[HIGH COURT OF AUSTRALIA.]

HOLLAND AND ANOTHER . . . . . APPELLANTS;
DEFENDANTS,

AND

WILTSHIRE . . . . . RESPONDENT.
PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1954.

ADELAIDE, *June* 15;

SYDNEY, *Aug.* 30.

Dixon C.J., Kitto and Taylor JJ.

Vendor and purchaser—Sale of land—Purchase price payable on fixed date—Vendor entitled to re-sell and rescind contract on default in payment of purchase price—Provision for forfeiture of moneys paid on account—Failure by purchaser to complete on due date—Notice by vendor to purchaser to complete on specified date or vendor would take proceedings for breach of contract—Continued failure by purchaser to complete—Re-sale by vendor at lower price—Whether vendor entitled to recover damages equal to difference in price.

A contract in writing for the sale and purchase of land provided that a deposit of £2 should be paid and the balance of the purchase price should be paid on 14th January 1952. It further provided that, if default should be made in due payment of the purchase money or any part thereof, the vendor might at his option without notice to the purchasers sell the land and rescind the contract and any moneys paid on account of the purchase should then be forfeited to the vendor as and for liquidated damages. The purchasers duly paid the deposit but, before 14th January 1952, they requested an extension of time for payment of the balance, which was agreed to by the vendor. About the second week in March 1952, the purchasers' solicitor informed the vendor that they would not proceed with the purchase. Thereupon the vendor, on 17th March 1952, gave the purchasers a notice which, after reciting the agreement, the date fixed for settlement, and the purchasers' failure to settle, required them to make settlement by 28th March 1952, and informed them that, if settlement were not made by that date, the vendor would take proceedings against them for breach of contract. The purchasers failed to complete the purchase and on 10th June 1952 the vendor re-sold the land at a lower price. He claimed to recover as damages the difference between the original contract price (less the £2 deposit) and the price at which he re-sold the land. The purchasers contended that he was entitled only to forfeiture of the deposit.

H. C. OF A. 1954. HOLLAND v. WILTSHIRE.

Held, that the re-sale was not effected under the rescission clause of the contract but independently thereof and the vendor was entitled to recover the damages claimed.

Decision of the Supreme Court of South Australia (Full Court): *Holland* v. *Wiltshire* (1954) S.A.S.R. 18, affirmed.

APPEAL from the Supreme Court of South Australia.

Herbert Keith Holland and Thelma Lilian Elsie Holland entered into a contract in writing, dated 13th December 1951, to purchase property No. 241 Grange Road, Flinders Park from Robert Cyril Wiltshire for the sum of £3,750, payable as to £2 by way of deposit and the balance on the day fixed for settlement, namely 14th January 1952. The contract, which was a printed form with the appropriate particulars filled in, contained, *inter alia*, the following clauses which alone are material to this report. The clauses were :— (i) If any error or misdescription of the property sold occur, the Vendor shall be at liberty to rescind this contract by returning all moneys paid by the Purchaser, and shall not be liable for compensation or any expense whatever. (ii) But if default shall be made in due payment of the said purchase money and interest or any part thereof respectively at the respective times aforesaid the Vendor may at his option without notice to the Purchaser sell the said property and rescind this contract and any moneys paid on account of the purchase shall then be forfeited to the Vendor as and for liquidated damages. (iii) Vacant possession to be given and taken on January 14th 1952, or before if mutually agreed upon by both parties.

Before 14th January 1952, the purchasers requested an extension of the time for completion fixed by the contract as they were experiencing difficulty in raising the purchase money, and this was granted by the vendor. Discussions between the parties continued until about the second week in March 1952, when the purchasers' solicitor informed the vendor that they would not proceed with the purchase.

The vendor by his solicitor thereupon sent to the purchasers the following notice, dated 17th March 1952 : " Whereas by agreement dated the 13th day of December 1951 you agreed to purchase the property known as 241 Grange Road, Flinders Park for the sum of £3,750, from Robert Cyril Wiltshire And whereas by the same agreement settlement was fixed for the 14th day of January 1952 or before And whereas you have not settled Now take notice that you are hereby required to make settlement by the 28th day of March 1952. If settlement is not made by that date the vendor

Robert Cyril Wiltshire will take proceedings against you for breach of contract ".

