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IBRAHIM SAIBO AND ANOTHER *v.* THE ORIENTAL BANK CORPORATION.

D. C., Colombo, 60,617.

Fraud—Implied trusts—Resulting and constructive trusts—English Law—Roman-Dutch Law—Deed secured by debtor, in name of third parties, in fraud of creditors—Ordinance No. 7 of 1840—Parol evidence to prove fraud.

Where the price for the purchase of certain lands was paid by one A, but the names of the plaintiffs were fraudulently entered in the conveyances as purchasers and as having paid the consideration, for the purpose of concealing the true ownership from A's creditors; and where the purchases were intended to be for A's benefit, and to withdraw from his creditors the purchase money and certain other large sums of money which he disbursed on the improvement of the lands and in erecting buildings on them; and where there was a secret understanding between A and plaintiffs that the latter should formally convey the lands to the former after he should compound with his creditors, and that in the meantime A should possess the lands as his own from the date of the conveyances to plaintiffs and with their knowledge and assent; and where at the date of the conveyances A was and ever since has been in insolvent circumstances, and where plaintiffs were parties to his fraud on his creditors—

Held, that the plaintiffs were not entitled to a declaration of title to these lands, nor to have them released from seizure under a writ sued out by defendants as creditors of A.

Per BERWICK, D.J.—English trusts are the offspring of the Roman Law, enlarged and developed from the Roman *fidei commissa*, which were only testamentary, so as to embrace trusts created by parties *inter vivos*, and ultimately trusts created by implication of law, which are analogous to obligations arising *quasi ex contractu*.

Though in the Roman-Dutch Law there are no technical terms corresponding to implied or resulting or constructive trusts, owing to the system of administration of law and equity being such that there was no occasion for such terms, yet the doctrine of implied trusts is in substance part of that law.

To establish such trusts parol evidence may be admitted without violating the Ordinance of Frauds.

Where a transaction is intended to effect a fraud, parol evidence is at all times admissible to establish and create a resulting or constructive trust.

THE facts of the case and the propositions of law applicable to them are fully stated in the following judgment (dated 9th October, 1873) of BERWICK, D.J. :—

This is an action to set aside a seizure of certain lands and goods on a writ of execution issued by the judgment-creditors of one Abbas, and to have plaintiffs declared the owners thereof. The lands are claimed by the plaintiffs in virtue of various purchase deeds in their names from third parties. Th · claimed by the creditors as the property of their debtor.

On the facts, I find with respect to lands I. and III. in the libel that the purchase money was paid by Abbas ; that the names of the plaintiffs were fraudulently entered in the conveyances as purchasers and as having paid the consideration, for the purpose of concealing the true ownership from Abbas' creditors ; that the purchases were intended to be for Abbas' benefit, and intended to withdraw from his creditors the purchase money and certain other large sums of money which he disbursed on their improvement and in erecting buildings on them ; that there was a secret understanding between him and plaintiffs that the latter should formally convey them to him after he should compound with his creditors, and that in the meantime he (Abbas) should possess the property and deal with it as his own ; that he accordingly entered into possession and dealt with it as his own from the date of the conveyances to plaintiffs and with their knowledge and assent,

I also find that at the date of the purchases he was, and has been ever since, in hopelessly insolvent circumstances ; and that the plaintiffs, who were the nominal purchasers, and his brother and sister-in-law were parties to this fraud on his creditors.

With respect to lands II. and IV. I find the same facts, with this difference : that the whole of the purchase money was paid with money borrowed from Mrs. De Vos on the security of the property, the bond being executed by plaintiffs, the nominal purchasers and nominal borrowers, but both the purchase and the loan being secretly intended for and on behalf of Abbas ; and there being the same understanding as before, that the plaintiff should make a written transfer to him after he compounds with his creditors, and that meanwhile he should possess the property and deal with it as his own. The purchase money having been wholly raised by mortgage of the property, Abbas' estate was not in fact diminished thereby. Wherefore his creditors are only prejudiced to the extent by which the improved value of the property may exceed the mortgage to Mrs. De Vos.

The vendors of the lots I., II., and IV. are not shown to have been parties to the fraudulent intent, nor, of course, Mrs. De Vos. There is reason to conclude that the vendor of lot III. was. Though I do not think this point material to the decision of a case of this nature, it is perhaps desirable to find a verdict on it, to avoid the contingency of the case being sent back for the purpose.

