

THE COMMON LAW DISCHARGE OF CONTRACTS UPON BREACH

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PART II

IV. CIRCUMSTANCES PRECLUDING THE EXERCISE OF THE RIGHT TO DISCHARGE THE CONTRACT

There are circumstances in which the innocent party is precluded from discharging a contract although the defaulting party has repudiated it or committed a breach of one of its essential terms. Where there has been a breach of an essential term but the innocent party is precluded from discharging the contract, the term remains an essential term but the only remedy available to him in respect of that particular breach is the recovery of damages.⁵³

The right of discharge is not available to the innocent party (a) if, with knowledge of the repudiation or breach of essential term, he proceeds with the contract or permits the other party to proceed, or (b) if the contract has been substantially performed. It has been claimed that the right of discharge is not available to the innocent party (c) if it is not possible for there to be *restitutio in integrum* between the parties. These circumstances will be examined in turn.

- (a) *Where the Innocent Party with Knowledge of the Repudiation or Breach of Essential Term Proceeds or Permits the Other Party to Proceed with the Contract.*

This position has been described succinctly by Jordan C.J.:⁵⁴

It needs to be remembered also that if a party who becomes entitled to put an end to a contract by reason of a breach of an essential promise does not exercise this right when he becomes aware of the breach, he loses his right, and is remitted to his remedy by way of damages only, in the following events: (1) If, notwithstanding the knowledge of the breach, he proceeds to do some act, referable to the contract, which could only be properly done by him by virtue of the contract treated as a subsisting contract: *O'Connor v. S. P. Bray Ltd.*⁵⁵ *Franklin v. Manufacturers Mutual Insurance Ltd.*⁵⁶ or (2) if the party in default proceeds to carry on with the performance of the contract at the request or with the permission, express or tacit, of the innocent

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⁵³ *Wallis v. Pratt* [1911] A.C. 394.

⁵⁴ *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 644.

⁵⁵ (1936) 36 S.R. (N.S.W.) 248, 261-262; 53 W.N. (N.S.W.) 72.

⁵⁶ (1936) 36 S.R. (N.S.W.) 76, 81-82; 53 W.N. (N.S.W.) 17.

party, made or given with knowledge of the breach: *ibid.*; *Fuller's Theatres Ltd v. Musgrove*.⁵⁷

(b) *Where the Contract has been Substantially Performed.*

Again the position is put by Jordan C.J.:⁵⁸

In considering the exact measure of relief that can be obtained in any particular case for breach of an essential promise, it is necessary to have regard to a number of factors. The breach may, for example, not occur or not be discovered until the contract has been wholly or partly performed; or the innocent party may by his conduct after the breach has come to his notice debar himself from relying on it as a ground for putting an end to the contract.

If an essential breach is committed when nothing has yet been done to perform the contract on either side, the innocent party if he chooses may by notice to the defaulting party exercise his right of treating himself as discharged from the obligations of the contract and may also sue for damages for loss of the contract. A communicated election to avoid the contract, if made by a party having a right to avoid it, is at once operative and is final and irrevocable: *Newbon v. City Mutual Life Assurance Society Ltd*,⁵⁹ *Guy-Pell v. Foster*.⁶⁰ And a party who has purported to avoid a contract upon an untenable ground is entitled to rely upon any valid ground which in fact then existed and has not been waived: *British & Beningtons Ltd v. N. W. Cachar Tea Co.*,⁶¹ *Shepherd v. Felt & Textiles of Australia Ltd*.⁶²

If, on the other hand, when the breach is discovered, the position is that the defaulting party has wholly (though defectively) performed the contract, and the innocent party has accepted performance in such a way that he can no longer reject it, he is remitted to his remedy by way of damages or set-off for the breach. *H. Dakin & Co. Ltd v. Lee*.⁶³ *Wallis, Son & Wells v. Pratt & Haynes*.⁶⁴ If, however, he is still in a position to reject performance, he may determine the contract, refuse to perform it further, recover any payments made, as on a total failure of consideration,⁶⁵ and also recover damages for loss of contract.

In the intermediate case, where the contract has been partly performed by the defaulting party, the questions arise⁶⁶ whether the innocent party who, after such performance, becomes aware of an essential breach committed in the course of performance, can rely on the breach as a ground for putting an end to the contract as a source of future obligations, and obtaining damages for loss of contract; and (2) whether, if he has and exercises this right, he is bound to accept and (upon a *quantum meruit* or otherwise) give consideration for, the defective part performance, subject to a right to compensation for the defect, or whether he may reject the defective part performance, obtain damages as on a total loss of contract, and also, in respect of any consideration already given by him, obtain relief as on a total failure of consideration.

⁵⁷ (1922) 31 C.L.R. 524, 540-541.

⁵⁸ (1934) 52 C.L.R. 723, 733.

⁶¹ [1923] A.C. 48, 71-72.

⁶³ [1916] 1 K.B. 566, 574.

⁶⁵ *Halsbury's Laws of England* (2nd ed. 1932) vii, 283-287.

⁶⁶ (1934) 52 C.L.R. 723, 733.

⁵⁸ (1938) 38 S.R. (N.S.W.) 632, 643-644.

⁶⁰ [1930] 2 Ch. 169.

⁶² (1930) 45 C.L.R. 359, 377-378.

⁶⁴ [1910] 2 K.B. 1003, 1014-1015.

Where the contract is of the type which requires a party to give complete and exact performance⁶⁷ before he can recover under it, the other party will be entitled to discharge the contract upon breach at any time prior to that complete and exact performance, except where the other party has, by accepting partial performance, waived the requirement of complete and exact performance.⁶⁸

Where the contract is of the type which requires a party to give substantial performance⁶⁹ before he can recover under it, the other party will be entitled to discharge the contract upon breach prior to that substantial performance.⁷⁰

It is submitted that at common law an innocent party (subject to any agreement to the contrary, made by the acceptance of partial performance) is not precluded from discharging a contract upon breach, by any performance which is less than substantial performance.⁷¹ This of course, must be read in conjunction with the first circumstance precluding discharge, which is discussed above.

The right of a buyer of goods to discharge the contract of sale upon the breach of an essential term is governed by section 16 (3) of the Goods Act 1958 which provides:

Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, or where the contract is for specific goods the property in which has passed to the buyer, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated unless there be a term of the contract express or implied to that effect.

In *Benjamin on Sale*⁷² it is stated that the provisions of this clause:

... so far as they relate to the entirety of contracts, mean that, after part acceptance of the benefit of an entire consideration, the buyer cannot repudiate the contract as a whole, and refuse to pay for the goods, or to accept the residue. This was the rule at common law, where a party who had accepted part performance, so that the parties could not be put *in statu quo*, could not repudiate the contract, and recover back any money he had paid.

⁶⁷ E.g. *Cutter v. Powell*, *Smith's Leading Cases* (13th ed. 1929) ii. 1; *Sinclair v. Bowles* (1829) 9 B & C 92; 109 E.R. 35. See *Salmond and Williams on Contract* (2nd ed.) 546.

⁶⁸ See *Sumpter v. Hedges* [1898] 1 Q. B. 673; Morison, *The Principles of Rescission of Contracts* (1916) 105-106; *Salmond and Williams on Contract*, *op. cit.* 546. In cases where the innocent party accepts partial performance a question arises as to whether the acceptance discharges the original contract by agreement or whether the innocent party discharges the original contract upon breach but accepts the partial performance notwithstanding his discharge of the original contract. This will depend on the proper interpretation of the intention of the parties in the circumstances.

