Present: Garvin and Dalton JJ., and Jayewardene A.J. 1926.

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193—D. C. Galle, 21,468.

Partition—Sale of divided lots after interlocutory decree—Legality—Covenant for further assurance—Ordinance No. 10 of 1863. s. 17.

In a partition action, after interlocutory decree was entered, a commission was issued and a survey of the land made, according to which it was proposed to allot to the defendant certain specific lots in the final decree.

Before final decree was entered the defendant transferred the said lots to the plaintiff, with an undertaking to execute such other deeds, &c., as may be necessary to assure more perfectly the premises to the purchaser.

Held (by Garvin and Dalton JJ., Jayewardene A.J. dissenting), that the transaction was not obnoxious to section 17 of the Partition Ordinance, and might be given effect to, as between the two parties.

IN a partition action the defendant was declared entitled to certain shares of a land, and the Surveyor-Commissioner proposed to assign him lots 2A, 2B, and 2 as his share. After the scheme of partition had been settled, but before final decree was entered, two deeds, Nos. 27 and 28, respectively, were executed between the plaintiff and the defendant. By deed No. 27 the defendant sold and purported to convey to the plaintiff lots 2A, 2B, and 2; and by deed No. 28 the parties considering that the deed was executed before final decree further agreed to give efficacy to the deed of sale No. 27. No possession was to be granted to the plaintiff until after final decree was entered. After final decree was entered the plaintiff requested the defendant to execute a further deed conveying to him the lots 2A, 2B, and 2 awarded to the defendant by the final decree. The defendant failed and neglected to execute the deed, and this action was brought to compel him to do so. The plaintiff's claim was successfully resisted in the District Court on the ground that deeds Nos. 27 and 28 were obnoxious to section 17 of the Partition Ordinance. From this judgment and order the plaintiff appealed.

Hayley (with *H. V. Perera* and *Amerasekere*), for plaintiff appellant.—The question that has to be decided is whether the covenant for further assurance is obnoxious to section 17 of the Partition Ordinance. Section 17 applies only to undivided shares, not to specific allotments (*Louis Appuhamy v. Punchi Baba* [1]).

[1] *(1904) 10 N. L. R. 196.*

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In *Appuhamy v. Babun Appu* [1] the conflict was between two grantees deriving title from the same source. They asked for a declaration of title and not for a declaration that the covenant was a valid one.

A subsequent acquisition of title by the vendor accrues to the vendee (*vide Rajapakse v. Fernando* [2]). In *Collyer v. Isaacs* [3] it was held that where one transfers for valuable consideration his interests under his father's will, he will be compelled by equity to do so when he does obtain an interest under the will.

Counsel also cited *16 N. L. R. 393; Jabbar v. Marikar.*[4] Even if the sale conveys no interest, yet the covenant stands as a separate contract. In *Parker v. Duswell* [5] it was held that although a conveyance may fail to transfer any interest, yet it may be good as a promise to convey which may be specifically enforced.

If the final decree wipes out all previous title, then the vendor must be regarded as a constructive trustee for the vendee of what he obtains under the final decree. This is a matter where only the vendor and vendee are concerned and no third parties are interested, and there must be some very strong policy of the law against the carrying out of the covenant before the vendor is allowed to go back on his own promise.

Counsel also cited *Edward v. Dick* [6]; *Pilpot v. Pilpot* [7]; *Maxwell on Statutes 374, 609.*

Drieberg, K.C. (*with Soertsz*), for defendant, respondent.—Section 9 wipes out whatever right, or title, or claim in the said property. The deed in question is a present transfer, not an agreement to convey. In *Perera v. Alvis* [8] a mortgage of an entire land pending action was held effective only as to extent of mortgagor's undivided interest. Any title plaintiff had, or any claim to title, is extinguished by section 9. The final decree is conclusive, *e.g.*, servitudes are extinguished. The effect of section 9 is not creation of new title, but elimination of previous titles. The reason for the words "until the Court . . . . have refused to grant the application" are explained in *Perera v. Alvis* (*supra*). Specific performance would be refused where the original contract is void. *Elphinstone and Norton 499.*

Although by *22 N. L. R. 137* a trust is not destroyed by a final decree, it would not apply here because the facts do not show a trust. Here there is only an obligation, and every obligation is not a trust. What the plaintiff got is a claim to title, which is more than an equitable right.

[1] *(1923) 25 N. L. R. 370.*
[2] *(1920) 21 N. L. R. 495.*
[3] *(1881) 19 C. D. 342.*
[4] *(1920) 22 N. L. R. 129.*
[5] *27 L. J. Chan. 812.*
[6] *4 B. & A. 212.*
[7] *10 Com. Bench 85.*
[8] *(1913) 17 N. L. R. 135.*

Maxwell (6th ed.) 379. The word " void " is construed to mean void for some purposes, and not void for other purposes. But there will be no difficulty where some transaction is declared to be unlawful. Here the transaction is void for all purposes (*vide* sections 9 and 17). Under the Roman-Dutch law it is impossible for a man to sell what he does not own. When the vendor subsequently obtains what he previously purported to sell, the vendee does not get this acquisition of title from the vendor, but his title on the deed is perfected. All this presupposes the existence of a deed which must be valid. (*27 Halsbury, ss. 13-15; 2 Williams 148.*)

Hayley, in reply.—Dealings between vendor and vendee sometimes create a constructive trust (*Rose v. Watson* [1]).

The mere use of the word " unlawful " does not prohibit the act so long as it is not within the mischief of the act. Where a contract is partly valid and partly invalid and the parts can be severed, the good part remains. *Maxwell 701.* The deed is purposely made in order that it may not conflict with the decree. The object of the parties was not to avoid the Statute. If the title is bad the vendee may fall back on the covenant for further assurance. *Sugden, 612 and 613.*

May 3, 1926. GARVIN J.—

The facts material to the questions reserved for decision by a Bench of three Judges by my brothers Dalton and Jayewardene, before whom this appeal was originally argued, are well ascertained.

By the interlocutory decree entered in partition case No. 12,213 of the District Court of Galle, to which the respondent to this appeal was a party, the Court declared the respondent and certain others entitled in certain proportions to a land called Assalakanda Addera Deniya and ordered a partition.

