Privy Council Appeal No. 1 of 1972

Lakshmijit s/o Bhai Suchit – – – – – – – *Appellant*

v.

Faiz Mohammed Khan Sherani – – – – – – *Respondent*
(as Administrator of the Estate of Shahbaz Khan deceased)

FROM

THE FIJI COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND MAY 1973

Present at the Hearing:
LORD DIPLOCK
VISCOUNT DILHORNE
LORD CROSS OF CHELSEA

[*Majority Judgment delivered by* LORD CROSS OF CHELSEA]

This is an appeal by Lakshmijit s/o Bhai Suchit from a judgment of the Fiji Court of Appeal dated 15th July 1971 by which that Court allowed an appeal by the respondent Faiz Mohammed Khan Sherani from an order of the Supreme Court of Fiji made on 5th November 1970 and granted him possession of the lands comprised in the two agreements for sale hereinafter mentioned.

The first agreement was made on 16th February 1948 between Shahbaz Khan (who is now dead and of whose estate the respondent is the administrator) therein called " the vendor " of the one part and Ujagir s/o Raj Kumar and the appellant therein called " the purchasers " of the other part. Clauses 1 to 5 were in the following terms:

" 1. The vendor will sell to the purchasers who will purchase the freehold estate and interest of the vendor in all that piece of land situate in the District of Rewa in the Island of Vitilevu containing 72 (seventy-two) acres more or less subject to survey as hereinafter provided known as " Navitoka " (part of) being part of the land comprised and described in the Certificate of Title No. 7064 which said piece of land is approximately delineated in the plan endorsed hereon and therein edged red at and for the price of £80.0.0 (Eighty pounds) per acre which shall be paid and satisfied by the purchasers in the manner following:—

(*a*) By payment of the sum of £120.0.0 as a deposit and in part payment of the said purchase price as follows:—

(i) the sum of £50.0.0 was on the 10th day of February 1948 paid to the vendor on account of the said deposit (the receipt whereof the vendor hereby acknowledges) and

(ii) the further sum of £70.0.0 the balance of the said deposit shall be paid to the vendor not later than the 6th day of April 1948

(*b*) The balance of the said purchase price estimated (subject to survey as aforesaid) to be £5640.0.0 shall be paid by quarterly instalments of £30.0.0 each on the first day of each of the months of August November February and May in each year hereafter until the whole of the said purchase price shall have been paid in full the first such instalment falling due on the 1st day of August 1948.

2. If the purchasers shall make default in the payment on the due date thereof of any instalment of purchase money as aforesaid and if such default shall continue for more than seven (7) days the vendor shall (without prejudice to any of his other rights powers and remedies hereunder) be entitled to charge receive and recover from the purchasers interest at the rate of £5.0.0 per centum per annum calculated upon the whole balance of the said estimated purchase price then remaining unpaid and computed from the due date of such instalment until the date of payment thereof such interest being payable as a first deduction from all moneys next paid to the vendor hereunder until all interest accrued due as aforesaid shall have been paid.

3. The purchasers shall be at liberty on any of the days hereinbefore appointed for the payment of purchase moneys without notice to pay off the whole or any part of the said balance purchase moneys then remaining owing hereunder Provided however that any payments made under this Clause shall not affect the continuity of the payments provided for in Clause 1 (*b*) hereof.

4. Possession of the property hereby agreed to be sold shall be deemed to have been given and taken on the 1st day of February 1948 as from which date the said property shall be held at the sole risk of the purchasers.

5. Upon payment in accordance with the terms of this Agreement of the whole of the said purchase price and all interest and other moneys (if any) payable hereunder the vendor and all other necessary parties (if any) will execute a proper transfer or other assurance of the said land to the purchasers or their nominee free from all encumbrances such transfer or assurance to be prepared by the purchasers at the cost in all things (including the vendor's solicitor's perusal fee) of the purchasers and to be tendered to the vendor for execution."

