1957 *Present :* Basnayake C.J., Gunasekara J., Pulle J., de Silva J., and Sansoni J.

JOSEPH PERERA, Appellant, *and* LEWIS ABEYSEKERA, Respondent

S. C. 140—D. C. Chilaw, 13,210

Contract—Informal agreement to sell immovable property—Time limit fixed for execution of deed of sale—Deposit of part of purchase price—Forfeiture clause—Failure of purchaser to pay balance sum within stipulated period—Right to claim refund of deposit—Unjust enrichment—Money had and received—Prevention of Frauds Ordinance, s. 2.

Where, under a non-notarial agreement to sell immovable property, a sum of money is paid in advance by the purchaser, but the sale subsequently falls through, the subsidiary agreement as to the destination of the money paid in advance is severable from the agreement for the sale of the immovable property and is valid.

By a non-notarial agreement the defendant agreed to convey to the plaintiff certain immovable property for Rs. 45,000. The plaintiff paid Rs. 5,000 in advance and it was stipulated in the agreement that, upon payment of the balance sum of Rs. 40,000, the conveyance was to be executed on or before November 8, 1949, i.e., within fifteen days from the date of the agreement. It was also agreed that should the plaintiff not pay the balance consideration within the fixed period, he was to forfeit the deposit of Rs. 5,000 and that should the defendant fail to fulfil his part of the agreement he should pay Rs. 10,000 as compensation to the plaintiff.

The balance sum of Rs. 40,000 was not paid by the plaintiff within the period of 15 days specified in the agreement. In the present action instituted by the plaintiff for the refund of the deposit of Rs. 5,000, the trial Judge found that the failure was due to the fact that essential steps relating to the investigation of the title to the property could not be completed within those 15 days because the defendant could not make available to the plaintiff the title deeds relating to the property ; the defendant therefore agreed to an extension of time, but subsequently on November 18, 1949, he repudiated the contract.

It was also decided by the trial Judge that it was not intended by the parties that time should be of the essence of the contract and that, in law therefore, the condition for the forfeiture of the deposit of Rs. 5,000 meant only that the purchase should be completed on or before November 8, 1949, or within a reasonable time thereafter.

Held, per GUNASEKARA, J., PULLE, J., and SANSONI, J. (BASNAYAKE, C.J., and DE SILVA, J., dissenting), that the plaintiff was entitled to the return of his deposit of Rs. 5,000. Although the informal agreement relating to the sale of immovable property was void by virtue of the provisions of section 2 of the Prevention of Frauds Ordinance, the subsidiary agreement, in the same contract, as to the destination of the deposit of Rs. 5,000 was severable and effect could be given to its terms according to law.

APPEAL from a judgment of the District Court, Chilaw. This appeal was referred under section 51 (1) of the Courts Ordinance to a Bench of five Judges.

H. V. Perera, Q.C., with *K. C. de Silva* and *J. A. D. de Silva*, for Defendant-Appellant.

N. K. Choksy, Q.C., with *E. G. Wikramanayake, Q.C.*, *E. R. S. R. Coomaraswamy*, *B. A. R. Candappa* and *N. K. Rodrigo*, for Plaintiff-Respondent.

Cur. adv. vult.

April 12, 1957. BASNAYAKE, C.J.—

In this action the plaintiff sued the defendant on three causes of action. For a first cause of action he alleged—

(*a*) that by agreement dated 24th October 1949 the defendant agreed to convey to him within 15 days of the execution of the agreement, for a sum of Rs. 45,000, a land about ten acres in extent, together with the buildings, furniture and the fibre mill thereon,

(*b*) that he paid to the defendant out of the consideration of Rs. 45,000 a sum of Rs. 5,000 as a payment in advance,

(*c*) that the failure to effect the conveyance in terms of the agreement was due to the default of the defendant.

For a second cause of action the plaintiff claimed a sum of Rs. 3,500 being the value of fibre wrongfully appropriated by the defendant and a sum of Rs. 806·54 as damages. He alleged—

(*a*) that the defendant, in terms of the agreement, on or about 24th October 1949, placed the plaintiff in possession of a fibre mill and gave him the right to work it and dispose of the fibre manufactured by him,

(*b*) that between the 25th October 1949 and the 18th November 1949 he brought 261,700 coconut husks for the manufacture of fibre and manufactured mattress fibre and bristle fibre, and

(*c*) that on 18th November 1949 the defendant took forcible possession of 250 cwt of mattress fibre manufactured by the plaintiff valued at Rs. 3,500.

As an alternative cause of action the plaintiff pleaded that even if it be held that the agreement was void in so far as it related to immovable property, he was entitled to recover the sum of Rs. 5,000 paid to the defendant on 24th October, 1949.

He prayed—

(*a*) on the first cause of action or on the alternative cause of action for judgment in a sum of Rs. 5,000 with legal interest thereon,

(*b*) for an order directing the defendant to deliver to the plaintiff 250 cwt of mattress fibre or in default to pay the sum of Rs. 3,500 with legal interest thereon,

(*c*) for judgment in a sum of Rs. 806·54, and

(*d*) for costs.

The defendant denied that the failure to effect the conveyance within the time stipulated in the agreement was due to his default. While admitting that he placed the plaintiff in possession of the land and the fibre mill thereon, the defendant denied that he took forcible possession of 250 cwt of fibre valued at Rs. 3,500. He valued the coconut husks brought by the plaintiff at Rs. 960·71. He prayed that the plaintiff's action be dismissed with costs.

The agreement referred to in the pleadings is not attested in the manner required by section 2 of the Prevention of Frauds Ordinance and is signed only by the defendant. It reads as follows :—

"This 24th day of October 1949.

I, the undersigned K. Edward Joseph Perera of Wennappuwa in Chilaw District have valued the land called Molawatta in extent about ten (10) acres situated at Wattakaliya within the town of Chilaw and the Blackstone Oil Engine bearing No. 161781 of 50 Horse Power and all other accessories of the Fibre Mill, all other buildings and all materials appertaining thereto and standing thereon for a sum of Rupees Forty-five Thousand (Rs. 45,000) of present lawful money of Ceylon, having agreed to transfer the same unto Mr. D. L. Abeyasekara of Andiambalama in Negombo and have received on this date a sum of Rupees Five Thousand (Rs. 5,000) in cash from the said Mr. Abeyasekera as an advance.

Wherefore the balance sum of Rupees Forty Thousand (Rs. 40,000) shall be paid within 15 days from this date and shall execute a deed of conveyance at the expense of the purchaser.

And that until the deed of conveyance is executed and the rights are assigned, I have hereby assigned all the right, title and interest of working the Mill and of disposing the goods manufactured unto the purchaser hereof from this date under a person authorised by me.

And that if the balance amount is not paid and the deed of conveyance is not executed within 15 days from this date and that the same could not be performed the sum of Rupees Five Thousand (Rs. 5,000) paid by the said Mr. D. L. Abeyasekera as advance and the authority assigned as aforesaid shall hereby be forfeited and null and void and that if I the vendor Mr. K. E. J. Perera neglected to execute the said deed and deliver the same, I have hereby agreed to pay a sum of Rupees Ten Thousand as compensation."

As in my view the translation filed of record is unsatisfactory, I set out below the document in its original form :—

වෂී 1949ක්වූ ඔක්තෝම්බර මස 24 වෙනි
දිනදිය.

මෙහි පහත අත්සන්කර දෙන හලාවත දිස්ත්‍රික්වේ වෙන්නප්පුවේ පදිංචි කේ. ඇඩිවර්ඩ් ජෝශප් ප්‍රේරා වන මට අයිති හලාවත වවුම්එකතුළ වට්ටක්කල්ලි-යේ පිහිටි අක්කර දහයක් පමණ විශාල මෝලවත්ත යන ඉඩම සහ එහිතුළ පිහිට නොම්මර 161781 දරණ අශ්වබල 50 ක බලැක්ස්ටෝන් ඔයිල් ඇන්ජින් එක සහ කොහුමෝලේ සියලුම ගොඩනැගිලින් එහිතුල තිබෙන මට අයිති සියලුම

බඩුබාහිරාදියන් දැනට ලංකාවේ වලංගුවෙන මුදලෙන් රුපියල් හතලිස් පන්දාහකට රු, 45000/- ට්‍රළ නියම කර ඔහුමු ආඩිඅම්බලමේ පදිංචි ඩී ඇල් අබේසේකර මහතාට විකිණීමට කැමතිවී එම අබේසේකර මහතාගෙන් ඇඩ්වාන්ස් වශයෙන් දැදීන රුපියල් පන්දහක් රු, 5000/-මුදලෙන් භාර ගන්ට යෙදුනෙමි. එසේ හෙයින් ඉතුරු මුදල වන රුපියල් හතලිස් දහ රු, 40000/- අද පටන් දවස් 15 ක් ඇතුලතදී ගෙවා ඔන්නක්කර ඔප්පුවක් ගැනුම්කාර මහතාගේ වියදමෙන් යාදාගත යුතුයි.

තවද අදපටන් ඔන්නක්කර ඔප්පුව සාදු අයිතිවාසිකම් පවරාගන්නාතුරු මෙම ගැනුම්කාර පක්ෂයට මෝලේ වැඩ කෙරවීම ආදියන් සාදන බවු විකුණාගැනිවටන් සියලුම බලය මගේ බාරකාරයෙක් යටතේ මෙයින් පවරාදී වැඩපල බාරදෙන්ට යෙදුනෙමි. තවද අද පටන් දවස් 15 ක් ඇතුලත ඉතුරු මුදල ගෙවා ඔන්නක්කර ඔප්පුව සාදු නොගතහොත් එකී දිනට එය ඉවට කරන්ට නොහැකි උනොහොත් මෙම ඩී ඇල් අබේසේකර මහතා විසින් ඇඩ්වාන්ස් වශයෙන් ගෙවන්ට යෙදුන රුපියල් පන්දහ රු, 5000/- සහ එම පවරාදුන් බලතලන් මෙයින් අවලංගුවී යන බවත් විකුනුම්කාර පක්ෂය වන කේ ඊ ජේ ප්‍රේරා මහතා එකී දිනට එම ඔප්පු සාදදී බාරදීමට පැහැර හැරියොත් වන්දි වශයෙන් රුපියල් දහදහක් වන්දි ගෙවන බවටත් මෙයින් පොරොන්දු වුනිමි.

