VOID FOR NON-REGISTRATION

Analysing Section 4 of the Registration of Instruments Act (Cap 256) As Amended, the Rule in Sesay v Bahsoon, and the Limits of Equity regarding a Void Conveyance

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I. INTRODUCTION

Few provisions regarding the law of property in Sierra Leone have produced consequences as severe and as final as section 4 of the Registration of Instruments Act, Cap 256 of the Laws of Sierra Leone 1960, as amended by section 2 of the Registration of Instruments (Amendment) Act 1964. The provision declares that every deed, contract or conveyance executed after 1st June 1964 shall be void, so far as regards any land to be thereby affected, unless it is registered within the period limited for such registration. The word that governs the entire provision, and that has dominated the jurisprudence built upon it, is 'void'. Not voidable, not unenforceable, but void: a nullity, incapable of conferring rights, and incapable of being saved by the equitable doctrines that elsewhere in the common law world rescue defective land transactions from the rigour of formal requirements.[1]

The authoritative interpretation of this provision was delivered by the Supreme Court of Sierra Leone in *Alhaji Abdulai Sesay v Emad Bahsoon*, where Semega-Janneh JSC *inter alia*, held that an unregistered land agreement becomes, upon the expiry of the registration period, not merely unenforceable but 'dead' and 'for all practical purposes, non existent'. That holding, the rule in *Sesay v Bahsoon* was reaffirmed and applied without qualification by the Supreme Court fifteen years later in *Tanios Gebran Chaghoury v Jamal Kamel Wansa*, where the Court held that equitable doctrines, including proprietary estoppel and part performance, cannot be deployed to validate a transaction that statute has declared void.[2]

This article proceeds in two movements. The first states and defends the orthodoxy. It examines the rule in *Sesay v Bahsoon* and its statutory foundation, and tests it against the most celebrated equitable softening of formal land law in the common law tradition: the rule in *Walsh v Lonsdale*, under which equity treats an agreement for a lease, specifically enforceable, as equivalent to a granted lease. It concludes that for the cases so far decided, the orthodoxy holds:

[1] Registration of Instruments Act (Sierra Leone), Cap 256 of the Laws of Sierra Leone 1960, s 4 (as amended by the Registration of Instruments (Amendment) Act 1964 (No 6 of 1964), s 2).

[2] Alhaji Abdulai Sesay v Emad Bahsoon (SC CIV APP 6 of 2005) [2010] SLSC 3 (12 February 2010) (Semega-Janneh JSC).

the equitable maxim presupposes a valid and specifically enforceable obligation, and section 4 destroys the very obligation upon which the maxim would have to fasten.

The second movement then presses against the orthodoxy a harder case than either *Sesay* or *Chaghoury* was required to decide: the performed lease, and asks, with the aid of Lord Denning's theory of precedent, whether the decided cases truly govern it. In outline, parts II to VI state the orthodoxy. Part VII sets out the doctrine of precedent as per Lord Denning. Part VIII constructs the Undecided Case. Part IX asks whether the decided cases may be distinguished from it. Part X does not resolve the question but frames it for the reader, and the court that must one day decide it.

II. THE STATUTORY SCHEME OF CAP 256

A. The Original Provision and the 1964 Amendment

The Registration of Instruments Act, Cap 256, is a consolidating ordinance whose origins lie in the Registration Ordinance of 1857 and successive amending instruments. In its original form, section 4 provided a system of priority by registration: every deed, contract or conveyance was to take effect, as against other deeds affecting the same land, from the date of its registration, with a proviso that the instrument would take effect from the date of execution if registered within the periods limited for registration. The Act defines 'conveyance' expansively to include assignments, appointments, leases, settlements and other assurances made by deed in a sale, mortgage, demise or other dealing with land. The periods for registration are tightly drawn: ten days where the instrument is executed in Freetown, sixty days elsewhere in the country, and one year where executed abroad.[3]

The original scheme was thus a priority regime: failure to register did not destroy the instrument but merely postponed its effective date and exposed it to defeat by competing registered instruments. The decisive change came with the Registration of Instruments (Amendment) Act 1964, which renumbered the existing section 4 as subsection (1) and inserted a new subsection (2).

