[HIGH COURT OF AUSTRALIA.]

FULLERS' THEATRES LIMITED AND ANOTHER . . . . . } APPELLANTS;
PLAINTIFFS,

AND

MUSGROVE . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Mar.* 26, 27; *May* 3.

KNOX C.J., ISAACS and RICH JJ.

Contract—Specific performance—Agreement to grant lease—Conduct disentitling plaintiff to equitable relief—Bar to relief—Prior action for ejectment—Rescission of contract—Election to rescind—Breach not going to root of contract—Restitutio in integrum—Rescission by mutual consent.

By a tripartite agreement between the two appellants, A and B, and the respondent, it was agreed that A should grant a sub-lease of one theatre to the respondent, that B should grant a lease of another theatre to the respondent, and that the respondent should grant a sub-lease of a third theatre, including all offices, to B. Pursuant to the agreement the respondent entered into possession of the two theatres leased to him and B entered into possession of the theatre leased to him, except that he was excluded from a room which the appellants alleged to be an office to possession of which B was entitled under the agreement. After the lapse of several months, during which the several parties paid rent for, used and made profit out of the respective theatres and correspondence passed between the parties in which delivery of possession of the room was on the one side claimed and on the other side resisted, the appellants instituted an action to recover damages for breach of the agreement and, shortly afterwards, an action for ejectment against the respondent. After further negotiations the action for ejectment was discontinued, and the appellants brought a suit in the Supreme Court of New South Wales in its equitable jurisdiction against the respondent for specific performance of the agreement.

Held, by *Knox* C.J., *Isaacs* and *Rich* JJ., that the conduct of the appellants was such as to make it inequitable that the Court should grant specific performance.

Held, also, by *Isaacs* and *Rich* JJ., that there had been no effectual rescission of the agreement, for the reasons: (1) that the possession of the office was not essential to the use of the premises as a theatre, and a refusal to give it did not entitle the appellants to rescind; (2) that a clause in the agreement entitling the appellants to cancel the leases agreed to be given by them if the respondent was unable to grant the sub-lease agreed to be given by him was limited to his inability to grant a sub-lease at all, and did not apply to a failure to include the office in the sub-lease; (3) that, if the appellants had an election to rescind, they had, by their conduct in going on with the agreement and taking advantage of it, irrevocably exercised their election to affirm the agreement; (4) that the appellants could not make *restitutio in integrum*; (5) that a clause in the agreement providing that a certain sum of money to be paid by the respondent should be treated as the amount of compensation in case of the failure of the respondent to carry out the contract did not authorize the respondent to validly determine the agreement by a notice to determine and an offer to pay that sum; and (6) that the giving of such an offer and notice, coupled with the bringing of the actions for breach of agreement and for ejectment, did not constitute a rescission by mutual consent.

Held, further, by *Isaacs* and *Rich* JJ., that neither the action for breach of the agreement nor that for ejectment was in itself an election by the appellants to terminate the agreement and, therefore, was not a bar to the suit for specific performance.

Williamson v. *Bors*, (1900) 21 N.S.W.L.R. (Eq.), 302, and *Blackett* v. *Bates*, (1865) L.R. 1 Ch., 117, distinguished.

Held, also, by *Isaacs* and *Rich* JJ., that, as there had been no rescission of the contract, the dismissal of the suit for specific performance should be without prejudice to any proceedings at common law by the appellants.

Decision of the Supreme Court of New South Wales (*Owen* A.-J.): *Fullers' Theatres Ltd.* v. *Musgrove*, (1922) 23 S.R. (N.S.W.), 65, varied and affirmed.

APPEAL from the Supreme Court of New South Wales.

A suit was brought on 15th March 1922, in the Supreme Court in its equitable jurisdiction, by Fullers' Theatres Ltd. and the Majestic Amusements Ltd. against Harry George Musgrove, claiming specific performance of an agreement made between the two plaintiffs and the defendant on 24th March 1921.

The agreement, so far as material, was as follows:—

"An agreement made the twenty-fourth day of March in the year of our Lord one thousand nine hundred and twenty-one between

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Fullers' Theatres and Vaudeville Limited a company duly incorporated according to the laws of New South Wales hereinafter called 'Fullers' Company' of the first part and Majestic Amusements Limited a company duly incorporated according to the laws of South Australia hereinafter called 'Majestic Company' of the second part and Harry George Musgrove of Sydney in the State of New South Wales hereinafter called 'Musgrove' of the third part Whereas Fullers' Company are the present lessees of the Theatre Royal situate in Perth in Western Australia And whereas Majestic Company are the present lessees of the theatre known as Majestic Theatre situate in King William Street Adelaide South Australia And whereas Musgrove is entitled to a sub-lease of the Prince of Wales Theatre situate in Grote Street Adelaide aforesaid And whereas the said Fullers' Company have agreed as herein mentioned to sub-lease the said Theatre Royal in Perth to the said Musgrove the Majestic Company have agreed to lease the Majestic Theatre to the said Musgrove and the said Musgrove has agreed to sub-lease the Prince of Wales Theatre to Majestic Company upon the terms and conditions hereinafter mentioned Now therefore this agreement witnesseth as follows:—(1) Fullers' Company shall grant a sub-lease to Musgrove of the said Theatre Royal Perth for a term of two years from the date Fullers' Company are able to obtain possession of the said theatre from one Thomas George Malloy namely on or about the thirtieth day of April one thousand nine hundred and twenty-one (2) The rent to be paid by the said Musgrove shall be the sum of one hundred and twenty pounds per week whilst the said Musgrove shall exhibit only pictures in the said theatre but in the event of the said Musgrove producing vaudeville or any other theatrical entertainments therein the rent to be paid by the said Musgrove shall be the sum of two hundred and fifty pounds per week (3) Musgrove shall pay all rates taxes fire insurance and other outgoings in respect to the said theatre so that the rent shall be clear to the said Fuller's Company (4) The other covenants of the lease shall be in the same terms as the lease from Malloy to Fullers' Company (5) Majestic Company shall execute a lease of the said Majestic Theatre to the said Musgrove for the term of five years from the twenty-sixth day of March instant (6) The rent to

be paid by Musgrove will be the sum of two hundred and seven pounds ten shillings per week whilst the said Musgrove shall exhibit moving pictures only in the said theatre but in the event of the said Musgrove producing vaudeville or any other theatrical entertainment therein the rent to be paid by the said Musgrove shall be the sum of four hundred pounds per week (7) Musgrove shall pay all rates taxes fire insurance and other outgoings in respect to the said theatre so that the rent shall be clear to the said Fullers' Company (8) The other covenants of the lease shall be in the same terms as the present lease to Fullers' Company (9) Musgrove shall execute a sub-lease to Majestic Company of the said Prince of Wales Theatre (including scene dock and all offices) but not the shops for the term of five years from the twenty sixth day of March instant (10) Musgrove shall pay all rates and fire insurances on the said theatre to the intent that the Majestic Company shall pay only the actual rent of fifty-seven pounds and ten shillings (11) The Majestic Company shall pay to Musgrove a weekly rental of fifty-seven pounds ten shillings but no more (11a) The other covenants shall be the same or similar to the covenants contained in the lease to Rickards Tivoli Theatres Limited except as to renewal of seating . . . (13) Should the said Musgrove be unable to grant the sub-lease of the Prince of Wales Theatre to Majestic Company the Majestic Company shall have the right to cancel the lease to Musgrove of Majestic Theatre and Fullers' Company shall have the right to cancel the lease to Musgrove of Theatre Royal (14) Clauses shall be inserted in the leases of the Majestic Theatre Adelaide and the Royal Theatre Perth to the effect that if Musgrove does not perform and carry out the covenants and conditions of the lease of either theatre the Majestic Company or Fullers' Company as the case may be shall have the right to cancel the lease of either Majestic Theatre or of the Royal Theatre as the case may be . . . (16) Musgrove shall at his own expense obtain all necessary consent to the validity of the lease to Majestic Company of the Prince of Wales Theatre (17) The leases shall be completed on or before the thirtieth day of April next and such time shall be the essence of the contract . . . (20) Musgrove shall if required provide for a bond of some person approved by Fullers' Company and Majestic Company that the said sub-lease

