9 Colo. 100, *; 10 P. 790, **;
1885 Colo. LEXIS 82, ***

BOHM v. BOHM.

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Supreme Court of Colorado

9 Colo. 100*; *10 P. 790*; *1885 Colo. LEXIS 82

December, 1885 [December Term]

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Appeal from Superior Court of the City of Denver.

OPINION

[*104] [**792] BECK, C.J. The questions presented by the demurrer to the cross-complaint are: 1. Do the averments of the cross-complaint bring the defendant's case within the twelfth section of the statute of limitations? 2. Do the facts and circumstances set forth in the cross-complaint constitute a cause of action -- that is, do they take the case out of the statute of frauds, so as to permit parol proof of the verbal agreement alleged to have been entered into by and between Charles Bohm and his mother, Magdalena Bohm, at the time of the execution of the deed to the said Charles Bohm?

The first ground of demurrer is that the case presented by the cross-complaint is barred by the statute of limitations. The twelfth section of this statute is as follows:

[HN1] "Bills for relief on the ground of fraud shall be filed within three years after the discovery, by the aggrieved party, of the facts constituting such fraud, and not afterwards." Gen. Stats. sec. 2174.

It is alleged in the demurrer that it appears by the cross-complaint that [***7] the failure to execute the declaration of trust occurred, if at all, and was known to the [*105] defendant, more than three years prior to the filing of her cross-complaint.

This proposition implies that the failure to execute the declaration of trust was equivalent to notice, from the time of the execution of the deed, of a fraudulent intent to deny the existence of the trust.

When we consider the close family relationship of the parties -- that of mother and son, -- and the implicit confidence which the mother says she reposed in the good faith of her son, we can readily understand why the mere failure of the son to put the verbal contract into writing might not, for a long time, excite the suspicion of the mother that he intended to defraud her out of her property.

The defendant alleges positively that she did not discover the fraud upon which she seeks relief, until within three years of the filing of her said cross-complaint, and this allegation, in our judgment, [**793] stands unimpeached.

Had the original transaction taken place between persons not occupying fiduciary relations to each other, the delay in seeking relief would afford strong grounds for holding [***8] that the action was barred (see *Pipe v. Smith, 5 Colo. 146*); but such is not the case here presented. The defendant alleges that she was a widow, inexperienced in business matters, and that she always looked to and relied upon her son, as one in whom she had a right to and could repose the utmost confidence and trust to aid her in such matters; that the said plaintiff, Mary Bohm, was the wife of her said son, and that the relations existing between herself and the said parties were such as to quiet all suspicions of an intent on the part of either of them to defraud her of her rights in the said premises.

If these allegations be true, and for the purpose of testing the sufficiency of the cross-complaint the demurrer admits them to be true, there seems to be nothing unreasonable in the proposition that the defendant might reasonably rest in fancied security for five or six years after [*106] making the contract described in the statement of the case, before discovering the fraudulent scheme which she charges, to wit, that her son designed to cheat her out of her property; she alleges that she did not discover such fraudulent intent until within three years of the filing [***9] of the amended cross-complaint. Under the peculiar circumstances stated, we are of opinion that the case comes within the provisions of the twelfth section of the statute of limitations, and is, therefore, not barred.

The next question is, whether the averments of the cross-complaint are sufficient to take the case out of the *statute of frauds,* and to permit the verbal agreement set up to be proved by parol evidence.

Section 6 of our statute of frauds provides that [HN2] "no estate of interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands, or in any manner relating thereto, shall hereafter be created, granted, assigned, surrendered or declared, unless by act or operation of law, or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same, or by his lawful agent, thereunto authorized by writing."

It is generally conceded that [HN3] the statutes of frauds of the several states have not essentially changed the rules established by the English statute of 29 Car. II., c. 3, and that the same evidence is necessary to establish a trust under the former as under [***10] the latter. 1 Perry on Trusts, secs. 78, 263.

