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THE COMMONWEALTH v. NEW SOUTH WALES.

Higgins J.

can sue the States as the States can sue the Commonwealth. Unless "any person" in sec. 58 includes the Commonwealth, there is no provision whatever in Part IX. enabling the Commonwealth to sue the States, although the States can sue the Commonwealth; and we should not act on such an absurd conclusion unless forced to it—"unless the contrary intention appears." The contrary intention must "appear"—not be a matter of surmise.

In my opinion, therefore, the Commonwealth is enabled to bring this suit by the *Judiciary Act*; and the summons to set aside the service of the writ or to stay proceedings should be dismissed.

Application dismissed with costs.

Solicitor for the plaintiff, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitors for the defendant, *Norton, Smith & Co.*

B.L.

[HIGH COURT OF AUSTRALIA.]

KING . . . . . APPELLANT;
DEFENDANT,

AND

POGGIOLI . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1922-1923.

SYDNEY, *Sept.* 15, 18, 1922; *April* 26, 1923.

Knox C.J., Higgins and Starke JJ.

Vendor and Purchaser—Day named for delivery of possession—Refusal to give possession on day named—Suit for specific performance—Jurisdiction of Court of Equity to award damages arising out of refusal to give possession—Readiness and willingness—Abatement of purchase-money—Diminution or deterioration in value of property — Breach of contract — Measure of damages — Equity Act 1901 (*N.S.W.*) (*No. 24 of* 1901), *sec.* 9.*

By an agreement in writing the appellant agreed to sell to the respondent a certain pastoral property, and it was thereby provided that delivery of

* Sec. 9 of the *Equity Act* 1901 (N.S.W.) provides that "In all cases in which the Court has jurisdiction to entertain an application . . . for the specific performance of any contract, covenant, or agreement the Court may award damages to the party injured either in addition to or in substitution for such . . . specific performance."

possession should be given and taken on a named day, 31st March 1920, on which the balance of purchase-money should be paid and transfers executed. The respondent brought a suit against the appellant in the Supreme Court of New South Wales in its equitable jurisdiction, claiming specific performance, and damages by way of compensation for the delay of the appellant beyond the named day in delivering possession of the bulk of the land and for his retention and use thereof, and that the damages might be deducted from the balance of purchase-money upon completion of the contract. By reason of the refusal of the appellant to deliver possession of the property on the named day and of the respondent's inability to obtain sufficient pasturage elsewhere, the respondent lost a number of cattle through starvation.

Held, by *Higgins* and *Starke* JJ. (*Knox* C.J. dissenting), on the evidence, affirming the finding of *Street* C.J. in Eq., that the appellant had refused to give to the respondent possession of the property on the named day.

Held, also, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), (1) that, although an abatement of purchase-money is permitted in cases where there is some diminution or deterioration in the value of the property contracted to be sold so that the purchaser will not get the whole of what he contracted to buy, the damages for breach of contract in not delivering possession of the whole property on the day named were not in the nature of compensation, but were unliquidated damages arising out of failure to deliver possession in accordance with the contract, and therefore could not be the subject of abatement of the purchase-money; (2) that the plaintiff was not entitled to specific performance, because he had failed to prove his readiness and willingness to perform his part of the contract inasmuch as he had refused to pay the balance of the purchase-money except subject to an abatement for damages which he was not entitled to claim; and (3) that, although those damages were recoverable at law, they could not be recovered in equity under sec. 9 of the *Equity Act* 1901 (N.S.W.) in a suit in which the plaintiff was not entitled to specific performance.

Per Higgins J.:—(1) The purchaser was entitled to enforce specific performance with compensation for the delay in giving possession until 5th June, as the delay involved the loss of the grass for the season, a substantial loss. (2) It is a diminution of the subject matter of the contract if the contract is for the enjoyment of the property as from one date, and the enjoyment is postponed till a subsequent date. (3) The cases have never made a distinction, for purposes of compensation, as to the nature of the deficiency of the subject matter, whether the deficiency is in size of the land, or in character of title, or in time of possession and enjoyment. (4) The *Equity Act* 1901 (N.S.W.), sec. 9, is irrelevant to the case.

Held, further, by *Higgins* and *Starke* JJ., that the value of the cattle lost was not the proper measure of the damages for refusal to deliver possession, since the loss of the cattle could not reasonably be said to have naturally arisen from the refusal to deliver possession or be supposed to have been in the contemplation of the parties as likely to so arise.

Phelps v. *Prothero*, (1855) 7 DeG. M. & G., 722; *Jaques* v. *Millar*, (1877) 6 Ch. D., 153; *Royal Bristol Permanent Building Society* v. *Bomash*, (1887) 35

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Ch. D., 390; *Jones* v. *Gardiner*, (1902) 1 Ch., 191, and *Rutherford* v. *Acton-Adams*, (1915) A.C., 866, considered.

Decision of the Supreme Court of New South Wales in Equity (*Street* C.J. in Eq.), reversed.

APPEAL from the Supreme Court of New South Wales.

On 12th January 1920 an agreement in writing was entered into whereby Horatio King, jun., agreed to sell to Hercules Henry Poggioli certain land in New South Wales, being 1,958 acres held under conditional purchase and conditional lease, at 30s. per acre. The terms of payment were that a mortgage debt of about £800 should be taken over by Poggioli, and that the balance of purchase-money should be paid in cash on the execution of transfers less the sum of £250, which was paid as a deposit. It was also provided that delivery should be given and taken on 31st March 1920, on which date the balance of purchase-money less the amount of the mortgage debt should be paid and transfers executed.

A suit was brought in the Supreme Court in its equitable jurisdiction by Poggioli against King, in which the plaintiff, alleging (*inter alia*) that the defendant had refused to deliver about 1,500 acres of the land until June 1920, claimed (1) a declaration that the contract ought to be specifically performed, and that the defendant was liable to pay to the plaintiff damages by way of compensation for the defendant's delay in delivering to the plaintiff possession of the 1,500 acres, and for his retention and use of the same; (2) a reference to the Master to ascertain the amount of such damages and compensation; (3) that the amount so ascertained and the plaintiff's costs of the suit be deducted from the balance of purchase-money and interest, if any, payable by the plaintiff to the defendant on completion; (4) such further and other relief as might be necessary and proper. The suit was heard by *Street* C.J. in Eq., who made a decree ordering (*inter alia*) that the defendant should pay to the plaintiff £700 by way of compensation and damages; that the plaintiff should pay to the defendant interest at bank rates from 1st April to 30th September on one-fourth, and from 1st October until completion on the whole, of the unpaid purchase-money; and that what should be coming to the defendant by way of interest

should be set off by the plaintiff against the damages payable to the plaintiff, and that the balance should be deducted by the plaintiff from the unpaid purchase-money.

From that decision the defendant now appealed to the High Court.

The other material facts appear in the judgments hereunder.

Davidson (*Loxton* K.C. and *Henry* with him), for the appellant. On the evidence the appellant put the respondent in effective control of the property on 31st March 1920, and that is all that is necessary to constitute the vacant possession to which the respondent was entitled (*Pollock and Wright on Possession*, pp. 12-13; *Blake Odgers on the Common Law of England*, pp. 437 *et seqq.*).

