7, 1948

No. 48 of 1946.

In the Privy Council.

UNIVERSITY OF LONDON
W.C.1.
-3 OCT 1956
INSTITUTE OF ADVANCED
LEGAL STUDIES
44205

ON APPEAL

FROM THE SUPREME COURT OF FIJI.

BETWEEN

YENKANNA Father's Name Pollaiya of Tavua in the Colony of Fiji Cultivator - - - - - *Appellant*

and

ACHANNA Father's Name Naka Naidu of Namata in the District of Nadroga Cultivator - - - - *Respondent.*

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Case for the Appellant.

RECORD.

1. This is an Appeal from a Judgment of the Supreme Court of Fiji (Sir C. R. W. Seton, Chief Justice) given on the 22nd October, 1945, in an action brought by the Respondent as Plaintiff against the Appellant as Defendant claiming a Declaration that the Appellant held certain land in trust for the Respondent and for an Order for the transfer of the said land to the Respondent and for repayment by the Appellant to the Respondent of a sum of £500 4s. 11d. [pp. 15–19. p. 1.]

2. This Appeal raises three main questions :—

20 (1) Whether the Respondent was entitled to claim an interest in the land contrary to the absolute registered transfer of the land to the Appellant.

(2) Whether the transaction alleged by the Respondent could properly be regarded as capable of resulting in the creation of a Trust.

(3) Whether the Supreme Court was justified, having regard to the evidence, in holding that a Trust had been made out.

3. The facts admitted or proved can be stated shortly as follows :—

30 (A) The Respondent purchased in 1933 from J. T. Mackie land in the Colony of Fiji comprised in Title No. 4085A having an area of 456 acres or thereabouts for £700 and the said land was conveyed to the Respondent by Transfer No. 8759 registered on the 4th December, 1933. [p. 6, ll. 1–5. p. 8, ll. 1–3. p. 15, l. 33.]

p. 6, ll. 9–10.
p. 8, l. 5.
p. 15, l. 34.

(B) The Respondent sold about 25 acres of the said land and the same was transferred to the Purchaser under Transfer No. 26055 and the Respondent received Balance Title No. 6656.

p. 6, ll. 6–8.
p. 8, ll. 4–7.

(C) The Respondent borrowed £700 from Vatu Investments Limited and mortgaged the remaining land to that Company to secure the loan.

p. 12, l. 12.
p. 9, ll. 24–26.

(D) By 1941 the Respondent had only been able to pay off between £100 and £200 to the Mortgagees and in 1941 he was in debt and had difficulty in keeping up his payments under the mortgage, and the Mortgagees gave him notice demanding repayment 10 of the whole amount due under the mortgage.

p. 21.
p. 22, l. 8.
p. 13, ll. 29–32.
p. 21, l. 32.

(E) On the 18th December, 1941, the Respondent transferred the whole of the land comprised in Title No. 6656, namely, 431 acres, 2 roods, 38 perches, to the Appellant by written Transfer No. 28905 of that date in consideration of the sum of one shilling but subject to the mortgage and to leases of parts of the said land, the leases including all the cane land. The said Transfer was duly registered. Part or the whole of the remaining part of the land was in the occupation of the Respondent who resided there and who remained in possession after the transfer. The Transfer contained a declara- 20 tion by the Respondent that the value of the land transferred did not exceed £1,500.

p. 10, ll. 31–32.
p. 13, l. 46.

(F) For about two years prior to the transfer to the Appellant the Respondent's daughter had been living in the Appellant's house and looking after his children, the Appellant's first wife having died in 1938. The Appellant re-married on the 30th January, 1940.

p. 9, l. 36.

(G) The Mortgagees did not demand repayment of the balance of the mortgage monies from the Appellant, who was known to be a person of substance, after the transfer to him. 30

p. 22, l. 18.
p. 11, l. 14.
p. 26, l. 29.

