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FAIZ MOHAMMED KHAN SHERANI (Administrator of Shahbaz Khan)

v.

LAKSHMIJIT

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[COURT OF APPEAL*, 1971 (Gould V.P., Marsack J.A., Richmond J.A.),
23rd April, 15th July]

Civil Jurisdiction

Limitation of actions—land—agreement for sale—instalments in arrears—provisions in agreement for vendor's right to rescind and re-enter—construction of agreement—no election to rescind until shortly before action for possession—time of accrual of right of action equated with time of accrual of right of entry—whether time for purpose of limitation ran from date of breach of condition for payment of instalments—election to rescind condition precedent to right of entry—necessity for election to rescind to be notified to purchaser—Real Property Limitation Act 1833 (3 & 4 Will. 4, c.27) (Imp.) ss.3, 4, 6, 7, 10—13, 34—Real Property Limitation Act 1874 (37 & 38 Vict., c.57) (Imp.) s.1—Statute of Limitations Declaration Ordinance (Cap. 137—1955)—Revised Edition of the Laws Ordinance 1965 s.5(1), 1st Schedule—Land (Transfer and Registration) Ordinance (Cap. 136—1955) s.14—Limitation Act 1935—1954 (Western Australia) ss.3, 4. Interpretation—limitation of actions—construction of Real Property Limitation Act 1833 (3 & 4 Will. 4, c.27) (Imp.) ss.3, 4, 7.

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The appellant's action in the Supreme Court for the recovery of the possession of land was dismissed on the ground that his right to recover possession had been extinguished by the Statutes of Limitation, which at the relevant time, comprised the Imperial Real Property Limitation Acts of 1833 and 1874. The respondent, as purchaser, had been in continuous possession under two agreements for sale executed on the 16th February and 23rd August, 1948 by Shahbaz Khan as vendor, whereby instalments of the purchase money were payable over a long period, and under which instalments were continuously in arrears as from dates in 1954 and 1952 respectively. The agreements contained express provisions as to the rights of the vendor in case of such default, including (at his option) rights (a) to enforce the contract, in which case the purchase money unpaid became due, or (b) to rescind the contract and thereupon all moneys theretofore paid would be forfeited and he could re-enter upon and take possession of the land without notice.

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During his lifetime Shahbaz Khan did not rescind either agreement, but on the 3rd April, 1967, the appellant (his administrator) sent a letter which was an effective rescission of both. The writ in these proceedings was issued on the 23rd October, 1967, but contained no claim for possession until an amendment was made on the 19th October, 1970. The trial judge held that the right of Shahbaz Khan to bring an action for the recovery of the land first accrued more than twelve years before the 19th October, 1970, namely from the dates in 1954 and 1952 when instalments fell into arrears as abovementioned.

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* The judgment of the Court of Appeal was upheld by the Privy Council. See *Lakshmijit v. Sherani* [1974] A.C. 605 [1973] 3 All E.R. 737.

A Held: 1(a) The possession of the respondent did not cease to be adverse in the modern sense of that word in the phrase "adverse possession", merely on the ground that it was referable to his lawful title under the agreements.

B (b) The construction to be placed upon the phrase "adverse possession" where used in section 14 of the Land (Transfer and Registration) Ordinance is not such as to put the appellant in any stronger position than he would be in if the matter were considered solely by relation to the Acts of 1833 and 1874.

C 2. The time when a right of action accrued to Shahbaz Khan must be equated with the time when a right of entry accrued to him. A right of entry in a sale and purchase agreement cannot accrue until all conditions precedent to its exercise have been fulfilled.

3. The proper construction of the provisions in the agreements giving the right to the vendor to re-enter and take possession was that rescission of the agreements was made a condition precedent to the exercise of such rights.

D 4(a) Section 3 of the Act of 1833, which provides that when the person claiming land shall have become entitled by reason of any breach of condition, such right shall be deemed to have first accrued when the condition was broken, is intended to apply to the kinds of conditions and forfeiture clauses which on breach give rise to an immediate right of entry without the necessity of any intervening further step by the person entitled.

E (b) In the present case, the contracts having made rescission a condition precedent to the right of entry, some form of notice was necessary; the optional right of entry did not arise at all until the exercise of the vendor's right to rescind.

F 5. The appellant's claim was not barred by the Statutes of Limitation and he was entitled to possession of the land.

6. No ground had been shown for granting relief against forfeiture to the respondent.

Observations upon the interpretation to be given to sections 4 and 7 of the Act of 1833.

G Cases referred to:

Barrat v. Richardson and Cresswell [1930] 1 K.B. 686; 142 L.T. 606.

Nepean v. Doe d. Knight (1837) 2 M. & W. 894; 150 E.R. 1021.

McWhirter v. Emerson-Elliott [1960] W.A.R. 208.

Robertson v. Keith (1870) 1 V.R. (E.) 11.

H *Staughton v. Brown* (1875) 1 V.L.R. (L.) 150.

Murphy v. Michel (1867) 4 W.W. & A'B. (L) 13.

May v. Martin (1885) 11 V.L.R. 562.

