Case and Comment

CONTRACTS — INSTALMENT TERMS — DEFAULT IN PAYMENT OF INSTALMENT — RELIEF FROM FORFEITURE OF PART PAYMENTS.—Instalment contracts for the purchase of land or goods sometimes provide for the retention of title by the vendor until payment in full and for rescission, repossession and retention of part payments by the vendor if there is default by the buyer in paying an instalment; such clauses, if literally applied, may cause hardship to purchasers who have paid a substantial part of the price before defaulting. It is not surprising then that attempts are made to obtain relief against forfeiture of part payments, usually on the ground that the clauses are in the nature of penalties and their enforcement would be against conscience. *Stockloser* v. *Johnson* was such a case.[1] The defendant had installed plant and machinery in a quarry of which he was tenant under a lease expiring in 1949. *X* then became tenant of the quarry and hired the plant and machinery from the defendant under a royalty contract for the term of the new lease. By contract made in April 1950 the defendant agreed to sell the plant and machinery and the benefit of the royalty contract with *X* to the plaintiff. The price was £11,000, of which £2,500 were paid when the contract was executed, the balance being payable in eight half-yearly instalments of £750 with a final payment of £2,500. Under the contract the defendant could rescind by giving fourteen days notice if the plaintiff was in default for twenty-eight days in paying an instalment; there was a power to repossess and re-enter into enjoyment of the royalty contract, "and in such event all payments made hereunder by the purchaser to the vendor shall be forfeited to the vendor who shall retain the same". Title to the subject matter was to remain in the defendant until all payments were made. Another contract was involved, but the important features of the case may be adequately dealt with by confining discussion to the one outlined.

The plaintiff failed to pay the instalment which fell due late

[1] [1954] 2 W.L.R. 439 (C.A.); [1954] 1 All E. R. 630.

in 1951, and in February the defendant gave the necessary notice to rescind. The plaintiff at no time expressed readiness or willingness to remedy the default and proceed with the contract. Later the defendant took over *X*'s lease; from that time the defendant could not have fulfilled the contract even had the plaintiff been ready and willing. The plaintiff claimed relief from forfeiture and restitution of the payments made before default. The trial judge held that the forfeiture clause was penal in nature and that the defendant was precluded from relying on the plaintiff's lack of readiness and willingness to proceed because by taking over *X*'s lease he had put it out of his power to perform the contract. The English Court of Appeal had to decide whether the clause was penal and, if so, whether in the circumstances relief should be granted.

Both Somervell and Romer L.JJ. found that the clause was not penal in nature. The former noted that, if past earnings of the quarry at the time of the contract had been maintained, instalments paid by the plaintiff to the defendant would have somewhat exceeded royalties received by him from *X* up to the end of 1951, but that by the end of 1952 and 1953 royalties would have been greater than instalments; the plaintiff had defaulted only because royalties were unexpectedly low; in short he had made a bad bargain. Moreover, both judges agreed that under the terms of the contract, properly construed, the purchaser was entitled to retain the royalties received by him before rescission. Significantly, however, Somervell L.J. said that if the buyer had been required to account for the royalties "the clause would, plainly, I think, be penal in its nature".[2] Romer L.J. gave his reasons for holding it was not penal in these words:

> . . . where A agrees to sell an income-producing asset to B by deferred payments, and it is expressly provided in the contract that if B (who is allowed to enter into immediate possession) defaults in payment of an instalment, A may rescind, and thereupon B shall forfeit the instalments which he has paid but shall be entitled to retain the income which he has received, no question of a penalty can arise—and a fortiori where profits and instalments are likely to be equated to the extent which [Somervell L J.] has indicated in his judgment; and the position is the same if a bargain to that effect is implicit in the contract although not introduced into it by express language. It is only if a purchaser, on default, forfeits to the vendor both past instalments and past profits of an income-producing asset that he can be regarded as entering the area of jurisdiction which the plaintiff is seeking to invoke in the present case.[3]

[2] [1954] 2 W.L R. at p. 442

[3] *Ibid.*, p. 451

Denning L. J. simply stated that he would regard the clause as penal in nature, "as the judge did and I am prepared to do".[4]

Having decided that the clause was not penal, neither Somervell L. J. nor Romer L. J. need have examined the further question whether relief should have been granted had it been penal; yet all the judges did consider this difficult problem. The consequence of holding that a contractual clause is penal in the strict sense is that in an action for breach of the contract the clause is ignored and damages assessed according to general contract rules; a clause which stipulates that a fixed sum is payable on breach is penal in this sense if the amount stated is not a fair pre-estimate of loss and will not be enforced.[5] If that rule were applied to a forfeiture clause, the result would be, as Denning L. J. indicated, that the case would be decided as though the clause were not in the contract; on the authority of *Dies* v. *British and International Mining Finance Corporation, Limited*[6] the buyer could recover at law the full amount of the part payments subject to a counterclaim for damages for breach.[7] A forfeiture clause penal in nature is, however, different from a penal clause in the strict sense; the buyer who seeks relief from its terms has paid over to the seller money which has become the seller's property; the buyer is seeking restitution on equitable grounds, which may be granted in a proper case on such terms as the court may impose. In other words, a finding that a clause is penal in nature is not in itself enough to ground relief: more is needed. But what more? On this point Romer L. J. disagreed with Somervell L. J. and Denning L. J.

