

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Loke Yew v. The Port Swettenham Rubber Company, Limited, from the Court of Appeal for the Federated Malay States (P.C. Appeal No. 34 of 1912); delivered the 19th March 1913.

PRESENT AT THE HEARING :

LORD ATKINSON.

LORD SHAW.

LORD MOULTON.

[DELIVERED BY LORD MOULTON.]

This is an action of ejectment brought by the Port Swettenham Rubber Company, Limited, against Loke Yew to recover possession of a piece of land situated in the State of Selangor. The statement of plaint alleges that the Plaintiff Company is the registered owner of the land—that there is no encumbrance upon it, and that the Defendant has no title to occupy it. It admits that the Defendant is in fact in occupation, but alleges notice to quit and refusal by the Defendant to go out. The statement of defence alleges title in the Defendant, and that the registered title of the Plaintiffs was obtained by fraud, and also pleads possession for 12 years before the commencement of the suit so that the Plaintiff's right of action is barred by the Limitation Enactment V. of 1896. The meaning and significance of the allegations in the defence

can only be understood by a reference to the history of the land in question and the transactions relating to it.

On January 4th, 1894, the Resident of Selangor under and by virtue of the power conferred upon him by the Selangor Land Code, 1891, in the name and on behalf of the Sultan of Selangor, made a grant of a piece of land in Kland, containing about 323 acres, to Haji Mohamed Eusope. The consideration for the grant was the sum of \$323, and an annual rent. The terms of the grant were: "To hold for ever, subject to the payment to His said Highness, his heirs and successors, therefor of the annual rent of thirty-two dollars and thirty cents, and to the provisions and agreements contained in the said Code."

Haji Mohamed Eusope having obtained the grant proceeded to dispose of portions of the land comprised in it to cultivators, who seem to have laboured the land and brought it under cultivation. The documents effecting the transactions in each case are in the Malay language, and are all in the same form. Taking, for example, the one exhibited in the action, namely, the transfer of about 4½ acres to Yeop Sow San, the operative words (as translated) are as follows:—

"Now I have truly given to Yeop Sow San the right to hold a portion of the said land on the same conditions that I hold it from the Government of Selangor—Yeop Sow San obtains from me the right to hold the land on the same condition, that is, he can sell it, he can mortgage it, and he can bequeath it to his heirs for the period mentioned in the big grant, that is — years. But during the said period, Yeop Sow San, or whoever, after him, having the right to hold the land by purchase or otherwise, must pay rent to me or, after me, to whomsoever that obtains the right to hold the big grant, that is, \$1.25 for an acre every year."

Although this grant may not be in a form such as would be used by skilled conveyancers, its language is clear, and their Lordships have no doubt as to its meaning or effect. It is perhaps best described as a sub-infeudation. The owner of the head grant parts with the whole of his interest in the specified portion of the land for a payment of money, and an annual rent or feu. There is no reversion, because the grant is for the same period as the head grant, *i.e.*, is a grant in perpetuity. Had this instrument been registered, it would thereupon have given to the grantee the whole of the interest in the specified land possessed by the holder of the head grant, and thus would have effectively carved out of the land included in the original grant the portion covered by the derivative grant. But owing to the provisions of Regulation 4 of 1891, which is entitled "A Regulation to provide for the Transfer of Land by Registration of Title," no instrument is effective to convey any estate in land unless it is registered, and therefore the effect of the instrument rested in contract until registration.

At various dates in and between December 1906 and January 1909, the Defendant Loke Yew purchased other of these sub-grants (fifteen in all) from their owners, and thus became possessed of an area of about 58 acres of land, comprised in the original grant. Certain other portions were acquired by a family, of which the head was Sz Woh Kongsí. Other sub-grants of portions of the land were also created by Haji Mohamed Eusope, but as these were subsequently bought back by him for a sum of about \$114,000, prior to the transaction between him and the Plaintiff Company about to be referred to, there is no need to make any further reference to them.

In the year 1910 the Plaintiff Company formed the project of acquiring the land included in the grant to Haji Mohamed Eusope, and commenced negotiations with him for that purpose. They had full knowledge of all the transactions above referred to. For the purpose of the sale he purchased back all his sub-grants with the exception of those in the hands of the Defendant Loke Yew and of the family of Sz Woh Kongsí. He sought to acquire in the same way those that were in the hands of the Defendant, but the Defendant refused to part with his grants. The family of Sz Woh Kongsí, on the other hand, were willing to sell their grants for \$14,000—the only difficulty being that, by reason of a lawsuit among the members of the family, it was uncertain in what proportions and to what members of the family that \$14,000 would eventually be distributed. The difficulty was met, as will presently be seen, by an allowance of the \$14,000 out of the price paid by the Plaintiff Company—they holding the sum so retained by them for the purpose of distribution among the family of Sz Woh Kongsí so soon as the shares should have been ascertained in the litigation.

