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he Stipulatio Poenae *in the Law of Ceylon*

HE problem stated.—When the parties to a contract agree that, in the event of a breach of contract, a sum of money is to be paid by the party in default to the injured party, to what extent is such an eement (which in Roman law was termed a *stipulatio poenae*[1]) enforce- e in the law of Ceylon?

Are we in Ceylon governed on this subject by 'the Roman-Dutch Law e and simple'[2], or has the English Law been introduced either expressly legislation or tacitly by judicial decision. If the Roman-Dutch Law has n superseded by the English Law, has the supersession taken place on the is that the Roman-Dutch Law and the English Law on the subject are ilar; and has the English Law replaced the Roman-Dutch Law wholly or y in part? What, in short, is 'the living law of Ceylon'[3] with regard he *stipulatio poenae*?

It must be noticed that the case that is proposed for discussion in this cle is that in which a party to a contract promises to pay the other a sum noney in the event of his breaking his obligations under the contract: the gation to pay the money is a merely accessory or secondary obligation, ch comes into existence only in the event of breach of the party's primary gations under the contract. The position is quite different in the case th which we are not concerned in this article) where the debtor's obligation

1. This may be translated 'stipulation for a penalty', provided we remember that he Roman and Roman-Dutch law *poena* or 'penalty' did not have the technical ning which it bears in English law; for the English law division of conventional into 'penalties' and 'liquidated damages' was not known in Roman and Roman- ch law. See *Namasivayam* v. *Suppramaniam* 1877 Ramanathan 362, 371; *Fernando ernando* 4 N.L.R. 285, 288; *Webster* v. *Bosanquet* 13 N.L.R. 47, 55-6; *Pearl Assurance Ltd.* v. *Union Government* 1933 A.D. 277, 300.

2. To use the phrase of Bertram, C.J. in *Samed* v. *Seguthamby* 25 N.L.R. 481, 487.

3. In *Rabot* v. *de Silva* 12 N.L.R. 81, 82 (P.C.), Lord Atkinson used this phrase istinguish 'the Roman-Dutch Law pure and simple' from that law as developed in ern times by the legislature and by judges in Ceylon.

to pay the money is not merely accessory to some other obligation which is the primary obligation under the contract, but is in terms of the contract itself a primary but alternative obligation at the election of the debtor. The distinction between the two cases depends entirely on the intention of the parties to the particular contract[4].

But even where it is quite clear that the parties to a contract intend that the obligation to pay the money was merely accessory to another primary obligation, the former obligation will not necessarily be enforceable. Thus, in the first place, since the obligation to pay the money is merely accessory to the principal obligation, it follows that if that principal obligation is for some reason null and void, the accessory obligation will also be void and unenforceable[5].

Secondly, even where the principal obligation is quite valid, and the accessory agreement to pay a sum on its breach is therefore *prima facie* valid, the creditor cannot enforce payment of the sum unless there has clearly been a default by the debtor in terms of the agreement[6]. It is a question of construction of the particular agreement exactly when, and upon which default of the debtor, the sum agreed upon becomes payable by him[7].

Thirdly, even where the principal obligation is quite valid and the default contemplated by the parties has clearly occurred, the creditor may be debarred from recovering the agreed sum because he has obtained other satisfaction from the debtor for the latter's default. Since the agreed sum is only accessory to the principal obligation of the debtor, and is intended to secure to the creditor performance of that obligation or compensation for its non-performance, the creditor is not obliged to claim the agreed sum. Instead of claiming that sum, the creditor may, if he prefers to do so, sue the debtor for performance of the primary obligation[8], or for damages for non-performance

4. See, e.g., *Paiva* v. *Marikar* 39 N.L.R. 255, 257 and the cases therein cited.

5. Voet 45. 1. 12; Pothier, Obligations, sec. 338; French Civil Code (1804) Art. 1227; German Civil Code (1900) Art. 344; cf. *Huxham* v. *de Waas* 1820 Ram. 39, 41.

6. *Kailasam Chetty* v. *Fernando* 2 Browne 87; *Lenora* v. *Amarasekera* 5 N.L.R. 114; *Avehami* v. *Jayasekara* 2 S.C.C. 142.

7. See, e.g., *Mohamed* v. *Wijeyewardene* 48 N.L.R. 73, where, on the construction of a building contract, it was held that the payment of the sum promised by the contractor for delay in completing the building became payable only on completion of the building, and only from such date as the architect should determine (under power given to him by the contract of extending the date for completion originally agreed upon between the employer and the contractor).

8. Pothier sec. 341; French Civil Code Art. 1228; *Howard* v. *Hopkyns* (1742) 2 Atk. 371; *Logan* v. *Wienholt* (1833) 1 Cl. and Fin. 611.

f that obligation[9]. But the creditor cannot demand both the agreed sum and damages[10] nor the agreed sum and performance.[11]

The problem, then, with which this article is concerned may be more ully stated as follows:—Where the parties to a valid primary contractual bligation agree that, in the event of a breach thereof, the party in default hall become liable to pay the other, as a secondary obligation, an agreed um, and the default has clearly taken place, to what extent does the law f Ceylon allow the injured party, who has not obtained any other satisfaction r the default, to recover the agreed sum? As stated earlier, we shall have examine the English Law and the Roman-Dutch Law respectively before e can decide exactly what the position is in the modern law of Ceylon.

The English Law.—The English Common Law Courts admitted the xaction in full of a sum stipulated as due in the event of breach of contract, ut in course of time the Court of Chancery gave relief in certain circumtances. The position in the modern law may be stated as follows:

Where the parties to a contract have themselves provided that in case of reach of the contract the party in default shall pay the other a stated sum, his sum may, in the eyes of the law, be one or two things: it may be either liquidated damages' or a 'penalty'. Whether the sum fixed is in any iven case a penalty or liquidated damages is a question of construction for e Court, in deciding which the Court will take into consideration the intenon of the parties as evidenced by their language and the circumstances of e case, taken as a whole and regarded as at the time of the making of the ntract[12]. If the sum fixed can be regarded as a genuine pre-estimate by e parties of the damage likely to follow from the breach[13], the sum will be

9. Pothier sec. 342. But in English law the creditor has no option to sue the debtor damages independently of suing for the agreed sum, if the agreed sum is held to be quidated damages'—i.e. a genuine pre-estimate by the parties of the loss likely to result m the breach. If, however, the agreed sum is held to be, not 'liquidated damages', t a 'penalty' (for the distinction see the text at p. 11), the creditor has the option either suing for the agreed sum or suing independently for damages for breach of contract; pp. 13-14.

