1914.

Present : Pereira J. and Ennis J.

WICKRAMANAYAKE *v.* ABEYWARDENE *et al.*

432—D. C. Matara, 5,716.

Agreement by B to convey land to plaintiff—Conveyance by heirs of B to C—Action by plaintiff against the administrator of B's estate and C and the heirs of B to cancel deed in favour of C and for a conveyance in favour of plaintiff—Misjoinder—Issue as to fraud necessary to impeach deed in favour of C.

B agreed to convey a certain parcel of land to plaintiff, but failed to do so. After B's death his heirs conveyed the land to C. Plaintiff sued C and the administrator of the estate of B and the heirs of B, claiming that the conveyance by the heirs of B in favour of C be cancelled, and that the administrator of the estate of B be condemned to convey the parcel of land to plaintiff in specific performance of B's agreement with the plaintiff.

Held, that there was no misjoinder of parties as defendants.

Held, further, that in order to impeach the deed by the heirs of B in favour of C on the ground that it was executed in fraud of plaintiff, it was necessary that a specific issue involving the question of fraud should be framed.

THE facts are set out in the judgment.

A. St. V. Jayewardene, for appellants.

Bawa, K.C., for respondent.

Cur. adv. vult.

February 26, 1914. PEREIRA J.—

The first defendant in this case is the administrator of the estate of one Don Bastian, deceased, and the plaintiff sues him for the specific performance of an agreement entered into by and between the plaintiff and Don Bastian for the conveyance by the latter to the plaintiff of the land described in the 20th paragraph of the plaint. The plaintiff has joined the second, third, and fourth defendants

1914.

PEREIRA J.

Wickramanayake v. Abeywardene

as parties to the action, because the third and fourth defendants, who are the heirs of Don Bastian, have since the date of the agreement referred to above conveyed the land, which was the subject of the agreement, to the second defendant. The plaintiff claims in this action a cancellation of the conveyance by the third and fourth defendants in favour of the second defendant, as a preliminary to the first defendant being condemned to execute a conveyance of the land referred to above in favour of the plaintiff. It has been argued by the appellants' counsel that there has been a misjoinder of defendants. Now, it has been held by this Court that it is competent to the heirs of an intestate to convey property left by the intestate, although a conveyance by the heirs might be defeated by an administrator subsequently appointed if he required the property for the purposes of administration (*Silva v. Silva* [1]). There is no pretence in the present case that the property in question is required by the first defendant for the purposes of administration. That being so, the present case is similar to a case by A against B and C claiming that a conveyance by B in C's favour be set aside, and that B be condemned to execute a conveyance of the property thus released in favour of A in specific performance of an agreement between A and B prior to the conveyance of the land by B in favour of C, and as regards the objection as to misjoinder of parties, it will be less confusing to consider it with reference to this hypothetical case. It is clear that no conveyance can be executed by B in favour of A until the conveyance by B in favour of C is cancelled, because, as this Court has more than once laid down, under our law, even a fraudulent conveyance, unlike one executed by a person not competent to contract, which on that account would be null and void, is operative until it is set aside by an order of Court, and when it is set aside, the cancellation refers back to the date of the conveyance.

Now, with regard to the objection referred to above, three cases have been cited: (1) *Luckumsey v. Ookuda;*[2] (2) *Hoghton v. Money;*[3] and (3) *Tasker v. Small.*[4] I do not think that any of these cases has any application to the present case. In the present case the real cause of action is the execution of the conveyance by B in favour of C. That conveyance deprived B of the power of conveying the land to A, and the object of the action primarily is to have that conveyance cancelled. For that purpose both B and C are properly before the Court. In *Hoghton v. Money*[3] it was held that a purchaser could not, before completing his contract, enforce any equities attaching to the property against persons not parties to the contract. There can be no doubt as to that, provided the situation is such that it is possible for the purchaser to complete his contract. In the present case B could not execute a conveyance in favour of A so long as B's conveyance in favour of C remained uncancelled

