[HIGH COURT OF AUSTRALIA.]

FITZGERALD AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

MASTERS . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 16-18; *Sept.* 11.

Dixon C.J., McTiernan, Webb, Fullagar and Taylor JJ.

Contract — Formation — Land — Interest — Sale — Document — Terms — Meaning — Parties — Intention — Conduct — Default — Rights — Assertion — Abandonment — Specific performance — Laches — Reasonableness — Readiness — Willingness — Moratorium Acts 1930-1950.

In 1927 the plaintiff made a contract in writing with the deceased of whose will the defendants were executors for the purchase of an interest in the deceased's farm. As from the date of the contract the farm was to be worked in effect as a partnership but the actual transfer of the interest in the land was not to take place till the plaintiff had paid in full. Amongst other provisions was one that the plaintiff was to pay for the interest by a deposit and by instalments. The final clause was expressed to embody a set of conditions of sale "so far as they are inconsistent" (*sic*). In fact no such set of conditions existed. The plaintiff paid more than half the purchase price almost at once, and in 1931 offered to pay a substantial part of what was outstanding, but at the deceased's request he did not do so; in 1932 he had the contract stamped and registered. Meanwhile the working partnership had been observed but later in 1932 the plaintiff left the farm. Between then and 1948 he had, apparently, no connexion with the working of it; in that year, however, he began a correspondence over the contract with the deceased which continued till the latter's death in 1951. In 1953 the plaintiff began a suit for specific performance against the defendants executors.

Held, (1) that, from the parties' clear intention, for "inconsistent" must be read "consistent", and that as there was otherwise a concluded contract the final clause was severable, any missing details being such as the law would supply;

(2) that although the partnership seemed to have been dissolved the contract had not been abandoned and thus the discretionary remedy should be granted: *per Dixon* C.J. and *Fullagar* J. on the grounds that the plaintiff had an equitable interest not destructible by mere inaction not amounting to release or abandonment; that there were no circumstances apart from delay why the Court should refuse the remedy and the delay had prejudiced neither third parties nor the deceased: *per McTiernan, Webb* and *Taylor* JJ., on the grounds that although the delay by itself was of such a character as to make it proper to refuse the remedy sought, yet the operation of successive Moratorium Acts to postpone the date for payment effected also a postponement of the right to transfer so that there was in fact no delay of which the defendants could take advantage to show that the Court should not exercise its discretion in the plaintiff's favour.

The circumstances in which a contract is deemed to be abandoned and the defence of laches, discussed.

Decision of the Supreme Court of New South Wales (*McLelland* J.): *Masters* v. *Fitzgerald*, affirmed.

APPEAL from the Supreme Court of New South Wales.

This was an appeal from a decision by the Supreme Court of New South Wales (*McLelland* J.) decreeing specific performance by the defendants, the executors of the will of John Martin Fitzgerald deceased, of an agreement in writing dated 5th March 1927, entered into between the plaintiff, Rupert Clarence Masters, as purchaser and Fitzgerald as vendor, the subject of the agreement being a homestead farm No. 21/3 Land District of Dubbo, comprising 1,773 acres, part of which at the time of the agreement had been cleared and was under cultivation.

Further facts sufficiently appear in the judgments hereunder.

K. S. Jacobs, for the appellants. The judge of first instance erred in finding that there was sufficient evidence of the terms of the contract, and that those terms were certain. The general propositions which appear in *Halsbury's Laws of England*, 2nd ed. (1938), vol. 31, p. 354, par. 396, are adopted: see *Blagdon* v. *Bradbear* (1). A case similar to this case, if it is found that it is not possible to ascertain what document is referred to, is *Stimson* v. *Gray* (2). It is not sufficient to be able to surmise whether a particular term was or was not important. All the terms must be before the court so that it can then be ascertained whether they are, or are not, material (*Stimson* v. *Gray* (3)). It must be assumed that there was something that the parties intended by cl. 8, and if what they

(1) (1806) 12 Ves. Jun. 466 [33 E.R. 176].

(2) (1929) 1 Ch. 629.

(3) (1929) 1 Ch., at p. 643.

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intended by that clause is uncertain then the contract is uncertain. The *Moratorium Acts* did not affect a current liability for payment of rates or taxes and the like. The respondent may have lulled the deceased into a feeling that the contract, despite the payment of purchase money, had in fact been abandoned but it is not necessary to look for any direct evidence of abandonment, or for any intention of paying the purchase money, while in 1932 it was a matter of considerable doubt on the decisions in *Ward* v. *Ellerton* (1). Reasons why the court will refuse to grant relief on the basis of delay and laches are, *inter alia*, the imperfection of memory, the loss of evidence in the meantime and factors of that nature. The judge of first instance did not examine the basis of the doctrine in equity by which delay does prevent relief being granted. If a person having a present right, namely, the right to possession, stands by and does not assert that right for something like twenty years, then that delay of itself, his right being a present right, is evidence of an abandonment of the contract. Where a person has delayed so long in asserting that right that the evidence has become lost, the court will not interfere. Although it is conceded, to some extent, the *Moratorium Acts* do apply, that has no relevance to the result because equity will look to ascertain whether or not the purchaser has exercised the rights that are open to him. The very existence of the *Moratorium Acts* substantiate his right to possession. The very nature of those Acts was intended to preserve to the respondent his right to his undivided possession of the property, and he never asserted it at any stage. The only conclusion that is open on the evidence, in the light of his conduct, is that the contract was abandoned. From then onwards he did not take any step to carry out his current obligations under the contract. From 1933 up till 1948 neither side asserted the contract: see *Wingfield* v. *Whaley* (2). On the inference that is to be drawn from lapse of time: see *Harcourt* v. *White* (3) and *Blake* v. *Gale* (4). Mere delay is a bar to specific performance: *Southcomb* v. *Bishop of Exeter* (5) and *Parkin* v. *Thorold* (6). There are two Statutes of Limitation applicable by analogy, namely the six years period referred to in *Blake* v. *Gale* (7) and the Imperial Act, the *Real Property Limitation Act* of 1833, adopted in New South Wales in 1837. The equitable right, as a tenant in common of this land, is barred by the adopting Act.

