect an objection to title, as was held by *Chitty* J. in *Ashburner* v. *Sewell* (1). But I do not think that a claim for compensation for an error or misdescription with regard to a subject matter the title to which is accepted is an objection to title. In the present case the vendor's title to the subject matter is not in question except as to the 2 inches of encroachment on Valentine Lane, as to which no point has ever been raised.

The vendor must, therefore, rely on the contention that clause 8 should be construed in the sense that the term "objection" includes a claim for compensation as well as an objection to title, in which view it would override clause 5. Mr. *Owen* contended that clause 5 was inserted for the benefit of the vendor only, and if he can establish this contention he must succeed. It is common ground that clause 5 does not apply to cases in which the error or misdescription is of such a nature that the only property which the vendor is able to convey is substantially a different thing from that agreed to be sold, but relates only to minor defects which can reasonably be compensated for by money.

I am unable to accept Mr. *Owen's* contention for several reasons. A contract should be so construed as to give effect, as far as possible, to all its stipulations. If, therefore, two provisions are apparently, but not necessarily, in conflict, a construction which will reconcile them is to be preferred. When I look at the language of clause 5 the first point that strikes me is that the word "compensation" *primâ facie* denotes something given by a person by way of amends for his inability to give what he has contracted to give. It aptly expresses a reduction in the agreed price of the thing sold when the vendor cannot convey all that he has agreed to sell. The description of the thing sold is, as *Sir E. Fry* points out, a matter for which the vendor is *primâ facie* responsible, and it seems a contradiction in terms to speak

(1) (1891) 3 Ch., 405.

of making compensation to him for his own mistake. I do not know of any case in which the term has been applied to denote an enhancement of the agreed price for a specific thing, and on reading *Sir E. Fry's* Chapter on *Compensation* it is apparent that the use of the term in that sense was not present to his mind when he penned it. I do not see any reason why the word when used in conditions of sale should receive any different interpretation from that in which it is ordinarily used in treating of specific performance, unless there is a context requiring a different interpretation (as *e.g.* in *Ashburner* v. *Sewell* (1)). There is no such context in the present case.

Again: the words of clause 5 import mutuality, in the sense that neither party is to be entitled to avoid or escape from the contract on the ground of error or misdescription. This is shown by the initial words "no error or misdescription shall annul the sale"; and the words "made or given," which suggest a distinction, real or assumed, between the making and giving of compensation, and which might be capable, in a different context, of indicating a payment to be made by the purchaser, are not inapt to express mutuality in another sense.

The clause assumes (rightly or wrongly) that error or misdescription might afford ground to either party for annulling the sale. If the purchaser seeks to annul it on the ground that he is not getting all that he bargained for, he is not to be entitled to do so, but the vendor may, nevertheless, insist on performance; but if he does, he must make up for the deficiency by compensation. If, on the other hand, the purchaser claims to enforce it with compensation for deficiency he may do so, and is in that case entitled to call on the vendor to make "compensation." The words "giving" and "making" denote, not inaptly, the two points of view from which the claim is regarded, that of a willing purchaser claiming compensation from an unwilling vendor who must "make" it, and that of an unwilling purchaser to whom the willing vendor must offer it and give it.

In my opinion this is the true construction of clause 5. So construed, it has the element of mutuality, for either party may take advantage of it, and, although in one sense it always operates

(1) (1891) 3 Ch., 405.

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for the benefit of the purchaser, yet in another it operates for that of the vendor, who may insist on the purchaser taking in the form of land less than he bargained for.

Further, I think that the term "objection," standing alone, imports that the purchaser takes up the position that the vendor is unable to perform the contract, and does not apply to a case where the purchaser insists upon performance of the contract so far as the vendor can perform it in specie, and claims to receive compensation, under the terms of the contract itself, in respect of a deficiency of quantity. The making of such compensation is as much a performance of the contract as the execution of the conveyance.

For these reasons I am of opinion that clauses 5 and 8 can be, and ought to be, construed so as to give effect to both, and that, so construed, clause 8 does not override clause 5. I think, also, that the description of the land as having a frontage of 26 feet 2 inches to George Street was an error of the kind contemplated by clause 5, and that the meaning of that clause is that compensation may be claimed by the purchaser for such an error.