"Generally speaking" Romer L. J said, "courts of equity have never interfered with contracts merely by reason of their being improvident."[8] Equity had, he noted, shown some tenderness to expectant heirs and borrowers, but in general "people were expected to abide by their contracts, and if a man made a foolish or improvident one so much the worse for him".[9] He then formulated the question before the court in this way: "The question, then, is whether a purchaser who freely and voluntarily negoti-

[4] *Ibid.*, p. 450

[5] *Dunlop Pneumatic Tyre Co., Ltd* v. *New Garage & Motor Co., Ltd.*, [1915] A.C. 79 (H.L.).

[6] [1939] 1 K.B 724

[7] In the *Dies* case the buyer had not had possession of the goods. In *Lambert* v *Slack*, [1926] 1 W.W.R. 614, [1926] 2 W.W R 882, [1926] 2 D.L.R. 166 (Sask. C.A), the defaulting buyer who had been in possession was not permitted to recover part payments which were less than the value of the use See also *Hayes* v *Mayne*, [1927] 3 W W R 524, [1927] 4 D L R. 1070 (Sask. C A.).

[8] [1954] 2 W.L.R. at p. 452 [9] *Ibid*, p. 453.

ates and executes a contract of sale upon terms that the price is to be paid by instalments and that, on default by him of payment of any instalment, the vendor may rescind the contract and retain any instalments previously paid, is entitled to relief in equity if he finds himself unable to comply with his bargain".[10] In cases of this kind, his lordship observed, there is no element of pressure or duress; the purchaser does not act under the stress of economic necessity; "both parties to the contract are on terms of bargaining equality with each other".[11] In these circumstances, "I am unable to see what ground there is for interference by a court of equity if it ultimately turns out that the terms on which these exchanges are mutually agreed operate hardly on either vendor or purchaser".[12]

His lordship did not, however, entirely rule out the possibility of equitable relief: in his view, while a contract is still subsisting, a buyer who has defaulted on an instalment, but who is able and willing to proceed with the contract, may be given a further opportunity of doing so, that is, he may be given an extension of time; however, "no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice or other unconscionable conduct of the vendor, to a purchaser after the vendor has rescinded the contract".[13]

This statement of the circumstances in which relief against forfeiture may be granted seemed to conflict to some extent with the decision of the Privy Council in the Canadian case, *Steedman* v. *Drinkle*.[14] There the Judicial Committee had denied the claim of a buyer to specific performance of a land contract after he had defaulted on an instalment and the seller had rescinded, time having been of the essence; however, relief was granted against forfeiture in full of the part payments which the buyer had made before default. Romer L. J. regarded the case as a special one, not of general application. He pointed out that the plaintiff had insisted in all courts on specific performance and had refused at the trial to amend to claim relief against forfeiture of the part payment, so that the forfeiture issue was not really before the courts on the pleadings. His lordship noted that the forfeiture point apparently had not been argued; indeed, the vendor may not even have contested it; the only sum forfeitable was the $1,000 paid on

[10] *Ibid.*
[11] *Ibid.*
[12] *Ibid.*
[13] *Ibid.*, p. 458
[14] [1916] 1 A.C. 275.

executing the agreement which, in his lordship's opinion, might better have been regarded as a deposit.

Somervell and Denning L.JJ. took a broader view of the equitable power to relieve against forfeiture of part payments under a clause penal in nature Both denied that readiness and willingness to remedy default in payment and to proceed with the contract is a prerequisite to relief. Relief should be granted if in all the circumstances it would be unconscionable for the vendor to retain the money paid and recover the object agreed to be sold; unreadiness or inability would merely be one of the circumstances to be considered. In so deciding they were faced with an obstacle also arising out of *Steedman* v. *Drinkle*, at least as that case was interpreted by Farwell J. in *Mussen* v. *Van Diemen's Land Co* [15] Farwell J. had explained the *Steedman* case in these words:

> In my judgment, the whole basis of that decision turns upon the fact that the appellant was ready and willing to perform the contract, and the only reason why performance was impossible was that the respondents refused to agree [to specific performance] and the terms of the contract made it impossible for the Court to decree specific performance. The Court appears to have thought that it was unconscionable for the respondents to take up the attitude of saying, 'We will not complete, but we will retain the money,' and on that ground relief could be granted [16]

Denning L. J. regarded this as too narrow an explanation:

> The basis of the decision in *Steedman* v. *Drinkle* was, I think, that the vendor had somewhat sharply exercised his right to rescind the contract and retake the land, and it was unconscionable for him also to forfeit the sums already paid Equity could not specifically enforce the contract, but it could and would relieve against the forfeiture [17]

Somervell L. J. did not suggest that "the plaintiff's readiness in *Steedman*'s case was not relevant to the question whether relief should be given. I am only not satisfied that it is the sole condition of relief. If the Judicial Committee had intended to lay down this limitation it would have done so."[18]

The effect of the judgments of Somervell and Denning L.JJ. may be summarized in a brief quotation from the latter's judgment To grant relief from a forfeiture clause two things are necessary: "first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money".[19] Unwillingness or inability to remedy

[15] [1938] Ch 253, [1938] 1 All E R. 210
[16] [1938] Ch. at p. 266
[17] [1954] 2 W L.R at p. 449
[18] *Ibid.*, p. 446.
[19] *Ibid.*, p. 448.

