

PHILLIPS *v.* PHILLIPS.

Opinion delivered February 4, 1929.

1. TRUSTS—ESTABLISHING TRUST EX MALEFICIO.—In order to establish a trust *ex maleficio*, there must be an element of positive fraud accompanying the promise by means of which the acquisition of the legal title is wrongfully obtained.
2. FRAUDS, STATUTE OF—FRAUD IN PROCURING DEED.—Fraud in the procurement of a conveyance takes the case out of the statute of frauds; the reason being that a rule intended as a protection against fraud ought not in a court of equity to be changed into an instrument for the procurement of fraud.
3. TRUSTS—MISREPRESENTATION.—The misrepresentation which will create a trust *ex maleficio* must be made before or at the time the legal title is acquired by the promisor.
4. TRUSTS—SUFFICIENCY OF EVIDENCE.—Evidence *held* sufficient to impose a trust *ex maleficio* in favor of plaintiff on lands the title of which was held by defendant.
5. TRUSTS—SUFFICIENCY OF EVIDENCE.—In order to establish a trust *ex maleficio*, the evidence must be clear, convincing and satisfactory.

Appeal from Washington Chancery Court; *John Mays*, Special Chancellor; affirmed.

STATEMENT BY THE COURT.

Appellee brought this suit in equity against appellants to have a trust declared in his favor in an undivided interest in forty acres of land containing a valuable apple and peach orchard, and to have an accounting of the rents and profits of the same. Appellants denied all the material allegations of the complaint, and pleaded the statute of frauds. By way of cross-complaint, Charles M. Phillips alleges that for the year 1920 A. J. Phillips received the sum of \$3,300 from the sale of a peach crop grown on the land, and has failed to account to him for the same. The prayer is that the complaint of A. J. Phillips be dismissed for want of equity and that he have judgment against said A. J. Phillips for the sum of \$3,300, the value of said peach crop. Charles M. Phillips also prays that his title to said land be forever quieted and confirmed in him against said A. J. Phillips.

The record shows that A. J. Phillips is the father of Charles M. Phillips and the other appellants, and originally owned the forty acres of land in question. He had executed a mortgage on the land to W. H. Kelso, and he had defaulted in the payment of the mortgage. He also executed a deed to said land to Charles M. Phillips and four of his other children. The land contained a valuable apple and peach orchard, which had been set out by appellee. A deed was executed to W. H. Kelso in satisfaction of his mortgage, and it was the contention of the Phillips family that this deed, although absolute in form, was intended as a mortgage to secure Kelso in the payment of his indebtedness. The Phillips family remained in possession of the land and accounted to Kelso for the proceeds derived from sale of the fruit of the orchard. On the 8th day of June, 1920, a written contract was executed by and between Charles M. Phillips, Onie Phillips and Jay Phillips, called parties of the first part, and A. J. Phillips, designated as party of the second part. The contract recites that, since the 9th day of September, 1913, the parties of the first part have been the owners of an undivided three-fifths interest in the

forty acres of land in question, subject to a mortgage lien in favor of Kelso. It also recites that the other two-fifths undivided interest is owned by two minor children of said A. J. Phillips. The contract then contains the following:

“Therefore it is hereby agreed by and between the parties hereto that, in the event of a sale of said lands under decree of foreclosure in chancery court, which is likely to occur because of the inability of the owners of said land to pay the mortgages now thereon and past due, the said party of the second part agrees that, if the parties of the first part will convey to him their undivided interest in said land, he will purchase the same at the contemplated foreclosure sale, and dispose of the land to the best advantage, for a consideration not less than \$13,000, out of which he will pay all indebtedness against the home place in Springdale, known as the F. B. Robb lot, in the southeast quarter of the southeast quarter of section 35, township 18 north, range 30 west, having a frontage of 132 feet on the west side of Thompson Avenue, in said city, which shall be conveyed to Walter Clyde Phillips and Daisy M. Phillips, subject to the right of their mother, Mrs. M. A. Phillips, to use and occupy the same as a home during her lifetime, any balance remaining of the proceeds of the sale of said 40-acre tract to be divided equally between the said A. J. Phillips and the parties of the first part, half and half.”

