[HIGH COURT OF AUSTRALIA.]

REDAPPLE AND HOWGATE . . . . APPELLANTS; APPLICANTS,

AND

HELY . . . . . RESPONDENT. RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Sept.* 25, 28.

SYDNEY, *Nov.* 30.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Vendor and Purchaser—Sale of land—Parcels—Boundaries—Purchaser's right to accurate title—Rescission—Special conditions—Undertaking to apply for amendment of title to conform to plan—Application made, but unsuccessful—Whether any right to rescind—Transfer of Land Act 1928 (*Vict.*) (*No.* 3791), *secs.* 215, 216, 233.

By contract dated 14th April 1927 the respondent agreed to sell to the appellants a piece of land on which a building was erected. The southern wall of the building encroached on the adjacent land on the south a distance varying from 6½ inches in front to 14¼ inches at a point 30 feet from the front. The contract of sale described the land as the land "shown on the plan annexed hereto." This plan was copied from a plan of survey referred to in the conditions of the contract and prepared with a view to having the title amended to accord with the occupation. The conditions of the contract provided (*inter alia*) that the vendor would "forthwith apply at her own expense . . . to amend the certificate of title to accord with the measurements shown on" the plan of survey, that the certificate of title "in respect of the land sold" would be produced, and also that in default of requisitions the purchasers should be deemed to have accepted title, and that no mistake in the description, measurements or area should invalidate the sale. The purchasers inspected title and went into and remained in possession up till the time of the summons hereinafter mentioned. The vendor applied in December 1927 to have the title amended, but the application was not successful and was withdrawn in August 1930. In February 1931 the appellants first learnt that the respondent's

application had been withdrawn, and in March 1931 the appellants purported to rescind the contract. On a vendor and purchaser summons taken out by the appellants, the Supreme Court held that they were not entitled to rescind. On appeal to the High Court,

Held, by *Rich*, *Dixon* and *McTiernan* JJ., that the purchasers contracted with the knowledge that the certificate of title did contain a description of the land by measurements which were erroneous and not in conformity with the survey plan adopted by the contract, and that in view of the special conditions the general condition for production of title could not be interpreted as a stipulation for title free from this defect, and that the effect of the special conditions of the contract was to impose upon the vendor the duty of making all reasonable endeavours to obtain an amendment of the measurements shown upon her certificate but otherwise to require the purchasers to accept title, and did not impose on the vendor an absolute obligation to obtain an amendment, and, consequently, that the appellants were not entitled to rescind the contract.

Per Starke J.: The purchasers had struck too soon and were not entitled to rescind the contract as and when they did, but were entitled to a declaration that the vendor had not at the date of the summons shown a good title to the land contracted to be sold.

Per Evatt J.: The vendor's special undertaking to apply at her own expense for an amendment of a specified certificate of title (not referable merely to the land sold) did not alter her obligation to make title at the proper time to the land which was the subject matter of sale, i.e., the land described in the survey plan. In the circumstances, however, the time for making title was postponed until a reasonable time after the application for the amendment was finally disposed of, and the purchasers were not entitled to rescind as and when they did.

Decision of the Supreme Court of Victoria (*Mann* J.) affirmed as varied.

APPEAL from the Supreme Court of Victoria.

The respondent, Catherine Hely, was registered as the proprietor of a piece of land described in the certificate of title as commencing at a point in Swanston Street, 79 feet 7½ inches southerly from Little Lonsdale Street and extending along Swanston Street for a distance of 31 feet 8½ inches. On this piece of land were erected two buildings used as shops. According to a survey plan (a copy of which was annexed to the contract) the middle line of the northern wall of these buildings commenced at a point in Swanston Street, 79 feet 11½ inches southerly from Little Lonsdale Street, that is, 4 inches beyond the position shown in the respondent's title. The distance between the middle line of the northern wall of the two shops and the

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middle line of the southern wall, which purported to be a party wall 18 inches thick, of the two shops, was actually a distance of 31 feet 11 inches, thus exceeding the frontage shown in the respondent's title by $2\frac{1}{2}$ inches. This excess of $2\frac{1}{2}$ inches, added to the error in alignment of 4 inches, brought the middle line of the southern wall of the two shops $6\frac{1}{2}$ inches beyond the position shown as the boundary of the land adjoining the respondent's property on the south. On no part of the southern boundary of the two shops was the respondent's wall wholly on the land comprised in the respondent's title. The middle line of the southern wall of the two shops ran from the point $6\frac{1}{2}$ inches south of respondent's title in a line in a south-westerly direction for a distance of 30 feet 1 inch, at which point the middle line of the wall was $5\frac{1}{4}$ inches off the land in the respondent's title. At this point it broke south $4\frac{1}{2}$ inches, instead of north as in the title, with the result that the middle line of the wall was 1 foot $2\frac{1}{4}$ inches off the land as shown in the respondent's title and thus continued a distance of 17 feet and $\frac{1}{2}$ an inch, for this distance the southern wall, being an 18 inch party wall, was wholly off the land ascertained according to the measurements in the respondent's title. The middle line of the wall dividing the two shops on the respondent's land was 16 feet 4 inches south of the middle line of the northern wall and 15 feet 7 inches north of the middle line of the southern wall, the two together thus representing the measurement of 31 feet 11 inches. The building on the southern part of the respondent's land and in fact having a frontage of 15 feet 7 inches was known as No. 309 Swanston Street, and it was the southern wall of this building, the middle line of which was at its intersection with Swanston Street $6\frac{1}{2}$ inches over the boundary shown in the respondent's title.