- Paradise Beach and Transportation Co. Ltd. v. Price-Robinson* [1968] A.C. 1072; [1968] 1 All E.R. 530. A
- Culley v. Doe d. Taylerson* (1840) 11 Ad. & E. 1008; 113 E.R. 697.
- Thomas v. Thomas* (1855) 2 K. & J. 79; 25 L.J.Ch. 159.
- Governors of Magdalen Hospital v. Knotts* (1878) 8 Ch.D. 709; 38 L.T. 624; Affd. (1879) 4 App. Cas. 324; 40 L.T. 466.
- Sykes v. Williams* [1933] 1 Ch. 285; 148 L.T. 121. B
- Joachimson v. Swiss Bank Corporation* [1921] 3 K.B. 110; 125 L.T. 338.
- Lloyd's Bank Ltd. v. Margolis* [1954] 1 All E.R. 734; [1954] 1 W.L.R. 644.
- Murphy v Lawrence* [1960] N.Z.L.R. 772.
- McDonald v Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457.
- Mayson v. Clouet* [1924] A.C. 980; 131 L.T. 645. C
- Connolly v. Leahy* [1899] 2 I.R. 344.
- Davenport v. The Queen* (1873) 3 App. Cas. 115; 37 L.T. 727.
- Car and Universal Finance Co. Ltd. v. Caldwell* [1965] 1 Q.B. 525; [1964] 1 All E.R. 290.
- Astley v. Earl of Essex* (1874) L.R. 18 Eq. 290; 30 L.T. 485.
- Doe d. Allen v. Blakeway* (1833) 5. C & P. 563; 172 E.R. 1100. D
- Doe d. Cook v. Danvers* (1806) 7 East 299; 103 E.R. 115.
- Keene v. Deardon* (1807) 8 East 248; 103 E.R. 336.
- Smith v. King* (1812) 16 East 283; 104 E.R. 1097.
- Drummond v. Sant* (1871) L.R.6 Q.B. 763; 25 L.T. 419.
- Nives v. Nives* (1880) 15 Ch.D. 649; 42 L.T. 832. E
- Kilmer v. British Columbia Orchard Lands Ltd.* [1913] A.C. 319; 108 L.T. 306.
- Appeal from a judgment of the Supreme Court in an action for possession of land.
- R. G. Kermode for the appellant.
- K. C. Ramrakha for the respondent. F
- The facts are sufficiently set out in the judgment of Richmond J.A.
- 15th July 1971 :
- The following judgments were read :
- RICHMOND J.A.
- I have been asked by the Vice-President to deliver the first judgment. G
- This is an appeal from a judgment of the Supreme Court in a civil action brought by the appellant (as original plaintiff) against the respondent (as original defendant) wherein the appellant claimed possession of two areas of land comprising in all approximately 210 acres and situated in Sawani in the district of Rewa in the Island of Viti Levu. The learned trial judge, after finding in the appellant's favour on certain matters which are not now in issue, dismissed the action on the grounds that any rights which the appellant might otherwise have had to recover possession of the land had been extinguished by the Statutes of Limitation in force in Fiji. It is against that decision that the appellant now appeals to this Court. H

A The relevant facts are set out in considerable detail in the judgment appealed from and there is no need for me to repeat them at length. So far as it is relevant to the present appeal the brief history of the matter is as follows.

B In the year 1948 one Shahbaz Khan was the owner of some 664 acres in Sawani. By an agreement in writing dated 16 February 1948 he agreed to sell 72 acres of this land to the respondent and one Ujagir at a price of £80 per acre (subject to survey). This agreement, after providing for payment of a small deposit, made provision for the estimated balance of the purchase price (£5,640) to be paid by quarterly instalments of £30 each, the first such instalment falling due on 1 August 1948. This meant that if the agreement had been carried out in accordance with its terms it would have taken some 47 years to pay the full purchase price. By a further agreement dated 23 August 1948 Shahbaz Khan agreed to sell to the respondent and Ujagir a further 138½ acres at a price of £50 per acre. This agreement also provided for payment of a small deposit and then provided that the balance of the estimated purchase price (£6,752) should be paid by equal quarterly instalments of £32 each, the first such instalment falling due on 31 August 1950. In this case, therefore, it would have taken approximately 52 years for the full purchase price to be paid.

D I shall not refer in detail to all the provisions of these two agreements which were substantially similar. In both cases provision was made for the purchasers to be let into immediate possession and the vendor undertook to give a transfer of title on payment of the whole of the purchase price. No interest was payable unless default was made in which event the vendor could charge interest in the one case at £5 per centum per annum and in the other at £2 10s. per centum per annum. Both agreements made express provision as to the rights of the vendor in the event of any of the instalments of purchase money being in arrear for the time specified in the agreements or in the event of the purchasers making default in the performance or observance of any other stipulation or agreement. In both cases it was provided that :—

F “in any such case the vendor without prejudice to his other rights and remedies hereunder may at his option exercise any of the following remedies namely :—

G “(a) May enforce this present contract in which case the whole of the purchase money and interest then unpaid shall become due and at once payable or

“(b) May rescind this contract of sale and thereupon all moneys theretofore paid shall be forfeited to the vendor as liquidated damages and

H (i) May re-enter upon and take possession of the said land hereby agreed to be sold and all improvements thereon without the necessity of giving any notice or making any formal demand and

- (ii) May at the option of the vendor re-sell the said land and improvements either by public auction or private contract subject to such stipulations as he may think fit and any deficiency in price which may result on and all expenses attending a re-sale or attempted re-sale shall be made good by the purchasers and shall be recoverable by the vendor as liquidated damages the purchasers receiving credit for any payments made in reduction of the purchase moneys. Any increase in the price on re-sale after deduction of expenses shall belong to the vendor."

