[HIGH COURT OF AUSTRALIA.]

NOSKE . . . . . APPELLANT;
DEFENDANT,

AND

McGINNIS AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1932.

MELBOURNE, *May* 24, 25.

SYDNEY, *Aug.* 8.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Contract—Sale of land—Exchange of properties—One property in New South Wales and the other in Victoria—Owner of Victorian property unable to convey—Failure to comply with requisition—Purported rescission under clause in contract—Clause giving vendor power to rescind if unwelcome requisition as to title made—Matter of conveyance or title—Interest in owner's wife alleged—Failure to remove claim—Breach of contract—Damages—Transfer of Land Act 1928 (*Vict.*) (*No.* 3791), *Sched.* 25.

Private International Law—Moratorium in New South Wales—Action in Victoria—Moratorium Act 1930-1931 (*N.S.W.*) (*No.* 48 *of* 1930—*No.* 43 *of* 1931), *sec.* 25.

The plaintiffs entered into a contract in New South Wales to sell to the defendant certain station property in that State for a price consisting in part of an equity of redemption of a hotel in Melbourne. The contract provided that, for the purpose of inspection of title to the hotel, making requisitions thereon and acceptance thereof, the conditions of Table A of the *Transfer of Land Act* 1928 of the State of Victoria should apply thereto. Similarly the conditions set out in the *Conveyancing Act* 1919 of New South Wales were made applicable to the sale of the station property to the defendant. The plaintiffs requisitioned the defendant inquiring whether the hotel was subject to any unregistered encumbrances. The defendant replied that his wife claimed that he was a trustee for her of the hotel, and that she had lodged a caveat to support her right. The plaintiffs thereupon required the defendant to have the caveat removed and to produce a clear title. The defendant replied

H. C. OF A. 1932. NOSKE v. MCGINNIS.

that he was unable to compel or arrange for the withdrawal of the caveat, and that unless the requisition was withdrawn he would rescind at the expiration of seven days. The requisition not having been withdrawn, the defendant purported to rescind the entire contract under the provisions of clause 3 of Table A of the Victorian *Transfer of Land Act* 1928, which provides that "If the purchaser shall . . . make any such requisition or objection as aforesaid" (that is, a requisition or objection on or to the title or concerning any matter appearing in the particulars or conditions of the sale) "which the vendor shall be unable or unwilling to remove or comply with the vendor . . . may give to the purchaser . . . notice in writing of the vendor's intention to rescind the contract . . . and if . . . the requisition or objection shall not be withdrawn . . . the contract shall thereupon be rescinded." No similar provision occurred in the *Conveyancing Act* of New South Wales. The trial Judge found that the defendant's wife did not have any interest in the hotel property. In an action by the owners of the station property for specific performance of the contract and damages,

Held, that, as the defendant either deliberately abstained from making title to his property, or else, having entered into the contract regardless of his wife's claim to an interest therein, made no effort to get in his wife's interest, if she had any, he could not take advantage of her caveat for the purpose of avoiding his contractual obligation under clause 3 of Table A of the *Transfer of Land Act* 1928 (Vict.); that the clause did not avail him either as a ground for avoiding the entire contract or that part of it which related to the hotel, and that the plaintiffs were entitled to general damages for loss of the bargain.

In re Daniel; *Daniel* v. *Vassall*, (1917) 2 Ch. 405; *Keen* v. *Mear*, (1920) 2 Ch. 574, at p. 581, and *Bain* v. *Fothergill*, (1874) L.R. 7 H.L. 158, at pp. 207-209, applied.

Flureau v. *Thornhill*, (1776) 2 W.Bl. 1078; 96 E.R. 635, distinguished.

Sec. 25 of the *Moratorium Act* 1930-1931 (N.S.W.), which provides that "no action, suit, or proceeding shall be commenced, nor shall any action or proceeding already commenced be continued for breach of" a contract of sale of real property, does not discharge or extinguish contractual obligations, but merely limits the personal remedy in New South Wales.

Decision of the Supreme Court of Victoria (*Macfarlan* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

The respondents, Ellen Mary McGinnis, Mary Dynon, Ignatius Marie McGinnis and Hilary Sebastian McGinnis, brought an action in the Supreme Court of Victoria against Traugott Johann Noske.

By their statement of claim the plaintiffs alleged:—(1) The plaintiffs had been since 16th July 1928 and were on 7th August 1930 carrying on the business of pastoralists, graziers and farmers under the firm name of Warwillah Pastoral Company. (2) By an

agreement in writing dated 7th August 1930 and made between the plaintiffs and the defendant it was agreed (*inter alia*) that the defendant would sell and the plaintiffs would buy the defendant's equity of redemption in the freehold property known as the Cosmopolitan Hotel, Swanston Street, Melbourne, for the sum of £35,000 payable immediately on the terms and conditions appearing therein. (3) It was a term of the said agreement, so far as related to the said sale, that the conditions of Table A of the *Transfer of Land Act* 1928 (Vict.) should apply. (4) The plaintiffs duly paid the said purchase price, and were ready and willing to carry out the said agreement on their part. (5) The vendor has purported to rescind the said sale under condition 3 of the said conditions of Table A but has not repaid and refuses to repay to the plaintiffs the said purchase price paid as aforesaid. (6) By the said agreement it was also agreed that the plaintiffs would sell and the defendant would buy the pastoral property known as Warwillah near Booroorban in New South Wales comprising 38,934 acres or thereabouts of freehold and 3,062 acres or thereabouts of leasehold together with the buildings and other improvements thereon and also all the sheep, horses and cattle and all working plant on the property on the terms and conditions appearing therein for the sum of £124,535 3s. of which £35,000 should be paid immediately as a deposit in part payment of the purchase-money and the balance by instalments as therein set forth. (7) The defendant accepted title and on 4th September 1930 or thereabouts entered into possession of the said property and took delivery of the said stock and working plant. (8) The plaintiffs have been at all times ready and willing to carry out the said agreement on their part, but the defendant has not paid the purchase price payable thereunder save and except the said deposit of £35,000 or alternatively has not paid any of such purchase price at all and has not completed the said purchase and has now renounced and refused to complete the same and has given up possession of and left the said property. (9) The plaintiffs have suffered damage by reason of the defendant's breach of the said agreement of 7th August 1930. The plaintiffs claimed: (1) repayment of the said sum of £35,000 referred to in par. 5 hereof; (1A) (added by amendment) damages for breach of the said agreement, £50,000;

H. C. OF A. 1932. NOSKE v. McGINNIS.

(2) specific performance of the said agreement so far as it related to the purchase by the defendant of the said property known as Warwillah; (3) such other relief as the Court might deem fit in the circumstances.

By his defence the defendant traversed pars. 1 to 8 of the statement of claim, and alleged:—(9) (*a*) If the defendant made the alleged or any agreement with the plaintiffs (which is not admitted) the defendant was induced to make the same by the representation made to him by the plaintiffs and/or their agents that the property Warwillah mentioned in the statement of claim had from the time of shearing in 1929 until the date of the defendant's inspection of the said property in August 1930 carried the whole of the sheep that were upon the property at the time of the defendant's inspection and had during part of such period carried some thousands in addition. (*b*) The said representation was false and fraudulent and was made with intent to induce the defendant to make the alleged agreement. (*c*) The defendant having discovered the falsity of the said representation has elected and/or elects to rescind the alleged agreement. (10) Alternatively to par. 9 if the defendant made the alleged or any agreement with the plaintiffs (which is not admitted) upon the proper construction of such agreement they were terms thereof—(*a*) That any obligation on the part of the defendant to purchase and/or to complete the purchase of the property known as Warwillah mentioned in the statement of claim or the buildings, improvements sheep horses cattle and plant therein referred to should be conditional upon (i.) the purchase by the plaintiffs from the defendant of the property known as the Cosmopolitan Hotel or alternatively the defendant's right title and interest in such property being made and completed; (ii.) the property known as the Cosmopolitan Hotel or alternatively the defendant's right title and interest therein being transferred to the plaintiffs and such transfer and the undertaking by the defendant to pay and discharge certain liabilities of the plaintiffs to mortgagees and unpaid vendors of Warwillah and to Younghusband Limited being accepted as consideration for the purchase by the defendant of the said property known as Warwillah; (iii.) the defendant being able to make and give such title to the property known as the Cosmopolitan Hotel as

the plaintiffs were bound or willing to accept; (iv.) the plaintiffs accepting the title of the defendant to the property known as the Cosmopolitan Hotel; (v.) the plaintiffs taking over and assuming liability as from 31st July 1930 for all rates taxes charges and other outgoings in respect of the said Cosmopolitan Hotel and/or all interest payable in respect of a mortgage of £20,000 thereon and paying to the defendant such rates taxes charges other outgoings and interest in June 1935 and in the meantime securing payment thereof by a mortgage to be given by the plaintiffs to the defendant over the said Cosmopolitan Hotel; (vi.) the plaintiffs repaying to the defendant an amount equal to the liability of the plaintiffs to Younghusband Limited on advance account by two equal payments on 31st July 1935 with interest thereon at £7 5s. per cent per annum and in the meantime securing such payments and interest by a mortgage over the said Cosmopolitan Hotel: (vii.) the plaintiffs repaying to the defendant the sum of £10,000 on 31st July 1935 or within one month thereafter and in the meantime securing such repayment by a second mortgage on the title to the said Cosmopolitan Hotel; (viii.) there being no rescission under the condition mentioned in sub-par. (*b*) of this paragraph of the sale and purchase of the said Cosmopolitan Hotel: (*b*) That if the plaintiffs should make any requisition or objection on or to the title of the defendant to the said Cosmopolitan Hotel which the defendant should be unable or unwilling to remove or comply with the defendant or his solicitor might give to the plaintiffs or their solicitor notice in writing to rescind the said agreement at the expiration of seven days unless such requisition or objection should be withdrawn and if such notice should be so given and the requisition or objection should not be withdrawn within seven days the said agreement or alternatively the sale and purchase of the said Cosmopolitan Hotel should thereupon be rescinded. (11) (*a*) The defendant was not in fact able to make or give such title to the said property known as the Cosmopolitan Hotel as the plaintiffs were bound or willing to accept. (*b*) The plaintiffs did not accept the title of the defendant to the said property known as the Cosmopolitan Hotel. (*c*) The plaintiffs made a requisition or objection on or to the title of the defendant to the said Cosmopolitan Hotel which the defendant was unable and