In these circumstances the respondent, on 14th April 1927, entered into a contract with the appellants, Joseph Redapple and Abraham Wilfred Wustemann Howgate, to sell to them "all that piece of land . . . particularly described in certificate of title volume 4469 folio 893674 with building thereon known as 309 Swanston Street Melbourne as such land is shown on the plan annexed hereto and signed by or for the vendor and the purchasers and thereon coloured red together with and subject to the easements

therein set out subject to the existing tenancy of the said land for the sum of seven thousand eight hundred and twelve pounds. The copyright conditions of sale of the Law Institute of Victoria and the special conditions (if any) indorsed hereon and annexed hereto shall form part of this contract."

The special conditions indorsed upon the contract were as follows: —"1. The land within described is sold according to the measurements on the within mentioned certificate of title and it is agreed that no compensation shall be paid by the vendor for any deficiency between the actual measurements and such title measurements and that the vendor shall not claim and not be entitled to any increase in the purchase-money by reason of any excess in actual measurements over such title measurements. 2. The purchasers shall take a transfer of the said land and execute in favour of the vendor a mortgage thereover to be prepared by her solicitors at the purchasers' expense to secure the payment of the within residue and interest in five years from the date of purchasers' taking possession and to contain an option of paying said residue or any part thereof not being less than one thousand pounds or some multiple thereof provided the purchasers shall have given three months' prior notice of making such payment. . . . 3. The vendor will at her own expense forthwith apply to the Registrar of Titles to amend the said certificate of title to accord with the measurements shown on a survey dated the tenth day of March one thousand nine hundred and twenty-seven of the said land made by Messrs. Doolan and Goodchild surveyors. 4. The said contract is signed subject to an agreement for abandonment of easement (if any) of light of adjoining property on south side being obtained within two weeks of date of said contract." The plan referred to in the contract of sale as annexed thereto appeared to have been copied from the plan referred to in clause 3 of the special conditions. Both plans showed the measurements of the buildings as they actually appeared on the land.

The conditions of sale of the Law Institute of Victoria which formed part of the contract provided (*inter alia*):—"2. The Crown grant or certificate of title in respect of the land sold shall be produced on demand to the purchaser or his solicitor who shall within 14 days

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from the day of sale deliver to the vendor or his solicitor in writing all requisitions or objections (if any) on or to the title or concerning any matter appearing in the particulars or conditions. If the vendor shall fail to produce such title on demand such 14 days shall not commence to run until production of such title. All requisitions or objections not included in any such writing so delivered shall be deemed waived by the purchaser and in default of such requisitions (if none) and subject to such (if any) as are so delivered the purchaser shall be deemed to have accepted title and the agent (if any) shall be entitled to pay to the vendor any deposit or other money received by him on account of the purchase-money. 3. If the purchaser shall within the said 14 days make any such requisition or objection as aforesaid which the vendor shall be unable or unwilling to remove or comply with the vendor or his solicitor (whether he shall have attempted to remove or comply with the same and notwithstanding any negotiation or litigation in respect thereof) may give to the purchaser or his solicitor notice in writing of the vendor's intention to rescind the contract at the expiration of seven days unless such requisition or objection shall be withdrawn and if such notice shall be so given and the requisition or objection shall not be withdrawn within such seven days the contract shall thereupon be rescinded and the vendor shall repay to the purchaser all deposit and other moneys received by him or his agent on account of the purchase-money but without interest, costs or damages and the same shall be accepted by the purchaser in full satisfaction of all claims. 4. No mistake in the description measurements or area of the said land in or omission from the particulars shall invalidate the sale unless the vendor rescinds pursuant to the last preceding condition but if notified to the other party within 21 days of the day of sale and not otherwise the same shall be the subject of compensation to be paid or received by the vendor as the case may require and to be assessed in case the parties differ by two arbitrators or their umpire in accordance with the provisions of the *Arbitration Act* 1915 and this condition shall in that event be deemed to be a submission to arbitration within that Act. . . . 7. The purchaser shall be entitled to possession of the land sold or the receipt of the rents and profits thereof upon acceptance of title. . . . 16. Time

shall be considered of the essence of the contract and of these conditions."

Shortly after the contract of sale was signed a solicitor or his clerk called on the solicitor for the respondent and, on behalf of the appellants, inspected the certificate of title, but no requisitions were made on the title by such solicitor. The appellants went into possession of the premises by receiving the rents thereof on 28th April 1927 and had since remained in possession.

On 3rd December 1927 the respondent applied to the Registrar of Titles to amend the certificate of title to accord with the measurements in the plan referred to in clause 3 of the special conditions of the contract pursuant to the provisions of sec. 233 of the *Transfer of Land Act* 1915. The Registrar of Titles raised objections to amending the certificate of title under this provision, and also informed the applicant that there would probably be difficulty in making title if the application were made under sec. 215. Difficulty arose in making title by adverse possession because, within the last twenty years, the property in question and the land adjoining it on the south on which the wall encroached had been in the hands of the same person as owner. The respondent endeavoured to have the application for the amendment of title carried through, but the Registrar finally notified the respondent that unless the Titles Office requisition dated 7th July 1928 was complied with the application would be rejected. This requisition required, in effect, a transfer by the adjoining owner of sufficient land with mutual party wall easements to enable the applicant's title to be rectified. The respondent thereupon, on 6th August 1930, withdrew her application, but did not inform the appellants of this fact. On 4th February 1931 the appellants first learnt that the respondent's application to amend her certificate of title had been withdrawn.