The appellant is therefore entitled to compensation, and the respondent was not entitled to rescind, and the questions submitted by the summons should be answered accordingly.

I desire to add, having regard to the view which I understand my brother *Isaacs* to take of the case, that if the subject matter of the contract was not the block of land on which the bank premises actually stood, but an area having in fact a frontage of 26 feet 2 inches to George Street, in which case the objection would be that the vendor could not make title to all the land agreed to be sold, I should still be of the same opinion. For, in that view I think that, when clauses 5 and 8 are read together, it appears that it was the intention of the parties that such an objection relating, as it does, only to a deficiency in frontage, should be the subject of compensation, and should not be made a ground of rescission.

O'CONNOR J. This appeal is brought to determine whether the Chief Judge in Equity has rightly decided two questions of law arising on the construction of a contract for the sale of land. The

subject matter of the contract was a piece of land in George Street, Sydney, with buildings thereon, and the contract follows a form in general use in Sydney known as "Richardson & Wrench's conditions." It contains eleven conditions which embody all the stipulations necessary for carrying out and completing the sale. Clause 2 restricts in certain respects the objections that can be made to title. The 4th clause provides that all objections which under the conditions the purchaser can take to the title shall be delivered within seven days from the delivery of the abstract. Clause 5 is in these words: "No error or misdescription of the property shall annul the sale but a compensation shall be made or given as the case may require by the usual mode of arbitration." The 8th clause stipulates "that if the vendor should be unable or unwilling to remove any objections which the purchaser shall be entitled to make under these conditions the vendor shall be at liberty to rescind the contract," &c. The remainder of the clause is immaterial. No difficulties as to title or conveyancing arose during the period allotted by the conditions for objections of that kind. But it was discovered by the purchaser's surveyor after the title must be taken to have been accepted that the frontage to George Street as occupied by the building was 5 inches short of the quantity described in the contract. The purchaser thereupon made a claim to be allowed compensation in respect of the deficiency. The purchase money was £6,000 and £150 was claimed as compensation for the shortage. There would appear to be no doubt that a misdescription resulting in so small a difference in value would come properly within the terms of clause 5. The vendor, however, instead of proceeding to the adjustment of the claim rescinded the contract, purporting to do so under clause 8. His contention is this—the word objection as used in that clause is not confined to title or conveyancing objections. It includes any objection to complete whether arising under the conditions or not, which the purchaser is not by the provisions of the contract prohibited from taking. The claim for compensation is, he maintains, an objection to complete unless compensation is made, and therefore an objection within the clause, and as he is unwilling to remove it he is entitled to rescind the contract.

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The purchaser, on the other hand, contends that "objection" must be construed as meaning an objection of the kind referred to in clauses 2 and 4, and which the purchaser is by those clauses impliedly entitled to make; that it cannot be read as including a claim for compensation under clause 5, the word being inapt to describe a claim made, not as a reason for refusing completion, but as a step towards completion in accordance with the contract. The learned Chief Judge has in effect adopted the vendor's contention. This Court has now to decide if he was right in so doing. A number of cases were cited during the argument, but it is in the nature of such cases difficult to extract from them a rule of general application. The decision in each case turned almost entirely on the form and wording of the particular conditions. In considering the value of such authorities, the observation of Mr. Justice *Chitty* in *Ashburner* v. *Sewell* (1) may well be applied. He says:—"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 merely in the Judge's opinion on the particular contract actually before him." The only proposition which the cases cited by Mr. *Owen* succeeded in establishing to my mind was this, that conditions may be so worded that the term objection may include a claim to compensation by a purchaser who is not objecting to complete but is desirous of completing in accordance with the contract. In all those cases there was in the several conditions a context which gave the term a different meaning from that which, according to my view, it must bear in clause 8 of the contract now under consideration. The cases cited, in my opinion, therefore throw little light on the question of construction with which this Court has now to deal.