⁶⁹ E.g. *H. Dakin & Co. Ltd v. Lee* [1916] 1 K.B. 566; *Hoening v. Isaacs* [1952] 2 All E.R. 176.

⁷⁰ *Salmond and Williams on Contract*, *op. cit.* 546.

⁷¹ Morison, *op. cit.*, 127.

⁷² (8th ed. 1950) 562.

The main authority cited by *Benjamin* for this rule at common law is *Hunt v. Silk*.⁷³

It will be submitted below that this doctrine, for which *Hunt v. Silk* is treated as authority, is based on a misconception of the legal nature of the discharge of a contract upon breach and is wrong in principle. Insofar as the statutory rule precludes discharge of the contract after the passing of the property in specific goods, it is based on *Street v. Blay*⁷⁴ and is consistent with the common law rule because on the passing of property the seller has performed his part of the contract (at least substantially). The same may be said to apply where the goods have been accepted. But there is no valid common law warrant, it is submitted, for the rule that in a contract of sale which is not severable the buyer is precluded from discharging the contract if he has accepted part of the goods. In the interest of clarity of thought, it should be remembered that this is a statutory exception.

(c) *The Alleged Requirement that Restitutio in Integrum be Possible.*

Although there is a good deal of authority for the proposition that a contract can not be discharged upon breach unless there can be *restitutio in integrum*, it is submitted that this view is wrong in principle and not justified by reliable authority. It is submitted that the proposition owes its existence to an uncritical acceptance of *Hunt v. Silk*,⁷⁵ a confusion between the legal nature of rescission *ab initio* and discharge upon breach and a confusion between, on the one hand, the act of a party rescinding a contract *ab initio* or discharging a contract upon breach, and on the other hand the act of a court in making orders consequential upon a rescission *ab initio* or a discharge.

The logic of the situation as expressed by Turner J. in the passage quoted above⁷⁶ is against there being any requirement of *restitutio in integrum*. The views of Morison,⁷⁷ and *Salmond and Williams*⁷⁸ are against the requirement. Considerations of commercial convenience are strongly against it. In many cases the courts have treated the contract as discharged upon breach although no *restitutio in integrum* was possible.⁷⁹ In spite of this, support for the proposition still persists. It is necessary to examine these decisions.

⁷³ (1804) 5 East 449.

⁷⁴ (1831) 2 B. & Ad. 456. See Stoljar, 'Conditions, Warranties and Descriptions of Quality in Sale of Goods' (1952) 15 *Modern Law Review* 425, especially 436; and (1953) 16 *Modern Law Review* 174.

⁷⁵ (1804) 5 East 449.

⁷⁷ *Op. cit.* Ch. x.

⁷⁶ Above pp. 256-257, n. 15.

⁷⁸ *Op. cit.* 566.

⁷⁹ E.g. the many building cases where the building has been partly erected on the owner's land but it has been held that the owner of the building has discharged the contract upon the breach of the other. Also most of the cases where the builder has recovered upon a *quantum meruit* as in *Lodder v. Slowey* [1904] A.C. 442.

In *Hunt v. Silk*⁸⁰ the defendant in consideration of the plaintiff paying him £10 on the execution of the lease, and for other considerations, agreed that within ten days from the date of the agreement he would grant the plaintiff a lease of a house for nineteen years at the yearly rental of £93. The defendant also agreed to make certain alterations to the premises and that the premises should at the time of executing the lease be in complete repair. In consideration of this, the plaintiff agreed to execute the lease and pay the rent. The plaintiff immediately took possession of the house and paid the £10 in confidence that the alterations and repairs would have been done within the ten days. But some days after the expiration of the ten days, nothing had been done in spite of several requests by the plaintiff to the defendant to perform the work and 'the plaintiff quitted the house, giving the defendant notice of his having rescinded the agreement in consequence of the defendant's default'.⁸¹

The plaintiff brought an action to recover back the money which he had paid. At the trial Lord Ellenborough thought that the plaintiff was too late to rescind the contract and that his only remedy was on the special agreement, and therefore directed a nonsuit.

The plaintiff moved for a new trial before the Court of King's Bench consisting of Lord Ellenborough C.J., Grose, Lawrence and Le Blanc JJ. which refused the application. In his judgment Lord Ellenborough said:

Now where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account. This objection cannot be gotten rid of: the parties cannot be put *in statu quo*.⁸²

As an authority for the proposition that where a party to a contract has had possession of the property the subject of the contract, he cannot recover money paid by him as money had and received upon a consideration which has wholly failed, this decision has been criticised.⁸³ But insofar as it decided that the contract could not be discharged upon breach because the parties could not be placed back *in statu quo* it has been the subject of a sustained attack. It plainly proceeds on the basis that the nature of the discharge of a contract upon breach is the same as that of a rescission *ab initio*. By holding that the plaintiff's occupation of the premises prevented the

⁸⁰ (1804) 5 East 449.

⁸¹ *Ibid.* 450.

⁸² *Ibid.* 452.

⁸³ Stoljar, 'The Doctrine of Failure of Consideration' (1959) 75 *Law Quarterly Review* 53, especially pp. 71-74. See however: *Hodder v. Watters* [1946] V.L.R. 222, 231-233.

parties from being placed *in statu quo*, Lord Ellenborough applied the strict rule applicable to a rescission *ab initio* at common law.⁸⁴ *Hunt v. Silk* proceeds also on the erroneous assumption that a party can not discharge a contract upon breach if it has been partly performed. The view of Morison⁸⁵ and *Salmond and Williams*⁸⁶ is that the case can be taken only as authority for the proposition that the plaintiff, having continued in occupation for some days after the expiration of the ten days, elected to continue the agreement and waived the breach.

The view expressed in *Hunt v. Silk* that a contract can not be discharged upon breach if the parties can not be placed *in statu quo* received approval (at least from Parke B. during argument) in *Blackburn v. Smith*⁸⁷ and was noticed without disapproval by Lord Wright in *Spence v. Crawford*.⁸⁸

The view was given fresh life by the decision in *Thorpe v. Fasey*.⁸⁹ In that case the plaintiff contracted to sell to the defendant, a builder, an estate of about 160 acres for £38,000. The contract provided for payment of a deposit of £1,400, completion followed by a conveyance as to 40 acres on or before 3 October 1937, subject to a payment of £12,600, and similar completion as to three further parcels of about 40 acres each on or before 3 October in 1939, 1940 and 1941 respectively, subject to a payment of £8,000 in each case. The defendant made the first payment of £12,600 and the first parcel was conveyed to him in October 1937. He entered into possession of this parcel and carried out certain development of it but conditions became unsuitable to enable further development to take place and he did not complete in respect of any of the other parcels. Correspondence took place between 1945 and 1947 in which the plaintiff, while urging the defendant to complete, never gave notice making time of the essence. The defendant, while stating his present inability to complete, consistently expressed his desire to do so when conditions should render possible the resumption of his building activities. In 1947 the plaintiff brought an action claiming specific performance, alternatively damages for breach of contract and in the further alternative, rescission. The claim for specific performance was abandoned by the plaintiff's counsel in opening and was not argued in view of the defendant's manifest inability to complete.

