1891
*June 15.
1892
*April 4.

FANNY MAY E. BARTON AND GEORGE BARTON (DEFENDANTS) } APPELLANTS;

AND

CATHERINE McMILLAN (PLAINTIFF)..RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Contract—Specific performance—Deed of land—Undisclosed trust—Enforcement—Statute of Frauds.

The property of M. having been advertised for sale under power in a mortgage his wife arranged with the mortgagee to redeem it by making a cash payment and giving another mortgage for the balance. To enable her to pay the amount B. agreed to lend it for a year taking an absolute deed of the property as security and holding it in trust for that time. A contract was drawn up by the mortgagee's solicitor for a purchase by B. of the property at the agreed price which B. signed, and he told the solicitor that he would advise him by telephone whether the deed would be taken in his own name or his daughter's. The next day a telephone message came from B.'s house to the solicitor instructing him to make the deed in the name of B.'s daughter, which was done, and the deed was executed by M. and his wife and the arrangement with the mortgagee carried out. Subsequently B.'s daughter claimed that she had purchased the property absolutely, and for her own benefit, and an action was brought by M.'s wife against her and B. to have the daughter declared a trustee of the property subject to re-payment of the loan from B. and for specific performance of the agreement. The plaintiff in the action charged collusion and conspiracy on the part of the defendants to deprive her of the property, and in addition to denying said charge defendants pleaded the Statute of Frauds.

Held, affirming the decision of the Court of Appeal, Strong J. dissenting, that the evidence proved that his daughter was aware of the agreement made with B., and the deed having been executed in pursuance of such agreement she must be held to have taken the

---

*PRESENT:—Sir W. J. Ritchie C.J., and Strong, Fournier, Gwynne and Patterson JJ.

1891

BARTON
v.
MCMILLAN.

property in trust as B. would have been if the deed had been taken in his name, and the Statute of Frauds did not prevent parol evidence being given of the agreement with the plaintiff.

APPEAL from a decision of the Court of Appeal for Ontario, affirming the judgment at the trial in favour of the plaintiff.

The circumstances which gave rise to this action were found by the trial judge as follows :—

The plaintiff's husband, John McMillan, owned certain property which was mortgaged, and default having been made in payment the same was advertised for sale under a power of sale in the mortgage. Some months before the auction at which the lands were offered the husband, the mortgagor, had made an assignment for the benefit of his creditors. The plaintiff conceived the idea of buying the property for herself and attended the sale, but did not make a bid; the property was not sold. On the following day she went with her husband to the office of the vendor's solicitor, and after some conversation made an offer in writing to pay $3,325 for it, $325 to be paid in cash and the balance to be secured by a mortgage on the property. On the following day she authorized her husband to increase that offer by $25, making the offer $3,350. This offer was verbally accepted, the plaintiff agreeing also to pay all taxes due on the property. The intention of the plaintiff and her husband was to take a sum of money which was due on a contract entered into between her and one Wilson, and which contract was being performed by the husband as a builder, he not being able to make a contract in his own name by reason of his insolvency; but this money was not forthcoming, and caused some embarrassment as the wherewithal to pay the first instalment was not just then obtainable. The husband, however, in the course of a few days after that met George Barton, to whom he

1891

BARTON
v.
MCMILLAN.

told the strait the plaintiff was in; in fact he said his wife was not able to carry out the sale because of the disappointment in getting the Wilson money. The defendant, George Barton, at once volunteered and made the offer: "I will not see your wife stuck in that way. I will advance money for her myself, and give her a year to pay me back, at 7 per cent, if she will give me security." The husband said, "She will give you security on the Gordon Street lots (which she held as her own separate property) or you can hold the property purchased in trust for a year, and she will pay you 7 per cent and all expenses of the conveyance to her at the end of that time." This latter was agreed to, and the defendant George Barton then agreed to enter into an agreement to that effect with the plaintiff; and it was also agreed that defendant George Barton should accompany the plaintiff's husband on the day after to the vendor's solicitor and complete the purchase, after which the agreement with the plaintiff was to be executed. The husband reported this offer of George Barton to the plaintiff, and she acquiesced, and her husband then went alone, at her request, to the office of the vendor's solicitors and informed them that the defendant George Barton had agreed to buy the place for his wife on the terms agreed upon between the plaintiff and the said solicitors. They acquiesced, and the husband having left the office met the defendant George Barton and then took him to the office and introduced him to the solicitor as being the party who had agreed to purchase for the plaintiff. The conditions of sale were then read over and the question of the taxes due on the property was spoken of, and the vendor told him they must be paid by the purchaser, and the plaintiff's husband then agreed on behalf of the plaintiff that she should pay them, and the only money to be advanced by George Barton

