[HIGH COURT OF AUSTRALIA.]

FURPHY AND OTHERS . . . . . APPELLANTS;
DEFENDANTS,

AND

NIXON AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Aug.* 3, 4, 5, 28.

Knox C.J., Isaacs and Higgins JJ.

Vendor and Purchaser—Originating summons—Jurisdiction of Supreme Court of New South Wales—Order for repayment of money paid involuntarily—Involuntary payment—Money paid under unjustifiable threat—Equity Act 1901 (*N.S.W.*) (*No.* 24 *of* 1901), *Fourth Schedule, r.* 6.

Held, (1) that the Supreme Court of New South Wales in its equitable jurisdiction has, on a vendor and purchaser summons under rule 6 of the Fourth Schedule to the *Equity Act* 1901 (N.S.W.), jurisdiction to order repayment of a sum of money involuntarily paid by a purchaser in excess of the money due for purchase-money and interest thereon; and (2) that a payment by a purchaser in excess of the money so due made under an unjustifiable threat by the vendor that he will rescind the contract is an involuntary payment which will justify an order for repayment.

The appellants agreed to sell to the respondents certain conditionally purchased land in respect of which all the conditions imposed by the Crown Lands Acts had been fulfilled, except payment of the balance of purchase-money due to the Crown, which balance was payable by instalments, consisting partly of principal and partly of interest, extending over a number of years. By the contract the price payable for the land was on a freehold basis, and was to be paid by instalments of 5 per cent on the signing of the contract, 5 per cent on a certain day in each of the three following years, and the balance on that day in the fourth year. The respondents agreed to pay interest, on so much of the purchase-money as for the time being remained unpaid, at a specified

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rate and at a higher rate on overdue purchase-money. Under the contract the land was to be transferred to the respondents before payment of the full purchase-money, and a mortgage was to be given by them to secure payment of the balance outstanding. The respondents were given the right to elect to take a transfer of the land as conditionally purchased land, unless the appellants should have been compelled by their vendor to make the land freehold or the land should become freehold before the respondents made their election. It was provided that in the event of this right being exercised the appellants should allow the amount owing to the Crown to make the land freehold together with certain charges to be deducted forthwith from the purchase-money. The respondents having exercised their right of election to take the land as conditionally purchased land,

Held, by *Knox* C.J. and *Higgins* J. (*Isaacs* J. dissenting), that, on the construction of the contract, for the purpose of calculating the interest payable on unpaid purchase-money after the election had been made, the purchase-money should be taken to be not the purchase price on a freehold basis but that price less the amount owing to the Crown at the date when the election was made.

Decision of the Supreme Court of New South Wales (*Long Innes* J.): *Nixon* v. *Furphy*, (1925) 25 S.R. (N.S.W.) 151, affirmed.

APPEAL from the Supreme Court of New South Wales.

An agreement was, on 1st July 1913, made between George Vaughan Furphy, Joseph Byrne, Arthur Willoughby Aston, Ernest C. Hawkins, John McLaughlin, Joseph William Muntz and Thomas Newell Muntz (therein called the vendors) of the one part, and William Nixon and William John Nixon (therein called the purchasers) of the other part, the material provisions of which were as follows:—

"1. The vendors sell to the purchasers and the purchasers purchase from the vendors all those 1,920 acres or thereabouts of conditionally purchased land being" &c.

"2. The price is on the basis of freehold £4 per acre for 1,050 acres and £4 10s. per acre for 869 acres 2 roods and the purchasers have already paid to the vendors in part payment of the purchase-money a sum equal to five pounds per cent of the purchase-money and will give promissory notes due 1st February 1914 for a further 5 per cent including interest on such payment at rate of 4½ per cent per annum and shall pay the balance of the said purchase-money as follows: 5 per cent 1st day of February 1915; 5 per cent 1st day of February 1916; balance purchase-money 1st day of February

1917. But the purchasers shall be at liberty on any half-yearly day fixed for payment of interest and upon giving three months' notice of their intentions so to do to pay the vendors any part of the principal money for the time being owing not being less at any one time than £200 or a multiple thereof.

"3. The purchasers shall pay interest on so much of the purchase-money as shall for the time being remain unpaid at the rate of £4 10s. per cent per annum computed from 1st August 1913, payable half-yearly but the first payment to be made on 1st February 1914.

"4. The purchasers shall give a mortgage to the vendors or to such person or persons corporate or incorporate as the vendors may direct over the lands sold to secure the balance of the purchase-money with interest thereon at the rate and payable at the time aforesaid such mortgage to be prepared and completed by the mortgagees' solicitors at the expense of the purchasers and to be in such form and to contain such covenants powers provisions and conditions as the mortgagees' solicitors consider necessary."

"7. The purchasers shall be entitled to possession of the lands purchased by them and to the receipt of the rents and profits thereof as from 1st August 1913.