යාක්ෂි 1 :—

2 :—

It is common ground that the balance of Rs. 40,000 was not paid within 15 days as stipulated in the agreement. It was also not disputed at the trial and the hearing of this appeal that the last day for the payment of the balance sum by the plaintiff and for the execution of the deed of conveyance was 8th November 1949. The plaintiff's notary, Proctor D. E. J. Peiris, states in his evidence that his client came to him on 27th or 28th October 1949 and informed him of the agreement and requested him to write to the defendant for the title deeds. In pursuance of that request he wrote a letter to a person whose name and address was furnished by the plaintiff, viz., W. E. I. Fernando, which is not the defendant's name. The letter was returned by the Post Office with the endorsement "Addressee not known". When the plaintiff came to see him a second time about the 3rd of November bringing with him the agreement pleaded by him, Proctor Peiris informed him that he had not got the deeds. The plaintiff then undertook to get them. He came a third time a few days later and informed him that the deeds were with Dr. Pinto to whom the property was mortgaged for Rs. 10,000 and that they could be examined at the office of Proctor W. R. Ranasinghe at Chilaw. On 7th November Proctor Peiris went to Proctor Ranasinghe's office with the plaintiff. There he discovered that the deeds were not with Proctor Ranasinghe but were in fact with Dr. Pinto. Proctor Ranasinghe, however, gave him the reference to the folios in which the deed was registered to enable him to search the registers kept under the Registration of Documents Ordinance and at the same time asked Proctor Peiris to write to him calling for the deeds to enable Proctor Ranasinghe to obtain them from Dr. Pinto. Proctor Peiris searched the encumbrances and returned to Negombo and on 8th November wrote to Proctor Ranasinghe requesting him to send the deeds. The deeds were received on 15th November with a covering letter dated 12th November.

The learned trial Judge has accepted the evidence of Proctor Peiris. I am unable to reconcile his finding that it was the defendant and not the plaintiff who defaulted in carrying out the agreement with the evidence of Proctor Peiris. To my mind on his evidence there can be no doubt that it was the plaintiff and not the defendant who defaulted. The plaintiff who gave evidence offered no valid explanation as to why he at first gave the wrong name to Proctor Peiris. On this point his evidence is at variance with Proctor Peiris's and must therefore be rejected. He denies he gave any name to his proctor. He says he gave the defendant's address and did not give his name, as it was in the agreement. But Proctor Peiris states that the agreement was brought by the plaintiff only on the second visit, the visit after the one in which he gave the wrong name. Neither the plaintiff nor his notary gives any satisfactory explanation as to why the conveyance was not prepared on the 7th or 8th November after Proctor Peiris had examined the land registers. Nor is there any explanation as to why the balance money at least was not paid on or before 8th November as required by the agreement. For, if the balance money had been paid within the stipulated time, the signing of the conveyance would have been a mere formality, especially as the plaintiff was in possession of the land.

The learned trial Judge's finding that it was the defendant and not the plaintiff who defaulted is not supported by the evidence and cannot therefore be sustained.

I shall next consider whether on this view of the facts the plaintiff would in law be entitled to claim a refund of the Rs. 5,000 paid by him even if the agreement had been notarially attested. The agreement, though a home made one written by the defendant's baas in Sinhalese, is a carefully worded instrument. It states that the sum of Rs. 5,000 is received as an advance being part of the purchase price of Rs. 45,000. It also provides that the balance of Rs. 40,000 shall be paid within 15 days of the date of its execution and that a conveyance shall be executed at the expense of the purchaser. It also makes provision for placing the plaintiff in possession of the mill pending the execution of the conveyance. It goes on further to provide that if the balance is not paid within 15 days of its execution the sum of Rs. 5,000 paid as advance shall be forfeited and all the rights given under the agreement shall be null and void and that if the vendor fails to fulfil his part of the agreement he should pay Rs. 10,000 as compensation.

The deposit of money which goes to form part of the purchase price if the sale goes through and is liable to forfeiture if it does not, was a common feature of contracts under Roman and Roman-Dutch Law. The deposit came to be called arrha in Roman Law and this expression was used by the Roman-Dutch writers as well. Isidore whom Voet quotes thinks the word was derived from *a re*—the thing on account of which it is delivered. Gane the translator of Voet calls this derivation fanciful and he traces it to the Greek ἀρραβών which is said to have a Hebrew origin and means "earnest" or "security". In English law arrha is known as earnest. In *Summer and Leivesley v. John Brown & Co.*[1] it is defined as "something given for the purpose of binding a

[1] *23 T. L. R. 745.*

contract, something to be used to put pressure on the defaulter if he failed to carry out his part. If the contract went through, the thing given in earnest was returned to the giver, or, if money, it was deducted from the price. If the contract went off through the giver's fault, the thing given in earnest was forfeited." Voet, Grotius, Van Leeuwen, Pothier, and Domat all agree that arrha is liable to forfeiture where the purchaser seeks to withdraw from the purchase. It will be helpful if I were to set out below relevant extracts from the discussions of this topic by the learned writers I have referred to above.

Voet—Book XVIII, Title I, Section 25 (Gane's translation)

But the jurists look at it in a slightly different way. In the first place it can consist either of a money payment or of other things. If it is in money, nothing forbids its remaining in the hands of the receiver after it has been given by the purchaser to the seller, and having to be reckoned as part of the price. But if it consists of other things, it is clear from the passage cited below that after completion of the contract of purchase and sale what had been given by way of earnest can be reclaimed by the giver in an action on the purchase or in a personal action for the recovery of what has been paid without cause. Then again in the second place, earnest was indeed often given in order to mark the completion of a contract of purchase which had further to be put into effect from both sides, so that thus the covenant as to the price could be more plainly proved. Yet it also was given sometimes as a token of an unfinished purchase to be later completed in writing or otherwise according to the will of the parties.

In the latter case there can be a retiring from the unfinished purchase subject to the loss of the earnests which one has given, or, if one has received them, subject to the restoration of their doubled value. But in the former case all change of mind has been shut out in accord with what has been said in our foregoing remarks although one is ready to lose the earnests given, or to pay back double the value of those received.

Voet—Book XVIII, Title 3, Section

Assuredly it is matter of reason that if an earnest has been given, or anything else has been disbursed by the buyer on account of the purchase, such as on a drinking-party on the preparation of a document of purchase, on the commission of a broker and on whatever else may be like such things, they are lost to the buyer and ought not to be restored to him. It came about through the buyer that he did not comply with the term annexed, and he ought not to be allowed to break faith with impunity.

As to its being stated in the passage cited below that there had been a special agreement that on the price not being paid " the buyer would lose the earnest and the thing be unbought ", you would not correctly infer from that a need of an agreement for the loss of the earnest. It is no novelty for such matters often to be put also into agreements

superfluously and for the purpose of removing doubt, though even without agreement they would flow from the very provision of the common law.

Voet—Book XVIII, Title 3, Section 4

This commissory term becomes effective in the ordinary course by the very passage of the time specified ; and there is no need of a demand by the seller to put the buyer in default, since the day makes full demand in place of the human being.

Voet—Book XVIII, Title 3, Section 5

Nevertheless the effect of such an agreement falls away whenever the non-payment of the price on its day has been due not to the buyer but to the seller.

Grotius—Book III, Ch. XIV, Sec. XXVII

Introduction to Dutch Jurisprudence (Herbert's Translation)

" An agreement without writing can be entered into not only between parties present, but also by letters, messengers, or agents ; and the purchase is considered as completed as soon as the price has been reciprocally agreed on. As long as the purchase is not fulfilled on either the one or the other side, the one or the other may retire therefrom without any loss, except that the purchaser loses his earnest or deposit, if any has been given ; this earnest is called by us God's money, because it seldom amounts to much more than is generally given on account of the poor or the church ; but if the seller has renounced the bargain, he must restore the earnest (should he have received any) twofold. "

Grotius—Book III, Ch. XIV, Sec. XXXII

" It is also frequently stipulated, that, unless the purchase money be paid on the day fixed, the subject shall be considered as unbought (*lex commissoria*), in which case also the purchase is actually effected ; but, in case of non-payment, the seller has the choice either to allow the purchase to stand, or take back to himself the thing that is sold, retaining the earnest and whatever more was paid on the purchase. "

Van Leeuwen—Pt. I, Book IV, Ch. XX, Sec. III (Barber & Mac-Fadyen)

" The conditional agreement by which it is agreed that, unless the price be paid within a certain time, the thing should be unbought, and this is also attached solely in the interest of the vendor, and therefore he has the choice either to demand the price or to make use of the conditional stipulation. But if he has once chosen he cannot afterwards change and if he has demanded the price or interest he seems to have renounced the ' lex commissoria '. "

Pothier—Contract of Sale, Sec. 474

"We add sometimes to the commissory pact, this clause, that the seller, who has received a part of the price, may, in case of a dissolution of the contract, for default of payment within the time limited, retain, by way of damages and interests, this part of the price, taking back the thing sold. This clause is lawful, provided the sum is not too considerable, and does not exceed the highest sum, in which the damages and interests, resulting from the non-execution of the contract, may be estimated."