Very little money was ever paid by the purchasers under either agreement. In the case of the agreement of 16 February 1948 approximately £825 had been paid as at 31 December 1966. In the case of the agreement of 23 August 1948 approximately £1,100 had been paid. The outstanding balances (including arrears of interest and the total purchase price) were £10,331 and £8,276 respectively. It is clear (as was found by the learned judge after giving consideration to a certain deed dated 24 September 1952 and an agreement of 28 July 1954 which are referred to in the judgment) that as from 29 July 1954 (in the case of the agreement of 16 February 1948) and 25 October 1952 (in the case of the agreement of 23 August 1948) the purchasers were continuously in default both in the payment of quarterly instalments and also under clauses in both agreements which provided that the purchasers would obtain a survey of the two areas of land. Both agreements provided that time would be of the essence.

The present proceedings were originally brought by the appellant against the respondent in his personal capacity and also as administrator of the estate of Ujagir who apparently died at some time before the writ was issued on 23 October 1967. The trial judge, for reasons set out in his judgment, dealt with the action as being brought against the respondent only. No point was raised in this connection at the hearing of this appeal. The whole matter was argued on the basis that the respondent had been in continuous possession of the lands in question since the agreements were entered into in 1948 and that the proceedings were properly dealt with in the Supreme Court as against him only. Finally, it was common ground in argument before us that although Shahbaz Khan made various demands for payment during his lifetime he did not in fact rescind either agreement. He died on 29 May 1964 and after various difficulties Letters of Administration with the will annexed were granted to the appellant on 5 January 1967. It was also common ground that the appellant did on 3 April 1967 send a letter which was an effective rescission of both agreements and which in the case of each agreement stated that the agreement was terminated "for reasons, amongst the many others, for non-payment of your debts."

The Statutes of Limitation applicable in Fiji at all material times relevant to the present proceedings were the Real Property Limitation Act 1833 (Imperial) 3 & 4 Will. 4 c.27 as amended by the Real Property Limitation Act 1874 (Imperial) 37 & 38 Vict. c.57. These Imperial Acts were in force in Fiji by virtue of the Statute of Limitations Declaration Ordinance Cap. 137 Laws of Fiji 1955. Under the Revised Edition of the Laws Ordinance 1965 (Section 5 (1) and the First Schedule) the Statute

- A of Limitations Declaration Ordinance Cap. 137 was omitted from the revised edition of the Laws of Fiji provided that the Ordinance should remain in force until the same should have been expressly repealed or should have expired, become spent or had its effect, which it has not, so far as these proceedings are concerned.

- B It will be convenient if I set out at this stage the provisions of the two Statutes which are particularly relevant to the present case. Section 1 of the Act of 1874 provides as follows:—

- C “After the commencement of this Act no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.”

- D Sections 3 and 4 of the Act of 1833 (in so far as they are material) are as follows:—

- E “3. In the construction of this Act the right to make an entry or distress or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) and when the person claiming such land or rent, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition was broken.”

- F “4. Provided always, that when any right to make an entry or distress or to bring an action to recover any land or rent, by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress or bring an action to recover such land or rent shall be deemed to have first accrued in respect of such estate or interest at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened.”

- G By Section 6 of the Act of 1833 time does not cease to run in respect of the gap between the death of any deceased person and the appointment of his administrator. The learned judge, after referring to the provisions of Section 3 of the 1833 Act which I have set out above, held that on 25 October 1952 Shahbaz Khan became entitled to rescind the agreement of August 1948 and on 29 July 1954 became entitled to rescind the agreement of February 1948. He held accordingly that it was on those two dates that the right of Shahbaz Khan (and accordingly of the appellant) to bring an action for the recovery of the two pieces of land first accrued and that as a result the action was statute-barred as a period of more than 12 years had expired prior to 19 October 1970. I should
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explain at this stage that the writ when originally issued contained no claim for possession and it was not until 19 October 1970 that a prayer for possession of the land was added by amendment.

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Against the foregoing background I now turn to consider the various submissions made by Mr. Kermode in support of the appeal:—

- (1) Section 14 of the Land (Transfer and Registration) Ordinance 1933 (Cap. 136) makes the title of a registered proprietor absolute and indefeasible except on the ground of fraud or misrepresentation or of "adverse possession in another for the prescriptive period." The possession of the respondent was at all times referable to the two agreements and was accordingly not adverse.
- (2) The learned judge erred in equating a right to rescind with a right to re-enter.
- (3) The provisions of Section 4 of the Act of 1833 governed the case and accordingly time did not run until notice of rescission was given in the year 1967.
- (4) Shahbaz Khan as vendor was a constructive trustee for the respondent as purchaser and accordingly time could not run against the vendor by virtue of the proviso to Section 7 of the Act of 1833.

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The first question which arises in relation to the question of "adverse possession" is the meaning which is to be given to that phrase as it is used in Section 14 of the Land (Transfer and Registration) Ordinance. The difficulty which arises is conveniently demonstrated by reference to the following passage in *Preston and Newsom - Limitation of Actions* (3rd Edn.) at pp. 86-87.