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of Prince of Wales Theatre will be granted to Majestic Company and all necessary consents given so that Majestic Company will have a sub-lease entitling them to peaceable possession of the Prince of Wales Theatre for the said term of five years (21) Musgrove shall provide a bank guarantee for two thousand pounds as security for the due performance by Musgrove of all covenants and conditions of the leases to him of Majestic Theatre and Theatre Royal Perth The said two thousand pounds is to be treated as the compensation agreed upon between the parties in case of failure by Musgrove to carry out his contract (22) If bank guarantee be not given within fourteen days Fullers' Company and Majestic Company to have the right to cancel this contract forthwith."

The plaintiffs had issued, on 8th July 1921, out of the Supreme Court of New South Wales, a writ for recovery of damages for breach of the contract, and, on 13th July, out of the Supreme Court of South Australia, a writ of ejectment in respect of the Majestic Theatre (into possession of which the defendant had gone shortly after the date of the contract), The action for ejectment had been discontinued on 28th November 1921, but the action for damages had not been discontinued.

The other material facts appear in the judgments hereunder.

The suit was heard by *Owen* A.-J., who dismissed it with costs : *Fullers' Theatres Ltd.* v. *Musgrove* (1)).

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

Jordan, for the appellants. The learned Judge was wrong in holding that the appellants by taking proceedings in ejectment and for damages for breach of the agreement had elected to rescind the agreement and therefore were precluded from bringing the suit for specific performance.

[ISAACS J. referred to *Hipgrave* v. *Case* (2).]

In principle there is nothing to prevent a person who has brought an action for ejectment from afterwards bringing a suit for specific performance. An election to rescind can only be effective if there is a right to rescind. At the time the appellants purported to determine the contract they had no right to repudiate, for there had not been

(1) (1922) 23 S.R. (N.S.W.), 65. (2) (1885) 28 Ch. D., 356.

a vital breach of the contract (*Serjeant* v. *Nash, Field & Co.* (1); *Croft* v. *Lumley* (2); *Ray* v. *Davies* (3)). The proposition in *Williamson* v. *Bors* (4) is not wide enough to support the respondent's case, for it only says that the plaintiff is barred from equitable relief where he has previously failed in an attempt to obtain inconsistent relief at law. The existence of the proceedings in ejectment at the same time as the proceedings for specific performance is only a reason why the appellants may be put to their election as to which proceedings they will go on with. (See *Gedye* v. *Duke of Montrose* (5); *Blackett* v. *Bates* (6).) If the breach by the respondent was one which went to the root of the contract so that the appellants had the right to elect whether they would or would not rescind, they have so acted as to give up that right, and may maintain the suit for specific performance. [Counsel also referred to *Daniel's Chancery Practice*, 5th ed., vol. I., p. 718.]

Leverrier K.C. (with him *Browne*), for the respondent. The breach in respect of which the appellants brought the action for ejectment was vital, and they called evidence to establish that it was (*In re Arnold*; *Arnold* v. *Arnold* (7)). That being so, *Williamson* v. *Bors* (8) and *Blackett* v. *Bates* (9) show that the action for ejectment amounted to an election to treat the contract as at an end so as to preclude the appellants from obtaining specific performance (see *Fry on Specific Performance*, 5th ed., p. 601). Even if the appellants had not a right to elect whether they would or would not rescind, they by their action for ejectment insisted on their right to rescind, and that entitled the respondent to regard the agreement as at an end, and consequently disentitled the appellants to specific performance. The conduct of the appellants was such that specific performance should not be decreed (*McDonald* v. *McMullen* (10); *Measures Brothers Ltd.* v. *Measures* (11)).

[KNOX C.J. referred to *Ellis* v. *Rogers* (12).]

(1) (1903) 2 K.B., 304, at pp. 311-312.
(2) (1858) 6 H.L.C., 672.
(3) (1909) 9 C.L.R., 160.
(4) (1900) 21 N.S.W.L.R. (Eq.), 302, at p. 308.
(5) (1858) 26 Beav., 45.
(6) (1865) L.R. 1 Ch., 117, at p. 126.
(7) (1880) 14 Ch. D., 270, at p. 279.
(8) (1900) 21 N.S.W.L.R. (Eq.), 302.
(9) (1865) L.R. 1 Ch., 117.
(10) (1908) 25 N.S.W.W.N., 142.
(11) (1910) 2 Ch., 248.
(12) (1884) 50 L.T., 660.

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Jordan, in reply, referred to *Bentsen* v. *Taylor, Sons & Co.* (1); *Re Allsop and Joy's Contract* (2); *Day* v. *Ross* (3); *Sun Permanent Benefit Building Society* v. *Western Suburban and Harrow Road Permanent Building Society* (4).

Cur. adv. vult.

May 3.

The following written judgments were delivered :—

KNOX C.J. This is an appeal by plaintiffs from a decree dismissing the suit with costs. The suit was for specific performance of an agreement in writing dated 24th March 1921, whereby it was agreed (*inter alia*) as follows :—Fullers' Company (meaning the appellant Fullers' Theatres Ltd.) shall grant a sub-lease to Musgrove of the Theatre Royal, Perth, for a term of two years from the date Fullers' Company is able to obtain possession of the said theatre from one Thomas George Malloy, namely, on or about 30th April 1921. Majestic Company (meaning the appellant Majestic Amusements Ltd.) shall execute a lease of the Majestic Theatre to the said Musgrove for the term of five years from 26th March instant. Musgrove shall execute a sub-lease to Majestic Company of the Prince of Wales Theatre (including scene dock and all offices) but not the shops for a term of five years from 26th March instant. Should the said Musgrove be unable to grant the sub-lease of the Prince of Wales Theatre to Majestic Company, the Majestic Company shall have the right to cancel the lease to Musgrove of Majestic Theatre and Fullers' Company shall have the right to cancel the lease to Musgrove of Theatre Royal. Musgrove shall provide a bank guarantee for £2,000 as security for the due performance by Musgrove of all covenants and conditions of the leases to him of Majestic Theatre and Theatre Royal, Perth. The said £2,000 is to be treated as the compensation agreed upon between the parties in case of failure by Musgrove to carry out his contract.