[3] Registration of Instruments Act, Cap 256, s 2 (definition of 'conveyance', which expressly includes a lease and a demise).

The new provision declared that every deed, contract or conveyance executed after 1 June 1964 'shall be void, so far as regards any land to be thereby affected, unless it is registered within the appropriate period limited for such registration under the proviso to subsection (1)'.[4]

The 1964 amendment therefore transformed the consequence of non-registration from a question of priority into a question of validity. Where the old section 4 deprived an unregistered instrument only of its priority, the new section 4(2) deprived it of existence. This is the textual foundation of the rule in *Sesay v Bahsoon*, and the distinction between postponement and nullification is the hinge on which the entire equity argument turns.[5]

B. <u>The Statutory Safety Valve</u>

It is essential to note that the legislature did not leave the harshness of the void provision wholly unmitigated. The proviso to the new subsection (2) created a discretionary mechanism for relief: any person prejudiced by the avoidance of a transaction may apply by originating summons to a Judge of the High Court for permission to register out of time. The Judge may grant permission if satisfied either that the failure to register was not due to any fault of the applicant, or that the applicant's failure to secure registration in time was, in all the circumstances, excusable. Where permission is granted, the transaction is deemed never to have been avoided and takes effect against other transactions from such date as the Judge thinks just.[6]

The significance of this statutory safety valve cannot be overstated for the equity argument. The legislature, having created the draconian consequence of voidness, simultaneously provided the exclusive route by which that consequence might be escaped: an application to register out of time, decided according to statutory criteria of fault and excusability. The existence of this purpose-built statutory discretion is a powerful textual signal that the legislature intended it to be the only avenue of relief, and that the general equitable jurisdiction of the court was not to be enlisted to achieve the same end by a different and unregulated path. A litigant who has neglected the statutory application cannot ask equity to supply what the statute offered and he failed to claim.

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[4] Registration of Instruments (Amendment) Act 1964, s 2, inserting s 4(2)(a) into Cap 256.

[5] ibid s 4, proviso (a)-(c).

[6] ibid, proviso to s 4(2)(a).

III. THE RULE IN SESAY V BAHSOON

A. The Facts and the Decision

The dispute in *Sesay v Bahsoon* arose from a sale agreement dated 15th December 1990 between Mr Sesay, the vendor, and Mr Bahsoon, the purchaser, in respect of property at Bolling Street, Kingtom, Freetown. The agreement, prepared by a layperson, provided for completion within three years. Completion did not occur, and in 1998 Mr Bahsoon issued a writ claiming specific performance and damages for breach of contract; Mr Sesay counterclaimed for possession and mesne profits. The trial court ordered specific performance; the Court of Appeal upheld that order; and Mr Sesay appealed to the Supreme Court.[7]

Although much of the Supreme Court's judgment was devoted to the inadequate fact-finding of the trial court and to the alleged payments under the disputed receipts, the decisive ground of decision was the operation of section 4 as amended. The agreement, executed in the Western Area, ought to have been registered within ten days of its execution on 15th December 1990. It was never registered. The Court held that the agreement 'became void ten (10) days after the 15th day of December 1990', and that thereafter it was 'not voidable or unenforceable but dead; and for all practical purposes, non existent'.[8]

B. The Void / Unenforceable Distinction

The conceptual heart of *Sesay v Bahsoon* is the sharp distinction the Court drew between the consequence of non-registration under Cap 256 and the consequence of non-compliance with the Statute of Frauds 1677. Under the Statute of Frauds, a contract for the sale of land that is not evidenced in writing is rendered merely unenforceable: the agreement continues to subsist, and equity may, in an appropriate case, decline to allow a defendant to rely on the statute as an instrument of fraud, thereby permitting the contract to be enforced notwithstanding the absence of writing. Section 4 of Cap 256, by contrast, renders the unregistered instrument void. As Semega-Janneh JSC reasoned, an unenforceable agreement subsists and may be revived by the

[7] Sesay v Bahsoon (n 2) 16 (Semega-Janneh JSC).