[STARKE J. referred to *Vaughan* v. *Benalla Shire* (1).]

After 31st March 1920 the appellant's cattle were on the property by the licence of the respondent, and the only cause of action of the respondent was for breach of the licence. Even if there was not a delivery of possession on that date, the respondent neither pleaded nor proved that he was ready and willing to perform his part of the contract; and that is necessary in order to support the claim for specific performance (*McDonald* v. *McMullen* (2)). All that was alleged and proved was a readiness and willingness to pay the balance of the purchase-money subject to a condition. The wrong measure of damages was applied. The proper measure is the cost to the plaintiff of obtaining pasturage elsewhere.

Teece (with him *Harrington*), for the respondent. The respondent is entitled in this action to specific performance with a deduction from the balance of the purchase-money of damages for the delay in giving him possession. The case is governed by *Royal Bristol Permanent Building Society* v. *Bomash* (3).

[STARKE J. referred to *Hensley* v. *Reschke* (4).]

It was not necessary for the respondent to allege or prove his readiness and willingness to do more than the Court would require him to do, and therefore it was sufficient for him to allege and prove

(1) (1891) 17 V.L.R., 129; 12 A.L.T., 176.
(2) (1908) 25 N.S.W.W.N., 142.
(3) (1887) 35 Ch. D., 390.
(4) (1914) 18 C.L.R., 452.

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that he was ready and willing to pay the balance of the purchase-money subject to a deduction of the damages arising from the failure of the appellant to deliver possession on the named day.

[HIGGINS J. referred to *Walker* v. *Jeffreys* (1).

[KNOX C.J. referred to *Cory* v. *Thames Iron Works and Ship Building Co.* (2).]

It is not necessary in every suit for specific performance for the plaintiff to prove that he is ready and willing to perform his part of the contract in its entirety (see *Canning* v. *Temby* (3); *Seton* v. *Slade* (4); *McKenzie* v. *Hesketh* (5)).

[KNOX C.J. referred to *Ferguson* v. *Tadman* (6); *Ellis* v. *Rogers* (7).]

The respondent had an equitable right to set off compensation for failure to deliver at the proper time (*Nelson* v. *Bridges* (8)). The appellant was bound to give vacant possession of the land on 31st March, and he cannot be said to have given that possession while he had a large number of his cattle grazing upon it. The measure of damages applied was the proper one. The respondent proved the damages he actually sustained, and it was then for the appellant to prove that the respondent could have minimized his loss.

Loxton K.C., in reply.

Cur. adv. vult.

April 26, 1923.

The following written judgments were delivered:—

KNOX C.J. By agreement in writing dated 12th January 1920 the appellant, Horatio King, jun., agreed to sell to the respondent, Hercules Henry Poggioli, a property containing about 1,900 acres of land at 30s. per acre. The terms of payment were £250 deposit, the respondent to take over a mortgage debt of £800, balance of purchase-money to be paid in cash on completion. It was provided in the agreement that delivery (i.e., of possession) should be given and taken on 31st March 1920, on which date the balance of purchase-money should

(1) (1841-42) 1 Ha., 341.
(2) (1863) 11 W.R., 589.
(3) (1905) 3 C.L.R., 419, at p. 425.
(4) 11. Wh. & Tud. L. C. in Eq. (8th ed.), p. 504.
(5) (1877) 7 Ch. D., 675.
(6) (1827) 1 Sim., 530.
(7) (1884) 50 L.T., 660.
(8) (1839) 2 Beav., 239.

be paid and transfers executed. On the same day, by another agreement in writing, the appellant agreed to sell to the respondent certain chattels contained in the residence on the said land and the plant used in connection therewith.

Before the agreements were signed there was some discussion with reference to the date on which possession was to be given. The respondent's version of it is as follows:—"I inspected the property on 10th or 11th January. I told defendant I wanted delivery to be given on 31st March; and he wanted three months from the date I inspected it. Defendant asked me if by the end of March he had not been able to remove his stock whether I would grant him the extra fortnight or not; to which I replied that I could not grant him anything definite, but, if at the end of March he had not been able to remove his stock, we would see how the position was and, if I was able to, I would grant him the extra time. The area of the property is 1,900 odd acres; it is divided into two large paddocks, one smaller paddock of 400 acres and then two smaller house paddocks besides two or three cultivation paddocks. There are three stock paddocks, one 400 acres and two larger paddocks containing roughly 1,500 acres. I saw defendant between the date when the contract was made and 31st March—I should say it was early in March. I asked him if he had been able to find a place to move his stock to, and he said No. He then asked me if he could have the extra fortnight. I said I did not think so, that I had cattle on adjoining property that I had bought and that I wanted his country on 31st March. He said he would do his best to remove his stock by that time."

On 29th March the respondent's solicitor, who had previously asked for particulars of title, wrote to the appellant's solicitors asking them to furnish particulars of title as quickly as possible, reminding them that the contract provided for completion and possession on 31st March, and stating that his client was anxious to complete and obtain possession on that date, and was ready to do so upon having any requisitions that might arise, after receipt of particulars of title, satisfied. On 31st March, no particulars of title having been furnished, the respondent went to the property to take delivery. His evidence as to this is as follows:—"I next saw defendant on 31st March when I went down to take delivery. As

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per agreement, I told him I had come to take delivery of the property. He said Yes, but that he was sorry he could not be able to remove his cattle out of the paddocks, that he had no place to put them on to. He said if I would give him a few days grace he would do his best to come down within two or three days and move them. He said he was already packed up and was in a hurry to get away to town, and was waiting to go into town. I told him to be sure and come down and remove his cattle, and he said he would. Then he left. None of his family remained behind ; I took possession of the house. Defendant's cattle were then depastured on practically the whole of the cattle property. They were not depasturing on the two house paddocks—an area about 50 or 60 acres. The house paddocks were eaten out. The rest of the property was good. I estimated there were 250 to 300 head of his cattle there—mixed cattle of different ages and sexes ; they were in good condition."

Between 31st March and 5th June, when appellant's cattle were removed from the property, the parties met on several occasions. The evidence of the respondent as to what took place on these occasions is as follows :—" I saw defendant in Tenterfield about 3rd or 4th April. I asked him why he had not come down to remove his stock, when he had promised me when he left on 31st March. He said that he had trouble in getting drovers ; that he was sorry. I told him he had better hurry up and find his drovers, and come down and remove his cattle quickly within the next day or two. I saw him next about 5th or 7th April in Tenterfield—twenty-six miles from the property. I again asked him why he had not been down to remove his cattle. He said he had not had the means of getting down. I replied, if that was his only difficulty I would drive him down. He said Yes, that would do him ; and we made arrangements for me to drive him down the following day when he said he would come down specially for the purpose of removing his cattle. I drove him down to the property the following afternoon, about 7th or 8th ; and he stayed at the house that night. The next morning he left on horseback, telling me that he was going to remove his cattle. He was away all day, came back that evening just before tea. I asked him whether he had got all his cattle together, got them mustered ready for moving ; and he told me No, he had not. We let matters drop

