**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN COMMON LAW**

**SUIT NO. D 093 OF 1993**

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| **BETWEEN** | **DENNIS ARMINE DALEY** | **PLAINTIFF** |
| **A N D** | **OLIVE LYSTRA JAMES McKENZIE** | **DEFENDANT** |

**Colin Henry for the Plaintiff**

**Dr. Lloyd Barnett and Miss Leila Parker for the defendant**

**Heard on the 9th day of October 1995, 12th June 1st and 2nd July 1996, 13th, 15th, 16th and 21st days of October 1997, the 26th day of March 1999.**

**COURTENAY ORR J.**

THE BACKGROUND

It is common ground between the parties that by a written agreement dated March 20, 1992, the plaintiff entered into two contracts with the defendant to purchase land and chattels respectively, at Hopewell in the parish of Saint Andrew. The said land is comprised in volume 1046 Folio 122 of the Register Book of Titles and consists of some 45 acres.

Prior to the agreement the defendant/vendor had operated a farm on the land. She had cultivated coffee and reared turkeys and pigs.

The price of the land was $1,500,000.00 and of the chattels $1,000,000.00. By the agreement the plaintiff was required to pay a deposit of 15% per centum of the sale price of the land and if the chattels. This made a total of $375,000.00. He paid the deposit and was let into possession.

The agreement was made subject to the plaintiff obtaining a letter of commitment for a mortgage loan of two million dollars $2,000,000.00 from a reputable money-lending organization within sixty

days. The plaintiff failed to obtain the letter of commitment within the said period, and hence the contract could not be performed .

The chattels which were the subject of the agreement were 4 large turkey pens, 1 large duck pen, 1 biogas plant, 1 processing plant inclusive of 2 cold rooms and equipment attached thereto, and a large feed storeroom.

The plaintiff remained in occupation until sometime in 1993. The parties differ on the pleadings as to when he gave up possession. He asserts that he did so on 13th March 1993, the defendant pleaded that she did not recover possession until April 1993; but in evidence, both in examination-in-chief and in cross examination she said that she recovered possession in March.

The other point of difference in this area is that the plaintiff denies the defendant's assertion that he remained on the property despite repeated requests for him to leave.

THE ISSUES AS PLEADED BY THE PLAINTIFF

The plaintiff pleads that on 11th March 1993, the defendant and/or her agents told the plaintiff to vacate the premises and broke and entered a cold room thereon. The following day they removed without his authority 2400 lbs of turkey meat belonging to the plaintiff and worth $126,000.00.

In his prayer he seeks the following remedies:

> "1. A declaration that the said contracts have been rescinded.
>
> 2. Return of the deposit of $375,000.00.
>
> 3. Payment of the sum of $126,000.00, being the value of the Plaintiff's turkey meat removed by the Defendant and converted to her own use.

4. Interest on the sum of $375,000.00 at the rate of 20% per annum from April 23 1993, until repaid by the Defendant.

5. Interest on the sum of $126,000.00 at the rate of 20% per annum from March 12, 1993 until payment

6. Damages."

THE DEFENCE AND COUNTERCLAIM

(1) The defendant alleges that the plaintiff removed and/or destroyed several items as a result of which the defendant has been unable to rent or operate the farm, and claims damages in conversion and/or detinue of $435,000.00 for the items removed.

(3) The defendant also claims loss of income is alternatively, compensation for wrongful occupation and use of her property by the defendant.

(2) Further the defendant asserts that she lawfully retained the deposit of $375,000.00 and in the alternative claims to set off the deposit against the sum claimed by the plaintiff.

THE EVIDENCE ON BEHALF OF THE PLAINTIFF

The plaintiff gave evidence as follows:

He was not told to leave the premises but sometime in November 1992, he received a letter requesting him to complete the sale. There was no "direct arrangement" for him to pay rent during the occupation of the premises, but it was agreed that the defendant could keep the interest from the deposit and if the contract failed the interest could be used to offset the rent.

His attorney had requested the return of the deposit - by letter dated April 1993 - but it had not been recovered.

