# THE COMMON LAW DISCHARGE OF CONTRACTS UPON BREACH

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PART I



PART II

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## PART I

The object of this article is to examine the leading principles which apply to the common law discharge of contracts upon breach.[1] In examining these principles, most attention will be given to those which are not clearly settled or are the subject of controversy.

This is an area of law in which uncertainty and confusion have been introduced by a failure on the part of some judges, lawyers and textbook writers to analyse, on the basis of first principles, the con-

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[1] The article is confined to the discharge of contracts in the exercise of a common law right and does not examine the termination or avoidance of contracts in the exercise of a right expressly given by the contract.

cepts with which they have been dealing. To borrow a phrase from telecommunication engineering, this field of law has been the victim of a high incidence of 'cross-talk'.[2] The errors to a large measure have been due to the deeply rooted practice of our law to employ the one word to denote different, and in this case inconsistent concepts. This had lead to the 'cross-talk' in which characteristics appropriate to one concept denoted by the word 'rescind' have been imputed to quite a different concept denoted by that word in another meaning, where these characteristics have no place on the basis of either principle or convenience. To a lesser extent, the errors have been due to a failure in some cases to distinguish between the right exercised by a party in discharging a contract and the legal remedies given by the courts in making orders with the object of placing the practical situations of the parties in correspondence with their legal situation after discharge.

In the hope that this article may decrease, rather than increase the confusion on this subject, the sense in which technical words are used in this article will be explained when the word is first used.

## I. THE LEGAL NATURE OF THE COMMON LAW DISCHARGE

It is vital at the outset to distinguish between two senses in which the word 'rescind' is commonly used. The word in its primary meaning, as applied to contracts, conveys the idea of an avoidance *ab initio*. It is used in this sense when we speak of the rescission of a contract for an invalidating cause which existed at the time when the contract was made. The clearest example of this is rescission for misrepresentation. The party who is entitled to rescind and who does so, thereby avoids the transaction *ab initio*.[3]

> Rescission for misrepresentation is always the act of the party himself: . . . The function of a court in which proceedings for rescission are taken is to adjudicate upon the validity of a purported disaffirmance as an act avoiding the transaction *ab initio*, and, if it is valid, to give effect to it and make appropriate consequential orders: . . .[4]

In this article when the word 'rescind' is used it is used as meaning

[2] 'Cross-talk' in the terms of telecommunication engineering occurs when the words of one telephone conversation cross to and mingle with the words of another conversation.

[3] In the case of an executed contract a party who rescinds for fraudulent misrepresentation is in fact rescinding the transaction, because the contract has been discharged by performance: C. B. Morison, *The Principles of Rescission of Contracts* (1916) 6-7.

[4] *Alati v. Kruger* (1955) 94 C.L.R. 216, 224 *per* Dixon C.J., Webb, Kitto, and Taylor JJ.

an avoidance of the transaction *ab initio,* as in the case of misrepresentation.

The different legal nature of the discharge of a contract upon breach is brought out by the following passages:

> When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach (See *Boston Deep Sea Fishing and Ice Co. v. Ansell,*[5] *Hirji Mulji v. Cheong Yue Steamship Co.,*[6] *Cornwall v. Henson,*[7] Salmond and Winfield, Law of Contracts,[8] Morison, Principles of Rescission of Contracts.[9])[10]

As has been pointed out—*e.g.* by Farwell J. in *Mussen v. Van Diemen's Land Co.*[11] and by the learned editors of *Salmond & Williams on Contracts*[12]—the word "Rescission" is capable of two meanings: see also *Pitt v. Curotta.*[13] In its original significance, it denotes an act or happening whereby a contract is destroyed as if it had never been—the parties revert to their original positions as if they had never contracted with the other; but there is another meaning which the word "rescission" is often made to bear—namely, the act of a party in treating a contract as discharged by breach. When such a party elects to repudiate[14] his future obligations under the contract, using a breach by the other party as his justification, and reserves his right to sue for damages for breach, he is sometimes loosely said to "rescind". Such a repudiation does not contemplate a restoration of the parties *in integrum;* this is frequently impossible, and sometimes unwanted even if possible. Where there is a rescission in the first sense, the parties go back to their original positions, but there can be no action for damages in breach, since the basis of the new position is the hypothesis that the parties, being restored to their original positions, shall henceforth pro-