(H) By an agreement in writing dated the 21st June, 1943, the Appellant agreed to sell to the Catholic Mission in Fiji approximately 267 acres, part of the land comprised in Title No. 6656 for £1,000 and the sum of £100 deposit was paid to the Appellant's solicitor, Mr. N. S. Chalmers. The sale was completed in February or March, 1944, and the balance of the purchase money, after deducting the amount due to the Mortgagees, was paid to the Appellant's solicitor; this balance amounted to about £500 and is the sum the repayment of which was claimed by the Respondent in the action and for which Judgment was given in his favour. 40

p. 24.

(I) On the 1st December, 1943, the Respondent's solicitor, Mr. Stuart, who acted throughout for the Respondent, the Mortgagees and the Catholic Mission, wrote to Mr. Chalmers as follows enclosing for execution by the Appellant a Transfer to the Respondent of the balance of the land remaining after the sale to the Catholic Mission, the transfer to the Catholic Mission of the land sold to the Mission having been executed by the Appellant some time previous :—

Lautoka,
Fiji,
1st December, 1943.

N. S. Chalmers, Esq.,
Solicitor,
Ba.

Dear Sir,

Yenkanna to R.C. Mission.

I enclose Transfer for perusal, and if in order for execution by your client. Kindly let me know the amount required to settle.

You will be aware, that no consideration passed on the transfer of this block from Achanna to Yenkanna, and the former now wants Yenkanna to re-transfer it to him. Of course, he will have to repay your client for anything he has spent on it, and if your client agrees, I shall be glad to know what amount he will require on re-transfer.

Yours faithfully,

P. RICE,

Per : K. A. STUART.

to which Mr. Chalmers replied on the 6th December as follows :— p. 25.

Ba, Fiji.
6th December, 1943.

P. Rice, Esq.,
Solicitor,
Lautoka.

Dear Sir,

Re Yenkanna & R.C. Mission.

I acknowledge your letter herein of the 1st instant. The Transfer to the R.C. Mission was presented for execution some time ago and has been executed by my Client, Yenkanna, and will be handed over to you as soon as the account with the mortgagees is settled and the mortgage is discharged and the balance purchase price is paid.

With regard to the other Transfer, my client denies that Achanna has any claim to the balance of the land and is not prepared to sign the Transfer. In any case the matter of this transfer never cropped up before the deal with the Mission was completed. The balance title should be issued in the name of Yenkanna as agreed. Achanna, if he has any claim to the land, can take action later as he may be advised.

Yours faithfully,

(signed) N. S. CHALMERS.

p. 29.

(J) On the 22nd June, 1944, Mr. Stuart wrote to Mr. Chalmers setting forth for the first time the Respondent's Claim against the Appellant in these proceedings in the following terms :—

Lautoka,
Fiji.
22nd June, 1944.

Mr. N. S. Chalmers,
Solicitor,
Ba.

Dear Sir, 10

Yenkanna and Achanna.

Further to my letter of the 1st December last and your reply of the 6th idem I am now instructed to make a formal request to Yenkanna to convey to Achanna the balance of the land transferred to Yenkanna in 1942. I have already pointed out that no money passed in respect of this land, but that it was transferred to Yenkanna upon the understanding that he was to pay off the mortgage, and that when any money advanced by him was repaid, he would re-convey the land to Achanna. In the result, of course, part of the land was sold to the Roman Catholic Mission—and 20 I emphasise that it was Achanna who conducted all the negotiations—and it was not necessary for Yenkanna to put his hand in his pocket at all. Yet he has received the purchase price, and now not only does he refuse to refund any part of that to Achanna, but he insists on retaining the land. I understand that a panchayat was recently held at Tavua and that Yenkanna was ordered to re-convey to Achanna, and to return him the balance of the purchase money, and I should be glad if you would kindly see him and arrange for this to be done.

I may say—quite without prejudice, of course—that I am 30 prepared to advise Achanna to make some allowance to Yenkanna to reimburse him for the responsibility he undertook, and other many attendances and journeyings he has, no doubt, made.

Yours faithfully,

P. RICE,

per : (signed) K. V. STUART.

p. 31, l. 27.

On the 30th June, Mr. Chalmers replied as follows :—

Chambers,
Ba, Fiji.
30th June, 1944. 40

P. Rice, Esq.,
Solicitor,
Lautoka.

Dear Sir,

Re Yenkanna and Achanna.