Wynn-Parry J. dealt first with the question of damages, which he said depended upon there having been a repudiation by the defendant of the contract, the repudiation being accepted by the plaintiff. He held that in the circumstances there had been no repudiation of the

⁸⁴ Compare *Alati v. Kruger* (1955) 94 C.L.R. 216, 223-225.

⁸⁵ *Op. cit.* 180.

⁸⁶ *Op. cit.* 547-548.

⁸⁷ (1848) 2 Exch. 783.

⁸⁸ [1939] 3 All E.R. 271, 290.

⁸⁹ [1949] 1 Ch. 649.

contract by the defendant which could be and was accepted by the plaintiff. Accordingly the claim by the plaintiff for damages at common law was dismissed.

Wynn-Parry J. then proceeded:

I must now consider the question of the alternative claim for rescission. On this aspect of the matter there is surprisingly little authority. I was referred to *Hunt v. Silk*.

His Lordship then read the sidenote to the report of that decision, quoted the passage from the judgment of Lord Ellenborough which is set out above and proceeded:

As I read that judgment, there is the statement of what Lord Ellenborough regarded as a well-established general principle that where a contract is to be rescinded at all it must be rescinded *in toto*, and the parties put *in statu quo*, and he then follows that general statement with its application to the particular case, ending with a reiteration of the essential elements that must exist as a condition precedent for the granting of the relief of rescission, namely, that the parties should be capable of being put *in statu quo*.

Wynn-Parry J. then referred to *Sheffield Nickel & Silver Plating Co. Ltd v. Unwin*⁹⁰ (a case dealing with the rescission of a contract for fraudulent misrepresentation) and continued:

There, again, the language used indicates that the court there intended to pray in aid a well-established general principle that a contract cannot be rescinded in part and stand good for the residue. If it cannot be rescinded *in toto* it cannot be rescinded at all; and one reason for not directing rescission is that the parties, or one of them, cannot be restored to their *status quo*.

He concluded:

It is surprising, but that would appear to be the sum total of the diligent researches of the four counsel who have been engaged in this case, and I must proceed on the basis of those authorities. There is a passage in *Williams on Vendor and Purchaser*, in the 4th ed., vol. II, p. 1006, to which I was referred and which clearly proceeds upon the basis of the existence of the general principle which, in my view, emerges from the two cases before me. I must, therefore, applying that principle, refuse rescission in this case unless I can come to the conclusion that the true way of viewing the position is that the contract which must be the subject of rescission is the residue of the agreement of August 3, 1947, remaining after that part of it which concerns the first parcel had been superseded for all purposes by the conveyance of October 27, 1937.⁹¹

His Lordship held that on the construction of the agreement, there was one contract, not a series of contracts. Accordingly he dismissed the plaintiff's action.

⁹⁰ (1877) 2 Q.B.D. 214.

⁹¹ [1949] 1 Ch. 649, 662-664.

In that case it does not appear from the report that the judge was referred to the cases which examine the legal nature of the discharge of the contract upon breach, nor to the criticisms which have been made of *Hunt v. Silk*.

*Thorpe v. Fasey*⁹² highlights the inconvenience which follows from the application of the rule supposed to flow from *Hunt v. Silk*. The plaintiff Thorpe abandoned the claim for specific performance, obviously because the defendant did not have the financial ability to carry out the contract. Although it was held on this occasion that the defendant had not repudiated the contract the plaintiff could, no doubt, have later ordered affairs so that it would be held that the defendant had repudiated or committed a breach of an essential term of the contract. But that would be of no avail because the plaintiff would still be precluded from discharging the contract because the parties could not be placed *in statu quo*. His position was similar to the position described in another context as remaining 'between two worlds—one dead, the other powerless to be born'.⁹³ No doubt it will be necessary to wait for new editions of *Miscellany-at-Law* to learn what became of the unfortunate Mr Thorpe.

Another example of the working out of the supposed rule makes its inconvenience obvious. Take a building contract in which the owner is to pay the builder a lump sum on completion. When the builder has completed two-thirds of the building work on the owner's land, the builder repudiates the contract. Is the law going to tell the owner that because restitution is impossible and the parties cannot be placed *in statu quo* he cannot discharge the contract? Is the owner to be told that there is no way in which he can employ another builder to complete the work without also remaining bound by the first contract? The fact that such a position does not commend itself to common sense is strong evidence that it is not the common law.

Wynn-Parry J. by his reference to *Sheffield Nickel & Silver Plating Co. Ltd v. Unwin*⁹⁴ shows that he had in mind a rescission of a contract *ab initio* and not a prospective discharge of a contract as upon breach.

In the fourth edition of their textbook, Cheshire and Fifoot⁹⁵ treated *Thorpe v. Fasey* as an illustration of the rule in *Hunt v. Silk*, and referred to there having been substantial performance of the contract in that case. But it is submitted that it could not be said that in *Thorpe v. Fasey* there had been such substantial performance as would preclude a discharge upon breach. In their fifth edition,

⁹² *Ibid.* 649.

⁹³ *Perpetual Executors and Trustees Association of Australia Ltd v. Russell* (1931) 45 C.L.R. 146, 155 per Evatt J.

⁹⁴ (1877) 2 Q.B.D. 214.

⁹⁵ *Law of Contract* (4th ed. 1956) 495.

however, the authors refer to the logical difficulty of equating a rescission *ab initio* with a discharge upon breach, but comment that the decision in *Thorpe v. Fasey* 'appears to lay down a general and convenient principle, applicable to breach no less than to fraud, that if a contract cannot be rescinded *in toto* it cannot be rescinded at all'.⁹⁶ It is submitted that not only is the rule adopted in *Thorpe v. Fasey* unjustifiable in logic or on principle, but it adopts a most inconvenient rule. The actual decision of course, is justified on the finding that the defendant had not repudiated the contract.

Thorpe v. Fasey was discussed in *Drozd v. Vaskas*.⁹⁷ This was a case in which the plaintiffs sold to the defendants a business described as the 'Juke Box Cafe' which was conducted in premises of which the defendants were lessees. The plaintiffs paid the purchase price, went into possession and conducted the business for almost six months. Then by a letter to the defendants' solicitors they stated that they treated the contract as rescinded on the grounds (a) that it had been induced by fraudulent misrepresentations as to profits (b) that the defendants had committed a breach of a fundamental term of the contract by failing to procure the transfer of the lease to the plaintiffs and (c) that they exercised their rights under section 39 of the Business Agents Act which provides that a contract for the sale of a business shall, within six months of its making, be voidable at the option of the purchaser unless it is executed by the purchaser in the presence of two witnesses. The plaintiffs in their action claimed rescission of the contract, return of the purchase price with interest or alternatively damages.

Reed J. found (a) that the plaintiffs had been induced to enter into the contracts by fraudulent misrepresentations as to profit by the defendants; (b) that the defendants had failed to procure the transfer of the lease thereby committing a breach of an essential term of the contract and (c) that the contract was not executed in the presence of two witnesses.

The defendants argued that the plaintiffs had affirmed the contract. His Honour rejected this argument insofar as the claim was based on fraudulent misrepresentation and breach of an essential term.

The plaintiffs had contended that upon discharging the contract upon breach they became entitled to the purchase moneys for the business and the ascertained price of the stock upon the basis that the agreement was rescinded *ab initio*. His Honour stated that this was not so and quoted the well known passage from the judgment of Dixon J. (as he then was) in *McDonald v. Dennys Lascelles*,⁹⁸

⁹⁶ *Law of Contract* (5th ed. 1960) 495-496.

