Present: Dalton and Drieberg JJ. 1929.

DON *v.* DON.

22—D. C. (Inty.) Badulla, 4,521.

Evidence—Transfer of property—Parol agreement to execute formal agreement to reconvey—Fraud—Ordinance No. 7 of 1840, s. 2.

Oral evidence of an informal promise given by the purchaser of property, to execute a notarial agreement to reconvey the same, is inadmissible.

Per DRIEBERG J.—The principle that equity does not allow the Statute of Frauds to be used as an instrument of fraud does not apply to cases where the fraud alleged is merely a refusal, after a parol agreement, to sign a written one.

APPEAL from a judgment of the District Judge of Badulla.

Plaintiff, who was the owner of Karlton estate, alleged that in 1924, owing to financial difficulties, he agreed with his brothers, the defendants, that they should buy the estate for Rs. 11,000, subject to the condition that the plaintiff should have the option of buying back the estate at any time within ten years for Rs. 11,000 plus interest thereon at 12 per cent. A notary was instructed to draw up two deeds—a transfer and an agreement to retransfer. Owing to the illness of the notary only the transfer was executed. The plaintiff, alleging that the defendants from time to time put off the signing of the agreement, brought this action in 1928 and prayed (*a*) that the deed of transfer be rectified, or (*b*) that he be declared entitled to secure an agreement for retransfer, or (*c*) that the defendants be declared to be trustees for plaintiff.

The defendants denied the agreement and at the trial objected to evidence of such an agreement being led. The District Judge upheld the objection and the plaintiff appealed.

Choksy, for plaintiff, appellant.—We should be allowed to prove the fraud. We are entitled to lead evidence to prove the whole intention of the agreement (section 92 of the Evidence Ordinance). Equity gives relief against the Statute of Frauds on the ground that where a man fraudulently prevents a document from coming into existence he cannot rely on the Statute of Frauds. The defendants are trustees for plaintiff.

There are two questions:—

(*a*) Was there such an agreement ?

(*b*) Can it be enforced ?

1929.

Don v. Don

The present appeal is upon the question of admissibility of evidence. All the circumstances of the fraud must be placed before the Court before we could ask for relief.

[DRIEBERG J.—The question is, if the averments in the plaint are correct, are you entitled to relief ?]

In that case defendants will be trustees (chapter IX. of Trusts Ordinance, *s.* 82).

It is possible to lead evidence of the circumstances surrounding the execution of a transfer to show that it was not intended to transfer the beneficial interest.

(Section 92 of Trusts Ordinance.) Defendants have only a qualified interest. No writing is necessary (sections 94, 96).

Last paragraph of section 5 of Trusts Ordinance does not apply where it will effectuate a fraud. (*Underhill on Trusts, 7th ed., Art. 11. at p. 79.*)

In *Nanayakkara v. Andris* [1] Bertram C.J. set out cases in which equity will give relief against Statute of Frauds. What takes a case out of the Statute is set out in *Fry on Specific Performance, pp. 271, 272.*

In *Perera v. Fernando* [2] Ennis J. comments on the absence of an allegation of fraud. The case reported in *Pronchihamy v. Don Davit* [3] will show that the presence or absence of fraud makes a great difference. Fraud can be at the inception of the transaction or subsequently. If fraud is averred I am entitled to an opportunity to prove it (*Ranasinghe v. Fernando* [4]).

[DRIEBERG J.—A refusal to carry out a trust is a fraud—a refusal to carry out an obligation is not a fraud.]

Re Duke of Marlborough: Davis v. Whitehead.[5] The mere fact that I was paid consideration does not conclude the case against me. The present case is similar. When the absence of a notarial agreement is due to the fraud of the defendants, they cannot set up the absence of the document as against me.

Woodroffe and Ameer Ali ; sections 573, 574, 577 of Fry ; Evidence Ordinance, s. 92; 4 Bom. 594; 16 Mad. 80.