With reference to your letter hereon of the 22nd instant my client says very definitely that there was no such arrangement,

as you suggest, between Achanna and himself. My client says that he took over the land for the mortgage debt which was then considered the full value of the land. My client has no intention whatsoever of transferring the balance of the land to Achanna or paying him any money. When my client signed the Transfer to the Roman Catholic Mission our arrangement was that you would obtain a balance title in the name of my client Yenkanna but at the cost of your Client, the R.C. Mission, and hand me the balance title. The application therefor being drawn up and signed by me, as Solicitor for the applicant, my client Yenkanna, in your office. I must ask you to adhere to that arrangement.

I note what you say with reference to a panchayat. The word " panchayat " is synonymous with our word " arbitration." There was no such thing as " arbitration " in this matter. My client instructs me that a number of persons were brought to his home at Tavua by Achanna; that these persons tried to intimidate him into recognising, in some way, that your client had certain interests in the land in question. Notwithstanding that my client was more or less alone he informs me that he would not submit to such intimidation and refused, on pressure, to recognise that your client had any interest whatsoever in the land.

My client has treated Achanna in a very liberal manner since he took over the land from him—allowing him to live rent free on the land. My client has now decided, however, that it would be in his best interests if your client left the land. I enclose a notice of demand for possession which I would be glad if you would hand to your client. I arranged with you to collect the rents from the lands on behalf of my client. Would you please let me have an account of these collections ?

Yours faithfully,

(signed) N. S. CHALMERS.

4. As a result, the Respondent issued his Writ in this action on the 6th September, 1945, claiming a Declaration that the Appellant held 164 acres 1 rood 34 perches, alleged to be the balance of the land comprised in Title No. 6656 (after deducting the land sold to the Catholic Mission) as Trustee for the Respondent and an Order directing the Appellant to execute a Transfer of the said land in favour of the Respondent and also claiming repayment of £500 4s. 11d. being the balance of £1,000 paid to the Appellant by the Catholic Mission upon the purchase after deducting the amount due to the Mortgagees under the mortgage. p. 1.

5. By Paragraph 5 of the Statement of Claim the Respondent alleged that the Transfer No. 28905 dated the 18th December, 1941, was made by the Respondent and accepted by the Appellant not absolutely but upon trust that the Appellant should pay off all monies payable by the Respondent by virtue of the mortgage and that upon the payment of such monies to the Appellant he, the Appellant, should re-transfer to the Respondent the said land comprised in Title No. 6656. By Paragraph 2 of his Defence the p. 3, l. 30. p. 4, l. 37.

p. 5, ll. 13–15.
p. 5, ll. 47–49.
p. 5, ll. 18–23.

Appellant denied the alleged Trust and relied upon certain provisions of the Indemnity, Guarantee and Bailment Ordinance No. 2 of 1881 and of the Land (Transfer and Registration) Ordinance No. 14 of 1933 and also alleged that the alleged agreement or undertaking to re-transfer the land to the Respondent was void for uncertainty, as it did not state who was to repay the Appellant, when or how the monies were to be repaid to him, who was to pay the interest under the mortgage and who was to pay the costs of transfer, discharge of mortgage, etc.

6. The relevant provisions of the Land (Transfer and Registration) Ordinance No. 14 of 1933 are Sections 10 and 14 and 19 which are as follows :— 10

10. When a grant is cancelled upon registration of a transfer or other dealing as hereinafter provided the Registrar shall issue in duplicate a certificate of title in favour of the new proprietor in the Form A. contained in the First Schedule hereto one duplicate of which he shall register in the same manner as provided for Crown Grants and the other he shall deliver to the new proprietor and in like manner upon the cancellation of each certificate of title a fresh certificate of title shall be issued and the title of the proprietor under each fresh certificate shall be as valid and effectual in every 20 respect as if he had been the original grantee of the land contained in the certificate.