H. C. OF A. 1932.

NOSKE v. MCGINNIS.

unwilling to remove or comply with whereupon the defendant or his solicitor gave notice in writing to the plaintiffs or their solicitor to rescind the said agreement at the expiration of seven days unless such requisition or objection should be withdrawn. The said requisition or objection was not withdrawn within seven days and thereupon the said agreement or alternatively the sale and purchase of the Cosmopolitan Hotel was rescinded. (*d*) The purchase by the plaintiffs from the defendant of the said property known as the Cosmopolitan Hotel or the defendant's right title and interest in such property was not made or completed and the plaintiffs have refused to make and complete the same. (*e*) The plaintiffs were not ready and willing to accept and have refused to accept the transfer and the undertaking referred to in par. 10 (*a*) (ii.) hereof as consideration for the purchase by the defendant of Warwillah. (*f*) By reason of the matters set forth in sub-pars. (*a*), (*b*), (*c*), (*d*) and (*e*) of this paragraph the obligations of the plaintiffs under par. 10 (*b*) (v.), (vi.) and (vii.) hereof have been rendered incapable of performance and the plaintiffs have repudiated the said agreement and exonerated and discharged the defendant from further performance thereof. (12) If the defendant entered into possession of Warwillah (which is not admitted) he did so pursuant to an agreement that such entry should not be interpreted as an acceptance of title and should not prejudice any of the rights of the parties. (13) By reason of the matters alleged in pars. (10) and (11) hereof the agreement (if any) made between the plaintiffs and the defendant is incapable of being completely performed and it would therefore be inequitable to make the decree claimed. (14) The agreement (if any) made between the plaintiffs and the defendant was void for uncertainty. (15) There was no note or memorandum in writing of the alleged agreement as required by the provisions of sec. 128 of the *Instruments Act* 1928.

By their reply the plaintiffs joined issue and alleged:—(2) The agreement referred to in the statement of claim so far as it relates to the purchase by the defendant of the property known as Warwillah has been part performed as follows: The defendant on or about 4th September 1930 or thereabouts took possession of the said property and took delivery of the stock and plant thereon.

(3) As to pars. (10), (11) and (13) of the defence, the plaintiffs will object that the matters alleged therein are bad in law and disclose no answer to the statement of claim on the ground that the defendant cannot take advantage of his own wrong and/or of events brought about by his own acts or omissions.

At the trial the defendant sought leave to add the following defence:—(16) (*a*) The agreement in writing referred to in the statement of claim or alternatively so much thereof as related to the property known as Warwillah was and is governed by the law of New South Wales. (*b*) The said agreement (if made) was a contract of sale of real property within the meaning of sec. 25 of the *Moratorium Act* 1930 of the State of New South Wales as amended by the *Moratorium (Amendment) Act* 1931 of the said State and this action or the further prosecution thereof was and is barred by the said Act as amended as aforesaid. This application for amendment was refused on the ground that it did not afford a defence to this action.

The contract between the plaintiffs and the defendant, which was executed in New South Wales, was in the following terms:—"I the undersigned I. M. McGinnis for and on behalf of the owners of Warwillah Station agree as follows:—(1) That in consideration of the sum of one pound this day paid to me I hereby give Mr. T. J. Noske for and on behalf of himself and purchasers represented by him a right and option to purchase—Firstly all that the right title and interest of us as owners in the pastoral property known as Warwillah near Booroorban in New South Wales comprising 38,934 acres 2 roods 13 perches of freehold lands together with the buildings and other improvements on the said land. The vendors will give in all their estate right title and interest in and to approximately 3,062 acres of leasehold land being occupation licence and preferential occupation licence held in connection with the said lands and appurtenant thereto. Secondly all the sheep to be taken as in the wool (between 16,000 and 17,000) horses (approximately 25) cattle (between 40 and 50) also all working plant including shearing plant furniture (except personal effects of the vendors and employees on the property). The purchase price shall be as follows:—The vendors will purchase the right title and

H. C. OF A. 1932. NOSKE v. MCGINNIS.

interest of the vendors in and to the freehold property known as the Cosmopolitan Hotel having a frontage of approximately 31 feet to Swanston Street by a depth of 75 feet to Little Bourke Street in the City of Melbourne for the sum of fifty-five thousand pounds. This property is subject to a building lease which expires in June 1935. The property is also subject to a mortgage for £20,000 leaving an equity of £35,000 which shall be credited as deposit on purchase of Warwillah with sheep horses cattle plant thereon as above specified. The balance of purchase-money £89,535 3s. shall be paid in terms of a contract of the said land made by the present vendors with Michael Hogan and others in respect of the said property and which said sum represents the balance due under the said contract the liability of which shall be taken over by the present purchasers. Such balance of purchase-money is payable as follows: —£5,000 due 15th January 1931. £5,000 due 15th January 1932. £5,500 due 15th January 1933. £5,500 due 15th January 1934. £14,785 3s. due 15th January 1935. The above payments bear interest at the rate of 6½ per cent per annum which is payable half-yearly. The balance £53,700 is represented as a mortgage to Edward Norton Settlement bearing interest at 6 per cent per annum payable half-yearly and due and payable on 15th January 1935 the liability of payment of such sum and interest thereon shall be taken over by the purchaser in terms of the contract. Special Conditions.—(1) The Cosmopolitan Hotel property to be acquired by the vendors of Warwillah Station as subject to a ground lease expiring in June 1935 of £312 per annum. The purchasers of Warwillah shall be entitled to receive the rents payable under such ground lease of the Cosmopolitan Hotel property and continue as though the holders thereof until same shall expire and shall pay all outgoings in respect of the property including interest on present mortgage land taxes compensation fees and other outgoings until the expiry of the said ground lease in June 1935. The present purchasers of Warwillah under this option shall also arrange the renewal or another mortgage in place thereof of the said mortgage of £20,000 until the said ground lease shall expire in June 1935. All amounts so paid by the present purchasers of Warwillah in respect of the outgoings of the Cosmopolitan Hotel property under

this clause shall be repaid to the purchasers of Warwillah on the expiry of the said ground lease in June 1935 or within one month thereafter and all such moneys so paid shall be a first charge on the equity which the present vendors of Warwillah shall acquire in the said hotel property. (2) The present vendors of Warwillah are indebted to Younghusband Limited to the sum of approximately £9,000 in respect of advances against the wool and sheep and produce thereof now on the Warwillah pastoral property. The present purchasers of Warwillah Station will arrange to take over this overdraft with Younghusband Limited to be reduced with the present wool clip from the property in view of the present sale price of the station being based on delivery of the station property with the sheep in the wool. The present vendors of Warwillah will repay to the now purchasers thereof the whole of the amount of such overdraft of approximately £9,000 so taken over by them as aforesaid on expiry of the ground lease of the Cosmopolitan Hotel property in June 1935 and this amount together with the amount specified in condition 1 hereof shall be a further charge against the equity to be acquired by the present vendors of Warwillah in the Cosmopolitan Hotel property to be repayable on the expiry of the present ground lease thereof in June 1935 or within one month thereafter. The vendors agree to pay interest on this sum of £9,000 calculated at the rate of $7\frac{1}{4}$ per cent in one lump sum shall become payable in June 1935 or within one month thereafter such interest to be calculated from 31st July 1930. (3) The Warwillah pastoral lands with all buildings and improvements and with plant cattle and horses shall be deemed to be taken as delivered on 31st July 1930 to the purchasers thereof free of all encumbrances other than the sum of £89,535 3s. due as aforesaid under and in terms of the contract of sale from M. Hogan and others with the present vendors of Warwillah. The sheep on Warwillah shall be taken as delivered in the wool as on 31st July 1930 the date of commencement of shearing and all adjustments of rents rates interests taxes wages and other outgoings in respect of the property together with the receipts of all profits and earnings of the property shall be payable or receivable by the present purchasers as and from 31st July 1930. (4) The condition of this sale shall be that on the expiry of the

H. C. OF A. 1932.

NOSKE v. McGINNIS.

