1945 *Present:* **Howard C.J. and Keuneman J.**

COOMARASWAMY, Appellant, *and* VINAYAGAMOORTHY *et al.*, Respondents.

191—D. C. Point Pedro, 15,691.

Fraudulent alienation—Sale of schooner by trustee—Elements of fraudulent intent—Breach of trust—No notice of equitable title—Legal estate—Prescription—Trusts Ordinance (Cap. 72) s. 111 (1) and (5).

Plaintiff claimed title to a schooner by virtue of a Bill of Sale, P 2, of August 25, 1937, given in his favour by the 8th defendant. It was established that the 1st, 2nd, 3rd and 4th defendants were the purchasers of the schooner in 1925, and that it was registered in the name of the 5th defendant. The 5th defendant sold the schooner in breach of trust by Bill of Sale, P 5, dated 1928 to 6th defendant who in turn sold it to 7th defendant, from whom the 8th defendant became the purchaser. The 1st and 2nd defendants denied that the plaintiff was the owner and pleaded that the Bill of Sale in his favour was executed fraudulently and collusively with intent to deprive them of a claim due to them in respect of the schooner arising from an action instituted by them against the 3rd and 4th defendants. They claim that the 5th defendant was not the owner and that he was holding the schooner in trust for the 3rd and

4th defendants and that the latter fraudulently and collusively obtained the execution of the various bills of sale and that by reason of the alienation they rendered themselves insolvent.

Held, that the defendants had failed to prove that the Bill of Sale, P 2, was a fraudulent alienation.

The evidence from which a fraudulent intent can be gathered is usually some or all of the following circumstances:—

(1) that there was no consideration,
(2) that the transfer was secret,
(3) that the transferor had continued in possession notwithstanding the transfer,
(4) that the transfer left him without any other property, and/or
(5) without enough to pay the debts which he owed at the time or was about to incur.

Held, further, that the claim of the defendants was prescribed and that the case did not come within the ambit of section 111 (1) or (5) of the Trusts Ordinance which excluded the operation of the Prescription Ordinance.

Held, also, that the plaintiff was not bound by the trust in breach of which the 5th defendant transferred to the 6th defendant for the following reasons:—

(1) He has obtained the legal title.
(2) He was a *bona fide* purchaser for valuable consideration.
(3) He received no notice that the transaction was a breach of trust before the transfer was complete.

APPEAL from a judgment of the Additional District Judge of Jaffna.

H. V. Perera, K.C. (with him *N. Kumarasingham*), for plaintiff, appellant.

N. Nadarajah, K.C. (with him *P. Navaratnarajah*), for 2nd, 9th and 11th defendants, respondents.

S. Mahadeva for 6th defendant, respondent.

A. C. Nadarajah (with him *C. J. Ranatunga*), for 8th defendant, respondent.

Cur. adv. vult.

June 13, 1945. HOWARD C.J.—

This is an appeal from a judgment of the Additional District Judge of Jaffna upholding the claim of the 1st and 2nd defendants, respondents, and dismissing the claim of the plaintiff with costs.

The action was concerned with the rights in a schooner named "Kadiresan" which were claimed by the plaintiff by virtue of a Bill of Sale P 2 dated August 25, 1937, in his favour made by the 8th defendant. The schooner had been transferred to the 8th defendant by Bill of Sale P 3 dated September 19, 1936, made in his favour by the 7th defendant who in his turn had obtained title in the same by virtue of Bill of Sale P 4 dated October 22, 1931, made in his favour by the 6th defendant. The 6th defendant was the holder of a Bill of Sale P 5, dated August 11, 1928, made by the 5th defendant in his favour. It