[8] ibid.

denial of a statutory defence, whereas a void agreement has no continuing existence on which any equitable doctrine could operate.[9]

This distinction supplied the answer to the Court of Appeal's attempt to invoke the principle, derived from the Statute of Frauds jurisprudence, that a statute may not be used as an instrument of fraud. The Supreme Court held that the principle was inapposite for two reasons. First, the factual predicate was absent: there was no plain, clear and deliberate fraud of the kind that animated the Statute of Frauds cases, only a dispute about whether payments had been made and what area of land was to be conveyed. Second, and more fundamentally, the principle could have no purchase against a void instrument, because there was no subsisting agreement to be saved. The Court memorably observed that to revive the void agreement would require it to be brought back to life, and that the Court was 'not endowed with such biblical powers; bringing the dead back to life'.[10]

The rule in *Sesay v Bahsoon* may therefore be stated as follows: an agreement, deed or conveyance touching and concerning land, executed after 1st June 1964 and not registered within the statutory period, is void *ab initio* upon the expiry of that period; it confers no rights, supports no claim for specific performance, and cannot be revived or validated by any equitable doctrine, because it has ceased to exist as a legal instrument. The only relief available is the statutory application to register out of time under the proviso to section 4(2).[11]

IV. THE RULE IN WALSH V LONSDALE

A. The Doctrine and its Rationale

The rule in *Walsh v Lonsdale* is one of the foundational doctrines of the post-Judicature Act fusion of law and equity. In that case, the parties had agreed in writing for a lease of a mill for seven years, the rent to be payable in advance on demand. No formal lease by deed was ever executed, and at common law the tenant who entered and paid rent held only a yearly tenancy on the terms of the agreement so far as consistent with a yearly tenancy. When the landlord

[9] ibid 15-16.

[10] Haigh v Kaye (1872) LR 7 Ch App 469; In re Duke of Marlborough, Davis v Whitehead [1894] 2 Ch 133.

[11] Sesay v Bahsoon (n 2) 16.

distrained for a year's rent in advance, the tenant argued that, at law, he held only a yearly tenancy under which rent in advance could not be demanded. The Court of Appeal rejected the argument.[12]

Sir George Jessel MR held that, since the Judicature Acts had fused the administration of law and equity in a single court, the court must give effect to equitable rights and remedies. In equity, the agreement for a lease was as good as a lease: equity regarded as done that which ought to be done, and since the agreement was specifically enforceable, the parties were treated as though the formal lease had already been granted. The tenant therefore held under the same terms as if a lease had been executed, including the obligation to pay rent in advance, and the distress was lawful.[13]

The doctrine rests on two interlocking foundations. The first is the maxim that equity treats as done that which ought to be done: where there is an obligation to execute a formal instrument, equity will treat the position as though the instrument had been executed. The second is the availability of specific performance: the maxim operates only where the agreement is one that a court of equity would specifically enforce. As Jessel MR put it, the tenant holds under the agreement 'under the same terms in equity as if a lease had been granted', precisely because he cannot complain of the exercise by the landlord of the same rights as the landlord would have had if a lease had been granted. The doctrine is, in this sense, parasitic on the enforceability of the underlying agreement.[14]

B. <u>The Essential Precondition: A Valid, Specifically Enforceable Contract</u>

For the subject under consideration, it is critical to identify precisely what *Walsh v Lonsdale* requires before equity will treat the agreement as a grant. The agreement must be a valid and subsisting contract; it must satisfy the formal requirements for an enforceable contract for the disposition of an interest in land; and it must be one that the court would, in its discretion, specifically enforce. Where any of these conditions is absent: where the contract is void, or unenforceable for want of the requisite formality, or not specifically enforceable because, for

[12] Walsh v Lonsdale (1882) 21 Ch D 9 (CA).

[13] Supreme Court of Judicature Act 1873, ss 24-25; Supreme Court of Judicature Act 1875.