In pursuance of a commission issued for the purpose a survey was made and a plan prepared setting out the manner in which it was proposed to partition the land. This plan, which is dated January 17, 1922, was made by J. H. Dahanayake, Licensed Surveyor, and the lots marked 2A, 2B, and 2 in that plan were the portions which it was proposed to assign to the respondent as and for his share of Assalakanda Addera Deniya. This scheme of partition was confirmed by the Court, and final decree in accordance therewith was entered on September 14, 1923.

After the Commissioner had formulated his scheme of partition, but before the final decree was entered, a certain transaction took place between the persons who are the parties to this appeal, and two deeds bearing Nos. 27 and 28, respectively, both attested by H. Louis de Silva, Notary Public, were executed on February 6, 1923.

[1] *10 House of Lords 672.*

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By deed No. 27 the respondent sold and purported to convey to the appellant the lots 2A, 2B, and 2 earlier referred to and delineated in Mr. Dahanayake's plan of June 17, 1922. He also agreed to "do and execute or cause to be done or executed all further acts, deeds, matters, and things as shall or may be necessary for the better or more perfectly assuring the said premises or any part thereof" unto the purchaser.

By deed No. 28 the parties, who were the present appellant and respondent, in consideration of the purchase and sale recorded in deed No. 27 and in view of the fact that that deed was executed before final decree, agreed and bound themselves by various covenants, the purpose whereof was to give efficacy to the sale by the respondent to the appellant. It was specially agreed that the appellant was only to have possession after the final decree was entered.

After final decree the appellant requested the respondent to execute a further deed conveying to him the lots 2A, 2B, and 2, of which he had by that decree been declared to be the owner. The respondent neglected to comply with this request, and the present action was brought to compel him to do so. The claim of the appellant was successfully resisted in the Court below on the ground that deeds Nos. 27 and 28 were obnoxious to section 17, as being in effect the alienation of an undivided share by a co-owner during the pendency of a partition action. The question we have now to consider is whether the District Judge was right.

What is the transaction of which the deeds Nos. 27 and 28 are the record? The parties to these deeds are the parties to this action, and the matter is free of the complications of claims by persons who are strangers to the contract. Now, the parties knew that final decree had not as yet been entered in the action for the partition of Assalakanda Addera Deniya. They knew also that a partition had been ordered and that the Commissioner had proposed a scheme of partition by which he recommended that lots 2A, 2B, and 2 in Mr. Dahanayake's plans should be assigned to the respondent as and for his share. This is patent on the face of the deeds. Acting on what they regarded as the moral certainty that lots 2A, 2B, and 2 would be allocated to the respondent, the parties entered into the transaction recorded in the deeds under consideration. It is clear from the language of deed No. 27 that what the respondent sold and the appellant bought were the lots 2A, 2B, and 2, and that the respondent purported to convey these lots to the appellant, binding himself to do and execute all such further acts and deeds as may be necessary to assure to the appellant the title he purported to convey. The contemporaneous deed No. 28 is an agreement expressed to have been made in consideration of the grantee having purchased certain premises by bill of

sale No. 27. The most material parts of the agreement are clauses 2, 3, and 4. which are as follows:—

"2. That in view of the fact that the aforesaid bill of sale was executed before the final decree in case No. 19,218 of the District Court of Galle, the grantor hereby promise and agree that he shall not do any act, matter, or thing at any time after these presents whereby the said grantee or his aforewritten shall be deprived of his or their title, interest, and claim under the said bill of sale.

"3. It is also agreed between the parties that the said bill of sale shall be of full force and valid at law and that the grantee and his aforewritten shall be at liberty to enjoy and possess the premises conveyed only after the entry of final decree in case No. 19,218 of the District Court of Galle.

"4. It is also further agreed between the parties that the costs of the partition case No. 19,218 of the District Court of Galle and whatever appraisement of the land referred to in the bill of sale aforesaid with regard to the improvements therein made in excess of the present appraisement made by Mr. Dahanayake, Licensed Surveyor, shall be borne by the grantee and his aforewritten."

It was evident to the parties that inasmuch as the scheme of partition proposed by the Commissioner had not been confirmed by a final decree the respondents had no title to lots 2A, 2B, and 2, and that those lots had no existence as separate holdings. The respondent, therefore, agrees that he will do nothing which will tend to deprive the appellant of the benefit of the sale to him of these lots, while the appellant recognizes that his rights to possess these lots must be postponed till the passing of the final decree.

It is obvious that the respondent might have endeavoured to defeat the transaction by objecting to the scheme or seeking a different distribution of the lots. But he bound himself not to do anything to the prejudice of the appellant. In substance this is a sale by one and a purchase by the other of certain lots of land which had no existence as separate holdings, but which the parties believed would as a result of the final decree to be entered be allotted in severalty to the respondent, possession was to commence on the entry of the final decree, the respondent binding himself to do nothing to deprive the appellant of the benefit of the sale and to execute all such further deeds as may be necessary to assure to the appellant a good title to the premises. Now, what is this transaction but a dealing by anticipation with the share which it was thought would be allotted to the respondent by the final decree. What the respondent intended to sell and the appellant to buy was the share to be allotted to the respondent by the final decree. It is true that both parties assumed that the share in severalty

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so to be allotted would consist of the lots 2A, 2B, and 2. The assumption has proved to be perfectly correct. It is quite obvious that the parties did not deal and did not intend to deal with any undivided interest. They dealt with certain lots which both believed and assumed to be the share in severalty which would in due course be allotted by the final decree. The respondent has undertaken that he will at all times do and execute all such acts and deeds as may be necessary to assure the premises to the appellant. He is in a position to do so, and must do so unless he can justify his refusal on some legal ground. It is said that the transaction embodied in these two deeds is obnoxious to section 17 of the Partition Ordinance. For the reasons already set out this transaction is not, in my opinion, such an alienation as is prohibited by that section. It was, however, argued that certain observations of Ennis A.C.J. in *Appuhamy v. Babun Appu* (*supra*) support the contention that inasmuch as at the date of the transaction recorded in deeds Nos. 27 and 28 the respondent had an undivided interest in these lots it must be regarded as an alienation of these interests and as such obnoxious to section 17. The facts of that case were in material particulars different to those with which we are here concerned. It was a contest as to title to a portion of land which originally formed part of a larger land. One Abdulla had an interest in this larger land, which he mortgaged. An action for the partition of the land was then instituted, and before final decree Abdulla sold a defined portion to one Simon. This portion was allotted to Abdulla in the final decree. The deed in favour of Simon is not before us, and it is impossible to say whether or not the language of the deed justified the observations made by Ennis A.C.J. There was no contemporaneous agreement, as in this case, and Simon made no attempt to obtain any further transfer from Abdulla. He transferred his interests such as they were, to the defendant. After the final decree had been entered the mortgagee put his bond in suit, and in execution this land was sold. The question for decision was whether the defendant or the purchaser had the better title.