14. The instrument of title of a proprietor issued by the Registrar upon a genuine dealing shall be taken by all Courts of Law as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof and the title of such proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to have been a party or on the ground of adverse possession in another for the prescriptive period. A duplicate or certified 30 copy of any registered instrument signed by the Registrar and sealed with his seal of office shall be received in evidence in the same manner as an original.

19. Except as herein otherwise provided every instrument presented for registration shall unless a Crown Grant be attested by one witness and shall be registered in the order of time in which the same is presented for that purpose and instruments registered in respect of or affecting the same estate or interest shall notwithstanding any express implied or constructive notice be entitled to priority according to the date of registration and not according 40 to the date of each instrument itself and the Registrar upon registration thereof shall file the instrument in his office and if such instrument is in duplicate as herein provided he shall deliver the duplicate to the person entitled thereto and so soon as registered every instrument shall for the purposes of this Ordinance be deemed and be taken to be embodied in the register as part and parcel thereof and such instrument when so constructively embodied and stamped with the seal of the Registrar shall have the effect of a Deed duly executed by the parties signing the same.

7. The action was heard by the Chief Justice of Fiji, Sir C. R. W. Seton, on the 19th and 20th September, 1945, the Respondent giving evidence on his own behalf and calling Mr. Stuart and putting in evidence a document drawn up at a panchayat at the Appellant's house and dated the 25th June, 1944 (the panchayat was held some days before this date) signed by both parties and also calling one Ramraj, who was present at the panchayat. The Appellant gave evidence on his own behalf and called one Rampraytap Singh who had drawn up the panchayat document.

p. 9.
p. 9, l. 24.
p. 11, l. 1.
p. 30.
p. 11, l. 29.
p. 12, l. 9.
p. 14, l. 9.

8. The Chief Justice gave Judgment on the 22nd October, 1945, in favour of the Respondent. He treated the whole action as dependent solely upon the application of the decision of the Court of Appeal in *Rochefoucald* v. *Bowstead*, 1897 1 Ch. 196, as if the only issue before the Court was whether the relevant provisions of the Indemnity Guarantee and Bailment Ordinance No. 2 of 1881, Section 59 of which, corresponding to the provisions of Section 7 of the Statute of Frauds, reads as follows :—

p. 15, l. 31.
p. 19, l. 20.

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59. No action shall be brought :—

(*a*) Whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate ; or

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(*b*) Whereby to charge the Defendant upon any special promise to answer for the debt default or miscarriages of another person ; or

(*c*) To charge any person upon any agreement made upon consideration of marriage ; or

(*d*) Upon any contract or sale of lands tenements or hereditaments or any interest in or concerning them ; or

(*e*) Upon any agreement that is not to be performed within the space of one year from the making thereof ; unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorised.

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prevented proof of what had in fact taken place. He did not consider at all the effect of the relevant provisions of the Land (Transfer and Registration) Ordinance No. 14 of 1933 set out in Paragraph 6 hereof. It is submitted as a matter of Law that the Chief Justice should have held that the Respondent was estopped by the registration of the Transfer which then took effect under Section 10 as the Respondent's deed from asserting his claim to the land and that under Section 14 the Appellant's title was absolute and indefeasible.

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9. After reciting the documents and reviewing the evidence the Chief Justice gave five reasons for his finding in favour of the Respondent, and assuming oral evidence can be adduced to destroy the effect of the registered transfer, it is necessary to examine each of these reasons carefully.

p. 18, l. 8.

10. The first reason given by the Chief Justice was expressed by him as follows :—

p. 18, l. 9.

"(A) The Plaintiff went to the Defendant for assistance but, according to the Defendant's account, he got nothing except that he parted with the only asset of value he had in return for the Defendant's undertaking responsibility for the repayment of the mortgage; it has been suggested that he thereby protected his other assets, i.e., his cultivation and his goats, but as these appear to have been already included in a Bill of Sale, they remained in jeopardy. The transaction as represented by the Defendant 10 seems to me an improbable one."

p. 21.