The negotiations between the Plaintiff Company and Haji Mohamed Eusope were carried on by a certain Mr. Glass as agent on behalf of the Company. The evidence shows that Haji Mohamed Eusope recognised throughout that he had parted with his interest in the Loke Yew lands (excepting the right to receive the annual payments or feus), and that it was arranged originally that the conveyance to the Plaintiff Company should not include Loke Yew's land. The price excluding that land was fixed at \$350,000. The deed of conveyance, however, purported to

convey the original grant in its entirety. Haji Mohamed Eusope, who appears to have acted honestly throughout, refused to sign that conveyance without a document showing that he was not selling Loke Yew's land, and originally a lengthy document to that effect was drawn up for him by a conveyancer, which he asked Mr. Glass to sign. This document, however, Mr. Glass refused to sign, apparently because of objections taken to it by the representative of the Bank who was in charge of the money to be paid as the purchase price. But Haji Mohamed Eusope would not proceed without an assurance that the lands of Loke Yew and Sz Woh Kongsi were not included in the sale. Mr. Glass then replied that he need not be afraid, as he knew Loke Yew, and would purchase his interest.

Haji Mohamed Eusope required however something in writing, and accordingly the following document was written out and signed by Mr. Glass:—

“To Haji Mohamed Eusop bin Abubakar.

I have purchased the land comprised in Grant No. 675 of Mukin Klang in the District of Klang for the sum of \$336,000.

As regards Loke Yew and See Oh Kongsee's land which is included in the said grant I shall have to make my own arrangements.

Kuala Lumpur. (Signed) PHILIP J. GLASS.

4th June 1910. Signed in the presence of

(Signed) G. H. DAY.

Lease :

Nos. 1, 3, 4, 5, 6, 33,
36, 40, 42, 43, 50,
59, 82, 83, 84 & 2.”

Their Lordships have no doubt that the true conclusion to be drawn from the evidence is that the above statement of Mr. Glass to

Haji Mohamed Eusope was intended to be and was a statement as to present intention as well as an undertaking with regard to the future, and that that statement was false and fraudulently made for the purpose of inducing Haji Mohamed Eusope to execute a conveyance which in form comprised the whole of the original grant, and that but for such fraudulent statement that conveyance would not have been executed. At that time it is evident that Mr. Glass intended to eject Loke Yew if he did not accept whatever sum he chose to offer, and that therefore he did not intend to purchase Loke Yew's rights. It is also clear that it was understood, and intended by Mr. Glass that it should be understood, that the document above set out was written (to use the words of one of the witnesses) "for the security of the vendor to show that he was not selling Loke Yew's land," and their Lordships are of opinion that the document carries out that intention. The purchase price there mentioned of \$336,000 makes allowance for the \$14,000 to be paid for Sz Woh Kongsii land which is the last of the parcels noted in the margin and called therein "lease," the other 15 being the numbers of the sub-grants held by Loke Yew. It is important in this connection to note that the purchase price inserted in the conveyance is \$417,000, showing a difference of \$67,000 when compared with the sum actually paid after allowing for the \$14,000 for Sz Woh Kongsii's land. This corresponds closely with the Plaintiff Company's own estimate of \$70,000 as the value of Loke Yew's land which appears elsewhere in the suit. It is clear, therefore, from the amount actually paid that Loke Yew's lands were not included in the sale.

Having thus possessed himself of a formal transfer of the original grant to himself as trustee for the Port Swettenham Rubber Company, Limited, Mr. Glass procured its registration, and thereupon the solicitors for the Plaintiffs wrote to Loke Yew the following letter:—

“Kuala Lumpur, Selangor,
“Federated Malay States,

“DEAR SIR, “22nd June 1910.

“ON behalf of the Port Swettenham Rubber Company, Limited, we are instructed to inform you that our clients have bought the land comprised in Grant 675, and we are further instructed to ask you to give directions to your coolies to cease from entering on this land and tapping the trees thereon. We are informed that you have an agreement of some nature with the former owner of this land, and that though our clients do not admit, and in fact deny, that you have any right against any person whatsoever under this agreement, yet to prevent any unpleasantness our clients are willing to pay you the sum of \$20,000 if you will surrender to them any rights you claim under the said agreement.

“Yours faithfully,

“Towkay Loke Yew. “HEWGILL AND DAY.”

and on the Defendant's refusing to vacate the land the Plaintiffs brought the present action for ejectment.

Their Lordships therefore find that the formal transfer of all the rights under the original grant was obtained by the deliberate fraud of Mr. Glass. He was aware that he could not obtain the execution of a transfer in that form otherwise than by fraudulently representing that there was no intention to use it until the Plaintiff Company were able so to do honestly by having acquired Loke Yew's sub-grants by purchase, and he therefore fraudulently made such representation, and thereby obtained the execution of the transfer. It is an important fact to be borne in mind

that although this fraud was clearly charged in the defence, Mr. Glass was not called at the trial, nor was his absence accounted for. The inference to be drawn from this is obvious and is entitled to great weight.

