Present: Dalton J. and Jayewardene A.J. 1926

PUNCHI HAMINE *v.* UKKU MENIKA.

10—D. C. Kandy, 32,059.

Concealed Fraud—Decree obtained by suppression of deed—Constructive trust—Sections 88, 111, and 118 of Ordinance No. 9 of 1917—Discovery of concealed fraud—Prescription—Sections 3 and 14 of Ordinance No. 22 of 1871.

Where a decree is entered in pursuance of an agreement induced by fraud, the party obtaining property under the decree and, those claiming from him as volunteers, hold the property so obtained in trust for the party defrauded.

The cause of action in such a case arises on the discovery of the fraud.

IN 1883 one Punchirala, a Kandyan Sinhalese, made a gift of the land, the subject matter of the action, to his three sons Appuhamy, Kiri Banda, and Punchi Appuhamy. In 1884 he purported to convey, on a duly registered deed, for consideration, this and other property to the sons. Appuhamy died in 1889; Kiri Banda died in 1912 leaving surviving him Punchi Hamine, his widow, and an only son, Sirisena. In June, 1913, Punchirala revoked the deed of gift of 1883 and gifted property, including the land in dispute, to Punchi Appuhamy. On the strength of the revocation of the first deed of gift, Punchirala commenced, in November of the same year, proceedings against Punchi Hamine and Sirisena to eject them from the land. Punchi Appuhamy himself was made a defendant to this action; the existence of the deed of conveyance of 1884 was not disclosed. The widow, on behalf of herself and her child, resisted the claim, but was obliged to yield to a settlement. On land, built by her husband, Kiri Banda, she surrendered the house and the land; and a decree in terms of the settlement was entered. Punchi Appuhamy thereupon occupied the house, and continued in possession of the house and the land until his death in 1923. It was only after this that Punchi Hamine became aware of the deed of transfer of 1884. Punchi Hamine, personally and as administratrix of the estate of Sirisena, instituted the present action against the widow of Punchi Appuhamy to have the decree in the earlier action set aside. Her complaint was that this decree was obtained by fraud, in that the existence of the deed of transfer of 1884 was deliberately suppressed.

The learned District Judge gave judgment for the plaintiff.

H. V. Perera (with *Vethavanam* and *Deraniyagala*), for defendant, appellant.

R. L. Pereira, for plaintiff, respondent.

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September 7, 1926. DALTON J.—

The plaintiff Punchi Hamine brought this action personally and as the widow of Kiri Banda, and as administratrix of the estate of her son Sirisena, against the defendant Ukku Menika as administratrix of the estate of Punchi Appuhamy to have the decree in action D. C. 22,536 set aside on the ground of fraud, for a declaration that she (plaintiff) was entitled to a half share of the tract of land described in the plaint, together with the entirety of the house and shed No. 411 built by her late husband, Kiri Banda, and a half share in house No. 412, and in addition to *mesne* profits and damages after setting off the sum awarded to plaintiff as compensation in D. C. 22,536.

The land, the subject of this claim, originally belonged to Punchirala, who had three sons, Appuhamy, Kiri Banda, and Punchi Appuhamy. In 1883 by deed P1 he gave this land to these three sons, who at the time, as the deed sets out, were about 11, 8, and 6 years old respectively. The next year, 1884, by deed P2 he purported to convey this same tract of land, together with other properties to his three sons in consideration of the sum of Rs. 300, which he acknowledged to have received previously. The third paragraph of deed P2 makes mention of the deed of gift P1. P2 was duly registered on March 11, 1885. Kiri Banda was married to Punchi Hamine (plaintiff) and died in 1912. It is stated he died in the house he had built on the land in dispute. He left the widow, Punchi Hamine, and a son Sirisena. Sirisena himself died in 1919.

The eldest brother, Appuhamy, is said to have died in 1889.

On June 14, 1913, by deed D1, Punchirala revoked his deed of gift P1, and on the same day, by deed D2, purported to donate the land, the subject of that former deed of gift together with other land, to his surviving son Punchi Appuhamy. Punchi Appuhamy is now dead, and the defendant is his widow and administratrix.

The action, D. C. 22,536, already referred to, was instituted on November 7, 1913, by Punchirala as plaintiff, against his son Punchi Appuhamy, Punchi Hamine, and Sirisena by his guardian *ad litem*, as defendants. The plaint (P3) refers to the deed of gift (P1) and its revocation in 1913. It then recites that the second and third defendants, Punchi Hamine and her son, are disputing his (Punchirala's) claim to the land in question and continue in wrongful possession of it. He, therefore, claims that he may be declared entitled to the land and house thereon. A claim for damages was added. In addition Punchirala stated he had been in undisturbed and uninterrupted possession of the land by a title adverse to all three defendants for a period of ten years and upwards, in terms of section 3 of the Prescription Ordinance, 1871. This, it must be noted, was a few months after the execution of the deed of donation (D2) to Punchi Appuhamy the 3rd defendant. This defendant

made no answer to his father's plaint. The 2nd and 3rd defendants resisted the claim, but after the action came before the court agreed to settle the matter and accept compensation for the house which Kiri Banda had built on the land. This compensation, Rs. 700, was paid in March, 1914, and a decree was entered on March 11, 1914, for the declaration sought in terms of Punchirala's plaint by consent.