(1) (1927) V.L.R. 494.
(2) (1722) 1 Bro. P.C. 200 [1 E.R. 513].
(3) (1860) 28 Beav. 303, at p. 309 [54 E.R. 382, at p. 385].
(4) (1886) 32 Ch. D. 571, at p. 581.
(5) (1847) 6 Ha. 213 [67 E.R. 1145].
(6) (1852) 16 Beav. 59, at p. 73 [51 E.R. 698, at pp. 703, 704].
(7) (1886) 32 Ch. D. 571.

[DIXON C.J. referred to *Lightwood* on *The Time Limit on Actions* (1909); *Carson's Real Property Statutes*, 2nd ed. (1910), and *Brunyate's Limitation of Actions in Equity* (1932).]

Reference to the operation of limitation provisions is made in *Halsbury's Laws of England*, 2nd ed. (1936), vol. 20, p. 720. *Roach* v. *Bickle* (1) and decisions of the New South Wales court have to be considered in the light of *Butts* v. *O'Dwyer* (2).

J. D. Evans Q.C. (with him *E. N. Dawes*), for the respondent. This is not a case of obvious mistake. The contract must be read as it appears. It matters little for the purposes of this case whether the word in cl. 8 should be read as "inconsistent" or "consistent", or whether the word "not" should be added before "inconsistent" to produce the same result. In either case it is established that there was not any document or form which could be described by the words used in cl. 8, either in use by New South Wales, or in use by the Real Estate Institute of New South Wales, or even in use by the members of the Real Estate Institute of New South Wales. As there is not any such document then there is not any term which could be said either to be consistent with it or inconsistent with it. Clause 8 had no operative effect, and the contract proceeds according to the other terms in it. Clause 8 is not sufficiently certainly expressed as to amount to an acceptance of the position by both parties that there was such a contract of this nature. There is such an element of uncertainty in the attitude of the parties in this matter that it is not necessarily to be imputed to them that they were contracting upon the basis that such a contract did exist. The parties intended to enter into a contract in the terms of cll. 1 to 7 inclusive. The trial judge's reasons would be equally valid if the word was "consistent" or "inconsistent". The case is to be distinguished from *Stimson* v. *Gray* (3) because there is not any certainty in the parties' minds under cl. 8 that something must and will be added. A contract was certainly proved. The evidence established the non-existence of usual conditions of sale of the nature mentioned. The evidence shows quite clearly that the plaintiff and the deceased were only discussing the position as it then existed between them and were not intending to make some arrangement which governed the whole of their future relationship in relation to this matter. The partnership does not matter at all. The decision in *Butts* v. *O'Dwyer* (2) applies. The respondent's position in this

(1) (1915) 20 C.L.R. 663.
(2) (1952) 87 C.L.R. 267.
(3) (1929) 1 Ch. 629.

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case is stronger than that of the successful party in that case : see (1). The position of a person seeking to deal in respect of a homestead farm is, under the Act, substantially the same as a person seeking to deal with a conditional purchase or one of the other types of holding dealt with in s. 272 which was considered in *Butts* v. *O'Dwyer* (2). The reasoning in that case extends to dealings with homestead farms under s. 274. The inquiries necessary to determine the moneys payable are those inquiries which are indicated by the contract itself. If both parties were in error in that they contemplated and contracted that there was some form approved by the Real Estate Institute in existence to which reference would be made, then their mistake would not be a sufficiently fundamental matter to affect the validity of the contract which they had otherwise entered into (*McRae* v. *Commonwealth Disposals Commission* (3)). If the parties did proceed on a common assumption of fact that there was in existence a certain Real Estate Institute form, it would not be correct in those circumstances to assume that the parties contracted on the basis that that assumption was fundamental to the contract. Unless that assumption be correct, the parties were not intending to contract. If parties do contract and they have a common assumption which is mistaken, their mistake as to that common assumption will not destroy their *consensus* ; will not destroy the *consensus ad idem* ; will not indicate that they have not contracted, unless that assumption be one of fundamental importance to their contract ; if it is as to a minor or subsidiary matter, then the mistake does not become operative to destroy their consent : see *Halsbury's Laws of England*, 3rd ed., vol. 8, pp. 80, 81 ; *Cheshire and Fifoot* on *Contracts*, 2nd ed. (1954), pp. 158-160, and *Bell* v. *Lever Bros. Ltd.* (4). If the existence of a Real Estate Institute form was an erroneous assumption on the part of the parties that assumption should not be regarded and it should not be imputed to the parties that they would have regarded the existence of that contract as vital. The position of a term which was bad from vagueness was dealt with in *Life Insurance Co. of Australia Ltd.* v. *Phillips* (5). As to the defence of laches : see *Rochefoucauld* v. *Boustead* (6). Moratorium legislation was extended on several occasions during the period from 1930 to 1952. The delay in payment was a right given to the respondent by the legislature. The respondent's only obligation under the contract at that time was to make the payments and as to that he was protected by the Moratorium legislation.

(1) (1952) 87 C.L.R., at pp. 276, 279-281, 286-288.
(2) (1952) 87 C.L.R. 267.
(3) (1951) 84 C.L.R. 377, at p. 409.
(4) (1932) A.C. 161.
(5) (1925) 36 C.L.R. 60.
(6) (1897) 1 Ch. 196, at pp. 210-212.

Relevant statements appear in *Suttor* v. *Gundowda Pty. Ltd.* (1) and *Fullers' Theatres Ltd.* v. *Musgrove* (2). Laches was referred to in *Carter* v. *Hyde* (3); *Hourigan* v. *Trustees Executors and Agency Co. Ltd.* (4); and *Allcard* v. *Skinner* (5). The plaintiff-respondent could not have proceeded for specific performance until either he had paid the purchase money and other amounts owing by him, or had offered to pay them and the offer had not been accepted, or unless the vendor had committed some breach of the contract which would amount to an anticipatory breach which would entitle the plaintiff to come to the court and seek specific performance on that basis. The time to take action for specific performance never arose until the purchase money had been paid. As to the defence based upon the *Statutes of Limitation*: see *Carson's Real Property Statutes*, 2nd ed. (1910), pp. 161, 247, et seq.; *Kinsman* v. *Rouse* (6); *Archbold* v. *Scully* (7); *Brunyates' Limitation of Actions in Equity* (1932), pp. 188, 189; and *Hanbury* on *Modern Equity*, 4th ed. (1946), p. 49.