"8. At the time of or as soon as practicable after payment of the deposit and acceptance of the title the vendors will execute a transfer of the property sold to the purchasers but subject nevertheless to the purchasers executing and handing over to the vendors or to such person or persons corporate or incorporate as the vendors may direct a mortgage over the lands sold in terms of condition 4 hereof. The purchasers shall at their own expense prepare the necessary transfer and submit the same to the vendors for execution and they shall also bear and pay all stamp duty and other fees in connection with the registration and completion of the same."

"17. Upon payment of the full amount of the purchase-money and interest the vendors will at the purchasers' expense sign and execute or procure to be signed and executed all necessary documents for transferring and making over to the purchasers the property sold if such transfer shall not have been already made."

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"19. The said lands are sold as freehold but the purchasers may elect to take their transfer of same as conditional purchases but such right of election shall not arise if the vendors shall have been compelled by the vendor to them to make such lands freehold or they shall by any other means have become freehold. If transferred as conditional purchases the vendors will allow the amount owing to the Crown to make said land freehold together with deed fee stamp duty and assurance fee to the Crown and such amounts shall be deducted forthwith from the purchase-money."

"21. In the event of the said purchasers being unable to pay the whole of the balance of the purchase-money on 1st February 1917, then the said vendors shall allow five pounds per centum of such balance of purchase-money to remain on second mortgage until 1st February 1918, and interest to be at the rate of four pounds ten shillings per centum per annum."

"23. From the date of possession and on the amount owing to the Crown as aforesaid being ascertained the purchasers shall pay all further instalments and interest due to the Crown in respect of said land and produce receipts to vendors when called upon so to do."

Disputes having arisen between the vendors and the purchasers, an originating summons was taken out by the purchasers in the Supreme Court in its equitable jurisdiction for the determination of the following questions :—

(1) Whether upon the true construction of the said contract and in the events which have happened the plaintiffs are chargeable in favour of the defendants for any and what period with interest at the rate of (1) $2\frac{1}{2}$ per cent per annum, (2) $4\frac{1}{2}$ per cent per annum, (3) 6 per cent per annum, (4) 7 per cent per annum, or any other and what rate, in respect of (a) the whole or any and what part of the sum ascertained at £4 per acre for 1,050 acres and £4 10s. per acre for 869 acres 2 roods, being the total area of the lands comprised in the said contract; (b) so much of such sum as is equivalent to the amount of the Crown balances in respect of the said lands at the date of the

said contract becoming or to become due and payable thereafter; (c) so much of such Crown balances as is equivalent to the amount paid to and received by the Crown in respect thereof since the date of the said contract.

The plaintiffs also asked by the summons for the following orders: (1) that it may be referred to the Master in Equity to inquire what was the amount of the balance properly payable to the defendants by the plaintiffs for principal and interest under the said contract; (2) that the defendants do pay to the plaintiffs the amount (if any) which on taking the said accounts shall be found to have been overpaid by the plaintiffs to the defendants; (3) that all necessary and proper orders and declarations may be made, directions given, inquiries had and accounts taken; (4) that the defendants may be ordered to pay to the plaintiffs the costs of the plaintiffs of this summons: and for such further or other order as the nature of the case may require.

In or about June 1924 the defendants, when requested to transfer the subject lands to or according to the directions of the plaintiffs, refused to do so unless the plaintiffs made a balance payment of £989 14s. 6d., which included an amount of interest calculated on the assumption that the defendants' view as to the sum on which interest was payable was correct. A correspondence then took place between the parties, and on 22nd August 1924 the defendants in effect threatened that they would take the necessary steps to cancel all and any interest of the plaintiffs under the contract of sale unless that amount were paid within twenty days. On 25th August 1924 the plaintiffs' solicitors wrote to the defendants' solicitors informing them that the plaintiffs' solicitors were taking steps to issue an originating summons for the purpose of obtaining the decision of the Court upon the matters in issue, and asked for a definite assurance that the matter would be allowed to remain in abeyance until such decision was obtained, and stated that, failing such an assurance, an application would be made for an injunction. On 28th August 1924 the defendants' solicitors reiterated the threat that the defendants would cancel the contract unless settlement were effected as previously demanded. The originating

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summons was taken out on 30th August 1924 and an appearance to it was entered on 17th September 1924. On 9th September 1924 the plaintiffs' solicitors wrote to the defendants' solicitors a formal letter of protest, which concluded as follows: "As, however, the vendors have seen fit to take this extreme step of threatening to rescind the contract and refuse to accept less than £989 14s. 6d. for principal and interest before transferring the balance of the lands comprised in the contract, in order to avoid such purported rescission and to enable our clients to settle with their sub-purchaser, Mr. Eli James Ellis, and to transfer to him the lands purchased by him, our clients are compelled to and now pay the sum of £989 14s. 6d. demanded by the vendors as due to them under the said contract under protest and without prejudice to the legal proceedings above mentioned and without in any way admitting that such amount is due; and we formally notify you that on the hearing of the summons our clients will ask for an order that the vendors repay to our clients all amounts paid in excess of what is due to your clients under the contracts aforesaid." This letter was enclosed in a covering letter in these terms:—"We enclose you herewith formal notice and copy thereof and shall be glad if you will sign copy and return to us in due course. The money is being paid under protest to the Equity Trustees Co. in accordance with vendors' authority."