The purchasers did not communicate with the vendor, in response to this notice, and, on 10th June 1952, after having advertised the sale in the press and by means of a board erected on the property, the vendor re-sold the property at auction for the net sum of £3,102 19s. 10d.

The vendor then brought an action in the Local Court of Adelaide in which he claimed £647 0s. 2d. damages, this being the difference between the contract price and the price obtained on re-sale. Judgment was given by the Local Court for the vendor for £645 0s. 2d., the amount claimed less the £2 deposit paid by the purchasers. The purchasers appealed to the Full Court of the Supreme Court of South Australia (*Napier* C.J., *Mayo* and *Ligertwood* JJ.), which, *Mayo* J. dissenting, dismissed the appeal.

From that decision the purchasers appealed to the High Court.

C. H. Bright (with him *D. B. McLeod*), for the appellants. The original contract was still operative at all times prior to the re-sale. The vendor sold pursuant to the default clause contained in the contract, or at least his right to damages is governed by it to the extent that the quantum of damages for breach has been agreed in advance. The vendor, by re-selling, *ipso facto* rescinded the contract. Having elected to exercise the remedy conferred on him by the contract, the vendor is bound by the terms of that remedy. He is, therefore, restricted to the damages provided for by the contract, namely, forfeiture of the deposit. If, on the other hand, it should be held that the vendor exercised his common law right of rescission, and not his right under the default clause, then a result of the rescission would be that the property reverted to the vendor discharged of the contract, but the vendor would not then have any claim against the purchasers in the event of his re-selling at a loss. [He referred to *Hirji Mulji* v. *Cheong Yue Steamship Co.* (1); *McDonald* v. *Dennys Lascelles Ltd.* (2); *Ward* v. *Ellerton* (3); *Pitt* v. *Curotta* (4); *McGifford* v. *O'Brien* (5) and *Stone* v. *Nilsen* (6).]

V. R. Millhouse Q.C. (with him *R. G. D. Cresswell*), for the respondent. There is no duty on a vendor to show that it was after the agreement had been rescinded that the re-sale took place

(1) (1926) A.C. 497.
(2) (1933) 48 C.L.R. 457.
(3) (1927) V.L.R. 494.
(4) (1931) 31 S.R. (N.S.W.) 477; 48 W.N. 156.
(5) (1932) V.L.R. 71.
(6) (1951) A.L.R. 808.

H. C. OF A. 1954. HOLLAND v. WILTSHIRE.

(*Icely* v. *Grew* (1)). The manner in which the vendor elected to proceed is a question of fact (*Hoad* v. *Swan* (2)). The vendor can elect at any time, even in court (*York Glass Co. Ltd.* v. *Jubb* (3)). (He also referred to *Harold Wood Brick Co. Ltd.* v. *Ferris* (4)).

C. H. Bright in reply.

Cur. adv. vult.

Aug. 30.

The following written judgments were delivered :—

DIXON C.J. This appeal, which comes from the Full Court of the Supreme Court of South Australia, arises from a vendor's action against purchasers of land in which the relief sought was unliquidated damages for loss of the sale. The action was brought by the vendor in the Local Court of Adelaide, a court with only a limited equitable jurisdiction, but, if it be material, bound like other courts of South Australia by s. 28 of the *Supreme Court Act* 1935-1952, which enacts in effect that in matters where there was formerly any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail so far as the matters to which these rules relate are cognizable by the relevant court : cf. per *Starke* J. in *Moore* v. *Dimond* (5).

In the Local Court the vendor was awarded £645, being the difference between the contract price of £3,750 less £2 paid by way of deposit and the amount obtained on a re-sale of the property, viz. £3,103. This judgment was affirmed by the Supreme Court. At the trial the defendants took more than one defence, but in the end the grounds of their appeal from the Local Court's judgment come down to one point. It is that there is a special clause in the contract which governs the matter and that it prescribes the only compensation which the vendor may have, namely the forfeiture of the moneys paid on account of the purchase as liquidated damages, that is to say, the amount of £2 paid as deposit. A printed form was used for the contract, which was made on 13th December 1951. After the blank space for the purchase price, which the parties filled in with the amount of £3,750, there followed in print the words " to be paid in manner following " and then there was left a number of lines so that the amount and date of payment of the instalments might be filled in. The sale, however, was for cash in a month and all that was typed by the parties into