It is submitted with respect that this reason is not well founded. The effect of the Transfer of the 18th December, 1941, was to cast upon the Appellant an obligation to pay and discharge the mortgage debt and to keep the Respondent indemnified therefrom, this being provided by Section 35 of the Land (Transfer and Registration) Ordinance No. 14 of 1933, which is as follows :—

"In every instrument transferring an estate or interest in land subject to mortgage or encumbrance, there shall be implied the following covenant by the Transferee (that is to say): That such 20 Transferee will pay the interest, annuity or rent charge secured by such mortgage or encumbrance after the rate and at the times specified in the instrument creating the same and will indemnify and keep harmless the Transferor from and against the principal sum secured by such instrument and from and against all liability in respect of any of the covenants therein contained or by this Ordinance implied on behalf of the Transferor."

p. 9, l. 36.

p. 13, l. 29.

The Appellant, therefore, came under a personal liability to pay and discharge the mortgage. It was common ground that the Appellant was a man of substance who was beyond question capable of discharging the 30 mortgage, and the Respondent, though he parted with the land itself, kept his personal chattels and remained in actual occupation of at least part of the land he occupied at the date of the transfer. The Appellant in his evidence stated that he agreed to the Respondent remaining in the house until he could get another place. It is incorrect to say that the Respondent's other assets included in the Bill of Sale which was given to the Mortgagees by way of Collateral Security remained in jeopardy because the Respondent now had the security of the indemnity given by the Appellant, upon which, as he well knew, he could rely.

p. 8, l. 10.

p. 10. l. 36.

As to the Appellant's story of the transfer being improbable there is, 40 it is submitted, nothing at all improbable about it. It is supported by the documents in the case and by every fact not in dispute. The Respondent's story, on the contrary, is improbable. Why should the Appellant undertake the liability for this mortgage at a time when the Respondent was incapable of meeting his liabilities and when the Mortgagees were dissatisfied with their security and were demanding repayment? Had the Mortgagees foreclosed or sold the Respondent would have been compelled forthwith to vacate the property and might in addition have found himself upon a forced sale by the Mortgagees still under liability to them and, in addition, he would or might have lost his personal chattels. By the sale 50

to the Appellant for the amount of the mortgage he secured what amounted to a discharge from the mortgage and a measure of protection for himself as was clearly borne out by the subsequent events. No reason whatever is advanced why the Appellant should have prepared to undertake the liability for the mortgage purely gratuitously. The only circumstances in which the Respondent would obtain no benefit at all from the transaction would be if his story were true, for in this event he would be bound to indemnify the Appellant instead of the Appellant indemnifying him, a matter with which the Chief Justice did not deal.

10 11. The second reason given by the Chief Justice is as follows :—

"(B) The Defendant says that at that time the land was not worth more than the amount due on the Mortgage, say, £500 to £600. Why, then, was there a certificate on the transfer (for purposes of stamp duty) that the value of the land did not exceed £1,500 ? The Defendant says that he knows nothing about such a certificate but both parties went to Mr. Stuart to prepare the transfer. Either Mr. Stuart knew the value (as he might have done, being also the solicitor for the mortgagees) or he asked the question of the parties and was told what to put. Moreover, a portion of the land was 20 sold for £1,000 not much more than a year after the transfer and, according to the Defendant, the land which remained after the sale is the more valuable. Judging from the slender evidence on the subject before me, I should say that at £1,500 the land was not over-valued." p. 8, l. 18.

The question of the value of the land is, it is submitted, of considerable importance because, if the land were in fact worth £1,500, it is improbable that the Respondent would have sold it for the amount of the mortgage, i.e., about £600 ; whereas, if, in fact, it was only worth about £600, the probability would, it is submitted, be the other way. The declaration 30 as to the £1,500 is an interlineation as appears from an inspection of the Transfer and it is a declaration made by the Respondent. It was necessary to put in a value for stamping purposes the rate of duty being 10s. per £100, but the Appellant had no part in inserting the figure of £1,500, although it was no doubt to his interest—for any future dealings by him with the land e.g. a mortgage—to have a high figure inserted rather than a low one. As to how this figure got into the Transfer, the Chief Justice states that either Mr. Stuart knew the value (as he might have done being also the solicitor for the mortgagees) or he asked the question of the parties and was told what to put. Mr. Stuart was, however, called by the 40 Respondent but he gave no evidence on this point at all and there was no evidence before the Chief Justice upon which he could find that Mr. Stuart knew the value or that he asked the question of the parties and was told what to put. The only direct oral evidence as to value before the Court was the evidence of the Appellant who estimated the value at between £500 and £600. The Appellant's estimate as to the value was supported by all the known facts. The land had been purchased for £700 in 1933 and a small part namely 25 acres had been sold off and, on the basis of this sale, the land comprised in the Transfer of the 18th December, 1941, would have produced about £600. There was no evidence of any appreciation 50 in value at the later date, on the contrary, the transfer took place only p. 21, l. 32. p. 18, l. 24. p. 13, ll. 9–10. p. 6, ll. 1–5. p. 6, l. 9.