In pursuance of the agreement the defendant was given possession of the Majestic Theatre and later, some time in April, of the Theatre Royal, Perth. About 24th March 1921 the plaintiff Majestic Amusements Ltd. went into possession of the Prince of Wales Theatre, but

(1) (1893) 2 Q.B., 274, at p. 281.
(2) (1889) 61 L.T., 213.
(3) (1921) 22 S.R. (N.S.W.), 248.
(4) (1921) 2 Ch., 438, at p. 453.

was excluded from a room on the first floor of the building which was used as an office by the representative of Tivoli Theatres Ltd., and in fact was the registered office of that company. Correspondence ensued between the parties and their solicitors, the plaintiffs complaining that they were entitled to possession and a lease of the whole of the theatre including the office, and the defendant denying that the plaintiffs were entitled to more than they had been given. At a later stage the defendant stated that if the plaintiffs insisted on the inclusion of the office in the lease he would take steps to have the agreement corrected, and the plaintiffs insisted that the inclusion of the office was vital to them. Further correspondence followed; and on 7th June 1921 the plaintiffs informed the defendant that owing to his refusal to execute a lease of the Prince of Wales Theatre including the office they were "determined to cancel the lease of the Majestic Theatre and of the Theatre Royal, Perth, and to sue him for the damage suffered by reason of his not carrying out the agreement in regard to the Prince of Wales Theatre," and gave him notice that, unless within seven days the lease of that theatre in the form demanded by them was executed and delivered to them, they would "resume possession of the Majestic Theatre and Theatre Royal and would issue a writ" for damages for breach of agreement. The defendant suggested, in answer to this, that the plaintiffs should take the necessary steps to have the question of his liability to execute a lease of the premises including the office determined in the proper manner. This suggestion was ignored by the plaintiffs, and on 13th June their agent gave formal notice in writing to the defendant that they intended "at the end of this week to resume possession of the Majestic Theatre and Theatre Royal and to instruct their solicitors to issue a writ for damages for breach of contract with regard to the Prince of Wales Theatre." Some negotiations followed, and on 22nd June the plaintiffs' solicitor gave definite notice that they would during the next week resume possession of the theatres and issue a writ for damages. This notice was repeated on 1st July. On 4th July the defendant expressed his willingness to give a lease of the Prince of Wales Theatre leaving the question of his liability in respect of the office to be determined in the proper

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manner, and stated that he would resist any attempt to take possession of the theatres of which he had been put in possession. He further stated that he had executed the leases to him of these theatres and was prepared to hand them over at any time. On 8th July the plaintiffs issued, out of the Supreme Court of New South Wales, a writ for recovery of damages for breach of contract, and, on 13th July, out of the Supreme Court of South Australia, a writ of ejectment in respect of the Majestic Theatre. Negotiations for settlement followed, but no agreement was arrived at. On 23rd September plaintiffs informed defendant that they proposed to allow him to continue in occupation for the present and to discontinue the action for ejectment, but that they intended, if necessary, to enforce their claim for damages at a later period. The action of ejectment was, in fact, discontinued on 28th November 1921, but the action for damages has never been discontinued. On 24th November the defendant asserted his right to terminate the agreement on handing back the theatres and paying £2,000. His right to do this was denied by the plaintiffs, and on 15th March 1922, after further abortive negotiations, the plaintiffs instituted this suit.

In his reasons for judgment the learned trial Judge expressed the opinion that the issue by the appellants of a writ in ejectment amounted to an unequivocal act indicating to the respondent that the appellants avoided the agreement, and to a definite election to treat the agreement as determined; but I gather that the real ground of his decision was that, by their conduct in instituting the actions at law for ejectment and recovery of damages for breach of the agreement, the appellants had debarred themselves from obtaining relief by way of specific performance. This conclusion appears to have been based on the decisions in *Williamson* v. *Bors* (1) and *Blackett* v. *Bates* (2).

The former case was a suit for specific performance of an agreement for the sale of land. The plaintiff was the purchaser, and it appeared that after he had heard that the defendant (the vendor) had sold the land to another person he sued the vendor at law for damages for breach of agreement. The vendor pleaded (*inter alia*) the *Statute of Frauds*. Thereupon the purchaser discontinued the

(1) (1900) 21 N.S.W.L.R (Eq.), 302. (2) (1865) L.R. 1 Ch., at p. 126.

action at law and instituted proceedings in equity for specific performance. *Walker* J. held that the conduct of the plaintiff debarred him from obtaining specific performance, on the ground that, where a party seeks a remedy at law which is inconsistent with any idea of specific performance, and does not seek or intimate any intention of seeking equitable relief until he has failed in the inconsistent relief which he sought at law, he comes into equity too late. "The plaintiff," he said (1), "by his conduct, has shown that he waived the equitable relief, and elected to regard the contract, not as one still existing and to be specifically performed, but as one that was at an end, except for the purpose of recovering damages for the breach of it." That is in line with the dictum of Lord *Cranworth* in *Blackett* v. *Bates* (2). The Lord Chancellor decided the case on another ground, but expressed the opinion that the plaintiff's title to relief by way of specific performance would have been barred by his conduct in endeavouring to set aside the award which at a later date he sought to have specifically performed. He said: "It is a strong thing to say that, after a party has denied the validity of an agreement, and taken proceedings to set it aside, he can, when the result of those proceedings has proved adverse, turn round and insist on specific performance."

In *Fry on Specific Performance*, 5th ed., p. 19, par. 44, it is said that the Court in granting or refusing specific performance has regard to the conduct of the plaintiff and to circumstances outside the contract itself, and that the mere fact of the existence of a valid contract is not conclusive in the plaintiff's favour. And at p. 56, par. 119, the dictum of Lord *Cranworth* in *Blackett* v. *Bates* (2) is cited in support of the proposition that the Court will not interfere when the plaintiff has elected to proceed in some other manner than for specific performance. The rule is stated broadly by *Plumer* V.C., in *Clowes* v. *Higginson* (3), that if the defendant can show any circumstance *dehors*, independent of the writing, making it inequitable to interpose for the purpose of a specific performance, a Court of equity will not interpose. This appears to be the meaning of the proposition that specific performance is in the discretion of the Court.

(1) (1900) 21 N.S.W.L.R. (Eq.), at p. 309.
(2) (1865) L.R. 1 Ch., at p. 126.
(3) (1813) 1 V. & B., 524, at p. 527.

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In the present case the conduct of the appellants, extending over a considerable period of time, was inconsistent with any claim on their part to treat the agreement as a binding agreement and one that should be specifically performed. The institution of proceedings for ejectment was consistent only with the position that the defendant had no right to the possession of the theatres from which they sought to eject him and no right to obtain a lease of those theatres; in other words, it was consistent only with the position that the rights of the defendant under the agreement had come to an end, and that the plaintiffs were entitled and intended to treat that agreement as determined. So also was the action for damages for breach of the agreement, having regard to the attitude taken up by the appellants as disclosed by the correspondence. In my opinion, the conduct of the appellants to which I have referred made it inequitable for a Court of equity to interpose at the instance of the appellants for the purpose of ordering the agreement to be specifically performed; and for this reason I think the decree dismissing the suit was rightly made.

In the circumstances it becomes unnecessary to express an opinion on the question whether the acts and statements of the appellants amounted to a final and irrevocable election, within the meaning of the authorities referred to by *Owen* A.-J., to treat the agreement as determined.