10. V. d. Keessel, *Dictata ad* Grotium, 3. 1. 43; cf. *Attorney-General* v. *Abram Saibo d Co.* 18 N.L.R. 417, 429.

11. except where the agreed sum is expressed to be payable for delay in performance such, as distinct from non-performance. Pothier sec. 344 ad fin; French Civil Code rt. 1229.

12. *Commissioner of Public Works* v. *Hill* 1906 A.C. 368 (P.C.); *Webster* v. *Bosanquet* 912 A.C. 394 (P.C.); *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage and Motor Co. d.* 1915 A.C. 79. In arriving at the intention of the parties, the Court is not restricted the terms of the agreement but may, by taking extrinsic evidence, inform itself of all e circumstances attending the making of the contract. *Abrahamson (Pty.) Ltd.* v. *uth African Electric Appliances (Pty.) Ltd.* 1940 C.P.D. 301 (a South African decision viewing both South African and English cases).

13. or if the sum, though not a genuine pre-estimate of the probable loss, has been ed by the parties because they agreed to limit the damages recoverable to less than ose which a breach of the contract would probably cause. *Cellulose Acetate Silk Co. d.* v. *Widnes Foundry (1925) Ltd.* 1933 A.C. 20, 25.

treated as liquidated damages[14]; but if the sum seems to have been fixed not with the idea of assessing the likely loss but *in terrorem*, that is, with the intention of securing performance of the contract by penalising a breach, the sum will be treated as a penalty[15].

The terms used by the parties to describe the sum fixed are not conclusive, and do not absolve the Court from deciding from the terms of the contract and the surrounding circumstances whether the sum fixed is a penalty or liquidated damages. But since the parties may *prima facie* be presumed to mean what they say, the presumption, where the parties have used the term ' penalty ', is that the sum is a penalty, so that the onus is on the party seeking to show that the amount is liquidated damages to prove this[16]; and, conversely, where the parties have used the term ' liquidated damages ', the presumption is that the sum is liquidated damages, so that the onus is on the party alleging it to be a penalty to prove that fact[17].

It has often been judicially stated that it is not possible to lay down exact rules for determining the question whether the sum fixed in a contract is a penalty or liquidated damages; but the decided cases have laid down certain tests which may be of help in ascertaining the intention of the parties. The application of these tests to the facts of particular cases has often led to differences of opinion; but it must be remembered these rules are no more than presumptions as to the parties' intention, so that they are rebuttable by evidence of a contrary intention appearing from a construction of the contract and the surrounding circumstances taken as a whole[18].

The following are the chief tests that have been applied by the Courts to decide the question ' Penalty or Liquidated Damages ?':—

(1) If the sum agreed upon is extravagant and unconscionable in amount in comparison with the greatest loss that could possibly follow from the breach, the sum will be held to be a penalty[19].

14. *Commissioner of Public Works* v. *Hill* 1906 A.C. 368 (P.C.), following *Clydebank Engineering and Shipbuilding Co. Ltd.* v. *Yzquierdo y Castenada* 1905 A.C. 6.

15. *Lowe* v. *Peers* (1768) 4 Burr. 2225, 2229; *Law* v. *Redditch Local Board* (1892) 1 Q.B. 127, 132.

16. *Wilson* v. *Love* (1896) 1 Q.B. 626; *Clydebank Engineering and Shipbuilding Co. Ltd.* v. *Yzquierdo y Castenada* 1905 A.C. 6.

17. *Pye* v. *British Automobile Commercial Syndicate Ltd.* (1906) 1 K.B. 425. Where the parties' intention is doubtful from the terms of the contract, *semble*, the sum is to be taken as a penalty. *Crisdee* v. *Bolton* (1827) 3 C. and P. 240, 243; cf. *Barton* v. *Glover* 1815 Holt (N.P.) 43.

18. *Pye* v. *British Automobile Commercial Syndicate Ltd.* (1906) 1 K.B. 425.

19. *Dunlop Pneumatic Tyre Co., Ltd.* v. *New Garage and Motor Co. Ltd.* 1915 A.C. 79, 87; *Clydebank Engineering and Shipbuilding Co. Ltd.* v. *Yzquierdo y Castenada* 1905 A.C. 6, 10.

(2) If a larger sum of money is made payable on breach of an obligation to pay a smaller sum of money, the larger sum will be held to be a penalty[20].

(3) Where a contract contains only one stipulation on the breach of which an agreed sum is to be paid, the sum will be held to be liquidated damages, especially where there is no adequate means of ascertaining the exact damage which may arise from the breach[21], except where the single stipulation is of trivial importance or can only give rise to nominal damages and the agreed sum payable is so large in comparison as to make it clear that the sum was fixed as a penalty[22].

(4) Where a contract contains a variety of stipulations, if a single lump sum is made payable on the occurrence of one or more or all of several events, some of which may occasion serious and others only trifling damage, the presumption is that the sum is a penalty[23], especially where some of the stipulations are of such a character that the damages which can possibly arise from a breach of any of them are insignificant when compared with the sum fixed by the parties[24]. But this presumption is weakened where the amount of damages for the breach of each stipulation is unascertainable or not readily ascertainable, and in such circumstances the sum made payable on breach of any of the stipulations will be treated as liquidated damages[25].

Where the Court comes to the conclusion that the sum fixed is liquidated damages, the party complaining of the breach is entitled to recover the sum fixed without having to prove actual damage, and the Court will accept the sum without interfering with it[26]. Where the Court comes to the conclusion that the sum fixed is a penalty, the party suing on the penalty can recover only the damages actually shown to have been suffered by him as a result of the breach, and in any event not beyond the amount of the penalty[27]; but

20. *Kemble* v. *Farran* (1829) 6 Bing. 141, 148; *Thompson* v. *Hudson* 1869 L.R. 4 H.L. 1, 15; *Wallis* v. *Smith* (1882) 21 Ch. D. 243, 256; *Law* v. *Redditch Local Board* (1892) 1 Q.B. 127, 130.

21. *Lea* v. *Whitaker* 1872 L.R. 8 C.P. 70; *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.* 1915 A.C. 79, 86; *Law* v. *Redditch Local Board* (1892) 1 Q.B. 127.

22. *Law* v. *Redditch Local Board* (1892) 1 Q.B. 127, 130; *Rayner* v. *Rederiaktiebolaget Condor* (1895) 2 Q.B. 289.

23. *Elphinstone* v. *Monkland Iron and Coal Co.* (1886) 11 App. Cas. 332, 342; *Dunlop Pneumatic Tyre Co. Ltd.* v. *New Garage and Motor Co. Ltd.* 1915 A.C. 79.

24. *Davies* v. *Penton* (1827) 6 B. and C. 216, 223; *Wallis* v. *Smith* (1882) 21 Ch. D. 243, 265 and 270.