ground lease now stated to be in existence on the property and to expire in June 1935 is that on the expiry of such ground lease in June 1935 the present vendors of Warwillah shall be entitled to vacant possession of the said hotel lands . . . together with the rights of the victualler's licence now held in connection with the hotel premises erected thereon free of any encumbrances whatsoever save and except the liability of a first mortgage of £20,000 and the charges or amounts to be repaid by the present vendors of Warwillah to the purchasers thereof in terms of conditions 2 and 3 hereof and to be charges against the equity to be acquired by the vendors of Warwillah in the said Cosmopolitan Hotel property which said equity shall be considered to have been acquired as and from 31st July 1930. All adjustments of rates taxes interest and other outgoings to be adjusted as between vendor and purchaser in respect of the said hotel property shall be adjusted as and from that date. (5) So far as the sale of the said hotel property is concerned from the purchasers of Warwillah to the vendors thereof for purposes of inspection of title making requisitions thereon and acceptance thereof the conditions of Table A of the *Transfer of Land Act* 1928 of the State of Victoria shall apply thereto. So far as relates to the sale of the Warwillah pastoral property from the present owners thereof to the above-named purchasers the conditions set out in *Conveyancing Act* 1919 of New South Wales shall for purposes of inspection requisition and acceptance of title in respect of the said land be applicable thereto subject to any alteration or modifications if any to such said conditions contained in the contract of sale under which the present vendors acquired the said land. This option of purchase is given to the said T. J. Noske and others on whose behalf he is at present negotiating to purchase the Warwillah pastoral property sheep cattle horses and plant thereon as aforesaid for a period of eleven days expiring at 11.30 a.m. on 9th August 1930 and must be accepted in writing on or before the expiry of such period. Such said acceptance to be delivered at the office of O'Connor, Egan & Smyth, 117 William Street, Melbourne on or before the expiry of such period. . . . Dated this 30th day of July 1930. The purchasers of hotel property will when called upon to do take a transfer of the said hotel property and shall simultaneously

therewith execute a second mortgage over the said hotel property to T. J. Noske or to whom he may direct to secure the amounts of principal and interest due under clauses 2 and 3 hereof as shall be payable under clauses 2 and 3 hereof. Likewise the purchasers of the hotel property may call on T. J. Noske or the registered proprietor of the Cosmopolitan Hotel property to give them a transfer of the hotel property and accept a second mortgage for to secure such moneys as shall be repayable under this agreement. For and on behalf of Warwillah Pastoral Company (Signed) I. M. McGinnis. I agree to purchase the above property in terms of above offer save and except the following alterations—(1) The price for Warwillah to be reduced by £10,000 in the event of Mrs. McGinnis and others being able to arrange with the executors of Michael Hogan and others the vendors to them to reduce the amount due under their contract by such amount of £10,000 then they may have the benefit of such reduction otherwise Mrs. McGinnis and others the present vendors of Warwillah shall repay to the present purchasers the said sum of £10,000 on 31st July 1935 or one month thereafter such amount to be secured by second mortgage on the title of the said hotel property. (2) The present purchasers of Warwillah to take over the present advance account with Younghusband Limited and after deduction of the proceeds of the present wool clip the amount then found on date of such sale due and owing to Younghusband Limited shall be repaid with interest at 7¼ per cent by the present vendors to the present purchasers in two equal amounts on 31st days of July in the years 1932 and 1935 and such payments to be secured by second mortgage on the title to hotel property. It is agreed that in the event of the present purchasers of the hotel property reselling same at any time before the due date of such last-mentioned payments then the whole of such amount of balance taken over from Younghusband Limited shall become due and payable and be repaid to the said T. J. Noske or his nominees out of deposit moneys received on the resale of the said hotel. Dated 7th August 1930. Delivery to be given and taken as and from 2nd September now next and adjustments to be made as and from that date. The purchasers of Warwillah agree to take present shearing tally as the count for sheep on property. (Signed) T. J.

H. C. OF A. 1932. NOSKE v. MCGINNIS.

Noske. We confirm the above sale. (Signed) Warwillah Pastoral Company, I. M. McGinnis."

On 22nd August 1930 the plaintiffs made a requisition asking whether the hotel property was "subject to any unregistered mortgages, charges, liens, rights or encumbrances of any kind other than those disclosed on the title or by the usual searches." On 7th October 1930 the defendant's solicitors wrote stating: "We have been notified by Messrs. Arthur Phillips and Just who are acting for Mrs. C. C. Noske that she is claiming that Mr. Noske is a trustee for her of the Cosmopolitan Hotel or alternatively an undivided share therein and they also inform us that they have lodged a caveat against the title forbidding the registration of any transfer or dealing." On 8th October 1930 the plaintiffs' solicitors replied as follows:— "Referring to your letter of the 7th inst. embodying replies to our requisitions and our interview yesterday afternoon, on behalf of Mrs. McGinnis, we require your client to arrange forthwith for the withdrawal of the caveat lodged on behalf of Mrs. Noske, and to transfer the hotel title to our client, subject only to the encumbrances referred to in the contract of sale, or alternatively to pay Mrs. McGinnis in cash an amount equivalent to the value of your client's equity in the hotel as fixed by the contract, viz., £35,000 less £10,000 the amount by which it was agreed the price of Warwillah should be reduced, and less also the amount of her indebtedness to Younghusbands which, in terms of the contract, is to be taken over by Mr. Noske." The defendant's solicitors replied on 13th October 1930:—"Our client is unable to compel or arrange for the withdrawal of the caveat lodged on behalf of Mrs. Noske or to make the transfer of the hotel property to your client except subject to Mrs. Noske's interest therein. Your client is not entitled to demand the second alternative set out in your letter, viz., the payment of cash. We now give you notice that it is our client's intention to rescind the contract at the expiration of seven days unless your requisitions and objections above referred to be in the meantime withdrawn." The plaintiffs' solicitors refused to withdraw their requisition, and on 21st October 1930 the defendant's solicitors purported to rescind the contract on his behalf. The plaintiffs' solicitors replied on 22nd October 1930:—"We would once more

remind you that the conditions of Table A of the *Transfer of Land Act* 1928 only apply to the sale of the hotel property, see special condition 5 and that, therefore, any rescission under condition 3 of Table A only operates to rescind the sale of the hotel property. There can, therefore, be no question of our client resuming possession of Warwillah, the sale of which is not governed by or affected by the conditions of Table A, but by the conditions set out in the *Conveyancing Act* 1919 of New South Wales. We must, therefore, ask your client to fulfil his obligations under condition 3 of Table A under which we understand he has purported to rescind the sale of the hotel property, and to repay to our client all deposit and other moneys received by him on account of the purchase-money. The moneys so received amount to the sum of £35,000 paid to your client by way of set-off against the deposit on the sale of Warwillah."

Macfarlan J., who tried the action, found that the defendant had only to ask, and the caveat by his wife would have been removed. His Honor said: "Further than that I am satisfied that it was his caveat, that the objection was his and the caveat was his." His Honor gave judgment for the plaintiffs for £10,828.

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

Robert Menzies K.C. and *Hudson*, for the appellant.

Robert Menzies K.C. On the moratorium point:—The contract was signed in New South Wales. The statement of claim was amended to claim damages for breach of contract and after that the defence under the *Moratorium Act* of New South Wales was raised, because then the *Moratorium Act* had just been passed. *Macfarlan* J. refused leave to raise this defence because he thought it did not afford a defence to the action. When it is found that the governing law is that of New South Wales the result of sec. 25 of the *Moratorium Act*, No. 48 of 1930, as amended by Act No. 43 of 1931, is to prevent this action being continued, and also to prevent the damages awarded being recovered. The first question is whether the law of New South Wales is the proper law of the contract. Prima facie the law of the place where the contract is made is the governing law of the contract, and though

H. C. OF A. 1932. NOSKE v. McGINNIS.

that may be rebutted by proof of an intention that there should be another governing law there is here no such intention (*Halsbury, Laws of England*, vol. VI., pp. 238-239). When it is shown that the contract is governed by New South Wales law the contract would be exposed to any effect of the New South Wales law unless the Victorian Court came to the conclusion that the New South Wales law was merely procedural. What is done by sec. 25 of the *Moratorium Act* of New South Wales is not something relating to procedure but is something which extinguishes a right. The proper law is the law of New South Wales, including its statute law. That law determines the rights and liabilities of the parties which arise from the contract, so that by looking at the contract arising under New South Wales law one can say that that contract entitles A to something against B and B to something against A. If the law enables you to indicate what are the rights of the parties then it is substantive law and not procedural law; and if litigation is commenced in a Victorian Court it will proceed on the assumption that the parties' rights are as the law of New South Wales allows, but that in determining what procedure is to be followed in the Victorian Courts the parties are not confined to what the New South Wales law provides: the real inquiry is whether under sec. 25 the rights of parties are taken away or modified, and if so it is only the rights as so modified that can be litigated (*Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Métaux* (1)). The real contrast is between law which affects the contract and law which is a mere matter of procedure (*Rouquette* v. *Overmann* (2)).

[STARKE J. referred to *Dicey, Conflict of Laws*, 4th ed., p. 623.]

Hudson. The position is stated by *Dicey*, 4th ed., pp. 565, 636, and in *British South Africa Co.* v. *De Beers Consolidated Mines Ltd.* (3).

