

The Central Trust and Safe Deposit Company
and Another - - - - - *Appellants,*

v.

Harvey G. Snider and others - - - *Respondents.*

FROM

THE SUPREME COURT OF ONTARIO (APPELLATE DIVISION).

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 21st DECEMBER 1915.

Present at the Hearing:

VISCOUNT HALDANE.
LORD PARKER OF WADDINGTON.
LORD SUMNER.

[Delivered by LORD PARKER OF WADDINGTON.]

The questions for decision in this case concern the title to certain hereditaments in Toronto, known as 78, Bay Street, and arise under the following circumstances:—

The late Martin Edward Snider died in the year 1888 intestate. He was at the time of his death the owner of the property in question, which then consisted of about 23 feet of frontage on the west side of Bay Street, with a small half-brick residence erected thereon. He left two children, Thomas E. Snider and the defendant, Mabel Carleton, and the property devolved upon them as his co-heirs. After their father's death they went to live with their

uncle, Thomas A. Snider, hereinafter referred to as the testator.

On the 4th September 1899 the testator purchased and took a conveyance of the moiety of the property belonging to Thomas C. Snider. The validity of this transaction is not now in dispute. The testator having thus become entitled to a moiety of the property, proceeded to erect thereon a warehouse, at a cost of some 10,000 dollars.

On the 15th May 1900 the defendant, Mabel Carleton, by deed conveyed to the testator all her estate and interest, legal or equitable, in the property in question, to hold the same unto and to the use of the testator in fee simple. The consideration expressed in the deed was the nominal consideration of one dollar, of which she acknowledged the receipt. The real consideration was admittedly that expressed in a letter dated the 9th May 1900, and written to her by Mr. Irwin, the testator's legal adviser. According to this letter she was to be paid during her life one half of the rents of the property less any disbursements, and after her death one moiety of the property itself was to be conveyed to her heirs. This was to be secured partly by the management of the property being left as theretofore in the hands of her maternal uncle, Frank Hillock, and partly by a will which the testator was to make in her favour.

It is in their Lordships' opinion probable that the last-mentioned transaction was, having regard to the relationship existing between the parties, originally voidable in a court of equity. Whether, having regard to what subsequently happened, it still remains voidable, is a different matter, and one which need not be considered, for no claim has been made to avoid it. On

the contrary, the defendant, Mabel Carleton, claims on the footing that by virtue of the conveyance of the 15th May 1900, and in the events which have happened, the testator at his death held the property conveyed in trust for her. Her counter-claim asks for a declaration that this conveyance, though absolute in form, was intended only as a conveyance in trust for her, and the first reason in her case on the present appeal is that, the conveyance having been made in consideration of a promise which was never carried out, there is a resulting trust in her favour. Neither the suggestion of an intention to create a trust nor the suggestion of there being a resulting trust is consistent with a claim to have the conveyance set aside on equitable grounds. It is worth while, however, before proceeding further with the history of the case, to consider both these suggestions.

In their Lordships' opinion, the intention of the parties must be gathered from the conveyance and Mr. Irwin's letter. The intention, as manifested by the conveyance, is clear enough. All the interest of the defendant Mabel Carleton, whether legal or equitable, is intended to pass. The letter contains nothing inconsistent with, and a good deal to, confirm this. The testator was evidently intended to be put in a position to grant a lease or leases of the property on such terms as he might think desirable, which could not be properly done if the defendant, Mabel Carleton, remained equitable owner of a moiety of the property. Further, the testator's promise to devise a moiety of the property in her favour is inconsistent with her being intended to remain in equity the owner of such moiety, whether the testator did or did not make such a devise.

A contract to devise a beneficial interest assumes an estate in the person who contracts sufficient to enable the contract to be performed, and it would be contrary to ordinary equitable principles to construe a promise to settle as a present declaration of trust. With great deference, their Lordships think that the trial judge, in holding that the letter created a trust, did not give sufficient weight to these considerations. In their opinion, it is impossible to impute to the parties any intention of creating a trust *in praesenti*.