The agreement contained a number of clauses which imposed obligations on the purchasers in relation to the land contracted to be sold so long as any monies should remain owing to the vendor under the agreement—*e.g.* clause 7 to pay rates, taxes and other outgoings, clause 8 to farm the land in a husbandlike manner and clause 15 not to charge or assign their equitable interest under the agreement or part with their possession of the land without the previous written consent of the vendor. Clause 20 was in the following terms:

" 20. If at any time two of the aforesaid quarterly instalments of purchase money shall be in arrear and unpaid for more than seven (7) days after the due date of the second of such overdue instalments or if the purchasers shall make default in the performance or observance of any other stipulation or agreement on the part of the purchasers herein contained and if such default shall continue for

the space of twenty-one days then and 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:—

(*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

(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 price on re-sale after deduction of expenses shall belong to the vendor."

The second agreement was made on 23rd August 1948 between the same parties and related to a piece of land adjoining that comprised in the first agreement. Clauses 1 and 2 were in the following terms:

" 1. The vendor will sell to the purchasers who will purchase the freehold estate and interest of the vendor in all that piece of land situate in the District of Rewa in the Island of Vitilevu containing 138½ (one hundred and thirty-eight and a half) acres more of [sic] less subject to survey as hereinafter provided known as " Navitoka " (part of) being part of the land comprised and described in Certificate of Title No. 7319 which said piece of land is approximately delineated in the plan endorsed hereon and therein edged red at and for the price of £50.0.0 (Fifty pounds) per acre which shall be paid and satisfied by the purchasers in the manner following:

(*a*) By payment of the sum of £173.0.0 as a deposit and in part payment of the said purchase price as follows:

(i) the sum of £17.5.0 upon the execution hereof (the receipt whereof the vendor hereby acknowledges)

(ii) the sum of £51.15.0 by three payments of £17.5.0 each on the last days of November 1948, February 1949 and May 1949 and

(iii) the further sum of £104.0.0 by four payments of £26.0.0 each on the last days of August and November 1949 and February and May 1950.

(*b*) The balance of the said purchase price estimated (subject to survey as aforesaid) to be £6752.0.0 shall be paid by equal quarterly instalments of £32.0.0 each on the last day of each of the months of August November February and May in each year until the whole of the said purchase price shall be paid in full the first such instalment falling due on the 31st day of August 1950.

2. If the purchasers shall make default in the payment on the due date thereof of any instalment of purchase money as aforesaid the vendor shall (without prejudice to any of his other rights powers

and remedies hereunder) be entitled to charge receive and recover from the purchasers interest at the rate of £2.10.0 per centum per annum calculated upon the amount of every such instalment so overdue and computed from the due date of such instalment until the date of payment thereof such interest being payable as a first deduction from all moneys next paid to the vendor hereunder until all interest accrued due as aforesaid shall have been paid."

Clauses 3 and 6 were in similar terms to clauses 3 and 5 of the earlier agreement and clause 4 provided that possession should be given and taken on the date of the execution of the agreement. The agreement contained a number of other provisions substantially to the same effect as those contained in the earlier agreement and a clause (clause 22) which opened as follows—" If any of the aforesaid instalments of purchase money or any interest thereon as aforesaid shall be in arrear and unpaid for more than twenty-one (21) days after the due date thereof or " and then continued in the same terms as clause 20 of the earlier agreement.

On 24th September 1952 a deed was entered into between the appellant's father, the said Ujagir, the appellant, and his brothers Ranjit and Dhanjit (therein collectively called " the mortgagors ") of the one part and the said Shahbaz Khan (therein called " the mortgagee ") of the other part in which it was recited that the mortgagors were indebted to the mortgagee for purchase moneys, principal, further advances, interest and other monies under the several documents described in the schedule. The first two documents in the schedule were the two sale agreements and it was said that under the first agreement £5610 was owing for balance of purchase money and £293 odd for interest up to 31st December 1951 and under the second agreement £6907 odd for balance of purchase money and £12 odd for interest up to 31st December 1951. The schedule set out particulars of a number of mortgages and bills of sale made between the mortgagors or some one or more of them and the mortgagee. After reciting that the mortgagors had requested the mortgagee to allow further time for payment of the monies owing by them and that he had agreed to do so subject to the terms therein set out the deed provided—so far as necessary to be here stated—(1) by clause 1 that the mortgagors acknowledged that there were then owing by them to the mortgagee the monies stated in the schedule (2) by clause 7 (*a*) that the mortgagee would not for a period of one month after the date of execution thereof take any steps to enforce payment of any of the monies payable to him under any of the scheduled documents and (3) by clause 9 that nothing therein contained should prejudice or affect in any way the rights, powers or remedies of the mortgagee under any of the scheduled documents in respect of the default of the mortgagors or any of them save as provided by clause 7 (*a*).