Domat—Pt. I, Book I, Title II, Sec. IV

Section 330.—

"The earnest penny is, as it were, a pledge which the buyer gives to the seller in money, or some other things; whether it be to signify more certainly that the sale is perfected; or to be in place of payment of a part of the price; or to regulate the damages to be recovered of the party who shall fail to perform the articles of the sale. Thus the earnest given in the sale has the effect which the parties have agreed it should have."

V

Section 331.—

"If there be no express agreement which regulates the effect which the earnest shall have, against the party who shall fail in performing the contract of sale; if it is the buyer, he shall lose his earnest; and if it is the seller, he shall give back the earnest, with as much more."

. . . . . .

In the instant case we have a written agreement which expressly stipulates the forfeiture of the deposit in the event of the purchaser's default. It is a contract of sale to which the Lex Commissoria applies. Except Pothier all the other writers are agreed that the full amount deposited may be forfeited in the event of default. Pothier alone states that the courts have power to mitigate the forfeiture. His view cannot be preferred to that of the writers on Roman-Dutch Law by whose opinion we must be guided. I hold therefore that even if this agreement had been notarially attested and therefore of force or avail in law the plaintiff would not be entitled to claim refund of his deposit of Rs. 5,000. The plaintiff cannot have greater rights under an agreement which is not notarially attested. His claim for a refund must therefore fail. There is considerable support for this view from the judgments of the South African Courts which like us are governed in matters of contract by the principles of Roman-Dutch Law.

The application of the Lex Commissoria (Commissory pact as Gane calls it) has been discussed in a number of cases where attempt has been unsuccessfully made to establish that such a forfeiture is a penalty coming

within the principle stated by Lord Tomlin in the *Pearl Assurance* case [1]. I shall now proceed to refer to the better known cases. I am citing at length because my citations are from reports which are not available in most of our libraries. In *Cloete v. Union Corporation Ltd.* [2] Tindall J. states :—

> "The Roman-Dutch authorities are clear that *arrha* is forfeited to the seller if the contract is cancelled owing to the buyer's default, and no Roman-Dutch authority has been quoted which shows that that is not the case where the *arrha* is a sum of money which is to be applied in part payment of the price. In regard to *Pothier's* statement in section 474 I know of no Roman-Dutch authority which is to the same effect. It is doubtful whether *Groenewegen in his note to Grotius* (3.14.32) had in mind the case of a special stipulation. It is not possible to read such a qualification into *Voet's* statement in 18.3.3. *Voet* was, however, well aware that the Roman-Dutch law mitigated the rigour of the Roman Law in regard to penal stipulations ; he deals with the subject in 45.1.12 and 13. But it must be observed that *Voet* does mention a certain mitigation of the forfeiture ; he states that if the seller keeps the portion of the price paid, the buyer must be allowed to retain the fruits. This alleviation of the buyer's position, though it is inconsistent with the view that the seller's right must be tested by the actual damages suffered, certainly does involve a discretion in the judge to mitigate the rigour of the forfeiture to some extent, namely, by allowing the buyer keep the fruits."

This question of the power of the Court to mitigate the forfeiture of *arrha* was again raised in the cases of *Arlow Properties (Pty) Ltd. v. Bailey* [3] and *Mine Workers' Union v. Prinsloo Greyling* [4]. In the former case the Court felt itself bound to follow *Cloete's* case ; but in the latter case the whole question was reagitated by counsel and dealt with in the judgments. Dealing with the argument that the provision for forfeiture should be treated as if it were a penalty Greenberg J.A. states at page 851 :—

> "The main contention advanced on behalf of the appellant was that the provision for forfeiture is indistinguishable from and is in fact a penalty and that there is no reason why, unlike other penal provisions, it should be enforced. But although it was recognised in Roman Dutch Law that penalties were not enforceable (*Voet*, 45.1.12, 13), the validity of a provision for forfeiture contained in a *lex commissoria* was not questioned and the proper conclusion seems to me to be that a pact of this kind was considered valid, notwithstanding its penal nature."

This view of the law has been approved by a Bench of five Judges of the Appellate Division in the case of *Tobacco Manufacturers Committee v. Jacob Green & Sons* [5]. Schreiner J. A. states at page 488 :—

> "Where there is provision for the payment of a sum, specified or ascertainable and, if ascertainable, by calculation or assessment,

[1] *1934 A. C. 570.*
[2] *(1929) T. P. D. 508 at 516-519.*
[3] *(1937) W. L. D. 116.*
[4] *1948 (3) S. A. L. R. 831.*
[5] *1953 (3) S. A. L. R. 480.*

upon a breach of a contract the question whether the sum is a penalty or liquidated damages must ordinarily arise. There may, no doubt, be exceptions, real or apparent, to this generalisation. For instance, forfeitures under a *lex commissoria*, though they may be highly penal in their operation, fall outside the field. (*The Mine Workers' Union v. Prinsloo and Greyling*[1]) "

The same question was again raised before five Judges of the Appellate Division in the case of *Baines Motors v. Piek*[2]. That case holds that a forfeiture clause accompanying a *lex commissoria* in a contract of sale and pertinent to that contract is enforceable according to its tenor, unless it is designed to enforce a principal obligation which is forbidden by the law or is conducive to immorality, and that the principles laid down in the *Pearl Assurance* case[3] in regard to a penalty in a contract of sale have no application to a forfeiture clause annexed to a commissory pact merely because it is penal in nature. Schreiner J.A. and Van Den Heever J.A. examine in detail the legal aspects of the question. Schreiner J.A. states at page 540 :

" In particular, if what the seller selects amounts to no more than recovery of the vehicle sold and retention of what the buyer has paid in respect of the purchase price, this is simply a *lex commissoria* which can be enforced even if it operates penally. That the actual claim of the seller is wholly within the field of the *lex commissoria* is not open to question, and it follows that, if that claim can be made despite the fact that it rests upon provisions of the contract which form part of a penal totality, the mere fact that there is such a penal element cannot be set up by the buyer and the exceptions to the plea and the counterclaim should have been upheld. "

He referred to the *Mineworkers* and the *Tobacco Manufacturers'* cases (*supra*) as supporting his view.

Van Den Heever J.A. in a forceful judgment upholding the claim to forfeiture based on the *lex commissoria* states at page 546 :

" I have come to the conclusion, therefore, that a forfeiture clause accompanying a *lex commissoria* in a contract of sale and pertinent to that contract is enforceable according to its tenor, unless it is designed to enforce a principal obligation which is forbidden by the law or is conducive to immorality. "

In view of the fact that the question of forfeiture of deposits is a subject dealt with both by the institutional writers and the South African Courts, it is not necessary to make more than passing reference to the English Law on the subject. It would appear from the case of *Hinton v. Sparkes*[4] that the forfeiture of a deposit operated to the full extent of the

[1] *1918 (3) S. A. 831 (A. D.)*
[2] *1955 (1) S. A. L. R. 531.*
[3] *1934 A. C. 570.*
[4] *L. R. C. P. Vol. III. Page 161 (1867-68).*

amount in deposit and in that case the Court refused to reduce the amount of forfeiture. Bovill C.J. stated at page 165 :

> " The intention of the parties, as I collect it from the agreement, is, that this is to be taken as the ordinary case of payment of a deposit, which is to be forfeited on the purchaser's failure to complete the contract. That being so, it follows that the defendant has no answer to the action. This view is entirely in accordance with the decision of the Court of Queen's Bench in *Ockenden v. Henly* [1]. The numerous cases referred to as to the distinction between penalty and liquidated damages have in my judgment no application to a contract in the form of that now in question. "

As the main controversy in this appeal centred round the plaintiff's claim for a refund of the deposit of Rs. 5,000 the decision I have reached concludes the matter but the question on which this appeal has been referred to a bench of five Judges is whether the case of *Nagur Pitchi v. Usoof* [2] has been rightly decided. Before I enter on a discussion of that case I think I should examine the meaning and effect of section 2 of the Prevention of Frauds Ordinance (hereinafter referred to as the Ordinance). That section reads :—

> " No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the *Thesawalamai* Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorised by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses. "

The above section declares that no transactions specified therein " shall be of force or avail in law " unless it is in writing and signed by the party making it or some person on his behalf in the presence of a notary and two witnesses present at the same time, and is duly attested by the notary and the two witnesses. The words that call for interpretation are self-explanatory and mean what they state, i. e. that a transaction which does not satisfy the requirements of the section is of no force or avail in law. The words " in law " have in my view been used in this context with the object of excluding even equitable relief to those who do not comply with the provisions of the statute ; for, the word " law " in its widest sense includes equity. (*The Queen v. Darlington Local Board of Health*)[3].

[1] *27 L. J. (Q.B.) 361.* [2] *(1917) 20 N. L. R. 1.*
[3] *6 B. & S. 562 at 569, 122 E. R. 1303 at 1305.*

According to the meaning of the material words in this context the transactions which are obnoxious to the section are not valid and have no efficacy. The words "of no force or avail in law" are very strong words and have the effect of making transactions which do not satisfy the requirements of the statute null and void. Such transactions must be treated as if they never came into existence. It is a canon of construction of statutes that where by the use of "clear and unequivocal language" capable of only one meaning anything is enacted by the legislature, it must be enforced without regard to the consequence of such enforcement. It would be wrong therefore to introduce the considerations which influenced the decisions on the Statute of Frauds in England into the construction of our Ordinance. Not only because the English statute is so different from ours; but also because in England there has been some laxity in permitting considerations of equity to over-ride the plain words of the statute. We should therefore guard ourselves against adopting the attitude of the English Courts.

In the Sixth Interim Report of the Law Revision Committee (Cmd. 5449 of 1937) under the Chairmanship of Lord Wright, which recommended the repeal of so much of section 4 of the Statute of Frauds as remained, the members observed:

> "In the two and a half centuries during which the statute has been in operation, widely divergent opinions have been expressed by high authorities as to its policy and merits . . . . Mitigating expedients, such as the doctrine of part performance, strained construction of its language, such as that which excluded contracts to marry from agreements in consideration of marriage, and statutory amendments, have softened its asperities."