With respect to the goods, the finding is that they formed part of Abbas' stock-in-trade, and were fraudulently transferred by him while in insolvent circumstances to his brother-in-law, the first plaintiff, without consideration.

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Finally, I find that at the date of all these fraudulent dealings the defendants were creditors of Abbas.

A review of the evidence on which these conclusions of fact are based is annexed to this judgment.

Having recorded the findings on the facts, I have now to consider the questions of law raised by the learned counsel for the plaintiffs, and to apply this law to the different circumstances of the different lands. Lots I. and III. are distinguished from lots II. and IV. by the special finding that in the case of the latter the insolvent's estate was not diminished by the amount of the purchase money, wherefore the general creditors were not prejudiced as respects that sum ; but it has to be determined whether, nevertheless, they have a beneficiary interest in these lots. First, as to lots I. and III. It was urged that these lands (and the others) never were the property of the defendants' debtor (the present case differing in this respect from the ordinary one of a fraudulent transfer by an insolvent), whence it was argued that they cannot belong to his creditors ; and the argument strenuously insisted on by the learned counsel, Mr. Dias, is that parol evidence is not admissible to show that the transferee under a deed which states that he has paid the consideration is a mere nominal transferee, and that the consideration was in fact paid by some one else who is the actual purchaser ; that such evidence would be to contradict the terms of the written deed and to violate the Ordinance No. 7 of 1840 ; and it was further strenuously insisted on that the doctrine of resulting trusts is not part of the Law of Ceylon, it being contended (1) that this is no part of the Dutch Law ; (2) that the English Law on this subject has never been introduced here and grafted on our Dutch Law ; and (3) that it could not be without violation to our Ordinance.

The question raised is of very great importance, and deserves to be solemnly determined and finally set at rest.

I will first consider the third point, viz., whether the English doctrine of resulting and constructive trust would be contradictory to our Ordinance No. 7 of 1840, which provides in effect that no interest in land can be created by sale, purchase, or transfer, or agreement therefor, otherwise than in writing.

There is a well-known distinction between the meaning of the technical terms " resulting " and " constructive " trusts, but both are " trusts created by operation of law," not trusts created by parties. By the 8th section of the English Statute of Frauds (*29 Carol II.*) all such trusts were expressly exempted from that Act, and the only difficulty which arises in our that it has not expressly made the same exception. It membered

that the 7th section of the English Act requires all declarations or creations of trusts of any land to be proved by some writing signed by the party who is by law entitled to make such trusts; and that the 8th section exempts from the preceding enactment all trusts which "arise or result by the implication or construc- "tion of law."

Now, the admirable and sound reasoning of Lewin at the end of his chapter on resulting and constructive trusts has shown to my mind conclusively that the 7th section does not embrace all trusts indiscriminately, but is confined to those created by parties, and that the exception in section 8 could only have been inserted *ex majori cautela*, that the extent of the enactment might not be left to implication.

The same line of reasoning when applied to the corresponding substantive enactment of our Ordinance, section 2, which does not specially provide for trusts, but includes them generally as being or creating interests in lands, demonstrates that it also does not embrace all interests in lands indiscriminately, but only such as are created by parties, and not such as are created by operation of law; and the very nature of the language used in the Ordinance requiring the contract to be signed by the party making the same shows this to have been the true intention, and that interests not made nor created by parties, but by operation of law, are not in its purview. So also Van Leeuwen, speaking of the Dutch Ordinances of Frauds, says: "From the operation of these regulations "are excluded all alienations acquired *titulo universali* by "inheritance, marriage, donation, bequest by last will, community "of property in consequence of marriage, separation of estate or "the like" (*Van Leeuwen's Coms., pp. 124 and 380*); and he might have added judicial decrees, prescriptive title, adjudication of bankruptcy, and others. This seems to me to dispose of the objection founded on the Ordinance.

