Present : Mr. Justice Wendt and Mr. Justice Grenier.

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OHLMUS *v.* OHLMUS.

D. C., Colombo, 21,828.

Purchase of land in another's name—Parol evidence—Implied or constructive trust—Fraud—Statute of Frauds (Ordinance No. 7 of 1840).

The plaintiff's testator bought a land from the Crown and obtained the grant in the name of the defendant (his mother), who was to hold in trust for the plaintiff's testator, and was to reconvey it to him at his request. The defendant having refused to reconvey the property, the plaintiff instituted this action to vindicate it. It was objected on behalf of the defendant that a trust relating to immovable property could not be proved by parol evidence.

Held (over-ruling the objection), that the plaintiff was entitled to prove the trust by parol evidence.

Gould v. Innasitamby (9 *N. L. R.* 177) followed.

GRENIER A.J.—Parol evidence is at all times admissible to establish a resulting or constructive trust where a transaction is intended to effect a fraud. It is not necessary that there should be fraud at the very inception of the transaction; it is sufficient if it arises subsequently.

APPEAL from a judgment of the Acting District Judge of Colombo (J. R. Weinman, Esq.)

The facts and arguments sufficiently appear in the judgment of Grenier A.J.

Walter Pereira, K.C., and *Bawa*, for the defendant, appellant.

Dornhorst, K.C., and *H. J. C. Pereira*, for the plaintiff, respondent.

Cur. adv. vult.

10th March, 1906. GRENIER A.J.—

This is an action by the plaintiff as the executor of the will of Oscar Oswald Ohlmus to vindicate a house called " St. Cuthbert's " as property belonging to his testator. The defendant is the mother of the testator, and asserted title to the house on a grant dated the 19th November, 1892, which she held from the Crown. The case for the plaintiff was that the land on which the house was subsequently erected was purchased by the testator for his own benefit and with moneys belonging to himself, and that the grant was obtained by him in the name of the defendant, who was to hold the said land in trust for the testator and reconvey the same to him at

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his request. It was also alleged by the plaintiff that his testator entered into possession of the land and improved the same by erecting thereon at his own cost and expense a substantial dwelling-house now standing on it and known as "St. Cuthbert's." The plaintiff further averred that his testator had obtained a title by prescription to the said house and land.

The substantial issues which were tried in the Court below were:—

(1) Was the land in question bought by the plaintiff's testator in the name of the defendant to be held by her in trust for him ?

(2) Did plaintiff's testator acquire a prescriptive title to the land ?

(3) Did the defendant acquire a prescriptive title to the land ?

These were the issues that arose on the pleading, and which were agreed to by counsel on both sides. After plaintiff's counsel had opened his case and was about to call his first witness the defendant's counsel proposed the following issue:—

Can the plaintiff, not having a notarial instrument, prove a trust by parol evidence ?

Counsel for the plaintiff rightly objected to this issue as it did not arise on the pleadings, but the learned District Judge accepted it and has adjudicated upon it, although all that the defendant averred in her answer was that her son, being desirous of making a gift to her and provision for her, purchased the land and caused the grant to be made in her favour, and having erected the house thereon placed her in possession of it to be held by her as her own property and not in trust for him. There was no indication in the answer of any desire on the part of the defendant to raise any question of law, such as was suggested by her counsel at the trial, but as the issue has been accepted and dealt with by the District Judge, I think it right that we should deal with it in appeal.

The facts have been clearly found by the District Judge in a lengthy and well considered judgment, and it is needless for me to recapitulate them here. It is enough to say that the evidence places it beyond all question that the land was purchased with moneys belonging to the plaintiff's testator, and that it was he who erected the house now standing thereon, and let it out to a large number of tenants from time to time. I think that the evidence is fairly conclusive on these points, although some parts of it were objected to as hearsay. The defendant admitted that her son was her mainstay and support for several years, and that in February, 1904, she received a letter from him asking her to transfer the house