He saw various types of equipment and farming tools and doors on a building on the premises, but he had not removed them, save some insulation and metal panels which he valued at $30,000.00, from an abandoned cold room. He had by letter dated September 1993, offered to return them.

Some of the items which the defendant claimed as missing had not been seen by him on the premises, others which he had seen were in much smaller quantities than alleged by the defendant. When he went into occupation he saw two abandoned cold rooms. He put one in working order, and stored plucked turkeys in it. Each turkey weighed an average of 20lbs and fetched a price of $52.50 per lb at that time. He reared pigs and planted coffee on the land. He was not in Jamaica when the turkey meat was alleged removed from the cold room, and authorized no one to do so.

Carlton Wigg, the plaintiff's caretaker spoke of the removal of meat from the cold room in this way. On a Thursday in the middle of March the defendant's husband, Albert McKenzie accompanied by two policeman came to the farm at about noon. He McKenzie, hit off the lock which was then on the cold room and replaced it with another one, and told him to vacate the premises. He then apparently left.

At about 12:30 p.m. Tenny James, the son of the defendant and step son of Albert McKenzie came there. He deposited 60 boxes, not yet assembled nearby.

Shortly thereafter, Lincoln Daley, the plaintiff's brother arrived. He broke off the lock placed on the door by Mr. McKenzie and removed pork

from the cold room, and closed the door without locking it. Wigg and another employee "Red Man" watched the cold room that night. Later the same night Lincoln Daley returned and took away live pigs, leaving only two big ones.

On the following day, Friday, Tenny James came back with a pick up, assembled the boxes and loaded in the van 2 turkeys in each of the 60 boxes. He also took 10 other turkeys which were not in boxes, and drove away.

Later Lincoln Daley came with two vans and removed turkey meat from the cold room. He, Wigg, left the premises on the Saturday, at that time the two remaining big pigs were removed.

He did not know how many pigs were there; nor could he say how many turkeys, or pigs Lincoln Daley removed. When he left on the Saturday nothing were left in the cold room.

He did not remove or see anyone remove any of the items and equipment claimed by the defendant. Nor did he see any insulation material removed from the cold room.

Lincoln Daley, supported the evidence of Wigg, in that he had seen carton boxes on the farm when he went there on the Thursday, and that he removed pork and live pigs that day after breaking off the lock on the cold room. Later he removed turkey meat. He did not move, tell anyone to move or see anyone move the various items which the defendant says are missing. On his visits to the farm that weekend, Wigg was the only person he say.

**THE EVIDENCE ON BEHALF OF THE DEFENCE**

The plaintiff had agreed that she could pay the deposit into Century National Bank as the Bank was "riding me for the money." When she gave possession to the plaintiff various tools and equipment were on the premises, including two cold rooms which were in working order.

She received no money for use and occupation of the premises, nor any interest on the outstanding balance of the purchase price. She had not demanded any interest from the plaintiff while he was in occupation. She estimated the rental of the property at that period to be $60,000.00 per month.

Albert McKenzie the defendant's husband was present when the plaintiff paid the deposit. He and the plaintiff told the bank's legal advisor that he would pay the interest on the defendant's loan with the bank. This was the basis for giving the plaintiff an extension of time within which to complete the payment. He has not paid any such monies Mr. McKenzie took possession of the property on behalf of the defendant. He was accompanied by two policemen from the Gordon Town Police Station.

He removed the plaintiff's lock from the cold room and substituted another lock. There were turkeys and pork in the cold room. He told the plaintiff's supervisor that if anyone wished something from the cold room he could contact the defendant at 5 Mona Plaza. Tenny James is Mr. McKenzie's step son, but at that time they were not on good terms.

Later he returned to the premises upon receiving certain information. On his second visit at about 8 - 8:30 p.m. the same night, he looked around asked questions and left. He saw the plaintiff's agents there on this occasion also. He did not know when the plaintiff's agents and workmen left.

He found many items missing, the value of which was $435,000.00 at the time of giving evidence. One of the cold rooms was dismantled and the insulation removed.

**SUBMISSIONS ON BEHALF OF THE PLAINTIFF**

No evidence was led to prove notice to complete was given. The only document included in the list of documents is the agreement for sale. So the defendant is bound by that omission and there is no evidence of that matter.