25. *Atkyns* v. *Kinnier* (1850) 4 Exch. 776, 783; *Galsworthy* v. *Strutt* (1848) 1 Exch. 659; *Wallis* v. *Smith* (1882) 21 Ch. D. 243, 258.

26. *Commissioner of Public Works* v. *Hill* 1906 A.C. 368, 375.

27. *Wilbeam* v. *Ashton* (1807) 1 Camp. 78; *Commissioner of Public Works* v. *Hill* 1906 A.C. 368, 375.

it is open to him to disregard the penalty and recover damages (even exceeding the amount of the sum fixed in the contract) in an action for breach of contract[28].

Before we turn from the English Law to consider the Roman-Dutch Law relating to the *stipulatio poenae*, it is not irrelevant to mention two authoritative attempts to restate concisely what was conceived to be the English Law but without express reference to the distinction between penalties and liquidated damages. The first is section 74 of the Indian Contract Act (Act No. 9 of 1872) which, as first enacted, did not contain the words italicized : ' When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, (*or if the contract contains any other stipulation by way of penalty*), the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named (*or, as the case may be, the penalty stipulated for*)[29] '. The second is section 339 (1) of the ' Restatement of the Law of Contracts ' issued by the American Law Institute in 1932, which runs as follows :—' An agreement, made in advance of breach, fixing the damages therefor, is not enforceable as a contract and does not affect the damages recoverable for the breach, unless (*a*) the amount so fixed is a reasonable forecast of just compensation for the harm that is caused by the breach, and (*b*) the harm that is caused by the breach is one that is incapable or very difficult of accurate estimation '. It will be seen that the latter section, which, unlike the former, does not necessarily limit the damages recoverable to the sum agreed upon by the parties, is the more correct statement of the present law of England, according to which the creditor, where the conventional sum is a ' penalty ' and not ' liquidated damages ', can sue for breach of contract independently of the penalty, and thus recover even more than the agreed sum[30].

28. *Lowe* v. *Peers* (1768) 4 Burr. 2225, 2228 ; *Harrison* v. *Wright* (1811) 13 East, 343, 348 ; *Wall* v. *Rederiaktietbolaget Luggude* (1915) 3 K.B. 66, 72-3 ; *Watts, Watts and Co. Ltd.* v. *Mitsui and Co. Ltd.* 1917 A.C. 227, 244-5 and 246. *Secus*, where the contract clearly shows that the right to recover the agreed sum is to be the injured party's only right in the event of a breach of contract. *Cellulose Acetate Silk Co.* v. *Widnes Foundry (1925) Ltd.* 1933 A.C. 20, 25-6.

29. ' The sole object of the section appears to have been to provide for the class of cases . . . in which the distinction between " liquidated damages " and " penalty " has given rise to so much difference of opinion in the English Courts ' (*Umarkhan* v. *Salekhan* (1892) 17 Bom. 106, 111). The words italicised in the text were added by section 4 of the Indian Contract Act Amendment Act No. 6 of 1899. Even the section as originally enacted was ' the result of a pronounced difference of opinion between the (Indian Law) Commissioners and the European business community in India as represented on the Select Committee of the Legislative Council ' (Sir G. C. Rankin, *Background to Indian Law* (1946) p. 108 ; cf. pp. 81-2).

30. See pp. 13-14 at n. 28.

The Roman and Roman-Dutch Law.—When we turn from the English Law to consider the rules of the Roman and Roman-Dutch Law on the subject of the *stipulatio poenae*[31], we find little or no agreement among the old text-writers. As Bynkershoek says in his *Quaestiones Iuris Privati* (2. 14), ' There is utter confusion among the commentators both ancient and modern on the question of penal clauses inserted in wills and contracts for the purposes of more effectively enforcing their provisions, and I doubt whether there is one who has stated the law correctly '.

It seems clear that the practice of annexing a *stipulatio poenae* to a contract was well established even in Roman times, and was recognized to be an useful device as avoiding the necessity of proving the damage suffered by a breach of the contract. Contradictory views were held by the mediaeval commentators as to the extent to which such stipulations could be enforced.

According to one view which was based on texts of the Roman Law like *Institutes* 3. 19. 9 and *Digest* 45. 1. 38. 17, the creditor could compel the debtor to pay the whole amount agreed upon, on the principle that a promisor should be held to his promise[32]. So long, therefore, as the parties in agreeing for the sum were not acting *in fraudem legis* (for example, they were not trying to evade the usury laws), the law would not interfere with the full exaction of the agreed sum. The great Azo of Bologna was amongst those who held this view of the strict enforceability of *stipulationes poenae*[33].

In opposition to this highly legalistic view point was that which, based on other texts of the Roman Law like *Code* 7. 47[34], *Digest* 19. 1. 28 and 44. 4. 4. 3, and first authoritatively expressed by Dumoulin (Molinaeus) in his well-known treatise ' On Damages ' (*De eo quod interest*),[35] came to be accepted by most of the Roman-Dutch text-writers as stating the position in their law. Voet expresses this view thus[36]: ' The rule under our present law is that where a very large penalty (*ingens poena*) is attached to a contract, the full

31. Since *poena* is rendered as ' penalty ' in many of the passages from the Roman and Roman-Dutch texts quoted below, attention is drawn to the fact that the word does not, in Roman and Roman-Dutch Law, possess the technical meaning it has in English law. See n. 1.

32. ' To the promisor of a penalty stipulated for, it is deservedly retorted that he ought to blame himself because he has of his own free will saddled himself with the bond of a penalty of such a character and amount ' *Digest* 2. 8. 1, quoted by Voet 45. 1. 12 *ad fin.*

33. See Pothier sec. 345.

34. See p. 16.

35. Dumoulin's views are neatly summarised by Pothier sec. 345.

36. 45. 1. 13 *ad fin.* The authorities cited by Voet are Ant. Faber *ad Code* 7. 23. 2 *ad fin*, Groenewegen *De Leg. Abrog. ad Code* 7. 47. 10, V. Leeuwen *Cens. For.* 1. 4. 15. 2, *Holl. Cons.* 4. 407 *ad fin.*

penalty is not adjudged, but that it ought rather to be mitigated in the discretion of the Judge, that it be reduced and limited so as to approximate to the amount which can probably represent the plaintiff's true damages'. The basis of this view is that 'when a debtor submits to an excessive penalty in case of the non-performance of his primary obligation, there is reason to presume that he was induced to do so under a false confidence that he should not fail in the performance of the primary obligation . . . and that he would not have submitted to it if he had supposed that the penalty could have been incurred . . . It would be contrary . . . to equity that the creditor should enrich himself at the expense of the debtor by requiring from him a penalty too excessive and manifestly beyond the damage which he has suffered from the non-performance of the primary obligation'[37].