a very short time after the attack by the Japanese upon the American Fleet at Pearl Harbour and the sinking of the "Prince of Wales" and the "Repulse"—events which could no more have resulted in an appreciation of values in Fiji than they did in England; they had exactly the reverse effect. It can hardly be questioned that in December, 1941, the position of the British Empire was a difficult one, and this naturally tended to depress the values of property. Furthermore, the Mortgagees were pressing for repayment, although in fact a small part of the mortgage had been paid off by the Respondent. When the Appellant took the Transfer they did not press him for payment because they knew that he was a man of 10 substance. But if the land were worth about £1,500, the mortgage being only about £600, why should the Mortgagees have been concerned for their loan and demand repayment by the Respondent?

p. 18, l. 26.

The Chief Justice relied upon the sale to the Catholic Mission in June, 1943, of part of the property for £1,000 but this sale could hardly form a safe guide because not only did it take place some 18 months later when the war had taken a more favourable turn in the Pacific and, in fact, in Europe as well, but the Catholic Mission can hardly be regarded as the kind of purchaser in view for the land in 1941. There was no suggestion that in 1941 anyone contemplated the possibility of selling the land for a 20 Mission or for building purposes or for any other special purpose which would have enabled a more than normal price to be obtained. The Appellant's contention was that the sale was an unexpectedly favourable one and there was no evidence to the contrary.

p. 13, ll. 10–12.

12. The third reason given by the Chief Justice was as follows:—

p. 18, l. 32.

> "(C) The Plaintiff continued in occupation of the property and no attempt was made to terminate his occupation until after the panchayat, i.e., 3 years or more after the alleged sale."

p. 10, l. 42.
p. 12, l. 21.

This reason must be taken, however, to refer only to the house and land in the actual occupation of the Respondent. All the cane land was 30 let to tenants and the rents were all collected and applied in discharge of the mortgage. Apart from the rent which the Appellant could have secured from the property occupied by the Respondent, as to which there was no evidence, there was no reason why the Appellant should disturb the Respondent's possession. The Appellant said it was a convenience to him to have the Respondent living on the land and that he looked upon him as a sort of caretaker. Furthermore, the Respondent's daughter was living in his house and looking after his children and the parties were at this time on friendly terms.

p. 13, l. 31.
p. 10, l. 31.

13. The fourth reason given by the Chief Justice was as follows:— 40

p. 18, l. 35.

> "(D) On the evidence, I belive that it was the Plaintiff who negotiated the sale to the Mission, and I disbelieve the Defendant when he says that it was he who did so."

Upon this part of the matter there is in fact nothing inconsistent in the story told by the Appellant with that told by the Respondent. That the Catholic Mission when inquiring about the land should see the Respondent was quite understandable because the Respondent had for many years been the owner of and resided on the land while the Appellant lived 60 miles away. The mere registration of the Transfer would not indicate

p. 13, l. 16.

to third parties that there had been a change of ownership and anyone inquiring about the land would normally be referred to the Respondent. Nor was there any reason why the Respondent, who as stated was living rent free in the house and was on friendly terms with the Appellant at the time, should not assist in negotiating the sale. It is quite clear, however, that the Catholic Priest and the Respondent came to see the Appellant about the sale and that the draft agreement which had been prepared by Mr. Stuart, who acted for the Mortgagees and the Catholic Mission, was considerably revised by Mr. Chalmers, acting for the Appellant as Vendor.

p. 10, l. 2.

p. 11, l. 10.