On 11th September the plaintiffs' representative, Mr. Hoskin, waited on Mr. Lewis, an accountant employed by the Equity Trustees Executors and Agency Co. Ltd., which company had previously received instructions from the defendants to represent them at the settlement, and showed him copies of the two letters of 9th September above mentioned, and also tendered to him bank drafts for the sum of £989 14s. 6d. and interest to that date, and stated that the money was being paid under protest. Mr. Lewis, having read the letters and consulted with the manager of the company, informed Mr. Hoskin that the company was merely an agent in the matter and would not accept any money under protest. On the following day Mr. Hoskin again attended at the office of the company and handed the drafts in question to Mr. Lewis without making any further protest to him, whereupon Mr. Lewis accepted

the same and caused a receipt therefor to be given by the company's cashier to Mr. Hoskin; but, on the same occasion and practically simultaneously with the handing of the drafts to Mr. Lewis, Mr. Hoskin handed duplicates of the two letters of 9th September 1924 to the inquiry clerk of the company and requested him to hand them to the manager of the company, and saw the clerk take them to the manager's room. The lands the subject of the contract were thereupon transferred by the defendants to the plaintiffs.

Long Innes J., who heard the summons, made a decretal order, the material portion of which was as follows:—"This Court doth declare: (1) that the plaintiffs were only rightly chargeable with interest from 1st August 1913 to 12th September 1924 on the sum of £5,851 or on so much thereof as from time to time remains unpaid and on such further sums as were paid by the defendants to the Crown in respect of the subject lands from the respective dates of such payments until the dates, if any, when such payments were recouped to the defendants by or on behalf of the plaintiffs; (2) that the plaintiffs were not otherwise chargeable with interest on interest; (3) that the rates at which interest should be computed are as follows—4½ per centum per annum from 1st August 1913 to 1st February 1917 both dates inclusive, 6 per centum per annum from 2nd February 1917 to 1st May 1920 both dates inclusive, 7 per centum per annum from 2nd May 1920 to 12th September 1924 both dates inclusive. And this Court doth further order that it be referred to the Master in Equity to inquire and certify what was the amount properly payable on completion by the plaintiffs to the defendants and the amount, if any, by which the defendants have been overpaid. And this Court doth reserve the further consideration of this suit including the question whether the plaintiffs are entitled to be repaid any sum in excess of the sum of £989 14s. 6d. And doth also reserve all questions of costs And all parties are to be at liberty to apply as they may be advised":—*Nixon* v. *Furphy* (1).

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

The other material facts are stated in the judgments hereunder.

(1) (1925) 25 S.R. (N.S.W.) 151.

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Maughan K.C. (with him *Dudley Williams*), for the appellants. The payment of the £989 14s. 6d. was a voluntary payment. The threat to take steps to cancel the interest of the respondents under the contract—which must have referred to legal proceedings of some kind—had not the effect of making the payment involuntary so as to entitle the respondents to recover it (see *T. & J. Brocklebank Ltd.* v. *The King* (1); *Moore* v. *Fulham Vestry* (2)).

[ISAACS J. referred to *Clydesdale Bank Ltd.* v. *Schröder & Co.* (3).

[HIGGINS J. referred to *Wilson's Music and General Printing Co.* v. *Finsbury Council* (4).]

Assuming that the payment was involuntary, the only right the respondents had was to bring a common law action for recovery of the money, and the Supreme Court in its equitable jurisdiction had no jurisdiction to order repayment. The contract had been completed by transfer of the land and payment of the money at the time the summons came on for hearing, and the Court had no further jurisdiction in the matter. [Counsel referred to *Hawdon* v. *Khan* (5); *Equity Act* 1901 (N.S.W.), secs. 8, 22 (2); *Administration of Justice Act* 1924 (N.S.W.), sec. 18; *Tooth & Co.* v. *Coombes* (6).]

Teece K.C. (with him *Tuthill*), for the respondents. There being matter which gave the Court jurisdiction to entertain the summons, the Court had jurisdiction to order repayment of the money which was paid involuntarily.

Maughan K.C., in reply.

Cur. adv. vult.

Aug. 28.

The following written judgments were delivered :—

KNOX C.J. A dispute having arisen between the appellants and the respondents as to the amount payable by the respondents to the appellants to complete the purchase of certain conditionally purchased lands which were the subject of a contract of sale between

(1) (1924) 1 K.B. 647, at p. 652.
(2) (1895) 1 Q.B. 399.
(3) (1913) 2 K.B. 1, at p. 5
(4) (1908) 1 K.B. 563.
(5) (1920) 37 N.S.W.W.N. 131.
(6) (1925) 42 N.S.W.W.N. 93.

