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*May 10.

*Dec. 14.

WILLIAM McKERCHER (DEFENDANT)...APPELLANT;

AND

WILLIAM SANDERSON (PLAINTIFF)... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Purchase of land—Joint negotiations—Deed to one only—Evidence—Resulting trust.

McK. & S. jointly negotiated for the purchase of land, and a deed was given to S. alone, a portion of the purchase money being secured by the joint notes of McK. & S. In an action by S. to have it declared that McK. had no interest in the property.

Held, reversing the judgment of the court below, and confirming the judgment of the trial judge, Henry J. dissenting, that the evidence greatly preponderated in favor of the contention of McK. that the purchase was a joint one by himself and S.

Held, also, that S. being liable for an ascertained portion of the purchase money there was a resulting trust in his favor for his interest in the land.

APPEAL from a decision of the Court of Appeal for Ontario (2) reversing the decision of Armour J. in favor of the defendant.

The question to be decided in this appeal is a simple one, namely, whether or not the purchase of land, the

*PRESENT—Sir W. J. Ritchie C.J. and Strong, Fournier, Henry, Taschereau and Gwynne JJ.

(1) 2 Can. S. C. R. 70. (2) 13 Ont. App. R. 561.

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deed of which was in the plaintiff's name, was a joint purchase by him and the defendant, the action being brought to have it declared that the defendant had no interest in the land.

The defendant had advanced, in money and promissory notes, a portion of the purchase money and claimed that he did so as a purchaser, that the deed was to the plaintiff alone according to the agreement between them and that the plaintiff was to execute a transfer of an undivided half in favor of the defendant. The plaintiff's contention was that the money so advanced was simply a loan and that there was no such agreement.

Mr. Justice Armour who tried the case gave judgment in favor of the defendant, holding that the evidence established a purchase by the parties on joint account. The Court of Appeal reversed his decision. The defendant then appealed to the Supreme Court of Canada.

McLennan Q.C. for the appellant.

Garrow Q.C. for the respondent.

Sir W. J. RITCHIE C.J.—I am of opinion that the original judgment of Mr. Justice Armour in this case was correct, and for the reasons given by Chief Justice Hagarty I think this appeal should be allowed and the judgment of Mr. Justice Armour restored. I cannot bring my mind to the conclusion that the money paid by defendant on account of this purchase was money lent to the plaintiff. All the surrounding circumstances of the case seem to me opposed to such an idea; on the contrary, it appears to me the payments made and notes given by defendant were for and on account of the purchase money of a joint speculation and purchase by defendant and plaintiff, each contributing a moiety, and that the deed of the property was taken in the plaintiff's name alone for their joint benefit. If the money had been advanced merely as a loan

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it is abundantly clear there would be no resulting trust, but thinking this not to have been the case, I think the appeal should be allowed.

Ritchie C.J.

STRONG J.—The purchase was completed on the 8th of April, 1882, when the conveyance of the land to the respondent was executed and the purchase money, or at least that portion of it which was to be paid in addition to the outstanding incumbrances assumed as part of the price, was secured by the joint promissory notes of the appellant and respondent, namely, one note at a short date for $1,500 and four notes at long dates for the residue, amounting altogether to $830. It is clear, therefore, that at the time of the completion of the purchase the appellant was legally bound to the vendor to contribute to the payment of the purchase money, equally with the respondent.

The law is clear that in order to raise a resulting trust the party asserting it must be able to show that at the time of the completion of the purchase he either actually paid, or came under an absolute obligation to pay, the whole or some ascertained proportion of the price. It cannot be doubted that, *primâ facie* at least, the appellant brings himself within these requirements of the law. If the appellant had insisted on his beneficial interest as a joint purchaser with the respondent before any money had been paid on account of the purchase, that is between the 8th and 17th April, he would have established his case by showing that he had become equally liable with the respondent for the payment of the promissory notes which had been given to secure the purchase money.

But a trust thus *primâ facie* resulting from the payment of an obligation to pay the purchase money may always be rebutted by parol evidence on the part of the nominal purchaser, and so on the other hand this rebutting evidence may in turn be contradicted by the same sort of evidence on the part of the alleged benefi-

ciary, and the question to be decided may thus become a pure question of fact to be determined on the conflicting evidence alternately adduced for these purposes. Such a question of fact to be determined on conflicting evidence is exactly what is presented by the case now before us.