The action (No. 32,059) out of which this appeal arises was brought by Punchi Hamine, in the capacities already set out, on August 13, 1924, to set aside that decree of March 11, 1914. She pleads that when she consented to the order made in action No. 22,536 she was wholly in ignorance of the deed of sale (P2) of 1884, of the existence of which she did not become aware until March, 1923, and that the fact that that deed of sale had been executed by Punchirala was fraudulently concealed by him and by Punchi Appuhamy in order to defraud her and her son and to deprive them of their share in the land under the deed. When this action came on for trial it was agreed that such rights as Punchirala obtained on the decree in action No. 22,536 are now vested in the defendant, the present appellant. After hearing evidence the trial judge came to the conclusion that in 1913, when action No. 22,536 was brought it was the duty of Punchirala to have revealed the existence of the deed of sale (P2) of 1884, and that his failure to do so was a deliberate fraud on the present plaintiff and induced her consent to the decree entered in the action. He further held that her present claim is not barred by prescription in view of the fact that prescription will commence to run from the date of the discovery of the fraud which was in March, 1923. He accordingly set aside the decree entered in action No. 22,536 and declared the plaintiff entitled to a one-third share of the land in dispute, subject to the defendant being credited with the sum paid to plaintiff in action No. 22,536 as compensation for the house already mentioned.

From this decision the defendant appeals. The appeal may be said to be based on four grounds:—

(1) There is no sufficient proof of any fraud on the part of Punchirala.

(2) The cause of action to set aside the decree in action No. 22,536 is prescribed.

(3) The action is not available as against the defendant, Punchi Appuhamy, the donee of Punchirala, being no party to any fraud.

(4) Defendant has acquired a title by prescription.

On the first ground, it seems to me that there was sufficient evidence before the learned Judge whence he might come to the conclusion that Punchirala had committed the fraud alleged on the plaintiff, and hence I would not interfere with his finding on

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that point. In my opinion under the circumstances here there was a duty imposed upon Punchirala to disclose the deed of sale; the suppression of the fact of its existence induced Punchi Hamine to consent to the decree entered against her, and had she had knowledge of the deed she would not have given her consent. The major part of the argument addressed to the court deals with the second and fourth grounds I have set out above.

On the second ground (and at some points of the argument the third ground was also incidentally dealt with) Mr. Perera sought to distinguish between the law as applicable to such a case as this in England and in Ceylon. Numerous English authorities were cited, but in my opinion it is here not necessary to refer to them for the decision of the Privy Council in *Dodwell & Co., Ltd., v. John*[1] is binding upon this court, and the law there laid down on the facts there would seem to me up to a point to be directly applicable to this case. The fraud of Punchirala was itself the suppression or concealment of the deed of 1884, the fraud committed in *Dodwell & Co., Ltd. v. John* (*supra*) was the drawing of cheques by an employee for himself and in his private interest in the name of his employers. A question arose there as to whether the claim of the plaintiff company was prescribed under the provisions of section 10 of the Prescription Ordinance. Under the law of England, Lord Haldane, in the judgment of the Board, points out that the Statute of Limitation did not apply to any jurisdiction of Courts of Equity which was not strictly concurrent with the jurisdiction of the courts of common law over causes of action which were within it. He goes on to state however:—

> "The Prescription Ordinance of Ceylon governs the whole of a jurisdiction which is general, including law and equity in one system and therefore the Ordinance is operative in the present case to bar the claim to the extent of the two earlier cheques unless the cause of action can be shown to have arisen later than their dates because of discovery for the first time of a concealed fraud."

On this authority it seems to me that the Prescription Ordinance is operative to bar the claim of Punchi Hamine, unless the cause of action on the fraud can be shown to have arisen later than the date of the fraud because of discovery for the first time of a concealed fraud. As did the employee in *Dodwell & Co. v. John* (*supra*) so did Punchirala, it seems to me, conceal a fraud, which was not discovered by plaintiff until March, 1923. But the appellants there were innocent parties. Here plaintiff pleaded collusion between Punchirala and Punchi Appuhamy, and an issue was framed on that question, but the learned judge did not deal with it. Punchi Hamine, in her evidence, however, admits that she cannot say that any of the

[1] *(1918) 20 N. L. R. 206. & 18 A.C. 563.*

sons of Punchirala were aware of the existence of the deed P 2. Assuming then that Punchi Appuhamy was an innocent party how is the appellant affected? Lord Haldane continues:—

> "Where the cause of action is for concealed fraud, must the fraud be that of the defendant personally or of some person for whose action in doing so he is directly responsible? No authority from Ceylon was cited at the bar on this question but their Lordships think that on principle the answer must be in the affirmative."

Then referring to certain passages in the Digest he states:—

> "They illustrate a general principle applicable in Ceylon and in England that to enable the defence of concealed fraud to be relied on as giving a new cause of action the fraud must be shown to be the fraud either of the defendant himself or of some one for whose action in the matter in question he has assumed responsibility . . . . The passage quoted shows that the doctrine of imputed fraud was closely confined in its application by the Roman jurists to the defendant either actually guilty of or legally responsible for the fraud."