In my opinion the suit was rightly dismissed, but, having regard to the opinion expressed by my brothers *Isaacs* and *Rich* on the question of rescission of the agreement of 24th March 1921, I think the decree should be expressed to be without prejudice to any proceeding at law that the plaintiff may be advised to bring.

I agree, in the circumstances, that the parties should bear their own costs both in the Supreme Court and in this Court.

ISAACS AND RICH JJ. We are of opinion, on the whole, that specific performance should, by a proper application of equitable considerations to the general facts, be refused, and the parties left to whatever legal remedies they may be entitled.

But we also think, in view of the issues raised and the many important principles involved, it is more satisfactory not to confine

our judgment to the ultimate point of our conclusions. The respondent pleaded rescission of the contract on various grounds, and, as the appellants are left to legal remedies, we think that, after all the expense and elaborate arguments in both Courts upon those issues, the parties are entitled to know whether further litigation would be useless or whether, though possible, it can be confined to questions untouched by the decision appealed from. Indeed, without some expression of our opinion, it might well be argued that the determination of the issues as to rescission remains untouched, and therefore stands as *res judicata*.

The facts, so far as they constitute the bargain between the parties, have been very fully and clearly narrated by *Owen* A.-J. To a great extent also the learned Judge has stated the part performance of the contract. One characteristic—perhaps the dominant characteristic—of this bargain is that it was not a simple sale of real property for money, awaiting conveyance. It was a tripartite bargain of a very complex nature, part of the consideration on both sides being the transfer of leasehold property. Each of two parties went into possession of the property agreed to be transferred to that party, and paid rent for and used and made profits out of the property of the other party. It is very necessary to bear these circumstances in mind when considering the true effect of what has been treated as a simple act of rescission.

Coming to the operative facts, the correspondence set out in evidence, much of it summarized in the judgment of *Owen* A.-J., shows that from a very early date the appellants vigorously claimed the disputed office. We may at once say that on the words of the bargain as it stands it seems unquestionable that they were as against Musgrove entitled to have it. Further, as a fact they were always ready and willing—had the office been offered—to carry out the bargain according to its terms. But the respondent with equal vigour resisted the claim to the office. He relied on mistaken expression of the real agreement, and suggested curial rectification of the recorded transaction. But, throughout, he was as clearly resolute in his refusal to accede to the appellants' demand as they were in making it. No doubt the appellants adopted methods of compulsion—an action for ejectment, and an action for damages—which

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were as framed inconsistent with the specific performance of the contract (see *Dominion Coal Co.* v. *Dominion Iron and Steel Co.* (1)). The learned primary Judge held that the ejectment action was an election to terminate the contract which in its nature was decisive and irrevocable, and that nothing but a new agreement, and not merely negotiations about the old agreement, could revive the contractual tie between the parties. That was a distinct finding on the pleaded issue of rescission, and, if it be allowed to stand without further observation, might conclude or seriously embarrass the appellants. The learned Judge stated the relevant law as to the principle of election in the most unexceptionable terms. The only question as to this branch of the case is whether that law, properly applied to the proved circumstances, entitles the respondent to say there was an election to rescind, or entitles the appellants to say there was no election at all, or whether it establishes that there was a definite irrevocable election to affirm the contract.

Another question of great importance earnestly pressed by Mr. *Jordan*, and as stoutly contested by Mr. *Leverrier*, was whether the attempted rescission by ejectment or by action for damages or by correspondence could, in the circumstances, take effect as a rescission without the concurrence of the opposite party. As was ultimately conceded by both sides, there is an indispensable condition to this so far as the rescission is to be supported on general principles, namely, whether the inclusion of the office was or was not a vital element of the bargain. Suggestions were made on both sides as to how far the office answered this description; and, as to this, Mr. *Leverrier* very properly referred to the judgment of *James* L.J. in *In re Arnold* (2), and refrained from adopting the "trifling" test of *Bramwell* and *Baggallay* L.JJ. in the same case, because Lord *Esher* M.R. in *In re Fawcett and Holmes' Contract* (3) explains that matter. It has to be ascertained whether that condition exists. But it must be observed that that is not the only condition in this case, owing to the complexity of the situation, and the events that have transpired. Even though the first named condition were satisfied, the question arises: Can *restitutio in integrum* be made by the rescinding party?

(1) (1909) A.C., 293, at p. 311. (2) (1880) 14 Ch. D., 270.
(3) (1889) 42 Ch. D., 150, at p. 157.

There is another suggested rescission, namely, by the appellants' cancellation pursuant to clause 13 of the agreement, and again another by the respondent's cancellation as under clause 21, leaving nothing but a liability on his part to pay £2,000 compensation.

A still further position is postulated. It is that while the appellants were asserting a claim to eject the respondent from the two theatres of which he had been given possession, and were also prosecuting their action for damages, the respondent gave his notice to rescind just mentioned. So, it is said, if acceptance of the appellants' claim to rescind were necessary, it was given and a consensus established to end the contract if it still existed. These questions may appropriately be considered before entering upon that of abandonment of the remedy. Unless there be a contract, there is nothing to enforce specifically.

1. *Was the office vital* ?—In *Lion White Lead Ltd.* v. *Rogers* (1) we stated the rule of law that " where the thing tendered as the consideration differs essentially from the thing contracted for, there is a failure of consideration, and the bargain is at an end." For this we cited *Kennedy* v. *Panama, New Zealand and Australian Royal Mail Co.* (2). That had the approval of *Barton* J. (3). The word " essentially " is used in so many collocations that it may easily be misunderstood. The rule means that, apart from express stipulation to the contrary, one party to a contract is not entitled to force upon the other party something which, by reason of a departure from the terms of the contract, is so materially altered in character as to be in substance a different thing from that contracted for. The rule is general; and is recognized in such cases as *Bentsen* v. *Taylor, Sons & Co.* (4), *In re Puckett and Smith's Contract* (5), *In re Atkinson and Horsell's Contract* (6) and *Lee* v. *Rayson* (7). In the last-mentioned case the following passage occurs, which is very apposite to the case now in hand. *Eve* J. says (8) :—" It is in *Knatchbull* v. *Grueber* (9), where Lord *Eldon* says : ' This Court is from time to time approaching nearer to the doctrine that a purchaser shall have that which he contracted for, or not be compelled

(1) (1918) 25 C.L.R., 533, at p. 550.
(2) (1867) L.R. 2 Q.B., 580.
(3) (1918) 25 C.L.R., at p. 544.
(4) (1893) 2 Q.B., at p. 281.
(5) (1902) 2 Ch., 258.
(6) (1912) 2 Ch., 1.
(7) (1917) 1 Ch., 613.
(8) (1917) 1 Ch., at p. 619.
(9) (1817) 3 Mer., 124, at p. 146.

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to take that which he did not mean to have.' I take that to mean that what the Court has to do in such a case as I have here to deal with is to decide whether the purchaser is getting substantially that which he bargained for, or whether the vendor is seeking to put him off with something which he never bargained for, and in arriving at a conclusion on this question the Court is bound to consider every incident by which the property offered to be assured can be differentiated from that contracted for. If the sum of these incidents really alters the subject matter, then the purchaser can repudiate the contract; if, on the other hand, the subject matter remains unaffected, or so little affected as to be substantially that which was agreed to be sold, then the purchaser must be held to his contract." That appears to us to be an accurate and, indeed, the only practical method of testing the matter.