the default and proceed with the contract is not necessarily fatal to a claim by a defaulting buyer for relief. Incidentally, Denning L.J. based the equity to relieve on the ground that the vendor "ought not unjustly to enrich himself at the plaintiff's expense".[20]

All the members of the Court of Appeal agreed that there was nothing unconscionable about the retention of the payments by the vendor on the facts of this case; they also agreed that the taking over of the lease of the quarry by the defendant had not prejudiced his position. It might have, in Denning L. J.'s opinion, if there had not been a forfeiture clause; in that case the plaintiff's claim to return of the instalments would have been at law, not in equity, and he would have had to show that the seller had treated the contract as at an end; acquisition of the lease by the vendor would have been decisive on this point because it would have disabled him from performing the contract. In the present case, however, the forfeiture clause prevented a claim at law. "He can only claim in equity; and he does not gain an equity simply because the seller has bought up the quarry."[21]

Three other points covered by these judgments merit special mention: (1) the burden of proving unconscionability is on the defaulting buyer and, in the words of Somervell L. J., "Where instalments are to be paid over a period in which the plaintiff has the use or the benefit of the subject-matter the burden of showing unconscionability is not a light one";[22] (2) exercise of the equitable power to relieve would not in every case involve restitution to the buyer of the full amount of the part payments, for the court might make an adjustment having in mind the benefits the buyer received from possession of the subject matter, or impose other terms; (3) Denning L. J. is of opinion that the reasoning applicable to relief from a clause providing for forfeiture of part payments is applicable to a payment described by the contract as a "deposit" which, he said, "is equivalent to a forfeiture clause".[23] Though a defaulting buyer has no remedy at law against loss of a deposit, equity may provide one if the amount is excessive.

The observations of the members of the Court of Appeal on the meaning of "unconscionability" are an important contribution to this difficult branch of the law. It is submitted that the more flexible approach of Somervell and Denning L.JJ. leaves room for a desirable discretion in a judge to individualize the application of the law in hard cases without unduly disturbing that security of transactions which the law should undoubtedly serve.

[20] *Ibid.*, p. 450.
[21] *Ibid.*, p. 451.
[22] *Ibid*, p. 444.
[23] *Ibid.*, p. 448; see also p. 450.

It may be noted that there is Ontario authority for the proposition that relief from a forfeiture clause will not be granted where, time being of the essence, a vendor rescinds a contract of sale on the purchaser's failure to pay an instalment, the purchaser being unwilling or unable to complete. In *Walsh* v. *Willaughan*,[24] the Ontario Appellate Division refused to grant restitution of part payments to a defaulting purchaser in such circumstances. Mulock C.J. said: ". . . the purchaser is not now seeking specific performance, nor is he ready and willing to carry out the contract, but merely insists that he is entitled to repayment of moneys paid by him under the contract, which, because of his default, has come to an end".[25] His lordship was of opinion that the purchaser had no such right. On the other hand in *Mosdell* v. *Jardine*,[26] a British Columbia case, Fisher J. said, ". . . it would seem that a purchaser even though in default and admitting inability to pay prior to an action against the vendor, is entitled to relief from the forfeiture of the money paid unless this would be inequitable. As to the equity of giving relief in this case it does not seem equitable to me that the vendor should be permitted to insist upon the 'letter of the bond' with regard to the retention of the moneys against the plaintiff . . ."[27] for a reason stated by his lordship. Fisher J. referred to *Brown* v. *Walsh*,[28] an Ontario case in which the buyer was given restitution of part payments and in which Meredith C.J.C.P. said that "the Privy Council at all events has gone pretty near to the rule that if the seller be fully compensated that is enough".[29] This statement was based on the Privy Council decision in *Steedman* v. *Drinkle*, previously discussed, and a passage in *Brickles* v. *Snell*,[30] in which their lordships indicated it was unfortunate in that case that a claim for relief against forfeiture had not been made as an alternative to the claim for specific performance, which could not be granted. In *Brown* v. *Walsh* there was no forfeiture clause and *Walsh* v. *Willaughan* was dis-

[24] (1918), 42 O.L.R. 455, 42 D.L.R. 581 See also *Dobbin* v. *Niebergall* (1920), 48 O.L.R. 343; (1921), 56 D.L.R. 510, and *Douglas* v. *Arthur* (1922-3), 53 O.L.R. 83, [1923] 3 D L.R. 800 In the last case Orde J. said, "Just what are the exact principles governing this question it is not easy to discover": (1922), 53 O.L.R. 83, at p. 85. And see *James* v. *Hauf and Green and Green Agencies*, [1954] 1 D L.R 598 (Alta. C.A.), and *De Palma* v. *The Runnymede Iron and Steel Company*, [1950] O R 1 (C.A.), [1950] 1 D.L.R. 557.

[25] (1918), 42 O.L.R. 455, at p. 461.

[26] [1929] 3 W.W.R 95; [1929] 4 D.L R. 617

[27] [1929] 3 W.W.R. 95, at p 100· however in this case the purchasers were claiming specific performance

[28] (1919), 45 O L.R. 646 (C.A.).

[29] *Ibid.*, p. 649.