⁹⁷ [1960] S.A.S.R. 88.

⁹⁸ (1933) 48 C.L.R. 457, 476-477. Above p. 256, n. 10.

and added that 'Furthermore the plaintiffs had occupation of the premises for a considerable time'.⁹⁹ He then applied *Thorpe v. Fasey*, referred to *Hunt v. Silk* and stated that in the case before him the contract could not be rescinded *in toto* and the parties placed *in statu quo*. His Honour then went on to deal with the question of *restitutio in integrum* but only in relation to the claim based on the Business Agents Act. He did not discuss *restitutio in integrum* in relation to the claim founded on the discharge of the contract upon breach. He held that, as the plaintiffs had discontinued the conduct of the business, they could not make restitution and were therefore precluded from rescinding both on the ground of misrepresentation and the ground under the Business Agents Act.

At first sight it does appear that by his reference to *Hunt v. Silk* and *Thorpe v. Fasey* his Honour was adopting the view that a contract could not be discharged for breach unless the parties could be placed *in statu quo*. However it is important to remember that in this case it was the plaintiffs' contention that discharge upon breach was the equivalent of rescission *ab initio*. Reed J. first quoted the passage from Dixon J. to show that discharge upon breach was prospective only and not rescission *ab initio*. It is submitted that the correct interpretation of the passage referring to *Hunt v. Silk* and *Thorpe v. Fasey* is that his Honour was merely saying that even if discharge upon breach were, upon proper legal analysis, a rescission *ab initio* it could still not be given for the reasons set out in the two authorities mentioned. If the proper analysis were that discharge upon breach amounted to rescission *ab initio* at law the fact of the plaintiff's possession would probably have precluded rescission, by analogy to rescission at common law for fraudulent misrepresentation: *Alati v. Kruger*.¹ It is submitted that on a fair reading of the judgment there is no warrant for the view that Reed J. was giving his support to the view expressed in *Hunt v. Silk* and *Thorpe v. Fasey* that discharge upon breach was only possible where the parties could be returned to the *status quo*. This is supported by the fact that his Honour does not discuss the question of *restitutio in integrum* in relation to discharge upon breach.

In *Fuller's Theatres Ltd v. Musgrove*² these questions received some consideration. In that case a tripartite agreement had been made between Fuller's Theatres, Majestic Amusements and Musgrove on 24 March 1921. In the agreement it was agreed that Fuller's Theatres should lease to Musgrove the Theatre Royal, Perth, that Majestic Amusements should lease to Musgrove the Majestic Theatre, Adelaide, and that Musgrove should lease to Majestic Amusements the Prince of Wales Theatre, Adelaide.

⁹⁹ [1960] S.A.S.R. 88, 98. ¹ (1955) 94 C.L.R. 216, 223-225. ² (1923) 31 C.L.R. 524.

Pursuant to the agreement, Musgrove went into possession of the Majestic Theatre and the Theatre Royal, in March and April respectively. In March, Majestic Amusements went into possession of the Prince of Wales Theatre with the exception of a room on the first floor which was the registered office of Tivoli Theatres Limited and of which Musgrove refused to give possession.

After some negotiations Fuller's Theatres and Majestic Amusements gave Musgrove notice that they intended to resume possession of the Majestic Theatre and the Theatre Royal and to issue a writ against Musgrove for damages. On 8 July they issued out of the Supreme Court of New South Wales a writ against Musgrove for recovery of damages for breach of contract and, on 13 July out of the Supreme Court of South Australia a writ of ejectment in respect of the Majestic Theatre. On 23 September they informed Musgrove that they intended, if necessary, to enforce their claim for damages at a later period. The action for ejectment was discontinued on 24 November but the action for damages was not discontinued. On 24 November Musgrove asserted a right to terminate the agreement on handing back the theatres and paying the sum of £2000 fixed by the agreement as compensation payable in the event of his not carrying out the agreement. His right to do this was denied by Fuller's Theatres and Majestic Amusements and on 15 March 1922 after further abortive negotiations they instituted a suit for specific performance in the Supreme Court of New South Wales.

Owen A-J. dismissed the suit on the ground that the issue of the writ in ejectment being a definite election to treat the agreement as determined, avoided it, and also on the ground that by commencing the action for damages and ejectment the plaintiffs had debarred themselves from obtaining the relief of specific performance.³

The plaintiffs appealed to the High Court. Knox C.J. held that by their earlier actions they had debarred themselves from the relief of specific performance and did not express an opinion as to whether the plaintiffs had made a final election to determine the agreement. The other members of the court, Isaacs and Rich JJ., in a joint judgment, also expressed the opinion that upon the application of equitable considerations to the general facts the appellants were not entitled to specific performance. Isaacs and Rich JJ. then proceeded to examine in detail the plea that the agreement had been 'rescinded'.

Their Honours first considered whether the inclusion of the office was a vital element of the bargain and expressed the opinion that it was not. They then considered the position on the assumption (contrary to their opinion) that the inclusion of the office was a vital element in the bargain. They held that, even on that assumption,

³ *Fuller's Theatres Ltd v. Musgrove* (1922) 23 S.R. (N.S.W.) 65.

the purported 'rescission' was ineffectual in law for two reasons. The first reason was that the appellants with full knowledge that the respondent would not include in his lease the disputed office went on with the contract and took its advantages. This amounted to an affirmation of the agreement and exhausted the power of electing to 'rescind' if that power existed. Their Honours stated their second reason as follows:

There is another well-settled principle of contract law: If the complaining party is not in a position to make *restitutio in integrum*, he cannot rescind (*Urquhart v. Macpherson*).⁴ That this is a doctrine to be rigidly applied, that it is not confined to any class of transaction but is a recognized and established doctrine of the law of contract in general, is definitely settled by the House of Lords (Lord Loreburn, Lord Atkinson, Lord Shaw and Lord Parmoor), and particularly in the judgments of Lord Atkinson and Lord Shaw, in the case of *Boyd & Forrest v. Glasgow and South-Western Railway Co.*⁵ The case, from its great general importance, merits publication in a way more generally accessible here. To incorporate those valuable judgments in this opinion is impossible, and they are too connected in thought to shorten. But it may be said that in one of them (that of Lord Atkinson) the case of *Hunt v. Silk*⁶ is cited, and Lord Ellenborough's judgment is quoted for the following passage: "Now where a contract is to be rescinded at all, it must be rescinded *in toto*, and the parties put *in statu quo*. But here was an intermediate occupation, a part execution of the agreement, which was incapable of being rescinded. If the plaintiff might occupy the premises two days beyond the time when the repairs were to have been done and the lease executed, and yet rescind the contract, why might he not rescind it after a twelvemonth on the same account. This objection cannot be gotten rid of: the parties cannot be put *in statu quo*". That passage is singularly apposite to the case in hand. In the judgments both of Lord Atkinson and Lord Shaw, the learned Lords treat *Adam v. Newbigging*⁷ as a strong authority against the proposition that where the parties cannot be restored to their position in fact, rescission may be decreed simply upon the terms of the payment of the sum of money by the party seeking rescission to the other party or *vice versa*. The business, said Lord Atkinson, speaking of that case, deteriorated "from its own inherent vice, not from any thing done or omitted by the respondent" before he discovered the misrepresentation. Lord Shaw agreed with what Lord Atkinson said as to *Adam v. Newbigging*. Lord Parmoor says: "The remedy of reduction is not in general available unless the party seeking reduction is able to place the party against whom it is sought in substantially the same position as he occupied before the contract. In substance there must be *restitutio in integrum*".⁸ Those judgments were delivered in a case which differed from the present in two relevant aspects. First all the work—a line of railway—had been done, and could not be undone; and next, the rescission was by order of the court. The first difference does not affect the principle that *restitutio* must be *in integrum*. Lord Loreburn says: "I do not enter upon the question how far this

⁴ (1878) 3 App. Cas. 831, 837-838.