On 3rd March 1931 the appellants' solicitors wrote to the respondent's solicitors saying:—"Your client, the vendor, having failed to comply with clause three of the special conditions of the contract, our clients (the purchasers) have elected to treat the contract as at an end and require the repayment of the deposit of £2,000. They are prepared to make all necessary adjustments regarding interest and rents and do whatever is required to restore

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the parties to their original position." To this letter the respondent's solicitors replied on 9th March 1931, stating:—"We are in receipt of your letter of 3rd inst. In the first place we emphatically deny your clients' right to treat as at an end the contract of sale and to a return of the deposit and are therefore not prepared to treat in regard to any adjustments, &c. The property in contract was sold as it stood. Your clients' previous legal advisers never at any time during the years that the contract has continued raised this point. As to our client's alleged failure to comply with clause 3, she did apply to the Registrar to amend, but after certain requisitions (explained to you) by him, we withdrew the application but are prepared, if required, to make a further application. She has observed and has always been ready and willing to carry out the contract, and requires you to pay the accruing interest when due. The buildings on the land contracted to be sold have been erected over sixty years and the title is good." In reply to this letter the appellants wrote on 15th April 1931 stating:—"Referring to your letter of 9th ult. we have made a further investigation of the vendor's title and we find that the land in question and the lands adjoining on the north and south respectively were all in one ownership from the year 1889 until July 1920, so that your statement that the buildings have been erected over sixty years carries the matter no further. The contract provides that the property is sold as shown on the annexed plan of survey, and a comparison of that plan with the plan shown on the vendor's certificate of title shows that only about $2\frac{1}{2}$ inches of the southern party walls (18 inches) abutting on Swanston Street is standing on the land included in the vendor's certificate of title. As regards the southern portion of the same party wall the position is even worse, as for a considerable length no part of the southern portion of the wall is on your client's land. There is such a serious defect in title that the purchasers refuse to accept the vendor's title. We propose to take out a vendor and purchaser summons for a declaration that the purchasers are entitled to rescind, and our clients will rely on the grounds stated above in addition to the grounds stated in our letter of 3rd March 1931."

The appellants thereupon took out a vendor and purchaser summons asking for a declaration (a) that the vendor had failed

to show a good title to the land included in the above-mentioned contract: (b) that the vendor had committed a breach of the special conditions of the said contract; (c) that the purchasers were entitled to rescind the said contract; (d) that the contract was lawfully rescinded on 3rd March 1931 or alternatively on 15th April 1931: and asking for an order for consequential relief.

The summons was heard by *Mann* J., who dismissed it. In delivering judgment his Honor said:—" In my opinion this summons fails. The defective title is ruled by the contract of sale. The parties to it made their own stipulations as to these very defects. The contract was signed on 14th April 1927. There was an express condition in the contract of sale that 'the land within described is sold according to the measurements on the within mentioned certificate of title and it is agreed that no compensation shall be paid by the vendor for any deficiency between the actual measurements and such title measurements.' On 10th March of that year a special survey had been made of the property in question, and the contract of sale also by an express condition provides that 'the vendor will at her own expense forthwith apply to the Registrar of Titles to amend the said certificate of title to accord with the measurements' of the survey of 10th March 1927. It is perfectly clear, consequently, that that stipulation is directed to the very discrepancy here complained of. Having signed the contract with that stipulation, the purchasers entered into possession of the premises and inspected title but made no requisitions thereon. Mr. Fitzgerald swears that a solicitor or his clerk came on the purchasers' behalf and inspected the contract shortly after the contract was signed and that he received no requisitions on title or communication from such solicitor. The purchasers remained in possession for over three years but took no steps during the whole of that time to find out whether this special condition in clause 3 of the contract as to rectifying the title was or was not being complied with and, if being complied with, with what result. The vendor did all she was obliged to do. She did not forthwith lodge application to amend, but did so eventually and attended to it as appears by Mr. Fitzgerald's affidavit and tried to get it through. If a discrepancy between the survey and the title had been a matter the purchasers

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had really troubled about, the condition in the contract called their attention to it and they could have stipulated not only that the vendor would apply for an amendment of the title but that she would get the title amended. It is altogether too late now to repudiate the contract on the ground which the purchasers might have taken before they went into possession or at the time of the production of title to the purchasers. I agree with Mr. *Wiseman* on both the grounds submitted, namely, that the vendor has complied with the contract which deals specifically with the point at issue, and that it is now too late for the purchasers to take objection to the title. The summons will be dismissed with costs."

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

Harry Walker, for the appellant. Two questions arise for decision, first, was the title good, and secondly, if not, was the purchaser prevented from objecting to it. As to the first question, the title is not such as a Court would compel a purchaser to accept. In sales of town property, with houses erected thereon, minute dimensions are of very material importance, and in this case the southern wall was for no part of its length wholly on the respondent's land and for some portion of it was entirely off such land (*Heath* v. *Allen* (1)). Moreover, the saving clause of " a little more or less " implied by what is now sec. 271 of the *Property Law Act* 1928 would not cover a discrepancy where a wall of a building is on land outside of the title, and such a discrepancy could not be regarded as a misdescription within the compensation clause of the contract. The deficiency in the contract was a case of inability to make title to a material part of the premises sold (*Perrin* v. *Reynolds* (2)). Condition 2 of the Law Institute Conditions providing that all requisitions and objections not made within fourteen days from the day of sale shall be deemed waived does not apply where the vendor has no title (*Want* v. *Stallibrass* (3)). Clause 3 of the special conditions providing that the vendor will at her own expense forthwith apply to the Registrar to amend the certificate would lead the purchaser to

(1) (1875) 1 V.L.R. (E.) 176. (2) (1886) 12 V.L.R. 440; 7 A.L.T. 160.
(3) (1873) L.R. 8 Ex. 175.

believe that the vendor was in a position to compel the amendment of the title and to expect that the title would be amended. In effect it guarantees the success of the application. The condition would indicate to a purchaser that the defect in title is one of those cases which would be dealt with under sec. 215 of the *Transfer of Land Act* 1915. [Counsel also referred to sec. 233 of the *Transfer of Land Act* 1915.]