The respondent attempts to destroy the presumption in favor of the appellant resulting from the joint liability on the promissory notes by proving that the appellant joined in making the notes, not as a joint purchaser of the land but as a mere surety for the respondent, and that his subsequent contributions to the monies applied to the payment of these notes were loans and advances made by him to the respondent.

The appellant in his turn denies that he was either a surety or a lender and asserts that he undertook the liability and paid the money for his own benefit as a joint purchaser of the land.

The question to be decided is, therefore, one not involving any legal principles, but exclusively one of fact, and to a considerable extent one of conflicting evidence to be determined according to the preference to be given to one set of witnesses rather than another. Then viewing the case as thus depending on a question of evidence, the first observation to be made is that the indirect and circumstantial proof by itself tends strongly in the appellant's favor inasmuch as the facts are inconsistent with the hypothesis that the appellant undertook the liability he came under in respect of the notes merely as a surety for the respondent. The appellant paid promptly and voluntarily and without any appeal being made to him by the respondent, but as a party primarily liable would have done, nearly an exact moiety of the money secured by these notes as they fell due, and altogether acted as if he was liable as a joint principal and not secondarily as a surety. This, however, is not conclusive against the respondent who

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asserts that the appellant was not only a surety in respect of his liab lity upon the notes, but, besides and beyond his undertaking as such, had agreed to lend to and advance for the respondent one-half of the money required to retire the notes, or rather the amount actually advanced by him for that purpose, being somewhat more than a half. There is, however, a total absence of evidence of any specific agreement for a loan, and the consequent uncertainty as to the terms of repayment, the rate of interest, and other details which the parties would naturally have provided for if that had been the real character of the transaction, operate strongly against the respondent's assertions in this respect and make the account which he gives of the appellant's connection with the matter an extremely improbable one. When, however, in addition we consider the conduct of the appellant from first to last in connection with the purchase, the chief part which he took in making the bargain and procuring the execution of the conveyance, and the principle of equality which, if not exactly observed owing to the inability of the respondent to furnish the full amount of his share, nevertheless runs throughout the whole transaction as regards the payments, to say nothing of the exercise by the appellant of indubitable acts of ownership over the property, the circumstances in evidence seem to me so strong in the appellant's favor, that even if they had been unsupported by any direct testimony I should have hesitated long before giving effect to the evidence of the respondent and the vendee Gibson as sufficient to displace the appellant's *primâ facie* title to a beneficial interest. When, however, we have opposed to the evidence of the respondent and Gibson not only the circumstances surrounding the transaction but also the positive and direct evidence of the appellant himself and his witness John Wilson, and when we find that these latter witnesses are accredited by the judge

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before whom they were examined in open court, who accepts their statements in preference to those of the respondent and his witness, it seems to me impossible, without entirely disregarding at once the effect of the evidence, and the authority of decisions (now become numerous both here and in England) prescribing the rules which should govern appellate courts in dealing with the conflicting testimony of witnesses, to do otherwise than to adopt the conclusion of the learned judge who tried the action. Had I considered the facts and circumstances as disclosed in the evidence, corroborated the respondent's rather than the appellant's explanation of the transaction, I should not have hesitated to have come to a different conclusion; for as regards the rule in question I adhere to the definition and limitation of it given with the sanction of the Court of Appeal in *Sanderson* v. *Burdette* (1), and according to the terms in which it is there expressed the decision at the trial is only to be deemed conclusive as regards the credit to be given to conflicting witnesses, and the appellate court is not to be excluded from drawing inferences from documentary evidence, from the surrounding facts and circumstances, from inconsistencies of statements, and from the self-contradictions of witnesses, even though such inferences may vary from those of the primary judge. In the present case, however, I think all the inferences of this kind which the evidence warrants accord with the finding of the learned judge who presided at the trial, and if I had had to deal in the first instance with the same evidence now before us, but presented upon written depositions taken before an examiner or commissioner, I should, with a confidence at least as strong as that expressed by Mr. Justice Armour, have found in the same way.

As regards the costs I am of opinion that the conduct

(1) 18 Grant 417.