[14] Walsh v Lonsdale (n 4) 14-15 (Jessel MR).

example, damages would be an adequate remedy or the conduct of the claimant disentitles him to equitable relief, the doctrine has nothing on which to operate.[15]

The point is illustrated by the orthodox understanding that a mere agreement, void or incapable of enforcement, cannot be elevated by *Walsh v Lonsdale* into an equitable interest. Equity follows the law; it does not contradict it. The maxim that equity treats as done that which ought to be done answers the question 'what ought to be done?' by reference to a legally subsisting obligation. If there is no obligation (because the instrument creating it is a nullity) then there is nothing that ought to be done, and the maxim is silent. This is the fault line along which the present argument runs.

V. WALSH V LONSDALE AGAINST SECTION 4: THE ORTHODOX ANSWER

A. The Argument for Equitable Intervention

The case for deploying *Walsh v Lonsdale* against the rule in *Sesay v Bahsoon* can be put with considerable force, and it is right to state it at its strongest before subjecting it to scrutiny. The argument proceeds in several steps. First, a purchaser who has paid all or a substantial part of the purchase price, taken possession, and in some cases expended money in improving the property, has done everything that equity ordinarily requires to attract the protection of specific performance. Second, the vendor who has received the price and stands by while the purchaser improves the land would, but for section 4, be compelled to convey. Third, to permit the vendor to invoke the purchaser's failure to register, a failure that the vendor himself might equally have remedied, is to permit the statute to be used as an engine of injustice. Fourth, equity, which looks to substance and not to form, and which will not permit a statute to be used as a cloak for fraud, should treat the specifically enforceable agreement as equivalent to a conveyance, just as it treated the agreement for a lease in *Walsh v Lonsdale* as equivalent to a lease.

[15] Parker v Taswell (1858) 2 De G & J 559, 44 ER 1106.

B. Why the Argument Fails in the Decided Cases: Void Means Void

Compelling as the argument appears, it founders on the precise point identified in *Sesay v Bahsoon*: the rule in *Walsh v Lonsdale* requires a valid and specifically enforceable contract, and section 4 of Cap 256 destroys the contract's validity. The maxim that equity treats as done that which ought to be done cannot apply where the law has declared that nothing remains to be done because the obligating instrument is void. This is not a refusal by equity to intervene out of deference to form; it is the logical impossibility of equity fastening upon an obligation that has been annihilated by statute.

The contrast with the Statute of Frauds, which the court in *Sesay* drew so sharply, is decisive here. The Statute of Frauds renders a non-compliant contract unenforceable, not void. An unenforceable contract subsists; it generates an obligation that the court declines to enforce only because a procedural bar is raised. When equity refuses to allow the defendant to raise the bar, the subsisting obligation springs back into enforceability, and *Walsh v Lonsdale* can then treat the (now enforceable) agreement as a grant. But where the contract is void, there is no subsisting obligation to be unbarred. Removing an obstacle to enforcement achieves nothing when there is nothing to enforce. Under the Statute of Frauds, the contract exists but is dormant; equity awakens it. Under section 4, the contract is dead; equity cannot resurrect it, because resurrection is not a remedy known to law.

C. Equity Follows the Law and Will Not Contradict the Statute

There is a further and independent reason why *Walsh v Lonsdale* cannot prevail against section 4 in the decided cases: the deployment of the doctrine to validate a void land agreement would set equity in direct contradiction to a clear statutory command, and equity does not contradict statute. To treat a void agreement as equivalent to a conveyance is, in substance, to give the void agreement the very legal effect that the statute has withheld. That is not the interpretation of a statute in light of equitable principle; it is the nullification of the statute by equitable fiat. The maxim that equity follows the law forbids it.

VI. THE CONFIRMATION IN CHAGHOURY V WANSA

A. The Facts and the Issue

In *Chaghoury v Wansa*, decided by the Supreme Court in December 2025, the appellant was the lessee and intending purchaser of property at Wilberforce, Freetown. The parties entered into a sale agreement in 2023 for US$460,000. Two irregularities arose: the respondent, who resided in Nigeria, executed the agreement there but failed to have it notarised for use in Sierra Leone, and neither party registered the agreement with the Office of the Administrator and Registrar General as required by section 4 of Cap 256 as amended. The appellant had paid US$300,000 and tendered a banker's cheque for the remaining US$160,000, which could not be cashed owing to the Lebanese banking crisis. When the respondent declined to execute the conveyance and sought a declaration that the agreement was void, the appellant resisted by invoking equity.[16]