Nor can the plain meaning of the section, as has been done in some of our decisions, be disregarded in order to bring it into line with concepts of the English doctrine of part performance and of use and occupation.

Mellish L.J. in commenting on the laxity of interpretation in England stated in *Edwards v. Edwards* [1]:

> "If the Legislature says that a deed shall be null and void to all intents and purposes whatsoever, how can a Court of Equity say that in certain circumstances it shall be valid."

Even where a statute is clearly in conflict with the common law or equity the Courts have no power to depart from the true meaning of the statute. It would appear from the case of *Britain v. Rossiter* [2] that in England a provision such as our section 2 would not have been given the same effect as section 4 of the Statute of Frauds. The words of Cotton L.J. in that case are as follows:—

> "If such contracts had been rendered void by the legislature, Courts of Equity would not have enforced them; but their doctrine was that the statute did not render the contracts void, but required written evidence to be given of them; and Courts of Equity were accustomed to dispense with that evidence in certain instances."

[1] *L. R. 24 Ch. D. 291.* [2] *11 Q. B. D. 123.*

The older English cases which gave equitable relief against the operation of a statute are according to Mellish L. J. in *Edwards v. Edwards* (supra) no longer followed :

> " The Courts of Equity have given relief on equitable grounds from provisions in old Acts of Parliament, but this has not been done in the case of modern acts, which are framed with a view to equitable as well as legal doctrines. "

It has also been recognised in England that in the endeavour to mitigate what appears to be the hardships caused by the Statute of Frauds greater harm has been done than could have been occasioned by a strict adherence to the words of the statute. In *Maddison v. Alderson* [1] Lord Blackburn, dealing with a case in which in a contract for the sale of land the vendee had been put in possession, stated :

> " This is, I think, in effect, to construe the 4th section of the Statute of Frauds as if it contained these words, ' or unless possession of the land shall be given and accepted '. Notwithstanding the very high authority of those who have decided those cases, I should not hesitate if it was *res integra* in refusing to interpolate such words, or put such a construction on the statute. But it is not *res integra* and I think that the cases are so numerous that this anomaly, if, as I think, it is an anomaly, must be taken as to some extent at least established. "

Story in his Equity Jurisprudence, Vol. I., p. 753 (12th Ed. 1877) cites the following remarks of Lord Redesdale in the case of *Lindsay v. Lynch* [2] the report of which is not available :—

> " The statute was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practising in courts of equity, than that the relaxation of that statute has been a ground of much perjury and much fraud. If the statute had been rigorously observed, the result would probably have been that few instances of parol agreements would have occurred. Agreements would, from the necessity of the case, have been reduced to writing. Whereas, it is manifest, that the decisions on the subject have opened a new door to fraud ; and that, under pretence of part execution, if possession is had in any way whatsoever, means are frequently found to put a court of equity in such a situation that, without departing from its rules, it feels itself obliged to break through the statute. And I remember, it was mentioned in one case, in argument, as a common expression at the bar, that it had become a practice *to improve gentlemen out of their estates*. It is, therefore, absolutely necessary for courts of equity to make a stand, and not carry the decisions farther. "

These words of caution seem to have passed unheeded in England ; but we have every reason to take them to heart and avoid the mistakes that were made in that country.

[1] *L. R. 8 App. Cas. 467.* [2] *2 Sch. & Lefr. 4, 5, 7.*

In view of the vital difference between our statute and the English statute a detailed discussion of the English cases will serve no useful purpose. Another reason why reference to English cases will not be profitable is that the English Act has undergone considerable change since the better known cases on section 4 of the Statute of Frauds were decided and those cases are now only of academic interest. In 1925 by sections 207, 209 and Schedule 7 of the Law of Property Act the words " or upon any contract or sale of lands, tenements or hereditaments or any interest in or concerning them " were repealed. In 1954 by section 1 of the Law Reform (Enforcement of Contracts) Act the following words were repealed :—

(*a*) " whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate ; or "

(*b*) " or to charge any person upon any agreement made upon consideration of marriage ", and

(*c*) " or upon any agreement that is not to be performed within the space of one year from the making thereof. "

The relevant portion of section 4 of the Statute of Frauds now reads :

" No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. "

As a matter of interest it might be mentioned that section 40 of the Law of Property Act 1925 (c. 20) still retains the prohibition against the bringing of actions upon contracts for the sale of land which are not in writing. That section reads :

(1) " No action may be brought upon any contract for the sale or other disposition of land or any interest in land, unless the agreement upon which such action is brought, or some memorandum or note thereof, is in writing, and signed by the party to be charged or by some other person thereunto by him lawfully authorised. "

(2) " This section applies to contracts whether made before or after the commencement of this Act and does not affect the law relating to part performance, or sales by the court. "

It is sufficient to say that the view of Mellish L.J. in *Edwards v. Edwards* (supra) is shared by the South African Courts. *Innes C.J. in Jolly v. Herman's Executors* [1] stated :—

" Had the 4th section of the Statute enacted that the agreements covered by its terms should, if not reduced to writing, be considered void *ab initio*, I cannot imagine that any place would have been found by English courts of equity for the doctrine of part performance in relation to such contracts. "

[1] *(1903) Transvaal Law Reports S. C. 515, at page 523.*

I shall now turn to our case of *Nagur Pitchi v. Usoof*[1] which we have been invited to reconsider in this appeal. De Sampayo J. has in that case examined almost all the previous decisions of this Court. I do not therefore propose to refer to them, beyond stating that I am in accord with his remarks regarding them at p. 6. He says :—

> " I was certainly much impressed at the argument with the number of them, and with the long period of time which they covered. But when the cases are closely examined, it will be found that they are neither individually strong, nor collectively such as to form a *cursus curiae*. None of them contains any discussion of principles or exposition of the law. "

The facts of that case are as follows :—The plaintiff advanced to the defendant a sum of Rs. 945 on an oral agreement for the lease to him by the defendant of two parcels of land. The plaintiff changed his mind and later did not wish to take the lease though the defendant was willing to execute it. The plaintiff then instituted legal proceedings to recover the advance paid by him. The trial Judge held that the defendant was entitled in law to retain the amount as forfeit. The plaintiff appealed and the case came up before a bench of three Judges. Ennis J. dismissed the appeal resting his decision on a passage in Halsbury's Laws of England (Vol. XXV, p. 402) which reads :

> " Where a deposit has been paid under a verbal contract for the sale of land, a vendor who resists the purchaser's action on the contract by the plea of the Statute of Frauds is liable to return the deposit as money had and received to the use of the purchaser ; but it seems that if the purchaser sets up the Statute in order to escape from his contract, he cannot recover the deposit. "

De Sampayo J. followed the course taken by Ennis J. and adopted the principle of the English decisions and dismissed the appeal. The other Judge Wood Renton C.J. agreed with Ennis and De Sampayo JJ. At p. 5 De Sampayo J. observes :

> " The more important question is whether the principle of the English decisions should be adopted here. I was doubtful on this point, but on consideration I cannot see why it should not. There is no essential difference between the English Statute and our Ordinance which may deprive us of the benefit of the English authorities. It is true that section 4 of the Statute of Frauds only provides that no action shall be brought on a contract which is not in writing as thereby required, and therefore other rights arising out of a contract, which is not void, though unenforceable may be established and secured by action. Section 2 of our Ordinance of Frauds and Perjuries, on the other hand, declared the contract to be of no force or avail in law. At the same time, that section of our Ordinance requires notarial writing only for the purposes therein mentioned ; it does not declare a non-notarial contract to be void for other purposes, and much less illegal. Therefore, I think the two Statutes, so far as

[1] *(1917) 20 N. L. R. 1.*

the point under consideration is concerned, are brought in essence into line with each other; as it may be said here, as it has been said in England, that the contract exists as a fact, which the Court can take cognizance of for other purposes than those stated, and that the only effect of the Statute is to render the kind of evidence required indispensable when it is sought to enforce the contract. (*Maddison v. Alderson* (1883) L. R. 8 A. C. 475). That being so there does not appear to be any difficulty in concluding that with us also a party who advances money on an informal agreement is entitled to a refund only if the other party refuses, or is incapable of completing, the transaction, and the consideration for the advance therefore fails."

With the greatest respect to so eminent a Judge as De Sampayo I cannot agree with his statement that section 4 of the English Statute of Frauds and section 2 of our Prevention of Frauds Ordinance "are brought in essence into line with each other". A comparison of the two sections above will show that there is a vast difference between the two enactments, and under our enactment which declares transactions contrary to it of no force or avail in law, the contract cannot be said to exist in fact as it had been said in England. The learned and distinguished Judge has failed to give effect to the language of our enactment although his observations seem to indicate that he held the view that transactions contrary to our enactment are void. It is difficult to reconcile his view that transactions contrary to our enactment are void with his conclusion that in essence the enactments have the same effect. A transaction which is void must be regarded as if it never came into existence. I cannot see how such a transaction can be invoked for any purpose at all. As stated by Innes J. in *Wilken v. Kohler* [1] a transaction which is void can under no circumstances confer any right of action. The case of *Carlis McCusker* [2] referred to in *Wilken's* case supports the view taken in the latter case. Although the case of *Nagoor Pitchi* has had the approval of Bertram C.J. (*Appuhamy v. Dissanayake* [3]) I find myself unable to agree that the reasoning of De Sampayo J. is sound. I say so in all humility. This is not the first time that the correctness of Nagur Pitchi's case has been questioned. It appears to have been done in the case of *Peris v. Vieyra* [4]. Dalton J. in that case expressed some difficulty in accepting *Nagur Pitchi's* case as sound law; but as the Bench was constituted by two Judges he felt himself bound by it. At page 279 he stated:

"The first question that arises is as to the nature of the agreement between the parties, and whether it was enforceable or of any effect whatsoever. On this point we have been referred to the decision of this Court in *Nagur Pitchi v. Usoof*. In spite of the essential difference between the provisions of Ordinance No. 7 of 1840 and the Statute of Frauds, the Court held that so far as the point under consideration is concerned the Ordinance and the Statute are in essence in line with one another, and that it may be said here, as in England, that the contract exists as a fact which the Court can take cognizance

[1] *1913 A. D. 135.*
[2] *1904 T. S. 917.*
[3] *(1921) 23 N. L. R. 88.*
[4] *(1926) 28 N. L. R. 278.*

of for other purposes than those stated in the Ordinance. I must admit I have the greatest difficulty in agreeing with that conclusion, but under the circumstances as the decision of a Court of three judges it is binding upon this Court."

