[HALLINAN, C. J. and ZEKIA, J.]
(November 17, 1956)

CHARALAMBOS DEMETRIOU of Famagusta,
*Appellant,*

*v.*

NICOLAS CONSTANTI ANDORKAS of Famagusta,
*Respondent.*

*(Civil Appeal No. 4194)*

*Sale of Land—Void because prohibited—But actionable under Contract Law, section 56 (3) — Compensation under section 56 (3) limited.*

Under a contract the defendant sold two donums of land for £100 to the plaintiff; in fact what the defendant was selling was 2/3rds share of three donums. The registered value of the share was less than £10 and such sales were prohibited under section 24 (3) of the Immovable Property Law (Cap. 231). Under section 56 of the Contract Law since the contract was impossible of performance it was void. Before the plaintiff had completed paying the purchase price, section 24 (3) of the Immovable Property Law was repealed. The owner of the other 1/3rd share having obtained a certificate of indivisibility under section 27 of the Immovable Property Law, the defendant's 2/3rds share was sold by auction. The plaintiff sued for the return of the purchase price and £50 damages. The purchase price was paid into Court by the defendant.

The trial Court found that from the conduct of the parties it was clear they considered themselves bound by the contract of sale after the repeal of section 24 (3). Therefore, the plaintiff was entitled to the damages claimed by him.

*Upon appeal,*

*Held:* The plaintiff could not succeed on the ground stated in the trial Court's judgment. There was no novation or rectification of the contract nor could the plaintiff succeed on the ground of estoppel by misrepresentation as there was no independent cause of action.

The plaintiff had a cause of action under section 56 (3) of the Contract Law for the promisor might, with reasonable diligence, have known that he was making a promise impossible of performance. However, he was not entitled to damages because:

(i) The damages of £50 he sought to recover was not a "loss" within the meaning of section 56 (3); and

(ii) even if he could recover such damages he had not proved them.

Appeal allowed.

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Appeal by defendant from the judgment of the District Court of Famagusta (Action No. 1566/54).

*S. Emphiedjis* and *M. K. Hadjidimitriou* for the appellant.

*L. Montanios* for the respondent.

That part of the Supreme Court judgment relating to the failure of the plaintiff to prove damages is omitted since this was an issue of fact.

The judgment of the Court was delivered by:

HALLINAN, C. J.: In this case the plaintiff entered into an agreement with the defendant on the 28th December, 1952, to buy from the defendant two donums of land situate at Dherynia village in the Famagusta district. The purchase price was £100 and the plaintiffs paid £40 at the date of the contract. He completed paying the purchase price in two instalments. One on the 29th November, 1953, for £50 and the last on the 3rd of March, 1954, for £10. Although the defendant purported to sell two donums of land in fact the interest in land which he was selling consisted of a two-thirds share in three donums, the other third being owned by a woman called Chryssi Vrachimi. Moreover, the registered value of the land was less than £10 and therefore under sub-section (3) of section 24 of the Immovable Property (Tenure, Registration and Valuation) Law, Cap. 231, the owner of an undivided share in this land was prohibited by law from selling his share.

On the 4th August, 1953, Chryssi Vrachimi applied under section 27 of Cap. 231 for the certificate of the Director of Lands and Surveys to the effect that the partition of the property is impossible. This certificate was obtained and a notice of the indivisibility of the land was served on the defendant in September, 1953. On the 27th January, 1954, Chryssi applied to the Director for the sale of the land and on the 12th September, 1954, the property was sold by public auction and bought by her husband for £110. Two days later the plaintiff issued the summons for commencing these proceedings in which he claimed either specific performance of the agreement or the return of his £100 and £50 damages for breach of contract.

The learned trial judge considered that since section 24, sub-section (3), of Cap. 231 was, as from the 4th of March, 1953, repealed and having regard to the conduct of the parties thereafter, the agreement which might have been void was a valid one. As regards the remedy to which the plaintiff was entitled he, in our view, rightly considered that specific performance could not be granted. Also no order was necessary as regards the return of the £100, because the defendant had paid that into Court and alleged that he tendered it before action had been brought and it had been refused.

