

H. C. OF A.
1908.

CAULFIELD
v.
CAULFIELD.

Appeal dismissed. Order appealed from varied by consent by directing payment of £40 8s. 4d. in discharge pro tanto of the respondent's costs. Except as aforesaid order appealed from affirmed. Respondent to pay costs of appeal.

Solicitors, for the appellant, *McInerney, McInerney & Win-grove.*

Solicitor, for the respondent, *J. W. Dixon.*

B. L.

Appl
Gray v
Pastorelli
[1987] WAR
174

Cons
Weston v
Beaufils
(1994) 122
ALR 240

Disced
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[HIGH COURT OF AUSTRALIA.]

PAYNE APPELLANT;
DEFENDANT,

AND

MCDONALD RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. *Illegal contract—Transfer of land to defeat creditors—No proof that creditors were defeated—Pleading.*
1908.

MELBOURNE,
June 19, 22,
23.

Griffith C.J.,
O'Connor, and
Higgins JJ.

In an action by which the plaintiff alleges and proves that land, which stands in the defendant's name, was bought with the plaintiff's money and was transferred to, and is held by, the defendant as trustee for the plaintiff, and seeks to compel the defendant to transfer the land to the plaintiff, it is not a defence that the land was originally transferred to the defendant in order to defeat the plaintiff's creditors unless it is also alleged and proved that that object was wholly or partly carried into effect.

Whether such proof would be sufficient: *Quære.*

Decision of the Supreme Court affirmed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Fanny McDonald against Henry Benedict Payne as executor of the will of Ellen Payne, deceased, who was the mother of the plaintiff and of the defendant.

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By the statement of claim it was alleged that shortly prior to 25th August 1899 it was verbally agreed between the plaintiff and the defendant as her agent that he should purchase for her, but in the name of Ellen Payne, a certain piece of land with moneys of the plaintiff, and that Ellen Payne consented to the land being so purchased; that in pursuance of such agreement and consent the land was so purchased and a transfer of the land to Ellen Payne was executed on the 25th August 1899, and subsequently a certificate of title was issued in the name of Ellen Payne; that after the transfer, and until the death of Ellen Payne on the 9th August 1904, Ellen Payne held the land as trustee for the plaintiff and permitted her to receive the rents and profits; that the defendant, to whom probate of the will of Ellen Payne was granted on 23rd December 1905, though requested to do so, had failed to supply the plaintiff with accounts of the rents and profits of the land, and though requested so to do had refused to transfer the land to the plaintiff. The plaintiff claimed a declaration that Ellen Payne, and subsequently the defendant as her executor, were trustees of the land for plaintiff, an order that the defendant as executor should transfer the land to the plaintiff, and an account of the rents and profits of the land, and payment of any amount proved to be due to the plaintiff.

In the defence the defendant by paragraph 11 raised the following defence:—

“ If the said land was bought as alleged with the moneys of the plaintiff (which the defendant does not admit but denies) it was so bought by the contrivance of the plaintiff in the name of the said Ellen Payne and transferred to the said Ellen Payne and the certificate of title was issued in the name of Ellen Payne for the purpose (as the plaintiff well knew and contrived) of defeating and delaying the creditors of the plaintiff, and the defendant will contend that the plaintiff cannot obtain the relief claimed in this

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action or any relief without alleging her own fraud which the defendant contends she ought not to be permitted to do."

The action was tried before *àBeckett J.* There was evidence that the land was bought with the plaintiff's money, that at the time the purchase was made she was indebted to certain banking and financial institutions, and that the land was put into her mother's name because of the plaintiff's indebtedness and to protect her from her creditors.

àBeckett J. found that the land was bought with the plaintiff's money and that there was a resulting trust in favour of the plaintiff, and he made an order directing the defendant to transfer the land to the plaintiff, and for accounts of the rents and profits thereof.

From that judgment the defendant now appealed to the High Court.

McCay, for the appellant. The transfer of the property to Mrs. Payne was obnoxious to 13 Eliz. c. 5, as the object was to hinder or delay the respondent's creditors. It was also in breach of the insolvency law, and contrary to the policy of the law. The illegal purpose having been, at any rate, partly carried out, there is no resulting trust in favour of the respondent as there otherwise would have been: *Taylor v. Bowers* (1); *Kearley v. Thomson* (2); *Birch v. Blagrove* (3); *Groves v. Groves* (4); *Symes v. Hughes* (5); *Herman v. Jeuchner* (6). The fact that the creditors did not sue the respondent is evidence that the illegal purpose was partly carried out. It was upon the respondent to show that no part of the purpose was carried out.

[HIGGINS J.—The appellant should have alleged in his pleading that the creditors were defrauded: *Haigh v. Kaye* (7).]

The defendant in such an action as this need only allege the intent to defeat or delay creditors, and it is upon the plaintiff then to set up and prove that the creditors were not defeated or delayed. See *Taylor v. Bowers* (1); *Symes v. Hughes* (5); *Scott v. Brown, Doering, McNab & Co.* (8). If the fraud appears, though it is not pleaded, the Court will not assist it.

(1) 1 Q.B.D., 291.