[30] [1916] 2 A C 599 (P C)· 30 D L.R 31.

tinguished on the ground that in that case the purchaser had expressly contracted himself out of the right to reclaim part payments.

The Ontario Appellate Division, in *Sanderson* v. *Morton*,[31] held that even were there no forfeiture clause the buyer could not recover part payments if he repudiated or abandoned the contract. This case was apparently accepted as sound by Hogg and Laidlaw JJ.A. in *De Palma* v. *The Runnymede Iron & Steel Company*,[32] but Aylesworth J.A. said that, in view of the decisions of the Privy Council in *Mayson* v. *Clouet*[33] and of the Supreme Court of Canada in *Cronholm* v. *Cole*,[34] "*Sanderson* v. *Morton* must now be taken to have been overruled in so far as that case was concerned with the question of recovery by a defaulting purchaser of mere instalment payments as contrasted with moneys paid by way of a deposit";[35] in the *De Palma* case the money in question was held to be a deposit, so it was not strictly necessary to decide whether the *Sanderson* case was still good law on part payments. In both the *Mason* and *Cronholm* cases the buyer recovered part payments on rescission by the vendor for the buyer's default and, with respect, there is great weight in Aylesworth J.A.'s appraisal of their effect on *Sanderson*'s case. The observations of Denning L.J. in the *Stockloser* case on the defaulting purchaser's right to recover part payments where there is no forfeiture clause are also in point. He stated, citing authority, that a buyer may recover if the vendor rescinds or treats the contract as at an end owing to the buyer's default.[36] This rule can hardly be distinguished from the *Sanderson* rule on the ground that it applies where the vendor rescinds, the *Sanderson* rule where the buyer ends the contract by repudiation:[37] even if the buyer repudiates, it is for the seller to elect whether or not to terminate.[38] It may of course be argued that, if the rescission by the seller

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[31] (1923), 54 O.L.R. 479. And see *Vancouver Land and Improvement Co* v. *Pillsbury Milling Co* (1914), 5 W.W.R. 1324 (B.C.C.A.); (1913), 15 D.L.R. 775; criticized in *Scott* v. *Butterfield*, [1951] 2 D.L.R. 339, at p. 344 (B.C.); *Thagard* v. *Edmiston*, [1925] 3 W.W.R. 527 (Man. C.A.), [1925] 4 D.L.R. 934; *Great West Life Assurance Company* v. *Prairie Developments, Limited*, [1928] 3 W.W.R. 601 (Man. C.A.); *Oughton* v. *Osepreghy*, [1931] 1 W.W.R. 604 (Man), [1931] 2 D.L.R. 996; *Rudd* v. *Balaz*, [1940] 2 W.W.R. 107 (Man.), [1940] 2 D.L.R. 588.

[32] [1950] O.R. 1 (C.A.); [1950] 1 D.L.R. 557.

[33] [1924] A.C. 980; [1924] 3 W.W.R. 211.

[34] [1928] 3 D.L.R. 321.

[35] [1950] O.R. 1, at p. 15.

[36] [1954] 2 W.L.R. 439, at p. 448.

[37] (1923), 54 O.L.R. 479, *per* Ferguson J.A. at p. 482.

[38] *Heyman* v. *Darwins, Ltd.*, [1942] A.C. 356 (H.L.), [1942] 1 All E.R. 337; but see *Rudd* v. *Balaz*, [1940] 2 W.W.R. 107

is the result of the buyer's repudiation rather than under a clause in the contract giving the seller power to terminate on the buyer's default, the buyer should not be permitted recovery; it is submitted, however, that in the absence of a forfeiture clause the buyer should recover at law even if he has repudiated, leaving the seller to a cross-claim for damages which he can set-off against the buyer's claim for return of the payments; this solution would avoid the injustice that might be caused the buyer if the part payments were in excess of the actual damage suffered by the seller.[39]

Canadian cases on forfeiture should be considered in the light of the broad statutory power conferred by provincial judicature acts to relieve against penalties and forfeitures. The New Brunswick Judicature Act,[40] for example, contains this section:

> 28(b). Subject to appeal as in other cases, the Court has power to relieve against all penalties and forfeitures, and in granting the relief to impose such terms as to costs, expenses, damages, compensation, and all other matters, as the Court thinks fit.

Referring to a similar section in the Alberta Judicature Act, Clinton J. Ford J.A. said in a recent case: "The jurisdiction under the present *Judicature Act*, R.S.A., 1942, c. 129, is of such extent that the only question for the court to decide is whether or not it is just and equitable to exercise it in the circumstances of the particular case".[41] It is to be hoped that, if a Canadian court is in the future required to decide whether to relieve a buyer under an instalment contract from a clause providing for forfeiture of part payments, it will approach the question whether it is just and equitable to exercise its discretion in his favour in the same spirit as that in which Somervell and Denning L.JJ. are prepared to examine "unconscionability"; it would be regrettable if readiness and willingness to remedy default and to complete the contract were made prerequisite to relief from literal application of a forfeiture clause penal in nature. In many cases inability of the buyer to complete is, as Denning L.J said, "the very reason why he needs the equity".[42]

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[39] *Dies* v. *British and International Mining and Finance Corporation*, [1939] 1 K.B. 724, at pp. 744, 745; but see Salmond and Williams on Contracts (2nd ed.) p. 569, footnote (b).

[40] R.S.N.B., 1952, c. 120.

