

IV. Even if the Court had jurisdiction to impose such a term (i.e., the return of instalments paid) would it be equitable to do so? It is submitted that it would *not* be, for the following reasons:—

The purchaser has had the valuable right to sell the property to another person and also, in the ordinary case, has had possession. Thus (A) the purchaser has not suffered a total failure of consideration; (B) It is impossible for the Court to adequately arrive at the value of the advantage gained on the one side and lost on the other; (C) The parties cannot be restored to their original positions.

In *Butchart v. McLean*, 15 B.C.R. 246, Irving, J.A., says: "The contract being in part performed it is impossible to relegate the parties to the original position they were in before the contract was made. The plaintiff has parted with his good money but has not the defendant lost something? Did he not forego the right to sell in the interval, no matter what price was offered? How is it possible to assess the damages he has sustained?"

In *Mulholland v. Holcombe*, 6 U.C.C.P. 520, the Full Court in refusing to order a return of monies to a purchaser says: "We find it laid down in Chitty on Contracts (624 of the 3rd ed., p. 742), the action for money had and received is not maintainable if the contract has been in part performed and the plaintiff has derived some benefit and by recovering a verdict the parties cannot be placed in the exact situation in which they respectively stood when the contract was entered into. It cannot be said that the plaintiff did not derive some benefit from the contract as he went into possession of the lands and retained possession nearly one year."

Halsbury (vol. 7, p. 477), says: "The action for money had and received is not maintainable where the parties cannot be restored to their original positions: as where the plaintiff has had possession of the defendant's goods during a certain period and it is impossible to ascertain of what rights and privileges the defendant has been deprived;" and citing *Bede v. Blandford*, 2 Y. & J., 278, and *Clarke v. Dickson*, E.B. & E. 148. Halsbury (vol. 7, p. 483), says: "Where a sum of money is paid for an entire considera-