I now turn to the contract itself, and I shall endeavour to ascertain by considering its other provisions and its whole scope and purpose in what way the parties must have intended clause 8 to operate. It is clear to my mind that clause 5 was intended to confer rights on the purchaser as well as on the vendor. It is, no doubt, for the vendor's benefit that he should be enabled to force on the purchaser the completion of an agreement which the

(1) (1891) 3 Ch., 405, at p. 410.

latter might otherwise refuse to perform. But if that had been the sole object of the clause it would have been merely necessary to provide that in such cases the vendor should make compensation, but the prohibition against annulling the contract on the grounds mentioned is directed against both parties, and with reference to compensation the words used are "made or given as the case may require." The expression "or given as the case may require" cannot be treated as meaningless, and the only way in which it can have effect is to read it as conferring correlative rights on both parties. The form of expression is exceedingly condensed, and necessarily elliptical. It would not be easy, perhaps, to determine in what way the expression "made or given as the case may require" could be made applicable to all controversies of the kind mentioned in the clause. But this, at least, is clear, that the clause carries on the face of it an intention to confer on the purchaser in the case of error or misdescription the same right of insisting upon a transfer and payment of compensation which it confers on the vendor of insisting on the property being accepted by the purchaser on payment of compensation. If, however, the vendor's interpretation of clause 8 is to be adopted the correlative operation of clause 5 is merely illusory. It will always rest with the vendor to say whether the purchaser is to be allowed to exercise any right under clause 5. Immediately the claim for compensation is made the vendor may treat it as an objection he is unwilling to remove, and rescind the contract. Such an interpretation of a contract as will by one clause confer an independent right on both parties, and by another clause render the right as to one of them entirely dependent on the will of the other, will not be adopted by the Court unless no other meaning can reasonably be found for the language the parties have used. In my opinion clause 8 is reasonably capable of the construction for which the purchaser is contending. Taken in its ordinary meaning the word "objection" is not appropriate to describe a claim for compensation which is put forward not as an obstacle to completion, but as a step towards completion in terms of the contract. Again: it is in my opinion more consonant with the provisions of the contract as a whole to construe the word "objection" as applying only to objections of

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the class dealt with in clauses 2 and 4, rather than to every or any objection which could arise in the carrying out of such a contract to completion. The several clauses of the contract cover, speaking generally, all the matters about which differences in such transactions are likely to arise. The narrower interpretation confers the right of rescission on the vendor under circumstances clearly indicated to both parties on the face of the contract. The wider interpretation confers on the vendor a right to rescind which has no defined limits, and which any chance difficulty in the completion of the transaction may bring into operation. The most important of all rules in the interpretation of a contract is to give full effect to all its provisions, and that can be done in this case only by holding that the claim made by the purchaser under clause 5 was not an objection within the meaning of clause 8, the making of which entitled the vendor to rescind the contract. It was also contended by the vendor's counsel that the claim was in reality an objection to title which, if made within time, would have come within clause 8, and which, whenever made, if insisted on, under the circumstances entitled the vendor to rescind. In considering that question it is necessary at the outset to ascertain what was really the subject matter of the contract. It is not at first sight easy to determine whether the subject matter is a piece of land occupied by the bank and other buildings estimated to cover a frontage of 26 feet 2 inches to George Street, or simply a piece of land having a frontage of 26 feet 2 inches to George Street measured from the properly aligned junction of George Street and Valentine Lane, the occupation of the land by buildings being merely one of its incidents. But after looking at the document from every point of view I have come to the conclusion that the subject matter about which both parties intended to contract was the block of land on which the bank and other buildings stood, both parties then believing that the building on the George Street frontage extended to the corner of that street and Valentine Lane and not beyond it. It is to that property as both parties so understood it the vendor undertook to establish title. After the date when it must be taken that the title could no longer be objected to under the contract, the purchaser finds from his surveyor's report of November 1908 that