[41] *Oil City Petroleums (Leduc) Limited* v. *American Leduc Petroleums Limited*, (1951) 2 W.W.R. (N.S.) 371 (Alta. C.A.), at p. 379, [1951] 3 D.L.R. 835; affd. [1952] 3 D.L.R. 577 (Can.). See also *East Crest Oil Company Limited* v. *Strohschein and Strohschein*, (1951-1952) 4 W.W.R. (N.S.) 70, affd. (1951-1952) 4 W.W.R. (N.S.) 553 (Alta. C.A.), [1952] 2 D.L.R. 432; *Litwiniuk* v. *Balzan*, [1951] O.W.N. 455.

[42] [1954] 2 W.L.R. 439, at p. 450

Possibly it should be mentioned, in conclusion, that under instalment contracts in which the times of payment are not of the essence or, having been of the essence, are waived by a course of conduct or otherwise the vendor cannot rescind without giving the buyer a reasonable time to remedy the default after making time of the essence; a premature attempt by the vendor to rescind may be deemed a repudiation on his part vesting in the purchaser a power to terminate and recover part payments; the recent decision of the Ontario Appeal Court in *Hutts* v. *Hancock*[43] illustrates this point.

W. F. RYAN*

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DAMAGES—CONTRACT—MEASURE OF DAMAGES AND THE FOURTH DIMENSION—TIME ELEMENT.—The general principle on measure of damages is that the wrongdoer should, so far as is possible by a money payment, put the plaintiff where he was before the wrong was committed. But, as Lord Wrenbury said, ". . . it is necessary to add the consideration of which we have recently heard so much, in the form of a fourth dimension,—namely, that of time".[1]

Campbell Mostyn (Provisions) Ltd. v. *Barnett*[2] illustrates the operation of the time factor. After non-acceptance of a consignment of tinned ham, the seller resold the goods above the contract price. But at the date which was taken as the date of non-acceptance, there was an available market for the goods and the market price at that time was below the contract price. By the Sale of Goods Act in England,[3] where there is an available market, the measure of damages is *prima facie* the difference between the contract price and the current market price at the time of non-acceptance and this difference had been assessed at £1,076:5/-. The court considered that the case was governed by *A.K.A.S. Jamal* v. *Moolla Dawood Sons & Co.*[4] and dismissed an appeal against the assessment of these damages. In the final result, therefore, the seller was in a pleasant position: (a) he had a judgment for substantial damages; (b) by reason of the non-acceptance, he had been able to resell the goods above the contract price. In the final outcome, he had an increase on the contract price plus damages. A fictitious ex-

[43] [1954] 1 D.L.R. 790.

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[1] *S. S. Celia* v. *S S. Volturno*, [1921] 2 A.C. 544, at p. 563

[2] Court of Appeal (England), The Times, Feb. 10th, 1954

[3] Section 50. Cf. Ontario Act, section 48

[4] [1916] 1 A.C. 175, an appeal to the Privy Council from Burma.

ample will illustrate the seller's ultimate position in a case of this kind. If the contract price is $10,000, the market price at date of non-acceptance, $7,000, and the resale price $12,000, the seller will end the day with $12,000 plus $3,000 (approximately) by way of damages. Had the goods been accepted, he would have received only the contract price of $10,000. As it is, he has had the advantage of the "fourth dimension".

A.K.A.S. Jamal v. *Moolla Dawood Sons & Company* concerned refusal to accept shares in the British Burma Petroleum Company. The market price at the date of refusal was below the contract price, but the sellers retained the shares for a period after the breach and resold them at a higher market price. The seller, however, was entitled to damages based on the difference between the contract price and the market price at the date of the breach. Lord Wrenbury said: ". . . is the seller bound to reduce the damages, if he can, by subsequent sales at better prices? If he is, and if the purchaser is entitled to the benefit of subsequent sales, it must also be true that he must bear the burden of subsequent losses. The latter proposition is in their Lordships' opinion impossible, and the former is equally unsound."[5] A plaintiff is under a duty reasonably to mitigate loss arising from the breach, but again time is important, for "the loss to be ascertained is the loss *at the date of the breech* If at that date the plaintiff could do something or did something which mitigated the damage, the defendant is entitled to the benefit of it."[6]

But events following the breach of a contract are not always irrelevant in the ascertainment of damages. In *British Westinghouse Electric & Manufacturing Co. Ltd.* v. *Underground Railways*,[7] turbines were supplied which were deficient in power and economy of working and did not conform to the contract. Reserving the right to sue for damages, the railway company used the turbines for a time and then replaced them by turbines of a different make. Even if turbines conforming to the contract had been supplied, it would still have been to the advantage of the railway company to have replaced them with the new type at their own expense. The House of Lords decided that the financial advantage which the company derived from the replacement was relevant in the assessment of the damages. A plaintiff is not obliged by the principle of mitigation to take any step which a reasonable and prudent man would not ordinarily take in the course of his business. "But when

[5] At p. 179
[6] *Ibid*
[7] [1912] A C 673.

in the course of his business he has taken action arising out of the transaction, which action has diminished his loss, the effect in actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act."[8] The subsequent transaction causing the diminution must be one arising out of the consequences of the breach and in the ordinary course of business.