On 28th July 1954 an agreement was entered into between Shahbaz Khan (therein called " the vendor ") of the one part and Ujagir and the appellant of the other part which was supplemental to the agreement for the sale dated 23rd August 1948 hereinbefore mentioned though by a mistake that date is given in the supplemental deed as 23rd October 1948. By that supplemental deed the vendor gave the purchasers power to subdivide part of the land comprised in that sale agreement into building sites and to sell such sites at the prices therein mentioned on condition that 80% of the proceeds of sale should be paid to the vendor to be applied by him in reduction of the monies owing to him under either of the two agreements for sale. Clause 5 of the supplemental deed was in the following terms:

" 5. Nothing expressed or implied in this agreement shall be deemed a waiver of nor in any way to prejudice the rights powers and remedies of the vendor under or by virtue of either of the

said Agreements in respect of any existing default by the purchasers thereunder which rights powers and remedies the vendor hereby expressly reserves."

The power of subdivision and sale given by the supplemental agreement was in fact never exercised.

On 17th September 1960 Shahbaz Khan addressed a notice to all the persons described as "mortgagors" in the deed of 24th September 1952 which stated (*inter alia*) that default had been made by the appellant and Ujagir in the payment of numerous instalments of purchase money due under the two agreements for sale dated 16th February 1948 and 23rd August 1948 and that in default of their paying within one month the moneys mentioned in the 1st and 2nd schedules Shahbaz Khan would proceed without further notice to exercise the rights, powers and remedies conferred on him by the said agreements for sale. The schedules stated as owing the whole outstanding balances of the purchase prices payable under the two agreements together with interest calculated in the case of the first agreement at 5% on the outstanding balance and in the case of the second agreement at $2\frac{1}{2}\%$ on the arrears of instalments calculated from the due date of each instalment. That demand not having been complied with Shahbaz Khan on 9th January 1964 addressed a second notice to the appellant and Ujagir in similar terms showing additional sums owing for interest up to date. Shahbaz Khan died on 29th May 1964 and on 5th January 1967 letters of administration with the will annexed to his estate were granted to the respondent. On 2nd March 1967 the respondent addressed a third notice to the appellant and Ujagir demanding payment of the monies due under the two sale agreements with interest up to the end of 1966. On the same day the respondent's solicitors wrote to them in the following terms:

"Messrs. Lakshmijit and Ujagir
Sawani,
Nausori.

Dear Sirs,

We refer to the Demand Notice served on you on 2nd March 1967. This is the third time such a Demand Notice has been served upon you.

Take Notice that unless you do pay up all the arrears of monies due by you within the time prescribed by the said Demand Notice dated 2nd March 1967 within thirty days from the said date your right and power under the Agreements for Sale and Purchase dated 16th February 1948 and 23rd August 1948 are hereby cancelled and rescinded and you are required to quit and give vacant possession of the land belonging to the Administrator of the Estate of Shahbaz Khan deceased now occupied by you or by anyone on your behalf.

TAKE NOTICE, that unless you either pay up the arrears, or quit and deliver vacant possession of the land now occupied by you at Navitoka being C.T.7064 (part of) an action for ejectment will be instituted.

TAKE FURTHER NOTICE that you are not to damage any fruit trees or fencing or any fixtures when vacating the premises in question.

Yours truly,
SHERANI & CO."

Ujagir died at about this time. In his Statement of Claim in the action the respondent alleged that the appellant was the administrator of his estate but this was not proved. As the appellant neither paid the monies

claimed nor gave up possession of the lands comprised in the sale agreements the respondent started this action against the appellant and the administrator of the Estate of Ujagir by writ dated 23rd October 1967. The original claim was for a declaration that the defendant's right to use the land had determined and for injunctions in support of such declaration but at the trial he was allowed, on 19th October 1970, to add a claim for possession of the lands covered by the two agreements. On 16th February 1968 the plaintiff discontinued his action against the estate of Ujagir and the action was dealt with thereafter as though the appellant had been the only purchaser. By his defence the appellant relied first on a letter purporting to have been written to him by Shahbaz Khan on 10th May 1961 by which he waived payment of the balance of principal and interest due under the sale agreements and secondly on the Statutes of Limitation.

