

the Railway Administration was unable by any reasonable precautions to avoid. The main argument of Mr. *Stallard*, therefore, appears to fail. If that argument were successful, the plea would afford no defence to the action. As it is, the plea is somewhat defective in not going somewhat further and alleging that the Administration could not by any reasonable care or foresight have possibly avoided the destruction of the goods by violence, because the plea amounts to very little more than a statement that the Administration took every reasonable precaution to resist the rioters in order to avoid the destruction of the goods by them, but such a defect in the plea could be easily amended. In these circumstances I have come to the conclusion that the words "inevitable superior force" cover the act of rioters, during a time of civil commotion, in forcibly entering the goods sheds and destroying the goods stored therein. The exception must therefore be overruled. Costs to be costs in the cause.

Plaintiff's Attorneys: *Kuper & Reid*; Defendant's Attorneys: *Bell & Nixon*.

[G. W.]

WHITE v. COLLINS.

1914. *April 30; May 15.* WARD, J.

Land.—Proclamation 8 of 1902, sec. 30.—Promise to hold land in trust.—Absence of contract in writing.—Interdict.

A promise by A to hold freehold property, registered in her name, in trust for B, is a contract to deliver such property to B on demand.

Such contract is not a contract of sale of fixed property in terms of sec. 30 of Proclamation 8 of 1902, and is not void therefore for want of the contract being in writing.

Where A threatened to sell such property, B was held entitled to an interdict, pending action, restraining her from doing so.

Application for an interdict restraining the respondent from alienating certain fixed property. The facts appear fully from the judgment.

H. H. Morris, for the appellant, moved in terms of the petition.

J. van Hoytema, for the respondent: The only ground entitling the applicant to get the property is under an agreement to transfer the property. Such an agreement is an agreement to cede the property, and being a freehold stand the agreement should have been in writing under sec. 30 of Proc. 8 of 1902. "Sale" includes "cession" (sec. 2, *ibid.*). See *Lucas' Trustee v. Ismail and Amod* (1905, T.S. 239) and *Wepener v. Schraader* (1903, T.S. 629). There is no contract in writing and therefore the application must fail.

Morris, in reply: The agreement does not fall within the terms of the proclamation. The respondent agreed to hold as agent and must therefore observe the utmost good faith.

Cur. adv. vult.

Postea. (May 15, 1914).

WARD, J.: In this matter the applicant alleges that he purchased a certain lot (freehold) from the Braamfontein Estates Limited; that he caused transfer to be passed in favour of the respondent who agreed with the applicant to accept transfer of the property in her name but to hold the same in trust for and on behalf of the applicant. He says now that she is going to sell the property and he wants an *interim* interdict to restrain her from doing so pending an action he is going to bring to claim the property.

The property was sold to the respondent by the Braamfontein Estates. But the applicant's case is that he supplied the purchase price and effected certain improvements in consideration of the respondent holding the property in trust for him. Why this was done is not explained but that is how the transaction is set forth. It is necessary to find out what the real transaction as alleged between the parties was, because Mr. *van Hoytema* contends that it amounts to a transaction of sale within the meaning of section 30 of Proc. No. 8 of 1902.

There is no declaration of trust in writing nor is the property registered in respondent's name as trustee. I think whatever way you regard the case the plaintiff is now claiming a transfer of this property from the respondent and he has to base his claim on contract. The *dominium* of the property is in the respondent, and the petitioner claims the property because she has promised to deliver it to him or his nominee on demand.

Under sec. 8 (1) of Ord. 14 of 1905 a transfer duty is payable by (1) Any person acquiring or becoming entitled to any fixed property by way of purchase, cession, exchange, donation or in any manner otherwise than by way of legacy testamentary or other inheritance.

Under sec. 7 of Ord. 14 of 1905—In every case in which any person shall by the record of the Deeds or other registration office appear to be merely a trustee for any other person the property so held in trust may be removed from the name of the trustee to that of some other trustee or that of such other person entitled to have it so removed without the payment of transfer duty.

Under sec. 2 of Proc. No. 8 of 1902—The term “sale” includes cession. And under sec. 30—No contract of sale of fixed property shall be of any force or effect unless it be in writing and signed by the parties thereto. This may therefore be read “no contract of cession” instead of “no contract of sale.”

The petitioner is not claiming under a contract of sale. Is he claiming under a contract of cession?

I am afraid I do not understand the meaning of the phrase “contract of cession.” Cession is a method of transfer and not a *causa*, sale is a *causa* for transfer and not a method of transfer. Probably what was intended is that a sale of fixed property falls within the proclamation even though such fixed property passes by cession of right rather than by transfer in the ordinary sense.

Sec. 30 of the Proclamation was passed to prevent frauds on the Treasury and it does not seem to me that cases like the present fall within the mischief which was aimed at.

A promise by A to hold property in trust for B may be a promise resulting from a sale from A to B or it may not. Under the Law of England a declaration of trust of real estate falls within the Statute of Frauds. On the other hand under that law, where money is advanced to purchase property, the property is impliedly held in trust for the person advancing the money, and an implied trust does not fall within the Statute of Frauds.

There is no such implied trust in our law and it seems to me that what I have to decide is whether a contract such as is alleged here is a sale.

If A buys a property on behalf of B from C and takes transfer into his own name with a promise to B to transfer it to him when called upon, B has an action *in personam* to compel A to transfer the property to him.

But the transaction between A and B is not a sale from A to B nor does the obligation from A to B arise out of a contract of sale. In the case of *Edgecombe v. Edgecombe*, (1909, L.L.R., 164) a partner purchased property on behalf of the partnership and had it transferred into his own name. The question only arose there as to the division of the profits arising from the realisation of the property. MASON, J., said: "These, *i.e.*, rights to profits, arose not by virtue of any sale but by virtue of the agreement prior to the sale making the brothers partners or joint venturers in the coming purchase. It does not seem to me tenable to suggest that A. Edgecombe could decline to recognise his brother's half interest in the venture because the parties had not both signed a contract in writing." I think this reasoning equally applies in an action for the division or transfer of the property.

With regard to the other defence I think the matter can only be determined by action and it would be inadvisable for me to discuss that portion of the case. I think there must be a temporary interdict. Action to be brought forthwith and the costs I think should be costs in the cause.

Applicant's Attorneys: *Sims & Michel*; Respondent's Attorneys: *Van Hulsteyn, Feltham & Ford*.

[G. W.]

SHAPIRO v. SHAPIRO.

1914. May 14, 22. MASON, J.

Husband and wife.—Domicile of Choice.—Residence by husband.

In order to constitute a domicile of choice, there must be, *inter alia*, actual residence in the place chosen.

Where a husband and wife, domiciled outside the Transvaal, agreed that the wife should come to the Transvaal, and that the husband should join her there later, with the intention of acquiring his domicile there, and she performed her part of the agreement but he did not, it was held that he was not domiciled in the Transvaal.