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of the appellant in withholding the deed from registration and thus endangering the respondent's title rendered the action to a certain extent necessary, and although the respondent failed in his demand so far as he claimed to be entitled to the whole of the land yet he in part succeeded at the trial, inasmuch as he established his right to have the deed produced for registration. Therefore, in my opinion, no costs should be given to either party up to and including the trial. The costs in appeal both here and in the Court of Appeal having been wholly caused by the contention of the respondent as to the character of the purchase, in which he has failed, should be paid by him to the appellant. Therefore the appeal should be allowed, the judgment of the Court of Appeal reversed, and the original judgment of the Common Pleas Division restored with the variation as to costs just mentioned.

FOURNIER J.—I, also, am of opinion that the appeal should be allowed and the judgment of Mr. Justice Armour restored.

HENRY J.—I entirely agree with the views of the three learned judges of the Court of Appeal who gave judgment in this case, and with the conclusion at which they arrived. In regard to the evidence it is, in my mind, conclusive that the land in question was purchased solely by the respondent.

In regard to the law I think it is also in his favor. In cases where there is contradictory evidence as to important points in a case, and where the result depends upon the weight of evidence, the learned judge who tries the issue and has the witnesses before him is very possibly much better able to judge of their credibility than a judge who has not had that opportunity, and in such cases the finding of the judge is generally held to be conclusive. This, however, is not such a case, for there is little if any conflict of evidence, and upon the

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only important point of difference between the parties in the cause the appellant, contradicted as he was by the respondent, is also, as to the same point, contradicted by three other witnesses and corroborated by none. The contention of the appellant upon which the decision of the case turns is, that the land was purchased by him and the respondent to be held by them as tenants in common, each of a moiety.

Before referring to the oral evidence I think it proper to refer to the deed. That is itself the strongest *primâ facie* evidence that it was made to the purchaser; and then it is shown to have been procured to be so made by the appellant himself without giving any satisfactory explanation why, if it were a joint purchase, a deed was given to the respondent alone. He attempted to do so, but his statements are contradictory and, to my mind, wholly unreliable. It would have been very different had the respondent caused the deed to be so made. The appellant might in such a case have complained, and if in his power shown a joint purchase. The appellant does not pretend that as to the deed being taken to the respondent after the purchase was made that there was any conversation or agreement between the parties on the subject; and if, when the purchase was agreed upon, the appellant was to have had a half interest in the land, is it not unaccountable that the appellant should have had the deed made as it was without the slightest understanding with the respondent? He is shown to have been an intelligent business man, and how can we so consider him such if in regard to an interest amounting to nearly two thousand dollars he failed in any way to provide for its protection? The deed being so made was the act of the appellant, and even from his own version of the circumstances I should consider that the evidence furnished by the deed alone should prevail. No mistake is suggested. The act on the part of the

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appellant was deliberate. The deed solemnly says the land was purchased by the respondent and no court should, in my opinion, reject its effect under such evidence as we have here. It may be asked: Why did the appellant advance money and security if he were not a joint purchaser? The evidence, as remarked by one or more of the learned judges of the Court of Appeal, amply furnishes the answer. He was the father-in-law of the respondent's brother, who, together with the respondent and another brother, lived on a small farm, of a little over a hundred acres, left them by their father to be divided between them according to value. The appellant was one of his executors and seemed to have felt the responsibility of having the land divided, which was to take place in about four years when the youngest son came of age. He too, no doubt, felt an interest in the position and prospects of his son-in-law. The farm had been let by lease, having about four years to run when the land was purchased. When the youngest of the three Sandersons came of age the respondent after the land was divided sold a part of his share to one of his brothers and the balance to the other, intending to retain and keep for himself the land conveyed to him and now the subject matter of this suit. That was, I fully believe, what was intended by the appellant when he told the respondent that he would have the deed made to him, the respondent, and that if he wanted it when the other property was divided he could have it. He expected, no doubt, that such an arrangement would benefit his son-in-law and very likely that was why he insisted in the purchase, and it is a little surprising that until after the division of the other property the appellant is not shown ever to have claimed to own an interest in the land. On the contrary it is shown he repudiated it. That division, however, having been made, and his son-in-law being no longer interested in the purchase or owner-

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ship of the land in question herein, the appellant set up a claim to the title of half of it. I have thus given what the evidence shows as the intention of both parties when the deed was made. I have no difficulty in arriving at that conclusion from the admitted facts, but when we consider the testimony of Gibson, Bell and Ireland I cannot help expressing myself strongly by saying that it is conclusive. I extract for the purpose their evidence, as found in the judgment of Mr. Justice Patterson :—