B. The Rejection of Equitable Validation

The appellant relied squarely on proprietary estoppel, contending that having paid almost half a million dollars he had acted to his detriment in reliance on the respondent's assurance, and that equity should not allow the statute to be used as an instrument of fraud. Thompson JSC, delivering the judgment of the Court, held that land sale agreements failing to comply with section 4 of Cap 256 are void, that this principle was 'properly established in *Sesay v Bahsoon*', and that the Court found 'no basis to depart from that precedent'. The Court drew explicit support from the English jurisprudence on section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, noting Rimer LJ's observation in *Keay v Morris Homes* that the effect of such a provision 'is merciless'.[17]

Most significantly, the Court articulated the controlling principle in terms that foreclose equitable circumvention in the case before it. Citing Lord Scott in *Cobbe v Yeoman's Row Management Ltd*, the Court endorsed the proposition that proprietary estoppel cannot be prayed in aid to render enforceable an agreement that statute has declared void, because 'equity can surely not contradict the statute'. The Court further invoked Halsbury's Laws of England for the principle that the doctrine of estoppel may not be invoked to render valid a transaction which the

[16] Chaghoury v Wansa (n 3) [31]-[32], [47].

[17] Keay & Anor v Morris Homes (West Midlands) Ltd [2012] EWCA Civ 900, [2012] 1 WLR 2855 [1] (Rimer LJ).

legislature has, on grounds of general public policy, enacted to be invalid, and rounded out its reasoning with *Bradshaw v McMullan*, in which Lord Shaw of Dunfermline declined to sanction the application of estoppel to any transaction in plain defiance of the statutory injunction.[18]

The Court also addressed, and rejected, the appellant's reliance on the doctrine of part performance, urged as an alternative route to validation. The refusal to allow part performance to revive a void agreement mirrors exactly the analysis in *Sesay v Bahsoon* concerning the inapplicability of the Statute of Frauds jurisprudence and confirms that the void/unenforceable distinction governs the whole field of equitable intervention, not merely one doctrine within it.[19]

So far, the orthodoxy, and, for the cases actually decided, it is submitted that the orthodoxy is right. Both Sesay and Chaghoury were contracts of sale, executory as to conveyance, in which the equity invoked would have compelled the creation of an estate that statute said the instrument could not create. But every rule is the prisoner of the facts that produced it, and the question to which this article now turns is whether those facts exhaust the field. Before constructing the case that tests the rule, it is necessary to establish the method by which such a test may legitimately be conducted.

VII. THE DOCTRINE OF PRECEDENT: LORD DENNING'S METHOD

In the seventh part of his book *The Discipline of Law*, Lord Denning set out a philosophy of *stare decisis* that has shaped my view on the subject under consideration. He began from candour about the doctrine: to the student it exercises a peculiar fascination; to the practitioner it is a thing that faces both ways, embraced or resisted according to whether it serves; and to the timid judge it offers a way of escape from the labour of independent thought. But the better judges, he observed, grow restless under a precedent when it compels them to do what is unjust, and that restlessness drives them to the legitimate expedients by which a wrong or over-broad authority may be confined.[20]

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[18] Cobbe v Yeoman's Row Management Ltd [2008] UKHL 55, [2008] 1 WLR 1752 [29] (Lord Scott); Halsbury's Laws of England (4th edn, vol 16) para 962 and Bradshaw v McMullan [1920] 2 IR 412, 425 (Lord Shaw of Dunfermline), both cited in Chaghoury v Wansa (n 3) [44]-[46].

[19] Chaghoury v Wansa (n 3) [30], [47] (rejection of the doctrine of part performance as a route to validation).

[20] Alfred Denning, The Discipline of Law (Butterworths 1979) Part Seven, 'The Doctrine of Precedent', 285-297.