[RICH J. referred to *In re Smith*; *Lawrence* v. *Kitson* (4).]

So far as intention expressed in the contract itself is concerned it is difficult to point to anything more persuasive as to the intention of the parties. The property was situated in New South Wales and possession would have to be handed over there, and so far as the

(1) (1890) 25 Q.B.D. 399.
(2) (1875) L.R. 10 Q.B. 525.
(3) (1910) 2 Ch. 502, at pp. 512-515, 517.
(4) (1916) 2 Ch. 206.

consideration was the handing over of Victorian property, that was subsidiary. Questions relating to procedure are matters quite divorced from the questions which arise in the present case. Though the effect of this Act is to deprive the parties of their rights for a time, the matter is governed by the proper law of the contract and not by the *lex fori*. The contract was rightly rescinded under the *Transfer of Land Act*. There was no evidence on which the learned trial Judge could find that the caveat was the defendant's caveat. What has to be shown under the clause is the defendant's inability or unwillingness to carry out the contract. Unless there is some evidence to support the Judge's finding that it was the defendant's caveat and not his wife's, the right of rescission arose. Condition 3 of Table A applies, as the question relates to the title to the hotel. Though condition 3 may not directly authorize the rescission of the sale of the grazing property, it does so indirectly as the two transactions could not be severed. The parties intended that if the purchaser should be unable to make title to the hotel he should have the right to rescind the contract to purchase the station property. There are sufficient facts shown to prove inability on the part of the defendant whatever view may be taken as to the credibility of these two witnesses, and there is no evidence of any fraud. There was no evidence to show that the defendant could have had the caveat removed. There is an interest outstanding in a third party which disabled the defendant from carrying out this contract, and he did not enter into this contract with any reckless disregard of this fact so as to prevent the clause as to rescission in the contract operating. Apart from condition 3, the rule in *Bain* v. *Fothergill* (1) is sufficiently wide to prevent damages being recovered against the defendant. *Day* v. *Singleton* (2) related to the sale of leasehold. The limit of *Bain* v. *Fothergill* is where the vendor has made no reasonable efforts to carry out his contract.

[EVATT J. referred to *Braybrooks* v. *Whaley* (3).]

There was no sufficient evidence to justify the amount of damages awarded. If this contract had been carried out on 24th October 1930 the plaintiffs would have had a hotel worth £35,000. That

(1) (1874) L.R. 7 H.L. 158, at p. 208. (2) (1899) 2 Ch. 320.
(3) (1919) 1 K.B. 435.

H. C. OF A. 1932. NOSKE v. MCGINNIS.

would have been subject to a mortgage of £20,000 and to a deduction of £7,350 for the tenant's interests and £10,000 representing a reduction in price. So the parties were dealing in minus quantities. This was an exchange and the station was worth £89,000 plus the value of the hotel, and there is no evidence as to the value of this. The station could not be taken as having a value of £115,000. There was no sufficient evidence on which the Judge could have found that the plaintiff was in any different position than if the contract had not been carried out. At most the plaintiff was entitled to nominal damages.

Wilbur Ham K.C. (with him *Herring*), for the respondents. This action does not come within the *Moratorium Act* of New South Wales, because the defendant purported to rescind the contract and the *Moratorium Act* deals only with subsisting contracts. The *Moratorium Act* of New South Wales can have no operation to bar Victorian suitors in a Victorian Court. There was no intention in the Act to discharge the whole mortgage obligation, and, if it did, the New South Wales Legislature could not prevent Victorian citizens exercising their rights in Victorian Courts: if it purported to do so, it would have to be cut down on the lines of *Macleod* v. *Attorney-General for New South Wales* (1). Moreover, the *Moratorium Act* is purely procedural and, therefore, does not affect the Victorian Court (*Foote's Private International Law*, 5th ed., pp. 550-551). The law of New South Wales is not the proper law of the contract. It is true that one of the properties was situate in New South Wales and one is situate in Victoria. It was a mere accident that all the parties were in New South Wales at the time when the contract was made. Where it is a pure accident that all the parties are in one country when a contract is signed, no inference can be drawn from that as to what the parties intended to be the proper law of the contract. Under clause 3 of Table A of the *Transfer of Land Act*, if the Court sees that from the nature of the transaction some of the conditions are applicable and some are not, the Court will apply only those that are applicable (*Halsbury, Laws of England*, vol. XVII., p. 343; *Cunard Steamship Co.* v. *Marten* (2)). Table A of the

(1) (1891) A.C. 455.

(2) (1902) 2 K.B. 624.

Transfer of Land Act applies only to the hotel and not to the station. Under the *Conveyancing Act* of New South Wales there is no corresponding provision, and, if this is to be treated as one contract, on its very terms condition 3 cannot be made applicable. If the defendant can rescind, all he can rescind is the sale of the hotel, and the contract for the sale of the station stands. The Court has power to award damages in addition to or in substitution for specific performance (*Supreme Court Act* 1928 (Vict.), sec. 62 (4)). Set-off amounts to payment (*J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (1)). The defendant makes no effort to obtain a title and is liable in damages (*In re Des Reaux and Setchfield's Contract* (2)). The parties in this case occupied the position of vendor and purchaser and, so far as damages are awarded, they are awarded to them as vendors of the station property. There is nothing to prevent them from recovering damages for the loss of their bargain, but they got no damages in respect of the loss of the Cosmopolitan Hotel. *Bain* v. *Fothergill* (3) is consequently distinguishable. That case applies only where the contract goes off through no fault of the vendor. If the defendant could not make title to the hotel he should have offered to complete the rest of the contract (*Williams* on *The Contract of Sale of Land*, p. 128 ; *In re Daniel*; *Daniel* v. *Vassall* (4)). If the contracts had been severable the plaintiffs should have got £38,000 as damages (*A. H. McDonald & Co. Pty. Ltd.* v. *Wells* (5)).

Cur. adv. vult.

The following written judgments were delivered :— Aug. 8.

RICH J. This appeal arises out of a contract of sale or exchange of land made on 7th August 1930 between the owners of a station property in New South Wales who are the respondents and the owner of a hotel in Melbourne who is the appellant. The contract expressed an agreement on the part of the respondents to sell the station with certain sheep, horses and plant for a purchase price consisting of (1) an equity of redemption in the hotel set down as £35,000 after

(1) (1929) 42 C.L.R. 452.
(2) (1926) Ch. 178.
(3) (1874) L.R. 7 H.L. 158.
(4) (1917) 2 Ch. 405, at p. 409.
(5) (1931) 45 C.L.R. 506.

H. C. OF A. 1932. NOSKE v. MCGINNIS. Rich J.

the deduction of a mortgage of £20,000; (2) £89,535—represented by £35,785 of unpaid purchase-money owing by the respondents to the vendors from whom they had acquired the station property and by £53,750 secured by way of mortgage over the property. Clause 5 of the contract provided that so far as the sale of the hotel was concerned from the appellant to the respondents for purposes of inspection of title, making requisitions thereon and acceptance thereof the conditions of Table A of the *Transfer of Land Act* 1928 of the State of Victoria should apply thereto. Similarly the conditions set out in the *Conveyancing Act* 1919 of New South Wales were made applicable to the sale of the station property from the respondents to the appellant. Requisitions were made under these provisions and the parties proceeded under the contract in a regular manner until 7th October 1930, when, in answer to a requisition made on behalf of the respondents inquiring whether the hotel was subject to any unregistered mortgages, charges, liens, rights or encumbrances, the appellant's solicitors wrote as follows: "We have been notified by Messrs. Arthur Phillips & Just who are acting for Mrs. C. C. Noske that she is claiming that Mr. Noske is a trustee for her of the Cosmopolitan Hotel or alternatively an undivided share therein and they also inform us that they have lodged a caveat against the title forbidding the registration of any transfer or dealing." On 8th October 1930 respondents' solicitors replied requiring the appellant to arrange forthwith for the withdrawal of the caveat lodged on behalf of his wife and to transfer the hotel subject only to the encumbrances referred to in the contract or to pay the amount of the purchase-money, £35,000, fixed by the contract as the value of the equity in the hotel, less a sum of £10,000 by which the price of the station property had been reduced by agreement between the parties. The appellant's solicitors replied on 13th October that their client was unable to compel or arrange for the withdrawal of his wife's caveat and that unless the requisition was withdrawn he would rescind at the expiration of seven days. The respondents refused to withdraw their requisition, and on 21st October 1930 the appellant's solicitors purported to rescind the contract on his behalf. The purported rescission was rested on the 3rd condition of Table A of the Victorian *Transfer of Land Act* 1928.