them, the respondents on 30th August 1924 took out an originating summons asking, in effect, for the determination of the amount properly payable under the contract and for an order that upon payment of such amount the appellants should transfer the lands in question to the respondents. The summons was served on 1st September, the time limited for appearance being sixteen days after service. On 12th September, before the time for appearance had expired and before any appearance had been entered, the respondents paid to the appellants the sum demanded by them under threat of cancellation of the contract in the event of non-payment on or before that day. On 17th September the appellants entered an appearance to the summons, which was subsequently amended by the insertion of a claim for repayment of the amount which should be found to have been overpaid by the respondents to the appellants. The alleged overpayments consisted of (a) a sum of £32 which the respondents claimed as an allowance in respect of certain land excluded from the transfer, (b) a sum representing interest computed on interest, and (c) a sum representing interest on an amount equal to the amount of certain balances due to the Crown on the land transferred. It was admitted that the respondents were entitled to credit for the sum of £32 mentioned in (a) and that the appellants were not entitled under the contract to charge interest on interest, but the appellants contested the right of the respondents to reopen the transaction of 12th September or to recover any part of the money paid on that day, on the ground that the payment was a voluntary payment made in order to close the transaction. The appellants also disputed the construction put on the contract by the respondents. On the hearing of the summons *Long Innes* J. held (1) that the payment made on 12th September was not a voluntary payment, (2) that the Court of Equity had jurisdiction to grant the relief claimed in the amended summons, and (3) that on the true construction of the contract of sale the contention of the respondents as to the amount on which interest should be computed was correct, and made an order which, so far as is material, is as follows :—[The portion of the order which is above quoted was set out]. From this order the present appeal is brought.

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In my opinion, the learned Judge was clearly right in deciding that the payment in question was not voluntary, and that, sitting as Judge in Equity, he had jurisdiction to grant the relief claimed in the amended summons, and I find it unnecessary to add anything to the reasons he gave in support of his conclusions on those questions.

It being admitted that, in making up the amount payable by the respondents on 12th September, the respondents should have been, but were not, allowed the sum of £32 mentioned above and that they were wrongly charged with interest on interest, it is clear that there must be an inquiry to determine the amount overpaid by them; but there remains for consideration the question whether that part of the order which fixes the amount on which interest was rightly chargeable is correct. The answer to this question depends on the construction of the contract between the parties.

The contract was for the sale of certain conditionally purchased land in respect of which all conditions imposed by the Crown Lands Acts had been fulfilled except payment of the balance of purchase-money due to the Crown. This balance was payable by instalments consisting partly of principal and partly of interest extending over a number of years. The price agreed to be paid by the purchasers amounted in all to £8,112 15s. on a freehold basis, that is to say, on the basis of the land being transferred to them as freehold. In other words, the purchasers were in that event to pay £8,112 15s., the vendors having paid the balance due to the Crown, but, if the liability to pay the balances due to the Crown fell on the purchasers, the price payable was to be reduced by a corresponding amount. Payment of the price was to be made by instalments of 5 per cent on signing the contract, 5 per cent. on 1st February in each of the three years 1914, 1915 and 1916, and the balance on 1st February 1917. By clause 3 of the contract the purchasers agreed to pay interest on so much of the purchase-money as should for the time being remain unpaid at a specified rate computed from 1st August 1913, and by clause 6 they further agreed to pay interest at a higher rate on overdue purchase-money. The provisions of certain clauses of the contract—e.g., clauses 4, 8 and 17—show that the parties contemplated that the land would be transferred to the purchasers

before payment of the full purchase-money and a mortgage given by them to secure payment of the balance outstanding. By clause 19 of the contract the purchasers were given the right to elect to take a transfer of the land as conditionally purchased land unless the vendors should have been compelled by their vendor to make the land freehold or the land should have become freehold before the purchasers made their election, and it was provided that in the event of this right being exercised the vendors should allow the amount owing to the Crown to make the land freehold together with certain charges to be deducted forthwith from the purchase-money. In July 1914 the purchasers exercised their right of election to take a transfer of the land as conditionally purchased land, and proposed that the land should be transferred to them in that condition and a mortgage given to secure the balance of purchase-money in accordance with clause 8 of the contract. The vendors professed their inability to transfer the land at that time, and in fact it was not transferred until September 1924. If a transfer had been given when demanded in 1914, it is clear that under clause 19 of the contract the purchase-money of the land would have been less than £8,112 15s. by the amount then owing to the Crown; and the amount secured by the mortgage for which the contract provided would have been, not £8,112 15s., but the lesser sum. It follows that interest would have been payable under the mortgage on the lesser sum and not on £8,112 15s. The appellants now claim that, although the land was eventually transferred as conditionally purchased land and the purchase-money or price was accordingly reduced by deducting from the price on the basis of freehold the amount owing to the Crown, they are nevertheless entitled to charge the respondents with interest on the total sum of £8,112 15s. or on so much thereof as should from time to time remain unpaid. They base this claim on the agreement on the part of the purchasers to "pay interest on so much of the purchase-money as shall from time to time remain unpaid." It is argued for them that the expression purchase-money in this contract means the sum of £8,112 15s. and nothing else, and that therefore the purchasers have expressly agreed to pay the interest which was claimed and exacted. I am unable to take