With respect to the objection that the doctrine of implied trusts is no part of the Dutch Law, it is quite true that we have no technical terms corresponding to implied or resulting or constructive trusts, but we have the things themselves; and the only reason we have not the terms arises from the difference in the system of administration of law and equity being such that there is no occasion for them. But it is to be remembered that English trusts are the very offspring of the Roman Law, enlarged and developed from the Roman *fidei commissa* (which were only testamentary), so as to embrace trusts created by parties *inter vivos* and ultimately embracing trusts created by implication of law, which are analogous to what, ages before, were known to the

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Civil Law as obligations arising *ex quasi contractu*, such as the *condictio indebiti* [the action whereby "whatever has been "delivered or paid on an erroneous conception of duty or obligation "may be recovered on the ground of equity, provided the person "receiving it has no ground on natural right, implied donation, or "compromise to rely on the acquisition as his own" (*Bell's Principles, sections 531–587*). The action by which is recovered whatever was paid without being due (*Voet, XII. 6, 1*)]—the *condictio sine causa*—[an action whereby the thing is recovered which another contrives to possess without (just) cause, although he may have originally obtained it justly, or when the consideration fails or is void in law (*Voet, lib. 12, tit. 7*); see an enumeration of various condictions at page 397 of *Tomkin's and Jencken's Compendium of Modern R. Law*], *&c.*

It cannot be denied that in the ordinary course of development of our Colonial Law to overtake the circumstances of modern life (what Warnkoenig calls the "amplification of these *rationes* "*vitae*") express trusts *inter vivos* are now as much part of the legal system of Ceylon as of England, though unknown in the practice of the old Civil Law (I mean virtually unknown, for traces of them are mentioned by Spence, *Equit. Jurisd., vol. I., pp. 37, 438*); and if in further assimilation to English Law we find it convenient, when dealing with what the English Law calls "implied trusts," to use that technical term, so as to collect under one denomination the many cases of implied obligations (*quasi* contracts) of a certain class there is not the less an identity in the things though the terminology be different, and though the forms by which substantial effect is given to equity differ, or though the law as to what circumstances will raise an "implied "trust" under the English Law or an obligation *ex quasi contractu* under the Civil law may, as it unquestionably does, sometimes differ. As illustrations of the substantial identity of the things, I need only point to the *conditio sine causa* or to the *restitutio in integrum*, of which last an example singularly in accord with the the English principles of implied trusts is given in the *Digest* and by *Voet ad Pand, IV. 3, 11*—that of a legatee who, having been bequeathed a legacy larger than that proportion of a testator's estate which the law allowed to be bequeathed away from heirs, has obtained payment of the whole by misrepresenting the true value of the estate to an ignorant heir, and is obliged to restore the fraudulently acquired surplus; or as English jurisprudence might put it, would be decreed to hold it in trust for the heir, the difference being merely in the form of decreasing equity, but not in the substance; and the difference in form arising

solely from the peculiar separation of legal and equitable estates in English Law. See another example in *Voet, XIII. 6, 3.* The Civil Law, Mandates, Liens, and *negotiorum gestio* all involve trusts by implication of law; and other illustrations are afforded by the action *rei vindicatio* in such a case as non-payment of purchase money (*Voet, VI. 1, sections 14, 15*) and by the *actio publiciana*, which actions, as Voet tells us, subsist in Dutch Law, though under other names (*VI. 2, 11*); also practically in the case of rescinding sales. In fact, the whole doctrine of resulting trusts in English Law (at least in the class of cases to which the present one belongs) is embraced and summed up in, if not perhaps founded on, the grand Roman maxim, *Jure naturae aequum est, neminem cum alterius detrimento et injuria fieri locupletiorem.*

Having established the doctrine of implied trusts to be in substance part of the Roman-Dutch Law, and that parol evidence to establish them would not violate our Ordinance of Frauds, and that therefore there is no legal difficulty on these grounds in holding that plaintiff was a trustee under a resulting trust for Abbas, and therefore for the creditors who succeed to whatever beneficiary rights he himself possessed, it is hardly worth while to point out that third parties not privies to deeds are not bound by recitals in them (such as the recital that plaintiffs had paid the consideration); and that there never has been a doubt that when a transaction is intended to effect a fraud, parol evidence is at all times admissible to establish and to create a "constructive" trust, notwithstanding the Statute of Frauds. To use technical language we have here (under English Law) a "resulting" trust in favour of Abbas and those who have his rights, and a "constructive" trust in favour of the creditors whom he and plaintiffs conspired to defraud.