There is considerable force in the objection that this condition is not incorporated in the contract by the provision which adopts the conditions of Table A only for purposes of inspection of title, making requisitions thereon and acceptance thereof. A power to rescind a contract in consequence of a purchaser insisting upon requisitions he has made cannot be considered as incidental to the making of requisitions or the acceptance of title. The New South Wales conditions incorporated with respect to the station property contain no analogous provision. I am disposed to think that, if the power of rescission were meant to apply to the hotel, clearer words should have been used. Many difficulties have arisen in the attempt of the appellant to rely upon it as a coherent part of this somewhat ill-drawn contract. Standing as he does in the situation of vendor of the hotel, he claims that he can rescind the entire contract and thus relieve himself of his obligation to acquire the station property, of which, to put it mildly, he appeared to be no longer an eager purchaser. The respondents retort that if the condition be a part of the contract its operation must be confined to the sale of the hotel and that, if in his character of vendor of that property he is unable and unwilling to comply with a proper requisition and so prefers to rescind its sale, the contract must be understood to mean that he should pay the sum of £35,000 (less the agreed deduction) which otherwise would be satisfied by the transfer of the hotel. The appellant replies that the contract is entire and severance is impossible. In the Supreme Court of Victoria *Macfarlan* J. assumed that the condition was incorporated and proceeded to investigate the bona fides of the exercise of the power it confers. After listening to evidence of the relations between the appellant and his wife, and of the circumstances in which she was alleged to have acquired and to retain an equitable interest in the land the legal estate of which was vested in the appellant, his Honor said: —"I reject the evidence of an estrangement and the evidence of the parties, that is, of the defendant and his wife . . . I am quite satisfied that the defendant had only to ask, and this caveat would have been removed, but further than that I am satisfied that it was his caveat, that the objection was his and the caveat was his. I am willing, if the parties desire it, to give my reasons for arriving at

H. C. OF A. 1932. NOSKE v. McGINNIS. Rich J.

that conclusion, but possibly the parties would prefer that I left the matter there." The parties manifested no further curiosity in respect of his Honor's reasons but the appellant contends that whatever may have been the *verba quæ tacite insunt* there is no affirmative evidence, first, that his wife had no interest; second, that he instigated the caveat, and, third, that he could secure its removal. His difficulty is that, in the circumstances set up by him, if his wife possessed an independent or adverse interest, he knew it existed when he entered into the contract. He must therefore be taken to have recklessly entered into the contract in a rash expectation of it proving acceptable to a wife he could not cajole, control or coerce. Adopting, therefore, the only logical alternative to that which commended itself to *Macfarlan* J. the appellant occupies a situation which, according to the well settled interpretation of such a condition as clause 3 of Table A affords no ground for rescission under the power it confers (*In re Des Reaux and Setchfield's Contract* (1)). A vendor who enters into a contract with full knowledge that his ability to complete depends upon the subsequent adoption of the bargain by an equitable owner of a share or interest in the estate, cannot shelter himself from the consequences of his recklessness under a clause directed to the unwillingness or inability of a vendor to comply with requisitions upon title. If, however, the hypothesis accepted by *Macfarlan* J. be adopted and the matter is determined upon the assumption that the caveat was a pretended and not a real obstacle to completion, it is equally clear that the appellant cannot rely upon the third condition of Table A. In any view therefore the appellant's attempted rescission amounted to a repudiation of the contract. This repudiation the respondents did not accept before action brought as putting an end to the contract and leaving the appellant liable to them for damages for loss of the bargain. On the contrary, they attempted to hold him to the contract by bringing an action for specific performance. However, this proceeding, in the course of its rather unsteady progress, lost some of its unequivocally equitable character, when by amendment a claim was added for damages for loss of the contract. As a result specific performance was not decreed, as, so far as I can see it might

(1) (1926) Ch. 178.

have been, but damages were awarded. The award of damages has provided the appellant with two complaints. Instinctively if not inevitably, his counsel resort to the rule in *Flureau* v. *Thornhill* (1) and maintain that general damages for loss of the bargain are not recoverable by a purchaser against a vendor of land who cannot perform because of the existence of some outstanding interest. A singular feature of this contention is that the position of purchaser and not of vendor is really occupied by the party who relies upon it. The postulated defect of title relates not to the land the successful disposal of which under the contract would have enriched the claimants but to the land to be transferred as part of the price. But in any case the modern authorities exclude from the application of this somewhat difficult rule breaches of his contract by a vendor occasioned by his deliberate omission. The most recent expositions of this rule are contained in the judgments of *Sargant* J. in *In re Daniel*; *Daniel* v. *Vassall* (2), and of *Russell* J. in *Keen* v. *Mear* (3), where he says: "*In re Daniel* was a case of a contract for sale of a property free from incumbrances by a vendor who must have known that he could not pay off a mortgage on the property sold with other property if the mortgagees refused, as in fact they did, to release the property sold from their security." *Sargant* J. in *In re Daniel* said (4):— "Contracts for the sale of real estate, like other contracts for sale, cast on vendors a general liability for damages for non-fulfilment of contract, subject only to an exception in a very special and limited class of cases, and that, unless a case is brought within that special class, the general rule applies. In *Day* v. *Singleton* (5) the question of the vendor's conduct was material, because, on the view taken by the Court, it prevented the case from falling within the special class by reason of the failure being due, in fact, not to inability to make title, but to deliberate abstention from doing so. But if the case, as here, is outside the special class of exception for another reason, namely, because it is a case merely of inability to convey, the question of conduct is immaterial, and the vendor is liable for non-fulfilment of contract, wholly irrespective of misconduct. The question, indeed, seems to me to be covered by the following passage in the

(1) (1776) 2 W. Bl. 1078; 96 E.R. 635.
(2) (1917) 2 Ch. 405.
(3) (1920) 2 Ch. 574, at p. 581.
(4) (1917) 2 Ch., at p. 410.
(5) (1899) 2 Ch. 320.

H. C. OF A. 1932. NOSKE v. McGINNIS. Rich J

judgment of Lord *Hatherley* in *Bain* v. *Fothergill* (1), namely, 'The vendor in that case'—*Engell* v. *Fitch* (2)—'was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is a duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance.' "

It thus appears that if, as *Macfarlan* J. thought, the appellant is able to secure the removal of the caveat and make title, but deliberately abstains from doing so, he is outside the rule and that he is also outside the rule if his difficulties relate to conveyance and not to title. It must be remembered that his entire story has been discredited, that all that is really known is that he possesses the legal title contracted for in all respects except that his wife has since the contract lodged a caveat. Now it is quite clear that if he entered into the contract knowing that by such a course his wife could prevent its fulfilment he cannot take cover under the rule. It is also clear that if he entered into the contract and afterwards discovered that his wife could prevent its performance he is bound to make all reasonable efforts to carry it out. There is every ground to suppose that he did not make any endeavour towards the fulfilment of the contract, and no credible evidence that he attempted to secure the removal of the caveat. Therefore, however the case is looked at, he has failed to bring himself within the special immunity conferred by what has been called " an anomalous rule based upon and justified by difficulties in showing a good title to real property in this country," viz., England (per *Sargant* J. (3), quoting *Lindley* M.R. in *Day* v. *Singleton* (4)). The second ground of complaint against the award of damages urged by the appellant depends upon the unsatisfactory character of the evidence upon which the large amount recovered, viz., £10,828 was assessed by *Macfarlan* J. The assessment proceeded from the basis that the value assigned to the station property represented its fair market price as on the date of the contract, 7th August 1930. This value, £114,535, was adopted upon the

(1) (1874) L.R. 7 H.L. 158, at p. 209.
(2) (1869) L.R. 4 Q.B. 659.
(3) (1917) 2 Ch., at p. 409.
(4) (1899) 2 Ch. 320.

evidence of a valuer who said that he considered the value on the date the appellant purchased was a very reasonable value; that he bought it very well. The looseness of these expressions makes it a little uncertain whether the witness considered the money sum specified to be reasonably low or the entire bargain to be satisfactory. But *Macfarlan* J., who heard the evidence, was in the best position to interpret it. He is not likely to have overlooked the predilection of those who negotiate contracts of exchange for putting the highest possible figures against each of the properties. Notwithstanding these considerations, his Honor adopted the figure of £114,525 as the commencing point, and in my opinion a Court of appeal who has not seen or heard the witnesses cannot interfere with his conclusion in this respect. He next had to consider how much of this value had disappeared when the property was thrown back on the respondents' hands. He arrived at what at first sight appears the astonishing conclusion that one-third of the value had disappeared in the short space of three months. But this fact was directly deposed to by a valuer of experience and was explained by the economic and political events of the period. Tumbling prices of primary products, impending and actual political changes, financial disasters and the uncertainty of the value of money, promoted apprehensions, not to say terrors, which would make values conjectures rather than assessments of sums actually obtainable. I think it is impossible to say that the depreciation fixed upon by the witness and adopted by the Judge is unreasonable. On the other side of the transaction his Honor accepted evidence which showed that for various reasons the hotel which the respondents would have acquired if the transaction had gone through possessed but little of the value assigned to it in the contract, viz., £55,000, considered as unencumbered. It cannot be said that *Macfarlan* J. adopted too high a value of the hotel as at the date of breach. No doubt the depreciation or reduction in values leaves the encumbrances greater than the values of the properties, but this is unimportant since, at least during the period we are concerned with, personal covenants continued to impose a liability. A further difficulty arising from the award of damages was mentioned from the Bench but not relied upon by the parties. Apparently the respondents' election to treat the appellant's

H. C. OF A. 1932. NOSKE v. MCGINNIS. Rich J.

purported rescission of the contract as a repudiation amounting to an anticipatory breach did not take place until after writ issued, when the amendments were made. The technical questions which may be discovered in this conjunction of circumstances were not discussed, and it may well be that when specific performance could have been granted damages can be given in lieu of that remedy apart altogether from any question which would arise in an action at law (cf. *Leeds Industrial Co-operative Society Ltd.* v. *Slack* (1)). In any case I do not think we are called upon to consider the question. For these reasons I am of opinion that the respondents are entitled to the damages awarded. But the appellant says they cannot recover them until the moratorium which in New South Wales prevails under the *Moratorium Act* 1930-1931 comes to an end. It is said that sec. 25 of that Act, which operates retrospectively as from 1st September 1931, prevents a vendor recovering damages for the loss of his contract, and that it does so even though the proceedings are brought in the Court of another State. The section creates many difficulties, but it seems clear that it does not extinguish rights and intends only to suspend remedies. The involved argument for ascertaining what as between New South Wales and Victoria was the proper or governing law of the contract seems for this reason to be beside the point. The real question is does the New South Wales statute suspend remedies which otherwise would be available in the Supreme Court of Victoria. The legislation of New South Wales cannot directly affect remedies given by the law of Victoria, and according to the principles of private international law the *lex fori* provides the law of remedies and ignores the *lex contractus*. In my opinion the *Moratorium Act* provides no answer to the Victorian action.