was established that the 1st, 2nd, 3rd and 4th defendants were the purchasers of the schooner in 1925. The vessel was registered and the documents were executed in the name of the 5th defendant. In 1926 disputes arose between the partners in this seafaring adventure. The matter was settled by the 1st and 2nd defendants agreeing to renounce their shares in the schooner on payment of Rs. 1,800 and a share in the profits for six months. This money not being paid the 1st and 2nd defendants instituted D. C. No 23,897 on January 20, 1928, against defendants 3, 4, and 5 for the recovery of Rs. 4,882.92 due to them on account of the schooner. The 5th defendant was made a party to this action as the legal ownership of the schooner was vested in him. Judgement in favour of the 1st and 2nd defendants was entered by default on February 1, 1933, and the decree was made absolute on May 12, 1933. From the record of the proceedings (2 D 6) in D.C. No. 23,897 it is clear that from the time of the decree absolute in favour of the 1st and 2nd defendants the latter made attempts to enforce their claim. On May 28, 1940, they claimed the schooner which was seized by the Fiscal under a Writ, sale being fixed for July 29, 1940. On July 11, 1940, the appellant in this action who had moved for summons on June 25, 1940, prayed under section 247 of the Civil Procedure Code that the sale of the schooner fixed for July 29, 1940, be stayed until the final determination of the action. On July 23, 1940, it was ordered that the sale be stayed unless the judgment creditor was prepared to give security. The present action therefore proceeded. On October 19, 1943, the 3rd defendant in the course of proceedings under D.C. 23,897 was examined for means under section 219 of the Civil Procedure Code. At this examination which is recorded in 2 D 7 the 3rd defendant stated that he was the tindal of the schooner and that neither he nor his wife, the 4th defendant, had been in possession of any property for the last 10 years. Since the institution of these proceedings by the appellant the 1st defendant has died and the 9th, 10th and 11th defendants as his heirs have been substituted in his place.

The plaintiff's claim was based on the title alleged to be vested in him under the various bills of sale referred to in this judgment and culminating in P 2 made in his favour by the 8th defendant. The plaintiff maintained that he had been in possession and charge of the vessel since August 25, 1937, the date of P 2. In these circumstances the seizure of the schooner by the Fiscal in May, 1940, was bad in law. The 1st and 2nd defendants in their answer deny that the plaintiff ever became the owner of the schooner and maintained that the bill of sale was effected secretly and fraudulently and collusively with the intent to defraud them of the money due to them. The 1st and 2nd defendant also contend that the vessel has always been in possession of the 3rd defendant and that the 5th defendant was never its owner and that he was holding it in trust for the 3rd and 4th defendants. The 1st and 2nd defendants also aver that the 3rd and 4th defendants fraudulently and collusively obtained the execution of the various bills of sale and by reason of the alienation by the said Bills rendered themselves insolvent. The 3rd defendant in his answer denied the allegations of fraud and collusion made by the 1st and 2nd defendants.

The District Judge in dismissing the plaintiff's claim has held as follows:—

(1) The plaintiff was not the owner of the vessel by virtue of P 2.
(2) The vessel was liable to seizure by the 1st and 2nd defendants in execution of the decree obtained by them in D. C. 23,897.
(3) The 5th defendant was holding the vessel in trust for the 3rd and 4th defendants at the time of the institution of case No. 23,897.
(4) The Bills of Sale were executed fraudulently and collusively in order to hinder the 1st and 2nd defendants in the execution of their decree.
(5) The alienation in favour of the 6th defendant rendered 3rd and 4th defendants insolvent.
(6) The claim of the 1st and 2nd defendants was not prescribed.

Mr. Perera, on behalf of the appellant, has contended that the defence of the 1st and 2nd defendants is based on the allegation of the fraudulent execution of the various bills of sale culminating in P 2 in favour of the appellant. That it has been established the plaintiff gave consideration for the transfer of the schooner. That no evidence has been adduced to prove affirmatively not only the fraud of the plaintiff but also the participation of the 3rd and 4th defendants in these transactions. Without such proof the defence must fail.