Wertheim v. *Chicoutimi Pulp Company*[9] is a case of breach by late delivery and resale at a price in excess of the market value at the actual date of delivery, but below the market value at the due date of delivery. In general the goods are presumed to have been worth to the purchaser the market value at the time of delivery. However, if he, in fact, sells at a price above such market value, the loss is measured in terms of the actual sale price.[10] Otherwise the plaintiff would "make a profit by the breach of contract, be compensated for a loss he never suffered, and be put, so far as money can do it, not in the same position in which he would have been if the contract had been performed, but in a much better position".[11]

The United States cases are of interest. In *Sloss-Sheffield Steel & Iron Co.* v. *Stover Mfg. & Engine Co.*,[12] there was non-acceptance of a consignment of pig iron. The iron was subsequently resold by the seller for the account of the buyer at a price above the market value at the date of breach. It was held that the seller, having elected to resell the goods, "cannot now recover the excess of the contract price over the market price at the time of the alleged breach by appellee, and having thereafter received more on the resale of the pig iron than the contract price, there is no loss or damage to compensate". On this view, the seller finally emerges no better off (except for the increased price on resale) than he would have been if the goods had been accepted. *Mossy Motors* v. *McRedmond*[13] concerned refusal to accept delivery of a car from a dealer. The dealer resold at the contract price and recovered in consequence no damages. The argument was advanced unsuccessfully for the dealer that, being able to obtain a more or less un-

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[8] *Per* Viscount Haldane L. C. at p. 689. Cf. in regard to a tort, *The Carslogie*, [1952] 1 All E.R. 20, and an article by R. G. McKerron in (1952), 69 So. Afr. L.J. 384

[9] [1911] A.C. 301.

[10] *Per* Lord Atkinson at p. 308.

[11] *Ibid* But resale below the market value would not depreciate the damages and would merely afford evidence of the market value. Cf. *Bainton* v. *Hallam Ltd.* (1920), 60 S.C.R. 325.

[12] (1929), 37 F. 2nd. 876.

[13] (1943), 12 So. 2nd. 719 (Louisiana).

limited supply of cars for sale, he could have sold a car to the customer to whom he resold Miss McRedmond's car even if she had accepted delivery. On balance, therefore, he had lost a customer

A situation, which is analogous to some degree, arises in the case of detinue or conversion of goods bailed. According to Winfield,[14] the value of the goods falls to be assessed as at the date of judgment. "This rule also applies to damages for conversion", but if at an earlier date the plaintiff knew or ought to have known of the actual or threatened wrong and took no steps to recover the goods or sue the wrongdoer, the damages will be assessed as at the earlier date.[15] In the United States, it seems that, where the value of the goods tends to fluctuate, the courts may depart from the general rule that in tort the damages should be measured as at the time of the wrong.[16] *Sachs* v. *Miklos*[17] dealt with the problem of a large rise in market value. An innocent conversion of furniture took place in 1944, the goods being sold for £15 less commission. The plaintiff definitely knew of the conversion in January 1946 and commenced his action in January 1947. At the date of judgment, the market value of the goods was £115 (due to war conditions). The decision was that the damages should be assessed on the basis of the market value at the date when the plaintiff first knew or ought to have known of the conversion. If the facts disclosed undue delay in bringing the action and that the result of that undue delay had been a rise in price, then allowance for this should be made in the assessment. The case was returned to the county court for determination of the damages on these lines. The reasoning was that, as soon as he knew of the conversion, the plaintiff could have purchased similar furniture as a replacement at current market prices and hence these market prices fix the upper limit of the defendant's liability. What will be the position if there is a falling market? Denning L.J. has said that, "should prices hereafter fall, the courts will probably be faced with the task of reconciling *Rosenthal* v. *Alderton*[18] with the settled rule that damages, whether in contract or tort, are to be assessed as at the date of the accrual of the cause of action and that subsequent fluctuations upwards or downwards in rates of exchange or commodity prices, before or during legal proceedings, are irrelevant".[19]

[14] A Text-book of the Law of Tort (5th ed., 1950) pp. 352-353.
[15] *Ibid.* Later Winfield suggests that the date of conversion would be preferable as the date of assessment, page 376.
[16] Paton, Bailment in the Common Law (1952) p. 410.
[17] [1948] 2 K.B. 23. [18] [1946] K.B. 374.
[19] *Beaman* v *A R T.S., Ltd.*, [1948] 2 All E R 89, at p. 93.

Had the "settled rule", been applied in *Sachs* v. *Miklos*, presumably the plaintiff would have received only around £15 in damages. But if the fact of the conversion was not known to the plaintiff until after the market had risen, it would have then cost £115 to replace the furniture wrongfully sold by the defendant. But if the market falls and the plaintiff is able to replace the goods between the date of the wrong and the date of judgment at a figure below the market price at the date of the wrong, are the damages to be reduced? Goods worth $1,000 at the date of conversion are wrongfully sold, and the plaintiff some months later but before judgment buys in a falling market exactly similar goods for $500. He then, on the basis of the "settled rule", recovers damages for around $1,000 but has replaced his goods for half that sum. This is the analogous situation in tort to the Jamal and Moolla Dawood situation in contract and in both cases the plaintiff ends up in an advantageous position.