It would appear from the foregoing remarks of Dalton J. that had he not been fettered by the binding decision of three Judges of this Court he was inclined to hold otherwise.

Since the decision of *Nagur Pitchi v. Usoof* (supra) the Privy Council has had occasion to consider our section and point out the vital difference between it and the corresponding provisions of the English Statute of Frauds.

In the case of *Adaicappa Chetty v. Caruppen Chetty* [1], the Privy Council drew attention to the difference between the two provisions in the following words :—

"This section is much more drastic than the fourth section of the Statute of Frauds. The latter section does not render a parol agreement of or concerning land invalid. It merely provides that the agreement cannot be enforced in a Court of law unless it, or a note or memorandum of it in writing, be signed by the party to be charged therewith, or some person thereunto lawfully authorized, be given in evidence. Under the latter Statute if the defendant in a suit brought to enforce the agreement has signed it, or a note of it in this manner, the agreement can be enforced though the plaintiff has not signed either. But the party who has signed it or the memorandum cannot sue to enforce it against the party who has not signed either. In both cases the contract entered into is the same. It is not illegal or invalid, but it can only be enforced in a Court of law if proved in a certain way.

"The fourth section of the Statute of Frauds has consequently often been well described as merely an enactment dealing with evidence. In the present case the second parol agreement is in their Lordships' view as invalid as the first . . . . This second agreement therefore falls within the express words of this same section 2 of Ordinance No. 7 of 1840, and not being in writing would be invalid.

"Evidence tendered by a party litigant relying upon an agreement as valid and enforceable, which, if admitted, would establish that the agreement was of no force or avail, is inadmissible. It would be a travesty of judicial procedure to admit it."

In the later case of *Saverimuttu v. Thangavelautham* [2] the Privy Council affirmed the decision in *Adaicappa Chetty v. Caruppen Chetty* [3] and extended its application to written agreements which were not attested by a notary. It stated :

"It thus appears that the law of Ceylon in the generality of cases refuses to recognise a transaction relating to immovable property unless the terms of the transaction have been embodied in a notarially

[1] *(1921) 22 N. L. R. 417 at page 426.* [2] *(1954) 55 N. L. R. 529.*
[3] *(1921) 22 N. L. R. 417.*

attested document. Oral evidence and even evidence in writing which does not possess the authenticity of a notarially attested document are thus rendered of no avail in the generality of cases. It is thus evident that the aim of the Prevention of Frauds Ordinance is to prevent frauds by making evidence other than the evidence of a notarially attested document ineffective. Their Lordships think that the departures permitted by law from this general rule should not be extended as any undue extension would interfere seriously with the object sought to be achieved by the statute law of Ceylon.

" Proof of fraud entitles the Court in certain circumstances to depart from the general rule. This principle has found statutory recognition in section 5 (3) of the Trusts Ordinance referred to above, and in some cases the provisions of the Prevention of Frauds Ordinance have been relaxed on proof of fraud on the ground that the ' Statute of Frauds *may not be made an instrument of fraud* '. It must however be remembered that this proposition has only a limited application. For instance it may be proved by evidence of the utmost reliability not supported by a notarially attested document that a person has entered into a plain and simple agreement to sell land to another for a consideration. A breach of such an agreement is undoubtedly dishonest, but the dishonest conduct resulting from the breach does not amount to fraud within the meaning of the proposition that the Statute of Frauds may not be used as an instrument of fraud. If the contrary view were taken the Ordinance would be totally ineffective. Their Lordships are of the view that in order that the Ordinance may not be deprived of *all efficacy it is necessary* that Courts should approach with caution the facts and the law on which any case, claimed to be an exception to the general rule referred to above, is founded. "

It is not clear what our authority is for introducing the equitable principle of the English Courts of Equity that the Statute of Frauds should not be made an engine of fraud. But as observed by the Privy Council in the case cited above the application of that rule to section 2 of our Ordinance would destroy its effect. In regard to trusts in relation to immovable property it is not necessary to introduce the English equitable principles in view of the express provisions of section 5 (3) of the Trusts Ordinance.

It would appear from what has been stated above that *Nagur Pitchi v. Usoof* has been wrongly decided and should be set aside.

This is a convenient point at which to refer to the approach of the South African Courts to a problem such as the one which arises for consideration here. In the case of *Jolly v. Herman's Executor* [1] the Court refused to enforce an agreement contrary to a Besluit to the effect that all contracts concerning the cession of rights to minerals or concerning rights to mine which did not conform to the provisions of the first paragraph of section 14 of Law No. 7 of 1883 should be *ab initio* void, and no one should have any action whatever on such agreements. This was a case in which the plaintiff was granted the exclusive right to prospect for and to work coal on a farm for the period of five years at

[1] *(1903) T. S. Vol. I, p. 515.*

a fixed rental, with a right of renewal on three months' notice duly given for further successive periods of five years, up to an inclusive term of forty years. The rent had been paid for the first five years of the lease and the plaintiff at the end of it tendered a year's rent in advance and claimed a renewal. Now section 14 of the statute referred to in the Besluit provided that no grant of rights to minerals on any farm shall be lawful unless embodied in a notarial deed and duly registered in the office of the Registrar of Deeds. It was argued on behalf of the plaintiff that the defendants (the Executors of the original grantors) ought not to be allowed to take advantage of the provisions of the Besluit, because they had received payment of rent under the agreement for five years, and that to allow them to contest its validity after five years, would amount to permitting a fraud on the plaintiff. This argument was rejected and the Court refused to apply to contracts governed by the Besluit the doctrine of part performance applied by the English Courts of Equity to certain contracts falling within the Statute of Frauds.

This case was followed in the case of *Wilkin v. Kohler* [1]. In that case the Court was called upon to interpret the words of section 49 of the Orange Free State Ordinance the material portion of which read :

> "No contract of sale of fixed property shall be of any force and effect unless it be in writing and signed by the parties thereto, or by their agents duly authorised in writing."

In construing this section Innes J. said :

> "The language of the section is perfectly plain; no unwritten contract of the kind referred to is to be of 'any force and effect'. Now, a contract which is of no force and effect is void. No emphatic adjectives, and no redundant repetition, could express a conclusion of nullity more effectually than do the simple words which the Legislature has employed. Nor is there any reason why we should refuse to give effect to these plain provisions. The language is precise and clear, and it is for the party who would water it down to show some ground for so doing."

Dealing with the argument that the parties were free to waive the benefit of the provisions of the Ordinance, Innes J. said :

> "Speaking generally, it is true that statutory provisions introduced simply for the benefit of an individual or a class may be waived by the person or persons for whose advantage they were devised. And a right given on those lines to treat a contract as void might be exercised or not at the pleasure of the party concerned; the agreement would in effect be voidable at his option. But that principle has no operation where the Legislature as a matter of policy has directed that a particular transaction shall be void or of no force and effect."

He then goes on to state the effect of the words 'no force and effect' thus :

> "A transaction which has no force and effect is necessarily void *ab initio*, and can under no circumstances confer any right of action."

[1] *(1913) A. D. 135.*

In the same case Solomons J. in dealing with the words of section 49 stated :

> " The words are very clear and precise, and in my opinion can have only one meaning. The effect of the provision is that a verbal contract of sale is of no force and effect, or, in other words, is null and void. For I can see no distinction in meaning between saying that a contract is of no force and effect, and saying that it is null and void. The two expressions, in my opinion, mean exactly the same thing, for that which is of no force and effect is necessarily null and void. "

The meaning given to the words ' no force and effect ' in *Wilken v. Kohler* (*supra*) was adopted with approval in the case of *Souter v. Norris* [1]. There the Court was called upon to interpret a provision of the Patent Act which provided that no assignment of a patent ' shall be of any force or effect unless registered at the patent office '. Referring to those words Curlewis J.A. stated :

> " Now the language used by the Legislature is clear and emphatic, and the words used admit of no doubt as to their meaning. "

These words and the word ' void ' again came up for consideration in the case of *Moser v. Milton* [2] where the Court was called upon to interpret the following regulation :

" No agreement for the sale of immovable property shall be of any force or effect unless—

(*a*) such agreement has been reduced to writing and signed by the parties thereto or by their agents duly authorised in writing ; and

(*b*) the purchaser, the purchase price and other terms and conditions of such agreement have been approved by the Minister. "

In this case by a contract of sale dated 22nd June 1944 signed by both parties the plaintiff sold to the defendant a land, stock and certain movables for a sum of £2,500. The plaintiff received £500 from the defendant at the time of signing of the contract and the balance on the execution of the deed of transfer. The deed stipulated that possession of the property should be taken on 1st July 1944 and that it should be at the risk and profit of the purchaser from that date onwards. Clause 6 contained the following stipulation :—

> " This agreement is subject to the approval of the Minister of Agriculture and in the event of the Minister fixing a lower price than that stipulated herein or refusing to sanction the said sale, the vendor shall not be bound thereby and this agreement shall be cancelled, whereupon the vendor shall immediately refund to the purchaser the said sum of £500 to be paid in terms of Clause 2 hereof. Pending such refund the purchaser shall retain possession of the said movables which shall thereupon be pledged to her as security for such refund. "

The Minister approved the sale as on 13th July 1944 and on 12th July 1944 the defendant purchaser withdrew from the agreement. The

[1] (1933) *A. D. 11.* [2] (1945) *A. D. 517.*

plaintiff vendor thereupon instituted this action claiming payment of the balance of the purchase price due and tendered transfer against such payment. The defendant denied liability and pleaded that the agreement was of no force or effect until the approval of the Minister was given. The High Court held against the defendant on the ground that the Minister's approval gave validity to the instrument with retrospective effect. He successfully appealed from that decision. The appellate division held that he had a right to resile from the agreement before the Minister's approval was given and that the Court had no right to enforce the agreement.

