MARTIN v. MARTIN[1]

Resulting trust—Advancement—Property bought by husband in wife's name—Proof of beneficial title in husband—Intention to escape taxation—Married Women's Property Acts

The respondent in this appeal applied by way of summons under section 105 of the South Australian Law of Property Act 1936-1956[2] in the Supreme Court of South Australia to determine the beneficial ownership of certain estates in land standing in the name of his wife, who was the respondent to the summons.

Before the parties were married, the husband owned about 2,000 acres of land, and subsequently he arranged to purchase another 1,527 acres, in two adjoining parcels of 827 acres and 700 acres respectively. The purchase price was seven hundred pounds, paid by the husband, in cash and by way of bank overdraft. The certificates of title were transferred into the wife's name by the vendors. In his evidence the husband claimed that he had not intended the beneficial ownership to pass to his wife; in his affidavit before the application, he alleged that he had intended his wife to hold for herself and him as tenants in common, but in cross-examination he claimed that he intended his wife to hold for him exclusively.

It was alleged by the wife, and indeed, stated by the husband in examination-in-chief, that one motive for his putting the property in his wife's name was to escape Federal land taxation[3] which had not been discontinued at the time of the transactions (1947). It was also shown that the husband had not avoided any taxation in this manner.

The trial judge (Abbott J.) declared that the beneficial interest in the 827-acre block only belonged to the husband, and ordered the wife to transfer the legal title. As the High Court pointed out, it is not clear whether the judge made this order as a convenient method of partitioning the shares of the husband and wife as tenants in common of the equitable estate in the whole 1,527 acres, or whether he was purporting to exercise a discretion to allocate proprietary rights conferred upon him by section 105 (2) of the Law of Property Act 1936-1956,[4] having accepted

[1] (1960) 33 A.L.J.R. 362. High Court of Australia; Dixon C.J., McTiernan, Fullagar and Windeyer JJ.

[2] Law of Property Act 1936-1956, s. 105 (1) (S.A.). 'In any question between husband and wife as to the title to or possession of property, either party or any other person interested may apply by originating summons to the court . . .' *Cf.* Married Women's Property Act 1882, s. 17 (U.K.), and Marriage Act 1958, s. 161 (1) (Vic.).

[3] Land Tax Act 1910-1950 (Cth); and Land Tax Abolition Acts 1952 and 1953 (Cth).

[4] Law of Property Act 1936-1956, s. 105 (2) (S.A.). 'The court . . . may make such order with respect to the property in dispute as such court shall think fit.' This section corresponds to the Married Women's Property Act 1882, s. 17 (U.K.), and to the Married Women's Property Act 1915, s. 20 (1) (Vic.), the latter Act having been repealed. See now the Marriage (Property) Act 1956, s. 7 (2), re-enacted as the Marriage Act 1958, s. 161 (2). 'The judge may make such order with respect to the property in dispute (including any order for the sale of the property and the division of the proceeds of the sale, or for the partition or division of the property) . . . as he thinks fit. . . .'

that the husband was beneficial owner of the whole. As will become apparent below, if the latter view of the judge's findings of fact is to be accepted the declaration and order were wrong under law applicable in cases before Australian courts. However, the former view is a possible conclusion upon the evidence, and the High Court was not prepared to disturb a trial judge's findings of fact, saying 'a court of appeal must exercise great caution in setting aside a finding upon a question of intention by a judge who has seen and heard the parties as witnesses'.[5] Nevertheless, the High Court doubted the respondent's integrity, and inclined to the view that, if he was entitled beneficially at all, he was entitled beneficially to all 1,527 acres; however, they could not give any effect to this view, because he had only claimed 827 acres in his summons. Despite their doubts, the Court, in a joint judgment, upheld the trial judge's findings and decision.

Three distinct issues arise from the case: first, the existence or otherwise of a resulting trust; secondly, the effect (if any) of the husband's motives in having the property placed in his wife's name; and thirdly, the interpretation placed upon section 105 of the Law of Property Act, and its equivalents, in the High Court, in the Supreme Court of South Australia, and consequentially in this State.