The case of the Plaintiffs as argued before their Lordships rested mainly on the effect of registration. At the date of the Writ the transfer to the Plaintiffs was registered while the sub-grants of Haji Mohamed Eusope held by Loke Yew were not. Counsel for the Plaintiffs therefore argued that under the provisions of the Registration of Titles Act the Plaintiffs possessed an indefeasible title to the land, and that under the provisions of section 4 all the sub-grants were "null and void and of no effect." A memorial of the transfer had been made upon the duplicate grant under the provisions of section 28, and they contended that that was equivalent to a certificate of title under section 6 and that by virtue of section 7 this was "conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof."

The conclusion to which their Lordships have come as to the transfer having been obtained by fraud brings the case within the exception of section 7 and is therefore a sufficient answer to these arguments. But their Lordships are of opinion that for other reasons they are irrelevant and beside the mark. They take no account of the power and duty of a Court to direct rectification of the Register. So long as the rights of third parties are not implicated a wrong-doer cannot shelter himself under the registration as against the man who has suffered the wrong. Indeed the duty of the Court to rectify the Register in proper cases is all the more imperative because of the absoluteness of the effect of the

registration if the register be not rectified. Take for example the simple case of an agent who has purchased land on behalf of his principal but has taken the conveyance in his own name, and in virtue thereof claims to be the owner of the land whereas in truth he is a bare trustee for his principal. The Court can order him to do his duty just as much in a country where registration is compulsory as in any other country, and if that duty includes fresh entries in the Register or the correction of existing entries it can order the necessary acts to be done accordingly. It may be laid down as a principle of general application that where the rights of third parties do not intervene no person can better his position by doing that which it is not honest to do, and inasmuch as the registration of this absolute transfer of the whole of the original grants was not an honest act under the circumstances it cannot better the position of the Plaintiffs as against the Defendant and they cannot rely on it as against him when seeking to enforce rights which formally belong to them only by reason of their own fraud. It must be remembered that in the present case the Defendant immediately on the bringing of the action applied to rectify the Register and that such rectification only awaits the event of this suit. His right to it is set up in the Defence, so that he has taken all the necessary steps to obtain the full relief to which he is entitled.

There is, however, another ground upon which, in their Lordships' opinion, the Defendant is entitled to succeed in this case. It is admitted that the Plaintiff Company bought with full knowledge of the transactions with regard to the land occupied by Loke Yew, so that they knew that Haji Mohamed Eusope had parted with his rights in that land. Under

the provisions of section 3 of Enactment No. 9 of 1903, entitled "An Enactment to define and amend the Law relating to certain kinds of Specific Relief," the Plaintiff Company became by the transfer trustees for Loke Yew in respect of that land. This is clear from illustration "g" to that section which reads as follows:—

"A. buys certain land with notice that B. has already contracted to buy it. A. is a trustee within the meaning of this enactment for B. of the land so bought."

The present is an even stronger case, inasmuch as the Plaintiff Company through Glass, their trustee and agent in the transaction, were aware that Haji Mohamed Eusope had actually granted away these lands and been paid for them. The Plaintiff Company, therefore, are trustees for the Defendant for all the rights of which they thus had notice. These rights amounted to the rights of a freeholder subject to an annual payment to the owner of the head grant. Now, it is clear that a *cestui que* trust has the right to require a trustee who is a bare trustee for him of land to register that land in his name, seeing that he is the sole beneficial owner and that the trustee has no interest therein. The present action from this point of view is an action by a bare trustee of land to eject the beneficial owner who is and has for years been in possession of the land and is cultivating it.

It is not necessary for their Lordships to decide whether the defence of the Statute of Limitations is well founded or not, and therefore that question must be taken to be left open.

In the Court of the Judicial Commissioner at Kuala Lumpur, in which the action came on in the first instance, Braddell J. found in favour of the Defendant with costs. On appeal to the

Court of Appeal this was set aside. In their Lordships' opinion the appeal ought to have been dismissed. Their Lordships will therefore humbly advise His Majesty that the Judgment of the Court of Appeal should be discharged with costs, and the Judgment of the Court of First Instance restored. The Respondents must pay the costs of this Appeal.

In the Privy Council.

LOKE YEW

v.

THE PORT SWETTENHAM RUBBER
COMPANY, LIMITED.

DELIVERED BY LORD MOULTON.

LONDON:

PRINTED BY EYRE AND SPOTTISWOODE, LTD.
PRINTERS TO THE KING'S MOST EXCELLENT MAJESTY.

1913.