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this view of the contract. It is clear that the amount of the purchase-money—i.e., the amount actually payable by the purchasers to the vendors as the price of the land—could not be determined until it was ascertained whether the land was to be transferred as freehold or as conditionally purchased land. In this state of facts I think the expression purchase-money in clause 3 of the contract should be construed as meaning the amount payable by the purchasers on the transfer to them of the land whatever that amount might turn out to be. It is, I think, clear that this must be the meaning of the expression where it occurs in clause 4 of the contract, which provides for a mortgage being given to secure the balance of the purchase-money. I think the same meaning must be given to the expression in clause 17 providing for a transfer on payment of the full amount of the purchase-money. This construction seems to me to be rendered necessary by reason of the option given to the purchasers to have a transfer of the land as conditionally purchased land. The same meaning appears to me appropriate to the expression purchase-money in clause 21. It is true that in other clauses of the contract purchase-money is used as denoting the amount computed on a freehold basis—e.g., in the latter portion of clause 19. But I do not think there is anything in the agreement which renders inadmissible the construction I have put on the expression in clause 3.

In my opinion the decision of *Long Innes* J. was right and this appeal should be dismissed.

ISAACS J. On the question of involuntary payment, I think it is plain the vendors exerted pressure under a threat which, having regard to clause 16 of the contract, was sufficient to alarm a reasonable man in the position of the purchasers and thereby to coerce his will. That the purchasers genuinely felt and yielded to the coercion is manifest, and the vendors cannot now be heard to say that their own threat was negligible and should have been disregarded.

As to the objection with regard to the general jurisdiction of equity to order repayment of the overpayment, if any, two answers suggest themselves: one is that no such order is yet made; another is that, if overpayment, recoverable at law, were shown to

be part of a larger integer in itself the subject of equity jurisdiction, it would come within sec. 8 of the *Equity Act*.

The third question is whether there was statutory equity jurisdiction under rule 6 on a vendor and purchaser summons to determine anything whatever in relation to a matter after the contract had been in fact performed by transfer and payment. It must be observed that we have not to deal with a case where a party institutes a proceeding to undo some act of his whether voluntary or involuntary. The summons was issued and served, and the jurisdiction of the Court attached, in circumstances leaving no doubt as to the jurisdiction. The Court was asked, in view of the dispute between the parties, to say on a proper construction of the contract how much was still owing. While the jurisdiction stood, the vendors, by what we must for this purpose assume to have been coercive conduct, forced the purchasers to pay the disputed sum. Having made a desert, they now call it peace. But is that permissible? In my opinion, the purchasers in the events that happened relinquished nothing except the actual possession of so much money. They made no new contract which would be voidable until avoided. They did not abandon their existing contractual rights or their right to a judicial decision on the pending summons upon the questions then asked. Mr. *Maughan* quoted a recent decision of *Harvey* C.J. in Eq. in *Tooth & Co.* v. *Coombes* (1), yet unreported, but he read a copy of the judgment. I entirely agree with that judgment, but it does not affect this case. The questions raised prior to 12th September were, as I read them, within the jurisdiction of the Equity Court. The payment on 12th September was, in the circumstances, such as to leave those questions substantially subsisting. The objections as made should therefore be overruled. But that is the conclusion I come to on the grounds advanced. There are, as will be seen, other reasons why, in my opinion, the summons should, on examination of the merits, have been dismissed as not properly determinable on such summary procedure.

The fourth point taken is a substantial one. It is: What was the true amount of the balance of purchase-money *contractually* payable

(1) Now reported, (1925) 42 N.S.W.W.N. 93.

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on 12th September ? I must candidly say that, if the contract is allowed to speak for itself in relation to the events that happened, I do not see much difficulty in coming to the conclusion that the first declaration in the decretal order cannot be supported. By no possibility, short of torturing the language of the contract, can the amount of £1,823, owing to the Crown on 1st August 1913, be made equivalent to the reduced amount at a later date when the election might take place. That would make the vendors suffer twice for the same amount—once by payment to the Crown, and next by diminishing the price they stipulated for. It was attempted to support it in two ways. One was by reference to clause 23. That clause, however, seems to me to be plainly confined to compelling the purchasers after transfer to agree to take up whatever responsibility the vendors had to make future payments to the Crown. If it were not so, the purchasers would be compellable to pay the Crown moneys in any event, that is, whether they had or had not elected to take the land as a conditional purchase. There is no provision for deducting that sum from the full freehold price unless there is such an election. Practically such a construction would be depriving the purchasers of their right to elect, and would cut down clause 17 and other clauses. It is really an impossible construction. The other way in which the amount of £1,823 was sought to be justified was by reading " the purchase-money " in some places as " gross purchase-money " and in others as " net purchase-money," and by giving a sort of general equivalent effect to the bargain irrespective of its actual language. Needless to say, that method of construction would be disastrous to all security of contracts. Mr. *Teece* invited the Court to disregard the actual language of the contract on the ground that it was not " artistic." I am unable to find in that, even if the observation were well founded, a sufficient reason for practically making a new bargain for the parties. I think, however, I perceive what was at the root of this argument. Some written bargains, and it at times happens in hurried mercantile transactions, are framed in an elliptical or conventional form, so that one has to try and read them as they would be expressed with the ellipsis supplied or in ordinary language. But this agreement is of the most formal character, there is nothing elliptical or