1891

BARTON v. McMILLAN.

would be the $350. This being settled a contract was drawn up by the solicitors and signed by the defendant George Barton in presence of the husband. The defendant George Barton said he did not know whether he would take the deed in his own or his daughter's name, but he would advise him by telephone. On the following day a message came to draw the deed in the name of the other defendant, Fanny Barton, who is the defendant George Barton's daughter, and the deed was so drawn, and she gave back a mortgage to secure $3,200 and paid the $350 by cheque. The defendant Fanny Barton now claims that she purchased for herself and the plaintiff charges that the defendants George Barton and Fanny Barton entered into a fraudulent conspiracy to deprive the plaintiff of the bargain she had made for the purchase of the property and in violation of the verbal agreement entered into between her, the plaintiff, and the defendant George Barton.

The plaintiff accordingly brought an action to have the defendant Fanny Barton declared a trustee for her of the said property subject to payment of the amount due on the loan by said George Barton, and for specific performance of the alleged agreement between her and George Barton. The defendants, in addition to denying the said agreement, pleaded that it was void under the Statute of Frauds for not being in writing, and that it was also void as being made in fraud of the creditors of the said John McMillan. The trial judge made the decree prayed for by the plaintiff and his decision was affirmed by the Court of Appeal. The defendants appealed to this court.

Moss Q.C. for the appellants cited *James* v. *Smith* (1); *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (2).

(1) [1891] 1 Ch. 384. (2) 17 Ch. D. 721.

1891

BARTON v. McMILLAN.

Bain Q.C. for the respondents referred to *Chattock* v. *Muller* (1); *Kitchen* v. *Dolan* (2); *Rose* v. *Hickey* (3).

Sir W. J. RITCHIE C.J.—My opinion is entirely in accord with the Chief Justice of the Court of Appeal and Mr. Justice Maclennan, and I therefore think the appeal should be dismissed.

STRONG J.—In my opinion the evidence did not warrant the conclusions of Mr. Justice Robertson and consequently the order of the Court of Appeal affirming his judgment ought to be reversed.

There never was any contract with the respondent or with Barton binding on Mr. Horsford, the mortgagee, to sell the property to either. The Statute of Frauds is pleaded and the defendant is entitled to avail herself of the defence afforded by it.

Mrs. McMillan's offer as signed by her was to purchase for $3,225, a price which was not accepted.

The offer signed by George Barton written at the foot of a copy of the printed conditions of sale was never signed by Mr. Horsford nor by any one duly authorized on his behalf; it never, therefore, ripened into a contract capable of being enforced against Horsford, although, no doubt, a mere parol acceptance by him would have made it a valid and binding contract within the Statute of Frauds as against Barton, and susceptible of being enforced against him. The law is clearly settled that where an offer to purchase, specifying all the terms required to make a contract of sale, is signed by the proposed purchaser a parol acceptance of that offer by the proposed vendor is sufficient to convert it into a contract binding on the party signing. *Warner* v. *Willington* (4). But on the

(1) 8 Ch. D. 177.
(2) 9 O. R. 432.
(3) 3 Ont. App. R. 309.
(4) 3 Drew. 523.

1892

BARTON v. McMILLAN.