I shall now deal with the case on the basis of the pleadings which I have summarised at the beginning of this judgment in order to determine which of the plaintiff's causes of action are affected by section 2 of the Prevention of Frauds Ordinance because under our procedure it is necessary that the determinations in a cause should be founded on a case either to be found in the pleadings, or involved in or consistent with the case made thereby (*1866*) *11 Moo. Ind. App. 7 at 20*). The first cause of action is clearly based on the agreement which admittedly is not in conformity with the Prevention of Frauds Ordinance and is therefore of no force or avail in law. Paragraph 4 of the plaint reads :—

> "The plaintiff states that the failure to effect the said conveyance within the said period was due to the default of the defendant in that the defendant did not make available to the plaintiff within the said 15 days the title deeds to the said property. The plaintiff makes no claim for damages sustained by reason of the said breach by the defendant of the said agreement but restricts his claim on this cause of action to a refund of the said sum of Rs. 5,000 paid in advance under the said agreement."

Such an agreement is inadmissible in evidence as was held by the Privy Council in *Adaicappa Chetty v. Caruppen Chetty* (*supra*) and cannot be proved. His claim on the first cause of action cannot therefore succeed.

I now come to the second cause of action. It is not disputed that in fact the plaintiff was placed in possession of the mill by the defendant ; but he denies the plaintiff's allegation that he brought 261,700 coconut husks to the premises. He however admits that the plaintiff brought coconut husks to the value of Rs. 960/71. The learned trial Judge has accepted the plaintiff's evidence on this cause of action and given judgment for the full sum of Rs. 3,250, but at the hearing of this appeal it was conceded that on the plaintiff's own evidence he was not entitled to claim more than the value of 144 cwt of fibre and that the amount allowed under this head should be Rs. 1,872 and not Rs. 3,250.

This claim does not arise on the agreement nor is it based on it ; but is independent of it. The defendant does not claim that he is entitled to the husks or fibre on the premises when he resumed possession. The dispute was only as regards the quantity actually on the site when the defendant regained possession. As the amount has been agreed on now and as there is no legal objection to the claim being sustained the plaintiff is entitled to judgment in the sum of Rs. 1,872.

On the alternative cause of action it was also contended that the sum of Rs. 5,000 paid as advance was recoverable as money had and received. This is a principle known to the English law and is thus stated in Halsbury Vol. 8 (3rd Edn) p. 235, s. 408.

> " Where one person has received the money of another under such circumstances that he is regarded in law as having received it to the use of that other, the law implies a promise on his part or imposes an obligation upon him to make payment to the person entitled thereto, and in default the rightful owner may maintain an action for money had and received to his use. "

The precise nature of the action is not yet settled and Halsbury (*supra*) s. 409 sets out the different schools of thought thus :

> " One approach is to regard the defendant as liable because he has been unjustly benefited. Another is to regard him as liable on an implied promise to pay. A third school of thought considers that the matter is still open and that the true nature of the action has yet to be established. Finally, it has been suggested that although the basis of the action is an implied promise to repay, such a promise will be implied only where an element of unjust enrichment exists. "

Whichever view is taken it cannot be said that in the instant case the sum of Rs. 5,000 received by the defendant was received by him in such circumstances that he can be regarded in law as having received it to the use of the plaintiff. It was clearly understood that if the plaintiff failed to carry out his part of the contract the defendant was to retain the sum of Rs. 5,000. In such circumstances it cannot be said that the defendant was unjustly enriched. There is nothing unjust about such an agreement especially as it had been stipulated that if the defendant defaulted he should pay Rs. 10,000. The intention of the parties was that if the plaintiff defaulted the defendant was to be enriched to the extent of Rs. 5,000 and if the defendant defaulted the plaintiff was to be enriched in a sum of Rs. 10,000. There is no reason why that intention should not be given effect to. There is nothing illegal in such an agreement nor is it contrary to public policy. Lord Wright in the Fibrosa case (*Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1]) quotes the analysis of the action for money had and received made by Lord Mansfied in *Moses v. MacFerlan* [2], and states :

> " This statement of Lord Mansfield has been the basis of the modern law of quasi-contract, notwithstanding the criticisms which have been launched against it. Like all large generalizations, it has needed and received qualifications in practice. There is, for instance, the qualification that an action for money had and received does not lie for money paid under an erroneous judgment or for moneys paid under an illegal or excessive distress. The law has provided other remedies as being more convenient. The standard of what is against conscience in this context has become more or less canalized or defined, but in substance the juristic concept remains as Lord Mansfield left it. "

[1] *(1943) A. C. 32.* [2] *(1760) 2 Burr 1005, 1012.*

Lord Mansfield said :

> " It lies for money paid by mistake ; or upon a consideration which happens to fail ; or for money got through imposition (express, or implied) ; or extortion ; or oppression ; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money. "

It is not necessary to discuss the law of money had and received at any length because the instant case is not one that falls within the scope of that law. It is sufficient to quote the words of Lord Wright in the *Fibrosa* case (*supra*). At page 67 after examining the various principles governing the law he states :

> " These principles, however, only apply where the payment is not of such a character that by the express or implied terms of the contract it is irrecoverable even though the consideration fails. The contract may exclude the repayment. "

As I have pointed out above even if this contract had been notarially attested the plaintiff would not be entitled to recover the money as he was the defaulter. The plaintiff is therefore not entitled to rely on the ground of " money had and received ".

I do not propose to go into the doctrine of unjust enrichment as it does not arise for decision here. It is sufficient to mention that it has been discussed in a number of recent decisions both in England and in South Africa. The doctrine is known to Roman and Roman-Dutch Law and the books contain many instances in which a person is not permitted to enrich himself at the expense of another. The judgment of Watermeyer J.A. in *Jajbhay v. Cassim* [1] contains a full analysis of the Roman and Roman-Dutch authorities on the subject of unjust enrichment. It being conceded that both under the English Law and under our Law the Courts will intervene to prevent unjust enrichment, the onus of proving that another person has unjustly enriched himself at his expense is on the person asserting the proposition. As was stated by Morton J. in the case of *Guarantee Investment Corporation Ltd v. Shaw* [2] :

> " The plaintiffs must prove not only that the defendant was enriched but also that he was unjustly enriched. "

In the same case it is stated that :

> " the broad principle that no one shall be unjustly enriched at the expense of another is one which must be applied with caution. "

The true question that arises for consideration in cases of unjust enrichment is—Is there an enrichment which equity demands should be restored to the plaintiff whose claim is not barred by legal principles ; for instance

[1] *(1939) A. D. 537 at 545 et seq.* [2] *(1953) 4 S. A. L. R. 479 at 482.*

because the rights between the parties are governed by contract or because the plaintiff's remedy is barred because of the *in pari delicto* rule, no circumstances being shown why that rule should be relaxed; or because of a *turpis causa*. In the case of *Wilson v. Smith & another* [1] following the dictum of Van den Heever J. in *Pucjlowski v. Johnston's Executors* [2], Kuper J. refused to grant relief on the ground of impossibility of performance. The remarks relied on are:

> "Where as in this case, a party to a putative agreement puts the other party into possession or leaves him in possession not as lessee, but for the objects of the intended contract, I cannot see on what equitable basis he can claim a rental or the value of use and occupation—unless one relies upon a vague and superficial notion of equity which is not reflected in the law."

Kuper J. summed up the decision thus:

> "Furthermore it seems to me that where both parties have suffered loss from the partial execution of the contract, the applicant because he has been deprived of the use and occupation of the lot for some 5 months, the first respondent because he has been deprived of the use of the £400 paid in by him and he has been put to certain expenses in the preparation of the lease and the contemplated mortgage bond, the Court should not be astute to determine any differences on a strict mathematical basis and should leave each party to bear his own loss, a loss occasioned by the frustration of the contract not due to the fault of either party."

In the instant case apart from the fact that the agreement is of no force or effect it was the plaintiff's default that prevented the sale going through. There can be no unjust enrichment in such a case. The plaintiff must bear the loss. The general rule of Roman-Dutch law is not to grant relief where the action arises on a *turpis causa* or *injusta causa* on the basis of the maxim *ex turpi causa non oritur actio*. Relief was also not granted where the parties were equally to blame for the illegal or void transaction which they sought to undo on the basis of the maxim *in pari delicto potior conditio possidentis*. In *Brandt v. Bergstedt* [3], where a cow had been sold on a Sunday contrary to the provisions of Ordinance No. 1 of 1838 and was delivered by the plaintiff to the defendant the following morning, the Court refused to grant relief to the plaintiff who sought to recover the cow or its value on the basis of the maxim *in pari delicto melior est conditio possidentis*. Kotze J. in the course of his judgment referred to the following words of Lindley L.J. In this connexion it is well to remember the words of Lindley L.J. in *Scott v. Doering McNab & Co.* [4], wherein he says:

> "No Court will allow itself to be made the instrument of enforcing transactions which are founded on illegality, when the party invoking the aid of the Court is himself concerned in the illegality. The Court

[1] *(1956) 1 S. A. L. R. 393.*
[2] *(1916) W. L. D. 1.*
[3] *(1917) C. P. D. 344.*
[4] *(1892) 2 Q. B., p. 728.*

cannot aid a party to defeat the clear intention of an Ordinance or statute."