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"Before the Real Property Limitation Act, 1833, "adverse possession" was a term of art. It arbitrarily excluded the possession of persons related to the true owner in particular ways, irrespective of their intentions or the true nature of their holdings. Thus, one co-owner could not have possession adverse to another; nor could a younger brother have possession adverse to the heir. Again, possession which was adverse could be made ineffective by a "mere entry" or a "continual claim" by the true owner, and these might be purely formal acts not amounting to a recovery of possession of the land. "By the 1833 Act, ss.10 to 13, the old rules were abolished. Denman, C.J., said in *Nepean v. Doe d. Knight* (1837), 2 M. & W. 894, at p.911: "We are all clearly of opinion that the Real Property Limitation Act, 1833, has done away with the doctrine of non-adverse possession . . . the question is whether twenty years have elapsed since the right accrued." The effect of that Act was therefore to substitute for a period of adverse possession in the old sense a simple period of time calculated from the accrual of the right of action. The date from which time ran was to be ascertained from the provisions of the 1833 Act, though in some cases resort might be had to general principles (see p.95).

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A "The term "adverse possession", however, continued to be used as a matter of convenience for all cases in which a person had taken possession of another's land and time was running in his favour. The content of the term was now quite different."

B I am not aware of any decision of this Court in which it has been decided whether the phrase "adverse possession" in Section 14 should be construed in the same sense as that phrase was used prior to 1833 or in the more modern sense referred to in the foregoing passage from *Preston and Newsom*. Similar questions have however arisen in Australia at first instance and the effect of the Australian authorities was discussed by Wolff C.J. in *McWhirter v. Emerson-Elliott* [1960] W.A.R. 208 at pp. 214-215:—

C "At one time (see *Robertson v. Keith* (1870), 1 V.R. (E) 11, per Molsworth, J., at p.15) there was some opinion that the term "adverse possession" as used in the Act meant adverse possession according to the meaning given to the term prior to the passing of the Imperial Act 3 and 4 Will. IV c. 27 (1833) — a meaning which Darby and Bosanquet, *Statutes of Limitation*, 2nd ed., p. 274, point out was not easy of ascertainment.

D "But since the passing of the Imperial Act referred to, the doctrine of adverse possession has been abolished "and the only question under the Acts now in force is whether 12 years have elapsed since the claimant's right accrued whatever be the nature of the present holder's possession" (Darby and Bosanquet, *ibid*, p. 275).

E "The earlier doctrine in regard to the meaning of "adverse possession" under the Transfer of Land Act has not been maintained (see per Fellows, J., in *Staughton v. Brown* (1875), 1 V.L.R. (L) 150, at p. 159; see also *Murphy v. Michel* (1867), 4 W.W. & A'B. (L) 13 at p.19, per Stawell, C.J.; *May v. Martin* (1885), 11 V.L.R. 562, at p.585, per Holroyd, J.). In my opinion, "adverse possession" should be construed in accordance with the meaning given to the term "possession" in the Limitation Act 1935 (see W.A. Stat. No. 35 of 1935, ss. 4 and 5; and *Nepean v. Doe d. Knight* (1837), 2 M & W. 894 per Lord Denman, C.J., at pp. 911-12, [46 R.R. 789])."

F I find myself in complete agreement with the conclusions arrived at in the more modern Australian cases and accordingly I am of the view that the provisions of Section 14 of the Ordinance do not in this respect put the appellant in any stronger position than he would be in if the matter were considered solely by relation to the Acts of 1833 and 1874. In that connection the modern position as to "adverse possession" has now been authoritatively stated by the Privy Council in *Paradise Beach and Transportation Company Limited v. Price-Robinson* [1968] A.C. 1072. Their Lordships (at p. 1083) clearly accepted as an accurate statement of the law the following observations of Denman C.J. in *Culley v. Doe d. Taylerson* (1840) 11 Ad. & E. 1088, 1015:—

H "The effect of this section (No. 2) is to put an end to all questions and discussions, whether the possession of lands, &c., be adverse or not; and, if one party has been in the actual possession for twenty years, whether adversely or not, the claimant, whose original right of entry accrued above twenty years before bringing the ejectment, is barred by this section."

It is also clear that since the decision of the Privy Council it cannot be said that there is any general rule that "possession is never adverse if it can be referred to a lawful title" (per Page-Wood V.C., in *Thomas v. Thomas* (1855) 2 K & J. 79, 83). In *Paradise Beach and Transportation Company Limited v. Price-Robinson* two daughters of a testator remained in possession of certain land pursuant to a devise of that land to themselves and their brothers as tenants in common. The brothers did not themselves enter into possession throughout the statutory period of limitation. Although the possession of the two daughters was attributable to a lawful title and was in no way wrongful as against their brothers it was nevertheless continuous and open and it was held that the title of the brothers was extinguished by Section 34 of the Act of 1833.

In the present case it was not questioned that the possession of the respondent was physically of a nature sufficient to satisfy the requirement of actual possession during the entire period commencing with the making of the two agreements in 1948. In my view if that possession was "adverse", in the modern sense of that word, then it did not cease to be so on the grounds that it was referable to a lawful title because of the continued existence of the agreements until the notice of rescission was given in 1967. The vital question to be decided is whether or not more than 12 years elapsed from the time at which the right of Shahbaz Khan to make an entry or bring an action or suit to recover the land first accrued.