[5] (1888) 39 Ch.D. 339, 365 *per* Bowen L.J.
[6] [1926] A.C. 497, 503 *per* Lord Sumner.
[7] [1899] 2 Ch. 710, 715; reversed C.A. [1900] 2 Ch. 298.
[8] (1927) 284-289. [9] (1916) 179, 180.
[10] *McDonald v. Dennys Lascelles Ltd* (1933) 48 C.L.R. 457, 476-477 *per* Dixon J.
[11] [1938] 1 Ch. 253, 260. [12] (2nd ed. 1945) 564-565.
[13] (1931) 31 S.R. (N.S.W.) 477, 482.
[14] The word 'repudiate' is here used in the sense in which the word 'discharge' is used in this article.

> ceed as if there had never been any contract at all. But an action for damages may be reserved consistently with rescission in the second sense, since when used in this sense the word means simply discharged by breach. There can be no question in this sense of a *restitutio in integrum,* since the action for damages is based upon a contract still in existence, and able to be sued upon, but broken by the defendant so as to relieve the plaintiff at his option from further performance.[15]

The word 'discharge'[16] is used in this article instead of the word 'rescind'[17] to denote the discharge of a contract upon breach.[18]

## II. THE CREATION OF THE RIGHT TO DISCHARGE THE CONTRACT

It is common and convenient to approach this question on the basis that the right of a party to discharge a contract upon breach arises in two circumstances—(1) upon a repudiation by the other party of his obligations under the contract and (2) upon a breach by the other party of an essential term or promise of the contract. This is not, by any means, an analysis which is uniformly adopted.[19] Indeed it has been denied that the repudiation of a contract prior to the time for performance is a breach of the contract at all.[20] On the other hand it has been said, correctly, it is submitted, that:

> One essential promise which is implied in every contract is that neither party will without just cause repudiate his obligations under the contract, whether the time for performance has arrived or not. . . . A breach of this implied promise not to repudiate ordinarily entitles the other party to put an end to the contract.[21]

The analysis that the right to discharge a contract arises in the two stated circumstances is adopted in this article because it avoids the

[15] *Bines v. Sankey* [1958] N.Z.L.R. 886, 893 *per* Turner J.

[16] It is usual to say that the innocent party, by treating the contract as discharged, discharges it. It is thought that the position is represented accurately by saying that in those circumstances the innocent party discharges the contract.

[17] In this article, when, in order to give an accurate representation of what was said by a judge or author, it is necessary to use the word 'rescind' as denoting discharge upon breach, the word is shown in inverted commas. This is not done, of course, in the case of a direct quotation.

[18] Note the regret that the word 'rescind' is used in so many varying senses, expressed by the late Mr H. Walker in the article 'Rescission of Contracts for the Sale of Land' (1932) 6 *Australian Law Journal* 48, 49. See also Morison, *op. cit.* 1-13.

[19] *E.g. Anson's Law of Contract* (21st ed. 1959) 413.

[20] Morison, *op. cit.* 34-35; *Y. P. Barley Producers Ltd v. E. C. Robertson Pty Ltd* [1927] V.L.R. 194.

[21] *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 646 *per* Jordan C.J. Although the decision of the Full Court in that case was reversed on appeal by the High Court this judgment has been treated with great respect as an exposition of principles. See *Salmond and Williams on Contract* (2nd ed. 1945) 534; *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322, 337. As to whether repudiation is a breach see *White and Carter (Councils) Ltd v. McGregor* [1962] 2 W.L.R. 17, 29.

necessity of using a variety of different terms for situations which do not differ in principle, and because it conveniently separates two situations which differ in their legal components.