Mr. Perera also contends that the claim of the 1st and 2nd defendants is prescribed. In this connection it would appear from 2 D 8 that action No. 14,025 was instituted on May 5, 1927, in the District Court of Kalutara, claiming a sum of Rs. 500 against the 1st defendant as owner and the 3rd defendant as Master of the schooner. On September 13, 1929, the vessel was claimed by the 6th defendant *vide* P 7. This claim was upheld on October 28, 1929 (*vide* P 8) by virtue of Bill of Sale of August 11, 1928 (P 5.) Neither the 1st nor 3rd defendants appear to have been present when this claim was upheld. Mr. Perera contends, however, that from this date the 1st and 2nd defendant's had notice of the fraudulent alienation by means of which the 3rd defendant had rendered himself insolvent. The cause of action of the 1st and 2nd defendants therefore arose on October 28, 1929, and was prescribed in three years from that date.

The 1st and 2nd defendants in their answer have prayed that the bills of sale be set aside. In his judgment the District Judge dismisses the plaintiff's action with costs in terms of the prayer of the 1st and 2nd defendants. The judgment must, therefore, be taken to have set aside the bills of sale. The first question that arises for consideration is whether the learned Judge was right in holding that those bills were executed fraudulently and collusively by the 5th defendant at the instigation of the 3rd and 4th defendants with the various assignees so as to put the property in the schooner beyond the reach of the 1st and 2nd defendants. In *Narayanan Chettyar v. Official Assignee, High Court, Rangoon A.I.R.*[1] it was held by the Privy Council that fraud must be established beyond all reasonable doubt and cannot be based on suspicion and conjecture. Again in *Muttiah Chetty v. Mohamood Hadjiar*[2] Ennis J. at page 186 says that there is no presumption of fraud and when it is alleged it must be

[1] *(1941) P. C. 93.* [2] *25 N. L. R. 185.*

fully proved. He then cites with approval a dictum of Hutchinson C.J. in the case of *Saravanai Armugam v. Kanthar Ponnambalam* [1] with regard to the question as to what was sufficient in a Paulian action to establish fraud. Hutchinson C.J. laid down that the evidence from which a fraudulent intention can be inferred is usually some or all of the following circumstances:—

(1) That there was no consideration.

(2) That the transfer was secret,

(3) That the transferor had continued in possession notwithstanding the transfer,

(4) That the transfer left him without any other property, and/or

(5) without enough to pay the debts which he owed at the time or was about to incur.

The plaintiff claims the schooner as a *bona fide* purchaser for value from the 8th defendant by virtue of Bill of Sale P 2. The 1st and 2nd defendants have not proved (1), (2) and (3). The plaintiff's attorney has proved that the plaintiff bought the schooner for Rs. 1,000, that is to say the same price that was paid for it in 1925. The transfer was not secret being registered (*vide* P 6). The plaintiff's attorney stated in evidence that the plaintiff was in possession after his purchase and used the schooner to carry cargo to and fro and that the 3rd defendant at the time of the seizure of the schooner was the tindal in charge. Subsequently and before the date of the seizure the 7th defendant was the tindal. I do not think it can be said to be established that the 3rd defendant remained in possession. Moreover it was the 5th defendant who transferred the schooner and not the 3rd defendant. It has not been proved that the 3rd and 4th defendants were left without any property when the schooner was transferred to the sixth defendant in 1928. At his examination on October 19, 1943, the 3rd defendant stated he and his wife had alienated no property in the last 10 years. This evidence does not prove what property he had in 1928 when P 5 was executed. Moreover, it was not these defendants who gave the bill of sale, but the 5th defendant. The learned Judge has found that the plaintiff has himself assisted defendants 7 and 8 in furtherance of the scheme to defraud 1st and 2nd defendants and therefore the fact that he gave consideration does not afford him a complete defence. The only evidence to prove that the plaintiff had participated in the fraud was the fact that he took a bill of sale from the 8th defendant. In view of the fact that he gave consideration I am of opinion that although the transactions being made for the most part by persons who were related to each other may give rise to suspicion, fraud has not been established against the plaintiff. In this connection it must be borne in mind that the latter according to the 2nd defendant was not a relation.