H. D. Wiseman, for the respondent. By clause 3 of the special conditions the vendor merely promised to apply for amendment of the certificate of title and did not undertake that such application would be successful. The vendor complied with that condition by making the application and trying to have it carried through. Clause 3 of the special conditions may be contrasted with clause 4, in which there is a definite undertaking to obtain the abandonment of the easement referred to. The contract of sale describes the land sold as it is shown on the plan annexed thereto. That plan is taken from the plan described in clause 3 of the special conditions. On entering into the contract, and at latest when the certificate of title was produced to them, the purchasers knew all the facts and with such knowledge went into possession and remained in possession for over three years. During this time, if their contention is correct, they were in a position either to affirm or to disaffirm the contract as they chose. Having elected to go into and to remain in possession, they must be taken to have affirmed the contract though the title was defective. Moreover, clause 2 of the Law Institute Conditions provides that if no requisitions are made the purchaser shall be deemed to have accepted title, and clause 4 of such conditions provides that no mistake in the description, measurements or area of the land shall invalidate the sale, and clause 7 provides that the purchaser shall be deemed entitled to possession upon acceptance of title. In any event the purchasers, having entered into possession, could not rescind without giving the vendor a reasonable opportunity of rectifying the certificate. The purchasers did not give any notice to the vendor fixing a time within which they required the title to be rectified, but, as soon as they discovered that the application had not been carried through, they purported to rescind the contract

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forthwith, and even when the vendor offered to renew the application they refused to accept such offer and insisted on their right to rescind. [Counsel referred to *Halkett* v. *Earl of Dudley* (1); *Procter* v. *Pugh* (2); *Berners* v. *Fleming* (3); *Chamberlain* v. *Lee* (4); *In re Gloag and Miller's Contract* (5); *Gardiner* v. *Orchard* (6); *National Trustees &c. Co.* v. *Hassett* (7); *Prideaux, Precedents in Conveyancing*, 5th ed., vol. I., pp. 20, 65.] In *Perrin* v. *Reynolds* (8) there was no clause with regard to a deficiency or as to the amendment of the title. In *Want* v. *Stallibrass* (9) the objection was that the vendor did not have title to any of the land, whereas in the present case the objection is only as to a small deficiency.

Harry Walker, in reply.

Cur. adv. vult.

Nov. 30. The following written judgments were delivered :—

RICH J. I have read the judgment of my brother *Dixon* and agree with it.

STARKE J. In April of 1927 Catherine Hely sold to Redapple and another " all that piece of land being part of Crown Allotment 9 Section 28 City of Melbourne Parish of North Melbourne County of Bourke and being part of the land more particularly described in certificate of title volume 4469 folio 893674 with building thereon known as 309 Swanston Street Melbourne as such land is shown on the plan annexed hereto and signed by or for the vendor and the purchasers." This plan was the result of actual survey and shows the position of party walls and the precise measurements of the land sold. The certificate of title mentioned in the contract was produced by the vendor to the purchasers, and from this it appears that on the south-eastern boundary a serious discrepancy exists between the land contracted to be sold and the land described in the certificate of title. The discrepancy varies between $5\frac{1}{4}$ inches

(1) (1907) 1 Ch. 590, at pp. 596, 600-601.
(2) (1921) 2 Ch. 256, at p. 268.
(3) (1925) Ch. 264.
(4) (1840) 10 Sim. 444; 59 E.R. 687.
(5) (1883) 23 Ch. D. 320, at p. 327.
(6) (1910) 10 C.L.R. 722, at p. 732.
(7) (1907) V.L.R. 404, at pp. 423-424; 28 A.L.T. 232, at pp. 240-241.
(8) (1886) 12 V.L.R. 440; 7 A.L.T. 160.
(9) (1873) L.R. 8 Ex. 175.

and as much as 1 foot 2½ inches, and the south-western end of the party wall does not even rest on the land described in the certificate of title. The parties, evidently, knew that the survey measurements and the title measurements did not agree, for condition 3 of the contract provided that "the vendor will at her own expense forthwith apply to the Registrar of Titles to amend the said certificate of title to accord with the measurements shown on a survey dated the tenth day of March one thousand nine hundred and twenty-seven of the said land made by Messrs. Doolan and Goodchild surveyors." The vendor did apply for amendment but was not successful, and withdrew her application. The purchasers on ascertaining this fact, about March 1931, rescinded the contract and sought declarations under a vendor and purchaser summons: (a) That the vendor failed to show a good title to the land sold; (b) that the vendor committed a breach of the conditions of the contract; (c) that the purchasers were entitled to rescind the contract; (d) that the contract was rescinded on 3rd March or 15th April 1931. *Mann* J. dismissed the summons, and from his decision an appeal has been brought to this Court.