Finally Lord Haldane states:—

> "In the present case there is a Statute of Limitation, and in order to escape from its application it is necessary to show that there is a subsequent and independent cause of action which arises from the concealment of the fraud such a separate cause of action arises, as their Lordships have already said, only out of the conduct of a person who is held to have been responsible for the fraud and has in breach of his duty concealed it."

But, so far as this appeal is concerned, the matter does not end there, for Punchirala cannot put the property beyond the reach of the plaintiff by a gratuitous alienation, nor can the donee claim the benefit of the donation in face of the fraud of the donor. Fraud on the part of the donor is sufficient to invalidate the donation even though the donee had no knowledge of the fraud or of the circumstances whence it is inferred. This matter is fully considered in *Kannappen v. Mylipody*.[1] That case, it is true, is one of fraud on creditors in an insolvency. But the principle applied is applicable here, where the facts are even stronger, for Punchirala purported to donate what he had already disposed of by deed, although it is true that the decree which he had obtained by fraud declared him to be the owner of the property. That decree, however, was the result of an agreement entered into between him and the plaintiff. Under the circumstances, I am of opinion that the provisions of section 88

[1] *(1872) 3 N. L. R. 274.*

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of the Trusts Ordinance relied upon in the course of the argument apply. The agreement was induced by the fraud of Punchirala who is the transferee. The decree effected the transfer agreed upon. He, therefore, held the property for the benefit of the transferor, subject to the repayment by her of the compensation she had received. Punchirala being the perpetrator of the fraud he clearly had notice of it.

I would, therefore, hold that a subsequent cause of action to set aside the decree and the donation to Punchi Appuhamy which followed on that decree arose to the plaintiff from the concealment on the discovery of the concealed fraud, and that although Punchi Appuhamy was not actually or legally responsible for the fraud. the defence based upon the deed of donation of 1913 must fail in view of the fraud of the donor. In my view of the case the cause of action is therefore not prescribed. In considering this ground of appeal it is not necessary in my opinion to consider the provisions of section 118 of the Trusts Ordinance, 1917. No argument was addressed to us on the point, and any reliance upon the section, from its very terms, would require very careful consideration.

With reference to the fourth ground of appeal, whether or not the defendant has acquired title by prescription to the plaintiff's interests in the land in dispute, this matter was not dealt with by the learned trial judge; it has not been seriously contested, however, on appeal that the former is entitled to the benefit of section 3 of the Prescription Ordinance, 1871. Upon that point therefore, I agree to the order proposed by my brother. Subject to that variation I would dismiss this appeal, but would direct that, as each party has succeeded in part in both Courts, plaintiff having failed in proving fraud on the part of Punchi Appuhamy, each party pay their own costs of trial and of this appeal.

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In this case the plaintiff seeks to set aside a decree passed in the year 1913, on the ground that it had been obtained by a fraud which was concealed and was not discovered till the year 1923, and to be declared entitled to the property which was transferred by the decree. It is common ground that one Punchirala was the owner of the land in question in this case. He had three children: Appuhamy, Kiri Banda, and Punchi Appuhamy to whom by deed of gift No. 6,937 of the year 1883, he gifted the land in equal shares. This deed was unregistered. In the following year, that is in 1884, by deed No. 7,105 duly registered, he sold and transferred the same land to his three children who were still minors aged 12, 9, and 7, respectively. Subsequently, his son Appuhamy died unmarried. Kiri Banda married the plaintiff and died leaving his widow and a child Sirisena. In the year 1913, Punchirala ignoring the deed of sale of the year 1884, purported to revoke the deed of gift No. 6,937

of the year 1883, and gifted the entire land in 1913 to Punchi Appuhamy, his sole surviving son. In the same year, Punchirala, the father, brought an action No. 21,930 of the District Court of Kandy, against the present plaintiff, Punchi Hamine, the widow of Kiri Banda, while that action was pending he instituted action No. 22,536 against Punchi Appuhamy (1st defendant). Punchi Hamine (2nd defendant) and Sirisena (3rd defendant) who was represented in the action by his guardian *ad litem* Punchi Hamine. He alleged that he had gifted the land in question to his three children by deed of gift No. 6,932 of the year 1883, which was not delivered or acted upon, and that he had revoked it by deed No. 4,123 of the year 1913. He complained that the 2nd and 3rd defendants were disputing his title to the land and wrongfully occupying the house on it. The 1st defendant was made a party as his presence was necessary for the complete adjudication of the case. He asked for a declaration of title, ejectment, and damages. He made no mention of the fact that he had sold the property to his children in the year 1884. Kiri Banda's widow and child filed answer. They contended that the deed of gift of the year 1883 was irrevocable, and that Kiri Banda had built a house on the land at a cost of Rs. 1,500. They were evidently not aware of the deed of sale of the year 1884, and it was not relied upon as the base of title. At the trial the parties came to an agreement settling both the cases No. 21,920 and No. 22,536 by which the defendants were to waive all their claims, whatever they may be, under the deed of gift of the year 1883 on their being allotted compensation for the house built by Kiri Banda. On the following day the Court made the following order:—"My order is that the plaintiff do bring into Court for the use of the representatives of Kiri Banda a sum of Rs. 700, and that on such sum being deposited the 2nd and 3rd defendants do give up possession, and decree be entered accordingly in connection with the agreement of yesterday. Costs divided." The decree entered has not been read in evidence in this case, but we may assume that formal decree was entered. The defendants received their compensation and surrendered possession of the land and the house. Sirisena died in the year 1919 while still a minor. Punchi Appuhamy, to whom the land had been gifted in 1913, entered into possession of the land and died about the year 1923. At the funeral of Punchi Appuhamy, the present plaintiff came to hear of the transfer of the year 1884. In August, 1924, she commenced the present action, personally and as administratrix of the estate of her son Sirisena, against the administratrix of the estate of Punchi Appuhamy. She alleged that the deed of sale of 1884 was fraudulently concealed by Punchirala with the object of defrauding her and her deceased son Sirisena, and of depriving them of their right to their share of the land which they were entitled to under the deed of sale, and that the decree in action No. 22,536 was obtained by Punchirala acting