telegraphic, and all we have to do is to read its words as they are written *in extenso* and apply them faithfully to the circumstances that have arisen. It is not out of place to recall the words of Lord *Eldon* L.C. in *Browne* v. *Warner* (1): "The Court cannot proceed safely in any other way than by acting upon the written contracts of men, as they are framed." Clause 17 of the contract entitled the purchasers to their transfer—"*upon payment of the full amount of the purchase-money and interest.*" With that, however, must be read the qualification in their favour created by clause 19, whereby it is declared that "if transferred as conditional purchases the vendors will allow the amount owing to the Crown to make said land freehold together with deed fee stamp duty and assurance fee to the Crown and *such amounts shall be deducted forthwith from the purchase-money.*" The contest centres round the question: What is meant by "the purchase-money"? It was admitted, and necessarily so, by Mr. *Teece*, that in clause 19 the expression "the purchase-money" means the full sum of £8,112 15s., that is, the price of the land as freehold. Obviously in clause 19 "the purchase-money" is the *minuend*, the "amounts" composed of the moneys owing to the Crown, plus fees and duties, are the *subtrahend*, and the difference is the agreed final amount payable on transfer. But the difference is *ex necessitate* not "the purchase-money" within the meaning of clause 19, where, if anywhere in the contract, one would expect it to be so termed. How, then, can it be so in clause 17, which assumes "the full amount" to be paid, which constitutes the *minuend* in clause 9? So that, apart from certain words found in clause 17 itself, it is clear there is no right to a transfer except upon payment of "the full amount," that is, £8,112 15s., or of that amount after allowing the agreed deductions. The saving words referred to in clause 17 are these: "if such transfer shall not have been already made." Those words send us again to the contract to see in what circumstances a transfer is contemplated prior to either the full payment or payment of that amount less the stipulated deductions. We find an answer to that in clauses 4 and 8. Logically, for present purposes, clause 8 should be read first. It says that "at the time of or as soon as

(1) (1808) 14 Ves. 409, at p. 415.

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practicable after payment of the deposit and acceptance of the title the vendors will execute a transfer of the property sold to the purchasers but subject nevertheless to the purchasers executing and handing over to the vendors . . . a mortgage over the lands sold in terms of condition 4 thereof." I may stop there for a moment to emphasize the point that there is no right to a transfer prior to 1st February 1917, when the balance of the purchase-money falls due, except upon the simultaneous giving of a mortgage to secure the balance of the purchase-money with interest. That involves, not only the complete acceptance of title, but also the absence of all conveyancing objections and, in short, a perfect and unqualified admission of the liability to pay the balance of the purchase-money and interest, either in full, if the land is taken as freehold, or after allowance of the two stipulated amounts under clause 19. It follows that, so long as the purchasers are unwilling to give that mortgage and thereby finalize their liability under the contract, they cannot claim a right to the interim transfer, but must wait until 1st February 1917. And further, clause 8 expressly requires the purchasers to do what it is the ordinary practice to do, namely, " prepare the necessary transfer and submit the same to the vendors for execution." This express provision has special importance in this contract. The purchasers, having to elect—if they have then the right to elect—in which form they will take the transfer and give the mortgage, must frame their transfer accordingly. The provisions of the contract may, therefore, for present purposes be thus stated :—(1) The land is sold as freehold for £8,112 15s., as purchase-money, payable normally as to 5 per cent by deposit; as to 5 per cent on 1st February 1914, with 4½ per cent interest; as to 5 per cent on 1st February 1915, with 4½ per cent interest; as to 5 per cent on 1st February 1916, with 4½ per cent interest; and the balance with interest at 4½ per cent on 1st February 1917. That last-mentioned date is—subject to a relaxation as to 5 per cent of it under clause 21—the latest possible date for payment. (2) 1st February 1917 is therefore the latest possible date to elect as to freehold or conditional purchase. (3) Between the date of possession—1st August 1913 and 1st February 1917—the right of election may arise. (4) Election in that interim period means