The reasons for the decision of the trial judge in holding that the agreement of sale was valid is contained in the following passage of his judgment:

> "Section 24 (3) of the Law, Cap. 231, has been repealed by section 8 (d) of Law 8 of 1953, without having been replaced by any similar or other provision. This repeal was made and put in force on the 4.3.53, i.e. after the date of the contract of sale which is the 28.12.52, but before the dates on which defendant had collected money from the plaintiff, for the agreed value of the land sold by defendant to plaintiff. Although there is no direct evidence that after the 4.3.53 a new agreement was made between the plaintiff and the defendant yet from the evidence adduced it is made clear that the parties continued to consider themselves bound by the terms of the original agreement of sale which is embodied in exhibit 2. The fact that the plaintiff continued being in possession of the land after the 4.3.1953 without any objection or interference by or on behalf of the defendant, who in addition continued collecting money from the plaintiff in full satisfaction of the agreed sale price of £100, shows clearly that they wanted the agreement of sale to be in force, and since the provision of the law which makes the agreement unlawful is not now in force, I do not see any reason why the agreement of sale would be considered void after the 4.3.1953 when section 8 (d) of Law 8 of 1953 came into force. This view is clearly abstracted, in the opinion of the Court, from the contents of the receipt dated the 3.1.1954, given by defendant to the plaintiff when the latter had paid to the defendant the sum of £10 in full satisfaction of the amount of £100 for the agreed sale price. This receipt is exhibit 3 and it reads that the defendant had collected from the plaintiff the sum of £100 for *the value of a field of two donums at locality* Karlikras with boundaries: road, aqueduct and hali. This means that the defendant on the 3.1.1954 acknowledged the sale of the land to the plaintiff for the sum of £100, and therefore the agreement of sale is valid."

We are unable to follow the judge's reasoning in this passage. When the contract was made the agreement was void because of section 24 (3) and it could not be performed. Counsel on the hearing of this appeal has submitted that the conduct of the parties after the repeal of section 24 (3) amounted to a novation. Novation is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that has already been made. The new contract may be between the original parties; for example where (under English Law) a written agreement is later incorporated in a deed;

or between different parties, e.g. where a new person is substituted for the original debtor or creditor. Discussions on novation in the text books are usually confined to the substitution of the parties. We cannot see anything in the conduct of the parties in the present case which amounts to the making of a new contract. Nor could their conduct amount to a ratification of the old contract because as stated in Cheshire & Fifoot, Law of Contract, 4th Edition, 386: "A contract that is void in its inception cannot be ratified; for ratification postulates an act which is capable of being ratified."

The doctrine of estoppel as developed in English Law comes nearest to giving the plaintiff a right of action. We accept the submission of counsel for the defendant-appellant that there is no evidence that the plaintiff knew that the defendant was selling an undivided two-thirds share in three donums, for the contract merely mentions two donums of land; on the other hand the defendant, if he did not know this, should, had he used reasonable diligence, have been aware of his own title, for it was set out in his certificate of registration. The defendant is old and sick and there is no sufficient evidence to support an action for fraud or deceit, but the plaintiff may well have been induced to enter into the contract by the innocent misrepresentation of the defendant that he was selling two donums not a two-third share in 3 donums. It might be thought, therefore, that the plaintiff might sue on the contract and that the defendant because of his innocent misrepresentation might be estopped from denying that he was selling 3 donums. However, there is a difficulty which is stated in Cheshire & Fifoot's Law of Contract (4th Ed.) at p. 242: an independent cause of action is essential before advantage can be taken of the doctrine of estoppel; and the authors cite the case of *Le Lievre and Dennes* v. *Gould*, (1893) Q.B., 491, where mortgagees of the interest of a builder under a building agreement advanced money to him from time to time on the faith of certificates given by a surveyor that certain specified stages in the progress of the buildings had been reached. The surveyor was not appointed by the mortgagees, and there was no contractual relation between him and them; nor did he owe them a duty to take care. In consequence of the negligence of the surveyor, the certificates contained untrue statements as to the progress of the buildings, but there was no fraud on his part. It was held that the mortgagees had no cause of action against the surveyor. The difficult question that therefore arises in the present case is whether there is an independent cause of action. The defendant was in fact selling an undivided share in land with a registered value of under ten pounds; he was agreeing to do an act impossible in itself (because it was prohibited by s. 24 (3) of Cap. 231); such an agreement is under sec. 56 (1) of Cap. 192 void. But it is open to the plaintiff to allege