The real ground of the decision was that the final decree was conclusive as to the title of Abdulla and was binding on Simon as effectively as if he had been a party to the action. In that view the execution purchaser had the better title. In that decision I concurred.

This is not a contest as to title. The appellant is seeking to compel the respondent to fulfil his part of the agreement by executing a transfer of the title declared by the final decree. In my judgment there is nothing in the Partition Ordinance which disentitles him to the relief he claims. The case is one of some difficulty, but as I observed earlier the matter happily is not complicated

by claims of persons who were strangers to the transaction recorded in deeds Nos. 27 and 28. The contesting parties now before us were the parties to those deeds. The intention of the parties is quite clear, and so is the transaction into which they respectively intended to enter. To give effect to this transaction two contemporaneous documents, Nos. 27 and 28, were executed. These deeds sufficiently disclose the agreement between the parties.

The respondent's plea that the transaction is obnoxious to the provisions of the Partition Ordinance fails.

For these reasons I would allow this appeal and concur in the order proposed by my brother Dalton.

DALTON J.—

In this case, by deed P1 dated February 6, 1923, the plaintiff purchased from the defendant three lots of land with all the plantations and buildings thereon, parts of the land called Assalakanda Addera Deniya, for the sum of Rs. 8,000. The deed sets out that the vendor was entitled to the property sold by right of partition in case No. 19,218, Galle.

It appears, however, that whilst the lots were the subject of an interlocutory decree at the date of the sale to the plaintiff, and had also been duly surveyed in accordance with the decree, the final decree, allotting the property to the defendant, was not entered until September 23, 1923, some seven months subsequent to the sale. By the deed, however, defendant undertook, at the cost of the vendee, to execute all further deeds " as shall or may be necessary for the better or more perfectly assuring the said premises or any part thereof " to the vendee as may reasonably be required. On the same date the parties entered into a subsidiary agreement (exhibit P2) reciting P1 and setting out that in view of the fact that P1 was executed before the final decree in the partition suit the vendor undertook not to do any act, matter, or thing at any time thereafter whereby the vendee should be deprived of his title, interest, or claim under P1. It was also agreed that the vendee should not be entitled to possession of the premises until after the entry of the final decree. Plaintiff now claims that defendant be ordered to execute a further deed of transfer of the property in question.

In his answer the defendant makes a vague and indefinite reference to the pendency of the partition suit at the time the sale was entered into, and pleads that plaintiff had undertaken to pay the costs of the partition suit, and still owed a balance of Rs. 1,690 of the purchase price of the property.

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Issues were then framed, of which the first two were in the following terms:—

(1) Is the plaintiff entitled to a conveyance in terms of his prayer?

(2) Did the deed of February 5, 1923, convey any rights to the plaintiff?

This latter issue the learned Judge answered in the negative, holding that the document P1 was void and illegal; he thereupon dismissed the plaintiff's claim with costs. From that order plaintiff appeals.

The District Judge bases his decision upon the provisions of section 17 of the Partition Ordinance, 1863, in his conclusion that the deed P1 is not only void but illegal. He holds that section 17 applies to the transaction on the ground that the property mentioned in the deed could not be considered as conveying anything except an undivided interest until partition proceedings had terminated.

The first ground of appeal argued is that the instrument P1 does not come within the provisions of section 17 of the Partition Ordinance. That section is in the following terms:—

> " 17. Whenever any legal proceedings shall have been instituted for obtaining a partition or sale of any property as aforesaid, it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest therein unless and until the Court before which the same were instituted shall, by its decree in the matter, have refused to grant the application for such partition or sale, as the case may be; and any such alienation or hypothecation shall be void."

There is not the least doubt as to what the parties intended to do when the documents P1 and P2 were executed. They were both aware of the partition proceedings and that defendant had an undivided interest in the land being partitioned; they were both aware that he had been alloted by the preliminary decree the specific land mentioned in P1 which had been duly surveyed. Defendant purported to sell and convey that specific property to plaintiff for the consideration set out, but possession was not to be given until the final decree was passed. Both were aware of the necessity of that decree to complete the transaction, and defendant undertook to do nothing until that decree was passed to deprive plaintiff of his claim under P1. There is not the least doubt as to what both parties intended, and there is not the least doubt that neither intended to deal with any undivided interest in the land.

It is argued, however, that because defendant had nothing but an undivided interest in the land at the time of the execution of P1, therefore all that passed to plaintiff by that deed was that

undivided interest, and as such a transaction is repugnant to the provisions of section 17 the whole transaction is void under that section.

This section of the Ordinance appears to have given the Court considerable trouble in the past, and there are several varying decisions as to its meaning and application. The case of *Appuhamy v. Babun Appu* (*supra*) is the latest decision of this Court on this matter, and it is relied upon by the respondent. An examination of that case, however, shows that it differs materially on the facts, whilst the decision is not based upon any interpretation of the provisions of section 17.

The facts there are as follows: One Abdulla had a ¼ and 1/20 undivided interest in the land, and on July 8, 1912, mortgaged his interests to one Abdul Cader. He thereafter started partition proceedings, interlocutory decree in which was dated March 23, 1914. Abdulla's specific share was called lot A., and it was declared to be subject to the mortgage. Final decree issued on May 23, 1916. On May 4, 1916, Abdulla, however, conveyed lot A to one Simon, Simon selling the lot to the defendant in the action on April 29, 1921. Meanwhile Abdul Cader put the mortgage bond in suit and obtained a decree thereon on June 4, 1919. Lot A was sold under the decree and purchased by Abdul Rafee on November 9, 1921. Abdul Rafee then, by duly registered lease, let the premises to plaintiff. Plaintiff sued for declaration of title and for possession of lot A as against the defendant.

The learned Judge (Ennis A.C.J.) in the course of his judgment points out that it was argued for the defendant-appellant that section 17 of the Partition Ordinance had no application, for what Abdulla sold to Simon was a specific whole and not an undivided share. The learned Judge was of opinion that the argument was unsound, because Abdulla only had an undivided interest in the land until the date of the final decree. He points out, however, that it is possible a co-owner in land subject to a partition suit may sell his interest in the land and agree to convey whatever he may receive under the final decree, adding that such an agreement would possibly not be obnoxious to section 17, not operating as a conveyance or alienation. He, however, does not decide the case on this point, holding that the partition decree under section 9 declares to the world that Abdulla was the owner of the land. That was notice also to Simon. The mortgage proceedings thereafter by Abdul Cader were taken on that footing, and also the subsequent proceedings and registration to which I have referred. The plaintiff was therefore held entitled to succeed.