election to accept without demur a transfer such as the vendors can give, and to give a mortgage irrevocably binding the purchasers to pay whatever balance may be due to the vendors in accordance with the election. (5) The amount deductible in respect of Crown liabilities is, on the true construction of the contract, *the amount owing to the Crown at the time of transfer.* The election, say on 1st February 1917, cannot entitle the purchaser to a deduction of the amount due on 1st August 1913. (6) Refusal to accept such transfer or give that mortgage on the ground of conveyancing objections might be justified and be consistent with an action for damages, but cannot alter the conditions of the contract if simple performance is relied on as in a Court of law. The fact that the purchasers did not prepare and tender a transfer is a strong piece of evidence that they were not ready and willing to *accept it and to give the necessary mortgage.* It is not at all an end of the matter, as I have said, that the vendors were not ready and willing to execute it at a given date unless the purchasers chose to sue for damages for breach, and even then they would have to prove their readiness and willingness to perform their part, which includes the non-objection as to conveyance as well as title, and also readiness and willingness to enter into the stipulated mortgage. But that is foreign to the question under the summons. Now, on what date were the purchasers so ready and willing, and on what date did they so inform the vendors? The onus is on them. Particularly is that so, in view of their non-presentation of any transfer under clause 8. The learned primary Judge has rightly disregarded for this purpose all communications earlier than 1st July 1914. But he has taken the letters of that date and of 30th July 1914 as constituting an effective election. But, with great respect, that is an error. The letter of 30th July expressly makes eighteen requisitions on title. It is, on the face of it, a refusal to accept a transfer *instanter* and give the required mortgage. I am not concerned whether this refusal was owing to the default of the vendors. If not, the purchasers cannot complain at all. If it was, then the purchasers can complain, but only by relying on a breach of contract and obtaining either damages at law or some adjustment by a Court of equity outside the vendor and purchaser summons. But they

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cannot assert that they have complied with the positive provisions of the contract as a matter of construction, which is what we are concerned with here. Until 27th April 1921 there is nothing like a distinct exercise of the option to take the land as a conditional purchase. By letter of 24th June 1921 that exercise is acknowledged by the vendors' solicitors. But there are still two difficulties in the purchasers' way: (1) they were even then not ready and willing to take the transfer and give the mortgage, as is shown by their letter of 13th February 1923, and (2) after 1st February 1917 they had no contractual right to elect. On that date their obligation to pay became contractually fixed. They had then to pay either the full amount of the balance of purchase-money on freehold basis, or that amount less unpaid Crown moneys required to make the land freehold. But that, in *contemplation of the contract* and as a matter of construction, was the last day for election. That day having passed, no later day could be claimed except upon some equitable ground, not now stated, not now contended for, and requiring for its determination, if suggested, a full examination and weighing of the circumstances, and an exercise of judicial discretion. All that is absent, even if it would have been within the jurisdiction of the Court upon a vendor and purchaser summons.

In my opinion the appeal, as to the first declaration, should be allowed; and, on the whole, having regard to the authorities cited, the summons should have been dismissed without prejudice to further proceedings of a suitable nature.

HIGGINS J. I am of opinion that the decretal order of *Long Innes* J. was right, and that the appeal should be dismissed.

I do not propose to deal at length with the objection to the procedure. I agree with my learned brothers that there was jurisdiction to make such an order on a vendor and purchaser summons (rule 6, Schedule 4 to *Equity Act*); and that the payment unjustly forced by improper pressure from the plaintiffs on 12th September 1924 of the amount demanded by the defendants is no bar to the declaration made or to the order for inquiries. On 22nd August 1924 the defendants, knowing that the purchasers Nixon would be in serious difficulties with their sub-purchasers if the

contract in question were cancelled, threatened to cancel it (how they did not say) if the interest were not paid, as claimed by the defendants, within twenty-one days. On 25th August plaintiffs' solicitors wrote to the defendants' solicitors stating that they were taking steps to issue an originating summons for the decision of the Court as to the questions in issue, and asking for an assurance that the defendants would hold their hands in the meantime. On 28th August, however, the defendants reiterated their threat to cancel unless settlement were made within the twenty-one days stated. The vendor and purchaser summons was filed on 30th August 1924; service was effected on 1st September; and on 17th September appearances were entered for the defendants. The plaintiffs, rather than incur the risk of cancellation, offered to pay the money claimed with a written protest, on 11th September. The defendants refused to accept payment with the protest; and the plaintiffs on 12th September, acting under the threat, paid it. But it was in fact an involuntary payment under unfair pressure; and the refusal to accept the money accompanied by the protest will avail the defendants nothing. We must "brush away the cobweb varnish," as Lord *Kenyon* once said, in a quaint mixture of metaphors; and the transaction stands revealed as an involuntary payment made under unjustifiable bluff. The true position, as it seems to me, is that the vendor and purchaser summons, filed and served for the determination of the interest question, and for incidental inquiries and orders, cannot be defeated by such conduct as described on the part of the defendants.

I propose to examine the contract of 1st July 1913, as its meaning is certainly open to question. The defendants sell to the plaintiffs 1,920 acres of conditionally purchased land. The price is on the basis of freehold land, £4 and £4 10s. per acre (clause 2)—£8,112 15s. in all—if the vendor pay the instalments due to the Crown. Five per cent. of the purchase-money is paid at the contract (roughly taken as £405 10s.); a promissory note due 1st February 1914 is given for a further 5 per cent (with interest at 4½ per cent per annum); and the balance of the said purchase-money as follows: 5 per cent 1st February 1915, 5 per cent 1st February 1916, balance purchase-money 1st February 1917. It is to be observed that the