(1) (1836) 6 Nev. & M. (K. B.) 467.
(2) (1920) 28 C.L.R. 258.
(3) (1924) 131 L.T. 559, at p. 562.
(4) (1935) 2 K.B. 198.
(5) (1929) 43 C.L.R. 105, at p. 124.

the space was, "Two pounds (£2) by way of a deposit and the balance on the day fixed for settlement namely January 14th 1952". Another clause of the contract in fact provided that vacant possession should be given and taken on that date or before if mutually agreed upon by both parties.

Included in the printed part of the contract were two clauses or conditions authorizing the vendor in given circumstances to rescind the contract. It is upon the second of these that the defendants appellants rely. The first enables the vendor to rescind if any error or misdescription of the property sold occur, but in that case he is to return all moneys paid by the purchasers, being on his side under no liability for compensation or expense whatever.

The second clause is as follows:—"But if default shall be made in due payment of the said purchase money and interest or any part thereof respectively at the respective times aforesaid the Vendor may at his option without notice to the Purchaser sell the said property and rescind this contract and any moneys paid on account of the purchase shall then be forfeited to the Vendor as and for liquidated damages." Both these clauses obviously were introduced into the form for the benefit of the vendor. It is, however, the purchasers, the defendants appellants, who rely upon the second of them. They say that what the vendor has done is to sell the property and rescind the contract in the exercise of the power it is expressed to confer, and that thereupon the damages became liquidated or ascertained by the clause at £2. It follows, they say, that the vendor, the plaintiff respondent, is entitled under the contract to no more.

The facts are simple and so far as material are not now in dispute. It appears that before the date for completion named in the contract, viz. 14th January 1952, the purchasers informed the vendor that they had found difficulty in raising the purchase money and craved an extension of time. Time was granted, perhaps a fortnight, perhaps no definite period. Discussions went on until about the second week in March 1952, when the purchasers' solicitor informed the vendor that they would not proceed with the purchase. Their grounds for thus renouncing the contract proved untenable as the facts were found and they cease to be material. The vendor might have accepted this as a renunciation at once and put an end to the contract. But in fact he proceeded to give to the purchaser a notice which, after reciting the agreement, the date fixed for settlement and the purchasers' failure to settle, required them to make settlement by 28th March 1952, and informed them that if settlement was not made by that date the vendor would take proceedings

H. C. OF A. 1954.

HOLLAND v. WILTSHIRE.

Dixon C.J.

against them for breach of contract. The date when this notice was given was 17th March 1952. It is now said by the defendants appellants that the period of ten days allowed by the notice was unreasonably short. This point was not taken in either of the courts below. If it had been taken in the Local Court there can be little doubt that in the circumstances of the case the finding would have been against the defendants. In any case we should not entertain the point. What is a reasonable time is a question of fact and it would not be in accordance with practice for this Court to allow an issue of fact even of that kind to be raised on appeal here for the first time. The notice should therefore be regarded as a notice calling on the purchasers to complete, and informing them that otherwise proceedings would be taken for breach of contract. In the circumstances that could only be understood to mean that the vendor would sue them for damages for loss of the bargain.

In fact the purchasers did not communicate with the vendor, who proceeded to advertise the property for sale. On 10th June 1952 the vendor re-sold the property. By a letter of 12th June the vendor's solicitor informed the purchasers' solicitors that the property had been re-sold. The letter prefaced the information by a reference to the statement made to the vendor by the purchasers' solicitors that they could not complete. The letter demanded payment of the difference between the contract price and the amount obtained on the re-sale. In reply, the purchasers' solicitors set up their clients' case, namely that the contract was only conditional, a case negatived by the findings, and said that their clients were not able and never had been able to find the money necessary to carry out the contract, and accordingly instructed them that the contract was not in force.

The contention of the defendants appellants, the purchasers, is that the re-sale amounted to an exercise of the power conferred on the vendor by the printed clause already set out, and that as he resorted to that clause he is bound by its terms, which entitled him to no greater compensation than £2.