Keuneman, for defendants, respondents, was not called upon; but cited *Amarasekere v. Rajapakse*,[6] *Arsecularatne v. Perera.*[7]

[1] *23 N. L. R. 193, at p. 199.*
[2] *17 N. L. R. 486.*
[3] *15 N. L. R. 13.*
[4] *24 N. L. R. 170.*
[5] *(1894) 2 Ch. 133.*
[6] *14 N. L. R. 110.*
[7] *28 N. L. R*

July 18, 1929. DALTON J.— 1929.

Don v. Don

The plaintiff sought to obtain in this action a decree directing one of the three following alternatives:—

(*a*) A decree that the defendants execute a deed of rectification of a certain deed of conveyance No. 267, embodying an agreement to reconvey the premises transferred by that deed, or

(*b*) A decree declaring that the defendants hold the premises transferred subject to a trust to reconvey, or

(*c*) A decree enjoining the defendants to execute an agreement to reconvey the said premises to plaintiff.

The plaintiff is a brother of the two defendants. The plaint sets out that the former was owner of Karlton estate, which is of about 30 acres in extent of which 20 acres are in tea. About the year 1924 plaintiff was in financial difficulties, his liabilities amounting to about Rs. 11,000. The plaint then sets out that the defendants came forward and offered to pay off these liabilities if plaintiff conveyed the estate to them, they "agreeing to enter into a notarial agreement" to reconvey the premises to him at such time within ten years as plaintiff repaid the Rs. 11,000 with interest at 12 per cent., and the value of any building erected by the defendants between the date of transfer and the date of repayment.

Paragraph 5 of the plaint sets out that in accordance with this agreement a notary was instructed to draw up the transfer and agreement to reconvey, and a deed of transfer was executed on March 19, 1924 (No. 267), by plaintiff to the defendants, attested by this same notary, but owing to the illness of the notary the drawing and assigning of the agreement to reconvey was deferred as plaintiff could not longer delay the payment of his liabilities. Paragraph 6 sets out that defendants have put off the plaintiff by promises, and have now fraudulently refused to sign the agreement to reconvey. The defendants deny that any such agreement was made, that plaintiff conveyed the estate for consideration, by deed duly attested by the notary, and that as a matter of law the agreement as alleged by plaintiff is void and of no force or avail in law in virtue of Ordinance No. 7 of 1840, and plaintiff cannot lead evidence of any such alleged agreement.

The trial Judge has held that plaintiff cannot lead evidence of the alleged agreement or trust, from which decision plaintiff appeals.

For the plaintiff-appellant Mr. Choksy, who cited a large number of cases, to which it does not seem necessary for me to refer in detail, has urged that plaintiff is entitled to put what he calls the whole agreement before the Court, and that the provisions of section 2 of Ordinance No. 7 of 1840 cannot be made use of to effectuate a fraud. If the whole agreement as alleged in the plaint can be proved before

1929.

DALTON J.

Don v. Don

the Court, then he urges that the defendants are constructive trustees for the plaintiff, and they hold the premises subject to the limitation that the plaintiff is entitled to a reconveyance on the conditions of the agreement.

It seems to me that, assuming that the provisions of section 92 of the Evidence Ordinance do not stand in plaintiff's way and that he was able in law to prove the agreement to enter into the agreement, to reconvey as alleged, that agreement, not being notarially executed as required by section 2, within which section it clearly falls, is of no force or avail in law; further, in my opinion no question of any trust arises here. Upon the case as presented by plaintiff it is admitted that the plaintiff has conveyed the estate to defendants who have paid the purchase price set out. It is not a case of defendants purchasing for plaintiff, or of obtaining a conveyance in his name, or of his supplying the purchase money, as in *Ohlmus v. Ohlmus*[1] and *Gould v. Inasitamby*.[2] All the alleged agreement sets up is that in certain eventualities plaintiff shall have the right to ask for a reconveyance by the defendants, that is, he has an option which is to last for ten years. The fraud alleged against the defendants is his refusal to sign this agreement. The case of *Perera v. Fernando* [3] is upon the facts very similar to this one. There the plaintiff transferred land to P. by a notarial deed, purporting on the face of it to sell the land. He sought to show by parol evidence that the transaction was in effect a mortgage and that P. had agreed to reconvey the property on payment of the money advanced. It was held that oral evidence to vary the deed was not admissible in view of the provisions of section 92 of the Evidence Ordinance. As regards the alleged agreement to reconvey de Sampayo J. says:—

> The argument as to the deed of sale being only a mortgage has been disposed of (*i.e.*, by application of section 92 of the Evidence Ordinance), and the position then is reduced to this: that plaintiff seeks to enforce an agreement to resell the lands on repayment of the amount paid by the purchaser Diego Perera. Such an agreement does not constitute a trust, but is a pure contract for the purchase and sale of immovable property, and Ordinance No. 7 of 1840 declares it to be void, in the absence of a notarial instrument.