The words I have underlined are noteworthy in the present context.

It is an established rule that a Court of Justice will not recognise and give validity to that which the legislature has declared null and void, nor will it permit anything which cannot be done directly to be done indirectly. Principles such as that no man shall be allowed to take advantage of his own wrong, and that no one can be permitted to enrich himself at the expense of another cannot be invoked for the purpose of permitting persons to act contrary to or ignore the express requirements of a Statute such as Section 2 of our Ordinance.

In his judgment in the *Jajbhay* case (*supra*) Watermeyer J.A. sums up his judgment thus :

"Under the general principle which has been discussed in this judgment, the Court will not assist a party to recover what he has paid or transferred to defendant in terms of the illegal contract, save in exceptional cases, but there is no reason to go further and to deprive him of rights which he has not transferred to defendant. What he has voluntarily paid or transferred he cannot recover, but there is no reason why he should lose what he has not intended to part with."

In the case of *Sandeman v. Solomon* [1] occurs the following quotation from Paulus at p. 149 :

"If, however, anything has actually been given in performance of such a void contract, the law will not compel restitution, unless the party be innocent. But if the party seeking restitution of what he has given be not a wrong doer, the law will enforce restitution. The party claiming restitution must come to Court with clean hands."

In this case Beaumont J. summarises his opinion thus :

"But looking to the strict sense in which our law has been interpreted by the most competent authorities, there seems to be no room for doubt that under our law, whatever may be the practice under the English law, the Court cannot take cognisance of a claim based directly or indirectly on what the law forbids, and where both parties are to blame it cannot help either."

The plaintiff is for the above reasons not entitled to succeed in his claim based on unjust enrichment as well.

In view of the conclusions I have reached on the main questions arising on this appeal it is not necessary to discuss at length whether the agreement is divisible or separable and whether time is of the essence of the contract.

In regard to the question of the divisibility of the contract it is sufficient to say that the instrument under consideration clearly shows that the

[1] *23 Natal Law Report 110.*

parties intended the contract to be single and entire and not separable. A divisible contract is a contract the whole performance of which is divided into two sets of partial performances, each part of each set being the agreed exchange for a corresponding part of the set of performances to be rendered by the other promissor. (Williston on Contracts, Vol. 3, p. 2408, Sec. 860A)

The question whether time is of the essence of the contract generally arises in actions for specific performance.

What is the meaning of " time is of the essence of the contract " ? It means that the performance by one party at the time specified in the contract is essential in order to enable him to require performance from the other party. It means that time is so material that exact compliance with the terms of the contract in this respect is essential to the right to require counter-performance. The first point to be determined in deciding whether time is of the essence of a particular contract is whether the parties have expressly made it so. By that I do not mean that it is essential to use the very words " time is of the essence " in the contract, but it should appear from the expressed terms and the surrounding circumstances taken as a whole that time is of the essence of the contract. It is therefore primarily a matter of interpretation of the contract. If the answer to the question whether time is of the essence is in the affirmative then the defaulter cannot enforce performance by the other party.

In this matter there is an important difference between contracts for the sale of goods and contracts for the sale of land. Section 11 of the Sale of Goods Ordinance provides that unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be the essence of a contract of sale.

In English common law stipulations as to time in contracts for the sale of land were always regarded as of the essence of the contract. The Court of Chancery in the exercise of its jurisdiction to decree specific performance adopted the rule that time was not essential unless either it was made so by express stipulation or it appeared to be so from the nature of the contract.

In the instant case the plaintiff is not seeking to enforce specific performance, but a reference to the contract shows that even if the contract was valid the plaintiff would not succeed as time has been made an essential term. What could be clearer than these words—

> " And that if the balance amount is not paid and the deed of conveyance is not executed within 15 days from this date and that the same could not be performed the sum of Rupees Five Thousand (Rs. 5,000/–) paid by the said Mr. D. L. Abeyasekera as advance and the authority assigned as aforesaid shall hereby be forfeited and null and void and that if I the vendor Mr. K. E. J. Perera neglected to execute the said deed and deliver the same, I have hereby agreed to pay a sum of Rupees Ten Thousand as compensation. "

The appeal is allowed with costs both here and below except in regard to the claim in respect of the coconut husks brought on the land by the plaintiff. The plaintiff's claim is allowed in respect of that item to the extent of Rs. 1,872.

DE SILVA, J.—I agree.

GUNASEKARA, J.—

I concur in the view taken by my brother Sansoni that the agreement as to the destination of the deposit of Rs. 5,000 is severable from the agreement for the sale of the mill and that it is valid. The authorities cited in the judgment of my lord the Chief Justice make it clear that in that view the respondent must be held to be entitled to recover the deposit if the party in default was the appellant.

The learned district judge holds that it does not appear to have been intended by the parties that time should be of the essence of the contract. "All that appears to have been contemplated", he says, "was that the transaction should be finished within a reasonable time and 15 days appear to have been set out as an indication of what that reasonable time was without any real intention of enforcing that limit." This finding is supported by the evidence, and there appears to be no sufficient ground for disturbing it.

According to the appellant's own evidence in chief he had told the respondent that he would instruct Mr. Ranasinghe to let the respondent inspect the deeds if he came to Mr. Ranasinghe's office. The learned district judge has accepted the evidence that on the morning of the 8th November the respondent and his proctor, Mr. Peiris, went to Mr. Ranasinghe's office to inspect them but Mr. Ranasinghe could not make them available for inspection. He holds that the appellant having failed to see that the deeds were available for inspection cannot blame the respondent for not executing the conveyance within the period of 15 days specified in the agreement. I see no reason to disagree with this finding. It seems to me, therefore, that even upon the assumption that the parties intended that time should be of the essence of the contract it must be held that it was the appellant's default that prevented the execution of the conveyance by the 8th November. Moreover, even if they originally regarded the stipulation as to time to be an essential term there can be no doubt that they later agreed to an extension of the time, and that it was by reason of the appellant's default that the conveyance was not executed within the extended period. I am unable to agree with Mr. Perera's contention that the question whether the parties agreed to an extension is not included in the issues tried. In my opinion it is covered by the 1st and 12th issues, which raise the question as to which party was in default.

I agree with my lord the Chief Justice that on the second cause of action the respondent is entitled to only 144 cwt. of mattress fibre or

Rs. 1,872 as its value. The decree under appeal must be varied accordingly. Subject to this variation the appeal must be dismissed with costs.

PULLE, J.—

I find myself in agreement with the learned trial Judge that time was not of the essence of the agreement dated 29th October, 1949. Both the parties to the action and the person who drafted the agreement were unfamiliar with legal niceties and I am of opinion that it would be artificial to impute to the parties an intention that, if the deed of transfer could not owing to an unexpected event be prepared in time, there would not be a reasonable extension of time to complete the transaction. The parties must be presumed to have contracted on the footing that the purchaser would have to take legal advice on title which oftentimes entails lengthy and laborious examination of the chain of deeds on which the vendor bases his title. Delays in examination of title are unpredictable. Again, the parties must have contemplated that the deed of transfer should be drawn up by the purchaser in a form that would meet the wishes of the vendor. There was a mortgage for Rs. 10,000. How was this debt to be discharged if the purchaser was to get the property free of encumbrances ? The agreement P1 is silent because it did not provide for all contingencies in implementing it and I think it was left to the good sense of the contracting parties to work out details during a period of negotiations extending beyond the 8th November. The events that occurred on this date and thereafter up to the 19th November, 1949, on which the learned judge has commented, support the contention of the purchaser that time was not of the essence of the agreement. On this part of the case, for the reasons fully set out in the judgment of Sansoni, J., I agree that the purchaser did not render himself liable to have his deposit of Rs. 5,000 forfeited.

On the second cause of action I agree with my Lord, the Chief Justice, that the sum of Rs. 3,250 awarded as damages should be reduced to Rs. 1,872. In the result I am of opinion that subject to this reduction the appeal should be dismissed with costs.

SANSONI, J.—

I agree with My Lord the Chief Justice that the plaintiff is entitled to recover a sum of Rs. 1,872 as damages on the second cause of action. I agree with my brother Gunasekara and my brother Pulle that the defendant's appeal fails in regard to the first cause of action and I shall state briefly my views on the more important questions of law argued before us.

Mr. Perera's position was that the document P1 could not be ignored merely because the agreement could not be specifically enforced. He urged that the condition regarding forfeiture should be enforced according to the terms of the agreement, and this submission was linked with his further submission that it was the plaintiff who was in default because he did not complete the purchase by 8th November, 1949.

Mr. Choksy's first submission was that as the agreement was one affecting land it was altogether void, and even the subsidiary agreement relating to the deposit of Rs. 5,000 was invalid and could not be considered. His second submission (and I think this was the one he pressed more earnestly) was that the agreement could be considered only in so far as it concerned the deposit of Rs. 5,000, and the Court would then have to decide who was in default in respect of that part of the agreement. He did not seriously contest the position that if the plaintiff was in default, he could not recover his deposit. On the other hand, if the defendant was in default and refused to wait till the agreed time for signing the deed on 8th November had arrived he submitted that the plaintiff was entitled to the return of his deposit.

Now I entertain no doubt on the question whether notice could be taken of, and effect given to, the subsidiary agreement relating to the deposit. Just as the Privy Council in *Arsecularatne v. Perera* [1] decided that a non-notarial writing affecting land was void as an agreement to effect a transfer of the leasehold interest, but could be referred to for the purpose of establishing a partnership, so in my opinion the fate of this deposit of Rs. 5,000 could be decided by considering the terms which the parties made concerning it.