⁵ [1915] S.C. (H.L.) 20.

⁶ (1804) 5 East 449, 452.

⁷ (1888) 13 App. Cas. 308. ⁸ [1915] S.C. (H.L.) 20, 43.

was an essential error which would have justified rescission, or how far it was a cause of action in itself, because what I have said is enough to dispose of the point. These contractors continued their contract when they knew the statements which had induced them to contract, and the reality which they found in working on the spot".⁹ The second difference tells heavily against the appellants because, where a party rescinds of his own motion, he makes no equitable adjustments; if effectual, his rescission is complete and unconditional. Whatever rights exist after that are strict legal rights. The necessity for *restitutio in integrum* is, therefore, in such a case a more rigid requirement.

In this case the 30 April, which was the fixed day for completion, came and went, the parties remained in possession, used the properties, took the benefits of their occupation, the leases daily diminishing, and, on the authorities referred to, restitution and therefore rescission became impossible. Nor has there been any offer to account for profits.¹⁰

For these reasons their Honours held that there had been no rescission of the agreement by the appellants and the High Court dismissed the appeal without prejudice to any proceedings at law which the plaintiffs may be advised to bring.

In order to see whether the law stated in the passage quoted from the judgment of Isaacs and Rich JJ. is well founded, it is necessary to examine the cases on which the passage is based. *Hunt v. Silk* has already been discussed.

In *Urquhart v. McPherson*¹¹ there was an appeal to the Privy Council from the Full Court of the Supreme Court of Victoria in a case in which the plaintiff sued the defendant for breaches of covenant in a partnership deed, dated 28 January 1859. The jury, the Full Court and the Privy Council held that there had been breaches of covenant. Among other defences the defendant relied on a deed of dissolution and release dated 11 January 1860. By this deed the partnership was dissolved and most of the assets of the partnership were assigned to the plaintiff and the plaintiff and the defendant released each other from all claims touching or concerning the partnership. The plaintiff replied that the deed was procured by the fraud of the defendant. The action had not been brought until more than fifteen years after the dissolution.

The Privy Council upheld the decision of the Supreme Court, holding that it was impossible to sever the release from the rest of the deed; that the plaintiff had taken the benefit of the deed without attempting to avoid it; that a contract which may be impeached on the ground of fraud could be avoided by the injured party only if the other party could be remitted to his former state and that as the plaintiff was unable to restore the defendant to his original position he was unable to rescind the release. It is clear that this case

⁹ *Ibid.* 24. ¹⁰ (1923) 31 C.L.R. 524, 541-543. ¹¹ (1878) 3 App. Cas. 831.

was solely concerned with the rescission of a contract for fraudulent misrepresentation and had nothing to do with discharge upon breach.

In *Boyd and Forrest v. The Glasgow and South Western Railway Co.*¹² it was alleged that a railway company, having called tenders for the construction of a branch line, represented to the contractors that a 'journal of bores' taken along the proposed line was a record kept by the borers who had made the bores. In fact the journal was inaccurate, being an interpretation by the company's engineer of what he believed to be the true meaning of the borers' reports. The contractors contracted to do the work for a fixed price. They began work in 1900 and soon discovered that the strata was much harder and more difficult than the journal had indicated. They complained and continued to complain but completed the contract in 1905. In 1907 the contractors brought an action which proved fertile in appeals.

As the engineer had acted honestly but mistakenly, the first appeal which ended in the House of Lords established that the contractor had no remedy on the basis of fraudulent misrepresentation. The case was remitted to the Court of Session.

The contractor's claim which was upheld by the second division of the Court of Session on this occasion¹³ was a claim for payment on the footing of a *quantum meruit* for the extra cost in which they had been involved as a result of the error. This claim was put in two ways. First it was put that they had been induced to enter the contract by an innocent misrepresentation. This involved the notion that after completing the work the contractors were entitled to rescind the contract for misrepresentation and claim upon a *quantum meruit* basis for the work done. Alternatively it was put that the accuracy of the journal of bores was a fundamental term of the contract. This argument was, in effect, that after the work was done the contractors, in reliance on the breach of a fundamental term, discharged the contract and became entitled to claim upon a *quantum meruit*. There was also a claim based on frustration which was similar to the claim rejected in *Davis Contractors Ltd v. Fareham U.D.C.*¹⁴ and a claim for damages for breach of contract. Both of these claims failed before the Court of Session.

There were four members of the Court of Session. The claim based on innocent misrepresentation was upheld by the three members who formed the majority—Lord Justice-Clerk,¹⁵ Lord Dundas,¹⁶ and Lord Salvesen.¹⁷ They took the view that although, in the literal sense, the *restitutio in integrum* required in the case of rescission for innocent misrepresentation was impossible, equity would grant a remedy here, where, by leaving the company with the com-

¹² [1915] S.C. (H.L.) 20. ¹³ [1914] S.C. 472. ¹⁴ [1956] A.C. 696.
¹⁵ [1914] S.C. 472, 489-490. ¹⁶ *Ibid.* 495-497. ¹⁷ *Ibid.* 505-506.

pleted railway and the contractors with the amount claimed, substantial justice could be done between the parties.

Lord Guthrie, who dissented, said:

It follows that a works contract, where a substantial part of the work has been executed, cannot be rescinded on the ground of innocent misrepresentation, because *restitutio in integrum* is impossible. The suggestion that in a case of this kind, restitution can be made in the shape of money or money's worth is fallacious. It is the pursuers who must make restitution, if they are to get rescission of the contract, and they are not proposing to restore in any shape whatsoever. Instead of restitution, they propose a complete subversal of the whole relations between the parties, to the serious detriment of the defenders.¹⁸

In dealing with the claim based on breach of a fundamental term, counsel for the company argued that the term had not been breached, that it was not fundamental and that the contractors, 'having gone on with the contract, could not now set it aside, and could at most claim damages'.¹⁹ The question of inability to make restitution was not argued in relation to the claim based on breach of a fundamental term but only in relation to the claim based on innocent misrepresentation.

Lord Justice-Clerk did not deal with the alternative argument based on breach of a fundamental term although he agreed with the interlocutor pronounced.²⁰ Lord Dundas upheld the argument, holding that it was a fundamental term of the contract that the journal should be accurate, that the contractors were entitled to declare the contract as at an end, and that the company could not hold the contractors to the contract as a basis of charge.²¹ Lord Salvesen also held that the contractors were entitled to succeed on the *quantum meruit* claim on the basis that there had been a breach by the company of a fundamental term.²² Lord Guthrie held that in the circumstances there was no breach of the term alleged. The interlocutor of the court found that the contractors entered into the contract under essential error induced by misrepresentation, that the company committed breaches of obligation which went to the root and consideration of the contract and that the contractors were entitled to be paid for the work on the basis of *quantum meruit*.