How do the circumstances here react to that test? It is alleged by the respondent (though not admitted by the appellants in their pleadings—see par. 3 of the statement of claim) that he is unable to give the office. If so, the fact that he was content to take the theatre without the office from his lessors is a strong tacit recognition of the view that the office is not essential to the use of the rest of the premises as a theatre. But, apart from that, the evidence is affirmatively clear that, though unquestionably the office would be a great convenience to those who occupied the rest of the building as a theatre, yet it was by no means essential. As a telephone room it could be and was early replaced. As a means of access to the ticket office it manifestly was not essential. That the appellants could and did carry on their business without it is a very strong proof. The room in question affords only one of three means of access to the ticket office. The chief complaint appears to be that the personnel of the theatre whose duty it is to go to the ticket office might, if the passage were crowded, find some inconvenience in getting through. We think it requires no inventive mind, but a little practical arrangement, to erect a barrier to protect a clear passageway to the door of the ticket room at all times. No reason other than that mentioned has been advanced for considering the office vital. The legal test is not reached by the facts. It may readily be admitted that such an exclusion in a private house, or in some

mercantile building where privacy for the staff is necessary, would stand in a very different position. The circumstances of each case must be measured by the legal test, and each case must find its own answer.

We are distinctly of opinion that—apart from the 13th clause of the agreement—the attempted renunciation without acceptance was futile. And we know both actions were resisted. So far the facts show that the contract remained unaffected.

2. *Cancellation under clause* 13.—As to the 13th clause, its force depends on the true meaning of the words "unable to grant the sub-lease of the Prince of Wales Theatre." Mr. Musgrove was clearly able to grant that sub-lease—or, at all events, he admitted as much—with the exception of the disputed room. Reading the words quoted by the light of the context of the whole contract, we are of opinion that it refers not to the parcels to be comprised in the sub-lease, but to his ability to procure a valid sub-lease at all. We would refer particularly to the last recital of the contract, to clause 16 and to the concluding part of clause 21. The absence of any reciprocal provision with respect to the other two theatres is significant, and strengthens the interpretation we have given. Consequently we think clause 13 has no application to the present case. If the quoted words include, *inter alia*, the parcels, what we have already said as to the sufficiency of a substantial compliance is applicable also to the clause.

3. *Election.*—But there steps in a factor of supreme importance. Suppose, for argument sake, the exclusion of the office in question were such a departure from the substance of the contract as in an ordinary case of sale or lease, uncomplicated by intervening acts, would justify rescission if the appellants so elected, the question then is: What was their position in that connection at the respective times when the ejectment action and the damages action were instituted, and the letter referring to cancellation was written? Here circumstances and dates are all important. There are two outstanding reasons why all such attempts to terminate the contract were ineffectual in point of law. We may state those two reasons succinctly before treating them explicitly. The first is that whatever election was open to the appellants by reason of deprivation of

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the office had already been exercised by acts of adherence to the contract. The second is that *restitutio in integrum* was impossible, and, if possible, was never offered, and without *restitutio in integrum* rescission—unless expressly provided to the contrary—cannot take place.

With regard to the first reason—prior election to the contrary—there was a letter announcing, not actual cancellation, but conditionally intended cancellation at a future date. Whatever its potential effect otherwise, its date was 7th June 1921. The damages action started on 8th July, and the ejectment action on 13th July 1921. Now, before even 30th April—which by clause 17 of the contract was fixed as the date of completion, with the additional provision that "time shall be the essence of the contract"—the appellants had been distinctly notified (see letters of 20th and 22nd April) that they could not have the office. On 30th April an unequivocally distinct intimation to that effect was conveyed in writing by the respondent's solicitors. Nevertheless, the appellants went on, retained the theatre, paid rent for it, and made what profits they could out of it. It is true they stated, as in their solicitor's letter of 4th May 1921, that the office was "vital"; but they continued to occupy and use the theatre and retained the advantages of possession. On 21st May and 28th May they paid the rent. On 3rd June they acknowledged payment of rent for the other two theatres, and, as appears by the letter of the respondent's accountant dated 7th June, they paid rent for the Prince of Wales Theatre to 3rd June. As late as 9th July they sent a cheque for rent of that theatre up to 8th July. Consequently, the facts establish that before the ejectment action was commenced—and so with the other two acts of alleged rescission—the appellants, with full knowledge that the respondent could not, and at all events would not, include in his sub-lease the disputed office, went on with the contract and took its advantages. They were attempting to bind and to loose at the same time. As is said in *R.* v. *Paulson* (1), they "cannot do both at the same time." The clear and undoubted line of authority culminating in *Paulson's Case* entirely supports the view that an election once made is irrevocable and exhausts the power. We

(1) (1921) 1 A.C., 271, at p. 284.

apply that doctrine, and more especially the following passage from *Clough* v. *London and North-Western Railway Co.* (1), a passage included in the quotation from that case by the learned primary Judge, namely: " If with knowledge of the forfeiture, by the *receipt of rent or other unequivocal act* he " (the landlord) " shows his intention to treat the lease as subsisting, he has *determined his election for ever*, and can no longer avoid the lease." It is true the converse as to ejectment is put; but it is a question *which came first*. Here the affirmance came first and exhausted the power of election, even if it then existed.

The second reason raises the prior consideration: Did the power of election then exist, or was it excluded by inability to restore *in integrum*? There is a well-established doctrine of the law of contract that, in the absence of express provision to the contrary, a bargain cannot be renounced entirely even for breach of a stipulation admittedly vital, if once the complaining party accepts the benefit of the contract with knowledge of the breach. This is exemplified by a number of cases, of which *Ellen* v. *Topp* (2), as corrected by Lord *Shaw* in *Wallis, Son & Wells* v. *Pratt & Haynes* (3), is, so to speak, the pioneer, and which include *Behn* v. *Burness* (4) and *Carter* v. *Scargill* (5). There is another well-settled principle of contract law: If the complaining party is not in a position to make *restitutio in integrum*, he cannot rescind (*Urquhart* v. *Macpherson* (6)). That this is a doctrine to be rigidly applied, that it is not confined to any class of transaction but is a recognized and established doctrine of the law of contract in general, is definitely settled by the decision of the House of Lords (Lord *Loreburn*, Lord *Atkinson*, Lord *Shaw* and Lord *Parmoor*), and particularly in the judgments of Lord *Atkinson* and Lord *Shaw*, in the case of *Boyd & Forrest* v. *Glasgow and South-Western Railway Co.* (7). The case, from its great general importance, merits publication in a way more generally accessible here. To incorporate those valuable judgments in this opinion is impossible, and they are too connected in thought to shorten. But it may be said that in one of them (that of Lord

(1) (1871) L.R. 7 Ex., 26, at p. 34.
(2) (1851) 6 Ex., 424.
(3) (1911) A.C., 394, at p. 400.
(4) (1863) 3 B. & S., 751, at p. 755.
(5) (1875) L.R. 10 Q.B., 564.
(6) (1878) 3 App. Cas., 831, at pp. 837-838.
(7) (1915) S.C. (H.L.), 20.

