Present : Mr. Justice Moncreiff and Mr. Justice Middleton.

1904.
January 18.

GOULD *v.* INNASITAMBY.

D. C., Kandy, 14,339.

Agreement to purchase land for another—Refusal to reconvey—Fraud—Trustee—Ordinance of Frauds and Perjuries (Ordinance No. 7 of 1840), *s.* 2.

The plaintiff employed the defendant to purchase a property for him. It was understood between the plaintiff and the defendant that the plaintiff should pay the purchase money, and that the defendant should get the conveyance in his own name, and should subsequently reconvey the property to the plaintiff. The defendant having refused to reconvey the property, the plaintiff raised this action to compel him to do so. The defendant pleaded section 2 of Ordinance No. 7 of 1840 in bar of the plaintiff's claim.

Held, that the plaintiff was entitled to maintain the action, notwithstanding the absence of any notarial instrument signed by the defendant agreeing to reconvey the property.

MIDDLETON J.—The Statute of Frauds should not be allowed to be used to perpetrate and cover fraud.

APPEAL by the plaintiff from a judgment of the District Judge of Kandy dismissing his action.

The facts sufficiently appear in the judgments.

The appellant appeared in person.

Bawa, for the respondent.

Cur. adv. vult.

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18th January, 1904. MONCREIFF J.—

The plaintiff, being desirous of buying some lands at Paldeniya, did so in the name of his servant Innasitamby, who is defendant in this action. He furnished the purchase money, and the defendant promised both before and after the purchase to convey the lands to him when called upon. Instead of doing so when called upon, the defendant, having had the Fiscal's transfers made out in his own name, claimed the lands as his own property. The plaintiff then sued for delivery of the bills of sale, plans, and documents; for a declaration that the defendant held the bills of sale in trust for him (the plaintiff) as his agent and mandatory; and for a transfer of the bills of sale and the right, title, and interest passing under them. The Judge dismissed the action. By our law (Ordinance No. 7 of 1840, section 2) no transaction relating to immovable property which falls within the section is of any avail in law, unless embodied in a notarial instrument, and " signed by the party making the same, or by some person lawfully authorized by him or her." It would seem that the purchaser may probably appoint a mandatory to buy for him, because such a proceeding is not one of the transactions arrived at in the section. The section relates only to what passes between parties who are dealing with interests in land; the appointment of a mandatory to buy is simply the employment by the buyer of an agent to do a ministerial act for him. But the proposition of the appellant is something quite different. Possibly he might prove by parol evidence an appointment of the defendant to sign his (the defendant's) name as mandatory of the plaintiff; but is that of any use unless he can also prove that the defendant agreed to reconvey to him (the plaintiff), for the mandatory who buys in his own name is bound as the purchaser (1).

A verbal promise, however, to reconvey is one of the things which apparently the section says shall be of no avail in law, and the plaintiff must show how it can be used to establish an obligation on the part of the defendant to convey these lands to the plaintiff. If no such obligation can be proved, the land bought is the property " *Ejus quidam nummis alienis emit aut ejus nomine empta est.* "

The purchaser of shares in a public Company sometimes buys in the name of another person. The nominee's name is retained on the register of shareholders—he is by English law trustee for the real purchaser. The appellant in this case is trying to show on the same principle that the defendant is trustee to reconvey to him—to do what the Ordinance apparently says he cannot do by parol evidence. Under English law such proof may be made because

(1) *Voet* 18, 1, 8.

section 8 of the Statute (29 *Car.* 2, *c.* 3) expressly provided that " when any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in every such case such trust or confidence shall be of the like force and effect as the same would have been if this Statute had not been made."

Mr. Berwick sees no significance in the fact that our Ordinance contains no such exception from the operation of section 2; and he considers that that section refers to interest created by the parties, but not to those arising by operation of law, *Ibrahim Saibo v. The Oriental Bank Corporation* (*1*).

He refers to the fact that Lewin (*7th Edn.*, 178) considers that the 7th section of 29 *Car.* 2, *c.* 3, was not meant to refer to trusts arising by operation of law, and that the 8th section was only inserted *ex majore cautela*. The reason given by Lewin is that the object of the Statute was to put an end to the perjury by means of which men sought to establish trusts, whereas trusts arising from operation of law are not dependent upon parol evidence and perjury. They arise from an ascertained series of facts and if the 7th section of the English Statute does not refer to them, may it not be said that the second section of our Ordinance has no more relation to them?

This is a question for the Full Court.

The plaintiff cited the familiar cases on this subject from our reports, but I do not think they give him much help.

There are some fugitive references to fraud in those cases. The District Judge does not interfere here on the ground of fraud, because he says there was no fraud in the inception. For example, if the defendant had dishonestly induced the plaintiff to buy the land in the defendant's name, the plaintiff would have been induced by fraud to part with his money. But the plaintiff parted with his money of his own free will, trusting not to any legal obligation but to the defendant's honour. The defendant knew that, and there is nothing to show that he had any fraudulent intention until after the purchase. Until then he intended to reconvey. But he turned the whole transaction into a fraud by taking the transfer in his own name and refusing to reconvey. The question is not one of enforcing an agreement which is not according to law, but whether a defendant is to be allowed to plead the Statute of Frauds in order that he may dishonestly keep the property of another man of which he got possession by engaging to return it when required. Even after

(1) (1874) 3 *N. L. R.* 148.

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the land was bought the defendant seems to have acknowledged the plaintiff as the real purchaser, to have taken his wages brought him the produce, and allowed him to lay out money upon it.