It will be seen, therefore, that there is no definite finding that the transaction of May 4, 1916, is repugnant to the provisions of section 17. On the other hand, Ennis A.C.J. in referring to *Subaseris v.*

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Prolis,[1] which is relied upon by the appellant, points out that the decision in that case was influenced by the consideration that a party to partition action "should be able to deal by anticipation with whatever divided interest he may ultimately obtain"; and he adds that he is in entire accord with that consideration. In that latter case also Wood Renton C.J. points out that—

> "It must be remembered that section 17 of the Partition Ordinance imposes a fetter on the free alienation of property, and the Courts ought to see that that fetter is not made more comprehensive than the language and the intention of the section require. The section itself prohibits only in terms the alienation of undivided shares or interests in property which is the subject of partition proceedings while these proceedings are still pending, and the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interests had been created since the proceedings began."

We have been referred also to *Louis Appuhamy v. Punchi Baba* (*supra*) where it was held that a sale or mortgage executed during the pendency of a partition suit in respect of a share or interest to which a person may become entitled after the termination of such suit is valid and is not affected by section 17 of the Partition Ordinance. Layard C.J. says:—

> "The respondent's Counsel has invited my attention to section 17, and has very fairly pointed out to the Court that the sales of properties to which that section is obnoxious are sales of undivided shares or interests in land the subject of a partition action. I do not think that section was intended to embrace or affect or to hinder or prevent persons from alienating or mortgaging the right to which they might become entitled after a partition had been decreed in respect of the land. Such a sale or mortgage executed during the pendency of a partition suit in respect of a share or interest to which a person may become entitled after the partition suit has terminated appears to me not affected by section 17."

I am unable to agree, therefore, after reference to the definite terms of the section itself and consideration of these cases, that the deed P1 is repugnant to the provisions of section 17. It is certainly a dealing by anticipation with divided interests to be ultimately obtained, by the vendor, with an undertaking to more perfectly assure the property to the vendee, but I am unable to agree that it is an alienation of an undivided interest within the

[1] (*1913*) *16 N. L. R. 393.*

meaning of the section, neither can I see that in any way it avoids the clear object of the enactment as set out by Wood Renton C.J. above.

It has, however, been further argued by Mr. Drieberg that the plaintiff has lost any right or claim to title he may have had owing to the operation of section 9 of the Ordinance. That section enacts that—

> "The decree for partition or sale given as hereinbefore provided shall be good and conclusive against all persons whomsoever, whatever right or title they have or claim to have in that said property, although all persons concerned are not named in any of the said proceedings, nor the title of the owners nor of any of them truly set forth, and shall be good and sufficient evidence of such partition and sale and of the titles of the parties to such shares or interests as have been thereby awarded in severalty . . . ."

The effect of the final decree is, it is argued, to wipe out any right or title or claim to title the plaintiff may have in the property, and therefore he has no right existing at the time title to the specific shares vests in the defendant. As a result nothing can accrue to him on that event, since he has nothing to be confirmed.

This argument, however, is not in my opinion sound, in so far as it seeks to restrict the meaning of the word "confirmatio" as used by Voet, for it is admitted that even where the vendor has no title at all, and so conveys nothing to the vendee, yet on the former subsequently acquiring title, that title goes to confirm the title of the vendor as from the date the vendor acquired his title.

On the other hand, it cannot be doubted what the parties had in mind would happen, so far as they were concerned under their agreement, when the final decree issued. They were awaiting it, not to wipe out any claim the plaintiff might have under the contract, but to complete and perfect it. I can find nothing in section 9 to debar such an arrangement being made. It must be remembered here we are dealing with the actual contracting parties, to one of whom the decree under section 9 was issued. It has been suggested by Mr. Hayley that the latter, so soon as the decree issued, was a constructive trustee for the plaintiff in respect of the property decreed to him. Mr. Drieberg, however, whilst admitting that it has been held that equitable rights are not extinguished by a decree of partition under section 9 (*Marikar v. Marikar* [1]), argues that this is a case, not of equitable rights arising, but of legal rights, based upon contract. It does not seem to me to be necessary to consider Mr. Hayley's argument on this point, for whatever the effect of section 9, there is no doubt whatsoever

[1] *(1920) 22 N. L. R. 137.*

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that defendant undertook, upon final decree for partition being obtained by him, to do what plaintiff now asks him to do in this action. The obtaining of a final decree in the partition proceedings by defendant for the property sold was a condition precedent to the terms of the contract being carried out. I am unable to see that the provisions of section 9 are prejudicial to plaintiff's claim.

What rights then has the plaintiff under the deed and subsidiary agreement? The property is sold by the defendant, the plan of the surveyor and the interlocutory decree being referred to in the deed. The defendant also undertook to do all that may be necessary for the better or more perfectly assuring the plaintiff as vendee in his purchase. In due course the final decree issues to the defendant. It is argued that all rights obtained by the defendant under that decree go automatically to the benefit of the plaintiff. On the authorities cited if defendant had no title at all at the time he purported to sell land to the plaintiff, but subsequently acquired a title thereto, the vendee could rely on that subsequently acquired title, not only against the defendant, but against anyone claiming under him. Two recent decisions in the Privy Council (*Rajapakse v. Fernando* (*supra*) and *Gunatilleke v. Fernando* [1]) have been referred to in support of this argument, in addition to English authorities. In *Rajapakse v. Fernando* (*supra*) Lord Moulton in the course of his judgment says:—

> "Their Lordships are of opinion that by the Roman-Dutch law as existing in Ceylon the English doctrine applies that where a grantor has purported to grant an interest in land which he did not at the time possess but subsequently acquires, the benefit of his subsequent acquisition goes automatically to the benefit of the earlier grantee, or, as it is usually expressed, 'feeds the estoppel.'"

In *Gunatilleke v. Fernando* (*supra*), however, Lord Phillimore, who delivered the judgment of the Board, in discussing *Rajapakse v. Fernando* (*supra*) states:—

> "It appears, however, to their Lordships that, though there is a considerable analogy between the doctrine of English law as to conveyance by estoppel as this Board thought in the case of *Rajapakse v. Fernando* (*supra*), the doctrine of the Roman-Dutch law which prevails in Ceylon is not identical with that of the English law . . . . Their Lordships, therefore, while not neglecting the benefits afforded by English decisions, have considered that their attention must principally be directed to the Roman-Dutch law as governing this case."