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amount of this final balance is not stated in figures; and this indefiniteness is, to say the least, consistent with the purchase-money being reduced from the primary amount (on the basis of transferring freehold) of £8,112 15s., and with a general adjustment of the accounts on 1st February 1917. The purchasers were at liberty on any half-yearly day fixed for payment of interest, and on three months' notice, to pay to the vendor any part of the principal money not less than £200 or a multiple thereof. Under clause 3 the purchasers were to pay interest on so much of "the purchase-money" as should for the time being remain unpaid at the rate of 4½ per cent as from 1st August 1913, the first payment to be made on 1st February 1914. This is the clause that creates and defines the obligation of the purchasers to pay interest. It is urged for the defendants that the purchasers are bound by clause 3 to pay interest on all the £8,112 15s., so far as unpaid, to the vendors from time to time; even if (under clause 19) the purchase-money be reduced in the meantime. If such is the clear, necessary meaning of the clause, we must give effect to it; but if we find that there is an alternative meaning, of which the words are equally capable, and which does not lead to a result so unjust and so absurd, we should accept it. The plaintiffs contend that the clause merely binds them to pay interest on the purchase-money *whatever it may turn out to be*—on the £8,112 15s. if there be no deduction from the primary purchase-money (under clause 19), on the reduced sum if there be a deduction.

Under the primary arrangement for sale on the basis of freehold, there was to be a transfer—as I read the contract, a transfer in fee simple, all Crown instalments paid by the vendors—to the purchasers, on payment of the deposit and acceptance of the title; and the purchasers were to execute a mortgage to secure the balance of the purchase-money (clauses 4, 8). According to clause 9, all the conditions had been fulfilled as to these lands conditionally purchased except payment of the balance due to the Crown. If error were found in the area "the necessary adjustment of purchase-money shall be made at the time when the last instalment becomes due" —that is to say, on 1st February 1917 when the "balance purchase-money" becomes due—the time when figures can be adjusted.

The purchasers were to deliver any objections and requisitions within twenty-one days after inspection of title ; and subject thereto the title shall be considered as accepted (clause 13). Possession was taken on 1st August 1913.

So far the position is simple enough. The vendor finds the money for all payments to the Crown, the half-yearly payments for the conditionally purchased lands. But clause 19 provided an alternative course which would materially affect the amount of purchase-money :—" The said lands are sold as freehold but the purchasers may elect to take their transfer of same as conditional purchases. . . . If transferred as conditional purchases the vendors will allow the amount owing to the Crown to make said land freehold together with deed fee stamp duty and assurance fee to the Crown *and such amounts shall be deducted forthwith from the purchase-money.*" I take it that " forthwith " refers to the time when the election is made ; and it was made here, as found by the learned Judge below, in July 1914. So that the purchase-money, which for the fee simple is £8,112, is to be reduced on this election being made ; and as the interest is on the unpaid purchase-money (clause 3)—not upon any absolute, unalterable sum set out in clause 3—the interest has now to be calculated on the purchase-money as reduced—on the £8,112, less the payments that the purchaser will have to make to the Crown.

But as from what date has the purchaser, if he elect under clause 19, to pay the Crown instalments ? This question clause 23 was, in my opinion, meant to answer : " *From the date of possession and on the amount owing to the Crown as aforesaid being ascertained* the purchasers shall pay all *further* instalments and interest due to the Crown in respect of said land and produce receipts to the vendors when called upon so to do." This clause creates some difficulty. Clause 19 does not impose any limit of time for the purchasers to elect to take the land as conditional purchases ; but clause 23 seems to imply that the election was to be made speedily. Possession was taken on 1st August 1913 ; and all further instalments were to be paid by the purchasers. But it appears that the vendors have paid subsequent instalments and interest due to the Crown. If we were enforcing specific performance under such circumstances, at

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the suit of the purchasers, the purchasers would be compelled by the Court to pay interest to the vendors on Crown instalments (and on Crown interest) which the vendors paid since possession taken, and as from the date of the respective payments. This course ought to be taken at the final adjustment of the balance payable, which was to be made on 1st February 1917, but which has been delayed.

But even if the view which I have put of the relation of clause 23 to the rest of the contract is not the true view, I can find nothing to qualify the express terms of clause 19, that the instalments necessary to make the land freehold "*shall be deducted forthwith from the purchase-money*"—forthwith at the time of election; and the interest payable by the purchaser has (in the absence of clear words to the contrary) to be proportionately reduced. "The fruit follows the tree, and goes the same way." For the purchase-money, which under the original obligation created by clause 2 was £8,112 15s., is to be substituted a reduced sum—the sum of £8,112 15s. less the amount of the instalments to be paid by the purchaser; and there is no valid ground, either in common fairness or under the express terms of the contract, for making the purchasers pay interest on such instalments paid to the Crown as the vendors did not pay.

In my opinion, the learned Judge of first instance, *Long Innes* J., was right in his declaration 1, as well as in declarations 2 and 3, of his decretal order; and the inquiries should be made as directed by him.

Appeal dismissed with costs.

Solicitors for the appellants, *Bradley, Son & Maughan.*

Solicitors for the respondents, *Dibbs & Farrell*, Temora, by *F. W. Walker & Son.*

B. L.