His analogy was with science. Just as the scientist builds general propositions from instances and modifies or discards them when they no longer fit, so the lawyer should take his precedents and build principles, refining them when unsuited to the times and discarding them when 'found to work injustice'. A law that clings to precedent while forgetting the principles of justice it exists to serve risks becoming 'that wilderness of single instances'; a coral reef of fossils, ceasing to grow. Yet Lord Denning was no enemy of certainty. I concur with his formulation of the balance : the law must be certain, as certain as may be, but it must be just too.[21]

Crucially, Lord Denning catalogued the legitimate means by which a court faced with an inconvenient precedent may proceed without lawless defiance of it. The first and most conventional is distinguishing: finding some distinction, on the facts or on the law, that takes the instant case outside the ratio of the earlier one. The second is confining the precedent by showing that a proposition was wider than the decision required, or that the earlier court cannot have had the present kind of case in mind. The third, available only to a court not bound, is departing outright, the liberty the 1966 Practice Statement reserved to the House of Lords, recognising that too rigid adherence to precedent may lead to injustice in a particular case. These techniques are not evasions. They rest on a jurisprudential truth: a precedent is authority for what it decides on the facts before the court, not for every proposition its language might be read to embrace.[22]

At the risk of being repetitive, the relevance of the above to the subject under consideration is direct. If the rule in *Sesay v Bahsoon* were to be applied so as to allow a landlord to keep years of rent and recover possession by pleading non-registration, a court faithful to this discipline would be entitled, indeed obliged, to ask whether that result flows from the *ratio* of the decided cases, or only from an over-broad reading of their language. That is the inquiry the next two Parts undertake.[23]

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[21] ibid 292-294 ('that wilderness of single instances', adopting Tennyson; the principles of the lawyer should be modified when unsuited to the times or discarded when found to work injustice; and 'The law must be certain. Yes, as certain as may be. But it must be just too.').

[22] ibid 297 (the conventional means of confining a wrong precedent 'was by distinguishing it … finding some distinction on the facts or on the law').

[23] Practice Statement (Judicial Precedent) [1966] 1 WLR 1234, reproduced in Denning (n 23) 314.

VIII. THE UNDECIDED CASE: THE PERFORMED LEASE

A. The Facts

Consider an Undecided Case where a landlord and a tenant execute a lease of premises for a term of years. The instrument touches and concerns land, and it is, on the ordinary meaning of Cap 256, a conveyance, for the Act's definition of that word expressly embraces a lease and a demise. Neither party registers it. The tenant enters into possession. Year after year he pays the reserved rent; the landlord receives it, banks it, and demands it as of right. The tenant repairs, insures, and orders his business on the faith of his term. Then, whether because the market has risen or the relationship has soured, the landlord asserts that the lease is void for non-registration, that the tenant holds no estate, that he is a trespasser or at best a yearly tenant, and that possession must be delivered up; the rents already paid being, on this view, the landlord's to keep.

This is not the case of *Sesay* or *Chaghoury*. It is, almost exactly, the case of *Walsh v Lonsdale* itself, an agreement for a lease, followed by entry and payment of rent, with the single, decisive addition of a statutory command of voidness. And it is a case in which the party invoking the statute is not a stranger protected by it, nor an innocent third party misled by the absence of registration, but the very counterparty who took the benefit of the transaction and who was himself equally able, and arguably equally bound, to procure registration.[24]

B. Where the Statute Becomes a Sword

The moral character of the landlord's plea in the Undecided Case differs in kind from anything in the decided authorities. In *Sesay* the vendor pleaded non-registration to resist conveying land for which, the Court found, he had received nothing; there was no unjust enrichment, because there was no benefit retained. In the Undecided Case, by contrast, the landlord has received the whole benefit he bargained for, years of rent and the tenant's performance, and seeks to keep it while repudiating the estate that was its consideration. To permit this is not to protect the integrity of the register; it is to enrich the landlord at the tenant's expense by means of a formal defect that

[24] Walsh v Lonsdale (n 4) 14-15; the doctrine is, at its origin, a doctrine of the performed agreement for a lease.

the landlord himself could have cured and from which he alone now profits. That is the statute wielded as a sword. It was against precisely this species of injustice that equity fashioned the principle that a statute may not be used as an instrument of fraud; a principle whose cases turn not on the particular statute but on the unconscionability of allowing a party to invoke a formal requirement to keep what conscience says he should not.