The next point to be considered—and I regard it as fundamental to the decision of this dispute—is whether time was of the essence of this contract. If it was, it would have been necessary to examine the evidence carefully to see in consequence of whose default the transaction of sale was not completed by the agreed date. If it was not, then one has to see whose default was responsible for the transaction having ultimately fallen through.

Mr. Perera argued that as the document P1 provides that the advance of Rs. 5,000 should be forfeited if the plaintiff's purchase price is not paid and the deed of conveyance not executed within fifteen days, the only conclusion possible is that time was regarded as the essence of this contract. In passing, I would remark that this document is not signed by the purchaser but only by the seller, but I make no point of that. The issue I wish to consider is whether such an agreement for forfeiture renders time of the essence of the contract, and here I have been guided by certain cases to which I shall immediately refer.

In *Jamshed Khodaram Ivari v. Burjorji Dhanjibhai* [2] the Privy Council had to consider a case where the defendant agreed to sell his leasehold interest in a land to the plaintiff for Rs. 85,000. The plaintiff paid Rs. 4,000 as a deposit or earnest and the parties agreed that the conveyance was to be prepared and received within two months from the date of the agreement. It was also agreed that should the purchaser not pay the balance consideration within the fixed period, *he was to have no right to the deposit or earnest money of Rs. 4,000 and any claim of his was to be void,* and the vendor was after that date to be at liberty to re-sell. Thereafter the plaintiff's solicitors investigated the title of the land and they called for various documents, one such document being called for after

[1] *(1927) 29 N. L. R. 342.* [2] *(1915) A. I. R. (P. C.) 83.*

the two months period had expired, with the result that the plaintiff was not ready to complete the purchase within the period of two months. The defendant's solicitors did not comply with the requisitions of the plaintiff's solicitors, and when three months had expired after the date of the agreement they asserted a right to put an end to the contract on the ground that time was of its essence, and to forfeit the deposit on the ground that the plaintiff had failed to complete his purchase within the date fixed.

In delivering the judgment of the Privy Council Lord Haldane said :

> " If these requisitions were made in time Their Lordships are of opinion that they were proper, and that they were not adequately answered. If time was not of the essence of the contract they were legitimately made, however the matter might stand as to one or other of them if time were of the essence. This last question therefore lies at the root of the controversy and the answer to it is decisive of the appeal. "

He considered the law of England as regards contracts to sell land and said :

> " Under that law equity, which governs the rights of the parties in cases of specific performance of contracts to sell real estate, looks not at the letter but at the substance of the agreement in order to ascertain whether the parties notwithstanding that they named a specific time within which completion was to take place, really and in substance intended more than that it should take place within a reasonable time. "

He added that the special jurisdiction of equity to disregard the letter of the contract may be excluded by any plainly expressed stipulation if the languge of the stipulation " plainly excludes the notion that these time limits were of merely secondary importance in the bargain, that to disregard them would be to disregard nothing that lay at its foundation ". Again, equity will not assist where there has been undue delay on the part of one party to the contract, and the other has given him reasonable notice that he must complete within a definite time. Nor will it exercise its jurisdiction when the character of the property or other circumstances would render such exercise likely to result in injustice. In such cases, the circumstances themselves, apart from any question of expressed intention, exclude the jurisdiction. Equity will further infer an intention that time should be of the essence from what has passed between the parties prior to the signing of the contract. But the construction of the contract cannot be affected by what takes place after it has once been entered into.

Lord Haldane, having stated these principles, applied them to the agreement in question and was of the opinion that there was nothing in its language or in the subject matter to displace the presumption that time was not of the essence of the bargain. I might add that the doctrine that time is not of the essence of the contract does not apply also when there has been a sale of land and an agreement to reconvey it within an

agreed period, because the title of the purchaser is practically in abeyance until after the expiry of the period mentioned in the agreement. It would only be just to the purchaser that he should know at what point of time his title would be perfected. But I would emphasise that the provision for forfeiture of the deposit was not considered by the Privy Council to have the effect of making time of the essence of the contract in that case.

In *Howe v. Smith* [1], the Court of Appeal considered a case where a sum of money was paid as a deposit and in part payment of the purchase money on a contract for the sale of land. The contract provided that the purchase should be completed on a day named and that if the purchaser should fail to comply with the agreement the vendor should be at liberty to resell. It was held in that case that the purchaser could not recover his deposit but the reasons for this conclusion are important. Cotton, L.J. pointed out that there had been undue delay on the part of the purchaser who had been given extensions of time, and it was clear that he was never, even at the time when he brought the action to recover the deposit, ready with the money to perform the contract. His conduct amounted to a repudiation of the contract and he could not therefore take advantage of his own default to recover the deposit. Fry, L.J. was also of the opinion that the purchaser could not show a readiness and willingness to complete either on the day fixed or within a reasonable time after, and there was such a protracted default on his part as justified the vendor in treating the contract as rescinded.

In *Microutsicos v. Swart* [2] the Appellate Division of the Supreme Court of South Africa considered the question as to when delay on the part of a buyer in making provision for payment of the purchase price of land is regarded as equivalent to total failure which entitles the seller to regard it as terminating the contract. It was decided in that case that Roman Dutch Law, like English Law, does not regard the mere fact that the debtor makes default on the stipulated date, if there is one, as sufficient for this purpose. Fagan, A. J. A. said that " where a time for the performance of a vital term in a contract has been stipulated for and one party is *in mora* by reason of his failure to perform it within that time, but time is not of the essence of the contract, the other party can make it so by giving notice that if the obligation is not complied with by a certain date, allowing a reasonable time, he will regard the contract as at an end.

In *Smith v. Hammerton* [3] the principles enunciated by Lord Haldane in the case I have referred to were applied by Harman, J. That was a case where on a contract for the purchase of a house for £3,000 the intending purchaser paid a deposit of £300 and completion of the purchase was fixed for 4th April 1949. On 29th March the purchaser, having experienced difficulty in raising the balance consideration, informed the vendor that it would not be possible for her to complete the purchase on the date fixed as she could not raise the money. The vendor wrote on 5th April that he could not agree to an extension of time but that he was

[1] *(1884) 27 Ch. D. 89.* [2] *(1949) 3 S. A. L. R. 715.*
[3] *(1951) Ch. 174.*

prepared, without prejudice, to delay enforcing his rights until 19th April. The purchaser could not complete the sale even by 19th April and the vendor informed her that he had forfeited the deposit and he thereafter sold the property. One of the conditions of the sale adopted provided that if the purchaser failed to complete his purchase according to the conditions *his deposit should thereupon be forfeited* (unless the Court otherwise directs) to the vendor. In an action brought by the purchaser for the return of her deposit, Harman, J. followed the Privy Council judgment. He held that time was not of the essence of the contract and that the condition for forfeiture referred to only meant that the purchase should be completed on 4th April or within a reasonable time thereafter. He also held that the vendor could not, by writing the letter of 5th April, make time of the essence of the contract, for he could do so only if there had been such delay or improper conduct on the part of the purchaser as to render it fair that if steps were not immediately taken to complete, the vendor should be relieved from his contract.

In the present case the defendant's conduct has been quite different from that of the vendor in the case just cited. Assuming that there was a default on the part of the plantiff in not completing his purchase on 8th November 1949, far from notifying the plaintiff that he would terminate the contract the defendant clearly indicated that he was prepared to give the plaintiff further time to complete the purchase. He elected to treat the agreement as still subsisting and he gave no notice to the plaintiff to complete the purchase within a stated time. I fail to see how he can now fall back on the agreement to forfeit. It is only on this hypothesis that he, as he admits, went several times to meet the plaintiff and the plaintiff's Proctor. On 17th November, on receipt of a telegram from the plaintiff's Proctor, he went to Negombo in order to sign the deed of transfer, and he went again on 18th November for the same purpose. He made a significant admission under cross-examination when he stated that he had told the plaintiff that he would come on the 8th November to Mr. Pieris's office at about 2 p.m. His admitted failure to wait till 2 p.m. in order to complete the transaction puts him in default, and I think Mr. H. V. Perera conceded that it was the defendant who ultimately "cried off". I think Mr. Perera also conceded that if time was not of the essence of the contract the default was on the part of the defendant.

Could it be said that if the defendant was in default or repudiated the contract, as he did by his letter D5 of 18th November, he was not liable to return the deposit to the plaintiff? I cannot accept any submission which would lead to such an unconscionable result. The deposit was made on the basis that a deed of sale would be executed, and it was to be taken as part of the purchase price. I have already held that the purchaser was not in default and that the vendor had no right to forfeit the deposit. Clearly then there was a failure of consideration so far as the plaintiff was concerned, because the money was paid on the understanding that it was to form part of the purchase price of the land. It was urged that there can be no failure of consideration in such a case where the contract itself is void. It is in just such a case, I think, that the money paid for that particular purpose can be recovered from the

payee. The payee received it for that purpose, he refused or neglected to carry out his part of the bargain, and his duty is to return it to the payer.

I think the principle of unjust enrichment would also apply. It cannot be said in this case that there was an intention on the part of the plaintiff that the defendant should retain the money. Such intention must be judged in the light of the implied condition that time was not of the essence of the contract and "if one party after receiving the benefit of the inchoate arrangement desired to retain that advantage while refusing to carry out his undertaking, he would be enriching himself at the expense of another, whom a Court of law would in such circumstances undoubtedly assist"—*Wilken v. Kohler* [1]. If, however, time had been of the essence of the contract and the plaintiff had been in default, the plaintiff would probably have been in a difficulty if he had sought to recover the deposit, for in such circumstances a Court may infer that the intention of the parties is that the defendant should retain the deposit.

For these reasons I would dismiss this appeal with costs subject to the variation in regard to the quantum of damages.

Appeal dismissed.

Decree varied.