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# *Forfeiture of Instalments of the Purchase-Price*

[In an article by the present writer written nearly six years ago, which appeared at pages 1—19 of the issue of the " University of Ceylon Review " for January 1951, the Roman-Dutch Law and the English Law dealing with the *stipulatio poenae* were compared and contrasted and the S. African and Ceylon decisions on the subject examined. The article concluded by pointing out that even if the Roman-Dutch principles relating to the *stipulatio poenae* had been superseded in Ceylon and S. Africa by the English Law, there might still be situations in which English Law asks whether a conventional sum payable by one contracting party to the other on breach of contract is a penalty or liquidated damages but in which the English test is not applied in Ceylon or S. Africa.

The authorities dealing with one such situation—forfeiture to the seller of instalments of the purchase price upon default by the buyer—were discussed in some detail in the concluding portion of the article (at pages 15 to 18). The treatment of this topic needs substantial revision in the light of subsequent judicial decisions, and the present article is submitted as a restatement of the principles now applicable. In an Appendix at the end of the article will be found a list of " Addenda et Corrigenda " to the main body of the earlier article .]

Where at the time of conclusion of a sale a payment is made by a buyer to a seller of less than the full price, it may, according to the intention of the parties, be either a deposit by way of *arrha* or earnest-money to bind the bargain (that is, to serve as security for the due fulfilment of the contract) or it may amount to a part-payment of the purchase price.[1] If it is the former, the payment will on default by the buyer be forfeited to the seller even without an express provision to that effect.[2] If it is a part-payment of the price and not *arrha*, the payment

1. For the distinction between *arrha* and part-payment see *Cloete v. Union Corporation Ltd.* 1929 T. P. D. 508, *Peris v. Vieyra* 28 N.L.R. 278 and *Palaniappa Chetty v. Mortimer* 25 N.L.R. 209.

2. *Cloete v. Union Corporation Ltd.* 1929 T.P.D. at p. 526, *Peris v. Vieyra* 28 N.L.R. at p. 281 ; " such b ing the English Law . . . . . and the Roman-Dutch Law " *Cloete v. Union Corporation Ltd.* 1929 T.P.D. at p. 256.

will not on the buyer's default be forfeited unless there is an express agreement to that effect.[3]

Dealing with the lex commissoria—that is, " a pact annexed to a purchase[4] 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 "[5]—Voet says that where the seller rescinds the sale for nonpayemnt of instalments, he must refund to the purchaser any part of the price received " unless it was a part of the agreement[6] that it should be forfeited as a penalty for default, in which case the fruits during the intervening period remain with the purchaser."[7]

On the authority of this passage it has been held that such forfeiture provisions can be enforced by the seller irrespective of whether the provision would otherwise have been considered a penalty and not liquidated damages,[8] as where it can be shown that the instalments forfeited to the seller by the defaulting purchaser are more than the amount of the loss suffered by the seller as a result of the purchaser's default.[9] A " sale containing a

3. *Barenblatt & Son v. Dixon* 1917 C.P.D. 319, *Peris v. Vieyra* 28 N.L.R. 278, cf. *Kalahe Chandratana Thero v. Sanghadasa Gunasekera* 49 C.L.W. 28.

4. " The lex commissoria, prohibited in the case of pledge but allowed here (i.e., in sale)" Voet, Commentaries, 18.3.1. For the prohibition of the lex commissoria in pledge see Voet 20.1.25, *Mapenduka v. Ashington* 1919 A.D. 343, *Saminathan Chetty v. Van der Poorten* 34 N.L.R. at pp. 294-5 (P.C.).

5. Voet, Commentaries, 18.3.1.

6. " The forfeiture clause is never a lex commissoria ; it is a term added (and not necessarily) to the lex commissoria." *Baines Motors v. Piek* 1955 (1) S.A.L.R. at p. 546 per Van den Heever, J.A.,; cf. ibid. at 544.

7. Voet 18.3.3. In *Haak's Garages Ltd. v. Van Wyk* 1933 T.P.D. 370, where there was no express provision for forfeiture of instalments paid, it was held that such a provision could be implied from an express provision entitling the seller on default by the buyer to recover instalments in arrears. " If this provision is not implied there would be no inducement to the seller to claim instalments, until they are all in arrear ; and again assuming that all but one instalment has been paid, then on cancellation by the seller, he would only be entitled to recover the last instalment, but would have to refund the other instalments." (1933 T.P.D. at p. 373).