This brings me to a consideration of the second main submission made by Mr. Kermode. It was, as already stated, that the learned judge erred in equating a right to rescind with a right to enter. Mr. Kermode pointed out that the agreements were not so worded as to bring about their automatic termination upon a default by the purchasers. The vendor is given a right of rescission but unless and until he rescinds he has no right to resume possession of the lands. He submitted accordingly that the giving of a notice of rescission was a condition precedent to any right of re-entry arising.

This question depends upon the combined effect of Section 1 of the Act of 1874 and Section 3 of the Act of 1833.

The effect of Section 1 is to make the 12 year period of limitation run from the time when the right of Shahbaz Khan to bring an action to recover the land "shall have first accrued". In the circumstances of the present case the time when such a right of action accrued to Shahbaz Khan must be equated with the time when a right of entry accrued to him. As was pointed out by Thesiger L.J. when delivering the judgment of the Court of Appeal in *Governors of Magdalen Hospital v. Knotts* (1878) 8 Ch. D. 709, 727, 728, "the Statute speaks not only of the right of action but of the right of entry and, in truth, where the claim is to the possession of land, the real right is the right of entry and the right of action is only given to enforce the right of entry."

Section 3 of the Act of 1833 makes particular provision as to the time when a right of entry shall be deemed to have accrued in the cases which are specifically referred to in that section. I propose to consider the present case, in the first instance, solely by reference to the more general language of Section 1. On that basis the question is whether a right of entry "accrued" to Shahbaz Khan within 12 years prior to 19 October 1970. The argument for the respondent is that as from 25

- A** October 1952 and 29 July 1954, at the latest, a situation had arisen in the case of the two agreements respectively whereby as a result of defaults by the respondent a right accrued to Shahbaz Khan to "re-enter upon and take possession of the said land hereby agreed to be sold and all improvements thereon without the necessity of giving any notice or making any formal demand." If this view is correct then the consequences to the appellant would be disastrous as Section 34 of the Act of 1833, described by Lord Hanworth M.R. in *Sykes v Williams* [1933] 1 Ch. 285, **B** 293, as a "violent" section, provides that:—

"At the determination of the period limited by this Act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson, for the recovery whereof such entry, distress, action or suit respectively might have been made or brought **C** within such period, shall be extinguished."

For the appellant, on the other hand, it is submitted that no right of entry "accrued" until the vendor elected to rescind the contract. If this submission is correct then the present action is well within the 12 years period, it being common ground that no effective rescission took place until 3 April 1967.

- D** I am unaware of any decision, either in England or any Commonwealth country, which directly deals with the application of the Statutes of Limitation to long-term agreements for the sale and purchase of land. It would seem clear in principle, however, that a right of entry cannot "accrue" until all conditions precedent to its exercise have been fulfilled. The problem seems to be substantially the same as that which faced the Court of Appeal in *Joachinson v. Swiss Bank Corporation* [1921] **E** 3 K.B., 110. In that case it was held that a cause of action did not accrue against a bank for money standing to the credit of a customer on current account until fulfilment of the necessary condition precedent of a demand on the bank by the customer. The general principle that a cause of action does not accrue until all conditions precedent to its existence have been fulfilled was not in question. The emphasis was rather on determining the real terms of the contract between the parties. Thus Bankes L.J. said **F** (at p. 115 and 117):—

"The question whether there was an accrued cause of action on August 1, 1914, depends upon whether a demand upon a banker is necessary before he comes under an obligation to pay his customer the amount standing to the customer's credit on his current account In every case, therefore, where this question arises the test must be whether the parties have, or have not, agreed that an actual demand shall be a condition precedent to the existence of a present enforceable debt." **G**

Reference may also be made to the decision of Upjohn J. in *Lloyd's Bank Ltd. v. Margolis and others* [1954] 1 All E.R. 734, and of Turner J. in *Murphy v. Lawrence* [1960] N.Z.L.R., 772.

- H** In the present case the agreement provides that on specified defaults by the purchaser the vendor is to have the option of enforcing the contract or in the alternative that he:—

"(b) May rescind this contract of sale and *thereupon* all moneys therefore paid shall be forfeited to the vendor as liquidated damages and

“(i) May re-enter upon and take possession of the said land

and

“(ii) May at the option of the vendor re-sell the said land”

On the fair construction of the foregoing provisions I am of opinion that the word “thereupon” governs both the automatic provision as to forfeiture of moneys paid and the optional rights of re-entry and resale. As a matter of language therefore the exercise of the right of rescission is made a condition precedent to the accrual of the right of re-entry. Nor do I see any reason to regard the substance of the agreement as differing in any way from the language in which it is recorded. It is one thing for a purchaser to confer an unqualified right of re-entry operative immediately upon the purchaser’s default. It is another thing altogether for the purchaser to stipulate for the additional requirement of a rescission of the contract. The exact consequences of such a rescission under a clause such as the present one are not entirely clear. They were discussed by Dixon J. in *McDonald v. Dennys Lascelles Ltd.* (1933) 48 C.L.R. 457 at 477-479. It is however at least clear the purchaser is freed from his future obligations under the contract and from liability to pay arrears of instalments of the purchase price. The election to rescind is therefore of considerable moment to the purchaser. In my view the language and substance of the present agreements made the right of re-entry an incident of rescission rather than an incident of default by the purchaser. The right to re-enter (and hence any right to recover the land by action) could not accrue until the vendor elected to rescind.