### A. Repudiation

Repudiation, in the sense in which it is used in this article,[22] occurs when a party to a contract acts so as to indicate to the other party that he refuses or is unable to perform his part of the contract.

The classical statement of the rule limited repudiation to an indication of refusal to perform the contract.[23] However, a consideration of the justification for there being a right to discharge a contract upon breach, shows that it is necessary to extend the rule to include the case of a party who is unable to perform his part of the contract. The justification for the rule is that once a party has indicated that in fact he will not perform his contract the other party should be able to free himself from the obligations of the contract by discharging it. The right to discharge is just as important to the party not at fault in a case where the other party is willing but incapable of performing the contract as in a case where the other party is capable of performing but refuses to do so. In the economic conditions experienced recently in this country the commercial scene abounded with persons whose most fervent desire and earnest endeavour was to perform their contracts but who, due to lack of finance, were unable to do so. In these cases it was not doubted that the other party could treat this as a repudiation and discharge the contract. It may be that the classical rule suffices, on the basis that being willing is to be treated as including being able.[24] The rule has, however, been restated in terms which expressly cover inability to perform the contract.[25]

### B. Breach of an Essential Term

All simple contracts which may be the subject of discharge upon breach contain two or more promises or terms.[26] For the present purposes these promises or terms are to be divided into those which are essential and those which are not. It is common to refer to the essential promises or terms as conditions and the non-essential

[22] The word 'repudiation' is also used in law in a variety of senses. See *Heyman v. Darwins Ltd* [1942] A.C. 356, 378-379.

[23] See *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884) 9 A.C. 434; *Robert A. Munro & Co. Ltd v. Meyer* [1930] 2 K.B. 312, 331; *Carr v. J. A. Berriman Pty Ltd* (1953) 89 C.L.R. 327, 351-352.

[24] See *Holland v. Wiltshire* (1954) 90 C.L.R. 409, 422.

[25] *Hacker v. The Australian Property and Finance Co. Ltd* (1891) 17 V.L.R. 376; *Maple Flock Co. Ltd v. Universal Furniture Products (Wembley) Ltd* [1934] 1 K.B. 148; *Harold Wood Brick Company Ltd v. Ferris* [1935] 2 K.B. 198.

[26] As contracts may be discharged upon breach only while they are executory, contracts which consist of a promise for an act, as in the reward cases, are excluded.

promises or terms as warranties. But each of these expressions is used to denote a number of different concepts in the law,[27] so in this article the expressions 'essential term' and 'non-essential term' will be used. The word 'term' is used as meaning a promise in a contract.

The method of determining whether a particular term is essential or not is stated by Jordan C.J. as follows:

> In some cases it is expressly provided that a particular promise is essential to the contract, *e.g.* by a stipulation that it is the basis or of the essence of the contract; . . . but in the absence of express provision the question is one of construction for the Court, when once the terms of contract have been ascertained.[28]

In the absence of express provision:

> The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor.[29]

The Chief Justice further says of the circumstances in which the breach of an essential term gives a right to the innocent party to discharge the contract:

> If the innocent party would not have entered into the contract unless assured of strict and literal performance of the promise, he may in general, treat himself as discharged upon any breach of the promise, however slight. If he contracted in reliance upon a substantial performance of the promise, any substantial breach will ordinarily justify a discharge.[30]

It follows from what is said in the last passage that some breaches (that is, a breach which does not amount to a substantial breach) of some essential terms (that is, where the promisee is taken to have contracted in reliance upon a substantial performance of the term) will not give the innocent party the right to discharge the contract. Where the breach of contract is the breach of a non-essential term this does not of itself entitle the innocent party to discharge the contract but it does entitle him to recover damages.

[27] As to conditions see Stoljar, 'The Contractual Concept of Condition' (1953) 69 *Law Quarterly Review* 485. As to warranties see *Oscar Chess Ltd v. Williams* [1957] 1 W.L.R. 370. As to both expressions see *Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Haisha Ltd* [1962] 2 W.L.R. 474.