(2) 24 Q.B.D., 742.

(3) Amb., 264.

(4) 3 Y. & J., 163.

(5) L.R. 9 Eq., 475.

(6) 15 Q.B.D., 561.

(7) L.R. 7 Ch., 469.

(8) (1892) 2 Q.B., 724.

Hayes and Power, for the respondent, were not heard.

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GRIFFITH C.J. The point raised on this appeal is one upon which, apparently, no argument was addressed to *à Beckett J.*, for he does not mention it in his judgment. The point on which he decided the case was not pressed before us. The plaintiff's case is very simple. As established by the evidence it is this:—Some years ago she bought some property and it was transferred into her mother's name. Under those circumstances, if there were no more in the case, the mother was a trustee for her. On the mother's death the property passed to the defendant, and the plaintiff now asks that the defendant should transfer it to her, which *à Beckett J.* ordered him to do. The point now made is this:—When the property was bought in the mother's name, the plaintiff was indebted to certain creditors, and the property was so transferred to the mother with the view of defeating those creditors. There the allegations and the evidence end. It is said that, that being so, the plaintiff cannot get the property back. I apprehend the principle is that the Court will not assist a party to carry out an illegal transaction—that, if, in the course of the plaintiff's story, the relevant facts show an illegal transaction, the Court will not assist him. As *James L.J.* said in *Taylor v. Bowers* (1):—"If it was merely a question for the first time to be determined upon principle, without authority, I should have no doubt in saying that the plaintiff was not obliged to rely upon the fraud for the purpose of recovering back the goods." In this case the plaintiff is not obliged to rely on anything except the fact that the land was transferred into her mother's name as trustee for her. I doubt, indeed, very much whether the doctrine *ex turpi causâ non oritur actio* applies at all to a case where the only illegality or impropriety alleged is an intent, not effectuated, to defeat creditors. *Primâ facie*, a man may do what he likes with his own property. Any restriction on his doing so is imposed by positive law, and there are a number of such restrictions to be found in the insolvency laws. Those laws are all, so far as I know, made for the benefit of creditors, and the restricted transactions are valid between the

(1) 1 Q.B.D., 291, at p. 298.

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parties to them unless the creditors intervene. So that I doubt whether there is any foundation at all for the argument. If the mere fact that a transaction was entered into with intent to defeat creditors were sufficient to prevent a man from asserting any rights in respect of it, most extraordinary results would ensue. For instance, every fraudulent preference, so-called, would be an illegal transaction. Now, a fraudulent preference very often consists of a transfer of property to a creditor by way of security or mortgage. If the debtor becomes insolvent within (in Victoria) three months of the transaction, it may be impeached by the other creditors, but if he does not, it cannot be impeached. If, however, the transaction is illegal in its inception, as according to the argument it is, the mortgagor can never set up his right to an account against the mortgagee. That is so absolutely contrary to the whole scheme of the insolvency law that it cannot be the law.

Again, another well known doctrine is that, if there is an illegal intention, and property is conveyed to give effect to it, and before the purpose is carried out the contract is rescinded, the parties will be restored to their original position. It is not sufficient to allege the illegal intention without showing that the intention has been carried out. In the present case there is nothing in the pleadings or in the evidence beyond an allegation and proof of an illegal intention: there is nothing to suggest that effect has been given to that intention. So that the defence set up by the defendant fails on every ground.

The authorities said to be in favour of the defendant are, in my opinion, all against him, and I think the reasons I have given show why there never was any authority to the effect of the proposition now contended for on behalf of the defendant.

O'CONNOR J. I am entirely of the same opinion, and desire to add nothing to what has been said.

HIGGINS J. I should like to put my judgment explicitly upon this ground—that paragraph 11 of the defence, even if proved, is no defence—is in effect a demurrable plea to the statement of claim. I think the defence should have alleged and proved that the pur-

pose of the plaintiff had succeeded in whole or in part. In addition to that, the facts necessary for the plaintiff's case, even if we could treat them as alleged, have not been proved. There was an intention on the part of the plaintiff to defeat her creditors. She intended to defeat her creditors, but there is no proof that she did defeat her creditors in the slightest degree. There is proof that she had creditors when the transaction took place, but if she had repented the very next day, the position would have been the same as it is now. On the day after the property was put into the mother's name the plaintiff might have repented, and said to her mother: "Give me back the property." That is exactly the position here. There is no evidence of any act done in pursuance of the fraudulent transaction that would prevent the plaintiff getting back her property. For ought that we know, she may be getting back the property in order to do justice to her creditors. I think that it is clear that the burden of proof to sustain an extraordinary defence of this sort—a defence under which the executor of the mother seeks to withhold from the plaintiff property which belonged to the plaintiff—lies upon the defendant. There may be some personal or family reasons which have influenced the defendant to take up this, at first sight, dishonest attitude, and therefore I make no comments on his conduct. But there can be no doubt that in any Court of law the plaintiff is entitled to get back her property.

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Appeal dismissed with costs.

Solicitors, for appellant, *Maddock & Jamieson.*

Solicitor, for respondent, *J. Hopkins.*

B. L.