8. Where the contract provides that in the event of breach the defaulting party shall pay the other party a sum of money, this sum, according to English Law, may be either " liquidated damages," a genuine pre-estimate by the parties of the damage likely to follow from the breach, or a " penalty," intended to secure performance of the contract by penalising a breach. " 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." *Pearl Assurance Co. Ltd. v. Union Government* 1934 A.D. at p. 568 (P.C.) This case held that the Roman Dutch Law relating to the stipulatio poenae had been superseded in South Africa by the English Law. The position would seem to be the same in Ceylon: see T. Nadaraja, " The Stipulatio Poenae in the Law of Ceylon," 1951. University of Ceylon Review at pp. 11-13 where the Ceylon decisions are examined.

9. *Rossler v. Vos* 1925 N.P.D. 266, *Arbor Properties Ltd. v. Bailey* 1937 W.L.D. 116, *Mine Workers' Union v. Prinsloo* 1948 (3) S.A.L.R. 831.





lex commissoria properly so called falls in a special category and . . . . . in such a case the Court has not the same jurisdiction to decline to enforce the forfeiture as it has in the case of penalties such as those dealt with in the authorities . . . . . discussed in *Pearl Assurance Co. Ltd.* v. *Union Government* (1933 A.D. 277 and 1934 A.D. 560)." [10]

In *Cloete* v. *Union Corporation Ltd.*[11] where the seller had expressly stipulated that in the event of the buyer's default not only an instalment already paid by the buyer but also fruits of the property should be forfeited to the seller, it was held that such a provision was inconsistent with the principles governing the lex commissoria as enunciated by Voet in his *Commentaries* 18-3-3, and that the seller was not entitled to retain the instalments in the absence of proof of damage. This case was distinguished in *Jonker* v. *Yzelle*[12], where it is pointed out[13] that Voet, *Commentaries*, 18.3.3. " does not mean that it was a condition that there should be mesne profits before the lex commissoria can be effective " but merely that " if it should happen that there were profits which had been gathered by the purchaser then it is equitable. . . . that as a quid pro quo the purchaser may keep " them. Consequently, it was held in the last-mentioned case that an express provision for forfeiture of instalments paid was not unenforceable even where the purchaser, not having had possession of the property, had not enjoyed the fruits[14] ; and in *Baines Motors* v. *Piek*[15] Van den Heever, J. A., expressed the view that even where there was an express provision for forfeiture of mesne profits (as in *Cloete* v. *Union Corporation Ltd.*[16] supra) such a provision was enforceable.

10. *Mine Workers' Union v. Prinsloo* 1948 (3) S.A.L.R. at pp. 838-9 per Tindall, A.C.J. " Forfeiture clauses of this kind differ materially from such penal clauses, in that they are designed to prevent the innocent party having to make payments because of the default of the other. The innocent party received these instalments of the purchase price, and may part with them in the justifiable belief that the balance will also be paid, and to compel him to repay them to the purchaser on cancellation, because of the purchaser's default, seems to me a very different thing from compelling a person to indemnify or pay a fixed sum because of his own fault." *Rossler v. Vos* 1925 N.P.D. at p. 271 per Dove-Wilson, J.P.

In English Law, however, the forfeiture clause will be treated as a penalty from which the purchaser may obtain relief on proper terms. *In re Dagenham Dock Co., ex parte Hulse* L.R. 8 Ch. 1922; *Kilmer v. British Columbia Orchards* 1913 A.C. 319 (P.C.); *Steedman v. Drinkle* (1916) 1 A.C. 275 (P.C.).

11. 1929 T.P.D. 508.

12. 1948 (2) S.A.L.R. 942.

13. 1948 (2) S.A.L.R. at p. 947.

14. In *Ngomezulu v. Alexandra Townships Ltd.* 1927 T.P.D. 401, it was held that an express provision that on default in payment the seller could cancel the sale, retain instalments paid, and resume possession without liablity to pay compensation for improvements effected by the purchaser (which were to accrue to the seller) was not unenforceable.

15. 1955 (1) S.A.L.R. at pp. 544 and 546.

16. supra at n. 11.

To consider now the enforcement of the lex commissoria and the forfeiture clause, " when the purchaser has made default, the seller can elect whether or not he is going to put the lex commissoria into operation[17] " and " once he has exercised his option he cannot resile from (it)".[18] Nor can he both approbate and reprobate at the same time. Thus, if the seller cancels the contract and claims the return of the property sold and retention of instalments already paid, he cannot also claim the balance of the purchase price[19] with or without damages.[20] But the mere fact that in the contract the seller has stipulated for a series of inconsistent remedies in the event of default by the purchaser does not mean that a Court will refuse him judgement in respect of those remedies which he is entitled to enforce if they are severable from the others.[21]

As to the test of severability, there has been some divergence of judicial opinion. In *Baines Motors* v. *Piek*[22] the question was recently considered by five judges of the Appellate Division of the Supreme Court of S. Africa. Hoexter, J. A., (with whose judgement Centlivres, C. J., and Fagan, J. A., concurred and with whom Van den Heever, J. A., agreed on the question of severability) took the view that the test to be applied was that of grammatical severability, and in his opinion " the question whether a contract in restraint of trade is severable is a very different one from the question whether the remedies contracted for on the lawful cancellation of a valid contract are severable." [23] On the other hand, Schreiner, J. A., considered that there must be not merely grammatical but also notional severance of the events that would bring the remedies into operation as well as of the remedies themselves,[24] and he did not think that the analogy with the cases on restraint of trade was too remote to be useful.