In my opinion the decision of *Macfarlan* J. was right and the appeal should be dismissed with costs.

STARKE J. This was an action tried before *Macfarlan* J. of the Supreme Court of Victoria in which he adjudged that the defendant pay to the plaintiffs the sum of £10,828 damages for breach by the defendant of an agreement dated 7th August 1930. Under this

(1) (1924) A.C. 851.

agreement the parties sold or exchanged a station property with stock &c., in New South Wales, for an hotel property in Melbourne. There is no sum mentioned in the agreement as the price of the station property; it is obtained by reference to other figures. The price for the hotel property stated in the contract is £55,000. This property was subject to a mortgage of £20,000, leaving an equity of £35,000, which the agreement provides shall be credited as a deposit on the purchase of the station property. The balance of the purchase-money for the station property amounted, after a reduction of £10,000, to a sum of £79,535, of which £53,750 was represented by a mortgage over the property to be taken over by the defendant and the remaining £25,785 was payable in cash over five years. Condition 5 of the agreement provided: "So far as the sale of the . . . hotel property is concerned . . . for purposes of inspection of title making requisitions thereon and acceptance thereof the conditions of Table A of the *Transfer of Land Act* 1928 of the State of Victoria shall apply thereto." Condition 3 of Table A is as follows: "If the purchaser shall . . . make any such requisition or objection as aforesaid"—that is, a requisition or objection on or to the title or concerning any matter appearing in the particulars or conditions of the sale—"which the vendor shall be unable or unwilling to remove or comply with the vendor . . . may give to the purchaser . . . notice in writing of the vendor's intention to rescind the contract . . . and if . . . the requisition or objection shall not be withdrawn . . . the contract shall thereupon be rescinded." It was assumed at the trial—and I think rightly—that this clause 3 was incorporated in the agreement of 7th August 1930. The plaintiffs delivered a requisition inquiring whether the Cosmopolitan Hotel was subject to any rights other than those disclosed on the title or by the usual searches, and a reply was given that the defendant's wife claimed that the defendant was a trustee for her of the hotel, or an undivided part thereof, and had lodged a caveat to protect her interest and forbidding registration of any transfer or dealing. The plaintiffs required the withdrawal of this caveat and a transfer of the property, but the defendant replied that he was unable to compel or arrange

H. C. OF A. 1932. NOSKE v. MCGINNIS. Starke J.

for the withdrawal of the caveat, and gave notice of his intention to rescind the contract unless the plaintiffs' requisitions or objections were withdrawn. They were not withdrawn, and the defendant notified the plaintiffs that he treated the contract as rescinded. The question whether the plaintiffs accepted this renunciation and acted upon it before action brought was not raised at the trial, and they were allowed to amend their pleadings and claim £50,000 damages for breach of the contract of 7th August 1930. It is too late now to raise any such question: the conduct of the parties at the trial precludes them from so doing.

It is well enough settled that a vendor cannot arbitrarily and capriciously exercise the power to rescind a contract contained in clause 3 of Table A. "It is not enough for the vendor to say: Here is a condition which, as a matter of construction, entitles me to rescind this contract. The answer is: No, you must look at all the circumstances; are they such as to entitle you to put an end to the contract of sale which, in form and in fact, you have entered into?" (*In re Jackson and Haden's Contract* (1)). So far as the facts of the present case are concerned, the defendant's allegation that his wife had an interest in the hotel property was not, I think, accepted by the learned trial Judge, but if it were, then the defendant entered into the contract knowing the exact facts, and without any ground—or any reasonable ground—for assuming authority to deal with his wife's interest in the property. In such circumstances the defendant cannot take advantage of clause 3 of Table A, reserving him the right to rescind.

The damages which the plaintiffs are entitled to recover for breach of the contract is another question. The defendant relies upon the rule in *Bain* v. *Fothergill* (2): "If a person enters into a contract for the sale of a real estate knowing that he has no title to it, nor any means of acquiring it, the purchaser cannot recover damages beyond the expenses he has incurred by an action for the breach of the contract; he can only obtain other damages by an action for deceit." But this exceptional rule has no application to the case of a vendor who can make a good title but will not, or who will not do what he can and ought to in order to obtain one (*Day*

(1) (1906) 1 Ch. 412, at p. 425.

(2) (1874) L.R. 7 H.L., at p. 207.

v. *Singleton* (1); *In re Daniel* (2); *Braybrooks* v. *Whaley* (3)). In the present case the defendant either deliberately abstained from making title to his property or else made no effort to get in his wife's interest, if she had any, and took advantage of her caveat for the purpose of avoiding his contractual obligation. The plaintiffs are therefore entitled to general damages for loss of the bargain. The evidence, though somewhat meagre, is sufficient to support the assessment made by the learned trial Judge, namely, £10,828, and I see no reason for interfering with it.

Lastly, the defendant sought leave to raise a defence based on sec. 25 of the *Moratorium Act* 1930-1931 of New South Wales. The learned trial Judge refused leave to amend because in his opinion the Act afforded no defence to the action. In this I agree. The Act does not discharge or extinguish the obligations of the contract, but suspends the personal remedy during the operation of the Act, "It is now established beyond doubt that a law which simply prescribes the time within which a chose in action must be put in force relates to procedure alone, and has no validity except in the tribunals to which it belongs and is addressed." A law suspending the personal remedy on a contract stands in the same position; it is a rule of procedure dictated by the *lex fori* and binding in that forum alone. (See *Foote* on *Private International Law*, 5th ed., pp. 549 *et seqq.*)

The result is that the appeal should be dismissed.

DIXON J. This is an appeal from a judgment of *Macfarlan* J. by which the appellant was ordered to pay to the respondents £10,828 as damages for the loss of a contract to purchase from the respondents a sheep station in New South Wales and, as a means of satisfying the price, to sell to them a hotel in Melbourne. The appellant purported to rescind the contract under the third condition of Table A of the *Transfer of Land Act* 1928, because the respondents insisted upon a requisition in respect of the title to the hotel with which he professed to be unable or unwilling to comply. It is not clear that this condition is incorporated in the contract, but upon

(1) (1899) 2 Ch. 320. (2) (1917) 2 Ch. 405.
(3) (1919) 1 K.B. 435.

H. C. OF A. 1932. NOSKE v. MCGINNIS. Dixon J.

the issue whether the appellant was unable or unwilling to comply with the requisition *Macfarlan* J. found against the appellant's bona fides. The respondents' statement of claim, as a result of amendment, included a claim for damages as well as for specific performance and the learned Judge awarded damages to them as on a renunciation.

Upon this appeal the question was not raised whether the respondents, who do not appear to have disaffirmed the contract before the commencement of the action, should be considered as then entitled to recover damages at common law for loss of the contract, and perhaps, having regard to the adoption of *Lord Cairns' Act* by sec. 62 (4) of the *Supreme Court Act* 1928, the question could not arise in a case where specific performance might have been decreed.

The first contention upon which the appellant relied was that the action was not maintainable because of sec. 25 of the New South Wales *Moratorium Act* 1930-1931. This provision does not discharge liabilities or extinguish rights, but limits remedies. In my opinion, the contention is sufficiently answered by the rule that the *lex fori* shall govern such questions. The provisions of sec. 25 of the *Moratorium Act* of New South Wales do not, of course, directly affect the Supreme Court of Victoria, and the section confers no rights or immunities, which, under the law administered by that Court, it should recognize or enforce.

The second ground upon which the appellant supported his appeal is that upon the evidence the learned Judge could not, or should not, have found, as he did, that the appellant himself caused the difficulty of title to which the requisition was directed, namely, the lodgment of a caveat on behalf of his wife, and that he was not honestly and reasonably unwilling or unable to comply with the requisition. The evidence of the appellant himself seems to have been entirely disbelieved and although, perhaps, little affirmative evidence was given upon which a positive finding could be based that the appellant himself caused the caveat to be lodged, yet, in the circumstances of this case, the appellant is left in the dilemma that, either his story that an outstanding interest existed in his wife is untrue, or else he knew that it existed but recklessly entered into the contract hoping that his wife would agree to enable him

to complete it. It is clear, as the law has been settled, that in neither case can he rely upon such a provision as clause 3 of Table A of the *Transfer of Land Act* 1928.