Oral modifications of the written agreement must be disregarded. The plaintiff's evidence that turkey meat was left in the cold room was not contradicted, and the plaintiff's case is that it was removed by Tenny James.

The assertion that the plaintiff reaped coffee is disputed.

The agreement for sale contain contradictory provisions concerning what should happen to any interest on the deposit. Hence the agreement must be construed contra proferentem the defendant who obtained the services of the Attorney who drafted the agreement.

There were no particulars of loss of income - which does not include salary, rents and profits; so the defendant has no claim to rents and profits.

As regards the defendant's counter claim for "compensation for wrongful occupation and use of her property by the plaintiff", the use was not wrongful because there was an agreement, and a purchaser in possession is not liable for use and occupation, especially as in the instant case, termination of his occupancy and expiry of the contract for sale were coextensive.

Some step had to be taken to rescind the contract. That step taken by Attorney Gloria Thompson in letter. So contract come to an end one month after letter, that is 17th March 1993. Thus until that date the plaintiff was in possession as purchaser and therefore the defendant is not entitled to payment for use and occupation.

Re compensation for loss of Equipment: Plaintiff admits dismantling cold room to a value of $30,000.00 only; so that would be the extent of any set off by defendant.

No evidence to prove that if equipment missing plaintiff took it. No evidence when defendant discovered items missing.

The Court should believe the plaintiff's witness that Tenny James removed turkey meat. He was clothed with authority, as the evidence is he helps his mother.

There is no claim by the defendant for the unpaid balance of the purchase price.

The case of Hoilett v Clarke (20 JLR 81) is distinguishable from the instant case.

The Headnote summarises the issue involved:

> "The plaintiffs/appellants were tennants of the defendant/respondent in respect of a property known as 17 Duhaney Drive, St. Andrew. By an agreement dated the 25th February, 1971, the defendant/respondent agreed to sell the property to the plaintiffs/ appellants 'as purchasers already in

possession as tennants of the vendor' for a consideration of !14,600.00 on the following terms of payment: "Deposit of $200 on signing hereof; further deposit of $6,000.00 on or before the 15th April 1971; balance on completion". The date fixed for the completion was 30th April, 1971. The agreement also contained a special condition that "the sale shall be subject to the purchasers raising a mortgage of $6,800.00 to enale them to complete."

The plaintiffs/appellants paid the deposit of $200 on signing the agreement on the 25th February 1971, but then paid haphazardly as follows: $3,000.00 on 5th May 1971, $1,500 on the 10th August 1971, and thereafter ceased making further payments. There was neither express stipulation in the agreement as to payment of interest on the agreed sum nor as to payment of further rent on the property.

As a result of delays (but repeated assuarances) on the part of the plaintiffs/appellants to complete the agreement, several correspondence were exchanged between the parties and repeated concessions allowed by the defendant/respondent. Then the defendant/respondent treated the contract as abortive and offered to refund the sum of the further payment of $4,500 less the sum of $2,000 claimed for rent on the premises for the period June 1971 to January 1973, at the rate of $100.00 per month as hitherto being paid by the plaintiffs/appellant as tenants before the abortive sale.

The plaintiffs/appellants objected to the termination of the contract of sale as well as the claim of the defendant/respondent for rent in lieu of completion. The plaintiffs/appellants sued (at the lower court) for several reliefs including an order of specific perofrmance of the agreement for sale; an injunction restraining the defendant/respondent (as vendor) from selling or otherwise dealing with the property; a claim for damages for breach of contract. The learned trial judge gave judgement for the defendant, inter alia, in the sum of $6,300.00 as follows: $3,900 for rent and $2,400.00 for use and occupation, with interest at 10% on the outstanding balance of $1,800 up to the date of the judgemenht. He also ordered possession. He further held that the whole of the amount in the defendants (vendor's) hand paid by the plaintiffs (purchasers) as deposits has been forfeited to the defendant (vendor) as a result of non-completion of the contract of sale by the plaintiffs.