Subject to any special stipulation in the contract, a vendor is bound to show a good title to the land sold, and to prove its identity with that contained in the title documents. It was said that the certificate of title produced by the vendor in the present case established a good title in the vendor to the land sold, because party walls on the north-east and south-east boundaries sufficiently defined her land, and identified it with that sold to the purchasers, though there were certain inaccuracies in dimensions and in connecting points on the map delineated on the title. But this aspect of the case was not investigated before *Mann* J., and materials are not available to this Court for any satisfactory determination of the matter. In any case, the dimensions and connecting points "are not an addition to something which has already been certainly described, but are part and parcel of the description itself." (Compare *Mellor* v. *Walmesley* (1).) Reference was made in support of the argument to another condition (No. 1) of the contract, which is as follows: "The land within described is sold according to the

(1) (1905) 2 Ch. 164, at p. 174.

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measurements on the within mentioned certificate of title and it is agreed that no compensation shall be paid by the vendor for any deficiency between the actual measurements and such title measurements and that the vendor shall not claim and not be entitled to any increase in the purchase-money by reason of any excess in actual measurements over such title measurements." But the land was sold according to actual survey measurements, and condition 3, already mentioned, provided for an application by the vendor to amend her certificate of title to accord with the measurements shown by survey. It is difficult, in the circumstances, to apply the provisions of condition 1 to the contract; it seems, as Mr. *Walker* suggested, to be a clause in common use and to have been inserted in a contract on this occasion to which it was not applicable. But, whatever effect the clause may have on compensation, it does not alter the description of the property sold, nor lessen the vendor's obligation to give a good title to the land which she contracted to sell. The purchasers, however, delivered no requisition on the title, and have, in fact, received the rents and profits of the land ever since April 1927. And they insisted that the certificate of title produced to them showed no title whatever to part of the land, and that they were entitled to take objection to title despite a condition of the contract requiring the purchasers to deliver to the vendor in writing requisitions or objections to the title within a specified time, and providing that all requisitions or objections not included in such writing should be deemed to be waived by the purchasers, and in default of such requisition (if none) and subject to such (if any) as were delivered, the purchasers should be deemed to have accepted title. It is not necessary to express any opinion upon the question whether the purchasers could take objection to title despite the condition (see *Want* v. *Stallibrass* (1); *In re Tanqueray-Willaume and Landau* (2)), for it must be read with the condition No. 3 dealing with the amendment of title. So far as the purchasers accepted the title produced by the vendor, the acceptance must be subject to the obligation of the vendor to apply for amendment of the certificate of title. Condition 3, it is true, does not absolutely promise an amendment, but it imports an

(1) (1873) L.R. 8 Ex. 175. (2) (1881) 20 Ch. D. 465.

obligation on the part of the vendor to use all reasonable and proper endeavours to amend the title. The vendor based her application for amendment upon sec. 233 of the *Transfer of Land Act* 1915, but it was, as already mentioned, withdrawn. It would seem, on the scanty materials before us, that an application based upon secs. 215 and 216 would have had more chance of success, and that such an application might still be made. The possibility of such an application was not unnoticed by the vendor's advisers, and was held in reserve. Later on, as I shall mention below, the vendor recurred to this idea, and offered to make another application to amend. The failure of the first application does not discharge the vendor from her obligation under condition 3 and on the evidence before the Court she has never performed that obligation, and I should think that she could not obtain specific performance of the contract, or otherwise enforce it, until she does perform the obligation. The purchasers, however, claim to have rescinded the contract owing to the default of the vendor in performing her part. About February 1931 the purchasers discovered that the application to amend the certificate of title had been withdrawn, and on 4th March "elected to treat the contract as at an end." The obligation upon the vendor to make a good title to the land contracted to be sold is an essential condition, and goes no doubt to the root of the contract, and if the stipulation be broken the purchasers may rescind the contract. But was the stipulation broken ? That question depends upon whether the vendor refused to go on with her application to amend or whether in fact further pursuit of any application was hopeless. Neither the one fact nor the other is proved. The withdrawal of the application was to meet difficulties raised in the Office of Titles and to prevent its rejection. The possibility of a further application under other sections of the Act was not unnoticed, and, though a long delay took place, the right to make further application was in reserve. No time was fixed by the contract or by the notice from the purchasers for making the application to amend and completing the title. And it is not unimportant to observe that the vendor as soon as she was challenged denied the purchasers' right to treat the contract as at an end, and offered to make a further application to amend. It is true that she denied,

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before both *Mann* J. and this Court, any obligation on her part to make such an application, but she suggested, through her counsel, that if an opportunity were given, she could and would make title to the land in accordance with the contract.

In my opinion, the purchasers, in all the circumstances, struck too soon, and were not entitled to rescind the contract. But I do not think a total dismissal of the summons is justified: I should prefer a declaration that the vendor has not yet shown a good title to the land contracted to be sold, that the vendor has not yet committed any breach of the conditions of the contract, and that the acts of the purchasers on 3rd March and 15th April 1931 did not work a rescission of the contract. The parties would thus be at liberty to complete the contract as they might be advised.