to him, and that the defendant spoke to Mr. John Ohlmus, a brother of the plaintiff's testator and the head of the family, on the subject of transferring the property to the testator. The District Judge, in view of the high character which the defendant herself gave Mr. John Ohlmus, has expressly believed his evidence in every particular. Such then being the case, it follows that the plaintiff has established all that was necessary for him to prove in regard to the relation in which the defendant stood to the plaintiff's testator at the time, and after the date of the grant in her favour by the Crown. So far as the real ownership of the property was concerned, she was simply a trustee for the plaintiff's testator, and the reason why the grant was made in her favour appears clear from the evidence. Plaintiff's testator was employed under Government as a surveyor, and was interdicted from purchasing Crown property for obvious reasons, and therefore the grant was made out in her name. She only lent her name, and judging from her own evidence and that of the witnesses called by her, as well as from the evidence called by the plaintiff she has apparently fallen a victim to the evil influence brought to bear on her by her son James in setting up her present defence. I think Mr. Dornhorst's strictures on the part that James has played in this matter were fully deserved; and a perusal of his cross-examination has satisfied me that he may well be looked upon as the instigator of what I do not hesitate to characterize as a false defence on the merits. Mr. Walter Pereira for the defendant argued this point of the case faintly, and indeed, if I am not mistaken, he did not attack the judgment of the District Judge on the facts, but relied on the legal objections that were raised by the additional issue which was suggested after the trial had commenced. I shall now address myself to that issue, as also to the question of prescription, which was argued before us.

It was submitted by the appellant's counsel that to create a trust there must have been an agreement, and that there must be fraud at the inception of the transaction. Now, the District Judge has held, and as I think rightly, that there was an implied understanding or agreement (which in certain circumstances is just as strong as an express understanding or agreement, and such circumstances are to be found in this case) between the plaintiff's testator and the defendant that the defendant should hold the property in trust for him and convey it to him at some future time. So long as the plaintiff's testator was in the service of Government, he could not ask his mother to transfer the property to him, but after he had retired from the public service, the defendant sent for Mr. John Ohlmus and told him that she was not in very good health, and expressed a desire to give the

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property back to her son as it was nominally in her name, and she wished that the deed should be in her son's name. We have therefore evidence from the lips of the defendant herself which throws into strong relief the fiduciary relation in which the mother stood to the son both at the date of the Crown grant and after. Such a relation may be brought about either by express agreement or by the conduct of parties, and our law makes very little distinction, if any, as I understand it, between an express and an implied trust. Certainly in order to establish an implied or resulting or constructive trust parol evidence is admissible, and the admission of such evidence does not violate the provision of our local Ordinance of Frauds; and as was held in the case of *Ibrahim Saibo v. The Oriental Bank Corporation* (1), parol evidence is at all times admissible to establish a resulting or constructive trust where a transaction is intended to effect a fraud. The question therefore is, whether it is essential that the fraud must be at the very inception of a transaction, or whether in cases where the fraud arises subsequently, it is open to the person who is defrauded to lead parol evidence to establish the trust. For my own part, I do not see why any distinction should be drawn between a case of fraud at the inception and fraud committed subsequently. Equity always relieves in cases of fraud, and it seems to me a monstrous proposition that an Ordinance which was intended to prevent frauds should be invoked in order that a fraud may be perpetrated under its shelter. The opinion that I have expressed has often been expressed from this Bench, and I therefore think that it is wrong and illogical to hold that there must be fraud only at the inception of a transaction. The present case is a typical one. It was readily granted by the counsel for the respondent that there was no fraud at the inception of the transaction between the defendant and the plaintiff's testator, but that the fraud dated from the time when the defendant with full knowledge of the fact that she was only a trustee for the plaintiff's testator, and that the property had been purchased with his money, refused to convey the property to him, although it was tacitly understood between them that the real owner was the plaintiff's testator, and it was only for a temporary purpose that the grant was made out in favour of the defendant. It is clear that according to section 2 of Ordinance No. 7 of 1840 oral evidence is inadmissible in cases relating to land, *Nachiar v. Fernando* (2). But where there is fraud the proposition may be stated broadly that oral evidence is admissible. Now, on closely considering the provisions of Ordinance No. 7 of 1840, section 2, it will be seen that they were intended to prevent

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

(2) (1900) 5 *N. L. R.* 56.