C. The Ontological Objection Confronted

The orthodox answer will be immediate: however unattractive the landlord's conduct, the lease is void, and equity cannot resurrect the dead. This is the ontological objection developed in Part V, and it must be met on its own ground rather than evaded. Two answers may be offered, and they are advanced not as demonstrations but as arguments fit for a court's consideration.

The first answer accepts that the lease is void as an instrument but denies that voidness of the instrument disposes of every right between the parties. That a deed is void does not mean the parties' dealings vanish from the eye of the law. A tenant who enters and pays rent, and a landlord who accepts it, may by their conduct create a periodic tenancy at common law independent of the void instrument; the rents paid and received are not undone by the nullity of the writing. If the parties' conduct can generate a common-law tenancy, then the void instrument is not the sole source of legal relations between them, and the landlord who has accepted rent under a de facto tenancy cannot be heard to say that nothing at all subsists. The question then is not whether the dead instrument can be revived, but whether, upon the living facts of possession and payment, the landlord may retain the benefit while denying the tenancy, and to that question the doctrine against statutes used as fraud speaks directly, without any resurrection being required.

The second answer is restitutionary. Even if the lease is void and no tenancy is found, it does not follow that the landlord keeps the rents. A total failure of consideration, or the receipt of money under a void transaction, founds a claim in unjust enrichment for the recovery of what was paid. The orthodox rule, taken to its limit in Sesay, left the purchaser who could prove no payment with nothing; but it did not decide that a party who can prove payment under a void land transaction is barred from restitution. A performed lease is the paradigm case in which the payments are admitted, recorded, and received. To allow the landlord to plead voidness against

the tenant's estate while denying the tenant restitution of rent would be to let the statute defeat not only the lease but the law of unjust enrichment as well; a result no authority compels.

IX. CAN SESAY AND CHAGHOURY BE DISTINGUISHED FROM THE UNDECIDED CASE?

A. Distinguishing Sesay v Bahsoon

Three features confine the *ratio* of *Sesay v Bahsoon*. First, the transaction was a contract of sale, wholly executory as to conveyance; no estate had been enjoyed and none had passed. Second, the Court found as a fact that no part of the purchase price had been paid; the vendor had retained no benefit, so the statute's operation enriched no one. Third, the equity urged upon the Court was, in substance, the enforcement of the void contract itself: specific performance of an instrument the statute had annihilated. On those facts the decision is unimpeachable. But none of those facts is present in the Undecided Case , where an estate has been enjoyed for years, the landlord has received and retained every rent, and the tenant asks not for the enforcement of the dead instrument but for the recognition of relations arising from conduct, or restitution of benefits conferred. A precedent is authority for what it decides; *Sesay* decided nothing about a landlord who takes the fruit of a demise and then disclaims its root.[25]

B. Distinguishing Chaghoury v Wansa

Chaghoury stands no closer to the Undecided Case. First, it too was a sale, executory as to conveyance; the purchaser sought to acquire an estate not yet transferred, and the equity invoked (proprietary estoppel) asked the Court to confer the very interest the statute said the instrument could not create. The performed lease asks a narrower and different question: whether a party who has received the benefit of a transaction may plead its voidness to keep that benefit while denying the counter-obligation. That is not the enforcement of a void instrument; it is the prevention of unjust enrichment procured through the void instrument. The distinction marks the line between using equity to contradict the statute, which *Chaghoury* forbids, and using equity to prevent the statute from becoming the engine of a fraud, which *Chaghoury* did not decide.[26]

[25] Sesay v Bahsoon (n 2) 15 (the finding that no part of the purchase price was paid).

[26] Chaghoury v Wansa (n 3) [43] (Thompson JSC).