The first apparent difficulty presented by the case at bar is that the alleged trust is not in writing, as required by the statute. The grantee, it is said, promised to put the verbal agreement in writing, and, had he complied with the promise, the statute would have been satisfied and the rights of the grantor secured. But he failed and refused, after persuading the grantor to execute to him a conveyance of the fee, to put the terms and conditions of the verbal agreement in writing.

[*107] If, then, the circumstances set forth in the [**794] cross-bill are not sufficient to take the case out of the operation of the statute, the demurrer was properly sustained.

The general rule is that [HN4] "a promise by a grantee to hold the land for the grantor, or to reconvey it to him, is in effect a declaration of trust, and directly within the mischief which the statute of frauds was intended to prevent. It cannot be taken out of the statute by calling the refusal to fulfill it a fraud. Such a refusal is not a fraud, unless the trust exists, and this is the very thing which the statute provides shall not be proved by parol." 2 Lead. [***11] Cases in Equity, part 1, p. 978; *Johnson v. La Motte,* 6 Rich. Eq. 347; Browne on Statute of Frauds, sec. 446.

Some authorities go a step further, and hold that the mere circumstance that a confidence has been violated is not sufficient to exclude the operation of the statute, the object of the legislature in requiring a writing to be signed by the party to be charged being to establish a rule which, though operating hardly in some instances, would in the long run conduce to certainty and prevent frauds. 2 Lead. Cases in Eq. p. 1013.

But cases occur which are recognized as exceptions to the general rules, and which are regarded as not coming within the operation of the statute. The elements usually distinguishing such cases from other cases are fraud, accident and mistake. [HN5] In the absence of these elements the grantor in an absolute conveyance is prohibited by the statute of frauds from setting up and proving a parol agreement, that the grantee was to hold the land in trust for his benefit.

[HN6] In order to exclude the operation of the statute on the ground of fraud, where an oral agreement is alleged as a foundation of the trust, the authorities hold that it must appear that [***12] the promise was used as a means of imposition or deceit, and if the case, taken as a whole, is one of fraud, the promise may be received in evidence as one of [*108] the steps by which the fraud was accomplished. 2 Lead. Cases in Eq. pp. 1013-1015; *Rasdall's Administrators v. Rasdall, 9 Wis. 384*.

[HN7] A verbal promise not based upon written evidence, to hold land in trust for the benefit of the grantor, is within the letter of the statute, and cannot be enforced. Courts of equity do not enforce mere verbal promises concerning land. It is accordingly held that [HN8] a verbal promise to hold the title to land for a certain specified purpose, as to convey it to a designated individual, or to reconvey it to the grantor, is not enforcible, unless the transaction by means of which the ownership is obtained is fraudulent, in which case equity will regard the person holding the property as charged with a constructive trust, and will compel him to fulfill it by conveying according to his engagement. 2 Pom. Eq. Jur. secs. 1055, 1056.

The settled doctrine is that the statute of frauds does not apply to such a case, since the trust arises out of the fraud, and is consequently excepted from [***13] the operation of the statute. Id. note 1, and cases cited.

The same rule applies [HN9] where a person occupying a fiduciary relation to the owner of real estate takes advantage of the confidence reposed in him by virtue of such relation to acquire an absolute conveyance [**795] thereof, without consideration, through a verbal agreement, which he promises to reduce to writing; as, for example, that the land conveyed to him is to be held in trust for some legitimate purpose. A refusal, under such circumstances, to reduce the verbal agreement to writing, or to reconvey the land to the real owner, is such an abuse of confidence as to vest a court of equity with jurisdiction to inquire thoroughly into the entire transaction, and to set aside the conveyance, or administer other proper relief. In 2 Pomeroy's Eq. Jur. p. 479, the doctrine is thus stated: [HN10] "Whenever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that [*109] confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, [***14] the person so availing himself of his position will not be permitted to retain the advantage, *although the transaction could not have been impeached, if no such confidential relation had existed."*

No illustration of the above rule can be stronger, than where an imposition has been practiced upon one party by the other, through confidence generated by the close ties of kindred -- as that of parent and child.This is a relation in which the most implicit confidence is usually reposed in the good faith of each other, and, by reason of this intimate relation and confidence, the precautions which would usually be observed in other cases are often omitted, giving opportunities for the practice of imposition which would not be otherwise obtained. When children are of tender years, or inexperienced in matters of business, they may be thus imposed upon by their parents. Again, when the parents become aged, or in dependent circumstances, the situation of the parties becomes reversed, and the like imposition may be practiced, and advantage taken of them, by their children.