[1] *22 (1921) N. L. R. 385; (1921) 2. A. C. 357.*

Thereafter he continues:—

> " This law admitted what was called the *exceptio rei venditae et traditae*. Under this exception the purchaser who had got possession from a vendor who at the time had no title could rely upon a title subsequently acquired by the vendor, not only against the vendor, but against any one claiming under the vendor; and although delivery was, as the title shows, a part of the defence, if the purchaser had acquired possession without force or fraud he could use the exception, though he never received actual delivery from the vendor . . . . The principle does not rest upon estoppel by recital and is broader in its effect than the English rule."

This is set out by Voet (*Bk. XXI. t. III. s. 1*) as follows, in *Berwick's Translation*:—

> " Since on the confirmation of the right of an alienator (which had been defective at the time of the alienation) the originally invalid right of his alienee also becomes confirmed from the very moment that the first vendor acquired the ownership; and therefore the ownership from that time annexed to the original purchaser could not be taken away from him without his own act or consent; hence he has the right of suing his vendor or a third party possessor on account of the loss of his possession, and of defeating his opponent's plea by the replication of acquired ownership."

The evidence shows, however, that the plaintiff was never in possession of the lots of land he purchased, the defendant being in possession up to the time these proceedings were taken. The references in the authorities to delivery and possession have been fully dealt with by Bertram C.J. in *Gunatilleke v. Fernando (supra)*, and the Privy Council agreed that his view therein was correct. " Traditio " he states, " whether actual or symbolic is no longer necessary for the consummation of a sale of immovable property, and has been replaced by the delivery of the deed . . . . The same protection, therefore, which the Roman law gave to a person who had completed his title by possession our own law will give to a person who has completed his title by securing the delivery of a deed."

The questions of possession and registration of the deed were not dealt with in the arguments addressed to us, but it seems to me that they have necessarily to be considered, having regard to

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the law applicable here. In both cases decided in the Privy Council to which I have referred, the deed in question had been registered. In *Gunatilleke v. Fernando* (*supra*) Lord Phillimore states:—

> "The deed of 1893 was attested by witnesses and a notary so as to satisfy the conditions required by the Ceylon Ordinance for effectual transfer of lands, and it was registered as another Ceylon Ordinance directs. In *Rajapakse v. Fernando* (*supra*) their Lordships laid stress upon the fact that the conveyance upon which reliance was placed had been duly registered, though it should be added that in that case the successful party was in possession."

In *Rajapakse v. Fernando* (*supra*) Lord Moulton states:—

> "It is possible that the existence of a compulsory scheme of registration might, under certain circumstances, bring about modifications of the application of that doctrine to land in Ceylon, but in the present case no such difficulties arise because the earlier conveyance was duly registered and was the only deed relating to the lands in question, which was registered or even existing at the time."

The doctrine to which he refers here is the English doctrine to which I have already referred, and which the Board in that case found to exist in the law in Ceylon. In the present case also no difficulties arise on that point, for the deed P1, which was duly delivered and registered, was the only deed relating to lands in existence at the time. The deed was registered on February 12, 1923, and there are no subsequent deeds to be considered here. The final decree of partition doubtless was registered, but that could not affect the position, as I have already stated, as between the plaintiff and the defendant. The registration of that decree as required by law must have been in the contemplation of both parties at the time they entered into their agreement in order to complete the defendant's defective title. "It could scarcely be held, in fact it was scarcely maintained in argument, that a sale made to a *bona fide* purchaser by the vendor could be set aside by the vendor himself" was an opinion expressed by the Privy Council in *Anund Loll Doss v. Jullodhur Shaw* [1] and applies most appropriately here.

I would therefore allow the appeal, with costs; answering the first two issues in favour of the plaintiff, and setting aside the order of the trial Judge.

The case must therefore go back for further adjudication and determination on the remaining issues which require to be answered.

[1] *14 Moore's Indian Appeals 550.*

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This appeal is concerned with the effect of a deed of transfer, executed after interlocutory but before final decree of partition, of certain specific lots of lands proposed to be alloted to the vendor in the final decree.

By deed No. 27 of February 6, 1923 (P1), the defendant sold and transferred to the plaintiffs lots 2, 2A, and 2B, of the land Assalakanda Addera Deniya appearing in plan filed in partition action No. 19,218, D. C. Galle, which he claimed to be entitled to by right of the partition decree in that case. The vendor (the defendant) was not entitled to the lots in question under the decree, for no final decree had then been entered. He had been declared entitled to certain undivided shares in the interlocutory decree, and the Commissioner appointed under section 5 of the Partition Ordinance had suggested a scheme by which those lots were to be allotted to the defendant in the final decree of partition, and the lots were indicated in a plan which had at the time been filed in the case. By his deed P1 the defendant undertook to warrant and defend the title conveyed, and to " at all times hereafter at the costs of the said vendee or his aforewritten do and execute or cause to be done or executed all further and other acts, deeds, matters, and things as shall or may be necessary for the better or more perfectly assuring the said premises or any part thereof unto him or his aforewritten as by him, them, or any of them shall or may be reasonably required," a clause for further assurance. At the same time the parties entered into a deed of agreement P2 which shows that the plaintiff knew that final decree had not been entered, and in which it was stipulated *inter alia* that the vendor should do nothing to defeat the purchaser's title under P1, that the purchaser should take possession after entry of final decree, that the costs of the partition action and any compensation awarded should be paid by the purchaser, and that if the vendor does any act to invalidate the rights conveyed in P1 he should pay the purchaser the full value of the premises sold. There was, however, no agreement for a fresh conveyance after final decree. Final decree was entered in September, 1923, and by it the defendant was allotted the lots he had sold and conveyed to the plaintiff. The plaintiff brings the present action asking for a further deed conveying these lots to him, basing his claim on the clause for further assurance contained in P1. In his answer the defendant pleaded that the plaintiff was not entitled to a conveyance, as he had failed to carry out his part of the agreement P2 and as there was a failure of consideration. At the trial, however, it was contended that P1 was invalid in law under section 17 of the Partition Ordinance, and that therefore the plaintiff was not entitled to the

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relief he claimed. This contention was upheld by the learned District Judge, who dismissed plaintiff's action. The question we are called upon to decide is whether this decision is right.