The plaintiffs/appellants then appealed to the Court of Appeal. They contended both in this appeal and (as in the court below) that the contract of sale was void for uncertainty and so the amounts of $200.00 and $4,500 (but more especially the amount of $4,500.00) should be refunded to them, and finally that the signing of the agreement of sale as 'purchasers already in possession as tenants of the vendor' terminated the landlord/tenant relationship hitherto existing between the parties, and that the appropriation of the sum of $4,500 in reduction of the rent was wrong. The defendant/respondent through his counsel on the other hand, submitted that he was entitled to revoke the agreement on the ground of the inordinate delays by the plaintiffs/appellants to complete the contract of sale.

**Held**: (i) Where the party seeking an order of specific performance of a contract of sale of property is found to have displayed attitudes amounting to inordinate delays resulting in the avoidance of non-completion of the contract, such an application for specific performance will be refused by the court. In the present case, the delay of three years exhibited by the plaintiffs/appellants amount to such inordinate delay.

(ii) In a contract of sale of property which contract was discharged for non-completion where there was stipulation for initial payments of sums of money as deposit and other payments in installments, the question whether or not such deposit shall be forfeited and what amounts to such deposit will depend on the interpretation of the whole of the agreement of sale and the conduct of the parties. In the instant case, only the sum of $200 paid as "deposit" may be forfeited.

(iii) The appropriate test employed by the courts to ascertain whether or not a particular part-payment in a contract of sale amounts to a "deposit" is by ascertaining the proportion of the part-payment in relation to what damage the vendor is likely to suffer by reason of the purchaser's breach of contract. In the case herein, the sum of $4,500 is wholly disproportionate as a deposit to the purchase money.

(iv) The general rule in a contract of sale of property in which the purchaser was already in possession as tenant prior to the date of the agreement is that pending completion the tenancy continues.

(v) For the general rule to be dispensed with, there must be clear indications in the contract of sale

> which outweigh the operation of the ordinary (general) rule. Such indications may include a clause in the agreement suspending further payment of rent or a clause for charging interest on the agreed purchase money from a statd date until completion." (emphasis mine)

Here the parties were strangers prior to agreement for sale. In the instant case bye agreement for sale the vendor has surrendered his rights in the real property and income it may generate for the right to receive money. He can no longer lay claim to rent, unless there is a specific agreement, to mesne profits or use and occupation, for all these have been surrendered.

But the defenfendant has a claim to the purchase price pursuant to the agreement, and interest. She can claim (a) for the bargain - money or (b) income from that money i.e. interest.

## THE SUBMISSIONS ON BEHALF OF THE DEFENDANT

Miss Parker submitted as follows: The contract for sale was subject to the plaintiff obtaining a mortgage. The plaintiff received a well cultivated farm and equipment. He paid nothing for use and occupation.

A Notice to complete was issued in November 1992. The plaintiff was absent when his workers left so he could not vouch for what was taken from the property.

The plaintiff admits that when the agreement was made he was told the money was needed speedily for Century National Bank.

The consideration for his paying interest is that he was let into possession before conditions completed.

The plaintiff should be held liable for rent or alternatively interest on the unpaid balance of the purchase price.

There is no dispute that all the plaintiff's rights and obligations regarding the property came to an end: that he remained till evicted, used all equipment reared turkeys, sold meat.

The agreement provided that the deposit be used by the vendor to stamp the agreement for sale and transfer documents, and the cost would be 80%. The case of Hoilett v Clarke supports the defendant's position. If

stamping took place the interest would be miniscule and could not pay the rent.

**Further submissions by Dr. Barnett for the Defendant**

The essential principle is one of equitable compensation for the loss suffered and that may be represented in a case in which the balance of the purhase price is a relevant factor, by interest on that balance during the period of delay in payment; or where payment of the purchase price is no longer relevant because the agreement no longer subsists, it would be more appropriate to give compensation for use and occupation of the property. It would be unjust for plaintiff to escape without making payment. See Sale v Allen 24 JLR 238.

There was a duty on plaintiff as regards chattels, farm equipment and auxillary articles which he received on the giving of possession, to return them in the condition in which he received them or to account for them. The burden of proof on this issue lies on the plaintiff. Morris v Martin & Sons [1965] 3 WLR 276, British Road Services v Crutchley [1968] 1 All ER 811, Port Swettenham Authority v TW. WV AND Co. (M) SDN. BHD [1978] 3 WLR 530. That burden has not been discharged.