In this respect it seems to me that the express provisions of the present agreements merely reflect the position which prevails in the case of a rescission at common law of an agreement for the sale of land by reason of an essential breach of the agreement. The right to recover possession of the land is only one of the several consequences which flow from such a rescission, other consequences being a reversion in the vendor of the equitable ownership of the land and a general obligation on the part of the vendor to make restitution of instalments of purchase money other than the deposit: *Mayson v. Clouet* [1924] A.C. 980. Whether or not there be an express provision for rescission therefore it seems to me quite unreal to say that a right of entry arises on a breach of condition. Once this position is reached then it can make no difference that the time when rescission takes place depends largely on the whim of the vendor: *Conolly v. Leahy* (1899) 2 I.R. 344.

So far I have approached the matter solely by reference to the general provisions of Section 1 of the Act of 1874. It is now necessary to consider whether the particular provisions of Section 3 of the Act of 1833 affect the conclusion at which I have so far arrived. By that section the right to make an entry or to bring an action to recover any land is deemed to have first accrued at the times therein mentioned, the only relevant provision being :—

“ . . . and when the person claiming such land, or the person through whom he claims, shall have become entitled by reason of any forfeiture or breach of condition, then such right shall be deemed to

- A** have first accrued when such forfeiture was incurred or such condition was broken."

B In my opinion the words which I have placed in italics should be interpreted in accordance with the maximum *In jure non remota causa sed proxima spectatur*. For reasons which I have already given I regard the act of rescission and not the breach of a condition as the proximate and effective cause entitling the vendor to re-enter. I think that the draftsman of the Statute had in mind the common kinds of conditions and forfeiture clauses which on breach give rise to an immediate right of entry without the necessity of the person entitled taking any further step as a condition precedent to the right of entry arising. Thus, but for the ameliorating provisions of Section 4 of the Act of 1833, Section 3 would apply to the ordinary clauses in leases providing for a right of re-entry on default. It is true that such clauses, even if so expressed as to bring about an automatic forfeiture, are interpreted as merely giving the lessor an option to re-enter — *Davenport v. The Queen* (1877) 3 App. Cas. 115 at 128. A similar situation prevails in the case of a fee simple upon condition (*Megarry and Wade — The Law of Real Property* (3rd Ed.) p. 78). In both cases however the lessor or grantor can elect to enter immediately on default or breach of condition. I believe that the reason for Section 3 lies in this right of election as but for its enactment the person in possession could be regarded as continuing a non-adverse possession unless and until the election was made. In the present case however the optional right of the vendor to re-enter did not arise at all until (and as an incident of) the exercise of his election to rescind.

E This vital feature renders inapplicable to the present case the reasoning of the Court of Appeal in *Governors of Magdalen College v. Knotts* (1878) 8 Ch. D. 709 (subsequently decided on different grounds in the House of Lords (1879) 4 App. Cas. 324). In that case (at p. 728) the Court of Appeal clearly took the view that a landlord who had granted a voidable lease could re-enter without any previous demand or notice. Where however the contract makes rescission a condition precedent to the right of re-entry then some form of previous notice is necessary, as the general rule is that rescission must take the form of an unequivocal election by words or conduct made known to the defaulting party. There is nothing in the language of the agreements or in the general circumstances to warrant a departure from that general rule in the present case. The question is discussed at length in *Car and Universal Finance Co. v. Caldwell* [1965] 1 Q.B., 525, a case of fraud in which special circumstances were held to exist. The present case is accordingly one where the right of entry (in the sense of a right to enter and remain in possession) was dependent on notice to the purchaser. Even if rescission took the form of an actual entry made known to the purchaser the real right to enter and remain in possession would not arise until such entry and communication thereof to the purchaser had been effected.

G For the foregoing reasons I am of opinion that the second main submission which was made to us by Mr. Kermode is correct, and that on that ground the appeal should succeed.

H In those circumstances it may perhaps be unnecessary for me to deal with the remaining arguments which were addressed to us by Mr. Kermode. As however it may be in some way helpful to the parties I propose to discuss them briefly.

Mr. Kermode relied on Section 4 of the Act of 1833 to take the appellant's case out of the operation of Section 3 even if the proper view was to regard the right of entry as accruing immediately on default. Section 4 deals, in my opinion, with the case of interests in remainder or reversion which eventually fall into possession for some reason *other than* a forfeiture incurred or a condition broken by the person entitled to a precedent interest in possession. The most obvious case is the reversion of a lessor falling into possession at the expiration of the term. Likewise a remainderman who fails to enforce a forfeiture of a preceding life estate obtains a fresh right to possession when the life estate terminates on the death of the life tenant: *Astley v. Earl of Essex* (1874) L.R. 18 Eq. 290. Section 4 can have no application to the relationship of vendor and purchaser as any reversionary interest of the vendor, if one can describe it as such, could only fall into possession as a result of a breach of condition and not, as the section obviously contemplates, for some other reason altogether. The purpose of Section 4 is explained in the following way in *Darby and Bosanquet Statutes of Limitations* (2nd Ed.) at pp. 335-336 :—

"Under the old law a remainderman or reversioner who had a right of entry on forfeiture of the particular estate was not bound to enforce the forfeiture, and his rights at the determination of such estate were in no way prejudiced by his not enforcing the forfeiture (*Doe d. Cook v. Denvers* 7 East 279; and see *Doe d. Allen v. Blakeway* 5 C. & P., 563). The object of the 4th Section of 3 and 4 Will. IV c. 27 is to preserve this rule."