The first question to be considered is the effect of P1. Does it convey to the purchaser the divided lots the vendor purported to convey, or the actual rights the vendor was entitled to at the date of the conveyance? The land of which these lots formed part was an undivided land and was the subject of a partition action. Under our law, when things are the common property of several co-owners one of them cannot sell or transfer by delivery to the purchaser more than his own share (*Voet XVIII., 1, 14*). But when a co-owner has conveyed a divided block of a land which is found to be undivided, the Courts have endeavoured to give the transfer some effect, and the grantee has been held entitled to such lesser estate or interests as the grantor could convey. The effect of a conveyance of this kind has been much canvassed in the United States of America, and a question has been raised as to whether it is not actually void; and Freeman in his book on *Co-tenancy and Partition* (page 273) says:—

> "Such a conveyance is undoubtedly void so far as it undertakes to impair any of the rights of the other co-tenants. It will not justify the grantee in taking exclusive possession of the part described in his deed. It will not deprive the other co-tenants of the right to enjoy every part and parcel of the real estate; nor can it, to any extent, prejudice or vary their right to a partition of the common property. The grantee is liable to lose all his interest in the parcel conveyed to him, by its being set off to some other of the co-tenants upon partition. But although the deed does not impair the rights of the other co-tenants, it by no means follows that they may treat it as void or entirely disregard it. While falling short of what it professes to be, it nevertheless operates on the interest of the grantor, by transferring it to the grantee. The latter acquires rights which the co-tenants ought to be bound to respect. They ought not to be permitted to ignore his conveyance, and treat him as one having no interest in the property."

Then after discussing the conflicting views prevailing in the different states he concludes as follows (page 279):—

> "We are not sure that the difference in the decisions of many of the Courts upon this subject has not been more in form of expression than in matters of substance. If, however, there remain any States wherein the Courts really intend to assert that conveyance by one co-tenant of part of the common property is void, in any other sense than

> that such conveyance will not operate to diminish or impair the rights of the non-assenting co-tenants, such Courts are falling into the minority, as the more recent decisions tend strongly and surely toward the recognition of such conveyance as a valid transfer of all the grantor's interest in the property therein described, entitling the grantee to certain rights that the co-tenants of the grantor cannot wantonly disregard."

As regards its effect as between the parties to the deed, he says (page 282):—

> "But when, upon partition, or by conveyance from his co-tenants, or through any other means the grantor acquires an estate in severalty in the premises so conveyed by him, this subsequently acquired estate vests in his grantee by operation of the previous conveyance. In this proposition all the authorities treating upon this subject seem to concur."

Of course, in America there are no provisions of the law corresponding to sections 9 and 17 of our Partition Ordinance, and there is no doubt that in cases which do not come within the operation of the Partition Ordinance the same rule would apply locally. In local cases the view favoured by the learned author has been accepted. Thus, in *Perera v. Alvis* (*supra*), where two of the co-owners of a land which was the subject of a partition action had mortgaged the entirety and it was contended the mortgage was not obnoxious to section 17, the Court held that it was as in effect a mortgage of the undivided shares of the two co-owners. Ennis J. said: "In my opinion there is no substance in the objection that as the mortgage purported to deal with the entirety of the land it does not fall within the provisions of section 17; it did in fact deal with undivided shares." And De Sampayo J. said: "Nor is the contention tenable that section 17 does not apply, because as a matter of fact the mortgagors purported to mortgage the entire land. The plaintiff himself admits that in reality the mortgage was only of an undivided half of the land." Again in *Appuhamy v. Babun Appu* (*supra*), where this Court had to construe a deed similar to P1, Ennis A.C.J. said: "It was strenuously urged on appeal that section 17 of the Partition Ordinance did not apply in the circumstances of this case. It was suggested that what Abdulla sold to Simon was not an undivided share of the land but a divided whole, and that such a conveyance would not fall within the terms of section 17. In my opinion this argument is unsound, because until May 23, 1916, when the final decree in the partition case was entered, Abdulla was not the owner of lot A but only of undivided shares of land—shares the alienation of which is prohibited and

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declared void by section 17." So in the present case P1 must be construed as conveying to the plaintiff, it at all, only such undivided interests as the defendant had in the land. The deed must, therefore, be regarded as a deed dealing with the undivided shares belonging to the defendant. If so, is it obnoxious to section 17? It may, I think, be taken as an axiom of our law of partition that all alienations or hypothecations between the institution of an action for partition and entry of final decree or the sale and conveyance of the subject-matter of the action in cases when a sale is decreed are absolutely void, that is, void for all purposes and not *quoad* the partition suit only. Learned Counsel for the appellant attempted to controvert this point, but I think it too firmly established to be shaken. It has been acted upon in numerous cases to be found in our Report, and formed the basis of the decision of the Full Bench of five Judges in *Pieris v. Pieris*,[1] *sub. nom.: Khan Bhai v. Perera*.[2] The alienation sought to be effected by P1 offends against section 17 and is therefore void. Notwithstanding this effect of section 17 on P1, various arguments have been addressed to us to justify the plaintiff's claim in view of the fact that the final decree allots to the defendant the very lots he had conveyed by P1, and as it contains an agreement for further assurance. It is pointed out that what section 17 makes void is any alienation or hypothecation, and not the deed creating them. That is no doubt true. But under our law an alienation or hypothecation of immovable property can only be effected by deed, and the section declares that it shall not be lawful for any of the owners to alienate or hypothecate his undivided share or interest therein, that is, to alienate or hypothecate by deed. The distinction sought to be drawn is useful in cases when a deed contains several parts, and the different parts can be severed. In such a case, where the illegality created by Statute affects some only of the parts, those parts can be rejected and the rest retained. Thus in the local case of *Sidambaram Chetty v. Jayawardene* [3] it was held that where a land was mortgaged during the pendency of partition suit the hypothecation was void, but not the instrument which contained it, and that the debtor was liable on the personal covenant contained in the bond, the hypothecation being severable from the rest of the instrument. But can it be said that a covenant for further assurance can be severed from the operative part of a deed of sale? Such a covenant forms an integral part of the deed and is included among the ordinary covenants for title. Under the English Conveyancing and Law of Property Act, 1881,[4] a covenant for further assurance and other covenants for title are implied in every conveyance by a beneficial owner for valuable consideration. *Halsbury's Laws of England, Vol. 27, p. 426.* By the