A business man might consider that in these situations the plaintiff leaves the court in *too* advantageous a position. Reverting to the situation in *Mostyn (Provisions) Ltd.* v. *Barnett*, a business man might look at the matter this way. When acceptance is refused, the goods will become available for resale, and so the seller is in the position of having the goods once more "in stock". Naturally, the seller will be entitled to recover from the non-accepting buyer any expenses incurred for consignment and carriage and a suitable sum if the goods have depreciated in the time interval caused by the failure to accept. Apart from these (usually minor) items the seller *at this stage* has suffered no actual loss. He has the same goods back in stock. From an accountancy point of view he may regard the returned goods as worth their market value at the date of non-acceptance and, if this figure is below the contract price, there will emerge a *bookkeeping* loss, but there is, as yet, no actual financial loss. The question whether the seller will suffer actual loss or not due to the purchaser's default is not determined until the goods are resold and then the actual loss (if any) is the difference between the resale price and the original contract price. But, of course, the principle of mitigation of damage applies and there must be an upper limit to the damages, this being fixed by the market price at the date of the breach. In other words, a real loss due to non-acceptance as opposed to a bookkeeping loss (if it arises at all) arises only on the resale. When there is an available market at all material times, a business man might, therefore, *prima facie* apply principles somewhat as follows:

(i) That the measure of damages should be the excess of the contract price over the resale price, subject to the proviso that such damages cannot *exceed* the difference between the contract price and the market value at the date of breach (for the seller has a duty to mitigate the damage and he can obtain the market price by immediate resale).

(ii) That if there is no resale before judgment the court must consider the probability of a loss arising subsequently. Thus the damages would be the excess of the contract price over the market price at the date of judgment subject to the same proviso as in (i).

But these principles, as has been shown, do not represent the law as pronounced by the English courts Indeed, to our hypothetical business man, the law on this subject may seem to be as clear and simple—as the fourth dimension.

IAN F. G. BAXTER*

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PRESCRIPTION—INTERRUPTION BY INSTITUTION OF ACTION—DURATION OF INTERRUPTION.—In four recent judgments, only one of which is reported, the Superior Court of the province of Quebec has refused to follow the rule laid down by the Court of King's Bench (Appeal Side) in *Beauchemin* v. *Dooner*[1] and *Richman* v. *Sabourin*[2] on a matter of considerable importance, with the result that the law on the point is now in a deplorable state of uncertainty. The question in issue between the two courts concerns the interruption of prescription that, in accordance with article 2224 C.C.,[3] is effected by the institution of an action at law. The appeal court in *Beauchemin* v. *Dooner* and *Richman* v. *Sabourin* had laid down the rule that this interruption is momentary only: the prescription commences to run again from the date of the institution of the action. The Superior Court now refuses to follow this rule, holding instead that the interruption of prescription effected by an action continues until final judgment, and that no prescription can be acquired while the suit is before the courts: *Nantel* v. *City*

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[1] (1931), 51 K B 177.

[2] [1949] K B. 410

[3] "2224. A judicial demand in proper form, served upon the person whose prescription it is sought to hinder, or filed and served conformably to the Code of Civil Procedure when a personal service is not required, creates a civil interruption.

"Seizures, set off, intervention and oppositions, are considered as judicial demands

"No extra-judicial demand, even when made by a notary or bailiff, and accompanied with the titles, or even signed by the party notified, is an interruption, if there be not an acknowledgement of the right."

of Montreal,[4] *Plouffe* v. *Guaranteed Pure Milk Company Limited*,[5] *Vocelle* v. *Beaudry et al.*[6] and *Gagnon* v. *Living Room Furniture Manufacturers Ltd.*[7]

The question is of little practical significance where the prescriptive period is of long duration, or even where it is as little as five years, but it assumes great importance in the case of the short prescriptions by one or two years, a class which includes, for example, all claims for damages either to person or to property arising out of offences or quasi-offences. Where the prescription is short the application of the rule laid down by the appeal court prevents the plaintiff increasing the amount of damages claimed or broadening the grounds of his action either by incidental demand (*Beauchemin* v. *Dooner*) or by amendment (*Richman* v. *Sabourin*) after the prescriptive period has expired, counting that period as having commenced on the date of the institution of the action. Particularly in personal injury claims, where latent damage may and often does manifest itself long after it was caused, the application of this rule may frequently result in serious prejudice.

The reluctance of the Superior Court judges to accept the two decisions of the appeal court is supported by the fact that these two decisions are not fully reasoned on the point they purport to decide, and by the further circumstance that both of them rely in part upon the supposed authority of an earlier judgment of the Supreme Court of Canada that is not in fact in point, as is demonstrated by St. Germain J. in *Richman* v. *Sabourin* and by Garneau J. in the *Plouffe* case. As three of the four judgments of the Superior Court point out, the whole weight of previous authority[8] is against the rule stated by the appeal court. Moreover, it is noteworthy that the appeal court had no "compassionate" grounds for allowing the plaintiff to succeed in either the *Beauchemin* or the *Richman* cases, since no serious prejudice was caused in either by applying the rule with its full vigour; in the cases that have recently come before the Superior Court, on the other hand, the plaintiffs would have suffered severe hardship had their incidental demands been refused.