Although Voet himself does not lay it down, some of the authorities he cites[38] prescribe that, in deciding whether or not the sum agreed upon by the parties is unconscionable, the Judge is to apply the rule laid down by Justinian in *Code* 7. 47 (*Lex unica de sententiis quae pro eo quod interest proferuntur*) which runs as follows :—'Since the uncertainties of ancient times in regard to the measure of damages have been drawn out *ad infinitum* . . . we . . . therefore decree that in all cases dealing with a defined quantity of anything, or anything definite in its nature, as in sales and leases, and all contracts, the damages shall on no account exceed double such defined amount. In other cases, where the amount appears to be undefinable, the judges who have undertaken to adjust the matter shall inquire into the case with as much exactness as they can, so that the amount of the loss actually sustained may be awarded as damages'. The exact scope of this *lex* unfortunately gave rise to many differences of opinion among the commentators[39]. Some jurists seem to have thought that Justinian's enactment did not apply at all to conventional penalties[40], whilst even of those who thought it did[41], some were not quite agreed as to how exactly it was applied[42].

37. Pothier sec. 345 ; cf. Dumoulin *De eo quod interest* n. 159.

38. *e.g.*, V.L. *Cens. For.* 1. 4. 15. 2-6 and 1. 4. 16. 12.

39. Groenewegen *De Leg. Abrog. ad Code* 7. 47 says that twenty-five different explanations of Justinian's enactment have been given by as many commentators. Bynkershoek (*Quaest. Iur. Priv.* 2. 14) says, 'Those who consider that this *lex* has been abrogated are mistaken, but those who think that Justinian failed to give certainty to an uncertain matter in this constitution are not mistaken. For it is most difficult to determine whether, in the case of claims of fixed amount, it is lawful to go up to a further similar amount, and whether in the case of claims not so fixed, the same or some other mode of assessing the actual loss is to be followed. Hence this *lex* has caused such confusion in the law-schools and the courts, that Carolus Molinaeus has laboriously compiled an entire book "On Damages" to explain it. But having read this book, you will be more confused than before you started . . .'.

40. Groenewegen *De Leg. Abrog. ad Code* 7. 47. 1.

41. V. Leeuwen *Cens. For.* 1. 4. 15. 2-6 and 1. 4. 16. 12; V d. Keessel *Dict. ad Gr.* 3. 1. 43 and *Theses* 481, Bynkershoek *Quaest. Iur. Priv.* 2. 14; *Aanmerkingen over het Redeneerend Vertoog* (1778 Amsterdam edn.) Vol. 2, pp. 445-6.

42. Cf. Bynkershoek quoted in n. 39.

But, whatever differences of view there may have been as to the basis on which the stipulated sum was to be modified, it is enough here to notice that the Roman-Dutch jurists for the most part did not adopt the strictly legalist view of Azo[43], and that they accepted the principle that a sum agreed upon as payable in the event of breach of contract could be modified by the judge if it was greatly in excess of the real loss suffered by the injured party. As we have seen[44], this was the view of Voet (following Faber, Groenewegen and Van Leeuwen), and writers after Voet also supported this view. Thus Bynkershoek, who is cited with approval by both Van der Keessel[45] and Van der Linden[46], says 'It is safer and better to follow the Roman Law, and to hold that penalties in contracts for doing or not doing something were invented for no other purpose than to provide that the measure of damages should not be uncertain, and that provided we observe the qualifications laid down in *lex unica Code de Sentent. quae pro eo quod interest profer.*, there is nothing to fear from such pacts . . . If however, a penalty clause in a contract is vastly in excess of (*longe et late excedat*), any real loss which the stipulator may suffer, then the lex referred to (C. 7. 47, *lex unica*) must be strictly observed'[47]. It is interesting to note that Pothier, who cannot strictly be called a 'Roman-Dutch text-writer', also prefers[48] the view of Dumoulin (which was in effect the same as that held by Bynkershoek) in preference to the view of Azo. The latter's view, which would make the conventional sum irreducible by the Court, has, however been adopted in the French Civil Code, which expressly says that the sum agreed upon between the parties cannot be modified by the Court[49].

To sum up the position in the Roman-Dutch Law, where the parties to a contract have agreed upon a sum to be paid in the event of non-performance, that sum was *prima facie* enforceable by the injured party against the defaulter, unless the latter could show that the sum agreed upon was much larger than the actual loss suffered by the former. On the other hand, it must be added that if the sum agreed upon proved insufficient to cover the actual loss, the

43. See p. 15 at n. 33.

44. See pp. 15-16 and n. 36.

45. *Dicta ta ad* Gr. 3. 1. 43 and *Theses* 481.

46. Note at vol. 1, p. 581 of his translation of Pothier, *Obligations*, sec. 345.

47. *Quaest. Iur. Priv.* 2. 14.

48. Pothier sec. 345.

49. Article 1152 ; except when the primary obligation has been performed only partially (Art. 1131). Article 343 of the German Civil Code gives the Court power to reduce the penalty where it is disproportionate in relation to the creditor's interest, but by Articles 348 and 351 of the Commercial Code a penalty promised by a 'mercantile trader' cannot be reduced.

Roman-Dutch Law allowed the injured party to recover compensation, even if that exceeded the sum agreed upon[50].

Having stated the English Law and the Roman-Dutch Law relating to the *stipulatio poenae*, we are now in a position to attempt a comparison and a contrast. Both systems of law agree in recognising the power of a person complaining of a breach of contract to sue the defaulting party for a sum of money promised in the event of default, that sum being *prima facie* due as promised ; and both systems also recognise that the defendant had the power of releasing himself from his *prima facie* liability to pay the full amount agreed upon if he could discharge a certain burden of proof. But what the defendant had to prove to avoid liability to pay the full sum claimed of him was differently prescribed by the two systems.

In English Law the defendant who wishes to avoid liability to pay the full sum has to show, from the terms of the contract and the surrounding circumstances as at the date of the contract, that the sum, (whatever name the plaintiff has called it), is not ' liquidated damages ', a genuine pre-estimate of the loss likely to arise from the breach of contract, but a ' penalty ', a sum fixed *in terrorem* with a view to securing performance of the contract. If the defendant discharges this onus, the plaintiff can recover only such damages as he can prove that he has suffered, but not exceeding the sum fixed in the contract.[51] In Roman-Dutch Law, on the other hand, the defendant who wishes to avoid liability for the full sum agreed upon, has to show that the plaintiff's claim is large in relation to the actual damage suffered by the plaintiff—an undeniably heavy burden since it involves the proof of facts not ordinarily within the knowledge of a defendant.