[1] *(1925) 6 Law Rec. Rep. 1.*
[2] *(1925) 26 N. L. R. 204.*
[3] *(1905) 4 Tamb. 85.*
[4] *44 & 45 Vic. c. 41, s. 7.*

covenant in question the vendor undertakes " to do and execute all further and other acts, deeds, &c., for the better and more perfectly assuring the said premises," that is, the property sold and granted. If the sale or alienation is void, I cannot see the use of better and more perfectly assuring the premises attempted to be conveyed. I would hold that the covenant for further assurance is merely ancillary to the principal contract which is void, and that the adjunct must go with the principal agreement. *Halsbury's Laws of England, Vol. 27. p. 13; Brett v. East India & London Shipping Co., Ltd.*[1]

But the appellant contends that the defendant is estopped from denying the validity of the title conveyed to him, and that the title subsequently acquired by the defendant under the final decree enures to his benefit (*Voet XXI. 3; Gunatilleke v. Fernando* (*supra*)), and that in the events that have happened he is entitled to call for another conveyance under the clause for further assurance. But, in my opinion, the plaintiff is unable to invoke the aid of the Roman-Dutch law rule created by the *exceptio rei venditae et traditae*, which is similar to the English doctrine of estoppel by conveyance, as the deed in his favour is void in law. A party relying on the *exceptio* must prove two things: first, the existence of a deed in his favour, and second, the subsequent acquisition by the vendor of the interest conveyed. If either of these be not proved, the case of the party pleading it must fail. The deed must be a " valid " one, which can become effective when title is subsequently acquired. Here, in my opinion, there is no such deed if P1 is void. The doctrine of the Roman-Dutch law on this point was discussed and explained by the Privy Council in *Gunatilleke v. Fernando* (*supra*). There the main point that arose for decision was as to whether an alienation by a remainderman of his contingent interest became effective on his subsequently succeeding to the title. This was answered in the affirmative. The deed in question was executed in the year 1895. Their Lordships' judgment, which was delivered by Lord Phillimore, pointed out the difference between the English law and the Roman-Dutch law on the subject, the latter being broader in its effect than the English rule. Their Lordships thought that the requirements of sale and actual or symbolic delivery of the property were satisfied under the present law by the delivery of a deed of sale accompanied, followed, or evidenced by acts which may be deemed equivalent to the Roman *traditio*. This they found present in the case before them. The recitals may be incorrect, and the vendor may or may not have had any right, title, or interest in the property. " Supposing they had none," said Lord Phillimore, " under the Roman-Dutch law their subsequent acquisition would make *this transfer* effective." Then, referring to the transfer His

[1] (*1864*) *2 Hem. & M. 404.*

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Lordship said: "But as to the alienability of a contingent interest, there appears to be a dearth of authority. None has been brought to their Lordships' notice. No doubt the *spes* which such a remainder-man can alienate is a very shadowy one, for if he predeceases the fiduciary his heirs take nothing (*Pereira: Laws of Ceylon, Ed. 2, p. 467*), and therefore the alienee could take nothing. *But there is, at any rate, no inclination either that such an alienation is prohibited by the policy of the law or that an instrument purporting to alienate is so null and void that it cannot be looked at for any purpose.*" Their Lordships came to the conclusion that the plaintiff could avail herself of the title which she got under the deed of 1895. This became possible only because the deed in question was not void. The rule of the Roman-Dutch law therefore depends on the validity of the deed executed when the vendor had no title or only a defective title. It is the same under the English law, where, if there is no valid deed creating an estoppel, there is nothing that can be fed by the subsequently acquired interest (*Spencer Bower, on The Law of Estoppel by Representation 284*).

In cases of this kind the execution of a second deed is really unnecessary, as the benefit of the subsequent acquisition goes automatically to the grantee. The doctrine of the Roman-Dutch law cannot, therefore, help the plaintiff, as there was no deed which could become effective on the defendant acquiring title under the partion decree.

Then it is argued that P1 should be treated as an agreement to convey. P1 is clearly not an agreement to convey in the future, but a completed transaction intended to pass an immediate interest in the property, although possession was postponed until entry of final decree by the agreement P2. The operative words used in P1: "grant, bargain, sell, assign, transfer, set over, and assure," are words appropriate to a conveyance transferring property. Clearer and stronger words to effect an immediate transfer and out-and-out sale cannot be conceived of. The parties are described as "vendor" and "vendee," and in the covenant the premises are described as the premises "hereby sold and assigned," and the vendor undertakes to warrant and defend and to further assure the premises sold.

Does P2 reduce this deed of conveyance (P1) to a mere agreement to convey? P2 recites the fact that the grantee, the present plaintiff, has purchased the property in P1, and proceeds to give the terms of the agreement:—

The first is that as P1 was executed before final decree, that the grantor should do nothing to deprive the grantee of his title, interest, and claim under P1;

Second, that P1 should be of full force and valid at law, and that the grantee should be entitled to enjoy and possess the premises conveyed after final decree:

Third, that the grantee should pay the costs payable by the grantor in the partition action and any compensation in excess of what the Commission had paid;

Fourth, creates a servitude over two of the lots conveyed in favour of the grantor;

Fifth, that if the grantor does any act, &c., to deprive the grantee of the right, title, and interest conveyed, the grantor should pay the full value of the premises; and

Lastly, that if either of the parties fail or refuse to carry out the terms of the agreement he should pay to the other Rs. 250 as liquidated damages.

The terms I have set out above indicate that the parties recognized that P1 was a valid conveyance, and had transferred to the purchaser the vendor's right, title, and interest in the property dealt with in P1. That view pervades the whole of P2, and, it seems to me, formed the basis of the agreement. Further, if the plaintiff had any doubt as to the validity of P1, he would not have failed to stipulate for a further conveyance after final decree. The absence of such a stipulation, especially where the first and fifth terms have been inserted, appear to conclude the matter. Learned Counsel for the appellant did not put his contention in that form. His contention was that although P1 was an out-and-out sale, if it was void as an alienation under section 17, he was entitled to ask the Court to treat it as an agreement to convey on the authority of the case of *Parker v. Taswell.*[1] In that case the parties had signed a document which created a lease, but it was void at law as a lease under *8 & 9 Vic. c. 106, s. 3*, because it was not by deed. But the Court (Lord Chelmsford L.C.) held that the Statute in question did not prevent an instrument which was void as a lease from being used as an agreement, and directed specific performance. In the course of his judgment the Lord Chancellor said: " Assuming, however, that it had been signed in the name of the lessor, and would, therefore, have amounted to a lease, as containing words of present demise, yet there is nothing in the Act to prevent its being used as an agreement, though void as a lease because not under seal.