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in fraud and collusion with his son Punchi Appuhamy by concealing the fact of the execution of the deed of sale. She prayed that the decree entered in action No. 22,536 be set aside and declared null and void as having been obtained by fraud and collusion, and that she be declared entitled to a half share (later restricted to ½) of the land and the buildings on it, *mesne* profits, less the sum paid as compensation, &c. The defendant who, as I said is the administratrix of Punchi Appuhamy's estate, and also his widow, claimed the land on the deed of gift executed by Punchirala in favour of Punchi Appuhamy, and pleaded that the decree in 23,536 was *res judicata* and that it was not competent for the plaintiff to ask to have the judgment set aside as her claim was barred by prescription. She denied the allegation of fraud and collusion and asserted that she and her predecessors in title had acquired a title to the land by prescription. At the trial several admissions were made and recorded, and one of them was that Punchirala *sold* the land to his three children by P2, that is the deed of sale No. 7,105 of 1884, another that Kiribanda left as his heir Sirisena, who died in 1919 aged 8, and the following issues were framed:—

(1) Was the duty cast on the plaintiff in D. C. 22,536 to reveal the existence of the deed P2?

(2) Was the failure to reveal the existence of such deed a fraudulent act on the part of such plaintiff?

(3) Were the 2nd and 3rd defendants in 22,536 induced by such fraud to give up all claim to the land?

(4) If so, is the plaintiff in this case entitled to ask for such judgment and decree to be set aside on the ground of fraud?

(5) If there was fraud on the part of Punchirala, is the title of Punchi Appuhamy under P2 affected thereby, and if so, to what extent?

(5A) Was there collusion between Punchirala and Punchi Appuhamy in the matter of such fraud?

(6) Has the defendant obtained a title by prescription to what is in dispute?

(7) What damages, if any, is plaintiff entitled to?

(8) What compensation, if any, is the defendant entitled to claim?

(9) Is plaintiff's action to set aside the decree barred by prescription?

The plaintiff in her evidence stated that she agreed to judgment in case No. 22,536, and was not aware of the existence of P2 at the time, she consented to judgment. She heard of it for the first time in 1923 at Punchi Appuhamy's funeral when Paulis Conductor informed her. She then got a copy of it. The deed had been registered. Paulis Conductor was also called as a witness, and he stated he knew Punchirala had executed a deed in

favour of his three sons. He questioned plaintiff about it at Punchi Appuhamy's funeral, and she said she knew nothing about it. The defendant called no evidence. The learned District Judge upheld the plaintiff's claim and set aside the decree entered in D. C. 22,536 declaring it null and void. In the course of his judgment he said:

" When Kiri Banda died, his wife was in ignorance of the existence of the deed, and Punchirala ceased to have any further interest in her and her child, and set about depriving them of their right under the deed. In bringing both his first action 21,920 and the subsequent action 22,536 he suppressed all mention of the existence of the transfer for the custody of which he was responsible. He pleaded only the deed of gift executed by himself and its subsequent revocation, and the present plaintiff had no reason to suspect that there was any other title. Under the circumstances, no duty was cast on her to examine the register of encumbrances. There was, therefore, no negligence or laches on her part. I think it was the duty of Punchirala to have revealed the existence of the transfer P2, and that his failure to do so was a deliberate fraud. It is clear that it was this fraud which induced the plaintiff to consent to the settlement which she now seeks to avoid. I think she would be entitled to that relief, unless her claim is barred by prescription. That will depend upon the date from which prescription will commence to run. In this case it will be from the date of the discovery of the fraud, which was in March, 1923. The action is therefore not barred."