DIXON J. The vendor became registered in 1921 as the proprietor of an estate in fee simple of a piece of land fronting the western side of Swanston Street, Melbourne. According to the plan upon the certificate of title, the northern boundary of the land met the Swanston Street frontage at a point 79 feet 7½ inches from the nearest corner of Little Lonsdale Street and Swanston Street, and from that point the frontage extended along Swanston Street for 31 feet 8½ inches. The southern boundary was depicted as the centre line of a reciprocal easement for party wall purposes for an 18 inch wall. This particular party wall easement was shown as running westerly at right angles to Swanston Street for a distance of 30 feet 3 inches when the centre line broke northerly 4½ inches. Thence an easement of a somewhat different character was shown running westerly for 17 feet 1 inch. This easement was described on the certificate of title as "the right to the use of the wall which on 10th June 1920 was standing on the land" nine inches beyond and eleven inches within the boundary, for the purpose of supporting the building then standing upon the land contained in the certificate. Two buildings, which had been erected over 50 years ago, stood upon the land with a party wall between them. A survey plan, dated 10th March 1927, which the vendor caused to be made, showed a number of inaccuracies in the measurements given by the plan upon the certificate of title. The distance from the corner of Little

Lonsdale Street to the junction of the northern boundary ascertained on the ground by reference to the building was not 79 feet 7½ inches, but 79 feet 11½ inches. The frontage to Swanston Street therefore actually commenced 4 inches further south than was stated by the plan upon the certificate. Further, this frontage, as measured to the centre line of the 18 inch wall on the southern boundary, was not 31 feet 8½ inches, but 31 feet 11 inches—2½ inches longer. The centre line of the wall was therefore actually 6½ inches (4 inches plus 2½ inches) further south than was stated by the plan on the certificate. Moreover, there was an error of 11 minutes in the bearing of the southern boundary, and it broke to the south instead of the north. The identity of the wall intended to be referred to in the plan of the certificate was undeniable, and its position upon the ground should have served to establish this boundary of the land intended to be described in the certificate, notwithstanding the discrepancy between the actual measurements on the ground and those stated on the plan. The southern of the two buildings occupied a frontage of 15 feet 7 inches, and the northern a frontage of 16 feet 4 inches.

On 14th April 1927 the vendor entered into a contract of sale with the purchasers by which she agreed to sell and they to buy for the sum of £7,812 the land on which the southern of the two buildings stood. The contract described the parcel as part of the land more particularly described in the certificate with the building thereon known as 309 Swanston Street, Melbourne, as such land is shown on the plan annexed thereto and signed by the vendor and the purchasers and thereon coloured red together with and subject to the easements therein set out. The purchase-money was payable by a deposit of £2,000 and the residue in five years. One of the special conditions provided that the purchasers should take a transfer of the land and execute a mortgage to the vendor to secure the payment of the residue of the purchase-money in five years with interest subject to an option of paying off the residue or any part of it upon notice. The general conditions provided that the certificate of title in respect of the land sold should be produced on demand to the purchasers or their solicitors who would make requisitions or objections within 14 days from the day of sale and,

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in default of so doing, be deemed to have accepted title. They contained no other express stipulation for a good title. A general condition provided that the purchasers should be entitled to possession upon acceptance of title. The third of the special conditions was as follows: "The vendor will at her own expense forthwith apply to the Registrar of Titles to amend the said certificate of title to accord with the measurements shown on a survey dated the tenth day of March one thousand nine hundred and twenty-seven of the said land. . . ." The survey referred to was that annexed to the contract and signed by the vendor and the purchasers. It appears to me necessarily to follow from this clause that the purchasers contracted with the knowledge that the certificate of title did contain a description of the land by measurements which were erroneous and not in conformity with the survey plan adopted by the contract. It appears to me also to follow that the certificate which the general condition requires to be produced is that containing the erroneous measurements, and consequently that the general condition cannot be interpreted as a stipulation for title free from this defect. "When the contract is silent as to the title which is to be shown by the vendor, and the purchaser's right to a good title is merely implied by law, that legal implication may be rebutted by showing that the purchaser had notice before the contract that the vendor could not give a good title" (per *Fry* J., *In re Gloag and Miller's Contract* (1)). Thus it would seem that in the circumstances the purchasers must depend upon the interpretation of the third special condition for any right to obtain a title free from the defects of the vendor's certificate. The first special condition, however, was as follows: "The land within described is sold according to the measurements on the within mentioned certificate of title and it is agreed that no compensation shall be paid by the vendor for any deficiency between the actual measurements and such title measurements and that the vendor shall not claim and not be entitled to any increase in the purchase-money by reason of any excess in actual measurements over such title measurements." The meaning and application is disputed of the statement in this clause that the land is sold according to the measurements on the certificate, but the

(1) (1883) 23 Ch. D., at p. 327.

remainder of the clause, which could have no operation if the application to amend the certificate succeeded, appears to contemplate completion without an amendment rectifying the measurements.

The purchasers were put in receipt of the rents and profits of the land on 27th April 1927. They made no requisitions and objections on title. On 3rd December 1927 the vendor lodged in the Office of Titles an application to amend the certificate so that the measurements and the plan would accord with those shown by the survey. This application was made as under the provisions which now stand as sec. 233 (*b*) of the *Transfer of Land Act* 1928. The application ought to have been made under the provisions of sec. 215, and perhaps under the provisions also of sec. 216 lest it might be said that the measurements determined the land actually within the certificate in spite of the existing wall being shown as on the boundary. The application appears not to have prospered in the Office of Titles, where difficulties are said to have been raised, not only because the application was not made under sec. 215, but also because the vendor had acquired the land from a registered proprietor who held it and the adjoining tenements under the same title. While this circumstance makes it impossible for the vendor to rely upon length of possession or enjoyment as conferring a title to the land outside the measurements shown in the same certificate and to the easements over the adjoining land, it would seem rather to strengthen than weaken the contention that the vendor's real title was to be ascertained by the centre line of the walls and the measurements were mistakes which ought to be corrected. Indeed, if the vendor acquired title from a vendor who retained the adjoining land, it is not easy to understand upon the facts before us how an application in proper form could be refused. However this may be both in form and in some other respects, the vendor's application does not appear to have commended itself to the Office of Titles, and eventually on 6th August 1930 the vendor's solicitor withdrew the application in deference to the views expressed. He did not, however, inform the purchasers; and when in February 1931 the withdrawal was discovered by their solicitor, the purchasers purported to treat the contract as at an end although the vendor's solicitor offered to make a further application for the amendment of the title.