K. S. Jacobs, in reply.

Cur. adv. vult.

Sept. 11.

The following written judgments were delivered:—

DIXON C.J. AND FULLAGAR J. This is an appeal from a decree of the Supreme Court of New South Wales (*McLelland* J.) in a suit for the specific performance of a contract in writing for the sale of an interest in land. A remarkable feature of the case is that the instrument was executed more than twenty-six years before the commencement of the suit. It was executed in 1927: the suit was commenced in 1953.

The appellants, who were the defendants in the suit, are the executors of the will of John Martin Fitzgerald, who died on or about 30th March 1951, and to whom we will refer as the deceased. The respondent and the deceased were cousins. In 1927 the deceased held certain Crown land in the Land District of Dubbo, comprising 1,773 acres, as a homestead farm. On 5th March 1927 a document was executed by which he purported to sell, and the respondent purported to buy, a one-half interest in this homestead farm. The price was £850. It was recited that a deposit of £200 had been paid, and the balance of purchase money was to be paid "in

(1) (1950) 81 C.L.R. 418, at pp. 438, 439.
(2) (1923) 31 C.L.R. 524, at p. 549.
(3) (1923) 33 C.L.R. 115, at pp. 122, 126, 127.
(4) (1934) 51 C.L.R. 619, at pp. 627-629, 635-638, 648, 650.
(5) (1887) 36 Ch. D. 145, at pp. 188, 193.
(6) (1881) 17 Ch. D. 104, at p. 107.
(7) (1861) 9 H.L.C. 360, at p. 383 [11 E.R. 769, at p. 778].

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instalments of £10 or more, at the option of the purchaser, per month", the first of such payments to be made on or before 1st of April 1927. Clause 2 provided: "From the date hereof the Purchaser shall be entitled to possession of the said Homestead Farm equally with the said Vendor and the Purchaser shall be liable for one half of all rents rates and taxes due or accruing due as from the date hereof and the Purchaser shall also be liable for one half the amount of the mortgage moneys due by the said Vendor to the Commissioners of the Government Savings Bank of New South Wales and the Purchaser shall also be liable for one half of all interest due or accruing due to the said Commissioners of the Government Savings Bank of New South Wales as from the date hereof and the Purchaser shall also be responsible for one half the costs of any improvements or repairs thereafter to be effected on the said land." Clause 3 provided:—"The Vendor shall transfer to the Purchaser one half interest in the said Homestead Farm when the Purchaser has paid to the Vendor the full amount of the said purchase money of Eight hundred and fifty pounds and provided the Purchaser complies with this agreement as regards the other payment as above mentioned for which he is liable." Clause 4 provided that the sale was made "subject to the Minister's consent", and cl. 5 provided that the consent of the Minister should be applied for when the purchaser had paid the full amount of the purchase money, and that each party should use his best endeavours to obtain that consent. Clause 8 provided: "The usual conditions of sale in use or approved of by the Real Estate Institute of New South Wales relating to sales by private contract of lands held under the *Crown Lands Act* shall so far as they are inconsistent (*sic.*) herewith be deemed to be embodied herein."

It is convenient to consider at this stage an argument for the appellants which, if it were accepted, would make it unnecessary to consider anything that happened after 5th March 1927. The appellants say that the document extracted above was not effectual to bring a contract into existence—that its contents show that the parties were not agreed as to the terms of their supposed contract, or (what amounts practically to the same thing) that the terms were so uncertain that the "sale" could not be enforced. The argument was based on cl. 8.

There is a superficial difficulty in cl. 8, because it purports to incorporate a set of conditions so far as they are *in*consistent with what has been specifically agreed upon. No real difficulty, however, is created. Words may generally be supplied, omitted or corrected, in an instrument, where it is clearly necessary in order to avoid

absurdity or inconsistency. Here it would be indeed absurd to suppose that the parties, having expressed their agreement on a number of special and essential matters, should intend to incorporate by reference terms inconsistent with what they had specially agreed upon. What they must clearly have intended is to incorporate a set of general conditions except so far as they were inconsistent with what they had specially agreed upon, and cl. 8 must be read as if it said " consistent " or " not inconsistent ".

The appellants' main argument on the contract, however, is not affected by this construction of cl. 8. It rests on this—that there was not in fact in existence any set of conditions of sale " in use or approved of by the Real Estate Institute of New South Wales relating to sales of lands held under the *Crown Lands Act* ". There was in existence a set of conditions of sale of land approved by the Real Estate Institute of New South Wales, and this was put in evidence and marked " Exhibit G ". But this form is concerned only with ordinary private sales of land. It does not relate to, and is inappropriate to, a sale of an interest in land held under the *Crown Lands Acts*. The appellants accordingly contend that there is no effective contract. The parties, they say, intended to agree on certain terms which they believed to be ascertainable by reference to a document. No such document exists. Therefore the terms upon which the parties intended to buy and sell are not ascertainable, and it follows that there is no contract.

The argument cannot, in our opinion, be sustained. It depends, in the last analysis, on an inference that the parties did not intend to contract otherwise than by reference to the terms of a document which they mistakenly believed to exist. It is only putting the same thing in another way if we say that the question is whether cl. 8 is severable from the rest of the instrument. No effect can be given to cl. 8, but there is good reason, in our opinion, for saying that cl. 8 is severable. No inference can be drawn that the parties did not intend to contract unless effect could be given to cl. 8. It seems indeed almost absurd to say that the parties, having agreed on everything essential, intended that that agreement should be nullified if effect could not be given to cl. 8. Authority is not needed to support this view, but reference may be made to *Nicolene Ltd.* v. *Simmonds* (1). It is to be observed that the headnote to the report of this case is inaccurate. The acceptance was *not* expressed to be " subject to " the " usual conditions ". If it had been so expressed, the position might well have been different : cf. *Bishop & Baxter Ltd.* v. *Anglo-Eastern Trading and Industrial Co. Ltd.* (2) and *British*

(1) (1953) 1 Q.B. 543.