If English law applied, this case would be subject to the principle acted upon in *Davis v. Whitehead* (1), following the judgment of James and Mellish L. JJ. in *Haigh v. Kaye* (2). In the former case the question was whether the Duchess of Marlborough was not entitled to return of a leasehold house which she had assigned for a limited purpose to her husband. It was held that the Statute of Frauds could not be used against her claim to cover what would amount to a fraud. There was no suggestion that the assignment was obtained by fraud. So in the latter case it was held that the Statute of Frauds " was never intended to prevent the Court of Equity from giving relief in a case of plain clear, and deliberate fraud." Haigh, expecting an adverse decision in a pending suit, conveyed an estate to Kaye for a sum which was never paid, and on the understanding that—if other arrangements were not made—Kaye should reconvey. Kaye pleaded the Statute of Frauds. No fraud in the inception was suggested, but the Court ordered Kaye to reconvey the estate. These decisions are quite independent of section 8 of the Statute of Charles the Second.

It may be said that the principle followed in these cases receives no sanction from the Roman-Dutch Law. Then I say that the case may be put in another way. The land was bought on the 16th of November, 1898; the Fiscal's transfer was given to the defendant on the 6th of March, 1899. Between the purchase and the transfer the defendant constantly acknowledged that the plaintiff was the owner of the land, and induced him to lay out money on it (see his letter of the 12th December, 1898). He is clearly estopped from asserting the contrary now.

The Judge makes some reference to the plaintiff's expedients " nicely balanced for defeating creditors." The plaintiff appears to be replete with expedients—he has too many; and I have strong suspicions as to his proceedings in this case. His own witness, D. Gould, says " plaintiff, and defendant, and Williams were all one at that time." But I think there is not enough in the case to prove that the plaintiff's object was to defeat his creditors, and that he and the defendant were *in pari delicto*.

I think that the plaintiff is entitled to a declaration that the purchase in the defendant's name should enure to his (the plaintiff's) benefit, and to a conveyance to him of the right, title, and interest passing under the Fiscal's transfer of March, 1899. I agree with

(1) (1894) 2 *Ch. D.* 133. (2) (1872) *L. R.* 7 *Ch. App.* 469.

my brother Middleton that the plaintiff should have his costs of appeal, but that each party should pay his own costs in the Court below.

MIDDLETON J.—

The question in this case is whether the defendant, who acted for the plaintiff in the purchase of an estate, and at the plaintiff's request obtained the conveyance in his (defendant's) name paying for it with the plaintiff's money on an understanding that the estate was subsequently to be reconveyed to the plaintiff, shall be allowed to get up the Statute of Frauds (Ordinance No. 7 of 1840, section 2) to evade that obligation.

To allow him to do so would be to use the Statute of Frauds to perpetrate and cover a fraud which is contrary to the principle enunciated by Lord Justice Turner in *Lincoln v. Wright* (1), and which the Court of Chancery in England has followed in many instances *Haigh v. Kaye* (2); *In re the Duke of Marlborough, Davis v. Whitehead* (3).

The cases quoted to us, *Godinho v. Perera* (4), *D. C., Kandy*, 55,940 (5), and *Simon v. Saibo* (6), are not on all fours with the case before us, as in those cases the fraud consisted in ignoring the instructions of the mandator and taking a conveyance in the mandatory's name, while in the case before us the defendant obeyed his mandator's instructions in taking a conveyance in his own name, but now fraudulently refuses to reconvey. There the question of a parol agreement to reconvey did not arise, but the mandatory acted in fraud of his mandator in obtaining the transfers in his own name, and the Court set them on one side on that ground. In the case before us all the evidence points to the conclusion that the plaintiff was the person who carried out the negotiations and provided the money and the legal adviser, and that the defendant acted as his agent and servant in possession of the property after the transfer to him. There is no evidence to point to the conclusion that the plaintiff intended to donate the property in question to the defendant, and the only reasonable inference is that it was understood that the defendant should hold in trust to reconvey to the plaintiff.

In this position of affairs the defendant says: "You cannot compel me to do so because you cannot prove a valid agreement

(1) (1859) 4 *De G. and J.* 16.
(2) (1872) *L. R.* 7 *Ch. App.* 469.
(3) *L. R.* (1894) 2 *Ch.* 133.
(4) *Ram.* (1860) 6.
(5) (1873) 2 *Grenier* 39.

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to reconvey the land under section 2 of Ordinance No. 7 of 1840, which I have failed to carry out."

The answer to this is, " Equity will not allow you to set up a Statute passed for the purpose of preventing frauds in order that you may perpetrate and cover a fraud." Although the proceedings of the plaintiff in reference to the purchase of this property were of a singularly occult nature, I do not think that there is sufficient evidence to indicate that their object was fraud, otherwise I would leave the plaintiff as he now is, on the principle *in pari delicto melior est conditio possidentis*.

The English enactment as to frauds having been engrafted on the Roman-Dutch Law with respect to immovable property, I can see no impropriety in deciding this case on the principle laid down and adopted in the English Courts in similar instances.

In the cases of *Silva v. Ranmenika* (1), *Andrewewe v. Bala Ettena* (2), and *Natchiar v. Fernando* (3) there was no fraud alleged or proved; and the case of *Ibrahim Saibo v. Oriental Banking Corporation* (4) does not appear to me to be in point here.

In my opinion therefore the judgment of the District Court should be set aside and the judgment entered for the plaintiff. As these proceedings have entirely arisen from the tortuous and mysterious conduct of the plaintiff, I would order that each party pay his own costs in the District Court, the plaintiff being only entitled to his costs of this appeal.

(1) (1889) 1 *Browne*, 268.
(2) (1884) 1 *Browne*, 269.
(3) (1900) 5 *N. L. R.* 56.
(4) (1874) 3 *N. L. R.* 148.