Upon the first issue, that of the presumption of resulting trusts, and the equitable doctrine of advancement,[6] the position appears, as Viscount Simonds has said, to be 'well settled'.[7] Where property has been purchased in the name of another, there is a resulting trust in favour of the purchaser, if the transferee is a stranger, in the absence of consideration or a declaration of trust in favour of the transferee. This trust arises, apart from any intention of the parties, by operation of law. Even when the subject-matter is an interest in land the trust need not be in writing to satisfy the Statute of Frauds.[8] This presumption is rebutted, or perhaps does not arise, if the transferee is a wife or child of the purchaser, for such person is considered to have taken by way of advancement. Nevertheless the purchaser may call evidence to show that he did not intend, at the time of the purchase, that his wife or child should take beneficially, and so the doctrine of advancement may itself be negatived.

The High Court regarded this as an anomaly, taking Ashburner's[9] view that there is no presumption of advancement as such, for the doctrine operates in a purely negative way to prevent a resulting trust from arising.

[5] (1960) 33 A.L.J.R. 362, 367.

[6] The expression 'doctrine of advancement' as used in this note is confined to its meaning as understood in cases where, but for the 'doctrine', a resulting trust would otherwise be presumed. No reference is intended to the doctrine which applies to reduce the portion of a child of an intestate who has advanced that child before his death.

[7] *Shephard v. Cartwright* [1955] A.C. 431, 444.

[8] Property Law Act 1958, s. 53 (1) (Vic.). 'Subject to the provisions hereinafter contained with respect to the creation of interests in land by parol . . .
(b) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will; . . .
(2) This section shall not affect the creation or operation of resulting, implied or constructive trusts.'

[9] *Equity* (2nd ed. 1933) 110.

> It is difficult to justify the grounds on which evidence of intention has been admitted to show that the child or wife takes as a trustee. Evidence of intention is always admissible to rebut a presumption made in equity against the legal effect of an instrument; but here there is, strictly speaking, no presumption of advancement. The child or wife has the legal title. The fact of his being a child or wife of the purchaser prevents any equitable presumption from arising.[10]

It may be noted here that the question is not treated as an anomaly elsewhere. In *Shephard v. Cartwright*,[11] Viscount Simonds regarded the doctrine as a counter-presumption which arose to rebut the presumption of a resulting trust. This was also the view of Cussen J. in *Davies v. National Trustees & Co.*[12] where he said, 'Where a husband or father purchases property in the name of his wife or child . . . a *prima facie* but rebuttable presumption arises that the wife or child takes by way of advancement'. This appears to be the traditional view taken in the cases, and by other text-writers.[13]

The English attitude toward this question, even more than that of the High Court, highlights the paradox inherent in this area of equity. If a purchaser in the name of his wife or child may call evidence to show that he did not intend the wife or child to take beneficially, and so negative the doctrine of advancement, it seems that such purchaser is, in effect, calling evidence to prove an intention to create a trust. This is tantamount to a declaration of trust, and yet the courts have never required evidence of such a trust to satisfy the Statute of Frauds even where the subject-matter is an interest in land. Two explanations of the nature of the trust created by negativing the doctrine of advancement are possible. One is that the trust is some kind of 'resolutive' resulting trust, not required to be in writing, which is the outcome of disproving the doctrine of advancement which had itself rebutted the resulting trust originally presumed. The other is that the trust created by negativing the doctrine of advancement is no more than the resulting trust originally presumed. Upon this latter view, the evidence against advancement given by the purchaser must be regarded as purely negative, and not having the positive attribute of showing an intention in the purchaser of establishing a trust.