(2) (1944) K.B. 12.

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Electrical and Associated Industries (Cardiff) Ltd. v. *Patley Pressings Ltd.* (1). The present case is quite different from *Stimson* v. *Gray* (2). In that case *Maugham* J. said :—" . . . if the Court is unable to determine all the material terms of the alleged contract, either by interpretation of the language used, or by holding that the missing details are such as the law will supply, I do not think it is possible to say that there is a binding contract. In the present case, with every wish to assist the plaintiff, I cannot escape from the the conclusion that the reservations, exceptions, restrictions, stipulations, and conditions referred to in condition 2 are material terms of the agreement which cannot be supplied by mere interpretation " (3). Here there is no difficulty whatever in giving full effect to what the parties have clearly agreed upon, the " details ", which cl. 8 was supposed to provide, being " such as the law will supply."

Apart from their denial that any contract was ever made, the appellants raised before *McLelland* J. a considerable number of defences. Some of these were not pressed before us. As to others, it is obvious that they were rightly rejected by *McLelland* J. The *Real Property Limitation Act* 1833 (Imp.), which is in force in New South Wales, has clearly no application to the case. Nor is the case one in which a court of equity would, or indeed could, " apply by analogy ", or have any regard to, any statute of limitation governing legal remedies. The substantial questions which remain in the case are (1) whether the conduct of the parties does not compel the inference that the contract was abandoned, with the result that it should be treated as discharged by mutual consent, and (2) whether in any case the delay in seeking to enforce the contract is such that the remedy of specific performance should, as a matter of discretion, be refused. These questions require reference to events which happened after the making of the contract. These may be stated shortly : it is only, we think, at one point that details may be of importance.

In addition to the sum of £200 mentioned in the contract as a deposit the respondent had before the making of the contract paid to the deceased a further sum of £150, and, as *McLelland* J. found, he paid shortly after the making of the contract further sums amounting to £130. He thus paid a total amount of £480 on account of a total purchase price of £850. In 1931 he told the deceased that he had some £350 in hand, and offered to make futher payments, but the deceased requested him not to do so, giving it as his reason that he had increased his overdraft at his bank without informing the bank

(1) (1953) 1 W.L.R. 280.
(2) (1929) 1 Ch. 629.
(3) (1929) 1 Ch., at p. 644.

that he had sold a half-interest in his property. There is a letter in evidence (Exhibit D), dated 24th April 1948, in which the deceased gives another reason for wishing to keep the transaction with the respondent secret, viz. that he had applied to the Lands Department for another piece of land. *McLelland* J. was satisfied that it was at the request of the deceased that further payments were not made in 1931 and 1932.

In 1929 the respondent went to live with the deceased in a cottage in Tumut, and went out daily to the property and worked on it. In 1931 he went with his wife and children to live on the property in a log cabin, which he had built. Most of the work on the property was done by him and by one of the sons of the deceased. About fifty acres were put under lucerne, and about two hundred acres under wheat. About four hundred sheep were grazed, and poultry and pigs were kept. There is no evidence of any definite agreement or understanding as to the terms on which the property was run. The respondent seems to have thought that there was a partnership. At any rate (apart from some trifling amounts for eggs) he did not in 1931 or subsequently receive any part of the proceeds of the working of the farm, though he retained, when he left in 1932, the proceeds of the poultry and pigs, which were then sold.

Early in 1932 the respondent, after consulting a solicitor, informed the deceased that he intended to have the contract stamped and registered. The deceased asked him not to do this, mentioning again that he had not informed his bank of the transaction. The respondent, however, in fact had the contract stamped and registered, and informed the deceased that this had been done. The date of registration was 25th February 1932.

In or about October 1932 the respondent with his wife and family left the property and went to live in Tumut. Some importance attaches to two conversations which took place about this time. Shortly before he left, the respondent told the deceased that he had had an offer of a job in Tumut, and said :—" There isn't enough on the property for two of us. I will take the job at Tumut, and leave you to carry on. I will still retain my equity in the place, but you carry on with the place." The deceased replied :—" That is the best thing to do. There isn't enough for two of us here at the present time." The other conversation—a very remarkable conversation—took place on the day the respondent left. The deceased said :—" You put your money into the property, Rupe. You own half of it, and I won't let you down. You will get your money back some day." The respondent replied :—" It will be a

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long time, Jack, but I will probably have to take you through the Equity Court to do it."

Before he left the property, the respondent had, on a number of occasions, asked the deceased to give him a statement of accounts so that they would "know where they stood". Shortly after he left, a firm of solicitors on his behalf wrote to the deceased, making the same request. No accounts, however, were ever furnished by the deceased. One is disposed to doubt whether he ever kept any accounts.

In 1937, after a storekeeper named Bailey had written to the respondent about an account, the respondent wrote to the deceased, asking him whether the debt was a private debt or a partnership debt. No reply was received.

On 2nd September 1948 the respondent's then solicitors wrote a letter to the deceased in the following terms :—"Mr. R. C. Masters has consulted us with reference to the Agreement dated the 5th March 1927 for the purchase of one half share or interest in your Homestead Farm 21/3 Dubbo. The position as it is at present is most unsatisfactory from our client's point of view and we shall be glad to hear from you as to any suggestions you have to make regarding the matter at your earliest convenience." No reply was received to this letter. On 30th March 1951, shortly after the death of the deceased, the respondent's solicitors wrote a letter to the defendants' solicitors. This letter, however, only asked for "an accounting of the working of the property since the beginning of 1931". Some further correspondence passed, but it was not until 16th April 1953, that a claim for performance of the contract of sale of March 1927, was made on behalf of the respondent. The suit was commenced on 12th June 1953.

The above recital shows that the respondent in 1933, 1937 and 1948, disclosed, or purported to disclose, a belief that a partnership existed between himself and the deceased, in respect of which he was entitled to accounts, but that, apart from that, neither the respondent nor the deceased at any time before the death of the deceased did or said anything at all after 1932 in relation to the contract of March 1927, by which the deceased had sold, and the respondent had bought, a one-half interest in the deceased's homestead farm. The inactivity of either party may or may not have been masterly, but certainly each was inactive. The respondent took no step to enforce the contract of sale, and the deceased took no step towards rescinding it. The respondent, when he commenced his suit, claimed only specific performance of the contract of sale

with consequential relief. He did not claim partnership accounts or any other relief based on the existence of a partnership.