Mr. Henry in Reply

The case of Sale v Allen is distinguishable. Here no claim for interest has been asserted. The Defendant had prevented plaintiff from making a safe orderly return of chattels by summary eviction so she cannot claim that plantiff failed to make such a return.

The defendant denies removing turkey meat, but she appropriated it when the lock on the door was changed.

**THE COURT'S ANALYSIS AND CONCLUSION**

I shall deal firstly with the claims for relief made by the plaintiff.

(1) "A Declaration that the said contracts have been rescinded."

The written agreement contained the following clause:

> "The purchaser must inform the Attorney-at-Law having the carriage of sale by way of a Letter of Commitment whether or not the mortgage loan is granted by the financial institution within forty days of the signing of the Sale Agreement between the Vendor and the Purchaser and if the Purchaser fails

> so to do within the stipulated period then the Vendor has the right to refund the deposit which has been paid and the contractual agreement is at on end and the Vendor thereafter will have the right to enter into any contractual arrangement with any other interested person who desires to purchase the holding."

The defendant served notice to quit on the plaintiff as a result of the plaintiff's failure to obtain a mortgage. In the circumstances I find that the contracts have been rescinded.

(2) THE RETURN OF THE DEPOSIT

The plaintiff argues that he is entitled to a refund of the deposit of $375,000.00 on the basis that it exceeds 10% of the purchase price and therefore is not a true deposit but a penalty as laid down in the case of Workers Trust and Merchant Bank Ltd v Dojap Investments Ltd [1993] 2 All ER 370 an appeal from Jamaica. The facts in this case are usefully summarized in [1993] All ER Annual Review pages 125 - 126:

> "The appellant bank acting as a mortgagee sold certain premises in Jamaica at auction to the respondent for $11,500,000.00. Clause 4 of the contract provided for payment of the deposit of 25% and a deposit of $2,875,000.00 was duly paid. The contract required the balance to be paid within 14 days of the date of the auction. For various reasons which do not require to be gone into in detail, the purchaser did not pay the balance on the 14th day though it tendered the full sum of the 21st day. The appellant claimed to be entitled to keep the whole deposit."

The latter portion of the headnote in the full report states succintly the ruling of the Privy Council at p. 370-371.

> "Held - A deposit by the purchaser on a contract for the sale of land showed that the purchaser was in earnest in performing the contract and, as such forfeiture of the deposit in the event of failure to complete the sale did not fall within the general rule that a penalty payable in the event of a breach of contract was unlawful unless the provision for the payment or forfeiture of a sum of money in the event of breach was a genuine preestimate of the loss which the innocent party would incur by reason of the breach. Accordingly a deposit could be validly forfeited even though the amount of the deposit bare no reference to the anticipated loss to

> the vendor flowing from the breach of contract. However, the amount of deposit had to be reasonable and, having regard to usage which had established over a long period that the customary deposit was 10% of the contract price, a vendor who sought to obtain a larger amount than 10% by way of forfeitable deposit had to show special circumstances which justified such a deposit otherwise the deposit would be held to be a penalty intended to act in terrorem. Since the 25% deposit required by the bank was not a true deposit by way of earnest, the provision for its forfeiture was plainly a penalty and had to be repaid. Moreover since the bank could not establish that the whole sum was truly a deposit, it had not contracted for a true deposit at all and therefore the deposit had to be repaid in full to the respondent which was also entitled to interest at 12% p.a from the date of rescission until the date of actual payment."

In the light of this decision prima facie the plaintiff is entitled to a refund of the "deposit" as it exceeds 10% of the purchase price and the defendant has not shown special circumstances which justified such deposit. I therefore hold that the sum paid $375,000.00 is a penalty and the full sum should be returned to the plaintiff with interest.

