Present: Lascelles C.J. 1913.

SILVA et al. v. SILVA.

25—C. R. Kalutara, 6,194 A.

Prescription—Cause of action—When it arises—Sale by wife—Action by husband to eject purchaser—Claim in reconvention by purchaser for refund of price.

First plaintiff's wife sold a land in 1902 to defendant, without first plaintiff's consent. The plaintiffs instituted this action about nine years thereafter for ejectment. The defendant claimed in reconvention the price he paid for the land.

Held, **that the defendant's claim in reconvention was not prescribed.**

The cause of action arose only when the plaintiffs began to disturb the defendant in his possession.

THE facts appear from the judgment.

A. St. V. Jayewardene, for the defendant, appellant.—The defendant purchased under an invalid deed. As long as he possessed the land conveyed to him he had no grievance against his vendors. The cause of action arose when the plaintiffs took steps to eject defendant. See *Cowper v. Godmond.*[1]

E. W. Jayewardene, for the plaintiffs, respondents.—It was held in *Martelis Appu v. Jayewardene* [2] that in a case like the present prescription began to run from the date of the payment of the money, and not from the date when the vendee was dispossessed. In *Cowper v. Godmond* [1] the facts were different. The annuity there could not have been declared void except at the option of the party pleading prescription. In this case the deed was invalid, as the husband had not joined in the execution.

A. St. V. Jayewardene, in reply.

Cur. adv. vult.

March 11, 1913. LASCELLES C.J.—

This appeal raises a question with regard to the law of prescription in the following circumstances.

In 1902 one Dosanhamy, who was the wife, married in community, of the first plaintiff, and the mother of the second and third plaintiffs, conveyed her interest in a certain land to the defendant. Dosanhamy's interest in the land is alleged by the defendant to have been sold to him to provide the means for the maintenance of Dosanhamy and her children.

[1] *9 Bing. 748.*

[2] *(1908) 11 N. L. R. 272.*

1913.

Lascelles C.J.

Silva v. Silva

The claim in the present action is to eject the defendant from this land, and in the course of the trial it was admitted that this claim must succeed, inasmuch as the first plaintiff, Dosanhamy's husband was not a party to the deed transferring the property to the defendant. The dispute is with regard to the defendant's claim in reconvention for Rs. 120, the consideration for the sale, which sum the defendant states was utilized for the plaintiffs' benefit.

The plaintiffs contend that this claim is prescribed, and the learned Commissioner has upheld their contention.

The crucial question is with regard to the point of time at which the cause of action arose. The plaintiffs' case, as presented to us on appeal, is that the cause of action arose in 1902, when the defendant's deed was executed. The defendant's case is that he had a cause of action for the refund of the purchase money only when the plaintiffs took steps to eject him from his share in the land.

The defendant's counsel referred me to *Cowper v. Godmond.*[1] In that case the defendant had granted a life annuity to two persons, and the plaintiffs were the executors of the estate of the surviving grantee. Six years later the defendant succeeded in setting aside the annuity on account of a defect in the memorial of the annuity. Two years after that the plaintiffs sued to recover the balance of the consideration money paid for the annuity. The question then arose whether claim was barred by the Statute of Limitations. The point on which the decision turned was whether the cause of action arose when the consideration for the annuity was paid or when the defendant avoided the annuity. The Court of Common Pleas held, for reasons which appear to me quite applicable to the present case, that the cause of action arose only when the annuity was avoided.

Tindal C.J. observed that if the decision were otherwise the grantor of a defective annuity might in every case defraud the annuitant by paying the annuity for six years, and then having set aside the securities by pleading the Statute of Limitations. Park J. held that the grantee could not have sued until the grantor had set aside the annuity, and until he could the cause of action was not complete. Alderson J., in language which seems to me particularly apposite to the present case, observed, " it may be conceded that the consideration money was money had and received by the grantor at the time of payment, but it was not had and received by the grantor, to the use of the grantee, until the grantor elected to treat the annuity as void." This reasoning appears to me to be precisely applicable to the circumstances of the present case. It is obvious that if the cause of action is held to have accrued at the date of the deed a door would be opened wide for fraud. The grantor of a non-notarial conveyance would only have to wait for three years to enable him to avoid the conveyance without being made responsible for the refund of the purchase money. Further,

[1] *9 Bing. 748.*

it did not lie with the defendant to set aside the deed which he had presumably accepted in the belief that it was valid; he was in possession, he had got what he bargained for; and it was only when the plaintiffs took steps to eject him that he had any ground of complaint or cause of action against the plaintiffs. In my opinion it is quite clear that the cause of action arose only when the plaintiffs began to disturb the defendant in his possession, and the defendant's claim in reconvention is not prescribed.

Counsel for the plaintiffs-respondents pressed me with the decision in *Martelis Appu v. Jayewardene*,[1] which it was contended was conclusive of the present case. This is not a proper occasion to consider whether, in the light of the English authority to which I have referred, this decision would be followed by a Court which had jurisdiction to review the decision. It is enough to point out the material difference which exists between the facts of the two cases. In *Martelis Appu v. Jayewardene* [1] the plaintiff took action to enforce a verbal agreement by the first defendant to sell him a piece of land for Rs. 800; he averred that he had paid Rs. 720 of this sum, and claimed that the first defendant should be called on to execute a transfer, and in the alternative to refund the Rs. 720. The decision was based on the ground that the cause of action arose when the money could have been recovered, *i.e.*, immediately on payment. However that may have been in that case, it cannot be contended in the present case that the defendant had a cause of action immediately on the execution of the transfer, at a time when he had been placed in possession of the land and had apparently got all that he had bargained for.

For the above reasons, I hold that the defendant's claim for a refund of the consideration paid for the land is not prescribed. The judgment is set aside, and the case remitted to the Commissioner for adjudication on the footing that the defendant's claim is not prescribed. With regard to costs, the defendant-appellant is entitled to the costs of the appeal. The order made by the Commissioner as to the costs of the trial is set aside, and at the conclusion of the trial the Commissioner will make such order as regards the costs of the trial as he may think just.

Set aside.

[1] (1908) 11 N. L. R. 272