The first matter to be considered is, we think, the effect of what happened when the respondent left the property in 1932. The evidence, of course, cannot be regarded as very reliable : It comes solely from the respondent himself, who is speaking of conversations which took place over twenty years ago. *McLelland* J., however, appears to have regarded the respondent's evidence as true in substance. There can be no doubt that the sale and purchase of the one-half interest was made with a view to a joint working of the property. The parties were probably not very clear as to its terms, but it is to be inferred that they intended a partnership in which each had an equal share. We would think it clear, however, that the partnership was dissolved when the respondent left. He left because there was " not enough in it " for two. The deceased was to " carry on with the place ". This implies that the land is to be worked henceforth by the deceased in his own interests, and it is in fact henceforth worked by the deceased without reference to the respondent. It is true that the respondent seems to have thought that the partnership continued to subsist until the death of the deceased. But he could have no clear idea about its terms, and it is very unlikely that he had any clear idea of the distinction between an interest in the land and an interest in the business carried on upon the land.

But, while we think it clear that any partnership ceased to exist, we do not think that the contract for the sale of a half interest in the land was affected in any way by what was said at the time of the parting in 1932. What was said is, as recounted, ambiguous, and contains what may be thought to be inconsistencies. It might be said that the words of the deceased—" you will get your money back some day " and " I won't let you down "—import that the contract is off, and the sum of £480, which has been paid by the respondent, is to be repaid to him, though he may have to wait some time for it. But something much clearer is required to justify holding that the contract was discharged. The respondent said :—" I will still retain my equity in the place ". And the deceased said :—" You put your money into the property, Rupe. You own half of it." In the light of these statements, no more significance can be attached to the reference to the respondent's " getting his money back " than as meaning, in a general way, that he will not lose in the long run. We will only add that the view that no partnership existed after 1932 seems to be much more favourable to the respondent than the view

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which he appears himself to have entertained. For, if the partnership continued, as he seems to have thought, until the death of the deceased, it might well be held that it would not be equitable to grant specific performance of the contract of sale except upon the taking of partnership accounts—an obvious impossibility.

Is abandonment, then, to be inferred from the long silence and inactivity that followed? In considering this question, we think that the period to be regarded is a period of about sixteen years—from 1932 to 1948. For, although the respondent's solicitors, when they wrote to the deceased in 1948, made no reference to the contract of sale, we agree with *McLelland* J. that their letter should be regarded as an intimation that the respondent intended to assert his rights, whatever they might be.

There can be no doubt that, where what has been called an "inordinate" length of time has been allowed to elapse, during which neither party has attempted to perform, or called upon the other to perform, a contract made between them, it may be inferred that the contract has been abandoned. A good example is to be found in *Pearl Mill Co. Ltd.* v. *Ivy Tannery Co. Ltd.* (1). See also *Mathews* v. *Mathews* (2) and *G. W. Fisher Ltd.* v. *Eastwoods Ltd.* (3), per *Branson* J. What is really inferred in such a case is that the contract has been discharged by agreement, each party being entitled to assume from a long-continued ignoring of the contract on both sides that (in the words of *Rowlatt* J.) "the matter is off altogether".

It is impossible, in our opinion, to infer a discharge of the contract in the present case. In each of the cases cited above the contract was an executory contract, under which neither party had acquired any proprietary right or interest. The position was simply that each party had promised to do something, and for a long period no act was done in performance of the contract, and no step was taken to require any act to be done in performance of the contract. Here the contract had been partly performed by the respondent. Before he left the property, he had paid more than half of the purchase price, and he had an equitable interest in the land. He had registered his contract. It is impossible to suppose, nor can the deceased have supposed, that he ever intended simply to allow the deceased to keep both the money and the land, and no suggestion that the money should be repaid to him was ever made. As *Taylor* J. observed during argument, if he had at any time regarded the contract as at an end, the first thing one would have expected him to do

(1) (1919) 1 K.B. 78.
(2) (1941) S.A.S.R. 250, at p. 255.
(3) (1936) 1 All E.R. 421, especially at p. 426.

was to demand repayment of his money. The truth is, we think, that the equitable interest in the land, which the respondent had acquired, could not be lost or destroyed by mere inaction on his part. It could only be lost or destroyed by release or express agreement on his part, or if the deceased lawfully rescinded the contract. Any release or agreement could be expected to provide for adjustments taking into account the part of the price already paid, and, in the event of rescission by the deceased, the rules of law and equity would take care of the position.

We have said that the second question of substance in the case is whether the very long delay of the respondent in seeking to enforce his contract is such as ought to induce a court of equity, in the exercise of its discretion, to refuse specific performance. This is, of course, a separate and distinct question, but what has already been said goes a long way towards answering it. There appear to be no circumstances, apart from delay as such, which would make it inequitable to decree specific performance. The land is said to have increased greatly in value over the years, but that cannot be a material consideration. Improvements may have been effected, but, if so, these can be provided for in any ultimate decree. There has been no prejudicing alteration in the position of the vendor or his estate : delay may indeed be said to have been to the advantage of the vendor, who enjoyed all the benefit to be derived from sole possession from 1932 to his death. There are no third parties whose interests may be affected. In these circumstances equity does not, we think, refuse specific performance unless it thinks that the plaintiff ought to be regarded as having abandoned any rights he ever had. And reasons have been given for saying that no abandonment can be inferred here.

We were referred to cases, of which *Southcomb* v. *Bishop of Exeter* (1) is an example, in which specific performance has been refused after a delay of even a few months. But special circumstances have existed in such cases as these. The typical case is the case where the vendor has purported to rescind for breach of contract or under a special condition as to title. In such cases the purchaser who wishes to attack the validity of the rescission must always come very promptly to a court of equity. It is natural and reasonable that this should be required of him, for the vendor is not to be placed indefinitely in the position of not knowing whether he can safely deal with the property in question on the footing that the contract has ceased to exist. In the present case the vendor could, if he had

(1) (1847) 6 Ha. 213 [67 E.R. 1145].