[28] *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 642.

[29] *Ibid.* 641-642. This passage was adopted by the High Court (Dixon, Williams, Webb, Fullagar and Kitto JJ.) in the judgment of the Court in *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322, 337.

[30] (1938) S.R. (N.S.W.) 632, 642.

There is authority for the proposition that there are some breaches of some terms which are neither conditions nor warranties, in the sense in which those words are used in the Goods Act 1958, which will go to the root of the contract and entitle the innocent party to discharge the contract.[31] It is submitted that this proposition, on a proper analysis, amounts to no more than the proposition that in certain circumstances the breach of a non-essential term may indicate a refusal or inability to perform the contract and thus amount to a repudiation of the contract. This position was recognized by the High Court in *Associated Newspapers Ltd v. Bancks*.[32]

It is important not to confuse the right to discharge a contract upon repudiation with the right which exists in the case of a breach of an essential term. However, the same circumstances may give a right to discharge the contract for repudiation and also a right to discharge it for breach of an essential term as in *Associated Newspapers Ltd v. Bancks*. In the case of the breach of an essential term the innocent party may discharge the contract upon the occurrence of the appropriate breach. His right to do so does not depend on the existence of conduct on the part of the defaulting party which shows an unwillingness or inability to perform the contract. On the other hand the right to discharge a contract upon repudiation may, and often does arise, when there has been no breach by the party at fault of any essential term of the contract (other than the implied essential promise not to repudiate[33]). These differences between the right to discharge a contract upon a repudiation and the right to discharge it upon the breach of an essential term are made clear in *Associated Newspapers Ltd v. Bancks*.[34]

## III. THE MANNER OF EXERCISING THE RIGHT TO DISCHARGE THE CONTRACT

It is settled law that the repudiation of a contract has no legal effect in itself except to confer on the other party an option to discharge the contract. 'An unaccepted repudiation,' it has been said by Asquith L.J., 'is a thing writ in water and of no value to anybody: it confers no legal rights of any sort or kind'.[35] Viscount Simon has explained the position thus:

> The first head of claim in the writ appears to be advanced on the view that an agreement is automatically terminated if one party "repudiates" it. That is not so. "I have never been able to understand," said Scrut-

[31] *Hongkong Fir Shipping Co. Ltd v. Kawasaki Kisen Haisha Ltd* [1962] 2 W.L.R. 474.

[32] (1951) 83 C.L.R. 322, 339-340; see also *Carr v. J. A. Berriman Pty Ltd* (1953) 89 C.L.R. 327.

[33] See the passage from the judgment of Jordan C.J. set out *supra*.

[34] (1951) 83 C.L.R. 322.

[35] *Howard v. Pickford Tool Co. Ltd* [1951] 1 K.B. 417, 421.

ton L.J. in *Golding v. London & Edinburgh Insurance Co. Ltd,*[36] "what effect the repudiation of one party has unless the other party accepts the repudiation." If one party so acts or so expresses himself, as to show that he does not mean to accept and discharge the obligations of a contract any further, the other party has an option as to the attitude he may take up. He may, notwithstanding the so-called repudiation, insist on holding his co-contractor to the bargain and continue to render due performance on his part. In that event, the co-contractor has the opportunity of withdrawing from his false position, and even if he does not, may escape ultimate liability because of some supervening event not due to his own fault which excuses or puts an end to further performance: a classic example of this is to be found in *Avery v. Bowden.*[37] Alternatively, the other party may rescind the contract, or as it is sometimes expressed, "accept the repudiation", by so acting as to make plain that in view of the wrongful action of the party who has repudiated, he claims to treat the contract as at an end, in which case he can sue at once for damages. "Rescission (except by mutual consent or by a competent court)", said Lord Sumner in *Hirji Mulji v. Cheong Yue Steamship Co. Ltd,*[38] "is the right of one party, arising upon conduct by the other, by which he intimates his intention to abide by the contract no longer. It is a right to treat the contract as at an end if he chooses, and to claim damages for its total breach, but it is a right in his option." But repudiation by one party standing alone does not terminate the contract. It takes two to end it, by repudiation, on the one side, and acceptance of the repudiation, on the other.[39]