That the purchaser may call and give evidence of his intention has long been established. In *Devoy v. Devoy*,[14] and *Dumper v. Dumper*,[15] Stuart V.C. accepted such evidence, but warned that it should be received cautiously. This warning was repeated by Cussen J. in *Davies v. National Trustees & Co.*[16] In that case, His Honour also stated some principles of evidence governing such cases, and the High Court adopted this exposition, saying:

> The burden of proof is placed firmly on the person asserting that a trust was intended but the issue depends upon the intention with which

[10] Ashburner, *op. cit.*, quoted by the High Court (1960) 33 A.L.J.R. 362, 365.
[11] [1955] A.C. 431, 445. [12] [1912] V.L.R. 397, 401.
[13] *Lewin on Trusts* (15th ed. 1950) 148; Snell, *Equity* (24th ed. 1954) 151.
[14] (1857) 3 Sm. & G. 403. [15] (1862) 3 Giffard 583. [16] [1912] V.L.R. 397, 403.

> the property was purchased by the parent in the name of the child or the husband in the name of the wife, or as the case may be.
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> 'If on the whole of the evidence the Court is satisfied', said Cussen J., 'that the husband or father did not intend at the time of the purchase that his wife or child should take by way of advancement, the rule of law is that there is a *resulting trust* for the husband or father.'[17]

Thus the degree of proof of intention is not stated to be very high, perhaps lower, indeed, than Lord Eldon inferred it should be when he warned that the doctrine of advancement should not give way to slight circumstances.[18]

It appears that the party alleging his intention must shew that it existed at the time of the transaction or immediately afterward. Stuart V.C. in *Dumper v. Dumper*[19] put the matter higher still, considering that the intention must be 'contemporaneous with the acts in question'.[20] The true position seems to be as stated in Snell's *Equity*.

> The acts or declarations of the parties before or at the time of the purchase, or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration. . . . But subsequent declarations are admissible only against the party who made them and not in his favour.[21]

Despite their misgivings, the High Court accepted the finding of Abbott J. that no advancement was intended, the husband having satisfied this onus of proof.

The second issue is that of the effects of the possible illegality in the husband's admitted motive in placing the property in his wife's name: to escape possible liability for Federal land tax. Here the Court was concerned to point out that:

> The argument that the reason or motive for causing the property to be purchased in the name of the wife was to make it possible to avoid tax or to escape some provision of the law must often be amphibolous.[22]

The transferee of the property may argue that no such avoidance can be effected lawfully unless the beneficial ownership passes with the legal title, so strengthening the proposition that advancement was intended. However, the purchaser may assert that the transfer was merely a device to cloak the truth—that the wife was no more than the husband's nominee—and the beneficial ownership remains in him. If the latter situation is alleged, as it was here, then under case law applied in Australia the court must enquire whether the illegal purpose was carried

[17] (1960) 33 A.L.J.R. 362, 365.

[18] *Finch v. Finch* (1808) 15 Ves. 43. See also *Drever v. Drever* [1936] Argus L.R. 446, 450, *per* Dixon J., where His Honour pointed out that evidence showing an intention as to use and enjoyment only is insufficient; an intention as to ownership must be shown.

[19] (1862) 3 Giffard 583. [20] *Ibid.* 590.

[21] Snell's *Equity* 153, quoted by Viscount Simonds in *Shephard v. Cartwright* [1955] A.C. 431, 445.

[22] (1960) 33 A.L.J.R. 362, 366. See also *Oxford English Dictionary* i, 290.

out. If it was not, then the purchaser may still rely on a resulting trust. This proposition is supported by an impressive line of cases—*Payne v. McDonald*,[23] *Perpetual Executors and Trustees Association Ltd v. Wright*,[24] *Donaldson v. Freeson*[25] and *Drever v. Drever*.[26]

All these cases dealt with transactions the intention of which was to defeat creditors, and in each this illegal purpose had not been carried out, so that a resulting trust was presumed in favour of the purchaser. The creditors in those cases whom the purchaser intended to defeat were private individuals, and not the Taxation Commissioner as in this case; however, the Court did not make the distinction.