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Dixon C.J. Fullagar J.

wished to bring matters to a head, have taken steps to rescind at any time. But he took no such step.

One other point raised by the appellants should be noticed in conclusion. They said that the respondent had not shown that he was at all times ready and willing to perform the contract on his part. He came into court, of course, himself in breach of contract. For, if he had performed his part, he would have paid the whole of the purchase money by August 1932. It is, of course, necessary for a plaintiff, who seeks specific performance, to show " first that he has performed, or been ready and willing to perform, the terms of the contract to be then performed ; and secondly, that he is ready and willing to do all matters and things on his part thereafter to be done " : *Fry* on *Specific Performance*, 6th ed. (1921), p. 435 ; *Walker* v. *Jeffreys* (1). It is in the first requirement that the respondent is said to have failed. But he seems to us to have a complete answer in the fact that, as *McLelland* J. found, he was requested by the deceased in 1931 not to make any further payments. The request was no doubt only intended to operate for the time being. But, until it was countermanded, he could not be said to be so in default as to be disentitled to an equitable remedy on the contract. In this connexion *McLelland* J. referred in his judgment to the *Moratorium Acts* of New South Wales as assisting the case of the respondent. With respect, we do not think that the respondent has any need to invoke those Acts. We would not indeed attach any importance to those Acts. They would or might have afforded protection to the respondent, if the deceased had at any time sued for an instalment or instalments, or taken steps towards rescinding the contract. But the deceased never at any time sought to recover any money under the contract, or took any step towards rescinding it.

The only decree actually made by *McLelland* J. in the suit ordered that the appellants, in effect, should use their best endeavours to procure the consent of the Minister to the sale of one-half of the deceased's interest in the land. For the reasons given, we are of opinion that the appeal against this decree should be dismissed. We think, however, that we should add one observation. If the Minister's consent is refused, that will be the end of the matter. If it is granted, the question will arise of what must be done by the respondent in order to entitle him to a conveyance. *McLelland* J. has stated, towards the end of his reasons for judgment, the sums which, in his opinion, ought to be paid by the respondent in exchange for a conveyance. We are by no means satisfied that his Honour's view

(1) (1842) 1 Ha. 341 [66 E.R. 1064].

is in all respects correct. The question seems to turn on the effect of cl. 2 of the contract in the events which happened in 1932. It is not a question which arises on the appeal, and there was not, and could not have been, a cross-appeal with regard to it. No argument, therefore, was addressed to it. If the Minister's consent is forthcoming, it will no doubt be argued and reconsidered.

McTIERNAN, WEBB AND TAYLOR JJ. The appellants, the executors of John Martin Fitzgerald deceased, were the unsuccessful defendants in a suit instituted by the present respondent for the purpose of obtaining a decree for the specific performance of an agreement for the sale by the deceased of a one-half interest in a homestead farm situated in the Dubbo district of New South Wales. Originally the respondent's claim to specific performance was resisted on many grounds but in this Court the appellants relied upon three grounds only. In the first place it was said that the evidence did not disclose a concluded contract between the parties, secondly, that the respondent had not, at all times, been ready and willing to complete the purchase, and, finally, that he had been guilty of unreasonable delay in seeking equitable relief.

The agreement sued upon is in writing and it purports to have been signed by the parties on 5th March 1927. It recites that the deceased was the "owner of Homestead Farm Number 21/3 Land District of Dubbo of One thousand seven hundred and seventy three acres" and that he had agreed to sell and that the respondent had agreed to purchase "one half interest of Vendor in the said homestead farm" as thereinafter mentioned. Thereafter the document witnessed the agreement of the parties to sell and purchase on the conditions thereinafter set out. Clause 1 provided that the purchase price for the one-half interest should be £850, payable as to £200—which had already been paid by the respondent to the appellant—by way of deposit, and, as to the balance, "in instalments of Ten pounds or more at the option of the Purchaser per month the first of such payments of Ten pounds to be made to the Vendor by the Purchaser on or before the first day of April next." Pursuant to cl. 2 the purchaser was to be entitled to possession of the homestead farm equally with the deceased and the former was to be liable for one half of all rents, rates and taxes due or accruing due as from the date of the agreement. He was also to be liable "for one half the amount of the mortgage moneys due by the said Vendor to the Commissioners of the Government Savings Bank of New South Wales" and also "for one half of all interest due or accruing due to the said Commissioners" as from the said date. The same clause also provided that the

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respondent should be responsible for one-half the costs of all improvements or repairs thereafter to be effected on the land. Clause 3 provided that the appellant should transfer to the purchaser the one-half interest when the respondent "has paid to the Vendor the full amount of the said purchase money of Eight hundred and fifty pounds and provided the Purchaser complies with this Agreement as regards the other payment as above mentioned for which he is liable". By cl. 4 it was agreed that the sale should be made "subject to the Minister's consent" and by cl. 5 it was provided that the consent of the Minister should be applied for when the respondent "has paid the full amount of his purchase money". Each party bound itself by this clause to do all such acts and sign and produce all such documents as might be necessary to obtain the Minister's consent and to use his best endeavours to obtain that consent. Clause 6 provided that the agreement should be binding upon the executors or administrators of the parties and by cl. 7 it was agreed that as from the date of the agreement the respondent, "provided he complies with this Agreement", should be entitled to a full half interest in all improvements "now on the said property". Clause 8, which is the final clause in the agreement and which raises questions of some difficulty, provided that the "usual conditions of sale in use or approved of by the Real Estate Institute of New South Wales relating to sales by private contract of lands held under the *Crown Lands Act* shall so far as they are inconsistent herewith be deemed to be embodied herein".