He declared the plaintiff entitled to a one-third share of the land and to the entirety of the house subject to the right of the defendant to retain possession till the sum of Rs. 250, which he found was the balance due to the defendant out of the compensation Rs. 700, and legal interest thereon after deducting *mesne* profits, was paid to her. The question whether the defendants had acquired a title to the land by prescription was not discussed or decided. The District Judge was evidently under the impression that that question did not really arise, as Sirisena at the date of his death in 1919 was eight years of age, and ten years had not elapsed between that date and the institution of the action. But the question necessarily arises as the plaintiff, as the widow of Kiri Banda, had a life interest in his acquired property—a right independent of that of her son. The judgment of the District Judge has been assailed on several grounds, and several important and interesting questions developed at the argument before us. In the first place it was contended that there has been no fraud or concealed fraud on the part of Punchirala in connection with action No. 22,536, when he failed to disclose the fact that he had sold the land to Kiri Banda and others in the year 1884. The expression " concealed fraud " is well known in English equity jurisprudence. It appears in section 26 of the Real

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Property Limitation Act, 1833 (*3 & 4 Will. IV., Ch. 27*), which as Lindley L.J. said in *Thorne v. Heard*,[1] is a legislative recognition and expression " of previously well settled principles in equity," and has been much discussed by the Courts in England. In the case of *Willis v. Earl Howe*,[2] Kay L.J. thus explained it: Vice-Chancellor Kindersley in *Petre v. Petre* (*1853-1 Dre-397*) says: ' What is meant by concealed fraud? It does not mean the case of a party entering wrongfully into possession, it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold.' That is not an exhaustive definition, and perhaps none could easily be given of the meaning of ' concealed fraud.' It is not merely an ' unknown fraud,' but the word ' concealed ' seems to indicate that there were facts known to the person who enters and designedly concealed by him from the real owner, which facts, ' if known,' would enable the real owner to recover. The deprivation of which the section speaks in such a case is by the fraudulent entry. But that which makes a wrongful entry fraudulent is, not only the knowledge, but the concealment of those facts. If they had been disclosed, and the person who disclosed them had nevertheless entered, the entry would have been wrongful; but would it have been fraudulent? The section seems to point to some contrivance by which the real owner had not merely been deprived, but defrauded, in the sense of being induced to believe that he was not owner, and that the person who so entered was owner and entitled to enter." The present case, in my opinion, falls within that definition of " concealed fraud." The failure of Punchirala to disclose the sale of 1884, which was known to him and was, as the District Judge finds, designedly concealed by him, defrauded the real owners, the widow and the child of Kiri Banda, who were induced to believe that they were not the real owners and that he, Punchirala, was the owner and entitled to possession. Then it is said that the existence of the sale of 1884 could have been discovered with reasonable diligence as the deed had been duly registered. But, as the learned District Judge says, the widow had no reason to suspect that her deceased husband had any other title than the deed of gift of 1883 and no duty was cast on her to examine the register of encumbrances. Registration under our law is not notice to all the world. Further, in the case of *Vane v. Vane* [3]—also a case of concealed fraud—where a younger son, the claimant was induced by a deception practised on him from earliest childhood to believe that he was not the heir, but that a son born before the marriage of the parents was the legitimate heir, it was contended that the claimant could have discovered the true facts earlier as the marriage of the parents and the birth of the illegitimate son had been registered and the

[1] (*1894*) *1 Ch. 599 (605).*

[2] (*1893*) *2 Ch. 545 (553).*

[3] (*1872*) *L. R. 8 Ch. 383.*

baptismal register had been altered to show that the illegitimate son was born before the marriage, the Court held that there had been no want of due diligence as neither the claimant nor anyone on his behalf had seen the entry in the register before the fraud was discovered. In the present case, there was no occasion for the plaintiff to search the register of deeds, and it was only after she became aware of the existence of the deed of sale in the year 1923, and discovered the fraud, that she obtained a copy of the register. She was entitled to regard the title set out by Punchirala in his plaint in 22,536 as correctly and truly set forth, and to act accordingly. In that case the person most affected was the minor Sirisena, and under our law no agreement or compromise of a minor's rights by a guardian *ad litem* is valid without the leave of the Court. (See section 500, Civil Procedure Code.) The sanction must be express, and it is incumbent on the parties to place before the Court all the material facts so as to enable the Court to decide whether the agreement or compromise is in the interest of the minor. See *Solomon v. Abdul Azeez*,[1] there the Calcutta High Court in construing section 462 of the Indian Civil Procedure Code of 1882 which is the same as section 500 of our Code followed the principle laid down in the English case of *Brooke v. Lord Mostyn*[2] where a compromise approved by the Court on behalf of an infant was questioned, and Pontifex J. said: "Lord Justice Turner at page 416 considers what circumstances will furnish sufficient ground for impeaching a compromise made under the order of the Court. He says with respect to a compromise between adults: 'If there be no fraud, and equal knowledge on both sides, the compromise cannot be disturbed; but if there is knowledge on one side, which is withheld, the compromise cannot stand, because the withholding of the knowledge amounts, in the view of a Court of Equity, to fraud.' And he proceeds to say, that the rule is the same when a compromise is sanctioned by the Court on behalf of an infant.

I confess I am myself inclined to think that even a higher degree of good faith is due when the Court's sanction is required, because that sanction is equally necessary for both parties; and each party is, in my opinion, bound to see that the materials before the Court are unimpeachable."

The agreement merged in a decree now impeached in this case was never expressly sanctioned, and would be liable to be set aside at the instance of the minor. I am, therefore, of opinion that Punchirala committed a fraud in connection with case No. 22,536, and that it was a concealed fraud.