17. *Baines Motors Ltd. v. Piek* 1955 (1) S.A.L.R. at p. 547 per Van den Heever, J.A., cf. *Peris v. Vieyra* 28 N.L.R. at p. 282 per Lyall Grant, J.

18. *Baines Motors Ltd. v. Pick* 1955 (1) S.A.L.R. at p. 547 per Van Den Heever, J.A.

19. *Moll v. Pretoria Tyre Depot and Vulcanizing Works* 1923 T.P.D. 465, *Hall v. Cox* 1926 C.P.D. 228, *Scharfenaker v. Duly and Co. Ltd.* 1940 S.R. at pp. 229-30. As to recovery of instalments due but unpaid at the date of cancellation (which is prima facie inconsistent with cancellation but has been allowed if the agreement expressly provides for it) see *Cohen Ltd. v. VanWyk* 1952 (1) S.A.L.R. 224 and authorities therein cited at p. 226; but see *Piek v. Baines Motors* 1954 (3) S.A.L.R. at p. 151.

20. *Moll v. Pretoria Tyre Depot and Vulcanizing Works* 1923 T.P.D. at pp. 471-2.

21. *Baines Motors v. Piek* 1955 (1) S.A.L.R. 534 (A.D.), especially at pp. 551-4 per Hoexter J.A., (dissenting on the question of severability from *Cloete v. Union Corporation Ltd.* supra and *Scharfenaker v. Duly and Co. Ltd.* supra), and at pp. 540-1, per Schreiner, J.A.

22. 1955 (1) S.A.L.R. 534.

23. 1955 (1) S.A.L.R. at p. 551.

24. For a case where in the absence of grammatical severance there was held to be notional severance in respect of the grounds for cancellation see *Jonker v. Yzelle* 1948 (2) S.A.L.R. 942.



# *Appendix*

(being a list of " Addenda et Corrigenda " to " The Stipulatio Poenae in the Law of Ceylon " 1951 " University of Ceylon Review " pp. 1-19).

**Page 3.** Replace note 9 by the following note :— " Pothier sec. 342. But in English Law a creditor suing independently of the agreement for damages for breach of contract will be unable to recover more than the agreed sum if the debtor can show that the sum amounted to " liquidated damages " i.e. a genuine preestimate by the parties of the loss likely to result from the breach. *Secus* where the sum is a " penalty," not " liquidated damages." See p. 6 at n. 28, and for the distinction between penalty and liquidated damages see pp. 3-4."

**Page 3 lines 6-7.** After " agreed sum " add the following footnote :— " The sum need not, however, be specified : it may be ascertainable either by calculation from specified data or by being fixed by a person to whom that power has been given by the contract. *Tobacco Manufaturers' Committee v. Jacob Green and Sons* 1953 (3) S.A.L.R. at pp. 487-8 (A.D.)."

**Page 6 n. 28 line 4.** Read " the agreed sum (which is not a genuine preestimate of the probable loss) is to be . . . " for " the agreed sum is to be . . . "

**Page 6 line 3.** Add :— " This is not possible where the sum is liquidated damages. cf. n. 9 at p. 3 supra."

**Page 10 line 15.** Read " (whatever the name by which . . . " for " (whatever name. . . . "

**Page 10 n. 51.** In the first line read " p. 6 " for " p. 14," and at the end of the note add " But see n. 9 at p. 3 supra."

**Page 13 line 20.** At the end of the sentence add as footnote 69*a* the following :— " The principles relating to penalties and liquidated damages apply not only where it is provided in a contract that a specified sum is payable on breach but also where the amount payable is unspecified but ascertainable either by calculation from specified data or by being fixed even after the breach by a person to whom that power has been given by the contract. *Tobacco Manufaturers Committee v. Jacob Green and Sons* 1953 (3) S.A.L.R. at pp. 487-8 (A.D.)."

**Page 13 last line** of the text should read " the negative. [70]. But there ". . . . and note 71 should be deleted.

**Page 14 n. 72.** Read " p. 6 " for " p. 14."

**Page 15 n. 78.** Read " p. 5 " for " p. 12."

**Page 16 n. 82. In line 3**, read " irrecoverable " for " unenforceable."

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