A third contention relied upon by the appellant is that damages for the respondents' loss of the contract ought not to have been awarded against him because his failure to perform it arose out of matters of title. It is to be noticed that in this case the party recovering damages is in the position of vendor because the respondents' loss consists in the difference between the amount or value which they would have obtained for their land if the contract had been performed and the value of the land as it remains on their hands. The appellant, however, insists that the contract remained unperformed because of his difficulty in making a good title to the hotel and that the reason of the rule in *Flureau* v. *Thornhill* (1) and *Bain* v. *Fothergill* (2) applies. However this may be, the circumstances in which he renounced the contract do not bring him within the rule. If in fact his wife had no interest in the hotel, he is simply in the position of one who, being able to carry out his contract, refuses to do so. If, on the other hand, knowing that his wife had an equitable interest, he made the contract relying upon his ability to obtain her consent or acquiescence, it is clear that upon the evidence the learned Judge was at least entitled to conclude that he had made no honest effort to carry the contract through. His own reliance, when he made the contract, upon his wife's subsequently giving her concurrence would place upon him the burden of showing why it was that his anticipations were unfulfilled, and of establishing that he himself had done what he could to carry through the transaction in the manner he hoped to do when he entered upon it. There is every reason to suspect that he at least welcomed his wife's intervention, and he has failed to establish that he took any steps to secure her concurrence, or to prevent the lodgment or to obtain the removal of the caveat. In these circumstances, I think the learned Judge was right in giving damages for the loss of the bargain. The evidence upon which he acted in assessing the amount of damages is not very satisfactory. But it

(1) (1776) 2 W. Bl. 1078; 96 E.R. 635. (2) (1874) L.R. 7 H.L. 158.

H. C. OF A. 1932.

NOSKE v. McGINNIS.

Evatt J.

was open to him, in my opinion, to arrive at the sum which he awarded.

I think that the appeal should be dismissed with costs.

EVATT J. The judgment of the Supreme Court of Victoria has been attacked upon four distinct grounds:—

(1) The contract between the parties was one for the exchange of station property called "Warwillah," situate in New South Wales, for a Melbourne hotel property known as the "Cosmopolitan." Each property was heavily mortgaged. The final negotiations took place in New South Wales, where, on August 7th, 1930, the agreement was signed.

By the New South Wales Act No. 43 of 1931, assented to on October 2nd, 1931, but commencing as from September 1st, 1931, sec. 25 was added to the *Moratorium Act*. By that section, after the commencement of the 1931 amending Act, it is provided that "no action, suit, or proceeding shall be commenced, nor shall any action or proceeding already commenced be continued for breach of any covenant, agreement, or condition expressed or implied in any mortgage of real property, except as hereinafter provided."

Sec. 25 (3) applies the section to all mortgages of real property whether executed before or after the commencement of the Act, and sec. 25 (6) provides that the section shall extend to a contract of sale of real property.

The present action by the respondent was commenced on November 12th, 1930, before the passing of the principal *Moratorium Act* (No. 48 of 1930), but it was contended for the appellants that sec. 25 of the 1931 amendment is effective to defeat the present action altogether because "the law" which should govern the contract in all British Courts, is that of the State of New South Wales which, in relation to the Supreme Court of Victoria, is a "foreign" jurisdictional unit.

In my opinion it is not necessary to consider to what extent, if at all, "the law" of the contract is that of New South Wales. For all that sec. 25 does is to prohibit, in the Courts over which the New South Wales Legislature has jurisdiction, the commencement or continuance of litigation of a certain character and description.

Contracts for the sale of real property are in no way invalidated or deprived of their binding effect by the section, contractual rights are not destroyed nor are contractual liabilities discharged. Sec. 25 is merely concerned with imposing a restriction upon certain methods of enforcing the contract. If the Supreme Court of Victoria was bound to treat the contract as one subject to the " proper and conventional " law of New South Wales, it was also entitled and bound, in administering its own rules of private international law, to disregard the limitation of remedies for breach of contract imposed by New South Wales law, and to choose the rules laid down for such purpose by the law of Victoria.

(2) The appellant claimed to be entitled to rescind the contract under condition 3 of Table A of the Victorian *Transfer of Land Act* 1928. Condition 5 of the agreement made the conditions of that Table applicable to the sale of the Cosmopolitan Hotel in relation to " inspection of title, making requisitions thereon, and acceptance thereof." The right given by condition 3 to a vendor, to compel the withdrawal of a requisition by a purchaser or face rescission, cannot be dissociated from the making of requisitions on title and the acceptance of it; and in my opinion condition 3 and all of it was intended to be applied to the agreement.

But the right of rescission given to a vendor " unable or unwilling " to comply with a purchaser's requisition, cannot be used as a mere device for getting rid of an unprofitable contract. *Macfarlan* J. found as follows :—

> " But in the present case I am prepared to go further and find on the evidence that I am satisfied that the objection and the caveat are the defendant's objection and caveat. I reject the evidence of an estrangement and the evidence of the parties—that is, of the defendant and his wife—as to the estrangement that has arisen between them. I am quite satisfied that the defendant had only to ask, and this caveat would have been removed, but further than that, I am satisfied that it was his caveat, that the objection was his and the caveat was his. I am willing, if the parties desire it, to give my reasons for arriving at that conclusion, but possibly the parties would prefer that I left the matter there."

This finding of fact shows that the appellant himself procured the challenge to his own title, and thus produced the requisition of the respondents to remove it. It is obvious that the benefit of condition 3 cannot be claimed by a person who causes a caveat to

H. C. OF A. 1932. NOSKE v. MCGINNIS. Evatt J.

be lodged against title merely as a step towards getting out of his bargain.

(3) The next question is whether the rule in *Bain* v. *Fothergill* (1) applies. No doubt, the question of title arose in relation to the Cosmopolitan Hotel, of which, in a sense, the appellant was vendor and the respondents purchasers. But this sale was subordinate to the main transaction, in which the respondents were vendors of the New South Wales station property, and the appellant the purchaser. This is not the ordinary case therefore of a vendor of real property being unable to make title.

But, in any event, the facts as found necessarily exclude the rule in *Bain* v. *Fothergill* (1). The real position was that the appellant's wife claimed that he was bound to pay her certain money. She sought to caveat, but *Macfarlan* J. regarded that, not as a genuine challenge by her to her husband's registered title, but as a device to assist the appellant himself for a very different purpose. Even if, contrary to his Honor's view, she is to be regarded as having made a claim against the appellant's hotel property, it is clear that the appellant made no attempt to satisfy her pecuniary demand, which would at once have cleared the title. His financial inability to pay her demand is no better defence than in other breaches of contract (*In re Daniel* (2)). Lord *Hatherley* pointed out in *Bain* v. *Fothergill* (3):—

> "The vendor in that case" (*Engell* v. *Fitch* (4)) "was bound by his contract, as every vendor is bound by his contract, to do all that he could to complete the conveyance. Whenever it is a matter of conveyancing, and not a matter of title, it is the duty of the vendor to do everything that he is enabled to do by force of his own interest, and also by force of the interest of others whom he can compel to concur in the conveyance."

It is clear that the appellant did not discharge the duty mentioned by Lord *Hatherley*. The case is really approximate to *Day* v. *Singleton* (5), one of deliberate abstention from making title, not genuine inability to do so without breach of duty. *Lindley* M.R. and *Rigby* L.J. said, in *Day* v. *Singleton* (6): "Neither Lord *Chelmsford's* speech nor Lord *Hatherley's* is an authority for the

(1) (1874) L.R. 7 H.L. 158.
(2) (1917) 2 Ch., at p. 410.
(3) (1874) L.R. 7 H.L., at p. 209.
(4) (1868) L.R. 3 Q.B. 314; (1869) L.R. 4 Q.B. 659.
(5) (1899) 2 Ch. 320.
(6) (1899) 2 Ch., at p. 329.

application of that exceptional rule to the case of a vendor who can make good title but will not, or will not do what he can do and ought to do in order to obtain one."

(4) The last question relates to the damages awarded. The respondents are entitled to general damages for the loss of their bargain. The ordinary measure of damages in the case of a purchaser defaulting is the difference between the contract price, and the value of the land as at the date of breach. Where the contract price is expressed in money, the resultant sum expresses, as at the moment of breach, the difference to the vendor between having his contract performed (and the purchase price paid) and having his land thrown back on his hands. If the vendor's land is subject to a mortgage, which he has to discharge upon completion, the measure of damages need not be differently determined because, although, strictly speaking, the vendor's interest in the land is measured by his equity and the mortgage should be brought into account, that consideration is cancelled by the postulated exclusion of the mortgage in the contract price of the land.

Another situation arises when the contract price consists wholly or in part of other land. The question is still what loss the vendor has sustained as at the time of breach. Had the bargain been carried out, the vendor would have received, as part of his price, land, the value of which may have altered between the date of contract and the date of breach. To measure the loss of the bargain, therefore, it is necessary to make a determination of the value of both parcels of land as at the time of breach.

In the present case such a determination has been made, but it is based on most scanty and unsatisfactory evidence.