The suggestion that there was a resulting trust does not appear to have been dealt with in the courts below. It is, in their Lordships' opinion, equally untenable. When once the conclusion is arrived at that a grantor intends to part with his whole legal and beneficial interest in favour of another, there can be no resulting trust unless, in the view of a court of equity, there be no consideration to support the transaction, or the consideration, if any, entirely fails. It is not alleged that there was no such consideration in the present case. It is suggested that the consideration failed. But how can there be a total failure of a consideration consisting, in part at any rate, of a promise to do something in future? If property be conveyed in consideration of a covenant to pay money, the breach of the covenant to pay does not bring about a failure of consideration. The consideration is the covenant, and failure to observe the covenant results in a right of action at law on the covenant or for its breach, and not in any equitable right based on failure of consideration.

In their Lordships' opinion Meredith, C.J., put the matter on a surer ground. There being no question of setting the transaction

aside, the only point to be determined is whether, by virtue of the testator's promise to settle the property given in the letter of the 9th May 1900 for valuable consideration, the defendant, Mabel Carleton, became entitled in equity to any and what interest. The learned Chief Justice refers to the case of *Freemoult v. Dedire* (1 P.W. 428) as having decided that a covenant to settle lands makes the covenantor but a trustee for the parties who would be interested if the covenant were performed, and to a passage in "Lewin on Trusts," 12th ed., p. 160-1, where it is stated that if a person agrees for valuable consideration to settle a specific estate, he becomes a trustee of it for the intended objects, and all the consequences of a trust will follow. *Freemoult v. Dedire* was undoubtedly a sound decision, and there is little fault to find in the statement in "Lewin on Trusts" as to the general equitable principle. But it must be remembered that this principle is but the logical consequence of the power of a court of equity to grant, and its practice in granting, specific performance of a contract to convey or settle real estate. It is often said that after a contract for the sale of land the vendor is a trustee for the purchaser, and it may be similarly said that a person who covenants for value to settle land is a trustee for the objects in whose favour the settlement is to be made. But it must not be forgotten that in each case it is tacitly assumed that the contract would in a court of equity be enforced specifically.

If for some reason equity would not enforce specific performance, or if the right to specific performance has been lost by the subsequent conduct of the party in whose favour specific performance might originally have been granted,

the vendor or covenantor either never was, or has ceased to be, a trustee in any sense at all. Their Lordships had to consider this point in the case of *Howard v. Miller* (1915, A.C., 318), in connection with the law as to the registration of titles in the province of British Columbia, and came to the conclusion that though the purchaser of real estate might before conveyance have an equitable interest capable of registration, such interest was in every case commensurate only with what would be decreed to him by a court of equity in specifically performing the contract, and could only be defined by reference to the relief which the court would give by way of specific performance.

If, therefore, the defendant, Mabel Carleton, has any interest in the property it can only be because an action would lie for specific performance of the testator's contract to settle the property in her favour. Their Lordships will assume that the contract is one in its nature capable of specific performance as against volunteers under the testator's will—as indeed would appear from the case of *Synge v. Synge* (1894, 1 Q.B., 466), and that the defendant, Mabel Carleton, is in the present action seeking to have it specifically performed. On this footing two questions arise: First, was the contract varied by substituting for the promise to settle the property a promise to leave the defendant, Mabel Carleton, the legacy of 20,000 dollars which the testator in fact gave her by his will? Secondly, if there was no such contract to vary, can the defendant, Mabel Carleton, enforce specific performance without abandoning her interest in this legacy? In considering these questions it is necessary to deal in some detail with what happened after the original promise was made.