Lastly, Mr. Kermode submitted that the effect of the proviso to Section 7 of the Act of 1833 was to prevent time running against the vendor. Section 7 is as follows :—

"When any person shall be in possession or in receipt of the profits of any land or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued, either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided always, that no mortgagor or cestui que trust shall be deemed to be a tenant at will, within the meaning of this clause, to his mortgagee or trustee."

It will be seen that the foregoing section deals with the case of tenants at will and it is one of the sections of the Act designed to curtail the earlier rules as to non-adverse possession. The proviso was inserted because of the legal principle whereby the possession of a cestui que trust under a simple trust is accounted for by describing him as tenant at will to the trustee. It followed, under the law prior to 1833, that the possession of the cestui que trust, while held under such tenancy, was not adverse to the trustee: *Keene v. Deardon* (1807) 8 East, 248; *Smith v. King* (1812) 16 East, 283. The purpose of the proviso to section 7 is obviously to continue the earlier principle of law in the case of a cestui que trust who in that capacity holds as a tenant at will. In the case of vendor and purchaser, the vendor is a constructive trustee for the purchaser and *Drummond v. Sant* (1871) L.R. 6, Q.B., 763 is authority for the application of the proviso to constructive trusts. However that may

- A be, it is clear that the effect of the proviso is merely to create an exception to the earlier part of Section 7. I do not think that it can possibly be read as creating an exception to the provisions of Section 3 of the Act whereby a right to make an entry or bring an action to recover any land is deemed to have first accrued when a forfeiture was incurred or a condition was broken. The purpose of the proviso is discussed at some length in *Lightwood — The Time Limit on Actions* (1909) at pp. 75-79.

- B Finally, I should mention that after hearing counsel it occurred to the members of the Court that some reliance might possibly be placed by the appellant on the decision of Lord Wright (then Wright J.) in *Barratt v. Richardson and Creswell* [1930] 1 K.B. 686. We accordingly invited counsel to make further submissions on the point. *Barratt v. Richardson and Creswell* was a case of successive defaults under a lease and it was held that the lessor was entitled to rely on the last non-payment of rent before the writ was issued or any previous non-payment up to 12 years before the writ. The difficulty about applying that case to the present circumstances is that in *Barratt v. Richardson and Creswell* no question could arise as to the operation of Section 34 of the Act of 1833 because of the saving provisions of Section 4. I express no concluded view on the matter, but I am inclined to think that if time began to run in the present case when contended by the respondent then it would not stop running as a result of subsequent defaults. If this be so then the effect of Section 34 would be to extinguish the right and title of the vendor at the end of twelve years from the original default.

- C The application of the Acts of 1883 and 1874 to long-term agreements for sale and purchase is complicated by the fact that the purchase money and interest thereon is secured by the vendor's lien and is accordingly money secured on land within the meaning of Section 8 of the Act of 1874. In the present case some small payments were made by the respondent in the year 1961 on account of principal or interest. It would seem, therefore, that at the time of rescission in 1967 the vendor could have sued for all arrears of instalments and could also have enforced his lien to that extent — *Nives v. Nives* (1880) 15 Ch. D. 649.
- D Yet if the respondent's contention be correct that the times for re-entry ran from 1952 and 1954 then the title of Shahbaz Khan to the land would have been extinguished in 1966 and he would accordingly have had no title to convey to the purchaser on completion. Such a difficult and conflicting situation is however avoided if I am correct in my earlier expressed opinion that the time for re-entry in fact ran from notice of rescission.

- E The application of the Acts of 1883 and 1874 to long-term agreements for sale and purchase is complicated by the fact that the purchase money and interest thereon is secured by the vendor's lien and is accordingly money secured on land within the meaning of Section 8 of the Act of 1874. In the present case some small payments were made by the respondent in the year 1961 on account of principal or interest. It would seem, therefore, that at the time of rescission in 1967 the vendor could have sued for all arrears of instalments and could also have enforced his lien to that extent — *Nives v. Nives* (1880) 15 Ch. D. 649.

- F Yet if the respondent's contention be correct that the times for re-entry ran from 1952 and 1954 then the title of Shahbaz Khan to the land would have been extinguished in 1966 and he would accordingly have had no title to convey to the purchaser on completion. Such a difficult and conflicting situation is however avoided if I am correct in my earlier expressed opinion that the time for re-entry in fact ran from notice of rescission.
- G It remains to deal with certain other aspects of the case which were referred to by Mr. Ramrakha.
- H The first concerns the pleadings. In the course of his submissions Mr. Kermode raised certain matters as taking the case out of the Statutes of Limitation, such matters not having been pleaded either in the statement of claim or in the reply. In particular, he referred to a caveat (Exhibit 7) dated 6 February 1968, signed by the respondent's Solicitors, and claiming an estate or interest as purchaser under the 1948 agreements. He submitted that this caveat was an acknowledgement of the vendor's title. All I need say on this branch of the case is that I have not found it necessary, in considering this appeal, to refer to any matters which are outside the scope of the pleadings.