It may be remarked that this contention assumes that when the clause says "and any moneys paid on account of the purchase shall . . . be forfeited to the vendor as and for liquidated damages" it means that the forfeiture shall take place independently of the vendor's volition. It is, however, plain that the clause is intended for his benefit only and it would not be an unnatural reading to treat the forfeiture as dependent upon his election. But however that may be, there is no sufficient reason for regarding the vendor

as having exercised the power conferred by the clause. On the contrary everything points to his having treated the contract as discharged by breach, and as having sold in the exercise of his right as owner unfettered by the contract.

Section 16 of the *Law of Property Act* 1936-1945 contains the provision that stipulations as to time, which according to the rules of equity are not deemed to be or become of the essence of the contract, shall be construed and have effect at law in accordance with the rules of equity. But the principles explained by Lord *Parker* in *Stickney* v. *Keeble* (1) apply to exclude the purchasers from the benefit of this provision. For they were never ready and willing to perform their contract and eventually renounced performance. They could never therefore have invoked the equitable remedies for the purpose of which the equitable rule obtained. Even if, contrary to the view of the majority of the Supreme Court, the character of the reference in the clause in question to the dates of payment would not suffice to make equity treat time as of the essence, it is the legal rule that would apply. That however, is not a matter of importance, in view of the notice and in view of the purchasers' clear intention not to complete in any case.

It is to be noticed that the clause is concerned with a default of payment at the time named. In the present case, however, there was more than such a default. There was a renunciation of and refusal to perform the entire contract on the part of the purchaser. True it is that it was not accepted at once either as a breach or as an anticipatory breach. What was done was to place the purchasers on notice that they would be sued for breach if they did not complete before the date named by the notice. This was not an unconditional affirmance of the contract notwithstanding the renunciation. It was a demand for performance coupled with an intimation that refusal or failure to perform would result in proceedings for damages. That is to say it kept the contract open for a limited time and conditionally upon compliance. If time is an essential condition, to extend it does not waive the effect of the stipulation as a condition: see per *Jessel* M.R., *Barclay* v. *Messenger* (2) and per *Talbot* J., *Bernard* v. *Williams* (3). In the same way to give a party refusing to perform a fixed time to resile from his refusal and to notify him that failing his doing so he will be sued for his breach does not amount to an unconditional waiver of the refusal as a renunciation. Here the inference of fact is plain that the purchasers were maintaining their attitude of refusal to go on with the sale.

(1) (1915) A.C. 386, at p. 417.
(2) (1874) 30 L.T. 351, at p. 354.
(3) (1928) 139 L.T. 22, at p. 25; 44 T.L.R. 437, at p. 438.

H. C. OF A. 1954.

HOLLAND v. WILTSHIRE.

Dixon C.J.

In these circumstances, the vendor was entitled to treat the contract as discharged by breach. He himself was ready and willing up to the expiration of the notice. His election to treat the contract as discharged by the purchasers' breach was sufficiently manifested by his proceeding to advertise the property for sale, and by his selling it. By that time, the purchasers were in actual breach and that breach was accompanied by an intention clearly evinced of setting the contract at nought. It is hard to see why this should not enable the vendor to treat the whole contract as discharged by the purchasers' breach or in other words to treat the contract as no longer binding upon him. This means that both parties would be discharged from further performance of the contract. The whole contract was involved, including the clause relating to rescission.

When the plaintiff respondent, the vendor, notified the defendants appellants, the purchasers, that he would take proceedings for breach of contract, he must have been understood as saying that he would seek to recover damages and that necessarily meant that he was putting on one side the restriction of the compensation to which he was entitled to the forfeiture under the clause of the £2 already paid.

The proper conclusion is that the vendor proceeded not under the contractual provision but on the footing that the purchasers had discharged him from the obligations of the contract. It follows that he is entitled to sue for unliquidated damages. Some suggestion was made for the defendants appellants that once the contract was treated by the vendor as discharged he could not recover for breach. This notion, however, is based on a confusion with rescission for some invalidating cause. It is quite inconsistent with principle and has long since been dissipated. It is enough to refer to the note upon the subject in Mr. *Voumard's Sale of Land in Victoria* (1939), at p. 499.

For the foregoing reasons the appeal should be dismissed.