These words seem to me to be equally applicable to the agreement to enter into a notarial agreement to reconvey alleged here. The Trusts Ordinance, 1917, has been enacted since that decision, but it in no way affects the decision. Mr. Choksy has failed to satisfy me that the present case as set out in the plaint can be brought within

[1] *9 N. L. R. 185.*

[2] *9 N. L. R. 177.*

[3] *17 N. L. R. 486.*

any of the provisions of that Ordinance. Further, the mere non-performance of a contract to sign a writing is not a fraud within the meaning of the Statute of Frauds (*Fry on Specific Performance, 5th ed. p. 289*).

It may further be pointed out, in reference to the question of the admissibility of parol evidence to prove agreements and the application of English authorities, that Ordinance No. 7 of 1840 differs very materially from the Statute of Frauds. Lord Atkinson calls attention to that in *Adaicappa Chetty v. Caruppen Chetty.*[1] Speaking of the deed and subsequent alleged oral agreement in that case he says:—

> The parol evidence, which must be taken to have been tendered, was properly held to have been inadmissible, for the simple reason that the agreement, if proved by it, must, under Ordinance No. 7 of 1840, sub-section (2), have been held not to be of "any force or avail in law." This section is much more drastic than the fourth section of the Statute of Frauds. The latter section does not render a parol agreement of or concerning land invalid.

He then concludes:—

> Evidence tendered by a party litigant relying upon an agreement as valid and enforceable, which, if admitted, would establish that the agreement was of no force or avail, is inadmissible. It would be a travesty of judicial procedure to admit it.

We have been referred to the words of Bertram C.J. in *Ranasinghe v. Fernando*,[2] where he states it is settled law that when a person who has obtained possession of the property of another subject to a trust or condition fraudulently claims to hold it free from such trust or condition, he cannot be allowed to claim the advantage of the Statute of Frauds, the more drastic terms of our Ordinance notwithstanding. He is, I take it, summing up in a few words and in general terms the settled law, but this case does not in my opinion come within any of the authorities which apply the settled law or which may themselves settle the law, nor does it come within any of the provisions of chapter IX. of the Trusts Ordinance. As I have stated, it is not in my opinion a case of trust at all, taking all the allegations set out in the plaint to have been duly proved.

For the above reasons the plaintiff cannot succeed in his claim. For the purpose of disposing of this appeal it is sufficient to state the trial Judge's decision that evidence of the alleged agreement to enter into a notarial agreement as set out in the plaint was inadmissible was correct. The appeal must therefore be dismissed with costs.

[1] *22 N. L. R. at p. 426.*

[2] *24 N. L. R. 170.*

1929. DRIEBERG J.—

Don v Don

The appellant says that owing to his money difficulties he agreed with the respondents that they should buy his Karlton estate for Rs. 11,000, the appellant having the option of buying back the estate at any time within ten years for Rs. 11,000, together with interest at 12 per cent. on that sum from the date of transfer. In accordance with this agreement a notary was instructed to prepare two deeds, a conveyance of the estate and an agreement for reconveyance. Owing to the illness of the notary only the deed of transfer was ready on March 19, 1924, and this was signed on that day by the appellant and delivered to the respondents. The plaint states that " the drawing and signing of the agreement was deferred owing to the illness of the said notary, and as the plaintiff could no longer delay the repayment of his liabilities the defendants expressing their willingness to appear and sign the agreement whenever called upon to do so on completion of the document, the transfer 267 was executed by the plaintiff."