Second, a substantial part of the reasoning in *Chaghoury* was conduct-based. The Court found that the appellant, faced with a banker's cheque that could not be cashed owing to the Lebanese banking crisis, had failed to take the remedial steps reasonably open to him, and that his response to the vendor's offer of an alternative mode of payment was not constructive. The dismissal of the equity was thus fact-sensitive: the appellant did not come to equity having done all that was reasonable. A tenant who has paid every instalment of rent for years, and performed every covenant, stands in a wholly different position; the conduct-based *ratio* does not touch him.[27]

Third, the distinction between a sale and a lease is not merely factual but doctrinal. *Walsh v Lonsdale* was itself a case of an unregistered, informally created lease followed by possession and payment of rent; the doctrine is, at its origin, a doctrine about performed agreements for leases. Neither *Sesay* nor *Chaghoury* was such a case; both were sales. It is at least arguable that the rule those sale cases announce, however apt for executory contracts of sale, was never directed to the performed lease, and that to apply it there is to extend a precedent beyond the facts that generated it; the very move Lord Denning's discipline warns against.[28]

C. The Counter-Considerations

Intellectual honesty requires that the counter-arguments be stated with equal force. First, the language of section 4 is unqualified: the instrument 'shall be void', and the word admits of no gradation between sale and lease. Second, the purpose of a registration statute is certainty of title, and certainty is ill served by a rule that turns on whether the party pleading nullity has behaved unconscionably. Third, the statute provides its own remedy: registration out of time, and a tenant who neglects that avenue may be said to have his remedy in his own hands. Fourth, *Chaghoury* is recent, considered, and emphatic, and only the Supreme Court itself can distinguish or depart.[29]

Yet against each of these the Undecided Case has its reply. The unqualified word 'void' governs the *instrument*; it does not, in terms, abolish the law of unjust enrichment or forbid the recognition of a common-law tenancy arising from conduct. Certainty of title is not undermined

[27] Chaghoury v Wansa (n 3) [41] (both parties acted in good faith, in ignorance of the legal requirements).

[29] Registration of Instruments Act, Cap 256, s 4(2) proviso (registration out of time on application to a Judge of the Supreme Court).

by requiring a landlord to return rents he received under a void lease; the register is protected whichever way the rents go. The statutory remedy of late registration presupposes a party who knows registration is required and neglects it; it offers cold comfort where, as the Court itself observed in *Chaghoury*, both parties acted in ignorance of the requirement. And the authority of *Chaghoury*, binding though it is, extends only to what it decided: an executory sale, resisted on estoppel, by a purchaser whose own conduct was found wanting. Its *ratio*, properly confined, leaves the performed lease undecided.[30]

X. CONCLUSION

The rule in *Sesay v Bahsoon*, reaffirmed in *Chaghoury v Wansa*, is sound law for the cases it decided: the executory contract of sale, where no benefit has been retained and no estate enjoyed, cannot be rescued from voidness by an equity that would contradict the statute. The rule in *Walsh v Lonsdale* cannot save such a contract, for the doctrine presupposes the valid, specifically enforceable obligation that section 4 destroys. To this extent the orthodoxy stands, and this article has defended it. But the performed lease is a different case, and it raises a different question, one our courts have not yet been required to confront, and one which, it has been argued, neither *Sesay* nor *Chaghoury* forecloses.[31]

The question may be put for future decision in this form. A landlord grants a lease that is void for non-registration. He receives rent under it for a decade. He then pleads its voidness to recover possession and to keep the rent. Does the law of Sierra Leone permit him to do so? If it does, then section 4, a statute enacted to bring order and honesty to dealings in land, has been turned into a licence for a particular and cruel dishonesty; the repudiation of a performed bargain by the party who took its every benefit. If it does not, then the courts must find the doctrinal instrument: a common-law tenancy arising from conduct, a restitutionary claim for the rents, or a confinement of the voidness rule to the executory case, by which justice may be done without contradicting the statute.

Lord Denning would have known where his sympathies lay, for he taught that a precedent found to work injustice should be confined or distinguished, and that the law, however certain, must be just too. But he also taught that the judge is a man set under authority, bound to abide by the law until he can persuade his brethren that it works injustice. In the premises, I am of the view that the performed lease is the case in which that persuasion must be attempted. Whether it succeeds is for the court, and not the commentator, to decide. The reader, whether practitioner, scholar, or judge, is left with the question, and with the materials for answering it. For the statute was made to be a shield. Whether it may also be a sword is the question that awaits its case.[32]

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