KITTO J. This appeal arises out of an action by a vendor of land against the purchasers thereof for damages for not completing the purchase. The contract sued upon was dated 13th December 1951, and was made between the respondent as vendor and the appellants, who are husband and wife, as purchasers. The purchase price was £3,750, of which £2 was paid by way of deposit on the signing of the contract and the balance was to be paid on the day fixed for settlement, namely 14th January 1952. The parties utilized for their contract a printed form containing a clause, which

may be called the rescission clause, in the following terms : " But if default shall be made in due payment of the said purchase money and interest or any part thereof respectively at the respective times aforesaid the Vendor may at his option without notice to the Purchaser sell the said property and rescind this contract and any moneys paid on account of the purchase shall then be forfeited to the Vendor as and for liquidated damages."

Shortly before 14th January 1952, one of the purchasers, Mr. Holland, asked the vendor for an extension of the time for completion on the ground that he was having difficulty in getting finance. An extension was agreed to, the period of the extension being fixed at a fortnight according to the vendor, but being left indefinite according to the purchasers ; but for want of writing, the agreement, whatever it was, cannot be relied upon as a variation of the contract. An offer by the vendor, made about 12th February 1952, to release the purchasers from their obligations on payment of a commission was rejected, and a further attempt to get the necessary finance was promised by the purchasers. Early in March 1952 the vendor told the purchasers' solicitor, in response to an inquiry by the purchasers, that he was prepared to allow £250 of the price to be secured by a second mortgage, and the solicitor promised to get into touch with Mr. Holland. About a fortnight later the vendor saw the solicitor again, and the latter then said : " Mr. Holland is not going on with the contract."

On 17th March 1952, the vendor gave the purchasers a notice in writing which recited the contract of sale and the purchasers' failure to settle, and notified the purchasers that they were required to make settlement by 28th March 1952. It added : " If settlement is not made by that date the vendor Robert Cyril Wiltshire will take proceedings against you for breach of contract." This notice the purchasers ignored, and they did not at any time retract the intimation which their solicitor had given of their intention not to go on with the purchase.

In May 1952, the vendor instructed a firm of estate agents to sell the property by public auction. The sale was advertised, in the press and by means of a board erected on the property, over a period of three weeks or a month. The property was sold on 10th June 1952 for a price which produced to the vendor the net sum of £3,102 19s. 10d. The vendor then sued the purchasers in the Local Court of Adelaide, a court of common law jurisdiction, to recover as damages £647 0s. 2d., being the amount of the difference between this sum and the price provided for in the contract. The action was tried by a special magistrate who, after allowing credit

H. C. OF A. 1954.

HOLLAND v. WILTSHIRE.

KITTO J.

for the deposit of £2, gave judgment for the plaintiff for £645 0s. 2d. The judgment was affirmed by the Supreme Court of South Australia (Full Court) and the purchasers now appeal to this Court.

The principal argument in support of the appeal sought to place the vendor in a dilemma. It was said that the contract was not discharged by anything that occurred before the re-sale on 10th June 1952, and that being so the re-sale either was to be justified as an exercise of the option given by the rescission clause, or it could not be justified at all and constituted a breach of the contract. If it was a sale authorized by the rescission clause, the argument proceeded, it had the effect for which that clause provided, namely that the purchase money paid, consisting of the deposit of £2 only, was forfeited as liquidated damages, and the vendor is consequently precluded from recovering any damages in the action; but if it was not a sale under the rescission clause, the vendor cannot claim to have continued at all times ready and willing to perform the contract on his part, and for that reason he cannot recover damages in the action.

The initial proposition, that the contract was still in full force on 10th June 1952, must, I think, be accepted. That is not to say that in relation to the stipulation fixing 14th January 1952 as the date of settlement, I regard time as not having been of the essence of the contract. At common law such a stipulation would certainly have been regarded as of the essence, that is to say it would have been treated as a condition of the contract in the sense that failure of one party to adhere to it would be held to entitle the other to put an end to the contract: *Noble* v. *Edwardes* (1). This is still the position when common law relief is sought, except in cases to which s. 16 of the *Law of Property Act* 1936-1945 (S.A.) applies. That section, which repeats s. 25 (7) of the *Judicature Act* 1873 (Imp.), provides that stipulations in a contract as to time which according to rules of equity are not deemed to be or to have become of the essence of the contract, are to be construed and have effect at law in accordance with the rules of equity. The qualification thus made upon the rule to be applied in the exercise of common law jurisdiction is, however, of limited application. It applies only in cases which are appropriate for the granting of equitable remedies by way of relief against the loss by a party of his contractual rights by reason of a failure on his part to perform the contract in precise accordance with its provisions as to time. This is so because only in such cases do the rules of equity treat as not of the essence of the contract time stipulations which are of the essence according