It will thus be seen that the Roman-Dutch differed from the English Law in that the former system did not adopt the English test of examining the contract in the light of the circumstances existing at the date of its making, with a view to deciding whether, according to the intention of the parties at *that* time, the sum fixed was in the nature of a ' penalty ' or of ' liquidated damages '.

50. Voet 46. 2. 4 ; Pothier sec. 342, who, however, adds ' but the judge ought not too readily to listen to the creditor who pretends that the penalty he has received was not a sufficient indemnification for the non-performance of the agreement ; for . . . the creditor, by demanding greater damages (than the sum agreed on) seems to act in opposition to an estimation which he himself has made, and this ought not to be allowed, at least unless he has proof at hand that the damage sustained by him exceeds the penalty agreed upon '.

51. As we have already seen (see p. 14 at n. 28) this limitation applies only where the plaintiff sues for the sum fixed by the contract. If the plaintiff wishes he may disregard the amount fixed in the contract and sue independently for damages for breach of contract, in which case he may recover more than the amount fixed.

The latter distinction was unknown to the Roman-Dutch Law and, as a consequence, the burden of proof required of the defendant by the two systems of law materially differed[52].

The Law of South Africa and Ceylon.—The last stage of our enquiry relates to finding out what is ' the living law of Ceylon '[53] and South Africa with regard to the *stipulatio poenae*. Does the Roman-Dutch Law apply or does the English Law or possibly a combination of both ? We shall consider first the law of South Africa.

Starting in the early half of the 19th century with a complete allegiance to the Roman-Dutch principles as enunciated by Voet and Bynkershoek[54], the South African courts have gradually accepted the English distinction between penalties and liquidated damages, although there was an intermediate period when the full consequences of the adoption of these two categories of English law do not seem to have been appreciated. Thus, in *Peach and Co.* v. *Jewish Congregation of Johannesburg*[55] and *Chaffer and Tassie* v. *Richards*[56], conventional sums held to be ' liquidated damages ' and not ' penalties ' were thought to admit of being scaled down if *ingens* (large); and as late as 1933 three Judges of the Appellate Division, while recognising that the two categories of English Law had been adopted in South Africa, were of the view that the Roman-Dutch Law rules as to the burden of proof of damage were still in force in South Africa[57]. But the Privy Council has now finally decided[58] that, with the adoption of the English distinction between penalties and liquidated damages, the English rules relating to the burden of proving damage, which were a necessary consequence of that distinction, had also been adopted in South Africa.

When we turn to consider the attitude of Ceylon judges to the *stipulatio poenae*, we find trends similar to those noticed in South Africa. In a few early cases the judges have expressed themselves so concisely that it is not quite clear whether they were applying the Roman-Dutch or the English Law[59]. In some cases quite clearly the Roman-Dutch Law is applied, either

52. See generally *Pearl Assurance Co. Ltd.* v. *Union Government* 1933 A.D. 277, 300-2 and 305, per Stratford, J.A., and, on appeal to the Privy Council, 1934 A.D. 560, 565, per Lord Tomlin.

53. See n. 2 for this phrase.

54. See e.g. *Borradaile and Co.* v. *Muller* (1832) 1 Menzies 555.

55. (1894) 12 Cape L.J. 69, 73, per Gregorowski, C.J.

56. (1905) 26 Natal L.R. 207, 225-8, per Bale, C.J.

57. *Pearl Assurance Co. Ltd.* v. *Union Government* 1933 A.D. 277 (Wessels, C.J. de Villiers, J.A. and Curlewis, J.A., Stratford, J.A., dissenting).

58. *Pearl Assurance Co. Ltd.* v. *Union Government* 1934 A.D. 560.

59. See e.g. *Huxham* v. *de Waas* (1820) 1820-33 Ram. 39, 41 ; *Braybrooke* v. *Perera* (1838) Morgan's Digest 227 ; the anonymous case C.R. Batticaloa 8275, 1877 Ramanathan 70.

with no mention of the English distinction between liquidated damages and penalties[60] or after express mention of the difference between the Roman-Dutch and the English systems[61]. In other cases, with equal definiteness, the English Law is applied, either with no explanation for applying a foreign system in place of our common law, the Roman-Dutch system[62], or with the explanation that the English Law is being applied because of its similarity to the Roman-Dutch Law[63] or because the English Law had been adopted in Ceylon[64]. As in South Africa[65], in Ceylon also at one time the full consequences of the adoption of the English distinction between liquidated damages and penalties do not seem to have been appreciated[66], and it cannot be denied that some of the points of similarity which certain Ceylon judges thought existed between the English Law and the Roman-Dutch Law do not bear critical examination[67]. But, although there is not for Ceylon any such

60. See e.g. *Fernando* v. *Fernando* (1899) 4 N.L.R. 285 ; *Kailasam Chetty* v. *Fernando* (1901) 2 Browne 87 ; *Jayasinghe* v. *Silva* (1911) 14 N.L.R. 170, 171-2, (per Lascelles, C.J., although the other judge, Middleton, J. (at p. 174), seems to have applied the English Law).

61. See e.g. *Parlett* v. *Pettachy Chetty* (1838) Morgan's Digest 218 ; *The A.G.* v. *Costa* (1922) 24 N.L.R. 281 ; cf. *Namasivayam* v. *Suppramaniam* 1877 Ram. 362, 371, per Berwick, D.J.

62. See e.g. *Kumaraperuma Arachchigey Davith* v. *Gamage Dingiri Appuhamy* (1887) 8 S.C.C. 84 per Clarence, J. (though Burnside, C.J. in his very short judgement seems to have applied the Roman-Dutch Law); *Jayasinghe* v. *Silva* (1911) 14 N.L.R. 170, 174, per Middleton, J. (Lascelles, C.J. applying the Roman-Dutch Law); *Webster* v. *Bosanquet* (1912) 15 N.L.R. 125 (P.C.); *Subramaniam* v. *Abeywardena* (1918) 21 N.L.R. 161 ; *Wickremasuriya* v. *Kanira Appuhamy* (1919) 6 C.W.R. 57 ; *Abdul Majeed* v. *Silva* (1930) 32 N.L.R. 161, 163-5, per Maartensz, A.J., (but Jayawardene, A.J. at p. 166 applied the English Law on the ground that the English Law was ' very much the same ' as the Roman-Dutch Law); *Associated Newspapers of Ceylon Ltd.* v. *Hendrick* (1935) 37 N.L.R. 104 (in this case Macdonell, C.J. applied the English Law though he used the terminology of Roman-Dutch Law when explaining the tests used in the English Law to distinguish liquidated damages from penalties).