I am also of opinion that even if fraud had been established the claim of the 1st and 2nd defendants was prescribed. Since the decision in

[1] 2 *Leader L. R. 11*

Dodwell & Co. v. E. John & Co. The Trusts Ordinance (Cap. 72) has come into operation. Section 2 of this Ordinance is worded as follows:—

> "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 principles of equity for the time being in force in the High Court of Justice in England."

The 1st and 2nd defendants base their claim on the ground that the bills of sale being induced by fraud an obligation in the nature of a trust was created arising by implication or construction of law and the person who has obtained the property or persons claiming from him as volunteers must hold it on trust for the person defrauded. Section 111 of the Trusts Ordinance deals with the law of prescription in relation to trusts and it excludes from the operation of the Prescription Ordinance certain classes of cases. This case does not come within the ambit of sub-section (1) nor in my opinion for the reasons given by Jayawardene A.J. in his judgment in *Punchi Hamine v. Ukku Menika* [1] can the plaintiff be said to be holding the property under a constructive trust which by the law of England is treated as an express trust. The plaintiff is therefore entitled to rely on the Prescription Ordinance. The 1st defendant was a defendant in the action taken by F. H. Perera in the District Court of Kalutara on May 5, 1927. On October 28, 1929, the claim of the 6th defendant was upheld, Bill of Sale P 5 in his favour by the 5th defendant having been produced in Court. The 1st defendant, therefore, had notice of P 5 from October 28, 1929. In her evidence the 2nd defendant stated that there was seizure of the schooner and that after such seizure she came to know of the transfer P 5 from the 1st defendant. The cause of action arose when the fradulent transfer was made on August 11, 1928. The 1st and 2nd defendants had knowledge of this fraud on or about October 28, 1929. Their claim was therefore barred in three years from this date—vide *Fernando v. Peiris* [2] and *Muttiah Chetty v. Mohamood Hadjiar* [3].

It has also been contended by Counsel for the 1st and 2nd defendants that even if the allegations of fraud on the part of the plaintiff have not been established, the plaintiff did not become the owner of the vessel by virtue of P 2 because the title of the 8th defendant was derived from the 5th defendant who fraudulently and in breach of trust transferred the schooner to the 6th defendant in 1928. The 5th defendant being only a trustee for the 3rd and 4th defendants could not transfer the beneficial interest in the schooner and hence the 6th defendant, 7th defendant, 8th defendant and the plaintiff in turn held the schooner in trust for the 3rd and 4th defendants. In *Dodwell & Co. v. E. John & Co.* [4] Ennis J. applied the equitable principle laid down by the English Courts without qualification, and Pereira J. said "This Court has often pointed out that

[1] *28 N. L. R. at p. 97.*
[2] *33 N. L. R. 1.*
[3] *25 N. L. R. 185.*
[4] *20 N. L. R. 206.*

our Courts (in Ceylon) are Courts of Law and Equity, and it would be quite in order to give here the same relief as given in England in cases of fraud". The judgment of Lord Haldane when *Dodwell & Co. v. E. John & Co.* came in appeal to the Privy Council (1918) A. C. 563 showed that the Privy Council upheld the applicability of the equitable principle referred to in the judgment of Pereira J. but held that the matter was subject to the Prescription Ordinance of Ceylon. The limitations on the right of a beneficiary to follow trust property with which the trustee has parted in breach of trust is referred to by James L.J. in *Pilcher v. Rawlins* (1872) 7 Chancery Appeals at pages 268-269 in the following passage :—

> "I propose simply to apply myself to the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage; and, according to my view of the established law of this Court, such a purihaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence, and an unanswerable plea to the jurisdiction of this Court. Such a purchaser, when he has once put in that plea, may be interrogated and tested to any extent as to the valuable consideration which he has given in order to show the *bona fides* or *mala fides* of his purchase, and also the presence or the absence of notice ; but when once he has gone through that ordeal, and has satisfied the terms of the plea of purchase for valuable consideration without notice, then, according to my judgment, this Court has no jurisdiction whatever to do anything more than to let him depart in possession of that legal estate, that legal right, that legal advantage which he has obtained, whatever it may be. In such a case a purchaser is entitled to hold that which without breach of duty, he has had conveyed to him."