then until after tea; and I then asked him what he intended doing in the matter, to which he would not give a definite answer at all—when I asked him when he was going to remove his cattle he said he could not say for certain as he was not able to arrange matters. I then asked him was it his intention to move the cattle, and to this I could not get an answer either; he answered indirectly. He beat round the bush, and said half-a-dozen things that were not on the subject at all. At last, after a good deal of talk, I said to him 'I want an answer, Yes or No—are you going to move those cattle?' to which it was hard to get an answer; and at last I stopped him and said: 'I do not want any of that talk—are you going to move the cattle?' to which he replied, after a lot of talk, 'No.' I then asked him why he did not intend to move his cattle; and he said that his solicitors advised him not to do so as I had not paid the purchase-money; to which I replied that it was not my fault that I had not paid the purchase-money as his title was not in order for the property, and he did not expect me to hand over the money without my being able to get title. I told him that since I knew he did not intend to move the cattle I would have to take steps to protect myself in the matter. His cattle were then in the two large paddocks. His stock were then on the 1,500 acres. On 31st March or 3rd April he had a few head of stock on a small paddock—about 400 acres—which I told him I was going to remove into the other paddocks as I wanted that paddock for some cattle that I had promised could come there on agistment. He said: 'Very well.' Myself and a man moved the stock off the 400 acres on to the rest. I saw defendant to speak to once or twice after that before I got possession of the whole, between the beginning of April and the beginning of June. Whenever I saw him, he asked me why I did not settle up for the property, and I told him that until he got his title in order I could not do anything in the matter, and that, besides, he still had his cattle on the property and made no attempt to move them, which had put me in a very awkward position, and, as things had gone, I considered I was entitled to compensation through his action. His stock remained on the 1,500 acres up to 5th June. They were removed then." On cross-examination the respondent said:—"I gave defendant clearly to understand that I would expect him to deliver possession on 31st

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March. On that day I went down there with my family, found defendant packed up prepared to leave, and he went off the premises and left me there. . . . I went up to the house and intimated that I had come to take possession in terms of this contract, and thereupon defendant left the premises and left me on them, and as far as I know did not leave anyone in charge. . . . Unless his cattle went out I could not put mine in, because it would only be injurious to my own; there was nothing from a physical standpoint to prevent me from driving my stock to any of the paddocks. When he left on 31st March I did not think that stock was rightly on the premises. You cannot take cattle out of a paddock knowingly and let them go anywhere without being responsible for them afterwards. The reason I did not have his stock removed was not because I had consented to his having them on the premises. The reason of my not taking any action in driving those cattle off was to be found in the fact that I had consented for them to remain two or three days. If I had not given that consent, I could not very well have driven them off the place." When asked if he had ever agreed that defendant's stock should be allowed to remain on the 1,500 acres till 8th April, respondent answered as follows :—" It is a hard thing to answer. Twice I asked him to remove his cattle, and each time he said he would be down within a day or two, which I expected. I saw him in town on the 3rd and I asked him to come down and remove the cattle, and he said he would do so in a day or two. There was no idea of me allowing them to stay till the 8th. He did not come down, and on the 6th or 7th, I think it was, I was in town again, and I asked him once more why he had not been down to remove them as promised. He said he would then come down and remove them the following day. I said : ' Very well, I will drive you down for the special purpose of removing those cattle.' He did not do so."

After looking at the letter of 10th April 1920 from his solicitor to the solicitor for the defendant, which he said was written with his knowledge and by his instruction, the plaintiff said there never was an agreement that the cattle should stay on the property till 8th April, but he said that the letter was not incorrect. The relevant portion of this letter was as follows :—" My client saw me this

morning and states that, although your client has given him possession of the property and he is residing on same, your client now refuses to remove his cattle until the balance of the purchase-money has been paid, and this in spite of the fact that on Wednesday last your client got mine to drive him down to the property with the express intention of seeing the cattle were moved. Your client's attitude with reference to the removal of his cattle is entirely unreasonable, as since 31st ult. the purchase-money has been available immediately your client can give a proper title, and it is no fault of my client's that I cannot even obtain particulars of title, nor that your client's title is not in order to transfer. I understand that there are still approximately 300 head of your client's cattle on about 1,500 acres, which means that if they are not removed at once the paddocks will be left practically bare for the coming winter. My client considers that agistment at the present time is well worth 2s. 6d. per head per week, but he is not willing to take stock on agistment even at such price. What he requires is the grass for his own stock, and I am instructed to inform you that he intends to claim very substantial damages for your client's stock remaining on the lands since 8th inst., the day on which it was mutually agreed they should be removed. Will you please give this matter your prompt attention and advise your client to remove his stock forthwith, as the present position is a most serious one."

On 21st April 1920 plaintiff's solicitor wrote to defendant's solicitor:—"My client informs me that the vendor's cattle are still on his land. I have again to request that they be removed forthwith. My client is most serious in his intention to recover damages for non-removal, and every day extra they are allowed to remain on the land materially increases the damage which he is suffering. My client has not only done all, but more than is required of him, to effect a settlement in terms of the contract, and it is certainly the fault of your client that the balance of purchase-money has not been paid over long ago. Indications point to the conclusion that a final settlement is being deliberately delayed in order to give your client an excuse to obtain grass that he is not entitled to for his stock."

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On 14th May 1920 plaintiff's solicitor wrote to defendant's solicitor:—"I also understand that your client's cattle still remain on part of the subject lands, and the damage which my client has been suffering is increasing daily. I must ask you to be good enough to take immediate steps for the completion of this matter and for the removal of the cattle. As before pointed out, my client intends to claim damages through your client's action in not removing his cattle when he should have done so, and the longer the cattle are allowed to remain where they are, the greater the damages will be."

On 27th July 1920 plaintiff's solicitor wrote to the defendant's solicitor:—"As previously pointed out, the purchaser has, by reason of the vendor wrongfully refusing to deliver up possession of about 1,500 acres of the subject property at the time when possession of the balance of the land sold was given to him, suffered great loss and damage, and he claims the right on completion to deduct a proper compensation for such loss and damage from the balance of the purchase-money. I shall therefore be glad to know at once, if, upon my requisition being satisfactorily complied with, your client will agree to such a deduction being made prior to final settlement."

On the same day he received a formal reply to his requisitions and on 30th July appellant's solicitor wrote that his client would not agree to any deduction prior to final settlement. On the same day the respondent instituted this suit.

In his statement of claim the respondent alleged that on or about 3rd April the appellant delivered possession of 458 acres only of the said land, and in breach of his contract refused to deliver to the respondent and retained possession of 1,500 acres thereof and continued to depasture his cattle thereon until the month of June; that the appellant's cattle had eaten bare the lands on which they remained, so that such lands would be useless to the respondent for many months; that the respondent had sustained loss and damage owing to the refusal of the appellant to deliver to him possession of the said 1,500 acres and to the appellant continuing in possession and use thereof. The statement of claim then proceeded:—Par. 7. "The plaintiff submits that under the circumstances aforesaid he is on completion of the said contract entitled to an allowance by way of compensation or damages to be deducted from the unpaid

balance of purchase-money but the defendant is unwilling and has refused to complete the said contract except on the terms of the plaintiff paying the full balance of purchase-money without any such deduction as aforesaid." Par. 8. " The plaintiff has always been and still is ready and willing and hereby offers to carry out the said contract so far as the same remains to be performed on his part." The relief claimed was as follows: " (1) That it be declared that the said contract ought specifically to be performed and that the defendant is liable to pay to the plaintiff damages by way of compensation for the defendant's said delay in delivering to the plaintiff possession of the said 1,500 acres and for his (the defendant's) retention and use of the same and that it be decreed accordingly; (2) that it be referred to the Master to inquire as to and to ascertain the amount of such damages and compensation; (3) that the amount so ascertained and the plaintiff's costs of this suit be deducted from the balance of purchase-money and interest, if any, payable by the plaintiff to the defendant on completion."