His Honor awarded damages by taking, first of all, the contract price of Warwillah, the respondents' property, as £114,535 3s. He accepted the evidence that there had been a $33\frac{1}{3}$ per cent fall in its value between the date of the contract and October 21st, the date of repudiation. The depreciation was, therefore, one-third of £114,535 3s., i.e., £38,178.

On the other hand, he found that the Cosmopolitan Hotel was worth only £27,650 " or thereabouts " at the date of the breach, although " the purchase price " for it at the date of the contract

H. C. OF A. 1932. NOSKE v. McGINNIS. Evatt J.

(August 7th) was £55,000. His Honor said that the difference between £55,000 and £27,650, i.e., £27,350, which, presumably, was the "depreciation" in value of the Cosmopolitan Hotel, must be subtracted from £38,178, the "depreciation" in Warwillah. The subtraction resulted in the sum of £10,828, for which judgment was entered for the respondents.

The question is, what did the respondents lose as at the date of breach, in reference to which all parties are agreed that damages should be estimated, although there was no acceptance of the repudiation at that time. If the contract had been performed, the respondents would have obtained, not the fee simple of the hotel, but the equity therein, and their obligations in respect to the mortgage and purchase-money of Warwillah, would, with the exception of £10,000, have been thrown upon the appellant. For the purpose of ascertaining the money value to the respondents of such an asset, the fee simple value of the hotel as at the date of breach had to be ascertained, but from it had to be deducted the existing mortgage of £20,000 and the £10,000 liability (by which the reduction of the contract price was effected). The resultant value of the hotel would have been £27,650 – £30,000; that is a liability or negative value of £2,350.

As it was, however, the respondents had Warwillah thrust back on their hands, at a time when its fee simple value is said to be only two-thirds of £114,535 3s., i.e., the sum of £76,357. In respect of it, there had to be deducted the full instalments of £35,785 3s. and a mortgage of £53,750, i.e., a total deduction of £89,535 the net result being a liability or negative value of £13,178.

Upon this basis the respondents were, by the appellant's breach, burdened with a liability of £13,178 instead of one of £2,350, and they were, therefore, £10,828 worse off.

This is, of course, the figure reached by *Macfarlan* J., but each calculation is based upon certain assumptions.

The matter may, perhaps, be more clearly expressed by the use of formulæ :—

(1) The damages to which the respondents are entitled
= Contract consideration for equity in Warwillah – Value of equity in Warwillah as at the time of breach.

(2) But the contract consideration for the Warwillah equity
= the equity in Cosmopolitan Hotel — £10,000.

(3) And the value of such contract consideration as at the time of breach
= the value of the equity in Cosmopolitan at time of contract — £10,000 — the depreciation in its value between time of contract and time of breach
= (say) Cc — £10,000 — deprec c.

(4) The value of the equity in Warwillah at the time of breach
= Value of equity in Warwillah at time of contract — depreciation in Warwillah between time of contract and time of breach
= Wc — depreciation w.

(5) Returning to the first equation, Damages are
= (Cc — £10,000 — depreciation c) — (Wc — depreciation w).

(6) If we assume that the contract was neither a good nor a bad bargain, and represented the true values of both Warwillah and the Cosmopolitan, we may postulate that the then value of the equity in Warwillah was precisely equivalent to the then value of the equity in Cosmopolitan, less £10,000 (for which the vendors of Warwillah had still to be responsible after the contract),
i.e. Wc = Cc — £10,000.

(7) The damages = Cc — £10,000 — deprecc — (Wc — deprecw)
= Cc — £10,000 — deprecc — (Cc — £10,000 — depreciationw)
= depreciationw — depreciationc.

This represents the fuller statement of the method of estimating damages which was adopted. It is only affirming that in every case of a contract for the exchange of land or tangible property of changing value, whatever monetary obligations or rights are to be included, damages for loss of the contract are, subject to one important condition, measurable by the difference between the depreciations in value of the two properties between the date of contract and the date of breach. This condition is that the contract, with all its incidental rights and obligations, must be one in which the bargain is not only "fair," but a perfect expression of the then existing values not only of the properties to be exchanged but also of all rights acquired and liabilities undertaken. Such an event is a possibility and a Court may occasionally see fit to assume its occurrence if what is placed before it does not include evidence of the value of the properties as at the date of contract, but consists merely of the contract itself.

In the present case, a witness, M. K. Smythe, was asked what was the value of Warwillah on the date of the contract, and said "I consider that the value on the date that Mr. Noske purchased was

H. C. OF A. 1932.

NOSKE v. MCGINNIS.

Evatt J.

a very reasonable value for the place. He had bought it very well." His Honor, commenting on this, said :—

"But in order to arrive at the value of Warwillah, at the date of breach, it is necessary to understand exactly of what Mr. Smythe is speaking. He says the price given was a fair price. Of what price was he speaking ? There is no lump sum mentioned in the contract as the price for Warwillah. It is obtained by addition ; addition, it is true, of figures which must be taken to be the basis on which the parties contracted, but what allowance he was making in that, whether he knew anything about the real value of the hotel, whether he took into account these two amounts, one amount of £9,000 with interest, and another amount of £10,000, which I mentioned in the contract does not appear."

Now, there is no evidence that M. K. Smythe had ever seen, or concerned himself with the value of, the Cosmopolitan Hotel, and I think it clear that he was addressing his evidence merely to the value of Warwillah, upon the same assumption as was made in the contract, viz. : that the fee simple of the Cosmopolitan was then worth £55,000. Another witness, A. G. Allard, gave evidence that the value of the Cosmopolitan at the date of breach was £27,650, and this evidence his Honor accepted. Later, however, the same witness said :—

"Q. You were considering a fall in values, of course ? A. Yes.

Q. In valuing the Cosmopolitan in 1930 ? A. Yes.

Q. When do you regard the peak period ? A. 1927 I should say.

Q. What percentage of fall do you think there would have been between 1927 and 1930 ? A. Generally we consider from 15 per cent to 20 per cent.

Q. In that class of property ? A. Yes, well property generally, property generally in the city."

It appeared also that the hotel was sold in 1926 for £21,000 and in the year 1926 there was something of a boom in values.

It seems quite impossible to believe that, at the time of the contract, the Cosmopolitan Hotel was worth anything approaching the sum of £55,000, and the depreciation in respect of it between the date of contract and the date of breach was therefore nothing approaching £27,350. On the other hand, if the value of the Cosmopolitan at the time of the contract was (say) only £35,000 the appellant made a better bargain by £20,000 than was assumed in the estimate of damages. On the one hand, the difference in depreciation values of the two properties should be increased in respect of Warwillah, and thereby the respondents' damages would be increased ; on the

other, the respondents made a bargain better by £20,000 than that made by the appellant, because £55,000 was the contract price and the value therein assigned to the hotel.

The result in damages to the respondents is the same whatever the true value of the hotel at the time of the contract, because the price or value equivalent assigned by the contract to the hotel was £55,000.

The damages awarded cannot be questioned if one accept the evidence of a depreciation of one-third in the value of Warwillah.

The witness M. K. Smythe asserted that, between August 7th 1930 and October 21st of the same year, a period of two and a half months, Warwillah depreciated by at least 33 per cent, and his Honor accepted this evidence, the figure being £38,178.

Now, Smythe himself made no sale of any Riverina property between August and December of that year. I have read the evidence of this witness very carefully, and in my opinion the suggestion of a fall of nearly £40,000 in the fee simple value between the two dates is quite incredible. That there was a fall in values during the year is clear enough. Another witness, W. D. Adams, says there was a fall in values from 10 per cent to 15 per cent. Neither of the witnesses could support their evidence by reference to any actual sales, but both based their opinion to some extent upon a change of government in New South Wales, though that did not take place until after the date of the breach! It is obvious that both were hazarding a more or less plausible guess about a decline in values over a very short period of time. But comparison was almost impossible and the witnesses have been affected by subsequent events which bore no relation to the real question before them. Such evidence is no satisfactory basis for the award of damages in contract.

It was for the respondents to put forward evidence upon which a fair estimate of damages could be based, and they failed to do so. The importance of this aspect of the appeal is great because, if the reduction in value of Warwillah over the period had been 10 per cent instead of $33\frac{1}{3}$ per cent, the depreciation would have been only £11,453, not £38,178, and the respondents' damages would have been nominal. Even if the depreciation had reached the percentage of 25 (enormous as it is, having regard to the time), the depreciation

H. C. OF A. 1932. NOSKE v. MCGINNIS. Evatt J.

allowed would have been £28,633 instead of £38,178, a difference of £9,545 against the respondents. The resulting damages would then have been reduced from £10,828 to the sum of £1,283. Nominal damages would result, even if the reduction on Warwillah during the period of 75 days had been as much as 23½ per cent.

The Supreme Court gave ample opportunity to the respondents to adduce further evidence, but they took no advantage of that opportunity. Although I think that justice compels the award of damages to be set aside, possibly the respondents should be given another opportunity of proving damages, but at their own risk as to costs. Failing this, damages should be reduced to the nominal sum of one shilling.

As to damages only, I am of opinion that the appeal should be allowed.

McTIERNAN J. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Malleson, Stewart, Stawell & Nankivell.*
Solicitors for the respondents, *Aitken, Walker & Strachan.*

H. D. W.