By his judgment given on 5th November 1970 Grant J. stated that even assuming that the letter if genuine would have afforded the appellant a defence to the action he was not satisfied that it was a genuine document signed by Shahbaz Khan; but he held that on the facts the respondent's claim was statute barred under the Real Property Limitation Acts 1833 and 1874 which are the statutes applicable to Fiji.

Section 2 of the Act of 1833—which was repealed by the Act of 1874 but re-enacted by s. 1 of that Act with the substitution of a period of twelve years for that of twenty years—provided as follows:

> " II. And be it further enacted, that after the thirty-first day of December one thousand eight hundred and thirty-three no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action 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 twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

Section 3 opens as follows:

> " And be it further enacted, that 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 herein-after is mentioned; (that is to say) ".

There then follow five different sets of circumstances the first four of which are plainly inapplicable to this case and the last of which runs as follows:—

> " 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 ".

Section 34 of the Act of 1833 was in the following terms:

> " XXXIV. And be it further enacted, 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 within such period, shall be extinguished."

The judge found that the appellant had never made regular quarterly payments under either of the two agreements and had never signed any acknowledgment of the title of Shahbaz Khan to the lands comprised in

either agreement other than such as were implicit in his execution of the documents of 24th September 1952 and 28th July 1954. He further held that as soon as by reason of the default of the appellant in payment of instalments Shahbaz Khan became entitled if he chose to exercise the rights of rescission given to him by clauses 20 and 22 of the respective agreements rights of entry for breaches of condition within the meaning of s. 3 of the Act of 1833 accrued to him and that as more than twelve years had elapsed between any acknowledgment of his title and the issue of the writ the action was statute barred.

The respondent appealed to the Court of Appeal which on 15th July 1971 reversed the judgment of Grant J. and made an order for possession in the respondent's favour. The ground for this decision contained in the leading judgment of Richmond J.A. was—briefly stated—that the rights of entry given to the vendor by clauses 20 and 22 of the agreements were each subject to the condition precedent that he had rescinded the agreements in question and did not arise until the respondent's solicitor sent the appellant the letter dated 2nd March 1967.

Counsel for the appellant in his argument before the Board accepted that the vendor had no right to recover possession of the land agreed to be sold without electing to rescind the contracts but submitted that as he was at liberty to rescind them as soon as there was such default in payment of the instalments as was specified in clauses 20 and 22 his rights of entry accrued at that time. In support of his argument he relied on the cases of *Reeves v. Butcher* [1891] 2 Q.B. 509, *Harry Smith Ltd. v. Craig* (1938) S.C. 620 and the *Governors of Magdalen Hospital v. Knotts* (1878) 8 Ch.D 709.

Their Lordships are not prepared to accept these submissions. If one regards the terms of the sale agreements apart from the clauses in question the position of the parties would be as follows. The purchasers would be under an obligation to pay the purchase price by instalments spread over a long period with interest on monies unpaid as from the dates of any defaults. The vendor on his side would have a right to sue for any instalments which were not paid when they fell due and interest thereon for any period for which payment was delayed and would also acquire a lien on the land, which he held as constructive trustee for the purchaser, in respect of each unpaid instalment and the interest thereon (see *Nives v. Nives* (1880) 15 Ch.D. 649). Alternatively if the purchasers committed breaches of their obligations which amounted to a repudiation of the agreement—which a mere failure to pay a single instalment on the due date would not do—the vendor would be able if he so elected to accept the repudiation as rescinding the sale agreement and sue for damages for breach of contract and recovery of the possession of the land. An election by the vendor to exercise a remedy of rescission alters the rights and obligations of both parties to the sale agreement, since it puts an end to the purchaser's right to possession of the land and prevents any further instalment of the purchase price becoming due. For this reason the election must their Lordships think be communicated by the vendor to the purchaser if it is to give him a right to recover possession of the land. No particular form of communication is needed. It is sufficient if the vendor makes it unequivocably clear to the purchaser that he is treating the agreement as being at an end. (See *Car and Universal Finance Co. Ltd. v. Caldwell* [1965] I Q.B. 525) Clauses 20 and 22 of the two agreements which are expressed to be " without prejudice to his other rights and remedies hereunder " were plainly intended to give the vendor further special remedies over and above those to which he would be entitled under the general law. The choice of whether or not to exercise one or other of the special remedies and if so, which, lies with the vendor.