From the decision of the Court of Session the contractors appealed to the House of Lords. The arguments before the House of Lords are not reported but appear from the judgments to have been similar to those advanced in the Court of Session. Lord Loreburn referred to the difficulty of disentangling the real contentions and said that he proposed to take notice only of those that had survived and might be regarded as real contentions. He expressed the opinion that

¹⁸ *Ibid.* 517. ¹⁹ *Ibid.* 479. ²⁰ *Ibid.* 491. ²¹ *Ibid.* 497-499. ²² *Ibid.* 506-508.

where *restitutio in integrum* was impossible the party induced to enter the contract by an innocent misrepresentation could not substitute for the contract price, whatever price the court thought reasonable. However, he decided that the claim based on innocent misrepresentation failed on the ground that the contractors knowing the facts proceeded and completed the contract.²³ He rejected the argument based on breach of a fundamental term on the ground that the contract contained no such term.²⁴ His Lordship did not mention any question of *restitutio in integrum* in relation to the claim based on breach of a fundamental term.

Lord Atkinson stated that the contractors had obtained an interlocutor setting the contract aside on the ground of innocent misrepresentation. He looked at the question—'Were the pursuers permitted to peruse and examine a document which was a true journal of bores within the meaning of the specification attached to the contract?'²⁵ He then construed the specification and decided that the engineer had complied with the duty imposed by the specification. He then held that the contractor's case failed upon the main point. He went on to say:

but even if I were in error in that view I should still be clearly of the opinion that they were not entitled to have this contract set aside, inasmuch as *restitutio in integrum*, in the true sense of that phrase, is now absolutely impossible.

The pursuers cannot take back what they gave, their work, though they might restore what they got, the money they received; that, however, is precisely what they are not required to do. The work was done; the parties cannot in any sense be restored, in relation to this contract, to the position they occupied before the contract was entered into. . .

The learned judges of the Second Division did not question the inapplicability of the doctrine of *restitutio in integrum* to this case, but they applied it in a novel and eccentric fashion. They do not direct that if the pursuers should recover on a *quantum meruit* less than the sum they have already received, they should refund the difference or refund anything at all, but merely that they should give credit for this latter sum against the sum recovered. This, in the result, merely means that the pursuers should keep all the money they have got and get as much more as possible. That no doubt, is a safe and lucrative kind of operation for the pursuers, but it is one which in many cases would lead to great injustice, and, with the utmost respect for the learned Judges of the Second Division, is, in my view, indefensible on authority.

There is no case in either country which I can find,—we certainly were not referred to any,—where it has even been suggested, much less held, that it is competent for a person, bound to restore what he has got under a contract which he asks to have set aside, to put a money value on the thing to be restored by him and pay over or allow

²³ [1915] S.C. (H.L.) 20, 23.

²⁴ *Ibid.* 23-24.

²⁵ *Ibid.* 27.

credit for that sum instead of returning the thing itself. If any such rule prevailed, *restitutio in integrum* might be satisfied in the case of a sale of a chattel by putting a money value on some article purchased when the former had been destroyed, lost, or re-sold, and setting off this sum *pro tanto* against the article purchased, thereby reducing the thing to what Lord Dundas describes in this case as a 'mere adjustment of disputed accounts'. Yet it has again and again been decided that this cannot be done. For instance, in *Wallis, Son, & Wells v. Pratt & Haynes*,²⁶ affirmed on appeal,²⁷ where seed indistinguishable from that purchased, but much inferior in quality and less valuable, was delivered instead of the seed purchased, it was admitted that the contract could not be rescinded because the inferior seed had been re-sold by the plaintiff and he therefore could not deliver it to the vendors. If this new mode of carrying out restitution were legitimate, the plaintiff could have put a money value on the inferior seed, and the contract of sale should have been rescinded on the terms of setting off *pro tanto* that sum against the contract price.²⁸

Lord Shaw stated that the case was now founded on misrepresentation and asked what it was which was said to be misrepresented.²⁹ He said that as a ground of rescinding the contract error and misrepresentation must be *in essentialibus*, and concluded that the case of misrepresentation failed.³⁰ He expressed his agreement with Lord Guthrie in his view of the law of the case but went further and held that provisions in the contract excluded the company from liability for innocent misrepresentation.³¹ He said that this view might be sufficient to dispose of the case but that the shape of the action and the attack upon certain principles fundamental to the law of rescission made it necessary for him to state his views on the subject. He gave his opinion that rescission was not open in the case because *restitutio in integrum* was impossible. He then added:

I see no foundation for the idea that this principle of law is confined to cases of sale. It appears to me, on the contrary, to be a recognised and established doctrine of the law of contract in general.³²

Lord Shaw referred to the cases of *Western Bank of Scotland v. Addie*³³ and *Adam v. Newbigging*³⁴ and later he expressed doubt as to whether the representations in the case went to the root of the contract.³⁵

Lord Parmoor dealt with the claim based on innocent misrepresentation and also that based on fundamental breach. On one aspect of the

²⁶ [1910] 2 K.B. 1003. ²⁷ [1911] A.C. 394.

²⁸ [1915] S.C. (H.L.) 20, 28-29. His Lordship referred to the following cases: *Hunt v. Silk* (1804) 5 East 449; *Blackburn v. Smith* (1848) 2 Ex. 783, 792; *Western Bank of Scotland v. Addie* (1867) 5 Macph. (H.L.) 88, 89; L.R. 1 H.L. Sc. 145, 164-165; *Houldsworth v. The City of Glasgow Bank* (1880) 5 App. Cas. 317, 338; *Adam v. Newbigging* (1888) 13 App. Cas. 308.

²⁹ [1915] S.C. 20, 34.

³⁰ *Ibid.* 35.

³¹ *Ibid.* 35-36.

³² *Ibid.* 37.

³³ (1867) 5 Macph. (H.L.) 80, 89; L.R. 1 H.L. S.C. 145.

³⁴ (1888) 13 App. Cas. 308.

³⁵ [1915] S.C. 20, 38.

alleged misrepresentation he held that there was no misrepresentation and no ground for claiming rescission of the contract for breach. He did not finally decide whether there had been a misrepresentation on another aspect of the alleged misrepresentation but held that the contractors were not entitled to succeed on the grounds of misrepresentation because there was no evidence that the representation induced them to enter into the contract.³⁶ He held that even if the contractors had been induced to enter the contract by innocent misrepresentation they were not entitled to rescission because *restitutio in integrum* was impossible.³⁷ He expressed his concurrence in the opinions of the other Lords.

The result of these decisions can hardly be said to have established that the impossibility of *restitutio in integrum* precludes discharge upon breach. The contractors never argued that it did. The contractors having continued with the contract for years after they knew of the breach, there was an unassailable defence to their claim which was based on discharge upon breach. With the exception of Lord Atkinson it is clear that all members of the House of Lords and the Court of Session in referring to the necessity for *restitutio in integrum* were referring solely to rescission upon misrepresentation.

From the authorities to which he refers, it can be seen that Lord Atkinson regarded the availability of *restitutio in integrum* as a necessary pre-requisite for the discharge of contracts upon breach. However, the more carefully these authorities are examined the more illusory does their support for that view become.