When did the cause of action to have the fraudulent decree set aside accrue? Did it accrue when the decree was entered, or when the concealed fraud was first discovered? It is conceded that the

[1] *(1881) 6 Cal. 687.*

[2] *De G. J. and S. 373*

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claim would be prescribed unless the action is brought within three years of its accrual, under section 11 of the Prescription Ordinance of 1871. If the rule of law be as contended for by learned Counsel for the appellant, that is, that under our law the cause of action accrues and prescription commences to run from the date of a concealed fraud unless some fresh act is done (which is absent in this case) to prevent the detection of the fraud which would give rise to a fresh cause of action, plaintiff's right to bring the action personally would have become prescribed after three years from 1913, the date of the decree, and after three years from the date of Sirisena's death which took place in 1919, in respect of her claim as successor in title to Sirisena. As the action was only brought in 1924, both causes of action would, therefore, be barred by prescription. But, in my opinion, the rule under our law in the case of concealed fraud is not as contended for by learned Counsel. A cause of action arises on the discovery of the concealed fraud. It is conceded that under the English Law, as administered by the Courts of Equity, this is so: Thus in *Ralfe v. Gregory*,[1] Westbury L. C. said: " As the remedy is given on the ground of fraud, it is governed by this important principle that the right of the party defrauded is not affected by lapse of time, or generally speaking, by anything done or omitted to be done, so long as he remains, without any fault of his own, in ignorance of the fraud that has been committed, " and in *Bullicoal Mining Co. v. Osborne*,[2] Lord James of Hereford delivering the judgment of the Judicial Committee said: " The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection (of a concealed fraud) is opposed to common sense as well as to the principles of equity." See also *Oelkers v. Ellis*,[3] where the above cases and others are referred to and followed. But it is said that our Prescription Ordinance applies to all actions whether at law or in equity indifferently and time begins to run from the moment the cause of action accrues, that is on the commission of the fraud, but a fresh cause of action might accrue not on the discovery of the fraud, but on the commission of a positive act intended fraudulently to conceal the original fraud and the cause of action it gave rise to. This contention, it was strenuously submitted, is supported by the judgment of the Privy Council in the local case of *Dodwell & Co. v. E. John & Co.*[4] In this case the Agent and Manager of the Plaintiff Company had paid to the defendants large sums of money which he personally owed the defendants with cheques drawn by him as Agent for the plaintiff. The Agent was held to have committed and concealed a fraud. To properly understand the judgment of the Privy Council it is necessary to state that in the judgments of this Court in appeal, reported in 1915,

[1] *(1865) 4 D. J. & S. 576 (579).*
[2] *(1899) A. C. 351.*
[3] *(1914) 2. K. B. 139.*
[4] *(1918) 20 N. L. R. 206 ; (1918) A. C. 663.*

18 N. L. R., 133, the Court (Pereira, Ennis, and Shaw JJ.—Ennis J. *diss.*) applied the equitable principle laid down by the English Courts without qualification, and Pereira J. said: "This Court has often pointed out that our Courts (in Ceylon) are Courts of Law and Equity, and it would be quite in order to give here the same relief as is given in English in cases of fraud. The point has hardly been contested . . . . In my opinion, the term of prescription should be deemed to have commenced in this case, at the time of the actual detection of the fraud . . . . ."

But this Court also held that the concealed fraud need not be the fraud of the person who seeks the protection of the Statute of Limitation, but might be that of any person through whom he claims. The judgment of Lord Haldane, in my opinion, shows that the Privy Council upheld the applicability of the equitable principle referred to in the judgment of Pereira J., but pointed out that the concealed fraud must be the fraud of the defendant personally, or of some person for whose action in doing so he is directly responsible both under the Roman Law and the English Law. It is on this second point that the Privy Council disagreed with the judgment of the Supreme Court. In fact the first point was not contested before the Privy Council. See the argument of Counsel as reported in (1918) A. C., pp. 565, 566. Lord Haldane, after pointing out that under the English Law the Statute of Limitations, did not apply to any jurisdiction of Courts of Equity which was not strictly concurrent with the jurisdiction of the Courts of Common Law, that is where the jurisdiction of the Courts of Equity was exclusive said: "The Prescription Ordinance of Ceylon governs the whole of a jurisdiction, which is general, including law and equity in one system, and therefore the Ordinance is operative in the present case to bar the claim to the extent of the two earlier cheques *unless the cause of action can be shown to have arisen later than their dates because of discovery for the first time of a concealed fraud.*" Then His Lordship proceeded to discuss the question whether the fraud must be the fraud of the defendant personally or of some person for whose action he was responsible, and decided it in the affirmative. "This appears," he observed, "to have been the view held by the Roman lawyers on whose system the law of Ceylon is founded." Then after considering certain passages from the *Digest*, he said, "The passage quoted shows that the doctrine of imputed fraud was closely confined in its application by the Roman Jurists to the defendant either actually guilty of or legally responsible for the fraud. Their Lordships are, therefore, of opinion that, according to the Law of Ceylon, the cause of action accrued, under the circumstances of this case, at the dates when the cheques were received and dealt with by the appellants . . . . ." that is not from the date when the fraud was discovered, as the fraud was not that of the defendant or of any person for whose acts he was directly