Strong J.

other hand such an offer thus accepted by parol does not become binding on the vendor, who may notwithstanding his acceptance repudiate it and set up the Statute of Frauds and the want of signing as a defence to an action brought to enforce the sale. It was long ago determined that the want of mutuality did not prevent a party to a contract of sale, who had not signed a memorandum such as the Statute of Frauds requires, from setting up the statute against the other party even though the latter had signed and would have been bound by the contract. Mr. Justice Maclennan suggests that inasmuch as the mortgagee's solicitor deposes that he referred by letter to his client, who lived at Port Hope, to inquire whether he would permit $3,200 instead of $3,000 to remain on mortgage, and inasmuch as Mr. Horsford authorized him to do this, the latter must be taken to have given a written assent to the contract. But there are several answers to this. In the first place the correspondence is not in evidence, and we cannot surmise that there was an assent to a proposal which, for all that appears, Mr. Horsford may never have had communicated to him. It is quite consistent with the evidence of Mr. Milligan, the solicitor, that the authority to take a mortgage for $3,200 may have been general and without reference to any particular offer or purchaser. Next, it could not apply to the contract signed by Mrs. McMillan for this was an offer to purchase for $3,325 only which was rejected by the solicitors, the price required by them being $3,550 which was never offered in writing by Mrs. McMillan. Then the assent of Mr. Horsford referred to by Mr. Justice Maclennan could not refer to the memorandum of offer signed by George Barton, for this was not signed until after Mr. Horsford's assent to take the mortgage for $3,200 had been communicated to his solicitors.

1892

BARTON v. McMILLAN.

Strong J.

It is therefore out of the question to say that on the 21st of November, 1888, the date of Miss Barton's purchase, Mr. Horsford the mortgagee was in any way bound to sell to Mrs. McMillan or to George Barton for her benefit; on the contrary, Mr. Horsford was, as Mr. Milligan quite correctly told Miss Barton, perfectly free to exercise his power of sale in favour of any one except himself or his solicitors. The reason for making these observations is this: If Horsford had become bound by reason of having, by a writing duly signed and so binding on him under the statute, accepted Mr. Barton's offer he would not have been free to sell to Miss Barton, and the latter, if she had taken the conveyance of the legal estate with notice of such a prior contract, would have been bound by it as much as Horsford himself. There is, however, no pretense for any such assumption. As far as Horsford was concerned he had a perfect right to sell to any one he chose, provided he complied with the terms of his power of sale.

The only question then is, whether Miss Barton was free to purchase as she did for her own benefit; and differing very widely indeed in the view I take of both the law and the facts from the learned trial judge, as well as from the learned Chief Justice and Mr. Justice Maclennan, I must answer this in the affirmative.

I do not regard *Bartlett* v. *Pickersgill* (1) as having been overruled by *Heard* v. *Pilley* (2) or any of the late cases which have been referred to. It had always, until it met with some judicial criticism from Selwyn and Giffard L.JJ. in *Heard* v. *Pilley* (2), been regarded as an authoritative decision, and what was said as to it in *Heard* v. *Pilley* (2) may well be regarded as *obiter dicta*, inasmuch as it was clear in that case that parol evidence was admissible upon a distinct ground. As has been pointed out by Kekewich J. in the late

(1) 1 Eden 515.

(2) 4 Ch. App. 548.

case of *James* v. *Smith* (1), the case of *Heard* v. *Pilley* (2) was a suit for specific performance instituted by a party, who had authorized another to purchase as his agent, against the vendor and the agent (who had taken the contract in his own name) to compel the execution of the contract of sale. No conveyance had been executed and the contract still remaining executory what the plaintiff sought to prove was not a trust but agency, and there is nothing in the Statute of Frauds forbidding the admission of parol evidence to establish such a relationship. The actual decision in *Heard* v. *Pilley* (2) is therefore really not at variance with *Bartlett* v. *Pickersgill* (3), and as the latter case has always been recognized as good law by such distinguished text writers as Lord St. Leonards (4) and Mr. Dart (5), and has moreover, so recently as 1890, received the judicial approval of Mr. Justice Kekewich (6) who, had the statute been properly pleaded, would have acted on this view in the case cited, I cannot regard it as an overruled case. See also Lewin on Trusts (7). The cases of *Lees* v. *Nuttall* (8), *Cave* v. *Mackenzie* (9), and *Chattock* v. *Muller* (10), are all susceptible of the same explanation; they were all cases of agency. Then if *Bartlett* v. *Pickersgill* (3) is to be taken as good law parol evidence would not have been admissible even against George Barton himself, if he had purchased, paid his own money, and given a mortgage in this own name. And if this is so it follows that the defence of the Statute of Frauds must be equally available to Miss Barton, by whom it has been duly pleaded and in whose behalf the objection to the admissibility of parol