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Atkinson) the case of *Hunt* v. *Silk* (1) is cited, and Lord *Ellenborough's* judgment is quoted for the following passage:—"Now where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account. This objection cannot be gotten rid of: the parties cannot be put *in statu quo*." That passage is singularly apposite to the case in hand. In the judgments both of Lord *Atkinson* and Lord *Shaw*, the learned Lords treat *Adam* v. *Newbigging* (2) as a strong authority against the proposition that where the parties cannot be restored to their position in fact, rescission may be decreed simply upon the terms of the payment of a sum of money by the party seeking rescission to the other party or *vice versâ*. The business, said Lord *Atkinson*, speaking of that case, deteriorated "from its own inherent vice, not from anything done or omitted by the respondent" before he discovered the misrepresentation. Lord *Shaw* agreed with what Lord *Atkinson* said as to *Adam* v. *Newbigging*. Lord *Parmoor* says (3):—"The remedy of reduction is not in general available unless the party seeking reduction is able to place the party against whom it is sought in substantially the same position as he occupied before the contract. In substance there must be *restitutio in integrum*." Those judgments were delivered in a case which differed from the present in two relevant respects. First, all the work—a line of railway—had been done, and could not be undone; and next, the rescission was by order of the Court. The first difference does not affect the principle that *restitutio* must be substantially *in integrum*. Lord *Loreburn* says (4):—"I do not enter upon the question how far this was an essential error which would have justified rescission, or how far it was a cause of action in itself, because what I have said is enough to dispose of the point. These contractors continued their contract when they knew the statements

(1) (1804) 5 East, 449, at p. 452.
(2) (1888) 13 App. Cas., 308.
(3) (1915) S.C. (H.L.), at p. 43.
(4) (1915) S.C. (H.L.), at p. 24.

that had induced them to contract, and the reality which they found in working on the spot." The second difference tells heavily against the appellants, because, where a party rescinds of his own motion, he makes no equitable adjustments; if effectual, his rescission is complete and unconditional. Whatever rights exist after that are strict legal rights. The necessity for *restitutio in integrum* is, therefore, in such a case a more rigid requirement.

In this case the 30th of April, which was the fixed day for completion, came and went, the parties remained in possession, used the properties, took the benefits of their occupation, the leases daily diminishing, and, on the authorities referred to, restitution and therefore rescission, became impossible. Nor has there been any offer to account for profits.

The result, so far, is that there was no rescission by the appellants.

4. *Rescission by respondent.*—It is said then that the respondent rescinded in either of two ways. First, that by notice dated 24th November 1921 he validly terminated the agreement, because by clause 21 it is provided that the full extent of his liability for non-performance of the agreement was fixed at £2,000 compensation and this he offered by the notice to pay. Elementary principles are opposed to such a contention. An arbitrary refusal to perform a contract is unlawful, and cannot be made lawful by offering damages in lieu of performance. In *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (1) Lord *Lindley* says :—" To break a contract is an unlawful act, or, in the language of Lord *Watson* in *Allen* v. *Flood* (2), 'a breach of contract is in itself a legal wrong.' The form of action for such a wrong is quite immaterial in considering the general question of the legality or illegality of a breach of contract. Any party to a contract can break it if he chooses; but in point of law he is not entitled to break it even on offering to pay damages. If he wants to entitle himself to do that he must stipulate for an option to that effect." If not arbitrary, a rescission unconsented to must be justified by some circumstance. In *In re Atkinson and Horsell's Contract* (3)

(1) (1905) A.C., 239, at p. 253. (2) (1898) A.C., 1, at p. 96.
(3) (1912) 2 Ch., at p. 12.

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Moulton L.J. says:—"Rescission is a volitional act of the party who is not guilty of the breach of the contract, taking advantage of a breach that is complete on the part of the other party to the contract *to exercise the right which the law gives him* of terminating the contract." Needless to say, the Lord Justice was not thinking of rescission under power of an option to that effect. Now, what was the respondent's "right" here? There was no default in performance on the appellants' part, there was no express provision in the contract permitting the respondent to rescind, and the mere fact that a limit of £2,000 was fixed, if it was fixed in that sense, cannot be construed as impliedly sanctioning an arbitrary refusal to proceed. In so referring to the limit of £2,000, we are by no means expressing any opinion that that is the limit of damages for breach of the whole contract by refusal to proceed. We neither express nor suggest any opinion on that subject one way or the other. It does not enter into our consideration in this appeal. The notice of 24th November 1921 as a unilateral attempt to rescind fails. The second way it is contended the respondent rescinded was by giving that notice four days before the ejectment action was withdrawn and while the action for damages continued. The synchronous attempts to rescind, so it is said, establish a consensus which in law amounts to an agreement to rescind. We cannot accept that view as correct. At best, the appellants' attempt to rescind was not limited as to damages, while the respondent's was. But the better answer is that the respondent's attempt was not intended as an acceptance of what is treated as the appellants' offer, but which was really an attempted rescission on the ground of respondent's prior and partial breach of contract, while the respondent's notice was obviously not an admission of a prior breach, but was given as the creation of a final and total breach for which £2,000 was offered as agreed compensation. The two attempts were as independent as an offer and a counter-offer on other terms.

We therefore hold that there was no rescission by the respondent. The contract, therefore, at the time the suit was instituted stood and still stands in full force.

5. *Abandonment of equitable remedy.*—The last ground on which the learned primary Judge proceeded was that, even though the

contract remained unterminated, yet, upon the authority of two cases (*Williamson* v. *Bors* (1) and *Blackett* v. *Bates* (2)), the appellants had elected to take another remedy, and that was in itself a bar to specific performance. Again some very radical considerations present themselves.

To take *Blackett* v. *Bates* (2) first:—To begin with, the case was not decided on the grounds suggested. Lord *Cranworth* L.C. expressly said so. It was decided on the ground that specific performance is never granted in cases of that nature. There was, however, a dictum added by the Lord Chancellor that he was "disposed to think" that conduct would have barred the title to relief. That conduct included delay, it included a denial of the validity of the agreement, it included obtaining a rule *nisi* to set aside the award, an argument on its return and an adverse decision discharging the rule. And still, as is observed, the Lord Chancellor did not give any positive decision on the point or enunciate any rigid rule of practice. In *Fry on Specific Performance* (6th ed., p. 726, sec. 1598) the case is quoted as making it "doubtful" in such cases whether a plaintiff can succeed. That observation appears as early as the second edition. In *Williamson* v. *Bors* (1) it was held that the plaintiff had disentitled himself to specific performance on grounds which are very fully set out at pp. 308-309 of the report. One sentence from those pages has been cited to us as laying down a strict rule. It is as follows: "Where a party seeks a remedy at law which is absolutely inconsistent with any idea of specific performance, and does not seek nor intimate any intention of seeking the equitable relief until he has failed in the inconsistent relief which he sought at law, he, in my opinion, comes into equity too late." It is said that that is an authority for refusing the relief in the present case. Even if the passage quoted could be divorced from the rest of the judgment, it contains an element not present here. There the plaintiff had been met with a plea of the *Statute of Frauds*, which we assume was recognized as insuperable. Then he retired beaten, on the ground that there was no enforceable contract. He had elected to proceed at law on the contract itself, and on the basis that it was not to be performed,

(1) (1900) 21 N.S.W.L.R. (Eq.), 302. (2) (1865) L.R. 1 Ch., 117.