The appellant alleges that the respondents put off the signing of the agreement and later " fraudulently refused " to sign it. He brought this action on January 5, 1928, praying that the deed of transfer be rectified by the insertion of this agreement, or for a declaration that he is entitled to secure such an agreement from the respondents, or for a declaration that the respondents hold the property subject to a trust to reconvey it to him.

The respondents denied that there was an agreement for reconveyance and pleaded that the appellant was not entitled to lead evidence of such an agreement which under the provisions of Ordinance No. 7 of 1840 would be void and of no force or avail in law.

At the trial objection was taken to the admission of evidence to prove the agreement to reconvey; the objection was upheld, and the appeal is against this order.

This case is nothing more than a sale with an informal agreement by the buyer to execute a formal agreement for resale when called upon to do so by the seller. Mr. Choksy, for the appellant, conceded that there is no local case in which such an agreement has been enforced.

The law as stated in *Perera v. Fernando*[1] and *Punchihamy v. Don Davit*,[2] in which the earlier cases are noted, has in no way been affected by the Trusts Ordinance, No. 9 of 1917. No trust arose out of this transaction, and the alleged informal undertaking by the respondents to execute a notarially attested agreement to reconvey is not enforceable.

[1] *(1914) 17 N. L. R. 486.* [2] *(1911) 15 N. L. R. 12.*

Mr. Choksy, however, contended that this was a cause of fraud and that on the principle that equity does not allow the Statute of Frauds to be used as an instrument for fraud, he was entitled to prove and compel performance of the agreement. This principle cannot be applied to such a case as this. It does operate in certain classes of cases. "It is a fraud on the part of a person to whom land is conveyed as a trustee and who knows it is so conveyed, to deny the trust and claim the land himself. Consequently notwithstanding the statute it is competent for a person claiming the land conveyed to another to prove by parol evidence that it was so conveyed upon trust for the claimant, and that the grantee, knowing the facts, is denying the trust and relying upon the form of the conveyance and the statute in order to keep the land hmself." —Lindley J., in *Rochefoucauld v. Boustead.* [1] The decision in *Re Duke of Marlborough: Davis v. Whitehead,* [2] which was cited to us, was based on the same reason. The facts found there were that the Duchess had transferred the house to the Duke simply for the limited purpose of enabling him to borrow money by mortgaging it and that subject to the mortgage created by him it was intended that the house should continue to belong to the Duchess. It was held that the Duke could not refuse to convey the equity of redemption to the Duchess, and that the plaintiffs, who claimed under him, were in no better position.

Relief is also given on this ground in cases where a person has fraudulently prevented the writing from coming into existence; an example of this is given in *Fry on Specific Performance, 6th ed., s. 574.*

But this principle does not extend to cases where the absence of the writing is due merely to non-performance of an informal contract to execute one. Referring to what was at one time the view, viz., that an allegation that it was part of the parol contract between the parties that the contract should be reduced to writing would take the case out of the statute on the ground of fraud, Fry states: "The law is clearly established that such an allegation does not withdraw the case from the operation of the statute, and that after a parol contract a refusal to sign a written one is no fraud of which the court can take cognizance." (*Fry on Specific Performance, 6th ed., s. 575.*)

In *Wood v. Midgley* [3] it was alleged that the defendant had approved of a draft agreement but had asked that in order to save him the trouble of waiting till it was copied, he might be allowed to call and sign the fair copy in the morning, which he promised but failed to do. It was held that this was not a case of a defendant

[1] *(1897) 1 Ch. 196. 1 at p. 206.* [2] *(1894) 2 Ch. 133.*
[3] *(1854) 5 de G. M. & G. 41.*

1929.

DRIEBERG J.

Don v. Don

by his fraudulent act preventing the formal agreement from coming into existence and that it was not a sufficient allegation of fraud to preclude him from setting up the Statute of Frauds as a defence.

In this case the appellant relies upon an informal promise by the respondents to execute a formal agreement to reconvey the estate when asked to do so, and this action is nothing more than an endeavour to compel performance of that promise. It was pointed out in *Wood v. Midgley* (*supra*) that when the law says that the defendant is not to be sued unless upon an agreement signed by him, it is not " a fraud on that law for him to say, I have agreed but I will not sign an agreement."

I agree that the appeal should be dismissed with costs.

Appeal dismissed.