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Upon a vendor and purchaser summons which the purchasers issued, *Mann* J. decided that the purchasers were not entitled to treat the contract as discharged. In my opinion this decision was right. I think the effect of the special conditions of the contract is to impose upon the vendor the duty of making all reasonable endeavours to obtain an amendment of the measurements shown upon her certificate, but otherwise to require the purchasers to accept title. I do not think there is any justification for treating the third of the special conditions as importing an absolute obligation to obtain an amendment. In terms it requires the vendor to do no more than make an application at her own expense. I think that such a stipulation does contain implications that the vendor would support and proceed with the application, and therefore that she would take all reasonable steps to secure its success, but I can find in it nothing amounting to a warranty that the application will succeed. The first of the special conditions ought not to be read apart from the third. The third condition is framed upon the footing that the measurements upon the vendor's certificate do not accord with the actual measurements of the land sold as ascertained by a survey. It may be conceded that the interpretation of this contract should begin from the position that "if a vendor means to exclude a purchaser from what is matter of common right, he is bound to express himself in terms the most clear and unambiguous" (per *Knight Bruce* V.C., *Symons* v. *James* (1)). But the third condition answers the test proposed by *Kindersley* V.C. in *Smith* v. *Watts* (2), and "points out to a man of ordinary intelligence what are the facts of the case." The purchaser, aware of the facts of the case and therefore knowing that the measurements of the land and the measurements appearing upon the title did not correspond, could not but understand the first condition as saying that the land described in the contract by its correct measurements was sold according to the incorrect measurements of the certificate of title which the contract identified. The measurements in the certificate were material only to the southern boundary of the land sold because its northern boundary would be formed by what the

(1) (1842) 1 Y. & C. C. C. 487, at p. 490; 62 E.R. 983, at p. 984.

(2) (1858) 4 Drew. 338, at p. 341; 62 E.R. 131, at p. 132.

vendor retained out of the whole parcel. But, whether the purchasers had by inspection of the certificate ascertained this or not, they must have understood that no compensation was to be paid or received for the disconformity.

In my opinion, when it appears that the purchasers contracted with a knowledge of the incorrectness of the measurements shown on the title, took no express stipulation for a correct title and, on the contrary, accepted a simple condition that the vendor will apply for a correction, the effect of the initial presumption with which the interpretation commenced has been so weakened that it is proper to construe the remaining conditions according to the natural meaning which they bear, and I am unable to see what else the first special condition can mean but that the purchasers shall accept the title measurements without giving or receiving compensation, that is upon the assumption that the title is not amended pursuant to the third condition. The result, in my opinion, was that, if the vendor had made an application in due form and had supported it properly, the purchasers would have been bound to accept the title notwithstanding the failure of the application. The question then remains whether the vendor's mistake in applying as under sec. 233 and her withdrawal of the application without consulting the purchasers entitles them to dissolve the contract or treat it as discharged. I am of opinion that it did not. I do not think the vendor committed a breach going to the root of the contract. There was no refusal to proceed. The parties had deviated from the terms of the contract which contemplated an immediate transfer to the purchasers and a mortgage by them to the vendor to secure the balance of purchase-money, which instruments doubtless would have been lodged in the Office of Titles on top of the application to amend. This departure from the exact terms of the contract left the purchasers without the control of the application which otherwise they might have obtained. But the vendor acted, I think, quite bona fide and had no intention to set any terms of the contract at nought. No time was fixed, either by the contract or by a notice, for the making of the application. The withdrawal of the application did not prejudice the ultimate success of a proper application. It was not, I think, possible for the purchasers to ignore the vendor's

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offer to renew the application and forthwith rescind although the time at which they were entitled to completion had not arrived.

I think the appeal should be dismissed with costs.

EVATT J. By contract dated April 14th, 1927, the respondent acknowledged that she had on that day sold to the appellants for the sum of £7,812 a "piece of land" in the City of Melbourne with a building thereon known as 309 Swanston Street, Melbourne," as such land is shown on the plan annexed" to the contract "and signed by or for the vendor and the purchasers and thereon coloured red together with and subject to the easements therein set out."

Although there is also a reference in the description of the land sold to a certificate of title (vol. 4469 fol. 893674) under the Transfer of Land Acts, it is clear that what the appellants purchased was the land upon which the building, 309 Swanston Street, then stood as such land was shown upon the survey plan annexed to the contract. The survey had been made only a few weeks before April 14th.

The certificate referred to (upon which the respondent relies to make title to the land sold) shows title to a very small portion of the southern 18 inches party wall of the existing building. The portion of the party wall on the south-east boundary from Swanston Street to a point 30 feet 1 inch from Swanston Street resting on the land in the certificate of title tapers from $2\frac{1}{2}$ inches at Swanston Street to $3\frac{3}{4}$ inches at a point 30 feet 1 inch from Swanston Street. From the latter point for a distance of about 17 feet no portion of the wall rests upon the land in the certificate. Thence, for the remaining distance of 23 feet 5 inches, only $3\frac{3}{4}$ inches of the wall is on the title.