the frontage along George Street to the corner of Valentine Lane, duly aligned, measured 25 feet 9 inches instead of 26 feet 2 inches, a deficiency of 5 inches. It being still believed by both parties that the corner of the building stood on the duly aligned point where George Street and Valentine Lane intersected. All parties being under that impression the purchaser by his letter of 5th April 1909 made his claim for compensation demanding that the contract should be carried out with compensation to him for the 5 inches deficiency in the frontage. In his letter of 10th August of the same year he insisted on the claim. The defendant, in his reply of the next day, notified that he rescinded the contract. On 1st September following the purchaser took out the originating summons, the judgment on which is the subject of this appeal, and on the 16th of the following month the purchaser's surveyor made an affidavit for use on the hearing. A few days before the latter date the surveyor in making a check survey, no doubt for the purposes of the affidavit, discovered that the City Bank building extended two inches beyond the corner as aligned, in other words, that it encroached 2 inches on Valentine Lane. It was then for the first time discovered that the encroachment existed. It may, no doubt, be conceded, now the encroachment has been discovered, that as to 2 out of the 5 inches short the vendor cannot in fact make out a title. And if that state of facts had been present to the minds of the parties when the purchaser's claim for compensation was made, or even when the contract was rescinded, it would have been difficult to treat the claim as not involving a demand in respect of title. But I am unable to understand how the claim made as it was under the circumstances related can be so regarded, especially as the purchaser's counsel has from the time when the discovery was made protested that he has never made a claim for a deficiency arising out of a defective title, and that he did not intend to press before the arbitrator any portion of the claim which could in fact involve that basis. Cases were cited from which it would, no doubt, appear that in certain forms of conditions a demand for compensation, although purporting to be founded on misdescription, would if it involved an objection to title, even in part only, be treated as an objection

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to title. But these were decisions in differently worded conditions and on a different state of facts. The material time to be looked at is the time when the contract was rescinded, and it is clear to my mind that at that time and under the circumstances then existing the purchaser's claim was intended to be, was taken by the vendor as being, and was in fact a claim for compensation under clause 5 and not an objection to title. In that way the claim must be taken to have been so regarded by all parties at the time when the originating summons was issued, and the vendor cannot, in my opinion, now be allowed to put a different complexion on it by reason of facts which have since come to light. For these reasons I hold that the purchaser's claim was properly made under clause 5, and that it was not an objection to title, either under clause 8 or outside it. On the whole case, therefore, I am of opinion that the vendor was not entitled to rescind the contract, and that the learned Judge should have answered both questions of law in accordance with the purchaser's contention. It follows that, in my opinion, the judgment appealed against must be set aside and the appeal allowed.

ISAACS J. The description in the contract of the land agreed to be sold is, in respect of matters with which we are unconcerned, neither complete nor accurate; but the Court must construe the contract by its terms, and, as I read it, part of the essential description it contains is a frontage of 26 feet 2 inches to George Street. It is common ground that the vendor's title covers only 25 feet 9 inches of that frontage. It necessarily follows that the title is defective to the extent of 5 inches: *Ashton* v. *Wood* (1). For this shortage the purchaser has claimed compensation, £150, or as settled by arbitration, and upon this demand the vendor has rescinded. It is agreed that the conduct of the parties on both sides is free from impropriety, that is, it is *bonâ fide*. The vendor, therefore, in claiming to rescind has, as we must assume, not acted from any improper motive; but still it remains to be determined how far the purchaser's claim for compensation, and the vendor's declaration of rescis-

(1) 3 Sm. & G., 436, at p. 448.

sion are justified upon the true construction of the contract. The claim for compensation rests upon condition 5. I see no reason to doubt that an error or misdescription, consisting of an innocent overstatement of the quantity of land really owned by the vendor, and in his power to sell, is within that condition. Where vendors sold land by a description wide enough to include the mines and minerals under it, though they had no title to them, it was held in *In re Jackson and Haden's Contract* (1) that the compensation clause applied. "To such a case of misdescription," said *Romer* L.J., "undoubtedly, and admittedly almost I may say, clause 14 of the contract applies." Clause 14 was the compensation clause, and so far as this branch of the case is concerned, presented no material distinction from the present clause 5.

There being no other objection to the claim for compensation, it is therefore in itself well founded. But as to the extent of it the purchaser cannot, I apprehend, both take from the vendor a conveyance of the 2 inches by which the building encroaches upon Valentine Lane and insist on compensation for it. He cannot have from the vendor 25 feet 11 inches and only pay him the price of 25 feet 9 inches.