(1) (1877) 5 Ch. D. 378, at p. 393.

to the traditional view of the common law: *Stickney* v. *Keeble* (1). Cases appropriate for the type of equitable relief referred to are those only in which it is possible without injustice to the parties, notwithstanding that the party who approaches the court is himself in default under the contract, to decree specific performance on the basis that the stipulation as to time was presumably regarded by the parties as not being essential to the main purpose of the contract. One case in which that is not the position is the case in which it appears from a consideration of the terms or nature of the contract or from the surrounding circumstances that the parties did in fact intend the stipulation to go to the root of the contract. And generally, where circumstances over and above the disregard of the stipulated time make it unjust to relieve the party in default from the consequences of his failure in precise adherence to the agreed time, equity has no occasion to differ, and therefore does not differ, from the common law in its treatment of the time stipulation. In the present case, even if the rescission clause in the contract should not be regarded as bringing the case within the first of these two classes, it is clear that in view of the purchasers' conduct in the face of the vendor's demands for performance, including their explicit refusal through their solicitor to go on with the contract, a court of equity considering the matter at the date when the case came before the Local Court could not possibly have thought it just to decree specific performance at the instance of the purchasers. That being so, the stipulation for completion on 14th January 1952 would not be given by a court of equity, at any rate after 28th March 1952, an effect different from that which it had at law; and accordingly, after the latter date s. 16 of the *Law of Property Act* 1936-1945 would not require a court exercising common law jurisdiction to treat the stipulation as not being of the essence of the contract: cf. *In re Sandwell Park Colliery Co.*; *Field* v. *The Company* (2); *Lock* v. *Bell* (3).

But though the stipulation should be considered as of the essence of the contract, the purchasers' failure to complete on the stated day did not automatically discharge the contract. It entitled the vendor, if he should so elect, to put an end to the contract as a source of further obligation. He chose however, not to do so. By insisting repeatedly upon the transaction being carried to completion, notwithstanding that 14th January had passed, he treated the stipulation as if it were a mere warranty, that is to say as if it had always been subordinate (or collateral, to use the word in the *Sale*

(1) (1915) A.C. 386.
(2) (1929) 1 Ch. 277, at pp. 285, 286.
(3) (1931) 1 Ch. 35, at pp. 43, 44.

H. C. OF A. 1954. HOLLAND v. WILTSHIRE. Kitto J.

of Goods Act 1895-1952 (*S.A.*)) to the main purpose of the contract ; and the consequence in law was that he was thenceforth disentitled to any higher remedy in respect of the purchasers' breach of the stipulation than damages for that particular breach : *Tramways Advertising Pty. Ltd.* v. *Luna Park (N.S.W.) Ltd.* (1). Moreover, the general obligation of the contract remained, though the particular provision for settlement on 14th January was no longer capable of being performed.

A second opportunity for the vendor to determine the contract arose when the purchasers' solicitor informed him that Mr. Holland (implying Mrs. Holland also) would not go on with the contract. But the next step he took was to give the purchasers the notice of 17th March. This notice did not accept the repudiation ; it ignored it and insisted upon the contract being performed. Beyond a peremptory demand for completion by 28th March, there was nothing in it but a warning that failure by the purchasers to complete by that date would be treated as a breach of contract for which a legal remedy would be sought. After this clear election, the right of the vendor to end the contract because of the repudiation conveyed by the solicitor was plainly gone.