The contract then provides for the division of some personal property, consisting of an auto truck and two automobiles, between the parties of the first part and the party of the second part. The contract was signed by all the parties.

According to the testimony of A. J. Phillips, he assisted in managing the orchard and in gathering the crops thereon. In 1924 he and Charles M. Phillips jointly purchased an orchard from Ed Smith, in which they were entitled to receive profits from the peaches marketed in the sum of \$1,792. They gave Smith a mortgage for \$800 in payment of the orchard. During the year 1924,

Charles M. Phillips also sold the peaches on the forty acres in question for \$2,000 net. He also received \$800 net on what was called the Smith orchard. He used a part of this money in paying off the Kelso mortgage. In 1921 A. J. Phillips gave a mortgage on the land in question to a bank in Springdale, and subsequently paid off this mortgage indebtedness, which amounted to \$1,300. Charles M. Phillips never made any claim that he was the sole owner of the forty acres in question until some time in 1925, after A. J. Phillips had gone to California. A. J. Phillips testified in detail as to the amount of work done by him and the sums of money expended by him on the orchard during the period of time the land was in the joint possession of himself and children, after he had executed the deed to them in 1913. He claims that he executed the deed in order to prevent a sale of the land by his creditors. He wanted to secure time in which to pay them, and did afterwards do so.

According to the testimony of Charles M. Phillips, W. H. Kelso held a mortgage against the forty acres of land for something like \$3,000, and the place was deeded to Charles M. Phillips and the other children, subject to the mortgage. He admitted the execution of the contract of June 8, 1920, referred to in the testimony of A. J. Phillips. He testified, however, that his father did not make the sale contemplated by it, and had no further interest in the land. He and his brothers continued in possession of the land, and marketed the apples and peaches grown on it. His father had no interest whatever in it. Charles M. Phillips also introduced in evidence the contract between himself and W. H. Kelso, the body of which reads as follows:

“This contract, made and entered into this 5th day of April, 1924, A. D., by and between Charles M. Phillips of Springdale, hereinafter mentioned as party of the first part, and W. H. Kelso of Springdale, hereinafter referred to as party of the second part, witnesseth: That the party of the first part agrees to take a certain forty acres now owned by party of the second part, and culti-

vate, spray and care for it in firstclass shape, and party of the first part also agrees to apply said proceeds from the sale of the crop on said forty acres, less the actual expenses, on a mortgage of \$2,775, together with the interest, and, when said mortgage and interest is paid in full, party of the second part agrees to deed this said forty acres back to the party of the first part. To all of the above we mutually agree, and hereby sign this contract this day and date first written above. This is also signed as our free act and deed.'"

W. H. Kelso died soon after the execution of this contract, and, it being an estate in entirety, his widow became the owner after his death. A suit was instituted in the chancery court by Charles M. Phillips and his brothers against W. H. Kelso and S. C. Kelso, his wife, to have the deed executed by them to the land declared a mortgage, and to have the title vested in them upon the payment of said mortgage indebtedness. The mortgage indebtedness amounted to something near \$2,775.52. This amount was paid, and the title to the land was declared vested by the chancery court in Charles M. Phillips.

According to the testimony of A. J. Phillips, this was done because Charles M. Phillips did not have in his hands sufficient money from the proceeds of the sale of the products of the orchard on this land and on the ten acres which they had purchased from Ed Smith to pay off the mortgage indebtedness to Kelso. It was necessary to borrow somewhere between \$500 and \$1,000 to satisfy the mortgage, and it was agreed between him and Charles M. Phillips and his other children interested in the land that the title should be vested in Charles M. Phillips in order to enable him to borrow money with which to pay off the balance of the mortgage indebtedness.

Judge Lee Seamster was the attorney in the case, and in every respect corroborated the testimony of A. J. Phillips as to the conduct of this suit. According to his testimony, during the time he was preparing the case for trial he was consulted by Charles M. Phillips and A.