The other question is, has the vendor validly rescinded? It is contended that any objection, and certainly any objection to title, falls within it. It is clear that a claim for compensation for want of title to part of the property sold is a question of title. As *Sir George Mellish* L.J. said in *Mawson* v. *Fletcher* (2), "it is not the less an objection to title because, instead of stating it as such, the purchaser claims compensation." The objection to title in this case, for so in my opinion it must be regarded, would fall literally within the words of the condition 8, and the passage read by the learned Chief Judge in Equity from *Williams on Vendor and Purchaser*, p. 644, is not to be questioned. It cannot, I agree, be laid down as a rule that the two clauses are necessarily mutually exclusive. But that is not decisive. A rescission clause is of a very special nature and for a very special purpose, and must always be construed accordingly. The subject received so much attention in argu-

(1) (1906) 1 Ch., 412, at p. 424.

(2) L.R. 6 Ch., 91, at p. 95.

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ment, and is of such general importance that it deserves precise investigation.

The observations of *Sir John Romilly* M.R., in *Greaves* v. *Wilson* (1) go to the heart of the matter. They are fundamental, and lay down the principles which govern the construction of such a clause. Speaking of a vendor who has inserted a condition for rescission, the learned Master of the Rolls says :—" He is bound to perform the duties of a vendor as fully as he is able to do, subject to this exception, *that it shall be reasonable,* for it is always a question of the reasonableness of the thing required, for although it may be in his power to do it, it may involve him in so much expense and trouble as to make it unreasonable that he should be called upon to do it. This exception or condition of sale is introduced with a view of meeting that particular case. *Page* v. *Adams* (2) establishes this: that a vendor cannot make use of a condition to rescind a contract, for the purpose of getting rid of the duty which attaches to him, *upon the rest of the contract,* of making out the title."

Lindley L.J. in *In re Dames and Wood* (3) says :—" The power so reserved to the vendor must be considered with reference to the object with which it was so inserted, an object perfectly well known to everybody who has any experience in real property transactions. The vendor cannot say ' I will not complete, and will throw up the contract for sale ' ; he must exercise the power *bonâ fide* for the purpose for which it was made part of the contract."

This is further supported by the judgments in *In re Jackson and Haden's Contract* (4). *Collins* M.R. says that " in dealing with this right to rescind, the learned Judges have always criticized most carefully the conduct of the parties to the contract, and the purpose for which the particular condition must be supposed to have been introduced, with a view to seeing whether or not it is, *in the circumstances of the particular case,* a condition that ought to be applied for the benefit of the person who has introduced it." And he asks the question, " Can we construe this condition, in the circumstances, as applying to the particular state

(1) 25 Beav., 290, at pp. 293, 294.
(2) 4 Beav., 269.
(3) 29 Ch. D., 626, at p. 634.
(4) (1906) 1 Ch., 412, at p. 419.

of facts which has caused the difficulty ?" Again (1), the learned Master of the Rolls quotes the words of *Turner* L.J. in *Duddell* v. *Simpson* (2), who speaks of the vendor's likelihood of being involved, by compliance with a requisition, in expenses far beyond what he ever contemplated, or in litigation and expenses which he never contemplated, and for avoiding which he reserved to himself the power of annulling the contract. *Turner* L.J. proceeds to deny to the vendor the power of saying that that which was intended as a sale, and was a sale, shall in truth be no sale at all. The Master of the Rolls proceeds to show why in the circumstances the rescission clause was not applicable, and having done that he makes some important observations with respect to overlapping. He says that even if the rescission and compensation clauses do overlap, yet as the bearing of the first is displaced, the case is to be governed by the second.

Romer L.J. (3), quoting *Rigby* L.J. in *In re Deighton and Harris' Contract* (4), says it would not be right to enable the vendor to " ride off upon a condition to rescind which was obviously not framed with reference to any such case " as that which arose. *Cozens-Hardy* L.J. says (5) :—" It is not enough for the vendor to say :—' Here is a condition which, as a matter of construction, entitles me to rescind this contract. The answer is : No, you must look at all the circumstances ; are they such as to entitle you to put an end to *that contract of sale* which, in form and in fact, you have entered into ?"

And having stated the facts, the learned Lord Justice concludes it would not be just or reasonable to permit rescission.

In considering whether such a clause justifies a vendor in any given case in cancelling his contract, the Court must bear in mind three things : First, the purpose of every such condition, which is a matter of law, and is stated in the passage quoted from *Greaves* v. *Wilson* (6) ; next, the necessity for *bona fides* on the part of the vendor in using his power for that purpose : see also *Woolcott* v. *Peggie* (7). This is a question of fact, and is admitted here. The third essential is that the cancellation must be reasonable.