The Legislature appears to have been very cautious and guarded in language, for it uses the expression " shall be void at law," that is, as a lease. If the Legislature had intended to deprive such a document of all efficacy, it would have said that the instrument should be " void to all intents and purposes." There are no such words in the Act. I think it would be too strong to say that because it is void at law as a lease, it cannot be used as an agreement enforceable in equity, the intention of the parties having been that there should be a lease, and the aid of equity being only invoked to carry

[1] *(1855) 27 L. J. Ch. 812 ; 44 E. R. 1106.*

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that intention into effect." This case has been followed, but in *Zimbler v. Abrahams*,[1] where the Court felt bound by it, Vaughan Williams L.J. remarked: "It is not material to state whether I approve of those decisions or not, though I must say that I feel strongly that the result of Lord Chelmsford's decision is to neutralize the effect of the Statute, *8 & 9 Vic. c. 106*. As the learned Judge points out in the earlier case, the language used by the Legislature in section 3 of *8 & 9 Vic. c. 106* is very guarded, and does not deprive the document of all efficacy, and this enabled the Court to treat a lease as an agreement to lease. But on the other hand this Court has held (see *Annamali Pillai v. Perera* [2]) that an alienation void under section 17 is "void to all intents and purposes." That being so, it becomes impossible to construe P1 as an agreement to convey, even if that were possible under our law, which I very much doubt.

If alienations and hypothecations pending partition proceedings are to be treated as agreements to alienate or hypothecate, section 17 would become practically a dead letter. Further, such a contention, so far as I am aware, has never been entertained—if it was ever submitted—by our Courts, although numerous deeds which have become inoperative by virtue of section 17 might have been saved if that contention was sound. If it is sound, the effect of section 9 of the Partition Ordinance would have to be considered: whether the deed creates a right or title which the grantee has or claims in the property, and which is destroyed by that section. In view of what I have said above it becomes unnecessary to express an opinion on the point.

Lastly, it was argued that if the deed of sale (P1) is void the vendor, the defendant, became a trustee for the purchaser, the plaintiff, of the interests sold, and as a trust is not in any way affected by a final decree (*Marikar v. Marikar* (*supra*)), the plaintiff is entitled to the conveyance he asks for. In support of this argument learned Counsel cited the case of *Rose v. Watson*.[3] In *Rose v. Watson* (*supra*) there was a contract for sale, then a mortgage with notice, and then the purchaser refused to complete the purchase owing to the misrepresentation of the vendor, and the House of Lords held that the purchaser, who had paid a deposit, had a charge on the land for that deposit and interest in priority to the mortgage. The principle on which the House acted is stated by Lord Cranworth thus (p. 683): "There can be no doubt, I apprehend, that when a purchaser has paid his purchase-money, though he has got no conveyance, the vendor becomes a trustee for him of the legal estate, and he is, in equity, considered as the owner of the estate. When, instead of paying the whole of his purchase-money,

[1] *(1903) 1 K. B. 577.*
[2] *(1902) 6 N. L. R. 108.*
[3] *(1864) 10 H. L. C. 672 (683) : 11 E. R. 1187.*

he pays a part of it, it would seem to follow, as a necessary corollary, that to the extent to which he has paid his purchase-money, to that extent the vendor is a trustee for him; in other words, that he acquires a lien, exactly in the same way as if upon the payment of part of the purchase-money the vendor had executed a mortgage to him of the estate to that extent. The same principle was thus stated by Jessel M.R. in the case of *Lysaght v. Edwards*:[1] "It (the doctrine) is that the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase-money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase-money is paid, in the absence of express contract as to the time of delivering possession." There must therefore be a "valid contract," and the learned Master of the Rolls says that "a valid contract" means in every case a contract sufficient in form and in substance so that there is no ground whatever for setting it aside as between the vendor and purchaser "a contract biding on both parties." Then he proceeds to point out that as regards real property another element of validity is required, that is, that the vendor must be in a position to make a title according to the contract. I very much doubt whether the doctrine laid down in these cases by the Courts of Equity in England on the effect of a contract for sale of land can have any application to our system of law. When one considers the consequences that flow from such a doctrine, one of which is that from the moment a valid contract for sale is entered into land is treated as having been converted into money, one could have very little hesitation in saying that it cannot form part of our law of real property. However that may be, here again there is no "valid contract," and in the absence of a valid contract the principle cannot be applied. Therefore, even under the English law the relation of trustee and *cestui que trust* would not have arisen on the execution of P1.

As regards local decisions, the case of *Appuhamy v. Babun Appu* (*supra*) is on all fours with the present case. There this Court had to construe a deed similar to P1, and declared it to be void. The judgment of the Court (Ennis A.C.J. and Garvin J.) proceeded on two grounds:- first, that the alienation, which was held to be in effect an alienation of undivided shares, was void under section 17, and secondly, that as a partition decree under section 9 was a judgment *in rem*, a mortgage of the divided lot allotted to the vendor after decree was not affected by a conveyance of the same divided lot before decree. The first reason given cannot, in my opinion, be disregarded as being merely *obiter*. This Court is,

[1] *(1876) 2 Ch. D. 499 (506).*

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however, not bound by that judgment, and it is in fact considering its soundness here. I think, however, that the reason in question is sound and ought to be adopted.

As Bertram C.J. said in delivering the judgment of the Full Bench of five Judges in *Pieris v. Pieris* (*supra*): "Persons desiring to charge or dispose of their interests in a property subject to a partition suit can only do so by expressly charging or disposing of the interest to be ultimately allotted to them in the action." The parties here have failed to see that done when they entered into P1, and the results is a deed of alienation void in law.

The case for the appellant fails on all points, and the judgment appealed from must be held to be right.

The record must go back for the decision of the third issue regarding the amount paid by the plaintiff to the defendant as consideration for P1. The plaintiff is clearly entitled to be repaid the consideration. The defendant has not contested his liability to repay whatever was paid to him by the plaintiff, and has admitted his willingness to do so in his answer. But the exact amount paid is in dispute. The learned District Judge will decide this question.

In the circumstances, I would allow the defendants the costs of this appeal and of the trial in the lower Court. The costs of the further proceedings will be in the discretion of the District Judge.

Appeal allowed.