J. Phillips. The purpose of the suit was to declare the deed to Kelso to be a mortgage. He talked with A. J. Phillips about the suit on different occasions, but never talked with Charles except when his father was with him. The children interested in the land and A. J. Phillips and his wife had made a warranty deed to W. H. Kelso and S. C. Kelso, his wife. Kelso had executed a contract with the holders of the legal title of the land, consisting of Charles M. Phillips and his brothers, to reconvey the land to them upon the payment of \$2,775.52. The contract between Charles M. Phillips and Kelso referred to above was entered into on the 5th day of April, 1924, and both these contracts were set out in full in the complaint. The case came up for trial at the August term, 1924, of the chancery court. Charles M. Phillips seemed to have been the one in charge of selling the products from the land, and there was between \$500 and \$1,000 necessary to be borrowed to finish paying off the mortgage. The other plaintiffs asked that the complaint be dismissed as to them, and this was done at the suggestion of Charles M. Phillips and A. J. Phillips. It was agreed that the title should be vested in Charles M. Phillips by them, and that this should be done for the benefit of all the parties interested. The title was agreed to be vested in him in order that he might get a loan from a bank in order to finish paying off the Kelso indebtedness.

The testimony of Charles M. Phillips and of his brother, Jay Phillips, was in direct conflict with the testimony of A. J. Phillips and Judge Lee Seamster on this branch of the case. They testified that their father had no interest whatever in the land, and denied that the title was vested in Charles M. Phillips for the purpose of enabling him to borrow money to pay off the Kelso indebtedness, and denied that there was any agreement whatever that A. J. Phillips was to have an undivided one-half interest in the land, or any interest at all in the land.

The special chancellor who tried the case made a specific finding of facts, in which he sustained A. J. Phillips in every respect. A decree was entered of

record in accordance with the findings of the chancellor, and to reverse that decree Charles M. Phillips has duly prosecuted an appeal to this court.

Combs & Johnson, for appellant.

HART, C. J., (after stating the facts). It is earnestly insisted by counsel for appellants that the decree should be reversed because, under our statute of frauds, parol evidence could not be introduced to create an express trust in a deed absolute in form, and that there could be no trust *ex maleficio* in favor of A. J. Phillips against Charles M. Phillips. On this latter proposition we cannot agree with counsel for appellants. It is true that in order to establish a trust *ex maleficio* there must be an element of positive fraud accompanying the promise, by means of which the acquisition of the legal title is wrongfully obtained. Fraud in the procurement of the conveyance for the benefit of the grantor takes the case out of the statute of frauds. The reason is that a rule intended as a protection against fraud ought not in a court of equity to be changed into an instrument for the procurement of the fraud. Of course, the misrepresentation which will create a trust *ex maleficio* must be made before or at the time the legal title is acquired by the promisor. *Barron v. Stuart*, 136 Ark. 481, 207 S. W. 322; *Bray v. Timms*, 162 Ark. 247, 258 S. W. 338; *Davidson v. Edwards*, 168 Ark. 306, 270 S. W. 94; and *Coleman v. Wigman*, 172 Ark. 132, 288 S. W. 376.

Now, it is the contention of A. J. Phillips that the conveyance made by him to Charles M. Phillips and his other four children, in 1913, subject to the Kelso mortgage, was for the purpose of preventing his creditors from levying on the land in question. On the other hand, it is the contention of Charles M. Phillips that the deed was an advancement to him and to the other children. The conclusion we have reached makes this immaterial.

On the 8th day of June, 1920, a written contract was entered into between Charles M. Phillips and two of his brothers and A. J. Phillips relative to the land. In that contract it was agreed that the children should convey