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responsible. The passages I have cited from the Judgment of Lord Haldane show that the discovery for the first time of a concealed fraud would constitute a cause of action arising later than the cause of action arising at the date of the commission of the fraud. If it were otherwise, it is difficult to understand why His Lordship should have considered the second question, that is, whether the fraud should have been committed by the defendant personally or by some one for whose action he was directly responsible. This question would not have arisen if the discovery of the fraud did not give a cause of action. Learned Counsel for the appellant relies strongly on a passage appearing lower down in the judgment where Lord Haldane was pointing out the inapplicability of such cases as *Huguenin v. Baseley*,[1] from which this Court had sought support for its views that the fraud of any person through whom the defendant claims was sufficient to let in the equitable principle in question. His Lordship said (p. 215), " But their Lordships have to point out that Lord Eldon was not there speaking of any new cause of action arising from a concealed fraud. No such question had arisen. He was simply illustrating the view taken by Courts of Equity in England when ordering the restitution of what they treated as a trust fund, and so exercising a jurisdiction which was exclusive, and to which no Statute of Limitation had any application. In the present case there is a Statute of Limitation, and in order to escape from its application it is necessary to show that there is a subsequent and independent cause of action which arises from the concealment of the fraud. Such a separate cause of action arises, as their Lordships have already said, only out of the conduct of a person who is held to have been responsible for the fraud and has in breach of his duty concealed it. Such cases are very different from what Lord Eldon was dealing with in *Huguenin v. Baseley* . . . . " This passage does not, in my opinion, lend support to the learned Counsel's contention. The " subsequent and independent cause of action which arises from concealment of the fraud " is, in my opinion, the discovery of the fraud and not another act of fraudulent concealment intended to prevent the detection of the concealed fraud or the original cause of action. This view is emphasized by what immediately follows: that such a separate cause of action arises only out of the conduct of a person who is responsible for the fraud and has concealed it in breach of his duty. In short, the Judicial Committee held that in that case no new cause of action arose when the fraud was discovered since the fraud was not that of the defendants nor of any person for whose acts they were responsible. So far as I can see in *Dodwell's case* there is no departure from the equitable principle applicable under the English Law to cases like the present. However, that may be, we are, I think, now bound to apply the English principle, as section 118 of " The Trust Ordinance

[1] *(1807) 14 Ves 273.*

of 1917, " which has come into operation since the Dodwell litigation enacts that: "all matters with reference to any trust, or with reference to any obligation in the nature of a trust arising or resulting by the implication or construction of law, for which no specific provision is made in this or any other Ordinance, shall be determined by the principle of equity for the time being in force in the High Court of Justice in England." In the present case the decree entered by agreement which has been induced by fraud, creates an obligation in the nature of a trust arising by the implication or construction of law, and the person who has obtained the property or persons claiming from him as volunteers must hold it in trust for the person defrauded. In *Dodwell's case* the Privy Council held that the money that passed to the defendants on the cheques fraudulently drawn by their Agent was in effect a trust fund. The question when the cause of action accrues in a case like the present is a matter with reference to an obligation in the nature of a trust for it provides the very foundation for the creation of the trust, the trust being created by the decree of Court in cases of fraud. The language of the section is very general and wise and is intended to have a wide application. No specific provision exists in the Trust Ordinance or in any other Ordinance on the point. The English principle, which I have stated above, therefore, applies to this case, and the cause of action must be regarded as having accrued on the discovery of the fraud and the cause of action to have the decree set aside is not barred by prescription. I have thought it necessary to discuss the effect of the judgment in *Dodwell's case*, as section 118 of the Trust Ordinance was not referred to at the argument, and its application to the present case was not discussed. But I have little doubt that it applies and must be given effect to.

What then is the effect of setting aside the decree on the ground of fraud? The person who obtained property under the fraudulent decree must hold it for the benefit of the person who was deprived of it. Section 88 lays this down. It runs as follows: " Where property is transferred in pursuance of a contract which is liable to rescission or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid, and subject to any compensation or other relief to which the transferee may be by law entitled."

It is argued that this section has no application to this case as there is no " contract " here. The decree was based on an agreement or contract between the parties. The extracts from the proceedings in case No. 22,536, (P 3), show that it was in consequence of an agreement between the parties that the present plaintiff and Sirisena, the defendants in that case waived their title to the land in dispute and consented to surrender possession on receipt of compensation. Decree was entered in terms of the agreement.

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The fact that a decree has been entered does not prevent the Court from treating the decree as no more than the contract between the parties, subject to the incidents of such a contract. For as Baron Parke said in *Wentworth v. Bullen*,[1] " The Contract of the parties is not the less a contract and subject to the incidents of a contract, because there is superadded the command of a judge." See also *Lievesby v. Gilmore*.[2] Thus in an Indian case where a plaintiff sought to enforce by action a right to forfeiture contained in a consent decree in terms of a compromise whereby the status of Landlord and tenant was established between the plaintiff and the defendant, it was held by a Full Bench of the Bombay High Court that the Court in its equitable jurisdiction was not precluded from granting such relief against forfeiture as it might have granted had the status arisen from contract or custom. Sir Lawrence Jenkins C.J., presently a member of the Judicial Committee of the Privy Council, said: " The mere recording of the agreemment can in no way change its legal effect. Can the passing of the decree have any such result? I think not . . . . . It appears to me on principle that as under the section (375, that is section 408 of our Code), the decree was to be in accordance with the agreement, it cannot have altered the relations of the parties as they existed under the agreement. And as it was an incident of those relations that the right of forfeiture was subject to relief, that incident must still apply when those relations are established by a decree passed in accordance with the agreement. It was laid down in *Wentworth v. Bullen*,[3] and has since been repeatedly affirmed that the contract of the parties is not the less a contract, and subject to the incidents of a contract, because there is superadded the command of a ' Judge,' and this, in my opinion, lends a sanction to the conclusion I have expressed: " *Krishnabai v. Hari Govind*.[4] The agreement or contract between the parties is embodied in the decree and not extinguished by it. There is, therefore, in my opinion, a sufficient contract within the meaning of section 88 of the Trusts Ordinance to bring this case within its operation.