63. *Pless Pol.* v. *de Soysa* (1909) 12 N.L.R. 45, 52, per Middleton, J ; *Webster* v. *Bosanquet* (1909) 13 N.L.R. 47, 49, per Middleton, A.C.J. (although Pereira, A.J. pointed out that the English Law diferred from the Roman-Dutch Law); *Ramasamy* v. *Kanapathy* (1910) 2 Current L.R. 64 ; *Wijeyewardena* v. *Noorbhai* (1927) 28 N.L.R. 430 ; *Abdul Majeed* v. *Silva* (1930) 32 N.L.R. 161, 166, per Jayewardene, A.J.; *Negombo Co-operative Society* v. *Mello* 13 C.L. Rec. 141.

64. *Wijeyewardena* v. *Noorbhai* (1927) 28 N.L.R. 430, 432, per Dalton, J.; *Negombo Co-operative Society* v. *Mello* 13 C.L. Rec. 141.

65. See p. 19 at nn. 55, 56.

66. See e.g. *Namasivayam* v. *Suppramaniam* 1877 Ram. 362, 371, per Berwick, D.J., who seems to have thought that even a sum found to be liquidated damages and not a penalty could be modified.

67. e.g., as we have seen, it is not correct to say, (as was said in *Pless Pol* v. *de Soysa* 12 N.L.R. 45, 52, per Middleton, J., cf. *ibid.* 48, per Hutchinson, C.J. ; *Negombo Co-operative Society* v. *Mello* 13 C.L. Rec. 141, 142-3 per Macdonell, C.J.), that the Roman-Dutch Law, in deciding whether the sum claimed by the plaintiff was *ingens* (large), adopted the test of finding out whether or not the parties intended, at the time of their entering into the contract, that the sum fixed was, in relation to the loss likely to be caused by a breach, a genuine pre-estimate of damage. See above p. 19 at n. 52.

unequivocal pronouncement as exists for South Africa in the Privy Council judgement in the *Pearl Assurance Company Case*, it is submitted, on the basis of recent judicial opinion in Ceylon, that the law of Ceylon has in effect adopted the English Law relating to the *stipulatio poenae*, both as regards the distinction between penalties and liquidated damages (as well as the tests applied to determine that distinction) and as regards the burden of proof required of the parties[68].

The following passage from the judgement of the Privy Council in *Pearl Assurance Company* v. *Union Government*[69] may, therefore, be taken as summing up the position for the law of Ceylon as well as for that of South Africa : ' Today the field covered by the old *poena* over which the Court could always have exercised a moderating jurisdiction on being satisfied that the *poena* was excessive, having regard to the actual damage suffered, is now occupied by the two categories ' (of English Law—penalties and liquidated damages), ' ascertained by reference to the intention of the parties exhibited in the contract . . . If the sum claimed falls into the first category of genuine pre-estimate of damage, it can be recovered on proof of breach of contract without proof of damage and cannot be reduced, but . . . if it falls into the second category it is a penalty and actual proved damage (but not exceeding the amount of the " penalty ") can alone be recovered in respect of it '.

In this South African case the Privy Council expressly left open the question whether, if damages exceeded the penalty, the full damages could be recovered in an action, not on the penalty, but for breach of contract; and in Ceylon it has been suggested, *obiter*, that the question must be answered in the negative[70]. But ' this can hardly be said to be equitable '[71] and there

68. As regards the latter, there is no suggestion in any Ceylon case, as there was in *Pearl Assurance Co. Ltd.* v. *Union Government* 1933 A.D. 277, (per Wessels, C.J., de Villiers, J.A. and Curlewis, J.A.), that, whilst the English distinction between liquidated damages and penalties had been accepted, the burden of proof required of the defendant was governed by the rules of the Roman-Dutch Law and not by those of the English Law. Our rules of evidence in Ceylon being based on the English Law, it may safely be presumed, in the absence of any judicial statement to the contrary, that the English Law relating to the burden of proof has been accepted in Ceylon, along with the English distinction between penalties and liquidated damages.

69. 1934 A.D. 560, 568.

70. *Lenora* v. *Amarasekera* 5 N.L.R. 114, 115, per Bonser, C.J.

71. *Pearl Assurance Co. Ltd.* v. *Union Government* 1933 A.D. 277, per Wessels, C.J.: ' The English system . . . makes the penal clause unenforceable . . . by the person in whose favour it has been inserted. As regards him it is held to be of no effect, but in respect of the promisor the clause has the effect of limiting the damage exigible by the plaintiff to the amount of the penalty, even though he proved that he has suffered greater damages than the stipulated penalty . . . It seems inequitable that, where there is a competition for a contract, and where the person who offers to pay a penalty upon non-performance gets the contract, when once he has obtained it he can ignore the penalty clause and treat it as if it were non-existent '.

seems no reason why an affirmative answer should not be given to this question in Ceylon and in South Africa, as in England[72].

By its judgement in the *Pearl Assurance Company Case*[73], it seems clear that the Privy Council was not merely putting new English wine into old Roman-Dutch bottles, but was in effect giving its *imprimatur* to the complete supersession of the Roman-Dutch Law relating to the *stipulatio poenae* by the English Law. The Privy Council itself, in an appeal from Ceylon, once said[74] that ' the cases in which the (English) Courts have had to consider whether a stipulated payment in respect of the breach of a contract should be regarded as liquidated damage . . . or merely as a penalty . . . are innumerable and perhaps difficult to reconcile '; and it may consequently, perhaps, be permissible to express a regret that the English Law, with its distinction between penalties and liquidated damages (which has well been described as ' the most troublesome knot in the (English) doctrine of damages '[75]), should have been adopted in South Africa and Ceylon in preference to the Roman-Dutch Law[76]. Might it not have been better if, instead of judicial legislation introducing the English Law, some statutory restatement of the Roman-Dutch principles had been adopted in South Africa and Ceylon ?[77]

72. See p. 14 at n. 28.

73. 1934 A.D. 560.

74. *Webster* v. *Bosanquet* 15 N.L.R. 125, 127 ; cf. *Hills* v. *Colonial Government* (1904) 14 C.T.R. 39, 53. See also *Uttumchand and Co. Ltd.* v. *Times of Ceylon* 48 N.L.R. 179, 182 *ad fin.*, per Wijeyewardene, J. for the difficulty of reconciling some of the Ceylon cases which have followed the English distinction between penalties and liquidated damages.