The Australian courts' attitude to such intentions is in sharp distinction to that which currently prevails in England. Two decisions, *Gascoigne v. Gascoigne*[27] and *Re Emery's Investment Trusts*,[28] support the view that intention to perform an illegal act under the cloak of the transaction will prevent a resulting trust from arising. The courts in those cases relied on the ancient equitable principle that 'he who comes to equity must come with clean hands'. It may be noted that in the first of the line of Australian cases, there is no explicit reference to the 'clean hands' doctrine, Griffiths C.J. saying:

> I doubt very much whether the doctrine *ex turpi causa non oritur actio* applies at all to a case where the only illegality or impropriety alleged is an intent, not effectuated, to defeat creditors.[29]

The Privy Council considered the question in *Petherpermal Chetty v. Muniandi Servai*,[30] which case supports the Australian view, and was cited with approval by Isaacs, Gavan Duffy and Rich JJ. in *Perpetual Executors and Trustees Association v. Wright*.[31]

In the present case, the High Court naturally followed the Australian authorities without question and so the resulting trust was made out in favour of the husband.

The third issue in this case was the interpretation placed by the Court upon section 105 of the South Australian Law of Property Act 1936-1956. The vexed question arising from this and similar sections in other jurisdictions is whether the presumption of resulting trusts and the doctrine of advancement any longer apply between husband and wife, or whether the title to and possession of property is a matter in the discretion of the courts, which may apply 'palm tree justice'[32] in their determinations under the power conferred by such sections.

The English position, as stated by the Court of Appeal in *Rimmer v. Rimmer*,[33] while not being entirely clear, is certainly far more extreme in its application of the section in summary proceedings than that assumed

[23] (1908) 6 C.L.R. 208. [24] (1917) 23 C.L.R. 185. [25] (1934) 51 C.L.R. 598.
[26] [1936] Argus L.R. 446. [27] [1918] 1 K.B. 223 (Divisional Court).
[28] [1959] Ch. 410 (Wynn-Parry J.). [29] (1908) 6 C.L.R. 208, 211.
[30] (1908) L.R. 35 Ind. App. 98, especially at 103, *per* Lord Atkinson, delivering the advice of the Board. [31] (1917) 23 C.L.R. 185, 197.
[32] *Rimmer v. Rimmer* [1953] 1 Q.B. 63, 68, *per* Lord Evershed M.R., quoting Bucknill L.J. in *Newgrosh v. Newgrosh* (1950 unreported). [33] [1953] 1 Q.B. 63.

by the High Court of Australia, as expounded in *Wirth v. Wirth*[34] and in the present case. In *Wirth v. Wirth,* Dixon C.J., with whom Taylor J. concurred on this point, put the following interpretation upon the Queensland enactment corresponding to the South Australian section 105:

> The discretion conferred on the Judge by the last words doubtless enables him, in granting withholding or moulding an order, to take into account considerations which go beyond the strict enforcement of proprietary or possessory rights, but the notion should be wholly rejected that the discretion affects anything more than the summary remedy. The law of property governs the ascertainment of its proprietary rights and interests of those who marry and those who do not . . . But the title to property and proprietary rights in the case of married persons no less than in that of unmarried persons rests upon the law and not upon judicial discretion.[35]

That case must be taken as overruling a decision of Smith J. in *Wood v. Wood,*[36] where he laid down several principles which should guide the judge in exercising his discretion, following upon the English decisions.[37]

In the Marriage (Property) Act (1956)[38] the discretion conferred on the judge was enlarged to allow him to order a sale of property and a division of the proceeds of sale. In *Ward v. Ward,*[39] Smith J. considered that the terms of the legislation precluded the restrictions laid down in *Wirth v. Wirth,*[40] but this view was disapproved by the Full Court of Victoria in *Noack v. Noack.*[41]

The situation prevailing now in South Australia, and probably Victoria, was stated by the High Court:

> It is hardly necessary to add that this Court does not accept the view that provisions like section 105 of the Law of Property Act 1936-1956 go beyond procedure for ascertaining and enforcing existing rights and confer upon the court what may be described as a special power of appointment over the disputed property between husband and wife.[42]

The main interest of the case lies in the fact that it contains the High Court's views on three matters in which there is some disparity between prevailing English and Australian attitudes. The first of these—the exact nature of the doctrine of advancement—is of academic interest

[34] (1956) 98 C.L.R. 228. [35] (1956) 98 C.L.R. 228, 231.