*Hunt v. Silk*³⁸ and *Blackburn v. Smith*³⁹ have already been mentioned. *Wallis, Son & Wells v. Pratt & Haynes*⁴⁰ was a case in which the equivalent of section 16 (3) of the Goods Act 1958 applied and in which the contract had been substantially performed. The passages referred to in *Western Bank of Scotland v. Addie*⁴¹ and *Houldsworth v. The City of Glasgow Bank*⁴² have reference solely to rescission for fraudulent misrepresentation. *Adam v. Newbigging*⁴³ was concerned solely with innocent misrepresentation.

When Lord Shaw in *Boyd and Forrest v. The Glasgow and South Western Railway Co.*⁴⁴ speaks of the necessity for *restitutio in integrum* being a recognized and established doctrine of law of contract in general, he is only speaking of it in relation to misrepresentation.

It is submitted that the statement of the law by Isaacs and Rich JJ. in *Fuller's Theatres Ltd v. Musgrove*⁴⁵ is not justified by the decisions from which it claims authority. It is based on the mis-

³⁶ *Ibid.* 41-42. ³⁷ *Ibid.* 42-44. ³⁸ (1804) East 449. ³⁹ (1848) 2 Ex. 783.

⁴⁰ [1910] 2 K.B. 1003; [1911] A.C. 394. ⁴¹ (1867) L.R. 1 H.L. S.C. 145, 164-165.

⁴² (1880) 5 App. Cas. 317, 318. ⁴³ (1888) 13 App. Cas. 308. ⁴⁴ [1915] S.C. 20, 37.

⁴⁵ (1923) 31 C.L.R. 524, 541-543.

conceptions of *Hunt v. Silk* and the false analogy of the misrepresentation cases. Being contrary to principle and convenience it should not be followed. Of course, the actual decision of their Honours in that case has ample warrant. It can be based on the general equitable principles which were mentioned and on the fact that the parties had continued to perform the contracts with knowledge of the breach.

The authorities which are cited in support of the alleged rule that a contract cannot be discharged for breach unless *restitutio in integrum* is possible and the parties can be placed *in statu quo* have now been examined. It is submitted that the examination shows that there is no place in the common law for such a rule on the basis of authority, principle or convenience.

Before leaving the subject some attention should be given to the position of sales of goods. In view of the limitations imposed by section 16 (3) of the Goods Act 1958 on the buyer's right to discharge the contract upon breach of an essential term the only common case which occurs, in which it is necessary to consider the effect at common law of the alleged rule on the right to discharge for breach, is the case of the severable contract for the sale of unascertained goods. The most common example of this type of contract is the contract for the sale of goods to be delivered by instalments.

This type of case is dealt with in a passage in *Halsbury's Laws of England*,⁴⁶ which states:

Notwithstanding that the instalments of the goods are to be separately paid for, or that some of the instalments have been delivered, the buyer may, on the seller's default in delivery of any instalment, and on returning any instalments previously received, repudiate the contract *ab initio*, and recover any part of the price paid, where the seller's breach constitutes a total failure of consideration, as where the instalments of the goods are portions of a quantity which in its nature is an indivisible whole, or a full delivery whereof is otherwise of the essence of the contract.

The footnote to that passage which states the authority for the proposition that it is necessary to return any of the instalments previously received is as follows: 'On general principles of law (*Hunt v. Silk*,⁴⁷ *Clarke v. Dickson*⁴⁸).' It is clear that the wide language of *Hunt v. Silk* and the ambiguity of the word 'rescind' have led the authors into the error of confusing discharge upon breach with rescission *ab initio*. *Clarke v. Dickson* was a case dealing with rescission for fraudulent misrepresentation.

It is submitted for the reasons advanced in this article that in a case in which the buyer is entitled to discharge the contract, he will

⁴⁶ (3rd ed. 1960) xxxiv, 102.

⁴⁷ (1804) 5 East 449. ⁴⁸ (1858) E.B. & E. 148.

not be required to return instalments previously received and will be able to discharge the contract although he could not return those instalments.

V. THE CONSEQUENCES OF DISCHARGE

(a) *The Right to Recover Damages.*

When the injured party discharges a contract upon breach he is entitled to sue for damages for that breach and also for prior breaches.⁴⁹ Confusion of the legal nature of a discharge upon breach, with that of rescission *ab initio*, led a number of authorities to deny such a right to damages.⁵⁰ The right is now established beyond question.⁵¹

On principle it would appear that when the innocent party had discharged the contract in reliance on a particular breach, the defaulting party would be entitled to sue for breaches by an 'innocent' party which occurred prior to the breach which led to the discharge. This would be on the basis that the defaulting party's cause of action had vested unconditionally prior to the discharge.⁵² There does not appear to have been a decision on this point.

The remnant of the heresy that damages cannot be obtained after a discharge still has a lingering existence in England. Encouraged by *Williams on Vendor and Purchaser*, and old decisions, the English courts still take the view that damages cannot be obtained where a 'rescission' of a contract is sought after there has been a failure to comply with a decree for specific performance.⁵³ The main case which is relied on for this proposition is *Henty v. Schroder*.⁵⁴ There has been much criticism of the view that this case is authority for that proposition.⁵⁵

In *White v. Ross*⁵⁶ Cleary J. said:

It may be that the explanation of *Henty v. Schroder* and the cases which have followed it is that given by Swift J. in *Harold Wood Brick Co. v. Ferris*:⁵⁷ "It seems to me that all those cases decide is that it

⁴⁹ *Heyman v. Darwins Ltd* [1942] A.C. 356, 379 *per* Lord Wright. *Dominion Coal Co. Ltd v. Dominion Iron and Steel Co. Ltd* [1909] A.C. 293, 311.

⁵⁰ E.g. *Williams on Vendor and Purchaser* (successive editions); *Halsbury's Laws of England* (3rd ed. 1960) xxxiv, 321; *McGifford v. O'Brien* [1932] V.L.R. 71, 79; *Ward v. Ellerton* [1927] V.L.R. 494.

⁵¹ *Heyman v. Darwins Ltd* [1942] A.C. 356 *passim*; *White and Carter (Councils) Ltd v. McGregor* [1962] 2 W.L.R. 17 *passim*; *Holland v. Wiltshire* (1954) 90 C.L.R. 409, 416; *Cooper v. Ungar* (1958) 100 C.L.R. 510, 512; *White v. Ross* [1960] N.Z.L.R. 247. *Voumard, Sale of Land* (1st ed. 1939) 498-499.

⁵² *Salmond and Williams on Contract*, *op. cit.* 566-567. For the principle see: *McDonald v. Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 476-477 *per* Dixon J. (above p. 256, n. 10). A somewhat similar problem dealing with the assessment of damages in deceit was considered in *Mallett v. Jones* [1959] V.R. 122.

⁵³ E.g. *Barber v. Wolfe* [1945] Ch. 187. ⁵⁴ (1879) 12 Ch.D. 666.