75. Pollock and Mulla, *The Indian Contract Act* (4th edn.) p. 422.

76. Cf. *The Negombo Co-operative Society* v. *Mello* (1934) 13 C.L. Rec. 141, 142, per Macdonell, C.J.

77. Cf. section 110 of the draft South African General Law Amendment Bill of 1935, proposed soon after the Privy Council decision in the *Pearl Assurance Company Case* but never enacted :

'(1) If a party (hereinafter referred to as the debtor) to a contract entered into after the commencement of this Act had thereby undertaken to pay or render to the other party thereto (hereinafter referred to as the creditor) any sum of money or other property in the event of any breach of the contract by the debtor, that undertaking shall, in the event of such breach, be enforceable, whether such money or property is described in the contract as a penalty, or as liquidated damages, or as a pre-estimate of damages or in any other manner, and whether the parties to the contract intended by the giving and acceptance of such undertaking to provide for the infliction upon the debtor of a punishment for such a breach or to provide for payment to the creditor of compensation for loss suffered by him as a result of such breach : Provided that—

(*a*) if the debtor proves that such sum of money or the value of such property is grossly excessive in comparison with the loss, inconvenience, disappointment or annoyance actually suffered by the creditor as a result of such breach, a competent court may, at the instance of the debtor, reduce the indebtedness of the debtor to a sum or value which the court considers sufficient to compensate the creditor fully for any such loss, inconvenience, disappointment or annoyance ;

(*b*) if the creditor has, as a result of such breach, suffered any loss in excess of such sum of money or in excess of the value of such property, he may recover from the debtor an amount equal to such excess in addition to such sum or property, unless it is clear from the terms of the contract that the liability of the debtor is in any event not to exceed such sum or value ;

(*c*) any such undertaking in connection with a contract for the payment of money shall be subject to the provisions of the law relating to usury.

'(2) No payment or delivery made in connection with any contract (whether described as arra, earnest money, forfeiture, penalty, damages, purchase price, rent or in any other manner) shall be recoverable by the person who made the payment or delivery merely by reason of the fact that it was made as a penalty for non-fulfilment of the said contract '.

78. See p. 12 at n. 20.

In veiw of the incorporation of the English Law in South Africa and Ceylon this possibility is now of merely academic interest. But it is important to notice that, although there is no longer any room in South Africa and Ceylon for the application of the Roman-Dutch principles relating to the *stipulatio poenae* (which must now be taken to have been completely superseded by the English Law), yet there may be legal situations in which the English Law applies the test of asking whether a conventional sum claimed by one contracting party against the other is a penalty or liquidated damages, but in which the Roman-Dutch Law did not apply the principles of the *stipulatio poenae* (and recognise the Court's power of reducing the amount claimed if excessive in relation to the actual loss), and in which situations, therefore, even in the modern Roman-Dutch Law countries the English test of ' Penalty or Liquidated Damages ?' would now be inapplicable. But it must be emphasised that, although in such a situation the English test of ' Penalty or Liquidated Damages ?' does not apply, neither do the Roman-Dutch principles of the *stipulatio poenae* apply today to such a situation, any more than they did earlier before the English Law had superseded them.

Good illustrations of the similarities and differences that exist between the English Law and the law of the modern Roman-Dutch Law countries can be found if we consider in some detail applications of the second of the tests which, as noticed above, have been laid down by the English Courts to decide between penalties and liquidated damages : namely, that where a larger sum of money is made payable on breach of an obligation to pay a smaller sum, the presumption is that the larger sum is a penalty[78].

Thus, the principle that general damages cannot be recovered for non-payment of an ordinary money debt, the creditor being entitled only to the

capital and reasonable interest, is accepted in English Law[79] as well as in South Africa[80]; and stipulations for payment of interest at a higher rate on default of payment of capital and interest at a lower rate are presumed to be penalties in English Law[81] as well as in the law of Ceylon[82].

In English Law, then, a promise to pay a larger sum of money on breach of an obligation to pay a smaller sum is presumed to be a provision by way of penalty. But in English Law, where for the benefit of the debtor it is expressly agreed that a debt may be paid by instalments subject to the condition that if default is made in payment of one instalment the whole debt becomes due, such an agreement is not considered to be a penalty[83]. On the other hand, according to English Law, where there is an express stipulation that part of the consideration[84] already paid by a purchaser should be forfeited unless the balance is also paid when due, such a forfeiture clause is treated as a penalty, from which the purchaser may obtain relief on proper terms[85].

The view of the Roman-Dutch Law as to forfeiture of such instalments is different and is based on a passage in Voet's *Commentaries* which deals with the *lex commissoria*—that is, 'a pact annexed to a purchase at the time it is contracted to the effect that, unless the price be paid at a certain time, the thing shall be considered as unbought (*res inempta est*)'[86]. Voet says that where the seller avails himself of his rights under a *lex commissoria* and rescinds the sale for non-payment of instalments, the seller must refund to the purchaser any part of the price received, 'unless it was a part of the agreement that it

79. *Kemble* v. *Farran* (1829) 6 Bing 141, 148.

80. *Becker* v. *Stusser* 1910 C.P.D. 289; *Koch* v. *Panovska* 1934 N.P.D. 776.

81. *Wallis* v. *Smith* (1882) 21 Ch. D. 243, 260-1.

82. *The Negombo Co-operative Society* v. *Mello* 13 C.L. Rec. 141. The Roman-Dutch Law arrived at more or less the same result: the higher interest, though not necessarily unenforceable, will be reduced if in all the circumstances of the case it is excessive. V. Leeuwen *Cens. For.* 1. 4. 16. 12; V.d. Keessel *Theses* 481 and *Dict. ad* Gr. 3. 1. 43; *Kailasam Chetty* v. *Fernando* 2 Browne 87.

83. *Thompson* v. *Hudson* 1869 L.R. 4 H.L. 1; *Wallingford* v. *Mutual Society* (1880) 5 A.C. 685; *Protector Endowment Loan and Annuity Co.* v. *Grice* (1880) 5 Q.B.D. 592; *Latter* v. *Colwill* (1937) 1 A.E.R. 442.

84. 'If (the payments) were *arrha* (i.e. a deposit by way of earnest-money to bind the bargain, as distinct from part-payment), it would be forfeited without any express stipulation, such being the English Law . . . and the Roman and Roman-Dutch Law' (*Cloete* v. *Union Corporation Ltd.* 1929 T.P.D. at 526. For the distinction between deposit and part-payment see, for Ceylon, *Peris* v. *Vieyra* 28 N.L.R. 278 and *Palaniappa Chetty* v. *Mortimer* 25 N.L.R. 209.

85. *In re Dagenham Dock Co., ex parte Hulse* L.R. 8 Ch. 1022; *Kilmer* v. *British Columbia Orchards* 1913 A.C. 319 (P.C.); *Steedman* v. *Drinkle* (1916) 1 A.C. 275 (P.C.); *Brickle* v. *Snell* (1916) 2 A.C. 599 at 605 (P.C.).