Has there been a transfer of property in pursuance of the contract? I think so. The deed of sale of 1884 was concealed, and Kiri Banda's title was alleged to be based on the deed of gift of the year 1883 which being a Kandyan deed of gift was revocable, and had in fact been expressly revoked. The hopelessness of questioning the right of revocation in the circumstances was realized by Kiri Banda's widow, and she agreed to waive all claims she and her son had under the deed of gift of 1883 and to surrender possession in favour of Punchirala. The agreement resulted in a transfer of the rights which she and her son Sirisena had under the deed of sale. It is only, however, on receiving notice that the contract has been

[1] *(1829) 9 B. & C. 850.*
[2] *(1866) L. R. 1 C. P. 570.*
[3] *(1829) 9 B. & C. 850.*
[4] *(1907) 31 Bom. 15.*

induced by fraud that the constructive trust arises. Such a contract is voidable and not altogether void, and it is from the time that the transferor makes up his mind to impeach the contract that the transferee must hold the property for the benefit of the transferor. In the present case no notice appears to have been given, but the institution of the action might be regarded as such notice. If, therefore, before the receipt of a notice or the institution of an action to set aside the contract, a transferee has been in possession of the property transferred for over the time fixed for acquisition of title by prescription he would be entitled to set up a title by prescription. This is clearly brought out by Lord Redesdal in an Irish case *Hovenden v. Lord Annesley* [1] where the learned Judge after stating that the possession of a trustee is no bar to a claim by the *cestui que trust* as his possession is according to his title points out that: " the question of fraud is of a very different description; that is a case where a person who is in possession by virtue of the fraud is not, in the ordinary sense of the word, a trustee, but is to be constituted a trustee by a decree of a Court of Equity, founded on the fraud; and his possession in the meantime is adverse to the title of the person who impeaches a transaction on the ground of fraud. " (*Lewin on "Trusts," p. 1083, 11th Edition*). Then a question arises as to whether in this case the defendant has acquired a title by prescription to the plaintiff's interests in the land. Section 111 of the Trusts Ordinance, 1917, deals with the law of prescription in relation to trusts, and it excludes from the operation of the Prescription Ordinance, 1871, certain classes of cases. It has adopted the law as enacted in the English Act of 1888 called " The Trustee Act. " But sub-section (5) of section 111 declares that the exemption " shall not apply to constructive trusts except in so far as such trusts are treated as express trusts by the law of England." According to the case of *Soar v. Ashwell*,[2] the following persons are treated under the English Law as holding property under an express trust although the trusts arise by construction of law:—

(1) A trustee *de son tort* or a stranger who assumes to act in an express trust as if he were a duly appointed trustee.

(2) A stranger to the trust who is privy to, and participates in, a fraudulent breach of trust by the trustee.

(3) A stranger to the trust who receives the trust money knowing them to be such and deals with them in a manner inconsistent with the trust.

(4) One who is in a fiduciary and in the footing of such position obtains possession of trust property.

[1] *2 Sch. & Lef. 630.*

[2] *(1893) 2 Q. B. 390*

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The present defendant does not come within any of the above-mentioned classes, and must be regarded as holding the property on a constructive trust which is not an express trust. She is, therefore, entitled to rely on the Prescription Ordinance. The plaintiff, as stated above, is entitled to a life interest in the one-third share as the widow of Kiri Banda, and also to the property itself as the heir of her son Sirisena. As the defendant has had possession in terms of section 3 of the Prescription Ordinance for a period exceeding ten years at the date of the institution of the action, she has acquired a title by prescription to plaintiff's life interest in the share claimed by her. Sirisena was a minor when action No. 22,536 terminated, and was a minor in 1919 when he died, and the plaintiff succeeded to his rights. By virtue of section 14 of the Ordinance of 1871 prescription would not run against him; it commenced to run against the plaintiff when she succeeded to his rights in 1919. But ten years had not elapsed after the death of Sirisena when this action was instituted. Therefore, the defendant has not acquired Sirisena's rights by prescription. The plaintiff has lost her life interest in the share claimed, but she is entitled to the one-third share subject to a life interest which is now vested in the defendant. The fact that the plaintiff had become entitled both to the life interest and the property itself cannot prevent her losing her life interest by adverse possession. The defendant will, therefore, be declared entitled to possess the land so long as the plaintiff is alive. The plaintiff will be declared entitled to a one-third share subject to the defendant's right as declared above. No question of damages or compensation need be considered at this stage. The judgment of the District Judge will be varied, and decree will be entered in terms of the declaration made above. All costs including the costs of this appeal will be borne by each party.

Appeal dismissed.