(1) (1906) 1 Ch., 412, at p. 420.
(2) L.R. 2 Ch., 107.
(3) (1906) 1 Ch., 412, at p. 424.
(4) (1898) 1 Ch , 458.
(5) (1906) 1 Ch., 412, at p. 425.
(6) 25 Beav., 290, at pp. 293, 294.
(7) 15 App. Cas., 42.

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Reasonableness is a question of fact, dependent on the whole of the circumstances, though one of those circumstances consists always of the wording of the contract itself. It is manifest, therefore, that in order to determine how far the rescission clause operates in the present case, the rest of the contract must be looked at and considered. It is urged on behalf of the vendor that the claim for £150 was in any case too great, and as it was insisted upon, subject to arbitration, the trouble and expense of that litigation proceeding was a sufficient reason for avoiding the whole contract. Possibly it would be in some circumstances and under some contracts. Reliance was placed on *Ashburner* v. *Sewell* (1) for so holding here, and if that case is blindly accepted in all its details, I think it does support the view so presented. Nearly everything in that case is undoubted law, but if it is to be understood as going to the length necessary to complete the vendor's claim in the present case, I desire to say, with the utmost deference to the eminent Judge who decided it, that it is opposed to the principles enunciated in 1858 by *Sir John Romilly* and repeated in 1906 by the Court of Appeal. The vendor had there expressly agreed to arbitrate, and *Chitty* J. nevertheless said, without any qualification, that he thought it quite reasonable for the vendor to say he declined to arbitrate, and insisted on settling the price himself.

With all respect, I do not think it is consistent with the authorities I have cited that the Court can ever consider it reasonable to point-blank refuse to fulfil a specific promise. In the present contract the vendor has definitely agreed that, in the event of error or misdescription, compensation shall be made or given, as the case may require, by the usual mode of arbitration. Arbitration was, therefore, a contemplated incident. Not only so; the unfairness of permitting the vendor to make mere arbitration a sufficient reason for escape is heightened by the fact that the purchaser would, as I construe the contract, be compelled to submit to it in case of surplus. I therefore think that it is not open to the vendor to say in general terms that he is entitled to regard all arbitration as *per se* enough to bring the case within the condition for rescission, as an uncontemplated

(1) (1891) 3 Ch., 405.

consequence from which he desires protection. I do not say that he would be bound to submit to arbitration in all circumstances, because he has not expressly said so. If the objection were, for instance, to a very large part of the land, and involved a serious proportion of the purchase money, or the arbitration would be attended with unusually arduous consequences, then, as there are no terms in clause 5 pledging the parties to arbitration whatever the circumstances might be, the element of reasonableness with regard to it might still be open. But this case falls far short of any such formidable departure from reasonable expectation as I have supposed. The amount claimed, viz., £150, so far beyond the contract rate, is still only one-fortieth of the total price, and might be reduced on arbitration, and no special circumstances are suggested to augment the anticipated difficulty or expenses of arbitration. I have therefore come to the conclusion that, having regard to the specific terms of the contract, and the circumstances of the claim for compensation, the case is not one which justly or reasonably falls within the ambit of the rescission clause. For these reasons I agree that the appeal should be allowed.

It is unnecessary, in the view I have taken, to state any concluded opinion upon the question whether the word "objection" in clause 8 extends beyond an objection to title or conveyance. I can only say I am not prepared to say it does not. The word "objection" is sometimes used, and apparently without any straining of signification, to express objections of a wider character —as in *Wood* v. *Machu* (1); *In re Terry and White's Contract* (2). I think the phrase "which the purchaser shall be entitled to take under these conditions" means "which the purchaser is not precluded from taking by these conditions," and, having regard to the purpose of the clause as already indicated, I am inclined to the belief that confining it to objections to title and conveyancing would deprive it of some of its intended efficacy. But as these conditions are of very general use, I reserve any final expression of opinion upon that point until it becomes necessary to decide it.

Appeal allowed.

Solicitors, for appellant, *Sly & Russell.*

Solicitor, for respondent, *A. G. Boulton.*

C. E. W.

(1) 5 Ha., 158, at p. 161. (2) 32 Ch. D., 14.