The Respondent himself says that after going with the Priest with the draft agreement to the Appellant he left the matter to the Appellant. p. 10, l. 23.

14. The Chief Justice's last reason was as follows :—

> "(E) As a witness the Plaintiff struck me as being honest, albeit somewhat stupid, while the Defendant I thought untruthful."

p. 11, l. 38.

It is respectfully submitted that the Chief Justice was not relying to any great extent upon the oral evidence of the parties in this, his last reason, and clearly in establishing a Trust against the evidence afforded by the documents and the surrounding circumstances, it would be too dangerous to rely solely upon the evidence of a stupid witness. It is respectfully submitted that where all the formal documents, the correspondence and the known facts negative a Trust, the oral evidence must be extremely strong and clear before the Court can find that a Trust is established. In *Haigh* v. *Kaye*, 1872, 7 Ch. 469, Lord Justice James said, at p. 474, that it is clear that the Statute of Frauds was never intended to prevent the Court of Equity from giving relief in the case of a plain, clear and deliberate fraud, and it is submitted that the Respondent must establish his claim plainly and clearly.

15. The Chief Justice then dealt with two matters which he stated seemed somewhat to conflict with the Respondent's account of his transaction with the Appellant. The first is the Respondent's solicitor's letter of the 1st December, 1943. The Chief Justice observes here that one would have expected that the terms upon which the Transfer was alleged to have been made to the Appellant would have been expressed with greater precision and, in particular, that instead of an inquiry as to what amount the Appellant would require on re-transfer, there would have been a statement that the Appellant was about to receive a sum more than sufficient to repay him for any money he had spent on the property and a demand for the balance. The Chief Justice suggests that apparently Mr. Stuart thought it sufficient to draw attention to the nominal consideration for the Transfer, for the rest to be implied.

p. 18, l. 46.
p. 24.
p. 18, l. 48.

p. 19, l. 6.

It is submitted, with respect, that the letter is utterly at variance with the Respondent's claim in the action and that it is impossible to imply what is suggested by the Chief Justice. Mr. Stuart gave evidence but he gave no explanation as to the letter. It is, however, inconceivable that, had he been told the story, put forward by the Respondent for the first time in his letter of the 22nd June, 1944, he could have written the letter of the 1st December, 1943. That letter was written upon the basis that the Appellant had paid nothing to the Respondent for the land and is no

p. 29.
p. 24.

more than a request that this being so the Appellant will let the Respondent have back the balance of the land. Mr. Stuart knew that there would be a balance of some £500 of the purchase money payable by the Mission, after deducting the amount due to the Mortgagees, in fact, he was the only person who knew the figures, but he did not for one moment suggest that this money was owing to the Respondent.

p. 11, l. 8.

16. The second matter stated by the Chief Justice to conflict with the Respondent's account of the transaction was a statement made by the Respondent in examination in chief, the statement being as follows :—

p. 19, l. 9.

> "The sale was completed by Mr. Stuart. After that I saw Defendant at Ba. I told him I wanted money and asked him to re-transfer balance of land to me so that I could raise some money on it." 10

17. The Chief Justice treated the Statement as having been made after the Contract had been made with the Catholic Mission but before completion. An examination of the facts shows, however, that it cannot be made to refer to a date prior to the completion of the Sale to the Mission without doing violence to the language used by the Respondent.

p. 19, l. 14.

18. It is respectfully submitted that the Respondent's claim was an afterthought built up by him and put forward with a view to bringing the 20 claim within the principles laid down in *Rochefoucauld* v. *Bowstead*, 1897, 1 Ch. 196, which was followed in the Supreme Court of Fiji in *Administrator of Lautoka* v. *Bakhtawali*, Civil Action No. 98 of 1936. Although Mr. Stuart was acting throughout for the Respondent, all the facts show that the Respondent's story was never put before Mr. Stuart until the writing of the letter of the 22nd June, 1944, and that, even at that date, the Respondent was not clear in his own mind as to what was the arrangement which he alleged was entered into in December, 1941, as is clear from the panchayat document. That document is based upon the same foundation as the letter of the 1st December, 1943, namely, that the Appellant had given no 30 consideration for the Transfer, and speaks definitely of the property having been purchased by the Appellant from the Respondent. The Respondent's claim as put forward in the panchayat document or at the panchayat itself was clearly not based upon any trust.

p. 29.

p. 30.

p. 24.