The first difficulty in the matter arises from the curious form of cl. 8. For that clause purports to incorporate in the agreement "usual conditions" which are *inconsistent* with the terms expressly declared by the parties. It should be said at once that the evidence in the case disclosed that there were no "usual conditions" of sale in use or approved of by the Real Estate Institute of New South Wales relating to sales by private contract of lands held under the *Crown Lands Act* and this state of affairs was relied upon by the appellants to found the contention that the parties could not be said to have concluded an enforcable agreement. In these circumstances the true construction of cl. 8 becomes a matter of some importance for if, as the appellants argue, it should be read literally, there would be much to support the contention advanced on their behalf. Acceptance of the view that the clause should be read literally would, of course, mean attributing to the parties an intention that the terms which they appear to have agreed upon expressly should not be the final measure of their contractual rights and obligations with respect to the matters covered by those terms. It would involve the notion

that the declared terms should be regarded as tentative or provisional only and subject to displacement in the event of "usual conditions" being inconsistent with them. Such inconsistent "usual conditions" only would be incorporated; these "usual conditions" which were not inconsistent would play no part in their agreement. The adoption of this view would, it seems to us, make it difficult to say that, in the circumstances, the parties had reached agreement at all. For if the terms of the written instrument must be regarded as intended to express only tentative or provisional agreement upon the matters with which they deal and if the parties really intended that with respect to each of these matters their relationship might ultimately be determined by reference to some other instrument concerning the existence of which they appear to have been mistaken, it would seem that they had not finally agreed in any particular. But we are satisfied that this view should not be adopted. It is trite law that an instrument must be construed as a whole. Indeed it is the only method by which inconsistencies of expression may be reconciled and it is in this natural and common sense approach to problems of construction that justification is to be found for the rejection of repugnant words, the transposition of words and the supplying of omitted words (cf. *Norton* on *Deeds*, 2nd. ed. (1928), p. 91). Many illustrations may be given of the circumstances in which these processes have been followed but to do so would add nothing to the rule that the intention of the parties is to be ascertained from the instrument as a whole and that this intention when ascertained will govern its construction. In the present case the instrument clearly evidenced an agreement for the sale and purchase of an interest in the specified farming property. The price is agreed upon and provision is made for the manner in which it shall be paid. Detailed provision is made for the purchaser to share possession with the vendor and comprehensive provision is made with respect to rents, rates and taxes, mortgage money and interest and the cost of making improvements. It is unnecessary, however, to traverse the whole of the agreement; it is, perhaps, sufficient to say that it is beyond question that each term of the agreement, other than the final clause, was designed to deal with particular incidents of a somewhat special kind of sale and it would, we should think, be strange to expect to find in any form of "usual conditions" any provision dealing with these matters. Moreover, it may be said, it would be extremely curious—to say the least—if, having directed their minds to these particular matters and having reached agreement upon them and having expressed their agreement in a formal document, the parties further intended that, if by some chance, a form of "usual

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conditions " should contain any inconsistent provisions those provisions should prevail. One might well think that if the parties had intended that the " usual conditions " should govern their relationship in all matters to which their minds had been directed they would have been sufficiently interested to have ascertained what the usual terms, if any, were and that they would have modelled their agreement accordingly. It is, we think, abundantly clear that they had no such intention. So far as their minds were directed to matters associated with the sale and purchase of the property they declared the substance of their agreement in unequivocal terms and it would be quite inconsistent with this declaration to read cl. 8 literally. There is no doubt in our minds that the only way in which the provisions of that clause can be reconciled with the intention of the parties as disclosed by the agreement is to supply the word " not " before the word " inconsistent ". The clause so read would be in a form not infrequently used by parties to an agreement to supplement express terms and that is what the parties clearly intended. The provision of the word " not " in such circumstances is by no means foreign to the process of construction (cf. *Butler* v. *Wigge* (1)).

Upon this view of cl. 8 its terms assume a lesser significance. In the circumstances of the case it must be regarded simply as a compendious provision inserted by way of more abundant caution to cover such incidental matters as did not obtrude themselves for the consideration of the parties. But their intention that they should be bound by the declared terms is clear. And it is equally clear that they intended their agreement to subsist even if the provisions of cl. 8 should fail to incorporate some term or terms from an identifiable form containing " usual conditions ". But it is said that if the provisions of cl. 8 prove to be nugatory, not because of a failure to find not inconsistent terms in an identifiable form, but because of the non-existence of any such form, the conclusion should be reached that the parties failed to agree. The suggestion does not carry conviction to our minds. Clause 8 was merely an appendage to the parties' declared agreement and there is nothing to show that it was intended to serve any purpose beyond providing for possible contingencies the nature of which they do not appear even to have contemplated. That they did not contract by reference to the provisions of any known form speaks eloquently and that they mistakenly assumed the existence of some form of contract such as that described in cl. 8 does not affect the matter. The nature of the mistake in this case is such that its consequences are quite unlike those which

(1) (1667) 1 Wms. Saund. 65 (n. 2) [85 E.R. 74].

arose in the circumstances related in *Stimson* v. *Gray* (1) to which we were referred by counsel for the appellant.

The other grounds taken by the appellants may, in the circumstances of this case, be considered together. The agreement, as already mentioned, was signed on 27th March 1927, but it was not until about October 1929 that the respondent entered into possession jointly with the deceased. The purchase had been made at the suggestion of the deceased, who was a cousin of the respondent, and in 1929, they commenced to work the property in partnership. But before the signing of the contract the respondent had paid to the deceased two sums of £200 and £150. These payments were made in November 1926, and February 1927, respectively and they were made after it had been orally agreed that the respondent should purchase a one-half interest in the property. Later, between April 1927 and February 1928, further payments, totalling £130, were made by the respondent. These payments were, apparently, treated as payments on account of the stipulated deposit—£200—and monthly payments of £10. On this basis the respondent paid the equivalent of twenty-eight monthly payments. All of the payments were made before the respondent came to live on the property and shortly after that event the deceased asked him not to make any further payments for the time being. None were in fact made thereafter. The evidence concerning the partnership arrangement between the deceased and the respondent is meagre and there is little information in the evidence concerning the partnership activities or income. Perhaps it may be said that this was not the fault of the respondent for the deceased appears to have handled the financial dealings of the partnership and no part of the proceeds received from the working of the property was paid by him to the respondent. Nor, it appears, was any information concerning the partnership accounts given to the latter notwithstanding the fact that from an early stage he sought information from the deceased concerning these matters. No doubt these unsatisfactory features contributed, even if they did not lead, to their relationship becoming strained and in the latter part of 1932 the respondent left the property. There is sufficient in the evidence to suggest that the partnership was not prospering and it appears that the respondent left the property after the deceased had said that there was not " enough in it for the two of them " and he acceded to the deceased's suggestion that he should accept a position at Tumut which was then offering. Whether or not the partnership arrangement was then terminated is a matter of some doubt and there is no evidence to lead either to

(1) (1929) 1 Ch. 629.