They are inconsistent with one another and also inconsistent with his rights under Clause 2 to charge interest on over-due instalments. If one is exercised, it puts an end to the sale agreement and to the purchaser's right to possession of the land. If the other is exercised, the sale agreement remains in force although on varied terms and the purchaser continues to be entitled to possession of the land. As in the case of the remedy of rescission at common law for breach of contract, the vendor, if he exercises his option in favour of rescission, must, in their Lordships' view, communicate that fact to the purchaser if he is to acquire a right to possession of the land. In the absence of such communication, the purchaser remains entitled to retain possession. If the appellant's argument is right the inclusion of these clauses drastically changed the position which would have obtained if they had not been there. In the first place the vendor on such default in payment by the purchasers as would entitle him to exercise one or other of his special remedies would automatically acquire a right of action against them for the whole outstanding purchase price which would be barred after six years and a lien on the land sold for that sum which would be barred after twelve years, and would also acquire a right of entry on the land which if unexercised would lead to his title to the land being extinguished after twelve years unless he procured some acknowledgment of his title from the purchasers. What would be the position with regard to the payment of instalments and the arising of liens for unpaid instalments after the remedies for the recovery of the whole purchase price had been barred it would be—as the Court of Appeal points out—hard to say.

In their Lordships' judgment the approach of the Court of Appeal to the problem was right and the cases relied on by the appellant are distinguishable. *Reeves v. Butcher* and *Harry Smith Ltd. v. Craig* were cases of contracts of loan. In the first case after a recital to the effect that the defendant had asked the plaintiff to lend her £425.18.0 " for a term of five years (subject to the power to call in the same at an earlier period in the events hereinafter mentioned) upon her personal security " the defendant agreed to pay interest at 7% by equal quarterly payments and the plaintiff agreed that she would not call in the principal or any part of it for five years if the defendant should pay the interest regularly provided always that if the defendant should make default in payment of any quarterly payment of interest for the period of twenty-one days it should be lawful for the plaintiff immediately upon the expiration of the period of twenty-one days to demand payment of the principal sum and the interest then owing. In the Scottish case in consideration of an advance of £220 the defendant gave the plaintiffs who were money-lenders a bill for £315 payable on demand and signed a letter the material terms of which were as follows:

> " The principal sum advanced is £220.0s.0d, and the interest thereon is £95.0s.0d, being at the rate of 48 per centum per annum as calculated according to the first Schedule of the Money-lenders' Act, 1927.
>
> The principal and interest is repayable by quarterly instalments of £52.10s.0d, which is applicable to principal and interest. The first instalment is payable on Jan. 25th 1936. In the event of default being made in the due payment of any sum, whether in respect of principal or interest under the contract, simple interest on that sum at the contract rate from the date of the default will be charged until the sum is paid. The simple interest shall not be reckoned as part of the interest charged on the loan.
>
> In the event of any default in payment the lender has the option of requiring immediate payment of the balance of the principal sum

advanced together with the stipulated interest thereon from the date of the default till payment.

Yours faithfully,

(Signed) AGNES G. CRAIG."

In each case the Courts held that the plaintiff's right of action accrued as soon as the defendant made default in payment of an instalment of interest and was barred after six years from that event. They were not treated as cases in which the plaintiff could elect between inconsistent remedies but as cases in which each contract imposed an obligation on the defendant to pay the principal lent as soon as the interest fell into arrear.—See e.g. *per* Fry L.J. at page 511 of the report in the first case:

> " The agreement contains a stipulation that the lender shall not call in the principal sum for a period of five years, if the borrower should . . . duly and regularly pay the interest. This implies a contract by the borrower that the principal should be paid at once . . . on default in payment of interest "

and *per* Lord Aitchison in the report of the second case at pp. 625/6:

> " The contract, as I read it, simply means that on default of any payment there is a constructive default of all payments ".