There is further in support of respondent's contention the evidence of Gibson, the vendor stated by the appellant to be a respectable and truthful man, that he sold the land to the respondent alone, and that appellant said to respondent in his (Gibson's) hearing that he would help him through with the payments. Then Bell says: Appellant told him shortly after the purchase that one of the Sanderson boys was getting the place ; that appellant always said it belonged to the Sandersons, and denied that he had any claim on it and that "Bill" (respondent) would go on it when the boys settled; that is, when the division of the homestead was made. And Andrew Ireland says: Appellant told him when on the way with the deeds to get Mrs. Gibson to sign them, which must have been directly after the bargain, that " Bill Sanderson (respondent) had bought it."

The learned judge after citing this evidence very forcibly says :—

With this clear and undisputed evidence all in support of the appellant's contention, and of the conveyances themselves, it is submitted that the learned judge was unduly impressed with the importance of the acts and conduct referred to in his judgment, not one of which in view of all the circumstances was unequivocal or inconsistent with the appellant's contention, and that he should have found that the true agreement was that appellant was to be the sole purchaser, and that respondent only agreed to help him in such purchase by loaning him what money he could.

Here, then, is the positive statement of Gibson, whose veracity is vouched for by the appellant himself, swearing that he sold the land to the respondents, and to place the matter beyond any doubt, that he heard the appellant say to the respondent that he would help him with the payments. Would that be langu-

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age of a man who was a joint purchaser?

Consider then the evidence of Bell. Can anything be stronger or more conclusive? Then again the statement of Ireland that when he with the appellant were on the way to obtain Mrs. Gibson's signature to the deed that the appellant said the respondent had bought the land. The appellant was examined as to those statements of the three witnesses just referred to and he would not undertake to contradict any of them. We must conclude then that they were true. If so we have the strongest evidence that could be produced and which estops the appellant, as admissions made by himself, from saying that the land was not purchased by the respondent alone. Taking into consideration the evidence that, immediately after the statements to which Gibson and Ireland refer the appellant got the deed executed, we have, in my opinion, an issue fully and satisfactorily proved by the respondent.

The law in respect of the statute of frauds as given by Patterson, Burton and Osler, justices, as applicable to this case, is in my opinion correct, and I think it only necessary to refer to their judgment. I also agree with the learned justices named that the evidence is wholly insufficient to establish the contention that there was any resulting trust. The evidence on the part of the appellant independently of the respondents does not, in my opinion, show any such trust. The law is so fully declared by the learned justices that I need only refer to their judgment.

I am of opinion that the appeal should be dismissed and the judgment of the court below affirmed with costs.

TASCHEREAU J.—I am of opinion that this appeal should be allowed with costs and the original judg-

ment restored, for the reasons given by Hagarty C. J. dissenting in the Court of Appeal.

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GWYNNE J.—There is much contradiction in the oral evidence given in this case and the learned judge who heard the evidence and saw the witnesses has expressed a strong opinion in favor of the defendant's contention, namely, that he was a co-purchaser of the land with the plaintiff and that it was as such that he paid his money, and not that he lent the money to the plaintiff as contended by the latter.

Upon a careful perusal of the evidence I cannot say that this opinion of the learned judge is erroneous and not justified by the evidence.

If the money was, as the plaintiff contends, advanced by the defendant to him as a loan, it is very singular that no terms of repayment should have been ever spoken of between them, or any security asked or offered. It is to be observed also that it was at the defendant's suggestion that the plaintiff became a party to the transaction—that the payments made by the defendant were made direct to the vendor and not to the plaintiff—and that the notes given to the vendor, securing the purchase money not paid when the deed was executed, were the joint notes of the plaintiff and the defendant, although neither the vendor required nor did the plaintiff ask the defendant to join in these notes as his surety. Why the defendant should have joined in these notes otherwise than as co-purchaser with the plaintiff no reasonable explanation appears to have been offered. These and other considerations referred to by Mr. Justice Armour, who tried the case, seem to me to lead to the conclusion that his finding upon the fact upon which the case depends is correct. But it is contended that a portion of the evidence given by the plaintiff himself is conclusive against his

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payments having been made qua-purchaser. The evidence relied upon as having this effect is that the defendant admitted that when speaking to the plaintiff about his and his brothers joining with the defendant's sons in making the purchase the following took place :—

> On Saturday I asked him what his brother and our boys told him, he said he only saw my son Alexander and that Alexander told him we had as much land now as we could work and that he would be willing to go in for it only on speculation; to which defendant replied: "No matter, I will go in with you for it, and put your name down in the writings, and if you want it when you are making division of your homestead property you can have it."