When the suit came on for hearing par. 8 of the statement of claim was amended to read as follows: " Up to the date fixed for completion the plaintiff was always ready and willing to perform the contract on his part, and thereafter the plaintiff has always been and still is ready and willing and hereby offers to carry out the said contract on the terms mentioned in par. 7 so far as the same remains to be performed on his part "; and thereupon counsel for the appellant demurred *ore tenus* to the statement of claim. At this stage both parties were willing to complete, and the only question at issue was whether the respondent was entitled to a deduction from the purchase-money as claimed by him.

The learned Chief Judge in Equity overruled the demurrer, holding that the respondent was entitled to a deduction if he could show that he had sustained loss by reason of the appellant's use of the property while he remained in possession. This decision, of course, proceeded on the footing that all the allegations in the statement of claim were true, including the allegation that until the month of June possession of the 1,500 acres had not been delivered to the respondent. The ground on which the demurrer was rested was that the averment

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of readiness and willingness contained in par. 8 of the amended statement of claim was insufficient.

The demurrer having been disposed of, the hearing of the suit on the issues of fact proceeded. The learned Judge held on the evidence: (1) that the appellant's action in insisting on leaving his cattle on the land against the will of the respondent was equivalent to a refusal to give possession of that part of the property on which they were running, i.e., the 1,500 acres; (2) that when the cattle were removed in June that part of the property on which they had been grazing was practically eaten out and did not again become fit for grazing until about the end of the following September; (3) that as a result of the respondent's failure to obtain possession of the whole of the property and of his inability to obtain sufficient pasturage elsewhere he lost 40 head of grown cattle and a hundred calves through starvation; (4) that the respondent was entitled to compensation for the injury sustained through the delay in completion; (5) that the measure of damages to be applied was the value of the cattle lost by the respondent, which he assessed at £15 each for the grown cattle and £1 each for the calves; (6) that the respondent should pay interest at bank rates on one-quarter of the unpaid purchase-money from 1st April to 30th September 1920 and interest on the whole unpaid purchase-money from 1st October 1920 till completion; (7) that interest payable by the respondent should be set off against the damages recovered by him, and that he should be at liberty to deduct the balance of the damages from the unpaid purchase-money.

The appellant now appeals against the decree embodying these findings and against the order overruling the demurrer to the statement of claim.

The questions for our consideration may be stated as follows:— (1) Was possession of the whole property delivered to the respondent on 31st March? (2) Has the respondent sufficiently (a) averred, or (b) proved, readiness and willingness to perform the contract so far as it remained to be performed on his part? (3) Is the respondent entitled to compensation or damages; and, if so, what measure should be applied in determining the amount recoverable?

(1) In determining whether the acts of the parties on 31st March

amounted to delivery of possession of the whole property it is material to consider not only what these acts were but also with what intention they were done; and the intention of each party may be ascertained from the nature of the acts done and from statements made at the time. "The essence of delivery" (of possession) "is that the deliveror, by some apt and manifest act, puts the deliveree in the same position of control over the thing . . . which he held himself immediately before that act. What particular acts are necessary or sufficient . . . in general depends on the nature of the thing and the relation of the parties to it at the time" (*Pollock and Wright on Possession*, at p. 46). And at p. 76 the same learned authors say: "What it is that passes by a particular livery . . . as to parcels . . . conveyed, depends in the first instance on the words used and on their true legal effect."

Accepting as correct the respondent's version of the transaction of 31st March, I think the proper inference to draw is that on that day the appellant delivered to the respondent and the respondent accepted from the appellant possession of the whole of the property. The fact that the appellant's cattle were running on the property and that he was not prepared forthwith to remove them might and probably would have justified the respondent in refusing to accept delivery or in accepting it conditionally on the cattle being removed within a given time. But he did not adopt this position; on the contrary, by giving permission to the appellant to leave his cattle there for two or three days he treated himself as being in possession of the whole property. The respondent said he had come to take delivery in accordance with the contract. He was put in actual physical possession of the house and of the chattels which he had agreed to purchase. Thereupon he with his family took up his residence in the house and the appellant and his family went away from the property. The appellant did not leave his cattle on the land in the assertion of any right to do so, but by the express permission of the respondent, and the fact that at a later date the appellant abused the concession that had been made to him by refusing to remove his cattle cannot, in my opinion, be regarded as of any importance in determining what was the intention of the parties on 31st March. The appellant left no one on or about the property to represent him

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and there was no physical obstruction—such as a locked gate—to prevent the appellant from using any part of the property. Moreover, the statements contained in the letters of the respondent's solicitor referred to above show clearly that the respondent regarded himself as having been put in possession of the whole of the property and having given a licence to the appellant to leave his cattle there for a few days.

If the vendor of a house, when delivering possession, obtained permission to use a room in it for the purpose of storing for a short time furniture which he could not conveniently remove at the moment, the fact that he subsequently neglected to remove the furniture would not be inconsistent with the conclusion that possession of the house had been delivered on the earlier day. I see no difference in principle between that case and the present. On 31st March the appellant either did or did not deliver possession of the whole property to the respondent. Whether he did so depends on what took place on or before that day, and the subsequent refusal of the appellant to remove his cattle in accordance with his promise is, in my opinion, irrelevant to the question whether possession was delivered on the earlier date. If this view of the facts be correct, it follows that the respondent was not entitled to the relief sought, his claim being founded on an assumed failure by the appellant to deliver possession of the property on 31st March. I may add that it was admitted by counsel for the appellant, in the course of argument before us, that the licence under which he left his cattle on the property came to an end on 8th April 1920, and that thereafter, so long as the cattle remained on the property, the appellant was a trespasser.

If the view which I have expressed on the first question were to prevail, it would be unnecessary for me to deal with the other questions; but, as I find myself in a minority on the first question, and as my brothers *Higgins* and *Starke* differ as to the correctness of the decision of the learned Chief Judge in Equity on the second question, it is necessary for me to express my opinion thereon. On this question I need say no more than that, for the reasons about to be stated by my brother *Starke*, I agree with him in the conclusion that the evidence shows that the respondent was not at any time

after 31st March 1920 ready or willing to complete the contract unless with a deduction from the purchase-money which he had no right at law or in equity to make but for which he had a remedy by action only. On this ground also the appellant, in my opinion, is entitled to succeed in this appeal.

I agree also with my brother *Starke* in thinking that in the circumstances of this case the contract should now be carried into execution without prejudice to the right of the respondent to proceed at law to recover damages for the breach by the appellant of his agreement to give possession on 31st March 1920.