Their Lordships do not construe these sale agreements as imposing an obligation on the purchasers to pay the whole purchase price as soon as they make such default in payment of instalments as entitled the vendor to exercise the remedies given to him by clauses 20 and 22. That obligation only arises if the vendor elects to impose it on them by making a demand for payment—as in fact he did on 17th September 1960. Similarly the right to possession of the lands agreed to be sold which was given to the purchasers by the agreements was not made subject to a condition of defeasance in the event of the purchasers making such default in payment of the instalments as entitled the vendor to rescind. Their possession of the lands did not become adverse to him as soon as he acquired the right to rescind but only when the right was exercised as it was in this case by the sending of the letter of 2nd March 1967. The five cases set out in s. 3 of the Act of 1833 are not intended to be an exhaustive enumeration of all the cases which can fall within s. 2 (see *Governors of Magdalen Hospital v. Knotts* (1878) 8 Ch.D. 709 at 727 and the other cases cited in Lightwood on The Time Limit on Actions, p. 15) and their Lordships think that the right of entry which accrued to the respondent on exercising his right of rescission ought not to be regarded as a right of entry arising on breach of condition at all. The facts in the Magdalen Hospital case were that in 1783 the Hospital granted a lease for ninety-nine years at a peppercorn rent in breach of the prohibition contained in the Statute 13 Eliz. I c. 10. In 1876 they sought to recover possession from the then occupier who alleged that the Hospital's right of entry accrued on the execution of the lease and was long since barred. The Hospital argued that the lease was voidable not void and that the right of entry first accrued when they elected to avoid it. The Court of Appeal felt constrained by authority to hold that the lease was only voidable but held nevertheless that the right of entry accrued when it was granted. The House of Lords on appeal (4 A.C. 324) held that the lease was void *ab initio* and refrained from expressing any opinion as to whether the decision of the Court of Appeal would have been right if in fact the lease had been only voidable. It appears that Counsel for the Hospital admitted (see page 726 of the report in 8 Ch.Div.) that although the lease was only voidable it was not necessary for the election to avoid it to have been communicated to

the lessee. On that admission it is not surprising that the Court held that, as the action required no precedent act to support it, the right of action accrued so soon as the lease was made. Whether or not the decision was correct it is not an authority which has any relevance to the present appeal.

Before parting with the case there are a few subsidiary matters to which their Lordships would call attention. First they would point out that they have dealt with the case on the footing that the appellant made no payments to the vendor or his estate under the agreements between the last acknowledgment of his title and the rescission of the contract. There was in fact some evidence that in 1961 certain small payments were made by the appellant to the vendor under one of the agreements but the judge made no findings with regard to them. In his case the respondent raised the contention that even if the appellant was right in his main argument those payments would have prevented time from running in the case of the agreement to which they related. Before the Board Counsel for the respondent conceded—rightly as their Lordships think—that in view of the absence of any findings as to these payments by the judge he could not rely on them. Secondly there can be no doubt that when on 17th September 1960 the vendor demanded payment of all monies due to him under the agreements a cause of action to recover those sums accrued to him which presumably became barred before the writ was issued. Their Lordships do not suggest that it could have been successfully argued that this fact affected the respondent's right to rescind the agreements during the period during which his lien for the purchase price was still subsisting if the appellant failed to pay but they think it right to record that no such argument was in fact advanced. Thirdly Counsel for the respondent submitted that even if a right of entry accrued to the vendor on the first failure to pay an instalment fresh rights of entry accrued to him on the failure to pay subsequent instalments and that even if the earlier rights were barred some of the latter would not be barred. In support of that argument he relied on *Barratt v. Richardson and Cresswell* [1930] 1 K.B. 686. Their Lordships express no opinion as to the correctness of the decision in that case but assuming it to have been right it would not in their view assist the respondent here since in this case the vendor's title to the land would be extinguished under s. 34 at the expiration of twelve years from the first default whereas in the case cited—as the Court of Appeal pointed out—the proviso to s. 4 prevented s. 34 from applying. Finally their Lordships would say that they agree with the Court of Appeal that the proviso to s. 7 of the Act, upon which Counsel for the respondent also sought to rely, did not help him. Assuming that the proviso relates to constructive as well as to express trusts and that accordingly any tenancy at will which could be said to have been vested in the purchasers by virtue of their right to possession under the sale agreements would not be barred under s. 7 that fact would not prevent a right of entry accruing to the vendor under s. 2.