It is contended that this last sentence shows that the defendant's position was not that of a co-purchaser with the plaintiff. To my mind, I must say that it conveys no such necessary conclusion, but that, on the contrary, it seems to me to be more consistent with the fact of the defendant being a co-purchaser with the plaintiff than with the fact of his being merely a lender of money to the plaintiff to enable him to make the purchase for himself alone. If the plaintiff was the sole purchaser what was the sense of the defendant saying that he would put the plaintiff's name down in the writings, and that if he should want the land, on his making a division of his homestead, he, the plaintiff, could have it ?

Surely there could have been no doubt that if the plaintiff was the sole purchaser the deed would naturally be in his name without any act or permission of defendant, or that the land, *eo instanti* of the conveyance being executed and the plaintiff's purchase completed, would be his own property apart from any condition of his wanting to have it upon a future occasion when the homestead should come to be divided. What was the sense of the defendant saying that conditionally upon the plaintiff requiring

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the land on a future event arising, he could have that which was already his own by the purchase? And if the plaintiff should not require the land upon the division of the homestead, where was the beneficial interest in the land to be in the meantime? Not with plaintiff for it was only conditional upon a future event arising that he was to have it.

The remark relied upon seems to be rather in the nature of a promise made by the defendant that conditionally upon the future event spoken of occurring the plaintiff should have from the defendant that which it could only be in the defendant's power to give by his being co-purchaser of the land with the plaintiff. This appears to me to be a more natural inference to draw from the remark than that it establishes the relation of borrower and lender between the parties to the conversation, and so reading this passage in the defendant's evidence it is the promise which would be void within the statute of frauds.

There was another argument used against the claim of the defendant, namely, that the land is subject to a mortgage executed by the plaintiff's vendor, which mortgage or any part thereof the defendant, as is said, is under no liability to pay, and therefore, as is contended, he cannot be heard to claim as a co-purchaser with the plaintiff. But in this respect the plaintiff is in the same position as the defendant, for neither has he entered into any obligation to pay the mortgage. He is, of course, liable to lose the land upon a bill of foreclosure being filed if he should fail to pay it, but he has entered into no obligation to pay it. Now the defendant if he be co-purchaser with the plaintiff is equally subject to the same consequence even though the bill of foreclosure and the decree therein for foreclosure should be against the plaintiff alone, and as co-purchaser with the plaintiff he could with him file

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a bill to redeem. The conveyance executed by the vendor has been a bargain and sale of the land with covenants for title against the acts of the vendor, but both the plaintiff and the defendant knew of the mortgage, the amount of which was retained to meet the mortgage and not paid to the vendor so that notwithstanding the vendor's convenant the estate conveyed was in the eye of a court of equity only the vendor's estate in the land which was subject to the mortgage. Now the plaintiff and defendant, assuming them to be co-purchasers, are both precisely in the same position as to the mortgage, that is to say, neither of them is under any obligation to pay it, but in default of their paying it they are both liable to lose their respective interest in the land, so that the fact of the defendant having entered into no obligation to pay the mortgage, affords no argument or reason whatsoever at variance with his being, as he insists he was, a co-purchaser with the plaintiff. But on the other side, if the plaintiff was sole purchaser and if he should suffer the mortgage to be foreclosed what obligation did he incur to repay the defendant those sums which the plaintiff now claims to have been loans to him? None whatever; and in such case the defendant was wholly at the plaintiff's mercy, while adopting the defendant's contention the plaintiff's interests were protected. The most reasonable conclusion to draw from the evidence is, I think, that arrived at by the learned judge who tried the case, namely, that the defendant was a co-purchaser who paid his money in that character, but took the deed in the name of the plaintiff for the sake of convenience, with a view to the possibility of the plaintiff at a future time desiring to acquire the whole property.

The appeal therefore should, in my opinion, be allowed with costs and the judgment of Mr. Justice

Armour restored.

Appeal allowed with costs.

Solicitors for appellant: *Cameron, Holt & Cameron.*

Solicitors for respondent: *Garrow & Proudfoot.*