(1) [1891] 1 Ch. 384.
(2) 4 Ch. App. 548.
(3) 1 Eden 515.
(4) Vendors and Purchasers, 14th ed. p. 703.
(5) Vendors and Purchasers, 6th ed. p. 1056.
(6) *James* v. *Smith*, [1891] 1 Ch. 384.
(7) 1891, 9th ed. p. 176 and note.
(8) 1 Russ. & Mylne 53; 2 My. & Keen 819.
(9) 46 L. J. Ch. 564.
(10) 8 Ch. Div. 177.

1892

BARTON v. McMILLAN.

Strong J.

evidence was expressly taken *in limine* at the trial. Upon this ground alone I should be prepared to allow the appeal.

As regards the cases of *Haigh* v. *Kaye* (1), *Booth* v. *Turle* (2), *Davies* v. *Otty* (No. 2) (3), and *Lincoln* v. *Wright* (4), no one who has been familiar with these cases and their application in practice by courts of equity can fail to apprehend the distinction between them and such cases as *James* v. *Smith* (5) and that now under consideration (6). In all the cases just cited an absolute conveyance had been made by the party asserting the trust upon a parol trust which was established not merely upon the parol testimony of witnesses, but by reason of the additional circumstance that the grantor had retained possession of the property conveyed, which possession being inconsistent with the deed was not susceptible of being referred to any other title than the trust. Under these circumstances it was held, upon a principle analogous to that on which courts of equity act in decreeing relief, on the ground of part performance in the cases of contracts by parol, that it would be to sanction a fraud upon the grantor and to make the statute the instrument for effecting that fraud to permit the trustee to set up an absolute title in himself with which the possession and enjoyment of the grantor would be inconsistent. In such cases the trust is not established merely on parol testimony but on the surrounding facts of the case, which are not excluded by the statute and which courts of equity hold are sufficient to let in the parol evidence. This class of cases can, however, manifestly have no application when the sale is, as here, under the paramount title of a mortgagee who has never been in

(1) 7 Ch. App. 469.
(2) L.R. 16 Eq. 182.
(3) 35 Beav. 208.
(4) 4 DeG. & J. 16.
(5) [1891] 1 Ch. 384.
(6) See Lewin on Trusts, 9th ed. p. 53.

possession, the possession being all along retained by the mortgagor. There is here, therefore, nothing inconsistent with the deed raising the presumption of a trust.

If, then, parol evidence is admitted in such a case to show a trust it would be, as Lord St. Leonards says, "directly in the teeth of the Statute of Frauds" (1).

There is, however, the further defence upon the facts. The evidence entirely fails to establish that the purchase by Miss Barton was made collusively with her father, with his money, or in any way for his benefit. On the contrary it appears very conclusively that Mr. Barton having mentioned to his daughter the fact that the property was for sale, and that he had agreed to purchase it for Mrs. McMillan and applied to her to advance the cash to enable him to do so, she refused to make the loan and at once resolved and declared her intention to purchase it for herself, and very promptly went to the office of the mortgagee's solicitors and there made the arrangement, going again the next day and paying the cash portion of the price. No fact could be more clearly established in evidence than that the money was the appellant's own. She points out the sources from which it was derived and the production of her bank account corroborates her statements in this respect. That Miss Barton did not avail herself of any contract entered into by the mortgagor with her father or Mrs. McMillan is sufficiently apparent from what has before been pointed out, viz., that there was no such contract binding on the mortgagee, and so far from assuming to claim the benefit of the offer, a proposal short of contract, before made with the solicitors she expressly asked Mr. Milligan if the mortgagee was free to sell to her, and announced to him that she was buying for her own account. Had Miss

(1) Vendors and Purchasers, p. 703, 14 ed.