For the reasons given earlier in this judgment their Lordships will humbly advise Her Majesty that this appeal be dismissed and that the appellant pay the costs of it.

[*Dissenting Judgment by* VISCOUNT DILHORNE]

I regret that I am unable to agree with the conclusion reached by the majority of the Board. The sole question for determination is, did the right to take possession of the lands, the subject of the two agreements made on the 16th February 1948 and the 23rd August 1948, accrue more than twelve years before the 23rd October 1967, the date of the institution of these proceedings.

Under the first of these agreements, directly there was a failure to pay two quarterly instalments of the purchase price within seven days of the due date for payment of the second instalment, the vendor, at his option, was entitled to exercise "any of the following remedies, namely" (*a*) to enforce the contract, in which case the whole of the purchase money and interest then unpaid became payable, or (*b*) to rescind the contract and thereupon all moneys theretofore paid were to be forfeited to the vendor as liquidated damages and

(i) 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 and"

(ii) to resell the land. . .

Under the second agreement the vendor was entitled to exercise the same remedies if there was default in payment of any instalment of the purchase money or interest for more than twenty-one days after the due date of the payment.

In my opinion the right to take possession accrued to the vendor when there was the requisite default under the agreements. I cannot read the contracts as requiring that notice of rescission had to be given before the right to take possession accrued. These were not, as was the contract in *Car and Universal Finance Co. Ltd. v. Caldwell* [1965] 1 Q.B. 525, contracts voidable on account of fraud. There the question to be decided was whether Caldwell had done enough to establish an election to rescind when he was unable to communicate his decision to do so to the other party to the contract. Here the vendor's rights were established by the contracts. Under each contract he had the option of enforcing it or of rescinding it. His right to rescind it accrued directly there was the requisite default. In my opinion the right to take possession accrued at the same time. If he decided to rescind, he could at the same time exercise his right to take possession. The Court of Appeal in Fiji, with whose conclusions my noble and learned friends agree, held that the right to take possession did not accrue until the 2nd March 1967 when a letter was sent rescinding the contracts and demanding possession and that consequently these proceedings are not statute barred. It appears to follow from this decision that the notice of rescission need not precede the demand to take possession, but that the right to take possession accrues at the same time as notice of rescission is given.

Grant J. held that from 1948 till the death of Shahbaz Khan (who died on the 19th May 1964 and of whose estate the respondent is administrator) the appellant had made no quarterly payments under either agreement. It follows that the right to rescind the agreements first arose much more than twelve years before the 23rd October 1967. It is not necessary in the circumstances of this case to determine the precise date when that right first arose.

So, if it be the case that the exercise of the right of rescission was so linked with the right of re-entry that the latter right could not be exercised without the former and without the purchaser being given notice of rescission, both rights could have been exercised directly the breaches first occurred. If that be so, in my view, it follows that the right to take possession accrued at that time. Once the breaches had occurred, the right to take possession was not dependent on any further act or omission on the part of the purchaser.

I do not however construe the contracts as providing that the right to take possession was linked with and dependent on the exercise of the right to rescind and upon the requirement that notice of rescission should be given to the purchaser. I do not read them as requiring that before or

when the vendor demanded payment of the balance of the purchase money and interest, he had to give notice to the purchaser of his intention to enforce the contract. The very fact that he demanded payment would show beyond all doubt that he was seeking to enforce the contract.

Similarly, a demand to take possession of the lands agreed to be sold, would show beyond doubt an intention to rescind. There is nothing in the contracts to suggest any requirement of notice. If a finance company elects in consequence of non-payment of a hire purchase instalment to rescind the contract and to repossess the car, it is not so far as I am aware necessary that it should give the hirer any notice of its intention to rescind before it retakes possession.