HIGGINS J. The material facts in this case have been set out in the judgment of the Chief Justice. The main contest has been on the question of law—was the plaintiff, the purchaser, entitled to some deduction from the purchase-money because of the defendant's breach of contract in not giving delivery of the possession on the date fixed therefor, 31st March 1920, or until 5th June following ?

It has been suggested that on 31st March the vendor did deliver to the purchaser, and the purchaser did accept, possession of the whole of the property ; because the purchaser gave " permission " to the vendor to leave his cattle on the 1,500 acres for two or three days, and thereby treated himself as being in possession of the whole property. This is a question of fact, and the facts stated must speak for themselves ; I cannot adopt the suggestion. The learned Judge of first instance (*Street* C.J. in Eq.) speaks of the " refusal to give possession," and of the vendor continuing in possession ; and finds that the cattle remained on the lands against the will of the plaintiff, and that the defendant's action in insisting upon leaving them there was equivalent to a refusal to give possession of that part of the property on which they were running. Not only was this the finding of the learned Judge, but the vendor himself took the same view of the facts. In three or four conversations with the purchaser, the vendor spoke of the leaving of the cattle, some 230 head, on the 1,500 acres as being a negation of or exception from delivery of the property. Thus on 31st March, as the purchaser says, " I told him I had come to take delivery of the property. He said Yes, but that he was sorry he could not be able to remove his

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cattle out of the paddocks, he had no place to put them on to. He said if I could give him a few days' grace he would do his best to come down within two or three days and move them . . . I told him to be sure and come down and remove his cattle, and he said he would. Then he left. None of his family remained behind; *I took possession of the house.*" In a letter of 27th July the solicitor for the plaintiff speaks of the vendor refusing to deliver possession of the 1,500 acres, and of the claim to deduct a proper compensation; but in the reply of the solicitors for the defendant, 30th July, they do not assert that possession was given—they merely say, having seen their client, that he would not agree to any deductions being made prior to final settlement. I do not know what the delivery of possession means if a vendor is to be treated as having delivered possession of the whole of the 1,958 acres although he keeps his cattle grazing on 1,500 acres. The purchaser certainly showed a commendable disposition not to push his legal rights to the extreme: but that does not mean that he waived his right to full actual possession, still less that he got such possession. The purchaser in no way released his rights under the contract; a man does not release his rights by neglecting to enforce them for a time. The vendor did not put the purchaser "in the same position of control over the thing . . . which he held himself" (*Pollock and Wright on Possession*, p. 46). To deliver possession is to deliver complete possession. As Sir *William Markby* says, possession in the legal sense is of necessity exclusive (*Elements of Law*, 4th ed., par. 397). There is, indeed, ample evidence to justify the finding of the trial Judge. Even if there was anything ambiguous (I do not think there was) about the attitude of the purchaser when the vendor asked him for a few days' grace, we have no right, in my opinion, to disturb the finding of the Judge on this subject.

Assuming, now, that possession was not given on 31st March, the question arises, is the plaintiff entitled to enforce specific performance with compensation for the delay in delivery of possession until 5th June, the delay involving also the loss of the grass for the season? It is to me startling to find this right denied to the purchaser. The cases have never made a distinction, for purposes of compensation, as to the nature of the deficiency of the subject matter, whether the

deficiency is in size of the land or in character of title, or in time of possession or enjoyment. As Lord *Eldon* put it, in *Wood* v. *Griffith* (1), "No one will dispute this proposition, that if a man offers to sell an estate in fee simple, and it appears that he is unable to make a title to the fee simple, he cannot refuse to make a title to all that he has. . . . If a person possessed of a term for 100 years contracts to sell the fee, he cannot compel the purchaser to take, but the purchaser can compel him to convey, the term, *and this Court will arrange the equities between the parties.*" This means compensation. I find that so recently as 1915 Lord *Haldane* stated in the Privy Council, in a brief and succinct form, the rule of equity on the subject:—"Subject to considerations of hardship he" (the purchaser) "may elect to take all he can get, and to have a proportionate abatement from the purchase-money. But this right applies only to a deficiency in the subject matter described in the contract. It does not apply to a claim to make good a representation about that subject matter made not in the contract but collaterally to it" (*Rutherford* v. *Acton-Adams* (2)). In the present case the contract was for conveyance and possession of certain land on 31st March. In other words, the purchaser was to have, under the contract, enjoyment of the benefits of the land as from 31st March, and he did not get that enjoyment till 5th June, when the grass had been eaten down by the vendor's stock. There was, therefore, a deficiency in the subject matter of the contract—the subject matter being the land *as from* 31*st March*, not as from 5th June, nor as from some future year. When we say that property is sold, we imply that the purchaser is to have the right to the enjoyment and control of the property to the extent indicated in the contract; and it is a diminution of the property sold if the enjoyment and control be postponed after the date fixed therefor for ten years, or for ten weeks, or for ten days; just as the present value of money payable twelve months hence is less than the value of money payable immediately. Where A contracted to sell a fee simple to C, and B, the wife of A, refused to convey her life interest, A was ordered to convey to C his own reversionary estate with compensation for the deficient life interest

(1) (1818) 1 Swans., 43, at p. 54. (2) (1915) A.C., 866, at p. 870.

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(*Barker* v. *Cox* (1)). The same principle applies where the vendor has only a life interest, and the wife, who will not convey, has the remainder (*Barnes* v. *Wood* (2)). According to *Barker* v. *Cox* (3), " the other party to the contract, who has parted with his money *or is ready to pay his money*, is entitled by compensation to be placed in the same position he would be in if the contract had been completed ; or if not, by compensation to be placed in the same position in which he would be entitled to stand." In that case, as the purchase-money had been actually paid, the purchaser was declared to be entitled to a lien on the purchase-money in the hands of the vendor ; and if there is a lien *after* payment, there is a right to deduct *before* payment. In *Jaques* v. *Millar* (4) the defendant had agreed to grant a lease as from 5th September ; but he refused to carry out the contract, with the knowledge that the plaintiff wanted to carry on his trade. It was held that the plaintiff was entitled not only to specific performance but to damages for the loss of his trade for the fifteen weeks which elapsed before he obtained other suitable premises. There was in that case no deduction from the purchase-money ; for there was no purchase-money—the contract was for a lease, not for a sale. Delay of the vendor in completion was treated as a ground for damages, in addition to specific performance, in *Jones* v. *Gardiner* (5). There the day for completion was 22nd October 1900, but actual possession was not given till 1st April 1901. The purchaser had paid the balance of his purchase-money on 1st April, so that the question of deduction did not arise ; and *Byrne* J. ordered specific performance with £25 damages for the delay. But the loss by delay in completion must be substantial ; compensation or damages for delay in completion will not be awarded where no special injury is shown to have been caused by the breach of contract (*Chinnock* v. *Marchioness of Ely* (6)—reversed on another point (7)).