to their father their undivided interest in the land and that he should dispose of it for a consideration of not less than \$13,000, out of which he would pay all indebtedness against the land and also some indebtedness against his home place, and that the balance of the proceeds of the sale should be divided equally between A. J. Phillips and three of his children, including Charles M. Phillips. Pursuant to this agreement, the parties entered into possession of said land and sold the products of the orchard annually for the purpose of paying off the Kelso indebtedness. Their testimony is in irreconcilable conflict as to the amount of work and money contributed by each of them for this purpose. Be that as it may, the testimony shows that all the parties did some work towards cultivating the orchard and gathering and marketing the apples and peaches grown thereon. Charles M. Phillips seems to have had charge of marketing the products. A. J. Phillips is shown to have worked in the orchards, to some extent, at least. This shows that the parties were continuing to operate under their agreement of June 8, 1920, and that Charles M. Phillips and his brothers recognized that their father had an interest in the land under their written agreement. This continued until 1924, at which time, according to the testimony of Judge Lee Seamster, Charles M. Phillips and A. J. Phillips employed him to bring a suit in the chancery court to have the deed to Kelso declared a mortgage. A. J. Phillips and Charles M. Phillips both consulted him about the matter and gave him directions about the conduct of the suit. It was finally agreed that the legal title under the decree should be taken in the name of Charles M. Phillips for the benefit of all interested parties. This was done in order to enable him to borrow money from a bank with which to pay off the Kelso indebtedness, which was a lien on the land. The money with which to pay the greater part of the indebtedness had been secured by the sale of the crops from the orchard on the land in question and from the one which is known as the Ed Smith orchard, in which the undisputed proof shows

that A. J. Phillips had an equal interest with his son, Charles M. Phillips.

A. J. Phillips in all respects corroborates the testimony of Judge Lee Seamster. On the other hand, his testimony is flatly contradicted by that of Charles M. Phillips and Jay Phillips.

While the rule is well settled in this State that, in order to impose a trust *ex maleficio*, the evidence must be clear, convincing and satisfactory, we think that requirement has been met in the present case. Judge Seamster had no interest whatever in the matter. He was employed by A. J. Phillips and Charles M. Phillips. Both of them consulted him about the management of the case. His testimony is strongly corroborated by the attendant circumstances. As we have already seen, the parties admitted the execution of the agrément of June 8, 1920, and the evidence clearly shows that all the parties at that time considered themselves interested in the orchards and the land itself as tenants in common. Charles M. Phillips and his brothers are shown by a preponderance of the evidence to have recognized that their father had some sort of an interest in the land. He could have had none except through this agreement.

We are of the opinion that the parties recognized that the agreement was entered into for the purpose of enabling them to make some kind of arrangement to pay off the Kelso indebtedness and to divide the land or the proceeds thereof equally between A. J. Phillips on the one hand and Charles M. Phillips and his brothers on the other.

It is claimed that A. J. Phillips never had any money at all during this period of time, but it is shown that he executed a mortgage on the land to a bank for \$1,300, and that he paid off this mortgage. It seems clear to us that the parties, when they brought the suit in the chancery court against Kelso and his wife to have their deed declared a mortgage, recognized the binding force of the agreement of June 8, 1920. It is true that A. J. Phillips was not made a party to the suit, but this was not neces-

sary, because the legal title was in Charles M. Phillips and his brothers from 1913 until their conveyance to Kelso and wife. No doubt A. J. Phillips thought that, as soon as the title was vested in his children, they would carry out their agreement with him, made on the 8th day of June, 1920, and give him an undivided one-half interest in the land. It was contemplated under that agreement that the children should deed the land to A. J. Phillips, who had a prospective purchaser for it, and that the proceeds should be divided between them according to the terms of the agreement, after paying off the mortgage indebtedness. The verbal agreement made during the pendency of the suit against Kelso and his wife was that the title should be vested in Charles M. Phillips for the purpose of enabling him to borrow money from a bank with which to pay off the balance of the Kelso mortgage, the greater part of which had already been paid by the proceeds arising from the sale of the crops of the orchards on the land in question and on the orchard on the Ed Smith land, owned jointly by A. J. Phillips and Charles M. Phillips. Thus it will be seen that the greater part of the consideration had been paid by Charles M. Phillips and A. J. Phillips at the time the legal title was acquired by Charles M. Phillips, and the chancellor was justified in finding a trust *ex maleficio* in favor of A. J. Phillips against Charles M. Phillips.

Therefore the decree will be affirmed.