The express repudiation however, was only one incident in a course of conduct by which the purchasers confronted the vendor with a clear and continuing refusal to perform the contract. Even if the refusal conveyed by the solicitor had never been given, it might well have been that the inference would have arisen from the whole course of the matter that the purchasers were in truth refusing to proceed. Delay or neglect without more, if continued long enough, may amount to a refusal ; and the other party is not bound to allow an unlimited time after the day named for performance of the contract : *De Soysa* v. *De Pless Pol* (2) ; see also *Forslind* v. *Bechely-Crundall* (3) ; *Rhymney Railway* v. *Brecon & Merthyr Tydfil Junction Railway* (4). So here, the vendor might well contend, if he needed to do so, that in view of the delay of which the purchasers had been guilty before 17th March, their continued failure to complete within the time fixed by the notice of that date amounted to an intimation of their intention to have no more to do with the purchase, so that thereafter the vendor was in a position to put an end to the contract. But however that may be, it is at least clear that the express refusal through the solicitor to go on with the matter, though the vendor lost by his election the right to

(1) (1938) 38 S.R. (N.S.W.) 632, at pp. 643-645.
(2) (1912) A.C. 194, at pp. 202, 203.
(3) (1922) S.C. (H.L.) 173, at pp. 179, 190, 191.
(4) (1900) 69 L.J. Ch. 813, at p. 818.

terminate the contract by reason of it, remained as a fact in the history of the matter and gave an unmistakeable colour to the continued inactivity of the purchasers after receiving the vendor's ultimatum. The only possible inference was that the purchasers were refusing, deliberately and finally, to complete the purchase. Consequently, when 28th March had gone by, the contract unquestionably stood repudiated by the purchasers, and the vendor, if his patience should become exhausted at any time while the repudiation continued, was entitled to treat the contract as no longer binding upon him: *Cort* v. *The Ambergate, Nottingham & Boston & Eastern Junction Railway Company* (1). The case was similar to that with which *Lindley* J. was dealing when he said in *Byrne* v. *Van Tienhoven* (2): "It was contended that by pressing the defendants to perform their contract the plaintiffs treated it as still subsisting and could not treat the defendants as having broken it, and a passage in Mr. *Benjamin's* book on Sales, p. 454, was referred to in support of this contention. But, when the plaintiffs found that the defendants were inflexible, and would not perform the contract at all, they had, in my opinion, a right to treat it as at an end and to bring an action for its breach. It would indeed be strange if the plaintiffs by trying to persuade the defendants to perform their contract were to lose their right to sue for its non-performance when their patience was exhausted. The authorities referred to by Mr. *Benjamin* (viz., *Avery* v. *Bowden* (3) and others of that class), shew that as the plaintiffs did not, when the defendants first refused to perform the contract, treat that refusal as a breach, the plaintiffs cannot now treat the contract as broken at the time of such refusal. But I have found no authority to shew that a continued refusal by the defendants to perform the contract cannot be treated by the plaintiffs as a breach of it by the defendants" (4).

It is a possible construction of the notice of 17th March that it expressed a definite election in advance to treat as a determination of the contract the purchasers' persistence until 28th March in this refusal to complete, if in fact they should persist in it until that date. It may well be that if that is what the letter should be understood to mean the contract came to an end on 28th March: cf. *Reynolds* v. *Nelson* (5). But, as I have indicated already, I do not read the notice as more than a warning, an expression not of a final election but of an intention which required a further act for its fulfilment.

(1) (1851) 17 Q.B. 127, at p. 148 [117 E.R. 1229, at p. 1237].
(2) (1880) 5 C.P.D. 344.
(3) (1855) 5 El. & Bl. 714 [119 E.R. 647].
(4) (1880) 5 C.P.D. 344, at p. 350.
(5) (1821) 6 Madd. 18 [56 E.R. 995].

H. C. OF A. 1954.

HOLLAND v. WILTSHIRE.

KITTO J.

Nothing further having occurred before the vendor placed the property in the hands of the agents for sale, the contract was still in force when he took that step. But even so, it seems to me impossible to hold that the re-sale was effected under the rescission clause, for that clause, which no doubt was drafted originally on the assumption that the printed form in which it appears would be used only for purchases by instalments, created in favour of the vendor an option to bring the contract to an end in the event of default being made "in due payment" of purchase money or interest "at the respect times aforesaid." The only time mentioned in the contract for the payment of purchase money (other than the deposit) was 14th January 1952, and when the purchasers had made default in payment at that date the vendor, as has already been pointed out, elected against determining the contract and insisted upon its being carried to completion. This was a clear exercise of the option which the rescission clause created, and the vendor could not thereafter retrace his steps and make a re-sale under the clause.