For the purposes of this opinion, *Cairns' Act* (21 & 22 Vict. c. 27) may be treated as irrelevant. That Act provides that, in all cases in which the Court of Chancery has jurisdiction to entertain an application for the specific performance of any contract, it should be lawful

(1) (1876) 4 Ch. D., 464.
(2) (1869) L.R. 8 Eq., 424.
(3) (1876) 4 Ch. D., 464, at p. 469.
(4) (1877) 6 Ch. D., 153.
(5) (1902) 1 Ch., 191.
(6) (1864) 2 Hem. & M., 220.
(7) (1865) 4 DeG. J. & S., 638.

for the Court, if it thought fit, to award damages to the party injured either in addition to or in substitution for specific performance. Sec. 9 of the New South Wales *Equity Act* 1901 has copied this provision. The Act was designed to meet the difficulty indicated by Lord *Eldon* in *Todd* v. *Gee* (1). There was a bill for specific performance; or, if the defendant could not perform the contract, satisfaction for the damages arising from non-performance. The sale was of 412 acres, 227 acres being described in the contract as "tithe-free"; but they were not tithe-free. There was thus no deficiency in the acreage, but a deficiency in the nature of the enjoyment. The Lord Chancellor held that the Court of Chancery had no jurisdiction to give damages for breach of contract—that was the function of the Courts of common law. But he pointed out the distinction between damages sustained by the purchaser not being able to complete a subsequent contract for sale to a stranger, and compensation for deficiency in the subject matter: "Where . . . an estate is held with an engagement, that a certain number of acres are tithe-free, which is not the case, and the vendee contracts to sell to another person with a similar engagement, *this Court would give compensation for so much as was not tithe-free*; but would not give compensation for the damage sustained by not being able to complete the subsequent contract" (2). Lord *Eldon* also said that the purchaser might require specific performance so far as the vendor can make a title, with an allowance for so much as he cannot make title to—e.g., compensation for freehold sold turning out to be leasehold. What the Court would order in the suit, the purchaser must be ready and willing to perform before the suit; and he need not offer to do more. If the purchaser is ready and willing to do all that which the Court, in enforcing the contract, would require him to do, he satisfies the law, satisfies the condition precedent. There is no need for the purchaser to bring a separate action at law for the delay and consequent damage; Courts of equity will give compensation if "the purchaser has not got the whole of what he contracted to buy" (per *Kay* L.J., *Clarke* v. *Ramuz* (3)); and in this case he has not got the whole enjoyment of the property as from the date fixed. In *Royal Bristol*

(1) (1810) 17 Ves., 273.
(2) (1810) 17 Ves., at p. 278.
(3) (1891) 2 Q.B., 456, at p. 461.

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Permanent Building Society v. *Bomash* (1) possession was to be delivered on 11th November, and it was not delivered in fact until 15th December. *Kekewich* J. allowed the purchaser to *deduct from the purchase-money and interest*, not only the amount of damage actually done to the property, but also £110 *for want of vacant possession*.

That case is criticized in *Webster on Conditions of Sale*, 3rd ed., pp. 334-335; but the writer does not suggest that a wilful failure to give vacant possession does not give a right to the purchaser to deduct compensation. The objection taken to the decision is that there was no wilful default of the vendor as to possession. In the case before us, there was wilful default; the vendor could have given vacant possession and refused to give it. The distinction as to wilful default arises from the peculiar doctrine of *Flureau* v. *Thornhill* (2) and of *Bain* v. *Fothergill* (3), as to sales of real estate, that if the vendor, without fraud, turn out to be incapable of making a good title, the intended purchaser is not entitled to any compensation for the loss of his bargain (4). This doctrine was held by *Kekewich* J. to apply to failure of the vendor to give possession at the proper time, not wilful failure, but failure to get possession from a person in possession who was making an unjustifiable claim of title (*Rowe* v. *School Board of London* (5)). The criticism of *Bomash's Case* (1) by the learned author does not apply to the present case; for the appellant King deliberately refused to give up possession in the interests of his own stock, and in breach of his promise. Such a refusal is fraudulent. As *Webster* says, at p. 335, "if a vendor wilfully refuse to complete, the purchaser may, in addition to obtaining specific performance, . . . recover damages for the breach of the vendor's . . . contract to give possession at a certain date. Such damages will be in the nature of damages *for a loss pro tanto of the bargain*."

It is true that the claim for the delay in giving possession of the land is a claim for an unliquidated sum in one sense; but the fact that the claim is for an unliquidated sum is no answer. An unliquidated sum is involved in most, if not all, cases of compensation.

(1) (1887) 35 Ch. D., 390.
(2) (1776) 2 W. Bl., 1078.
(3) (1874) L.R. 7 H.L., 158.
(4) (1874) L.R. 7 H.L., at p. 201.
(5) (1887) 36 Ch. D., 619.

Here, the statement of claim, after alleging the breach, alleges (par. 8): "Up to the date fixed for completion the plaintiff was always ready and willing to perform the contract on his part, and thereafter the plaintiff has always been, and still is, ready and willing and hereby offers to carry out the said contract on the terms mentioned in par. 7 so far as the same remains to be performed on his part"—that is to say (par. 7), he submits that he is entitled to an allowance by way of compensation or damages to be deducted from the unpaid balance of purchase-money; but the defendant refused to complete the contract unless the plaintiff paid the full purchase-money without *any* such deduction. This refusal is admitted. Under the New South Wales law, as the English Judicature Rules have not been adopted, there must, it seems, be a proper allegation of readiness and willingness on the part of the plaintiff; and, in my opinion, the allegation in par. 8 is proper and sufficient, as held by the learned Judge on the demurrer *ore tenus*; and, as the allegation was proved, the judgment for specific performance with compensation should stand.

But I am unable to concur with the measure of compensation which the learned Judge has adopted—£10 per head for 40 grown cattle and £6 per head for calves—£700 in all. According to *Fry* J. in *Jaques* v. *Millar* (1), the proper measure is "the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract"; and I cannot think that the loss of the cattle comes within this rule. I rather think that substantial justice would be done by assessing the compensation at such rate per head as the plaintiff could have obtained for the use of the 1,500 acres by 250 cattle up to 5th June. The fact, however, that plaintiff sought to apply a wrong measure of compensation is not fatal to the plaintiff's claim as based on allegations in the statement of claim and supported by the evidence. The plaintiff at no time made any particular measure of damages an essential condition of completion. As put by his solicitor in a letter written on 27th July, shortly before taking proceedings, the plaintiff's position was:—"The purchaser has, by reason

(1) (1877) 6 Ch. D., at p. 160.

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of the vendor wrongfully refusing to deliver up possession of about 1,500 acres of the subject property at the time when possession of the balance of the land sold was given to him, suffered great loss and damage, and he claims the right on completion to deduct a proper compensation for such loss and damage, from the balance of the purchase-money. I shall therefore be glad to know at once, if, upon my requisitions being satisfactorily complied with, your client will agree to such a deduction being made prior to final settlement." The reply of the vendor's solicitors was (30th July): "Our client will not agree to *any* deductions being made prior to final settlement." Par. 7 of the statement of claim alleges that "the defendant is unwilling and has refused to complete the said contract except on the terms of the plaintiff paying the full balance of purchase-money without any such deduction as aforesaid," and this paragraph is not denied in the defence.