In the present case the 5th defendant was a trustee of the schooner and in breach of trust transferred it to the 6th defendant in 1928. The plaintiff who by a series of transactions has become the recipient of the schooner will be bound by the trust unless he can show (1) that he has obtained the legal title, (2) that he was a *bona fide* purchaser for valuable considertion, and (3) that he received no notice that the transaction was a breach of trust before the transfer was complete. In my opinion the plaintiff has obtained the legal estate. By virtue of rule 1 of section 19 of the Sale of Goods Ordinance the property in the schooner passed to the plaintiff when the Bill of Sale P 2 was executed. Moreover their is evidence that the plaintiff took possession. The plaintiff has therefore satisfied (1). (2) has also been satisfied. With regard to (3), it is true that the plaintiff failed to give evidence at the trial. It was, however, held in *Joseph v. Lyons* [1] that corporal chattels are outside the realm of constructive notice. In his judgment Lindley L.J. said that as the plaintiff claimed the goods in order to succeed, either he must have a legal title, or if he had only an equitable title he must show that the defendant had

[1] *15 Q. B. D. 280.*

notice of that title. The judgment of Cotton L.J. was to the same effect as will be seen from the following passage at page 286:—

> "Then reliance was placed upon a contract that the after-acquired property should belong to the plaintiff: it was the rule at common law that the property in future-acquired goods should not pass, except, perhaps, where there was a contract that the property in them should pass: that rule still remains in force; and it follows that the legal title remains as it stood at law; only an interest in equity passed to the plaintiff. Then the defendant had the legal title: he had no notice of the equitable title existing in the plaintiff: at least nothing has been proved showing that he had notice: here the defendant was a pawnbroker, and he was not bound to search the register of bills of sale: he was not bound to inquire as to goods pledged with him in the course of his business. Of course, if he had been informed of the existence of the bill of sale, he would have been bound to search the register in order to inform himself of its contents; but I think that the doctrine as to constructive notice has gone too far, and I shall not extend it."

Again in *Lord Strathcona Steamship Company v. Dominion Coal Co.* [1] the following dictum from the judgment of Knight Bruce L.J. in *De Mattos v. Gibson* [2] was cited with approval at page 117 in the judgment of Lord Shaw:—

> "Reason and justice seem to prescribe that, at least as a general rule, where a man, by gift or purchase, acquires property from another, with knowledge of a previous contract, lawfully and for valuable consideration made by him with a third person, to use and employ the property for a particular purpose in a specified manner, the acquirer shall not to the material damage of the third person, in opposition to the contract and inconsistently with it, use and employ the property in a manner not allowable to the giver or seller."

In the present case neither the 1st and 2nd defendants nor the 3rd and 4th defendants have the legal title in the schooner. The 1st and 2nd defendants must prove that the plaintiff when he purchased by P 2 had notice of the 3rd and 4th defendants' equitable title. This they have not done and in the circumstances I am of opinion that the plaintiff, as expressed by James L.J. in *Pilcher v. Rawlins*, is entitled to depart in possession of the legal estate.

For the reasons I have given the judgment of the District Judge is set aside and judgment must be entered for the plaintiff as claimed together with costs in this Court and the Court below.

KEUNEMAN J.—I agree.

Appeal allowed.

[1] *(1926) A. C. 108.*

[2] *4 De G. & J. 276.*