The vendor's certificate of title is not referable to 309 Swanston Street alone. The frontage to Swanston Street included in the certificate is 31 feet $8\frac{1}{2}$ inches, and the frontage to 309 Swanston Street sold by the respondent as shown in the survey is 15 feet 7 inches.

As the certificate shows external monuments only, the northern party wall of 309 Swanston Street is nowhere indicated.

Special condition 1 declares that "the land within described is sold according to the *measurements on* the within mentioned

certificate of title," as introductory to a clause excluding the duty of both vendor and purchasers to make compensation or pay increased purchase-money by reason of discrepancies between actual and title "measurements." It is not the ordinary function of a special condition to alter the subject matter of sale, when described by reference to a surveyor's plan. The "measurements on" the certificate of the land do not indicate what frontage to Swanston Street is being sold, and as only the southern wall of 309 Swanston Street is shown on the certificate, it would appear that special clause 1 can only reasonably be applied to the measurements showing the depth of the land. All the land in the certificate ran from Swanston Street to Drewery Lane, and the measurements of depth on the survey plan do not agree with those on the certificate. No doubt the parties might, by more specific reference to the southern party wall of No. 309, have contracted that the only title to be given at that boundary was according to what was shown on the certificate. But this was not done. As the measurements of depth could not in the circumstances be corrected by the application to amend the certificate, special clause 1 still has an operation in the event of an application to amend under special clause 3 succeeding. As it is quite impossible to gather from the certificate of title *alone*, even approximately, what land was sold, special clause 1 cannot be read as affecting the subject matter of sale.

Special clause 3 imposed upon the vendor the obligation of applying forthwith "at her own expense" to the Registrar of Titles to amend the certificate of title so as to accord with the measurements shown on the survey plan. This clause shows that the parties must be taken to have been aware at the time of the contract that title could not readily be made by the vendor to the land sold. But the latter undertook to apply to amend the certificate so as to make title.

I do not see why it should be inferred that this undertaking represented the full extent of the vendor's duty to make title. But for special clause 3, the Law Institute's conditions which formed part of the contract would have enabled the vendor to rescind had the purchasers insisted upon a requisition as to the discrepancy in title. The actual certificate of title held by the vendor was regarded as requiring amendment, but the knowledge of such fact has no

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necessary relation to the vendor's obligation to make title. What the vendor was, by general condition 2, bound to produce on demand was the "Crown grant or certificate of title in respect of the land sold." If the certificate produced did not cover the "land sold," a good requisition could be made. The mere fact that both parties knew that, at the moment of the contract, the vendor did not "have" title, could not affect the obligation to "make" title which seems to be explicit enough in general clause 2.

If this view is right, the position is that the vendor did not make, and has not yet made, title to the land by producing a certificate covering the subject matter of sale. The discrepancy is serious and substantial, and, but for one matter to be referred to later, the purchasers would have been entitled to rescind.

The general conditions incorporated in the contract provided that the purchasers should make requisitions within 14 days in default of being deemed to waive them, and that the purchasers should be entitled to possession "upon acceptance of title."

But the special conditions of the contract contemplated that completion would not take place until the vendor's application to amend her certificate was proceeded with. That had to be done to make title, and the transfer and mortgage back would have to await the result of the application. In these circumstances the parties must either be taken as treating a requisition as having been made within the time mentioned in general clause 2 or else as having postponed the adjustment of all questions of title until the vendor's application to amend was finally disposed of. It follows that the purchasers' possession of the land since shortly after the date of the contract cannot be regarded as closing dispute as to title.

The last question is whether the contract was duly rescinded by the purchasers' letter of April 15th, 1931, or the earlier letter dated March 3rd, 1931.

The vendor made her application to amend the certificate on December 3rd, 1927, and withdrew it on August 6th, 1930, more than three years after the date of the contract. The withdrawal of the application was not notified to the purchasers, whose solicitor did not hear of it until February 4th, 1931. On March 3rd, 1931, the purchasers purported to elect to treat the contract as at an end,

but the ground taken was that the vendor had "failed to comply with clause 3 of the special conditions." In fact the vendor had made an application, and there was no breach of clause 3. Further, on March 9th, 1931, the vendor stated her willingness, if required, to make a further application, although she insisted that her title was good. The purchasers reiterated their challenge to title in their letter of April 15th, 1931.

In my opinion the purchasers were not entitled to rescind as and when they did. The proper time for completion was a reasonable time after the application to amend the certificate had been finally dealt with. Notwithstanding the vendor's failure to communicate with the purchasers after August 6th, 1930, there had already been a very long delay at the Office of Titles, and the purchasers should have given the vendor a final opportunity of making a good title. The question, however, was not (as the letter of March 9th, 1931, suggested) whether the purchasers might require another application to be made for the amendment of the certificate, but whether the vendor could carry out her obligation to make title and complete by producing one or more certificates of title covering all the land described in the survey plan.

The purchasers, although not entitled to rescind when they purported to do so, should have obtained the first declaration asked for in the summons, that the vendor had not yet shown a good title to the land contracted to be sold.

In part therefore the appeal should be allowed.

McTiernan J. I agree with the reasons of my brother *Dixon*, and I have nothing to add. I am of opinion that the appeal should be dismissed.

Judgment of the Supreme Court varied by inserting after the words "that this summons be dismissed" the words "without prejudice to the rights of the parties"; otherwise appeal dismissed with costs.

Solicitors for the appellants, *William S. Cook & McCallum.*

Solicitors for the respondent, *Fitzgerald & Fitzgerald.*

H. D. W.