Even the specific relief claimed in the prayer does not point to any particular measure of compensation: the prayer asks for a declaration of right to damages by way of compensation, for a reference to the Master to ascertain the amount; and for deduction of the amount ascertained from the balance of the purchase-money and interest payable by the plaintiff. It is alleged in the statement of claim, and proved, that the plaintiff (as the defendant well knew) purchased the land for the purpose of depasturing his stock; that the defendant retained possession of 1,500 acres and depastured his own stock thereon; that when delivery of the land ought to have been given the land was well covered with edible grass, but that when delivery was in fact given the land was eaten bare and useless for months to come. There is, therefore, ample ground for proper compensation, to be assessed by the Court or as it may direct.

In my opinion, the appeal should be dismissed, but the judgment should be varied as to damages.

STARKE J. By a contract of sale King sold to Poggioli certain conditional purchase and conditional lease lands in New South Wales. One of the terms of the contract was: "Delivery to be given and taken on 31st March 1920 on which date the balance of purchase-money less the amount due to the Savings Bank shall be paid and

transfers executed." The vendor gave possession of part of the property on 31st March, but asked for a few days' grace as to the remainder of the property, so that he might remove his cattle. The purchaser acceded to the request, but on 8th April the vendor announced that he did not intend to remove his cattle, because the purchase-money had not been paid. He, in fact, continued to agist the cattle on the part of the property which he had not vacated on 31st March until 5th June 1920, when he removed them and allowed the purchaser, for the first time, to use and occupy the whole of the property purchased by him.

The Chief Judge in Equity (*Street* J.), before whom the action was tried, found that non-payment of the purchase-money on 31st March 1920 was due not to any default on the part of the purchaser, but to the delay of the vendor in furnishing particulars of his title and in agreeing to conveyancing details. Ultimately both parties were prepared to carry out the contract. But the purchaser, on 27th July 1920, insisted that he was entitled " to deduct a proper compensation for . . . loss or damage from the balance of the purchase-money " by reason of the failure by the vendor to give possession on 31st March 1920, according to the terms of the contract. The vendor declined to agree " to any deductions being made prior to final settlement."

The date of the delivery of possession was not, on a proper construction of the contract, dependent upon payment of the purchase-money, and it was, in my opinion, of the essence of the contract (see *Gedye* v. *Duke of Montrose* (1)). A breach of the stipulation would sound in damages, and might, perhaps, have entitled the purchaser to rescind. But even if possession were dependent upon payment of the purchase-money, the purchaser might still, I apprehend, obtain damages for the loss occasioned by the delay in giving possession, if such delay were due to the wilful default of the vendor (see *Jaques* v. *Millar* (2)). Some cases hold that the principle extends somewhat further (cf. *Jones* v. *Gardiner* (3) ; *Royal Bristol Permanent Building Society* v. *Bomash* (4)). But a note on these cases in *Webster's Conditions of Sale*, 3rd ed., p. 335, is worth attention.

(1) (1858) 26 Beav., 45.
(2) (1877) 6 Ch. D., 153.
(3) (1902) 1 Ch., 191.
(4) (1887) 35 Ch. D., 390.

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In the present case the learned Judge found that possession was not given of the whole of the property owing to the wilful default of the vendor (see *In re Hetling & Merton's Contract* (1); *In re Wilsons & Stevens' Contract* (2)). And this conclusion cannot, in my opinion, be disturbed. I think it is clearly right. The argument that the purchaser got possession of the whole and relegated the vendor to the position of a licensee, and ultimately to that of a trespasser, ignores realities and the necessities of the purchaser at the time. The purchaser did not, in fact, obtain physical possession or enjoyment of the whole of the property on the agreed date, notwithstanding the urgent need he had for country on which to run his stock. Consequently, in my opinion, the purchaser is entitled to damages for breach of his contract.

But these damages are "really unliquidated damages arising out of non-delivery of possession according to the conditions" (*In re Wilsons & Stevens' Contract* (3)). They are not "compensation" properly so called (*ibid.*; and see *Webster's Conditions of Sale*, 3rd ed., pp. 335-336). The nature of compensation properly so called is indicated in *Dart on Vendor and Purchaser*, 7th ed., vol. I., p. 672. Substantially, compensation is given for some diminution or deterioration in the value of the property contracted to be sold: the purchaser "has not got the whole of what he contracted to buy" (*Clarke* v. *Ramuz* (4); *Rutherford* v. *Acton-Adams* (5)). A property may, no doubt, be deteriorated or lessened in value by the removal of the soil, and perhaps by the use of the herbage growing thereon, but a claim for loss due to delay in giving possession is not, in my opinion, of the nature of a claim for compensation, even though it be measured by the value of the herbage which has been eaten or destroyed. There was a time, apparently, when the Court of Chancery would have disclaimed the power to award such damages and would have remitted the parties to their rights at law (*Todd* v. *Gee* (6); *Jenkins* v. *Parkinson* (7); *Story's Equity Jurisprudence*, 2nd Eng. ed., pp. 532 *et seqq.*; *Fry on Specific Performance*, 6th ed., p. 600; *White and Tudor's Leading Cases in Equity*, 8th ed., vol. II., p. 452). Later,

(1) (1893) 3 Ch., 269, at p. 281.
(2) (1894) 3 Ch., 546, at p. 550.
(3) (1894) 3 Ch., at p. 552.
(4) (1891) 2 Q.B., at p. 461.
(5) (1915) A.C., 866.
(6) (1810) 17 Ves., 273.
(7) (1833) 2 Myl. & K., 5.

the jurisdiction was asserted in cases in which damages were sought as incidental and ancillary to relief by way of specific performance (cf. *Newham* v. *May* (1); *Phelps* v. *Prothero* (2)). *Cairns' Act* (21 & 22 Vict. c. 27, sec. 2) empowered the Court of Chancery to award damages to the party injured either in addition to or in substitution for specific performance. And this provision is found in sec. 9 of the *Equity Act* 1901 of New South Wales. But in England, under *Cairns' Act*, "the plaintiff had first to make out that he was entitled to specific performance before he could get damages at all" (*Elmore* v. *Pirrie* (3); *Durell* v. *Pritchard* (4)). Since the Judicature Acts the Chancery Division of the High Court has power "to award damages in any case, whether specific performance can be granted or not" (*Elmore* v. *Pirrie*; *Serrao* v. *Noel* (5); *Ryan* v. *Mutual Tontine Westminster Chambers Association* (6)). But the *Judicature Act* has not been adopted in New South Wales, and this case must be resolved on the law as it is settled under *Cairns' Act*. We must therefore, in my opinion, first decide whether the plaintiff in this suit was entitled to a decree for specific performance. If he was, damages might properly be awarded for the loss occasioned by the delay in giving possession. If he was not, then damages cannot, as I understand the law in force in New South Wales, be awarded in this suit, whatever the position is at law.