that the defendant agreed to sell 3 donums of land, not an undivided share, and that the defendant because of his misrepresentation is estopped from denying this. The contract which the plaintiff seeks to establish is not for the doing of an act impossible in itself, and therefore such contract is not void. I am inclined to the view that, if estoppel had been pleaded, an action in these circumstances would lie; but the plaintiff, following the rule in actions for innocent misrepresentation, would only be entitled to an indemnity and not to damages, that is to say, to the refund of his £100 but not to £50 damages for the loss of his bargain. Of course the plaintiff could have recovered his £100 by simply suing for it as money had and received upon a consideration that failed.

Counsel for plaintiff on this appeal has based himself not so much on novation, ratification or estoppel as on the provisions of section 56 (3) of the Contract Law, Cap. 192, which is as follows:

> "Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non performance of the promise."

Section 56 is taken verbatim from section 56 of the Indian Contract Law. The illustrations only give examples of cases falling under sub-sections (1) and (2) of that section. And in Pollock and Mulla's book on the Indian Contract Law there is no discussion on sub-section (3). It appears to apply the doctrine of estoppel to contracts that are void because of impossibility or illegality: one party to the contract either deceitfully or by an innocent misrepresentation allows the other party to enter into a contract which he knew or might with reasonable diligence have known was void.

In my view, the plaintiff has a right of action under section 56 (3) provided he establishes that he has sustained "loss" through the non performance of the promise. However, I am clearly of opinion that the plaintiff's claim cannot succeed for two reasons: first, that the damages of £50 which he is seeking to recover are not a "loss" within the meaning of section 56 (3); and, secondly, even if he could recover such damages, he did not prove them.

Throughout the Contract Law the word "compensation" is used to cover both damages and indemnity. Section 73 contains general provisions based on the rule in *Hadley* v. *Baxendale* relating to compensation for loss or damage caused by breach of contract. Presumably the legislative authority did not mean that the word "loss" and the word "damage" should mean the same thing. Probably "loss"

is something which, before the breach of the contract, a party had possessed and which must be restored to him; whereas "damage" includes the profit he might have made on his bargain if there had been no breach of contract. Section 65 of the Contract Law provides that when an agreement is discovered to be void or when a contract becomes void any person who has received any damage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. A person claiming compensation under this section clearly cannot do more than receive back what he has given to the other party. The word "compensation" in the Contract Law cannot always be equited with the word "damages" and in my view where the cause of action arises because of an innocent misrepresentation the words in sec. 56 (3) "such promisor must make compensation to such promisee for any loss" do not mean that the promisee must not only be put back into the position he was before the contract was made but also is entitled to a profit on his bargain. This view accords with the fair and reasonable rule of English Law that a plaintiff's right against a defendant for innocent misrepresentation is not for damages but for an indemnity (*Mayne on Damages*, 11th Ed., 211). If the defendant had committed deliberate fraud he might have been sued for the tort of deceit and the defendant would be responsible for all injury which is the direct and natural result of his bad faith. But in the present case it is one of innocent misrepresentation and it is fair and reasonable that the plaintiff's right should not go beyond the refund of this £100 which the defendant received from him.

The plaintiff's claim must also fail because even if he could recover damages, he did not prove them.

*For these reasons the judgment for the plaintiff for £50 with legal interest and costs is set aside and this appeal is allowed with costs here and below.*

ZEKIA, J.: I agree. There was no novation in the contract under consideration. What was done by the parties, after the amendment of section 24 of the Immovable Property (Tenure, Registration and Valuation) Law, by section 8 (d) of Law 8 of 1953, amounted only to an endorsement of the original contract which was void *ab initio* and could not have any effect.

It is clear that the respondent-plaintiff is entitled to have the purchase price paid returned to him under section 65 of the Contract Law, but it is very doubtful if he is entitled to any damages under sec. 56 (3) of the Contract Law, in addition to the return of the money paid. I am inclined to the view that "compensation for any loss" included in the above sub-section does not cover compensation for loss of profit and I have no doubt that it would not apply to cases where the conduct of the party in default amounts only to innocent misrepresentation.