Applying the principles and rules above announced to the case before us, as the same is stated in the cross-complaint [***15] of the defendant, Magdalena Bohm, it would constitute the late Charles Bohm a trustee, *ex maleficio*, of the tract of land conveyed to him by his mother; for if the facts stated be true, he took advantage of his mother's confidence to obtain the title from her without consideration, by promises to remove the incumbrances, and then to reconvey to her an undivided third of the premises.

A title obtained under such circumstances, and by the violation of confidence inspired by a fiduciary relation of the character here alleged, ought not, according to the rules of equity and good conscience, to stand, but the [*110] party obtaining such an inequitable advantage, or the party taking and holding under such party, with knowledge, or without consideration, should be decreed to hold it in trust, according to the verbal agreemtn under which it was obtained.

Upon this theory the plaintiff, Mary Bohm, occupies the same position previously occupied by her husband, as to the land conveyed to her, if, as alleged, she took such conveyance with knowledge of the circumstances under which the title was obtained from the defendant.

[**796] The case is one of peculiar hardship, as presented [***16] to us. Not only was a conveyance of land obtained by a son from his mother without consideration, upon the strength of fair promises made by him, and upon which the mother relied, but the cross-complaint sets up that this land embraced all the means which the mother possessed. This fact alone, in view of the existing relations, if clearly proven, would render the conveyance on its face unconscionable, and would justify the interference of a court of equity, to compel the party obtaining such advantage to do justice. Story's Eq. Jur. sec. 309*a* and note 1; 2 Pom. Eq. Jur. secs. 956-962; *Highberger v. Stiffler, 21 Md. 338*; *Comstock v. Comstock, 57 Bar. 453*.

The verbal agreement, as stated by the mother, appears to have been fair and reasonable, and had the son shown his good faith by reducing it to writing, as he promised to do, the mother may have been afforded a livelihood out of the unincumbered one-third portion of the premises, or out of the money arising from sales of her interest. The refusal, however, of the son and of the plaintiff, to either put the contract in writing, reconvey to the defendant, or account for the proceeds of sales, would appear to place the [***17] defendant in a much worse financial condition than that from which the son proposed to rescue her.

We deem this a case in which it becomes the duty of the court to inquire into the facts, investigate the whole [*111] transaction, and if it appear that, by imposing upon the confidence so confided in him, the son succeeded in obtaining the title to his mother's property without consideration paid therefor, a decree for proper relief should be entered, if the same can be done consistent with the rules and principles of law and equity, under the change of circumstances and lapse of time.

The foregoing views are based upon the allegations of the cross-complaint, and the law arising thereon. We are aware that it is easier to state a cause of action than to prove the same. In cases of this character, where the cause of action would be barred by the statute of frauds but for equitable considerations arising out of the circumstances alleged, which permit a resort to parol evidence to establish the real contract, or the means by which the conveyance was obtained, the rule is that the evidence must be strong and unequivocal, and must clearly establish the trust alleged. *Whitesett* [***18] *v. Kershaw, 4 Colo. 423*; *Troll v. Carter, 15 W. Va. 567*; *Nelson v. Warrell, 20 Iowa, 469*.

In the present case, if the defendant's allegations are not sustained, but it should appear that the transaction was just and fair, and that no undue or fraudulent advantage was taken of the defendant, as alleged, the case presented by the cross-complaint must fail. But if the facts alleged in the cross complaint are sustained by sufficient evidence, then the conveyance made by the defendant must either be set aside or the plaintiff decreed to hold the property as trustee for the said Magdalena Bohm. In the latter case, also, the requisite relief must be decreed as to the money realized by the plaintiff from sales of portions of said land, if any such were [**797] made, since they pertain to and constitute part of the same transaction.

Judgment reversed and cause remanded for further proceedings.

Reversed.