The next question is as to relief against forfeiture. Mr. Ramrakha submitted that the provisions of the agreements making time of the essence and providing for rescission and forfeiture of instalments of purchase money already paid by the purchasers amount to a penalty. In this he may well be correct — *Kilmer v. British Columbia Orchard Lands Limited* [1913] A.C., 319. Assuming that he is correct then there can be no doubt that the Court has jurisdiction to give relief against forfeiture either by taking steps to enable specific performance of the agreement or alternatively by ensuring a return of such part of the monies paid by the purchasers as would result in a fair *restitutio in integrum*.

As to the first of these courses, Mr. Ramrakha submitted that the respondent should be allowed a reasonable period of time within which to make payment of all monies owing under the agreements. It is to be observed that no evidence was given as to the readiness, willingness or ability of the respondent to make payment of the large amounts now owing. For very many years he has made no effort whatsoever to carry out his obligations under the agreements. In these circumstances I see no justification whatsoever for acceding to the first suggestion made by Mr. Ramrakha.

As to the second suggestion, I accept the position that the Courts have often directed an enquiry in order to ascertain the basis upon which *restitutio in integrum* could fairly be accomplished. This would involve a fair occupation rent being allowed to the vendor. In the present case the amounts paid by the purchasers prior to rescission are so small in amount compared with the value of the land and the length of the respondent's occupation that it would serve no useful purpose to order such an enquiry. In my view no case has been made out for relief against forfeiture of monies received by the vendor prior to rescission.

There is only one other matter which requires mentioning. It appears that after the agreements were rescinded the appellant credited as against the monies owing by the purchasers thereunder a sum of £1,107-3-6 realised as a result of the sale of certain properties over which the purchasers had given security by way of mortgage. I need not go into the details of this matter, but merely record the fact that Mr. Kermode on behalf of the appellant undertook at the hearing of this appeal that the appellant would abandon any claim to retain this money as against monies owing under the agreements of 1948. This undertaking related solely to monies owing by the respondent under the agreements and did not extend to any monies which might be owing by the respondent on any other account.

For the reasons which I have given I would allow the appeal and would enter judgment granting to the appellant possession of the lands the subject matter of the 1948 agreements. No case was made out for the granting of any of the other forms or relief sought in the amended statement of claim.

In the Court below the counterclaim for relief against forfeiture was dismissed and it follows from what I have said in this judgment that no grounds have been made out requiring this Court to interfere with that dismissal.

I would also allow costs to the appellant both in this Court and in the Court below.

A MARSACK J.A. :

I have had the advantage of reading the judgment prepared by Richmond J.A. I fully agree with that judgment and with the reasoning upon which it is based, and have nothing to add.

GOULD V.P. :

B I have had the advantage of reading the judgment of Richmond J.A. in this difficult case and am in full agreement with his reasoning and conclusions. I propose to add only a brief word.

C The crux of the matter is that the parties have chosen so to word their contract that there is no automatic right of re-entry on breach of condition. The exercise of the right to rescind has been made a condition precedent to entitlement to possession and it is a meaningful right. What then, was the position in relation to the Real Property Limitation Acts of 1833 and 1874 (Imperial) immediately after the breach of the condition for prompt payment of instalments? Section 3 of the 1833 Act contains the words, "and when the person claiming shall have become entitled by reason of any breach of condition . . .". The breach of condition must therefore be such as to entitle the claimant to the possession of the land. In the present case it did not have that effect; it entitled the appellant only to rescind, if he thought fit, whereupon he would acquire the right to possession. But I think he would acquire that right either in his capacity as owner of the land untrammelled by any contract, or pursuant to terms of the contract which came into effect upon and therefore survived rescission. At no time prior to the determination of the contract could the vendor have claimed possession of the land by reason of a breach of condition.

E Even if it could be said that, by reason of the rescission, the prior breach of condition had expanded into something which entitled the appellant to possession, I would not think that the words of section 3, "deemed to have first accrued when such condition was broken", could be called in aid to antedate that effect to the date of the original breach. It is true that in *Barrett v. Richardson and Cresswell* [1930] 1 K.B. 686, Lord Wright said — "The words 'first accrued' in my opinion, are merely inserted to show the absolute identity in time between the right relied on as justifying the forfeiture and the commencement of the statutory period." In my judgment, however, the "right relied on" must be an effective right entitling the claimant to immediate possession, and the word "deemed" in the section, can never have been intended, by some sort of retroactive effect, to convert an inchoate or imperfect right into a complete or perfect one.

G I should perhaps add that in my consideration of the matter in issue I have been mindful of the principle that, in a question of limitation, the merits of the parties are not relevant.

H All members of the Court being of the same opinion, the appeal is allowed with the consequences proposed in the judgment of Richmond J.A. We would add that in arriving at our conclusion we have been greatly assisted by the careful and painstaking judgment of the learned judge in the Supreme Court, before whom the issue of limitation was not comprehensively argued.

Appeal allowed.