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instead of proceeding in equity, not upon the contract which was barred by the statute, but upon the equities arising out of part performance. There is little analogy between that case and the present. In this case there was no fatal plea, and no retirement as defeated on the issue of an enforceable contract. Further, when the judgment as a whole comes to be examined, it is seen that the proceedings at law were only portion of the conduct relied on by the learned Judge (*Walker* J.) for displacing the right to relief. There had been a sale by the defendant Wood to the defendant Bors after the sale to the plaintiff, and the plaintiff, after learning of that, took no steps to intervene, but, as the learned Judge says, that was a *right* he deliberately elected to forego, and sued for damages instead. It is plain he had created equities in third persons by his laches, of which his action at law was only part. Consequently, neither of these cases can, in our opinion, be regarded as laying down any strict rule disentitling a plaintiff seeking specific performance merely because he has commenced an inconsistent action at law.

There is no such rigid rule of equity practice. Where an action at law validly operates as an act of disaffirmance of a contract, so as to terminate it from that time and leave only the obligation to pay damages, specific performance is, of course, impossible; but for a totally different reason. Where, however, the action does not so operate, but leaves the contract still existing, a Court of equity must in view of the whole circumstances determine in its discretion how justice will best be served. If the action and the suit are for the same thing, that is, in respect of the same thing, the Court of equity will generally compel the plaintiff to elect which remedy he will pursue. This is shown by many cases. In *Jones* v. *Earl of Strafford* (1) the Lord Chancellor and the Chief Justice overruled a plea of action depending in another Court for the same thing, but ordered the plaintiff to make election in what Court he would sue. The note to that case shows very distinctly the nature and reason of the order to elect. The reason is that " the defendant is doubly vexed "; the nature is to compel the plaintiff to choose one of two Courts, and in default of election the bill to be dismissed. If he elects to proceed at law, the bill is dismissed, and if at equity, an injunction

(1) (1730) 3 P. Wms., 79, at p. 90.

issues against proceeding at law. But *Countess of Plymouth* v. *Bladon* (1) shows that dismission upon election is not peremptory; it is like a nonsuit at law. If the plaintiff fails at law—as she did in that case after election—that is not necessarily a bar to a new bill. She brought a new bill, and the defendant, who pleaded the former action at law for the same cause in which he succeeded on a certain plea, was nevertheless ordered to answer. *Mortimore* v. *Soares* (2) was a case in the Queen's Bench in 1859. An action for freight was brought in 1857, and a bill filed for the same freight in 1858. The Master of the Rolls simply made the order for election, and the plaintiff elected to proceed in the Rolls Court. The defendant at law took steps to put an end to the action, and, during the argument, *Crompton* J. reaffirmed the principle of double vexation, and said the defendant had a right to get rid of the action at law.

It will be seen that there is no suggestion of any rule of practice or law that, simply because a party has instituted an action at law—which was the first proceeding in at least two of the cases mentioned—relief ought to be refused in equity. The jurisdiction is exercisable in equity because the Court *has* possession of the cause, and not because it *first* had possession. The principle was extended to *Phelps* v. *Prothero* (3) by *Turner* L.J., who held that a plaintiff who has legal rights and comes to a Court of equity for its aid is bound to put his legal rights under the control of the Court, and could not proceed at law *otherwise than by leave of the Court.*

But all this shows that equity in such matters regards not technicality but justice. The Court does not refuse its aid as a penalty for seeking redress elsewhere, but insists, when its jurisdiction is invoked, in preventing either party from being unnecessarily harassed by multiplicity of proceedings.

Fennings v. *Humphery* (4) and *Anglo-Danubian Co.* v. *Rogerson* (5) show what is meant by suing for the same thing. In the first case a bill for specific performance was filed in 1839, and in 1841 an action was commenced for damages for breaches of the agreement. The defendant obtained the common order to elect and

(1) (1687) 2 Vern., 32.
(2) (1859) 5 Jur. (N.S.), 574.
(3) (1855) 7 DeG. M. & G., 722.
(4) (1841) 4 Beav., 1.
(5) (1867) L.R. 4 Eq., 3.

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served it on the plaintiff, who nevertheless proceeded at law. The Master of the Rolls held that the order was wrongly made because, the suit being for specific performance of the agreement so far as it could be specifically performed, and the action for damages in respect of matters that could not be the subject of specific performance, the proceedings were not for the same matters, and the order was rightly made. But, said the Master of the Rolls (1), if both had been in respect of the same part of the agreement, then the bill would have been for performance, and the action for compensation in lieu of performance and inconsistent. Though the remedies claimed were different, the proceedings would have been for the same thing, namely, the same breach of the same agreements. The second case went on the same lines.

We may refer to one case more, which practically completes the situation. In *Lord Tredegar* v. *Windus* (2) the plaintiff had filed a bill which was dismissed, and then he sued at law for the same thing. As this was after decree, the defendant, in order to restrain the action, had to file a bill for the purpose. *Hall* V.C. granted the injunction, resting on *Phelps* v. *Prothero* (3), and adding the further step (at p. 615) that after decree it was right "in a *case like the present*, to put the parties in the same situation as they would have been in had an order to elect been made, and the election had been to proceed in equity."

It is quite clear from those cases, that a plaintiff who had commenced an action, whether before or after the filing of the bill, could have elected to do exactly what the plaintiffs in this case did, namely, discontinue the action before termination or, at all events, before some plea that was an inevitable bar. And in such case equity would never have refused relief merely because the plaintiff had resorted to law. *Williamson* v. *Bors* (4) ought, we think, to be read as in accordance with the principles and precedents we have quoted. If that were impossible, it could not be supported.

The true position is that, having a valid contract, unrescinded, and of a nature that equity ordinarily decrees to be specifically

(1) (1841) 4 Beav., at p. 6.
(2) (1875) L.R. 19 Eq., 607.
(3) (1855) 7 DeG. M. & G., 722.
(4) (1900) 21 N.S.W.L.R. (Eq.), 302.

performed, the *primâ facie* right of the appellants is to have it so decreed.