VALUE OF TURKEY MEAT ALLEGEDLY REMOVED

FROM THE COLD ROOM

I accept the evidence that Tenny James took the quantity of meat alleged from the cold room. The witness a man of abviously humble circumstances gave convincing details as to how the operation was carried out, and how the boxes were stacked in the van. The defendant admitted that Tenny James "does things for me when he is here." So the plaintiff succeeds on this issue but he also succeeds for another reason. At no times did she assert that she had not given him authority to remove the turkey meat.

Further in the pleadings the averment regarding the removal of turkey meat was never specifically traversed neither by denial or refusal to admit. True the defence contains the usual sweeping general denial.

> "Save as is herein before expressly admitted, the Defendant denies each and every allegation in the Statement of Claim appearing."

This practice should not be adopted in dealing with essential allegations. Such should be traversed specifically - see dictum of Lord Denning MR in Walterstein v Moir [1974] 1 WLR 991 at 1002, Byrd v Nunn (1877) 5 ch D 781 affirmed 7 ch D 284.

See 180. of the Civil Procedure Code provides:

Denial to be specific

> "It shall not be sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply, to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages."

Nor does the defendant's pleading attain the limited strength of the irregular pleading accepted in Grocott v Lovatt and Another WN Aug 5.

1916, P317.

In that case there was an action for libel. Paragraph 3 of the statement of claim alleged that "on or about May 25, 1916, the defendants falsely and maliciously wrote, printed and published" of the plaintiff a handbill containing the words complained of, Paragraph 1 of the defence was as follows:

> "The defendants deny the facts alleged in paragraph 3 of the statement of claim".

At the trial Avory J held that paragraph 1 of the defence (supra) was not denial of the publication of the handbill.

On appeal the Court (Swinifen Eady, Phillimore and Bankes LJJ) ordered a new trial holding that although the defence was pleaded in a loose and irregular form, Avory J was wrong in treating the case as one in which the defendants had admitted publication.

In the instant case at no time was there an application to amend the defence to meet this new allegation in the amended Statement of Claim. I therefore hold that the allegation has been admitted, and find for the plaintiff on this issue. I accept the plaintiff's valuation of the meat and hold that the defendant is therefore indebted in the sum of $126,000.00 for the meat.

(3) THE CLAIMS FOR INTEREST

The plaintiff claims interest of 20% on the deposit and also on the meat converted by the defendant. The only evidence on this point is the plaintiffs assertion under cross-examination: "On normal Certificate of Deposit I think it would attract about 35% at that time (1992);" and in his closing submissions Mr. Henry suggested the court use the money lending Act as a litmus test and award interest at 20%. I regard this as insufficient evidence and shall award interest of 12% as in Dojap's case (supra) on the deposit. The same rate shall apply to the value of the turkey meat.

**THE RELIEF CLAIMED BY THE DEFENDANT**

(1) Detinue and/or conversion by the plaintiff of articles and equipment.

The plaintiff was a bailee of the cold room and the four equipment. The onus is on him to show that these items were not lost due to his negligence. He has not discharged that burden. Indeed he has admitted to removing a part of one cold room - the insulation on which he places a value of $30,000.00. He has offered no good reason for so doing.

I reject his evidence that on taking possession he saw two abandoned cold rooms. I accept the defendant's evidence that both of them were in working order, and that after the plaintiff left they were both damaged the insulation having been removed. Regretably the defendant gave no evidence of the cost of these items so I will use the plaintiff's valuation of $30,000.00 and award her a total of $60.000.00 for damage to the two cold rooms.

I accept that the items of farm equipment were missing and the values attributed to them by the defendant's witness. The total value of these items is $335,000.00. Hence for the cold rooms dismantled and the farm equipment I award the defendant $395,000.00.

(2) Loss of Income or Alternatively Compensation for the wrongful occupation and use of the defendant's Property by the Plaintiff.

Dr. Barnett cited the case of Hoilett v Clarke (supra) as authority for recovery of compensation in this case. But I agree with Mr. Henry that the circumstances in that case had an important difference from the instant

case, in that there the parties had an antecedent relationship of landlord and tenant. So I agree with Mr. Henry that Hoilett v Clarke is unhelpful.

But is Mr. Henry's submission that the defendant is not entitled to compensation or rents and profits a sound one?