It appears that the testator, shortly after the conveyance of the 15th May 1900, granted a ten-year lease of the property at an annual rent of 977 dollars, and one half of the rent, less outgoings, was duly paid to the defendant, Mabel Carleton. In the year 1904 the warehouse built by the testator was burned down, and the testator thereafter erected on the property a larger warehouse at a cost of 27,000 dollars. This sum was provided partly out of moneys received for insurance, partly by a mortgage of the property for 20,000 dollars, and partly out of the testator's private moneys. On the 26th June 1905 the testator granted a lease of the property for ten years at an annual rent of 2,632.72 dollars. In the year 1909 the testator, through Frank Hillock, proposed to the defendant, Mabel Carleton, to modify the arrangement contained in the letter of the 9th May 1900 as follows, that is to say, the defendant, Mabel Carleton, was to be paid 600 dollars a year during his life and he was by his will to give her an annuity of 1,200 dollars, with a legacy of 20,000 dollars to her children after her death, she on her part giving up all interest in the property in question. The answer of the defendant, Mabel Carleton, to these proposals is contained in her letter to Mr. Frank Hillock of the 20th May 1909. She refers to the arrangement as to receiving half the rents of the property and complains that she has not even had the 600 dollars now proposed to be paid to her. She insists on this arrangement being adhered to. She says, however, "As to " Uncle T. A.'s will, that is all right," and in their Lordships' opinion this can only mean that she is willing to accept the new proposals so far as they relate to the provision of the 1,200 dollars annuity and the legacy of 20,000 dollars

to her children after her death instead of the interest in the property itself, which was to be secured to her according to the original arrangement by her uncle's will. The letter, therefore, is at most a proposal, and not the acceptance of an offer so as to constitute a contract modifying the original arrangement.

There the correspondence ends, but it appears that the testator thereafter paid her 600 dollars a year, which amounted approximately to one-half the rents of the property, and also made a will bequeathing to her an annuity of 1,200 dollars and to her children after her death the sum of 20,000 dollars. The defendant, Mabel Carleton, discussed these provisions with him, evidently on the footing that they were to be in substitution for her interest in the property after his death. She suggested that there was no reason why the legacy should not be left to her absolutely instead of to her children. There was no reason why anybody but herself should benefit by her father's property. By his last will the testator left her an immediate legacy of 20,000 dollars, but did not leave the property itself, as provided by the letter of the 9th May 1900. Under these circumstances their Lordships conclude that the 20,000 dollars was left to her on the footing that she had relinquished or would relinquish her interest in the property itself, and that she knew it was so left, and did nothing to bring home to the testator the fact that she would not accept it on this footing. It would be clearly inequitable to allow a legatee, while insisting on her legal right to the legacy, to appeal to a court of equity to complete her title to the property itself.

A person who asks equitable relief must himself be willing to do what is equitable. It

follows that, even if the agreement of 9th May 1900 has not been varied by mutual consent, it can only be specifically performed if the defendant, Mabel Carleton, is willing to disclaim the legacy. The appellants being willing that the defendant, Mabel Carleton, should take either a moiety of the property itself, subject to the existing mortgage, or the legacy, whichever she may prefer, it is unnecessary to decide whether there was ever any binding agreement for the variation of the original contract.

Under the circumstances, their Lordships are of opinion that the appeal succeeds, and that the right order will be to declare that the defendant, Mabel Carleton, cannot take both the interest in the property, to which the courts below have declared her to be entitled, and the 20,000 dollars legacy, and to limit a period of three months within which she is to exercise her election.

Their Lordships will humbly advise His Majesty to this effect, and they think that the respondent, Mabel Carleton, should pay the appellants' costs here and in the Court of Appeal. With regard to the costs here and in the Court of Appeal of the other respondents, they should be paid out of the estate of Thomas A. Snider.

In the Privy Council.

THE CENTRAL TRUST AND SAFE
DEPOSIT COMPANY AND ANOTHER.

v.

HARVEY G. SNIDER AND OTHERS.

DELIVERED BY

LORD PARKER OF WADDINGTON.

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