The submission upon which the purchasers then fall back is that when the vendor ultimately brought action against the purchasers on the footing that the contract was at an end, thereby exercising the right to determine the contract with which the purchasers' persistence in their attitude continuously presented him, he was unable, having by then re-sold the property, to prove the readiness and willingness to complete which formed a condition of his cause of action. It is clear enough that "repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.": *Heyman* v. *Darwins Ltd.* (1). But even if it is true that the contract in the present case was still binding upon both parties until the vendor began his action in the Local Court, a sufficient answer to the purchasers' submission is that the contract relieved the vendor from the necessity, which otherwise he would have been under, of proving that up to the institution of the action he remained ready and willing (which includes that he remained able) to convey the property to the purchasers: *Cort* v. *The Ambergate, etc., Railway Company* (2); *British & Beningtons Ltd.* v. *North Western Cachar Tea Co.* (3).

Finally, a submission was made that on the true construction of the recission clause, a re-sale by the vendor after default by the

(1) (1942) A.C. 356, at p. 361.
(2) (1851) 17 Q.B. 127 [117 E.R. 1229].
(3) (1923) A.C. 48.

purchasers in payment of purchase moneys, even though the re-sale did not constitute an exercise of the vendor's option under the clause, resulted in the purchase moneys paid being forfeited as liquidated damages. This submission overlooks the force of the word " then " in the clause. Clearly the character of liquidated damages is given only to purchase moneys which become forfeited by reason of an exercise of the power of re-sale and consequential rescission under the clause.

For these reasons I am of opinion that the vendor is entitled to hold the judgment which he obtained in the Local Court, and that accordingly the appeal should be dismissed.

TAYLOR J. I agree that the appeal should be dismissed. For the reasons already given it is clear that on 17th March 1952, when the notification which has already been referred to was given, the appellants had signified quite plainly their intention of " not going on with the contract ". In those circumstances the respondent was entitled there and then to elect to treat the agreement as at an end and, at his option, to sue to recover damages for the appellants' refusal to complete. But it is said that the respondent did not adopt this course but that, on the contrary, the effect of the notice which was given was to keep the contract on foot and that, although there was a continued refusal to complete on the part of the appellants, the respondent did not at any later stage and before instituting his action make any effective election to determine the contract. In these circumstances, it is said, the respondent was not entitled to recover damages at all or, alternatively, that the most favourable view of his position in the matter is that he acted pursuant to the provisions of cl. 2 of the agreement and, accordingly, that his rights must be determined exclusively by reference to that clause. In my opinion, there is no substance in these submissions. Clause 2 provided an alternative right to the respondent and it was for him to elect to proceed under it or independently of it. There is, in my view, no doubt that the evidence established an intention on his part to proceed independently of it. I regard the notice of 17th March 1952 as a clear intimation to the appellants that if they continued in default after 28th March 1952, the respondent would elect to treat the contract as at an end and would sue to recover damages for the appellants' breach. On this view there is no doubt that the respondent elected to proceed independently of the provisions of the clause.

The question whether the respondent was entitled to recover damages at all raises another matter for consideration. It is said,

H. C. OF A. 1954.

HOLLAND v. WILTSHIRE.

Taylor J.

in effect, that there could be no effective election by the respondent to treat the contract as at an end unless after 28th March he notified the appellants of his intention so to act. But in view of the situation as it existed on 17th March 1952, the respondent was entitled to treat the contract at an end at that stage and, if he had so chosen, he might have done so and notified the appellants to that effect. But he did not, either by an unconditional notice to the appellants or by his conduct, purport to do so. He did, however, intimate to them that if settlement was not made by 28th March 1952 he would take proceedings against them for breach of contract. Holding the view which I have already expressed concerning the meaning and effect of this notice, it was, I think, quite unnecessary that any further notice should be given by the respondent to the appellants before proceeding to treat the contract as at an end and instituting his action to recover damages.

Appeal dismissed with costs.

Solicitors for the appellants, *Isaachsen, Bright and Zelling.*
Solicitor for the respondent, *R. G. D. Cresswell.*

B. H.