⁵⁵ Walker, 'Rescission of Contracts for the Sale of Land' (1932) 6 *Australian Law Journal* 49-50; *Voumard, op. cit.* 498-499; *Salmond and Williams on Contract, op. cit.* 561-562. ⁵⁶ [1960] N.Z.L.R. 247, 253. ⁵⁷ [1935] 1 K.B. 613, 615.

was not appropriate in the years they were decided, in the Chancery Division, to put into one order an order rescinding the contract and an order providing for the assessment of damages for breach of contract" . . . Whatever be the explanation for *Henty v. Schroder*,⁵⁸ I feel that its application is limited to the practice of the Court of Chancery in England in cases where a rescission is sought of a contract after failure to comply with a decree for specific performance. I am therefore of the opinion that there is no authority which should prevent me from holding that a vendor who has rescinded for breach is entitled to claim for damages from his defaulting purchaser, even after a resale of the property.

In *McKenna v. Richey*⁵⁹ O'Bryan J. considered this proposition in a case where the plaintiff had obtained specific performance of a contract for the sale of land and then sought rescission and damages for breach of contract. His Honour analysed the decisions and the concepts involved. He declined to follow the English cases and held the plaintiff entitled to damages at common law.

It appears that some of the views in these English cases are due to a failure to take into account the fact that at least in the cases of misrepresentation and discharge upon breach, a court which makes what is called a 'rescission' order does no more than determine whether a party who has purported to rescind or discharge a contract has effectively done so. If he has, the court makes consequential orders. It is important to bear in mind that the order of the court neither rescinds the contract *ab initio* in the case of misrepresentation nor discharges the contract in case of breach. In both these cases this is the act of one of the parties.⁶⁰

(b) *The Right to Enforce Acquired Rights.*

Either party may enforce rights such as the right to payment of money, which had been acquired prior to the discharge.⁶¹ A good example of this is *McLachlan v. Nourse*⁶² where under a contract for the deepening of dams the contractors became entitled to progress payments and then repudiated the contract, upon which the owner discharged it. Angus Parsons J. held that the contractors were entitled to recover the progress payments due to them before the discharge.⁶³

⁵⁸ (1879) 12 Ch.D. 666. ⁵⁹ [1950] V.L.R. 360.

⁶⁰ *Alati v. Kruger* (1955) 94 C.L.R. 216, 224-225 (misrepresentation). In the case of discharge upon breach this is clearly the position.

⁶¹ *Salmond and Williams on Contract*, *op. cit.* 566-567. A right to a payment which had accrued due before discharge would not be enforced in a case where, if the payment had been made before discharge, the party making the payment would have been entitled to recover it upon a total failure of consideration. *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] A.C. 32, 53-54.

⁶² [1928] S.A.S.R. 230.

⁶³ It is submitted that in a case such as this the contractors could also have recovered in an action in *indebitatus assumpsit*. *Turner v. Bladin* (1951) 82 C.L.R. 463, 474-475. *James v. Thomas H. Kent & Co. Ltd* [1950] 2 All E.R. 1099; [1951] 1 K.B. 551.

(c) *The Right to Recover upon a Quantum Meruit.*

The right of the innocent party has been stated by Jordan C.J.:

I think that it is clearly settled that if one party to a contract repudiates his liabilities under it, the other party may treat such repudiation as an invitation to him to regard himself as discharged from the further performance of the contract; and he may accept this invitation and treat the contract as at an end, except for the purpose of an action for damages for breach of contract: *Johnstone v. Millings*,⁶⁴ *Dominion Coal Co. Ltd v. Dominion Iron & Steel Co. Ltd*,⁶⁵ *Mayson v. Clouet*,⁶⁶ *McDonald v. Dennys Lascelles Ltd*,⁶⁷ or, in a proper case, an action for *quantum meruit*. Where a wrongful repudiation has the effect of preventing the other party from becoming entitled to receive remuneration for services already rendered, which remuneration, according to the terms of the contract, he is entitled to receive only if the contract is wholly carried into effect, the innocent party, who has elected to treat the contract as at an end may, instead of suing for damages, maintain an action to recover a *quantum meruit* for the services which he has rendered under the contract before it came to an end.⁶⁸

The general rule is that the defaulting party is not entitled to recover upon a *quantum meruit* for work which he has done.⁶⁹ However, where the defaulting party has done work or provided goods under the contract, but has acquired no rights of payment in respect thereof prior to discharge, he may in certain circumstances, recover upon a *quantum meruit* or a *quantum valebat*. In order to do this the defaulting party must show that the other party, having an option to accept or refuse, accepted the partial performance so as to raise the inference of a fresh contract to pay.⁷⁰

(d) *The Right to the Return of Moneys Paid.*

As a general rule the money paid by a purchaser to the vendor as a deposit is liable to forfeiture by the vendor if the vendor discharges the contract in reliance on the purchaser's breach.⁷¹ Unless an order for repayment is made under section 49 (2) of the Property Law Act 1958⁷² or by the court in the exercise of its jurisdiction to relieve against forfeitures in the nature of penalties⁷³ the vendor may retain the deposit.

As a general rule a party who has, prior to discharge, paid purchase money under a contract for the sale of land is entitled to recover it,

⁶⁴ (1885-6) 16 Q.B.D. 460, 467, 470, 473.

⁶⁵ [1909] A.C. 293.

⁶⁶ [1924] A.C. 980, 985.

⁶⁷ (1932) 48 C.L.R. 457.

⁶⁸ *Segur v. Franklin* (1934) 34 S.R. (N.S.W.) 67, 72.

⁶⁹ *Salmond and Williams on Contract*, *op. cit.* 567-568.

⁷⁰ *Sumpter v. Hedges* [1898] 1 Q.B. 673. *Morison, op. cit.* 124-127.

⁷¹ *Voumard, op. cit.* 504-505.

⁷² This relief is confined to the sale or exchange of interests in land. S. 49 (3).

⁷³ *Stockloser v. Johnston* [1954] 1 Q.B. 476. *Smyth v. Jessup* [1956] V.R. 230.

although he may have had possession of the land.⁷⁴ Similarly in the case of the sale of goods the purchaser who has paid the price but has failed to accept the goods, is entitled after the discharge of the contract, to recover the money paid by him.⁷⁵

⁷⁴ There is a great deal of learning on the precise circumstances in which and the precise rights under which such moneys are recovered. These questions are not examined in this article. See Voumard, *op. cit.* 505-510; Fox, 'The Right of the Defaulting Purchaser to the Return of Instalments' (1954) 28 *Australian Law Journal* 67; Stoljar, 'The Defaulting Purchaser' (1956) 30 *Australian Law Journal* 68; (1957) 31 *Australian Law Journal* 510. For a recent example of equitable adjustment following what, in the view of Dixon C.J., was a discharge of a contract upon breach, see *Rawson v. Hobbs* (1961) 35 A.L.J.R. 342. In the context, the reference by Dixon C.J., at p. 347, to the fact that the discharge could not amount to a rescission *ab initio* with complete *restitutio in integrum* is, it is submitted, consistent with the contentions advanced in this article. In its context, the statement by Kitto J. at p. 350, that rescission under the general law depended upon the possibility of a substantial *restitutio in integrum* appears to be inconsistent with the contentions of this article, but His Honour may there have been referring to rescission for invalidating cause. See also: *Woodhouse v. Thurecht* (1924) 24 S.R. (N.S.W.) 342 where the possibility of *restitutio in integrum* was treated as a prerequisite, not of discharge, but of equitable relief following discharge.

⁷⁵ *Dies v. British and International Mining and Finance Corporation Ltd* [1939] 1 K.B. 724. The precise basis of this decision has been the subject of controversy; see, e.g. *Salmond and Williams on Contract*, *op. cit.* 568-570.