fraud and perjury in respect of the ownership of land, and therefore section 2 required that all transactions referring to land should be in writing notarially executed; section 2 made it impossible for A to come forward and say " I am the owner of this land, the same having been sold to me by B on a certain day," and to lead evidence of a verbal sale or transfer or assignment to him. That is quite a different thing from A coming forward and saying "I gave B money to buy the land for me and he has had the deed made out in his own name," or, as in the present case, where the defendant knew very well that she was only the nominal purchaser, and knowing that she refuses to transfer the land to the real purchaser, whose money was paid for the land. Once the distinction, which does not seem to me to be founded on reason or good sense, between fraud at the inception and fraud subsequently is brushed aside as mere sophistry, the ground is made clear for the admission of parol evidence in respect of both classes of cases.

In the cases that were cited before us in argument dating down from *Ramanathan* 1860-1862, namely 3 *S.C.C.* 103, 3 *N. L. R.* 148, 5 *N. L. R.* 188 and 56, 1 *N. L. R.* 228, and 2 *N. L. R.* 255, the point that I have hitherto been dealing with does not appear to have arisen, and therefore it was not discussed. In a recent case, however, which has unfortunately not been reported, *Gould v. Innasitamby* (1), which was argued before Moncreiff and Middleton J.J., and which is practically on all fours with the present case, the matter was well put by Mr. Justice Moncreiff when he said that " 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. "

Mr. Justice Middleton in the course of his judgment made the following observation, with which I entirely agree. After stating the case for the plaintiff and the defendant he said:—" In this position of affairs the defendant says: ' You cannot compel me to do so because you cannot prove a valid agreement 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. " Earlier in his judgment Mr. Justice Middleton made the following observation:— " 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* (2), and which

(1) (1904) 9 *N. L. R.* 177.

(2) 4 *De G. and J.* 16.

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the Court of Chancery in England has followed in many instances *Haigh v. Kaye* (1), *In re the Duke of Marlborough, Davis v. Whitehead* (2). " Counsel for the appellant sought to draw a fine distinction between section 2 of Ordinance No. 7 of 1840 and section 7 of the English Statute of Frauds. The point has been exhaustively discussed by Mr. Berwick, District Judge of Colombo, in *Saibo v. The Oriental Bank Corporation* (3), and I have nothing to add to his judgment. The judgment was affirmed in appeal by a Full Bench consisting of Morgan A.C.J. and Stewart and Cayley J.J.

On the question of prescription, it was argued for the appellant that, assuming the plaintiff's testator had possession of the premises in question from the date of the grant in favour of the defendant, there was an acknowledgment by him of his mother's title when he allowed her to mortgage the land in June, 1899, for Rs. 6,000. Mr. Alwis's evidence throws the true light on this transaction; and from his evidence it would appear that it was the plaintiff's testator who made the application for the loan, although the mortgage bond was signed by the defendant, and that it was he who paid the interest on the loan with his own cheques till about the beginning of 1904. It is clear, therefore, that plaintiff's testator and the defendant both looked upon " St. Cuthbert's " as the property of the former, and there was no interruption of the plaintiff's testator's possession at any time.

It was a submitted by the defendant's counsel that the defendant had paid off the mortgage created by her on this property for the benefit of the plaintiff's testator, and that she was entitled to be repaid the amount as in the nature of an improvement to the property. I can find no distinct evidence on the point beyond a statement made by the defendant in her examination in chief that she raised a loan and paid off Mr. Alwis's mortgage in December, 1904, after her son's death. It does not appear clear whether or not the mortgage was paid off by the property being mortgaged again, but I find that in the last will of the plaintiff's testator he has made express provision that the mortgage amount, namely, Rs. 6,000, should be repaid out of his estate. No application was made to the Court below in respect of this sum, nor is any mention made of it in the petition of appeal, and I cannot see my way to make any definite order on the subject.

For the reasons I have given, I would dismiss the appeal with costs.

WENDT, J.—I am of the same opinion both on the question under the Ordinance of Frauds and Perjuries, and on the question of prescription, and I agree that the defendant's appeal should be dismissed.

(1) *L. R. 7 Ch. App.* 469. (2) *L. R.* (1894) 2 *Ch.* 133.
(3) *N. L. R.* 143.