The real difficulty as it presents itself to my mind is whether the facts proved, though they constitute an "implied trust" of the land in English Law, do by Roman-Dutch Law create in respect to the land, as distinguished from the purchase money, an "implied obligation" or *quasi* contract by plaintiff in favour of Abbas and those representing him as creditors, there being, as already observed, frequently a conflict between the English and Civil Laws with respect to these implications of law. For example, though under English Law, whenever (as in this case) a person purchases an estate in the name of a third party who has paid the consideration (being a stranger in blood), there is a resulting trust in favour of the latter; there is under Scotch Law no such presumption; and in the Civil Law it is a general rule that the property in a thing does not belong to him with whose money it

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is purchased, but to the person who purchased it with the stranger's money in his own name, the consequence of which rule is that the finder of the funds cannot recover the land by *rei vindicatio*, but has only a personal action against the purchaser to recover his money (which is not, however, the object of the defendants in this case), *Deinde generaliter in jure traditum, rem ex mea pecunia emptam meam non esse, sed ejus qui eam nummis alienis emit, aut cujus nomine empta est; cui consequens est, ut per nummorum dominum nequeat ulla ratione vindicari sed sola ei competat pro pecunia personalis actio* (*Voet, VI. 1, 11*). And again at section 21 : *Denique, cum id quod pecunia mea comparatum ab alio est meum non fiat, etiam neminem vindicare posse rem suis nummis per alium emptam*, the authority for which will be found in the *Code, lib. 4, tit 50*, and I have not been able to find anything in the Dutch Law to lead to the supposition that it is different from the Roman and the Scotch Law. But the grounds on which I think that those representing Abbas (even if there had been no conspiracy to defraud them of the money spent on the purchases) may " vindicate " the property—and it makes no difference but in form whether we call plaintiff a trustee for the creditors, or whether they " vindicate," *i.e.*, recover the property from him—are these : (1) It is a matter of indifference in the Civil Law whose name is inserted in the instrument of sale (*Code, IV. 50, 4*, and *Voet, XVIII. 1, 18*) ; (2) the circumstances satisfy the Court that plaintiff, when making the purchases, acted as a mandatory for Abbas ; and (3) the crucial test of right to recover the lands previous delivery and possession, on which see every section of the book of the *Justinian Code* already cited, and sections 4 and 5 may perhaps be deemed most forcibly at one with the present case, for the evidence fully proves the possession of the land and the exercise of the dominium to have been from the beginning with Abbas, as well as that the purchase money, was furnished by him, and that the present claim of property by plaintiffs is also *contra bonam fidem*, all which three incidents are included in the sections 4 and 5 specially cited. These concurring—but more especially the possession from the first by Abbas—seems to me to except the case from what Voet states to be only the general rule.

The foregoing line of discussion brings us to see plaintiffs' position in its true light, that, namely, of a person out of possession at the time of suit and who is not proved ever to have had possession, nor actual dominion, seeking to vindicate his title to the property against the representatives of Abbas, who has had

undoubted possession and dominium. This view makes it unnecessary to inquire whether, if the plaintiffs were in possession at the time of suit, the defendants could vindicate the land from them or establish a trust in them (which is the same thing, save in form of remedy). A plaintiff in Roman-Dutch Law, which combines the *civiliter* and *utiliter* actions—the legal and praetorian jurisdictions—must show both a legal and equitable title ; and as the mere fact of his name being inserted in the deed of purchase does not give him this under Civil Law, the rule applies *in aequali jure melior est conditio possidentis*. But, further, assuming that the plaintiffs taking unfair advantage of Abbas' imprisonment have recently obtained the actual, I mean the natural, possession (which, however, is not proved), or were in such possession at the time of seizure by the Fiscal, this is precisely one of those cases in which, if necessary, a feigned legal possession would be ascribed to the defendants by the fiction of equity introduced by the *actio publiciana*, which is given against every *possessor sive bonae sive malae fidei qui jure debiliori possidet* (see *Voet, VI. 2, 6, &c.*), and section 11, to show that the principle of this action is in force in Dutch Law.

It is on these principles that I think that whether we deal with the case by the English Law of implied trusts, or, as the learned counsel for the plaintiff asks, by Roman-Dutch Law, the defendants have a right at their option either to recover the purchase money from the plaintiffs or the land itself, were the latter in possession of it, and that they, as plaintiffs, out of possession (whether actual or legal), cannot maintain a title in equity to the land against defendants' better title. To hold otherwise in favour of a plaintiff who paid no part of the price of the land, and who therefore can only have a " lucrative " title, and that, *mala fide*, would be to violate the maxim, which cannot be too often reiterated, *aequum est neminem cum alterius detrimento et injuria fieri locupletiorem*, and would moreover be to sustain a gross fraud.