1892

BARTON v. McMILLAN.

Strong J.

Barton represented to the solicitors of the mortgagee or led them to believe that she was carrying out the proposal made by her father the case might have been different, though even then I should have thought there would have been legal difficulties in the plaintiff's way; so far from doing this, I repeat, she took pains to impress upon them that she was buying for herself. It is true that Mr. Milligan said in answer to a question put to him by the learned judge—a question I may say, which if it had been put by counsel and objected to, it would have been the learned judge's duty to have overruled—that he understood "they were carrying out the contract which George Barton had signed;" but this is not evidence but the mere conclusion of the witness, entirely unwarranted by anything which Miss Barton is proved to have either said or done.

Then what is there remaining to warrant the inferences of fraud and conspiracy which have been imputed to the appellants? Nothing but the relationship of father and daughter which exists between them. Had Mr. Barton told a person in no way related to him that he proposed to buy the property for the respondent surely that person would not have been incapacitated from making a purchase for his own benefit, nor, if he had done so, could it, in the absence of evidence, have been reasonably imputed to him that he was acting in collusion with Barton. Then upon what principle should any difference be made between the present case of a purchase by his daughter and that just supposed? The appellant, Miss Barton, is not a child nor an inexperienced girl, but a young woman of twenty-four years, who, as Mr. Justice Burton in his judgment has remarked, indicated by her evidence the possession of considerable ability, who, as she states, had had experience in dealings in real

estate previous to this purchase, and who was moreover possessed of means, satisfactorily proved to have been her own, amply sufficient to justify her in engaging in the purchase. Had the appellant been dependent on her father and without resources of her own, or had she been a young person of immature years, we might have gone far in making the presumption that she was interposed for the purpose of cloaking a purchase for her father's benefit, by whom in that case the money would presumably have been supplied; but as the case is presented to us on the evidence no such inference is admissible, and I am unable to find any reason why the case of Miss Barton should be distinguished from that of a mere stranger to whom her father had made the same communication of the facts and the same application for an advance of money which he had made to her. It is out of the question to say, as Mr. Justice Robertson does, that Miss Barton's father ought to have controlled her. We are dealing with legal rights and obligations, and with nothing else, and the plain answer to the learned judge's observation on this head is that she was in no way subject to the legal control or tutelage of her father; that she was as regards both legal age and actual capacity quite competent to act for herself; and so far from there being any proof that what she did was done under her father's influence, or with a view to his advantage, such presumptions are most effectually rebutted. Unless, therefore, it is to be held as a matter of legal presumption that a young woman of twenty-four, possessed of evident business ability and experience, could not act in a matter of this kind independently of her father merely because she was resident in his house, the respondent's case must fail. So to extend the disqualification of the

1892

BARTON v. McMILLAN.

Strong J.

father, to make the purchase for his own benefit, to the daughter, as a matter of legal disability, could have no sanction either in law or reason. Some stress was laid upon Miss Barton having said that she understood from her father that McMillan was to pay the taxes as indicating that she had adopted his proposal and was merely carrying it out on his behalf. She gives in her evidence an explanation of this which is reasonable and satisfactory. She says she expected McMillan to pay the taxes as he had been in possession. No doubt this was legally correct. McMillan must have been assessed for the taxes and was the person primarily liable to pay them, and the only person to whom any personal liability in respect of them attached, although, of course, the taxes were also a charge upon the property itself. I see nothing in this observation to indicate that the purchase was for the benefit of George Barton, or otherwise than as it was expressly declared to be, an independent purchase by Miss Barton with her own money and for her own exclusive benefit.

The appeal must be dismissed with costs.

FOURNIER J.—I am of opinion that this appeal should be dismissed.