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the conclusion that it was or was not. But from the terms of the conversation briefly referred to it is probable that it was. After leaving the property the respondent did not return to it nor, indeed, did he see it again until after 1951 when the deceased died. Upon the evidence there can be no suggestion that the respondent intended to abandon his rights under the contract at the time when he left the property for the deceased undertook to work the property during his absence and, as we understand the evidence and the finding of the learned trial judge, to protect the respondent's interest in the property. That the respondent had no thought of abandoning his rights under the agreement is borne out by an incident that occurred shortly before he left the property. The difficulties already referred to had arisen between the respondent and the deceased and some question arose between them concerning the registration of the agreement for sale. This occurred early in 1932 and the respondent, as a result of his discussions with the deceased, thought it wise to consult a solicitor. After receiving advice he had the agreement registered with the Department of Lands and this he did after notice to the deceased and in spite of the latter's requests that he should forbear from doing so for the time being.

In July 1933, the respondent received a communication from a firm of solicitors acting on behalf of the deceased but it is unnecessary to refer to the terms of this communication. It is sufficient to say that there is nothing to suggest that at this stage the parties did not regard the agreement as still being on foot. Nothing more passed between the parties until 1937 and thereafter there was silence until September 1948. We forbear to discuss the correspondence which passed between the parties at this later stage but it continued sporadically until the death of the deceased in 1951. Subsequently letters passed between the solicitors for the parties to this appeal and on 12th June 1953, the suit which has lead to this appeal was commenced.

After discussing the question of the respondent's delay with as much particularity as the meagre evidence permitted the learned trial judge expressed the view that if no other factor remained for consideration the equitable relief sought by the respondent should be refused. With this view we agree. The suit was instituted some twenty-six years after the date when the contract was made and some twenty years after the date when, if the instalments of purchase money had been paid in accordance with the terms of the agreement, the full amount of the purchase money would have been paid. And, notwithstanding the unusual circumstances in which the respondent left the property, the delay was of such a character as to justify

entirely the conclusion that equitable relief sought should be refused. Indeed, in our view, it is doubtful whether any other conclusion would fairly have been open. But in December 1930, the *Moratorium Act* of that year came into force and it was common ground upon the argument of this appeal that the dates fixed by the agreement for payment of instalments of purchase money were postponed until " prescribed dates " in 1933. By successive *Moratorium Acts*, the provisions of which it is unnecessary to set out, the contractual dates for the payment of instalments were further postponed on a number of occasions and ultimately the time for payment was extended until " prescribed dates " in the year 1952. The result was that except, perhaps, for a very short period in 1930 the respondent was not in default in payments of any instalment during the lifetime of the deceased. Indeed, after December 1930 no further instalments became due and payable until some time in 1952 and before this—in March 1951—the respondent was moving to assert his rights. It is true that the letter of 30th March 1951 written by the respondent's solicitor did not, in terms, claim specific performance of the agreement but if the appellants did not then appreciate that the respondent wished to have the agreement carried into effect —which we doubt—it became abundantly clear to them shortly afterwards and certainly, at the latest, during the following year after further correspondence had passed. It was, as already appears, only in this year that the outstanding instalments began to fall due and it is only too plain that the appellants were not then prepared to recognise the respondent's claim. In these circumstances we fail to see how it can be said that a case of unreasonable delay was made out. The respondent was not entitled to a transfer of an interest in the land until he had paid the balance of the purchase money and he was under no obligation to pay it until 1952. And at that stage the appellants refused and thereafter continued to refuse to perform the agreement on their part. There was not, as was suggested on behalf of the appellants, a delay on the part of the respondent of something like twenty years in seeking to enforce his right to a transfer; on the contrary as long as the balance of purchase money remained outstanding he had no such right and as long as his obligation to pay such balance was postponed by the operation of the *Moratorium Acts* there was no delay of which the deceased, in his lifetime, or the appellants, thereafter, could take advantage.

But two other contentions were advanced to assist both this defence and the defence that the respondent was not at all material times a ready and willing purchaser. The first was concerned with the

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obligation of the respondent to make payments in accordance with cl. 2 of the agreement. But whether or not these payments were wholly or in part paid out of partnership income does not appear. Moreover the suggestion is open upon the evidence that the deceased waived his rights to periodical payments pursuant to this clause when the respondent, at the suggestion of the former, left the property in 1932. It is, however, unnecessary to pursue these matters for it is clear that if the provisions of cl. 2 required the respondent to make payments from time to time—and do not merely prescribe the extent of his liability to make one " other payment as above mentioned " prior to completion (see cl. 3)—the payments were to be made to the deceased and it is equally clear that, without knowledge of the amounts falling due, it was impossible for the respondent to make them. Yet the deceased refused consistently to furnish the respondent with information concerning the affairs of the partnership in the early stages and there is some evidence that the refusal was continued at a later stage. In any event the evidence makes it clear that at no time did the deceased furnish the respondent with information which would have enabled the latter to discharge his obligations under cl. 2 and, in these circumstances, it does not lie in the mouth of the appellants to assert that the respondent was guilty of unreasonable delay in making such payments or that his failure to make such payments establishes that he was not a ready and willing purchaser.

Finally it was suggested that the defence of delay might be supported by the respondent's failure to assert his right to possession. He was, it was said, entitled to possession as from the date of the contract and his failure to assert, or re-assert, this right after 1932 was sufficient to constitute a bar to the relief sought. But the respondent's suit was not a suit to enforce a right to possession; it was a suit to obtain a decree for the specific performance of an agreement which, in the circumstances of the case, did not bind the respondent to perform the conditions precedent to his right to a transfer until 1952. This being so there is no substance in this contention.

For the reasons given the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Duncan Barron & Co.*
Solicitors for the respondent, *Dettmann Austin & Maclean.*

J. B.