[36] [1956] V.L.R. 478. This was a decision upon the now-repealed 1928 Act.

[37] *Ibid.* 488. '. . . the judge, in exercising the discretion should be guided by the following general principles:

(a) In so far as an actual intention as to ownership is disclosed effect should be given to it.

(b) In so far as no actual intention is disclosed the judge should make such order as is "fair and just in the special circumstances of the case".

(c) For the purpose of deciding what is fair and just in relation to property acquired during the marriage as the result of payments or efforts by both spouses: (i) The judge is not bound to apply the presumptions and technical rules by which ownership is ascertained at law or in equity. (ii) He should lean towards equality, particularly in relation to property which the spouses have been using in common, and also in cases in which the contribution by each has been substantial and the proportion appears to have been due to chance circumstances rather than design.'

[38] *Supra* n. 4. [39] [1958] V.R. 68. [40] (1956) 98 C.L.R. 228.

[41] [1959] V.R. 137. [42] (1960) 33 A.L.J.R. 362, 366.

only, because the *practice* of courts in England and Australia does not differ. However, the second and third are of considerable practical importance. The effect of illegality of motive upon the presumption of resulting trusts has not been considered by the highest English domestic tribunals, and it may be added here, with great respect, that the position adopted by Australian courts does not truly accord with fundamental equitable principles.

As to the third question, the matter is much confused, but one is inclined, at least until the legislatures speak with greater clarity, to reject 'palm tree justice' and to hope that the title and proprietary rights of married persons continue to rest upon the law and not upon judicial discretion.

D. GRAHAM

KIRIRI COTTON CO. LTD v. RANCHHODDAS KESHAVJI DEWANI; SAJAN SINGH v. SARDARA ALI[1]

Contract—Statutory illegality—Payment under contract—Whether recoverable—Basis of recovery

Contract—Illegal purpose—Payment under contract—Whether goods passed into ownership of buyer—Basis of right of ownership

The basic classification of illegal contracts is between contracts declared illegal by statute, contracts, the making of which is legal, but which have an illegal purpose, and contracts declared illegal at common law because they offend against public policy.

It is a general principle of law that where a contract is *per se* illegal because of statute or public policy, it is void and of no effect and no rights or duties can accrue under it. Nor can any property in goods pass under it.[2] However, where the making of a contract is legal but where there is an illegal purpose involved, the knowledge of the parties becomes relevant.[3] The contract is voidable and is not avoided until the innocent party becomes aware of the illegality, so that rights under it may accrue to the innocent party although the party with knowledge of the illegality remains remediless.

Even though both parties may be aware of the illegality, it is possible for a party to recover the property in goods under an illegal contract where:

(a) He can claim the property in the goods by virtue of some title which is independent of the illegal contract, so that no reliance is placed on the illegal contract.[4]

[1] [1960] 2 W.L.R. 127; [1960] 2 W.L.R. 180.

[2] *Re Mahmoud and Ispahani* [1921] 2 K.B. 716, 728; Cheshire and Fifoot, *The Law of Contract* (4th ed. 1956) 293.

[3] Cheshire and Fifoot, *op. cit.* 289; Anson, *Principles of the English Law of Contract* (21st ed. 1959) 314.

[4] *Bowmakers Ltd v. Barnet Instruments Ltd* [1945] K.B. 65; Cheshire and Fifoot, *op. cit.* 297; Anson, *op. cit.* 323.