Morison took the view that in cases of what he called a failure of a 'condition proper' or a 'failure of consideration' the contract was discharged automatically and notice from the innocent party was relevant only for the purpose of negativing a waiver of the breach. His opinion, however, was that in the case of a repudiation it was necessary for the innocent party to accept the repudiation or the contract would remain in force.[40] Whether or not that view was justified on the authorities in 1916, when the book was published, it is clear that in the law today the effect of an essential breach is the same as that of a repudiation, in that discharge of the contract does not take place unless and until the innocent party elects to treat it as discharged.[41]

It is further clear that both in the case of a repudiation and in the case of the breach of an essential term the party at fault cannot compel the innocent party to put an end to the contract. Where the innocent party is able to perform his part of the contract without the co-operation of the party at fault he is entitled to do so and to sue for amounts which become due to him, and is not obliged to dis-

[36] (1932) 43 Ll.L.Rep. 487, 488. [37] (1855) 5 E. & B. 714. [38] [1926] A.C. 497, 509.
[39] *Heyman v. Darwins Ltd* [1942] A.C. 356, 361. See also *White and Carter (Councils) Ltd v. McGregor* [1962] 2 W.L.R. 17, 20 *per* Lord Reid.
[40] Morison, *op. cit.* 1-22, especially 8.
[41] *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 643; *Associated Newspapers Ltd v. Bancks* (1951) 83 C.L.R. 322, 336-337.

charge the contract in order to minimize damages.[42] In appropriate cases the innocent party may obtain an order for specific performance of the contract which has been repudiated or of which there has been breach of an essential term.

It is now necessary to determine what conduct on the part of the innocent party amounts to an exercise of the option to discharge the contract. The principle was stated by Lord Blackburn in *Scarf v. Jardine*:[43]

> The principle, I take it, running through all the cases as to what is an election is this, that where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but as soon as he has not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he has made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act—I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way—the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election.[44]

There have been cases in which an option to terminate a contract has been treated as exercised effectively although the conduct constituting the exercise of the option has not been communicated to the other party.[45] It is submitted that these cases should be treated as particular exceptions to the principle stated by Lord Blackburn. It is submitted that in relation to discharge upon breach the only general exception to the principle should be that where the party entitled to discharge the contract is unable to communicate with the other party, he may exercise his option by conduct which evidences his election in the most unequivocal and open manner available to him.

Problems as to whether a party has exercised his right to discharge the contract frequently arise in Victoria in relation to contracts for

[42] *White and Carter (Councils) Ltd v. McGregor* [1962] 2 W.L.R. 17 (repudiation). (This was a decision on Scots law, but it seems from the judgments that there is no difference in this regard between Scots and English law.); *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 645 (breach of essential term).

[43] (1882) 7 A.C. 345, 360-361.

[44] See also *Smith's Leading Cases* (13th ed. 1929) i, 42; *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 643.

[45] *Reliance Car Facilities Ltd v. Roding Motors* [1952] 2 Q.B. 844, 849 (termination of hire-purchase agreement by the owner repossessing the goods); *Serjeant v. Nash* (1903) 2 K.B. 309, 311 (election to forfeit a lease by issuing a writ for possession); *Car and Universal Finance Co. Ltd v. Caldwell* [1963] 2 All E.R. 547 (seller of car, unable to communicate with purchaser, taking all available steps to repossess car).