He argued that the plaintiff was in possession as purchaser from March 1992 to March 1993; the later date being when the contract came to an end. Because the plaintiff was in possession as purchaser the defendant is not entitled to payment for use and occupation, but could sue for the balance of the purchase price and interest. He cited the New Zealand case of Chambers v Simpson (supra.)

The headnote reads as follows:

> "Where a purchaser is in possession of a property under a contract of sale and purchase which is still in force he is not liable for use and occupation of the property for the period during which he has been in possession as purchaser." (emphasis supplied)

Now Mr. Henry has asked the Court to declare the contract rescinded. The court has agreed. Therefore the contract is no longer in force and the principle of *restitutio in* integrum applies.

More opposite to the instant case are the following three decisions: Firstly, Hayes v Ross (No 3) [1919] NZLR 786.

The headnote reads as follows:

> Plaintiff, who had let defendant into possession of land under an agreement for sale and purchase, sued for rescission of the contrat on the ground of the failure of a substantial part of the consideration. Plaintiff also claimed for defendant's use and occupation of the property, for its deterioration through his acts and omissions, and for the amount of commission paid to the agent who negotiated the sale. Judgment having been given for rescission of the agreement and a *restitutio ad integrum,*
> *Held*, 1. That the principle that where a party who has obtained some benefit from a contract seeks to rescind that contract with the aid of a Court of Equity he must give up the benefit and make *restitutio ad integrum* a reality is necessarily reciprocal. The party who has done the wrong or is in default cannot be in a better position than the one who has suffered, and therefore plaintiff was

entitled to recover the value of the depreciation.

Erlanger v. New Sombrero Phosphate Co. (1) and Stanley Stamp Co. v. Brodie(2) applied

2. That plaintiff was entitled to compensation in the nature of rent for the period of defendant's occupation.

King v King(3) applied

Walker v. Creaven(4) distinguished.

3. That the relief granted to plaintiff must be limited to the liabilities imposed by or arising under the contract, and that the claim for commission, being a claim for damages suffered in a matter antecedent and therefore collateral to the contractual obligation, must be rejected.

*Newbigging v. Adam(5)* applied.

Secondly Martin v Finch [1923] NZLR 570: There the headnote reads:

Plaintiff as vendor, and defendant as purchaser, entered into an agreement for the sale and purchase of certain land. Plaintiff received money. Defendant made such default under his contract as precluded him from demanding the transfer of the estate. He alone was responsible for the purchase not being completed. Plaintiff rescinded the agreement, and there was no resale. It was admitted that the sum of L150 would have to be paid back. The vital words used in the contract respecting the L100 were "as a deposit of and in part-payment of the purchase-money." The defendant went into the possession of the property shortly after the making of the contract, and he or his tenants continued in occupation up to the date of judgment.

*Held*, 1. That the defendant had forfeited the amount of the deposit and the plaintiff was entitled to retain it.

2. That the plaintiff was entitled to be restored to her position and should get compensation in the nature of rent computed for the period during which defendant had been in occupation of the property.

*Howe v Smith(1), Re Parnell, Ex parte Barrell(2), and Hayes v Ross(3)* applied.

*Ockenden v Henly(4)* distinguished

Thirdly Howard v Shaw 8M & W 118. The headnotes is a follows:

"Where a party is let into possession of land under a contract of purchase, which afterwards

> goes off, he is liable to an action for use and occupation at the suit of the vendor, for the period during which he continues in possession after the contract went off.

On the principle enunciated in these cases the defendant is entitled to compensation for use and occupation of the farm during the plaintiff's possession. She gave evidence that it could fetch a rental of $60,000.00 per month. This was not challenged and I accept it. He was in possession for twelve months. This would produce a rental of $720,000.00. I award the defendant this sum.

On the claim, I grant a declaration that the contract is rescinded. I adjudge the defendant to pay the plaintiff $510,000.00 being the refund of the deposit of $375,000.00 with interest of 12% from 12th March 1992, and $126,000.00 for meat converted, with interest of 12% from 12th March 1993 with costs to be taxed if not agreed.

On the counterclaim I give judgment for the defendant in the sum of $1,115,000.00 with costs to be taxed if not agreed.