Had the suit been one by defendants, to recover merely the money fraudulently alienated by Abbas to plaintiff for the purpose of these secret purchases, the foregoing questions would not have arisen, and the whole case would have been simple and manifestly governed on the principles to be found in *tit. 8 of book 42 of Voet ad. Pand.*

I may further remark that the claim, as the case stands, to the lands purchased with the funds so fraudulently alienated from creditors might have been very shortly and simply disposed of in favour of the defendants if English Law were applied (see *Lewin on Trusts, chapter 19, sections 2, 10, p. 130*) ; but it is very

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doubtful indeed, to say the least, whether the money could have been followed into the land under Dutch Law merely on the ground that money fraudulently obtained had been so converted (see *Voet, VI. 3*), and this judgment therefore goes on other grounds as far as concerns the Dutch Law.

The plaintiff's claim to lots I. and III. will be dismissed, and they will be declared liable to be sold in execution as prayed for in the answer.

With respect to lots II. and IV. purchased with money wholly borrowed on the security of the property, whereby therefore, as has been specially found, Abbas' funds available to creditors were in no degree diminished, this finding would have been very material if the defendant's claim were simply founded on an alleged fraudulent or gratuitous alienation of funds to the plaintiffs. But this distinction of fact between this and the other cases is in no way material when the question is, as here, simply whether the land formed part of Abbas' estate, though colourably held under the name of another. Such being the real question, the principles applied in the other lots apply equally to these lots. It is of no consequence whose name was inserted in the instrument of purchase. The purchase was intended to be on behalf of Abbas by plaintiff as his secret mandatory. The possession was by Abbas, and by plaintiff's consent and knowledge the actual exercise of dominium was by him, and they were essentially, though secretly, a part of his estate. From an English point of view he had beneficial use, though not the legal title, and the defendants have a beneficiary interest in the property acquired on his behalf; from the Civil Law point of view plaintiffs had neither a legal nor an equitable title. It can hardly be even said that the purchase money was raised on the credit of the plaintiffs; it was raised on the credit of the land, and as has been seen in reviewing the evidence it was raised by the procurance and interference and for the use of Abbas. The fact that plaintiff's name stands in the mortgage bond to Mrs. De Vos has no more significance than his name standing in the purchase deed. There, too, he was simply acting as the secret agent of Abbas, a second concealment, without which the latter's real ownership could not be effectually concealed. The conveyance being in plaintiff's name, it was necessary that the same name should appear as mortgagor. The purchase and the bond were but parts of one simultaneous transaction, namely, a secret acquisition of property by the insolvent in the name of another; wherefore according to English Law that other is a trustee for Abbas and his representative; according to Civil Law the latter

are simply entitled to be deemed the owners without distinction of legal and equitable interests, the effect being substantially the same though the form of judgment differs. Plaintiff is unable to maintain *rei vindicatio*, and cannot have judgment.

It has been clearly proved, circumstantially and directly, that the whole transaction as regards the names appearing in the deeds was a fraud upon Abbas' creditors to conceal from them a part of his estate, in which fraud plaintiffs participated, and neither of them can be suffered to obtain any advantage over third parties from their fraud on them. Following the principles laid down in respect to the other lots, the lots II. and IV. will also be decreed a part of Abbas' estate ; and this claim of the plaintiff's will be dismissed, and these lands will be declared liable to be sold in execution on the defendants' judgment, subject to the mortgage in favour of Mrs. De Vos, whose preferential rights as special mortgagee will be reserved intact.

With respect to lot V., the finding on the evidence leaves no question of law, and plaintiffs are entitled to judgment for it.

The goods are also free of any question of law on the facts found.

Judgment for defendants for lots I., II., III., IV., and for the movables forming item VI. With respect to lot V. (Madangahawatta), the plaintiffs will have judgment.

Plaintiffs to pay costs of suit.

Plaintiffs appealed. No appearance for them.

Ferdinands and *Browne* appeared for respondents.

The case came on for argument before MORGAN, A.C.J., and STEWART and CAYLEY, J.J., and on 19th November, 1874, the Supreme Court affirmed the judgment of the Court below, seeing no reason to the contrary.