the sale of land containing clauses such as clause 6 (1) of Table 'A' of the Transfer of Land Act 1958. This clause provides, in effect, that if the purchaser makes default in the performance of any of the terms of the contract, the vendor shall not be entitled to exercise his common law or other rights to discharge or rescind the contract, unless he serves on the purchaser a notice in writing specifying the default and stating his intention to exercise his rights unless the default is remedied within a period of not less than fourteen days. Where notices are given under clauses of this type, questions arise whether, upon failure to remedy the default within the period specified, the contract is discharged. Generally some further act after the expiration of the period, communicated to the purchaser, is necessary to discharge the contract. It is submitted that the only exception occurs when the terms of the notice amount to an unequivocal election to treat the contract as discharged unless the default is remedied within the period. Such words as 'the vendor hereby elects to discharge the contract in the exercise of his common law rights' unless the default is remedied within the period, would, it is thought, effectively discharge the contract upon the expiration of the period with the default remaining un-remedied.[46] The safe course in the present state of authority is to give to the purchaser, after the expiration of the period, a notice expressed to discharge the contract in the exercise of the vendor's common law rights.

Some contracts contain provisions such as clause 6 (2) of Table 'A' of the Transfer of Land Act 1958 which makes express provision for what occurs when the default is not remedied after the giving of a notice of default in a particular form. This question was considered in *Holland v. Wiltshire*.[47] In that case a notice was given by a vendor of land to defaulting purchasers which contained the statement:

> Now take notice that you are hereby required to make settlement by the 28th day of March 1952. If settlement is not made by that date, the vendor . . . will take proceedings against you for breach of contract.

The purchasers made no response to this notice and the vendor instructed auctioneers to sell the property. The sale was advertised extensively, both by a board erected on the property and by advertisements in the newspapers, for three or four weeks. The property was sold at auction on 10 June 1952. It was held by the High Court and by a majority of the Supreme Court of South Australia that the vendor had discharged the contract in the exercise of his common

[46] See a note in (1954) 28 *Australian Law Journal* 238. A notice in this form would, it is submitted, satisfy the requirements of clause 6 (1) of Table 'A'. *Cf. Petrie v. Dwyer* (1954) 91 C.L.R. 99.

[47] [1954] S.A.S.R. 18; (1954) 90 C.L.R. 409.

law rights. One of the questions discussed was when and how the contract had been discharged.

In the Supreme Court, Ligertwood J. (with whom Napier C.J. agreed) treated the contract as having been discharged on 29 March, but Mayo J. held that the notice did not amount to an election to determine the contract. In the High Court, Dixon C.J. said that the vendor's election to treat the contract as discharged was sufficiently manifested by his proceeding to advertise the property for sale and by his selling it.[48] Kitto J. construed the notice as not amounting to a definite election in advance to treat as a determination of the contract the purchasers' refusal to complete on or before 28 March, but he added that if it had amounted to such an election it may have determined the contract.[49] As authority for this view he relied on *Reynolds v. Nelson*.[50] In that case the Vice-Chancellor, Sir John Leach, holding that a contract had not been discharged, said of a notice:

> The notice given in this case was not that the Defendant would consider the contract at an end if it was not completed within the time, but that he would consider its not being completed within the time as equivalent to a refusal to perform it, and would act accordingly; but whether he would act as if the contract were abandoned, or would act by filing a bill for specific performance, he leaves wholly in doubt.

Taylor J. took the view that the notice of itself was effective to discharge the contract.[51]

It is established that once the option to discharge a contract has been exercised effectively the contract is at an end and further conduct by one or both of the parties, while it might amount to the making of a new agreement, will not revive the discharged contract.[52]

[48] (1954) 90 C.L.R. 409, 415-416. There is nothing in the report to suggest that the vendor's advertising the sale and selling the property did not come to the notice of the purchasers.

[49] *Ibid.* 421.

[50] (1821) 6 Madd. 18, 26.

[51] *Holland v. Wiltshire* (1954) 90 C.L.R. 409, 423-424.

[52] See *Smith's Leading Cases, op. cit.* i, 47, notes to *Dumpor's* case; *Stone v. Nilsen* [1951] V.L.R. 389; *Tramways Advertising Pty Ltd v. Luna Park (N.S.W.) Ltd* (1938) 38 S.R. (N.S.W.) 632, 643.