Was the plaintiff, then, entitled to a decree for specific performance? As Sir *Edward Fry* remarks (*Specific Performance*, 6th ed., p. 435), "with regard to the matters to be done by the plaintiff according to the terms of the contract, it is, from obvious principles of justice, incumbent on him, when he seeks the performance of the contract, *to show*, *first*, that he has performed or been ready and willing to perform, the terms of the contract on his part to be then performed; and secondly, that he is ready and willing to do all matters and things on his part thereafter to be done; and a default on his part in either of these respects furnishes a ground upon which the action may be resisted." The demurrer *ore tenus* before the learned Chief Judge in Equity was directed to this matter (7). It turns

(1) (1824) 13 Price, 749.
(2) (1855) 7 DeG. M. & G., 722.
(3) (1887) 57 L.T., 333.
(4) (1865) L.R. 1 Ch., 244.
(5) (1885) 15 Q.B.D., 549, at p. 559.
(6) (1893) 1 Ch., 116.
(7) (1921) 21 S.R. (N.S.W.), 667.

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upon the allegation in pars. 7 and 8 of the statement of claim, which is as follows:—"7. The plaintiff submits that under the circumstances aforesaid he is on completion of the said contract entitled to an allowance by way of compensation or damages to be deducted from the unpaid balance of purchase-money but the defendant is unwilling and has refused to complete the said contract except on the terms of the plaintiff paying the full balance of purchase-money without any such deduction as aforesaid. 8. Up to the date fixed for completion the plaintiff was always ready and willing to perform the contract on his part and thereafter the plaintiff has always been and still is ready and willing and hereby offers to carry out the said contract on the terms mentioned in par. 7 so far as the same remains to be performed on his part." The meaning of this allegation is far from clear. If it means that the purchaser was ready and willing to take and pay for the property according to the terms of the contract up to the date fixed for completion, and thereafter to take and pay for what he could get—that is, to take the property in a diminished or deteriorated condition, or, to use the words of Sir *Edward Fry*, to perform the contract "*cy près* or as a new contract" (*Specific Performance*, 6th ed., pp. 582, 587)—then the allegation may, I think, be supported. But if it means, as I suspect was intended, that the purchaser was ready and willing to perform according to the terms of the contract up to the date of completion, but thereafter only if he were allowed a deduction from his purchase-money by way of compensation of the amount of any diminution or deterioration in value of the property he bought, and also all loss and damage which he sustained by the breach of the agreement to give possession on 31st March 1920, then, in my opinion, the allegation is indefensible. An abatement in purchase-money is intelligible if the property is diminished or deteriorated in value by reason of a breach of contract; but it is not intelligible, to my mind, if the abatement claim is made, not in respect of a diminution or deterioration in value of the property, but in respect of loss or damage, however sustained, arising from the breach of contract. In the latter case the party is left his remedy by counterclaim or cross-action. (Cf. sales of goods, *Bow, McLachlan & Co.* v. *Ship Camosun* (1).)

(1) (1909) A.C., 597.

Now, as a matter of construction, the pleading ought, if possible, to be taken in a sense that will support it rather than destroy it. As it is ambiguous, I construe it as alleging that the plaintiff was ready and willing to complete after the date fixed for completion subject to an abatement of purchase-money in respect of a diminution or deterioration in value of the property purchased. But if the allegation be thus construed, then the facts proved do not establish, and indeed negative, its truth. On 10th April 1920 a claim for very substantial damages for the vendor's stock remaining on the land was put forward, and on 21st April and also on 14th March the claim was seriously pressed and the damage said to be increasing. On 27th July the purchaser again asserted that he had suffered great loss and damage, and he now insisted, for the first time, that it should be deducted from the purchase-money. The vendor denied the purchaser's right to make such a deduction, and this suit was brought and came ultimately for trial. No evidence whatever was led of any diminution or deterioration in value of the property, and the damage proved or sought to be proved was loss occasioned by the inability of the purchaser to obtain sufficient pasturage elsewhere for his cattle, whereby the same died or were diminished in value. It was on this basis that the learned Judge awarded the purchaser damages. The evidence clearly shows, in my opinion, that the purchaser was not at any time after 31st March 1920 ready and willing to complete the contract unless with a deduction from the purchase-money which he had no right at law or in equity to make, but for which he had a remedy by action only.

It would be most inconvenient and unjust, to my mind, if purchasers could refuse to pay their purchase-money on the ground of some breach of contract sounding in damages only and in no wise lessening or deteriorating the value of the property purchased. Thus in the present case the purchaser's claims approached in amount the balance of the purchase-money payable by him.

It was argued that *Phelps* v. *Prothero* (1), *Jaques* v. *Millar* (2), *Royal Bristol Permanent Building Society* v. *Bomash* (3) and *Jones*

(1) (1855) 7 DeG. M. & G., 722. (2) (1877) 6 Ch. D., 153.
(3) (1887) 35 Ch. D., 390.

H. C. OF A. 1922-1923.

KING v. POGGIOLI.

Starke J.

v. *Gardiner* (1) conclusively decided this case in favour of the plaintiff. I cannot agree. In all those cases the party was entitled to a decree for specific performance. In other words, he had performed, or was ready and willing to perform, all things on his part required by law to be performed. And as he was entitled to a decree, the Court had then power to award damages under *Cairns' Act* or the *Judicature Act*. But in this case the plaintiff was not ready and willing to pay his purchase-money at the time he called upon the defendant to complete, nor at the time of action brought, nor at the time when the decree for specific performance was made by the Supreme Court of New South Wales. *Bomash's Case* (2) gives, in my opinion, no support to the proposition that a purchaser can deduct from his purchase-money unliquidated damages for breach of contract as distinguishable from compensation properly so called. It is an authority only for the proposition that in cases in which unliquidated damages have been judicially ascertained, then the Court, on the final settlement or completion of the contract pursuant to a decree for specific performance, may require, at that stage, actual payment of the difference between the amount of the purchase-money and the ascertained damages.

Lastly, I will add that the damages awarded by the learned Chief Judge could not, in my opinion, have been sustained. They cannot fairly and reasonably be considered as naturally arising from the breach of the contract according to the usual course of things. The death of the stock was a very remote and improbable consequence of the breach alleged, and there were no special circumstances communicated to the vendor which suggest that the damage flows naturally from a breach of contract under those circumstances. I do not dwell on this point because in my opinion the action should be decided upon the ground already mentioned. The appeal succeeds, and the decree must be discharged.

But as the parties informed the learned Chief Judge at the trial that they were prepared to complete the contract, and in fact confined themselves to the question whether the purchaser was entitled to deduct his claim for damages from the purchase-money, and

(1) (1902) 1 Ch., 191. (2) (1887) 35 Ch. D., 390.

having regard also to the fact that the purchaser has been in possession of the property for a considerable time, I see no reason why this Court should not allow them to perform the contract as they desire without prejudice to the purchaser's claim for damages at law. It is to be hoped, however, that the parties do not commence further litigation, but endeavour to settle a reasonable sum between them for the loss of grass which the purchaser undoubtedly sustained.

Appeal allowed. Decree appealed from discharged. The parties being willing at the time of the hearing of the suit before the Supreme Court to complete the contract of 12th January 1920, *let it be performed and carried into execution accordingly, but without prejudice to any right of the purchaser to damages at law for breach by the vendor of the contract. Suit remitted to the Supreme Court in its equitable jurisdiction for the purpose of giving effect to the foregoing order for the execution of the contract. Respondent to pay costs of appeal.*

Solicitor for the appellant, *J. A. Thomas.*

Solicitor for the respondent, *D. G. Stuart*, Tenterfield, by *Buchanan, Teece & Co.*

B. L.