In *Reeves v. Butcher* [1891] 2 Q.B. 509, the plaintiff had lent money to the defendant for the term of five years, the defendant agreeing to pay interest thereon quarterly. The plaintiff had agreed that if she paid the interest quarterly, he would not call in the principal. The agreement expressly provided that if the defendant made a default in payment of any quarterly instalment of interest for the period of twenty-one days, it should be lawful for the plaintiff immediately on the expiry thereof to demand payment of the principal sum and interest then owing. No interest was paid but the plaintiff did not sue until after the five years had elapsed and it was then contended that the claim was barred by the Statute of Limitations. The Court of Appeal upheld this contention, Lindley L. J. saying at page 511:

> " This expression, ' cause of action ', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* (4 Q.B. 519), decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events but it has always been held that the statute runs from the earliest time at which an action could be brought."

Fry L. J. said that it was implied that the principal should be paid on default in payment of interest. I do not myself understand why it was necessary to imply any such term as it was expressly provided that on default in paying a quarterly payment of interest for twenty-one days the plaintiff could demand payment of the principal and interest then owing. He held that time began to run from the date when a quarterly instalment of interest was twenty-one days overdue. Lopez L. J. agreed.

In that case the question was: when did the cause of action arise? In this case it is: when did the right to take possession accrue, but I do not think that that affects the weight to be given to the observations made by the Lords Justices in *Reeves v. Butcher*.

In *Harry Smith Ltd. v. Craig* [1938] S.C. 620 a loan was made on the terms that the principal and interest had to be repayable by quarterly instalments and that " in the event of any default in payment the lender has the option of requiring immediate payment of the balance of the principal sum and interest ". Section 13 (1) of the Moneylenders Act 1927 requires proceedings to be commenced before the expiration of twelve months from the date on which the cause of action accrued and it was contended by the borrower that the pursuers' claim was, in consequence of this provision, statute barred. Lord Aitchison, the Lord Justice Clerk, said in the course of his judgment:

> " It was not disputed that the appellants could have sued the respondent for recovery of the whole loan and interest after 25th January 1936, being the date of the first default. It was said, however, that until the appellants exercised their option and required

payment of the balance, the last instalment payment had not become due. In my opinion, this is to read the language of the contract in a too narrow and literal sense. The contract, as I read it, simply means that on default of any payment there is a constructive default of all payments and the lender has a right to sue at once as for default of all payments. There emerges a cause of action for the recovery of all payments, and, therefore, in the words of the proviso, a cause of action has accrued in respect of the last payment becoming due under the contract."

It thus appears that Lord Aitchison rejected the argument advanced by the pursuers that because the moneylenders could at their option wait until the whole sums exigible under the loan had matured before taking any action for recovery of them, their right to do so only accrued when the option was exercised; an argument not wholly dissimilar from one advanced in this case, namely that the respondent could wait and not take any action and that therefore the right to take possession did not accrue until he exercised his option. It is true that the respondent here need not have taken any action when the breaches first occurred in which case interest became payable to him under the contracts, but the question is not when did he decide to take action, but when did the right to take action first accrue and in the light of these two cases, it is, I think, clear that the right to take possession first accrued when the necessary defaults first occurred.

I agree that the sale agreements in this case do not impose any obligation to pay the purchase price as soon as the purchaser makes default in the payment of instalments. They do however impose a clear obligation on the purchaser to pay the whole of the purchase money and interest if there is default for seven days in payment of two instalments under the first agreement and of any instalment under the second agreement of more than twenty-one days after the due date if the vendor demanded it, as under the agreements he was entitled to do if he chose.

In the two cases above cited the plaintiffs on default occurring had one right and one right only, to demand payment of principal and interest. In this case the vendor had a choice of rights and the question is, when did they accrue to him? On this, I think, the decisions above cited are relevant. I do not think the contracts provide that the right to sue for the balance of the purchase money only arose when then vendor decided to do so, or that the right to take possession only accrued when he decided to do so or when he decided to rescind, or on notification of his decision to rescind to the purchaser.

I recognise that the application of the contracts might in certain circumstances lead to difficulty and also that a claim to payment of the balance of the purchase money only arose when the vendor decided to claim to take possession of the land, but I do not think that these facts have any bearing on the question to be decided now, namely, did the right to take possession first accrue more than twelve years before the institution of these proceedings. In my opinion it did and for the reasons I have stated in my own opinion this appeal should be allowed.

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In the Privy Council

LAKSHMIJIT S/O BHAI SUCHIT

v.

FAIZ MOHAMMED KHAN SHERANI

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