It is well established that the Court cannot judicially exercise its discretion by refusing the remedy in a case of the appropriate class, unless some sound and recognized reason is shown (see per Sir *W. Grant* M.R. in *Hall* v. *Warren* (1)). In *Hexter* v. *Pearce* (2) *Farwell* J. states the position very clearly. He reaffirmed it in *Rudd* v. *Lascelles* (3). In *Stewart* v. *Kennedy* (4) Lord *Watson* says: "Specific performance is not a matter of legal right, but a purely equitable remedy, *which the Court can withhold when there are sufficient reasons of conscience or expediency against it.*" In *Davis* v. *Maung Shwe Go* (5) the Privy Council were urged on the ground of discretion not to affirm a decree for specific performance having regard to the onerous nature of the bargain. But their Lordships held that in the absence of fraud or misrepresentation or any unconscionable feature, or proof of improper advantage having been taken, they could not accede to the argument. Nothing here said is intended to limit the power of the Court under sec. 9 of the *Equity Act* 1901. It was contended here that the appellants, by their conduct in demanding restoration and suing for possession and damages, had proved they were not at all times ready and willing to perform their part of the bargain, and that that established a bar to their success. There is no such rule even at law. A party plaintiff must be ready and willing at the proper time to perform his part of the contract (*Cohen & Co.* v. *Ockerby & Co.* (6)). But he may, before the proper time arrives, form an intention to break his contract. If he declares that intention, the opposite party may accept that declaration and terminate their relations, except for suing for damages; or the opposite party may ignore the declaration, and in that case the contract remains intact for the benefit of both parties just as if the declaration had never been made. "In that case," says *Cockburn* C.J. in *Frost* v. *Knight* (7), "*he keeps the contract alive for the benefit of the other party as well as his own.*" The interim intention to break the contract may prove to have been

(1) (1804) 9 Ves., 605, at p. 608.
(2) (1900) 1 Ch., 341, at p. 346.
(3) (1900) 1 Ch., 815, at p. 817.
(4) (1890) 15 App. Cas., 75, at p. 102.
(5) (1911) L.R. 38 Ind. App., 155.
(6) (1917) 24 C.L.R., 288.
(7) (1872) L.R. 7 Ex., 111, at p. 112.

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what Lord *Campbell* in *Hochster* v. *De La Tour* (1) says—"a passing intention . . . which he may repent of,"—and he may at the proper time duly perform the contract and enforce it. Further, a plaintiff in equity may even have actually broken his contract in the letter and yet succeed, if the substance remains. Since the classical judgment in *Lennon* v. *Napper* (2) this can never have been doubted. The contention advanced is untenable.

But the conduct of the appellants in instituting their actions is not without effect. While not a bar to the right as ending the contract, nor a bar to the remedy as necessarily working an abandonment of equitable relief, it is still an important element in the Court's exercise of its discretion on the ground of laches. The doctrine stated by Lord *Alvanley* in *Milward* v. *Earl Thanet* (3), that a plaintiff must have been "ready, desirous, prompt, and eager," was reaffirmed in *Mills* v. *Haywood* (4) by *Cotton* L.J., for the Court; and is well established. That doctrine is based on laches, and on the recognition by the Court of the injustice to the defendant of keeping a contract he cannot or does not perform hanging over him without some definite step taken by the plaintiff to enforce it either specifically or by way of damages. The doctrine of laches is not measured by any arbitrary or technical standard. The Court weighs the circumstances, and, according as the balance inclines to the justice or injustice of granting the remedy, determines accordingly. That is the view of the Privy Council in *Lindsay Petroleum Co.* v. *Hurd* (5), and of Lord *Penzance* and Lord *Blackburn* in *Erlanger* v. *New Sombrero Phosphate Co.* (6).

On which side does the balance incline here? Without doubt both parties have adopted inconsistent attitudes. The appellants have displayed much more frequent changes than the respondent. In the absence of rectification (and none has been suggested in these proceedings) the appellants were legally in the right as to the effect of the contract, and they were always desirous and eager to have the contract carried out as agreed. That was what they insisted

(1) (1853) 2 El. & Bl., 678, at p. 689.
(2) (1802) 2 Sch. & Lef., 682, at p. 684.
(3) (1801) 5 Ves., 720 (n.).
(4) (1877) 6 Ch. D., 196, at p. 202.
(5) (1874) L.R. 5 P.C., 221, at pp. 239-241.
(6) (1878) 3 App. Cas., 1218, at pp. 1230, 1279.

on; and it was because the respondent failed to do so, that they took whatever course they did. But they vacillated in their course of action, they delayed to enforce their claim, they continued to take the advantages of wasting property while complaining. And, as a very important consideration, they left the respondent with a bargain hanging over him, and made threats of diverse and inconsistent remedies, so that it may seriously have hampered him in the arrangements for carrying on whatever theatre or theatres were eventually to be left to him. Such arrangements had notoriously to be made well in advance. In *Crofton* v. *Ormsby* (1) Lord *Redesdale* says: "In many other cases . . . Courts of equity ought to refuse specific performance, where the delay would be very injurious to the party sought to be charged." In *Alley* v. *Deschamps* (2) Lord *Erskine* L.C. makes it quite clear that the Court of Chancery "ought not to interfere, unless it is clear, that the party will substantially have that, for which he contracted." It is very far from clear that the respondent, who, while the ejectment action was still pending and the damages action was maintained, and in view of the vacillations of the appellants, relinquished the two theatres of which he had been given possession, could have had substantially that for which he had contracted. He had contracted for property with a certain business stability of occupation that would have enabled him to make theatrical engagements with reference to those buildings. Acting upon the principles mentioned, we think justice inclines very distinctly in favour of refusing the remedy as a sound exercise of the discretionary power of the Court. We also think the parties should as to damages be left to whatever remedy they have at law. Both parties are to blame for this. The appellants' hovering tactics, the respondent's initial undertaking to give the whole of the Prince of Wales Theatre and his subsequent indefinite attitude, leave them both in fault.

The order of this Court should, in our opinion, be: (1) That in the decree, after the words "the same is hereby dismissed," there be inserted the words "without prejudice to any proceedings at law that the plaintiff may be advised to bring," and in lieu of the order as to costs there be substituted the words "and that the

(1) (1806) 2 Sch. & Lef., 583, at p. 604. (2) (1806) 13 Ves., 225, at p. 228.

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FULLERS' THEATRES LTD. v. MUSGROVE.

parties do bear their own respective costs"; and (2) that subject as aforesaid this appeal be dismissed without costs.

Decree varied as above mentioned. Subject to such variation appeal dismissed.

Solicitors for the appellants, *Sly & Russell.*

Solicitors for the respondent, *Ernest Cohen & Linton.*

B. L.

Appl *Southern Equities Corp v West Aust Government Holdings Ltd* (1993) 10 WAR 1

[HIGH COURT OF AUSTRALIA.]

SMITH'S WEEKLY PUBLISHING COMPANY LIMITED . . . . . DEFENDANT, } APPELLANT;

AND

THE SUNDAY TIMES NEWSPAPER COMPANY LIMITED . . . . . PLAINTIFF, } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1923.

SYDNEY, *Mar.* 27, 28; *April* 24.

Knox C.J., Isaacs and Rich JJ.

Practice—Discovery—Common law action—Inspection of document—Claim for privilege—Affidavit of discovery—Common Law Procedure Act 1899 (*N.S.W.*) (*No.* 21 *of* 1899), *secs.* 102, 103.*

In an action for libel brought in the Supreme Court of New South Wales the defendant obtained an order for discovery, and in the affidavit of discovery it was sworn on behalf of the plaintiff that a certain document in its possession

* Sec. 102 of the *Common Law Procedure Act* 1899 (N.S.W.) provides that "(1) Upon the application of either party to any action or other proceeding, upon an affidavit by such party or his attorney of his belief that any document to the production of which he is entitled for the purpose of discovery or otherwise is in the possession or power of the opposite party, the Court or a Judge may order that (*a*) the party against whom such application is made; or (*b*) if such party is a body corporate, some officer to be named of such body corporate, shall answer on affidavit stating what documents he or they has or have in his or their possession or power relating to the matters in dispute, or what he knows as to the custody such documents or any of them are in, and whether he or they objects or object to the production