86. Voet 18. 3. 1.

should be forfeited as a penalty for default, in which case the fruits during the intervening period remain with the purchaser'.[87]

On the authority of this passage, it has been held in South Africa that 'the forfeiture provisions of a *lex commissoria* attached to a contract of sale[88] are, if they conform to the requirements of Voet 18. 3. 3, enforceable, and . . . in such a case no question as to penalties or pre-estimates of loss arises'[89]. For Ceylon there is no direct authority, but in *Peris* v. *Vieyra*[90], where, in the absence of an express stipulation regarding forfeiture of the instalments of the purchase price paid, the purchaser was held entitled to recover the instalments, both judges used language which seems to have recognised the seller's right to retain the payments if there had been an express stipulation to that effect[91].

But, while recognising the existence of this important difference between the English Law and the Roman-Dutch Law as administered in South Africa and Ceylon, the exact limits of this exception to the general principles within which penalties can be enforced must be noticed. The decided cases lay it down that, where the forfeiture clause falls strictly within the limits of the rule laid down by Voet in 18. 3. 3, it can be enforced, irrespective of the question whether it would otherwise have been considered a penalty and not liquidated damages, and even where the instalments paid by the defaulting purchaser and retained by the seller are more than the amount of the actual loss suffered by the seller as a result of the purchaser's default[92]. But where the forfeiture clause does not conform to the requirements in Voet 18. 3. 3, the clause will be governed by the general principles within which alone penalties can be

87. Voet 18. 3. 3.

88. 'prohibited in the case of pledge, but allowed in sale' Voet 18. 3. 1. For the prohibition of the *lex commissoria* in mortgage see Voet 20. 1. 25, *Mapenduka* v. *Ashington* 1919 A.D. 343; and *Saminathan Chetty* v. *Van der Poorten* 34 N.L.R. 287, 294-5 (P.C.).

89. *Arbor Properties (Pty.) Ltd.* v. *Bailey* 1937 W.L.D. 116, 121-2; see also *Rossler* v. *Voss* 1925 N.P.D. 266; *Mine Workers' Union* v. *Prinsloo* 1948 (3) S.A.L.R. 831. In *Ngomezulu* v. *Alexandra Townships Ltd.* 1927 T.P.D. 401 the principle laid down in Voet 18. 3. 3. was applied, and there was held to be no penalty in an express provision that on default in payment the seller could cancel the sale and resume possession without liability to pay compensation for improvements effected by the purchaser. In *Jonker* v. *Yzell* 1948 (2) S.A.L.R. 942 it was held that the principle in Voet 18. 3. 3. applied and there was no penalty in an express provision for forfeiture of instalments on default, even where the purchaser had not had the benefit of possession of the property.

90. 28 N.L.R. 278.

91. Lyall Grant, J. at p. 282 said, 'He cannot claim more except by proving an express agreement that moneys paid should be retained by him'. Dalton, J. at p. 282 said, 'No doubt on (the purchaser's) default the (vendor) had his remedy, but he is not necessarily entitled to retain the instalments of purchase money paid'.

92. See the cases cited in n. 89 and *Diamond* v. *Vosloo* 1936 E.D.L. 343, 355.

enforced[93]. Again, it must be noticed that the seller cannot both approbate and reprobate at the same time : so that if the seller cancels the contract, claiming return of the article and retention of instalments paid by the purchaser[94], he cannot also claim the balance of the purchase price[95] with or without damages[96] ; and any express provision to that effect would amount to a penalty[97].

Summary

(1) The English Law and the Roman-Dutch Law relating to the power of a contracting party to recover the full amount of a sum promised by the other party in the event of default are not, in spite of what some Ceylon judges have said, ' much the same '.

(2) The English Law on the subject, both as regards the distinction between penalties and liquidated damages (which was unknown to the Roman-Dutch Law) and as regards the burden of proof of damage, has, quite unequivocally, been adopted in South Africa.

(3) According to the trend of recent judicial opinion in Ceylon, the English Law may be said to have been adopted in Ceylon. An unequivocal judicial pronouncement to that effect is desirable in order to end all doubt.

93. See e.g. *Cloete* v. *Union Corporation Ltd.* 1924 T.P.D. 508 where, the seller having expressly stipulated that the purchaser was not to retain the fruits, the case was distinguished from that in Voet 18. 3. 3, and the clause providing for forfeiture of instalments of the purchase-price on default by the purchaser was held to be penal, with the consequence that the seller who had not proved any damage was held not entitled to retain the instalments.

94. including also, if expressly so provided, recovery of instalments due but unpaid at the date of cancellation. *Emmett* v. *Darter and Sons* 1920 E.D.L. 74, 78 ; *Bloch* v. *Michal* 1924 T.P.D. 54, 57-8.

95. *Webster* v. *Varley* 1915 W.L.D. 79 ; *Scharfenaker* v. *Duly and Co. Ltd.* 1940 S.R. 223.

96. *Moll* v. *Pretoria Tyre Depot and Vulcanizing Works* 1923 T.P.D. 465, 471-2.

97. *Moll* v. *Pretoria Tyre Depot and Vulcanizing Works* 1923 T.P.D. 465, 472 and 474. Cf. *Bawa Saibo* v. *Jacob Cooray* 1 S.C.R. 233 (a case of lease). In this case the lessor claimed (*a*) forfeiture of the lease (on the ground of breach of the condition to pay rent in advance), (*b*) rent in advance due at the date of cancellation, and (*c*) as damages, the sum agreed upon by the parties as payable in the event of the lessee's default. It was held that the lessor could not, whilst recovering the property, recover both unpaid rent (semble, that due for the period after the cancellation) and damages.

It is to be noticed that, where a lessor sues only for forfeiture of a lease for breach of conditions in it, the Courts in South Africa and Ceylon have no equitable jurisdiction (as English Courts have) to grant relief to the tenant, though the Courts may be guided by equitable consideration in deciding whether or not a breach of the condition in question has been committed. For the authorities, and a criticism of some of the Ceylon cases, see the present writer's article ' The Law of Nature and the Law of Ceylon ' in 1946 *Ceylon Law Students' Magazine*, p. 27, n. 29.

(4) But although there is now (in view of the adoption of the English Law) no room in South Africa or Ceylon for the application of the Roman-Dutch principles of the *stipulatio poenae*, situations may arise in South Africa and Ceylon in which the English Law applies the test of ' Penalty or Liquidated Damages ?' but in which the Roman-Dutch Law did not apply the principles of the *stipulatio poenae* and in which, therefore, the English test is inapplicable today in South Africa and Ceylon.

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