19. In this connection it is important to notice that Mr. Stuart was acting for the Mortgagees and for the Respondent at the time of the Transfer of the 18th December, 1941, and he prepared the Transfer, which was executed by the Respondent in his presence and, as appears plainly from the Transfer, he read over and explained the contents of it to the Respondent who appeared fully to understand the meaning and 40 effect of it and Mr. Stuart added his certificate to this effect. The duty to do this was imposed upon Mr. Stuart by the Land (Transfer and Registration) Ordinance No. 14 of 1933 and the Certificate is in the form set forth in Form R (Section 140) in the First Schedule to the last-mentioned Ordinance. The Respondent states that he never told Mr. Stuart of the arrangement in December, 1941, but why did he remain silent when Mr. Stuart explained to him that the effect of the Transfer was to vest the property absolutely in the Appellant ? There is a perfectly simple method whereby the position of the Respondent could have been safeguarded had

p. 11, l. 8.

p. 11, l. 5.

p. 11, l. 2.

p. 10, ll. 33–34.

the property been transferred to the Appellant as Trustee, it being provided by Section 107 of the Land (Transfer and Registration) Ordinance, 1933, as follows :—

> " When the proprietor of land transfers or transmits the same to trustees the Registrar shall not make any entry in the Register of the Trusts but he shall register the fact that the persons in whose favour the instrument is granted are Trustees by adding the words ' as Trustees ' after their names and designations in the Register and on the duplicates of the Certificate of Title to be issued in their favour, and the instrument creating the Trust or a duplicate or certified copy thereof shall be preserved in the Registry."

Mr. Stuart would not have had the slightest difficulty in protecting the Respondent by the appropriate entries.

20. It is further respectfully submitted by the Appellant that this claim would never have been put forward but for the fortunate sale to the Catholic Mission. At no time prior to this sale had the Respondent made any claim or been given or, indeed, asked for any accounts of the property or the state of the mortgage.

21. The Appellant raised a Counter-claim for possession of the land occupied by the Respondent. This Counter-claim was not gone into in the Supreme Court of Fiji having regard to the decision of the Chief Justice upon the claim. It is respectfully submitted that if this Appeal be allowed the Counter-claim must succeed, and that the matter should be remitted to the Supreme Court of Fiji for an order upon the Counter-claim. p. 6, l. 40.

22. The Appellant submits that this Appeal should be allowed and this Honourable Court of His Majesty's Privy Council should advise his Majesty accordingly for the following (among other)

REASONS

(1) BECAUSE under Section 14 of the Land (Transfer and Registration) Ordinance No. 14 of 1933 the Appellant's title to the land was absolute and indefeasible.

(2) BECAUSE the Respondent was estopped by virtue of Sections 10 and 19 of the said Ordinance from alleging that the registered transfer did not operate to transfer the said land to the Appellant absolutely.

(3) BECAUSE the facts alleged by the Respondent in his oral evidence did not disclose the creation of any Trust in his favour imposed upon the Appellant.

(4) BECAUSE the alleged Trust was too indefinite and uncertain to be enforced.

(5) BECAUSE there was no plain and clear evidence of a Trust sufficient to destroy the effect of the registered and other documents.

(6) BECAUSE the Judgment of the Chief Justice was wrong and ought to be reversed.

GILBERT DARE.

No. 48 of 1946.

In the Privy Council.

ON APPEAL

From the Supreme Court of Fiji.

BETWEEN

YENKANNA Father's Name Pollaiya of Tavua in the Colony of Fiji Cultivator - - - *Appellant*

AND

ACHANNA Father's Name Naka Naidu of Namata in the District of Nadroga Cultivator - *Respondent.*

Case for the Appellant

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