[1] *(1907) 10 N. L. R. 234.*
[2] *I. L. R. 5 Bom. 177.*
[3] *2 Ch. Ap. 164.*
[4] *3 My. & Cr. 63.*

and therefore it would have been nugatory for A to sue B alone, and unless A had title to the land from B he could not sue C and B for a cancellation of the conveyance by the latter in favour of the former. That is the dilemma in which A would be if the case of *Hoghton v. Money* [1] were applicable to the present case; but it will be seen that the defendants who were objected to in that case claimed under a mere agreement prior to the agreement of which specific performance was sought. The latter agreement dated 1864 was one between the plaintiff in that case and the defendant Cotton for the purchase of "the piece of land in question and Cotton's entire interest therein without any reservation whatever, except as to a disputed right claimed by the defendant Money in respect of a certain letter addressed to him by Cotton dated 1862." The contention was that this latter conveyed no title, and that it was null and void, and not that it needed cancellation. So that it was quite open to the defendant Cotton to convey the land to the plaintiff, and for an order for that purpose the presence of Money as a defendant was not necessary. In the Indian case cited, the defendants who were objected to asserted to be entitled to merely a charge upon the land in respect of which a conveyance was claimed. As to when and how that charge came into existence there is no precise information, and there is nothing to show that there was any obstacle to the land being conveyed to the plaintiff by the defendant against whom specific performance was claimed. In *Tasker v. Small* [2] it was held that mortgagees of the property and persons who claimed an interest in the equity of redemption could not be joined as defendants to an action for specific performance. It is clear that in spite of such interests there was no objection to the conveyance of the property by the principal defendant. As explained above, the situation that we are concerned with in the present case is different. We are here face to face with the Roman-Dutch law principle, that a fraudulent deed is operative until it is set aside, and so the first defendant could not possibly be condemned to execute a conveyance in the plaintiff's favour until the conveyance by the third and fourth defendants in favour of the second defendant was cancelled. I therefore think that the objection to the action on the ground of misjoinder cannot be sustained.

The next question in the case is whether the plaintiff has shown himself entitled to a cancellation of the deed of conveyance executed by the third and fourth defendants in favour of the second defendant (deed No. 784, dated July 16, 1910). From two of the cases cited in the course of the argument—*Matthes v. Raymond* [3] and *Appuhamy v. Boteju* [4]—it would appear that where one conveys land to a person which he had already agreed to convey to another, he thereby places himself beyond the power of specifically performing his agreement

[1] *2 Ch. Ap. 164.*
[2] *3 My. & Cr. 63.*
[3] *(1896) 2 N. L. R. 270.*
[4] *(1908) 11 N. L. R. 187.*

1914.

PEREIRA J.

Wickramanayake v. Abeywardene

with the latter ; but, clearly, under the Roman-Dutch law fraud vitiates every contract, and if the latter of the two deeds could be shown to be fraudulent, it would be cancelled, and the way paved for the specific performance of the former. So that the main question in the present case is whether deed No. 784 was executed in fraud of the plaintiff. No such issue was expressly framed, but we are asked by the plaintiff's counsel to infer fraud from the facts proved. He has contended that the attitude taken up by the plaintiff was that the deed was fraudulent, and that the tenth issue in the case is tantamount to an issue of fraud. I do not think that the passages cited by him from *Story on Equity* apply to a case like this. The issue framed in spite of objection was whether the second defendant was a *bona fide* purchaser for value, and the District Judge has held that the second defendant "made a collusive purchase "; but mere collusion or lack of *bona fides* does not necessarily amount to fraud. A person may take unfair advantage of a particular situation and act accordingly, but his action may, nevertheless, not be fraudulent. Whatever is dishonourable is not necessarily dishonest in the eye of the law. I think that the parties should clearly understand the issue before them and then proceed to trial thereon. I would set aside the judgment, and direct that the following issue be framed and tried in lieu of issue No. 10.—Did the third and fourth defendants and the second defendant act collusively and with intent to defraud the plaintiff in the execution of deed No. 784, dated July 16, 1910?—the plaint being amended accordingly (see *Ratwatte v. Owen* [1]). I think that the District Judge should deliver judgment *de novo* in accordance with his decision on the above issue and the decisions already recorded by him on issues 1 to 9, except so far as those decisions may be affected by his decision on the new issue framed.

I think that all costs should abide the event.

ENNIS J.—I agree.

Sent back.

[1] *(1896) 2 N. L. R. 141.*