GWYNNE J.—Notwithstanding some contradiction between the evidence of John McMillan, the plaintiff's husband, and the defendant George Barton it sufficiently appears, I think, from Barton's own evidence, that he signed the agreement which he did sign for the purchase of the property in question at the instance of John McMillan, but for and on behalf of the plaintiff, for the purpose of giving effect to an offer which had been made by her to, and accepted by, the vendor through his solicitor, and upon an agreement that he should hold the property only as security for

1892

BARTON v. McMILLAN.

Gwynne J.

repayment by the plaintiff of the purchase money mentioned in the contract of purchase as being given in cash, together with interest thereon, to be repaid within a year, and that it was part of the arrangement made with him that although by the contract of purchase he was to buy subject to the back taxes these taxes should be paid by McMillan. When Barton signed the contract of purchase he gave to the vendor's solicitors his own name and that of his wife in case the papers should be made out in his own name and also the name of his daughter Fanny M. E. Barton saying that perhaps the papers should be made in his daughter's name, and that he would telephone from his house whether they should be made out in his own name or in that of his daughter; of the above facts there is, I think, no doubt. Now on the same afternoon a telephone message was delivered to the vendor's solicitors from a son of George Barton's from George Barton's house, saying that the property was to go in Miss Barton's name, and I am of opinion that although the defendant Fanny Barton seems to have entertained the design of acquiring the property absolutely to her own use in despite of her father's contract of purchase, of which she was quite aware, she in point of fact procured the deed to be executed upon the faith of her father's contract, and that it was executed to her with the intention upon the part of the vendor's solicitors of giving effect to the father's contract. She stated to the vendor's solicitor that she knew she was purchasing subject to the back taxes, but added that McMillan had agreed to pay them, thus showing that she was perfectly aware of the agreement between her father and McMillan in relation to these taxes and that she was taking the benefit of that agreement. It is apparent that the learned trial judge did not believe the evi-

1892

BARTON v. McMILLAN.

Gwynne J.

dence of the defendant Fanny M. Barton when she represented herself as being a *bonâ fide* purchaser of the property wholly independently of her father's contract, of the terms of which she was quite aware, and was as I have observed taking advantage of as to the back taxes, and I cannot say that the conclusion so arrived at by the learned trial judge was incorrect. I am satisfied upon the evidence that notwithstanding the skill exhibited by the young lady in endeavouring to support the purchase as one made *bonâ fide* in her own interest as an independent purchase, the deed under which she claims was in truth and in fact executed to her for the sole purpose of giving effect to her father's contract of purchase, and that she must abide the consequences and hold the property as her father must have held it if the deed had been taken in his name, subject to the terms of redemption upon the faith of which he entered into the contract of purchase for and in behalf of the plaintiff. The appeal must therefore be dismissed with costs.

PATTERSON J.—In my opinion this judgment ought to be affirmed on the grounds fully stated and discussed by Mr. Justice Maclennan in the Court of Appeal.

The fact seems to me to be manifest, from the evidence taken as a whole, that the conveyance to Fanny Barton carried out, and was made by the vendor for the purpose of carrying out, the arrangement specified in the offer made in writing by George Barton on behalf of the plaintiff, but being really the arrangement made by the plaintiff herself with some intervention by her husband.

The objection so much relied on, that that agreement could not have been enforced against the vendor for want of a writing signed by him to satisfy the 4th section of the Statute of Frauds is beside the question,

1892

BARTON v. McMILLAN.

Patterson J.

as has been clearly demonstrated by Mr. Justice Maclennan, and I think that the principles enunciated by James L. J. in the case of *Haigh* v. *Kaye* (1), with respect to the operation of the 7th section of the statute, fully sustain the propriety of treating the appellant Fanny Barton as a trustee for the respondent, notwithstanding the absence of any written declaration of the trust, and without impediment from the suggestion that the transaction was put in the name of Mrs. McMillan, and not in that of her husband, in order to avoid interference by the creditors of the latter.

I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for appellants: *Morphy & Millar.*

Solicitors for respondent: *Greene & Greene.*

(1) 7 Ch. App. 469.