The decision of the Supreme Court relied on in both the *Beauchemin* and *Richman* cases is *The City of Montreal* v. *McGee* de-

[4] [1954] S C. 89 (Challies J.)
[5] S.C. 314346, Montreal, March 19th, 1954 (Garneau J)
[6] S.C. 327231, Montreal, April 5th, 1954 (Prévost J).
[7] S C. 312623, Montreal, June 8th, 1954 (Prévost J).
[8] Including the decisions of the appeal court itself. *Larouche* v *Corporation du Canton de Chicoutimi* (1925), 41 K B 249, and the remarks (at page 154) of Lacoste C J. in *Campbell* v. *Baxter* (1898), 7 Q.B. 134. But see the judgment of Forest J in *Weinstein* v. *Auerbach* (1936), 42 R J 328, where *Beauchemin* v. *Dooner* is cited and followed.

cided in 1900.[9] In this case, the plaintiff, who had been injured in an accident in August 1895 and had recovered a judgment for damages in June 1896 that reserved his further recourses, instituted a new action in December 1897 for further damages. The judgment of the Supreme Court, delivered by Taschereau and Girouard JJ., holds that the second action, if it were based on a cause different from the cause of the first action, was prescribed by the expiry of more than one year from the date of the accident, and, if it were based on the same cause as the cause of the first action, had already been adjudicated by the first judgment. This decision does not bear in any respect upon the question of the interruption of prescription *pendente lite*; all it deals with is the effect on the prescription of one cause of action of the institution of a suit based on another cause.

Beauchemin v. *Dooner*, decided in 1931, was a case where an incidental demand for additional damages for personal injuries had been made during the course of the suit but more than one year after its institution. The unanimous judgment of the appeal court dismisses the incidental demand as being prescribed, on the authority (cited both in the formal judgment and in the notes of Hall and Bond JJ.) of *The City of Montreal* v. *McGee*. All the four judges whose notes are recorded held that the prescription begins to run again immediately after the institution of action, and can expire *pendente lite* so as to prevent an incidental demand, but none gave any reason other than the bare citation of the *McGee* case.

In the 1949 case of *Richman* v. *Sabourin*, the plaintiff-appellant sought to increase the amount of a claim for personal injuries by means of an amendment made more than one year after the institution of the action. The amendment would have altered nothing but the amounts claimed under the various heads of injury. The appeal court, with St. Germain J. disagreeing on this point, held that the amendment was precluded by the expiry of the prescriptive period of one year. The other judges relied on *Beauchemin* v. *Dooner* and *The City of Montreal* v. *McGee*, without advancing additional reasons, although all of them gave reasons for not accepting the appellant's argument, based on article 2265 C.C., that the prescriptive period for all damages, whether claimed by the action or not, is extended to thirty years by the fact of the institution of action.

The opinion of St. Germain J. in *Richman* v. *Sabourin* on the question of prescription (although he agreed in dismissing the appeal for other reasons) is the first full judicial review of the problem in the jurisprudence of the province of Quebec,[10] and it is upon this

[9] 30 S.C.R. 582.

[10] *Montreal Tramways Company* v. *McNeil* (1916), 25 K.B. 90, and

opinion that the judges of the Superior Court have largely relied in refusing to follow the decisions of the appeal court. The opinion of St. Germain J., taken with the full and careful notes of Garneau J. in *Plouffe* v. *Guaranteed Pure Milk Company Limited*, covers the whole field and sets out all the relevant authorities. It appears from these two judgments that the French authors, and Mignault in Quebec, are all agreed that the interruption of prescription effected by the institution of an action continues throughout the pendency of the suit. Garneau J. also points out that the wording of articles 2264 and 2265 C.C. leads to the same conclusion.[11] There would seem to be no authority to support the *Beauchemin* and *Richman* cases.

The conclusion is inescapable that St. Germain J. and the judges of the Superior Court are in law correct in their view of the effect of a pending action in interrupting prescription. It is less easy to say that the Superior Court is justified, even on the basis of impeccable reasoning, in going contrary to the recent jurisprudence of the higher court. The situation at present is unsatisfactory for lawyers and litigants alike, and must also cause concern to the judges of the Superior Court. As a practical matter, the advocate, who now has to advise a plaintiff wishing to amend or increase his claim in circumstances similar to those in the cases under comment, must first consider whether the defendant is rich or determined enough to go to appeal. A state of the law that leaves so important a matter to the whim or financial capacity of individual defendants is obviously undesirable. It is to be hoped, in the interest of certainty, that the question will shortly be carried to appeal and, if the appeal court persists in its previous jurisprudence, that the Supreme Court of Canada will be given an opportunity to pass on it.

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Magid v. *Diamond Truck* (1931), 37 R.J. 250, both cited by St Germain J., while reasoned judgments, are not strictly in point

[11] "2264. After renunciation or interruption, except as to prescription by ten years in favor of subsequent purchasers, prescription recommences to run for the same time as before, if there be no novation, saving the provisions of the following article.

"2265. Any action which is not declared to be perempted, and any judicial condemnation, constitutes a title which is only prescribed by thirty years, although the subject matter thereof be sooner prescriptible.

"A judicial admission interrupts prescription, even in an action the peremption of which is declared or which is otherwise insufficient to interrupt it alone, but the prescription which recommences is not thereby prolonged"

An article in (1948), 8 R. du B. 489 by Claude Demers deals briefly at page 492 with the problem here considered, and concludes from the two articles that the interruption continues as long as the suit; but no other authority is given

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