

[HIGH COURT OF AUSTRALIA.]

DONALDSON AND ANOTHER . . . APPELLANTS;
PLAINTIFFS,

AND

FREESON AND ANOTHER . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A. *Trust—Declaration of trust—Land purchased with husband's money transferred to*
1934. *wife—Illegal purpose of husband—Knowledge of wife—No proof that illegal*
SYDNEY, *purpose effected, or other party prejudiced—Representations by wife—Estoppel*
by acquiescence—Credibility of witnesses—Conclusions of trial Judge—Cognizance
by Court of Appeal.
April 24, 26.

MELBOURNE,
May 23.

Gavan Duffy
C.J., Starke
and McTiernan
JJ.

M.D. was the registered proprietor of certain land which had been purchased in her name, part of the purchase money being paid by cash provided by her husband, S.D., and the balance being secured by mortgage back to the vendor, executed by M.D. The receipts were given in the name of M.D. S.D. expended a large sum from his own moneys in remodelling buildings on the land, and paid the legal costs in connection with the sale of the land, the insurance on the property, and interest moneys under the mortgage. A writ of fieri facias issued at the instance of F. for the enforcement of a judgment previously recovered by him against M.D. The latter subsequently executed a declaration of trust in respect of the above-mentioned land in favour of S.D. It was ante-dated so that it appeared to be prior in time to the date of the entry of the writ in the register, but notice of the alleged trust was not given to the sheriff until some weeks after the date appearing on the declaration. The sale of the land to F. was effected by the sheriff after the receipt by the latter of the notice. In proceedings under the *Moratorium Act* 1930-1931 (N.S.W.) for relief against execution, M.D. in her affidavit claimed that the land was purchased by her husband and put into her name. In a further affidavit she alleged that the purchase

money was found by her husband and was still owing to him. S.D. knew of the application and assisted in its prosecution. In a suit by M.D. and S.D. to restrain the registration of a transfer of the land from the sheriff to F. on the ground that M.D. was a trustee thereof for S.D., the latter gave as his reason for placing the land in his wife's name that he desired to evade payment of income tax. He denied knowledge of the contents of the affidavits but M.D. stated that they were sworn under his direction. The trial Judge accepted the reason given by S.D. and granted the injunction sought. An appeal to the Full Court was allowed on the grounds that M.D. and S.D. were (a) disentitled to equitable relief as the transaction was a partial gift with a right of recall at the election of S.D., and was a scheme designed to defraud S.D.'s creditors, and (b) S.D. was estopped from setting up his equitable right by reason of the representations acquiesced in by him in the moratorium proceedings.

Held that the plaintiffs' claim was not barred by estoppel, election or illegality, and the decision of the trial Judge should be restored. Assuming that S.D. was under a duty to assert his title at the time of the moratorium proceedings, the position of F. in law was not changed as a result of those proceedings, and the evidence did not show that S.D. had defrauded his creditors or that any illegal purpose had been carried into effect.

Decision of the Supreme Court of New South Wales (Full Court) : *Donaldson v. Freeson*, (1933) 33 S.R. (N.S.W.) 460 ; 50 W.N. (N.S.W.) 194, reversed.

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APPEAL from the Supreme Court of New South Wales.

A suit was brought in the Supreme Court in its equitable jurisdiction by Margaret Jarden Donaldson and her husband, Stuart James Donaldson, against Claudius John Freeson and the Registrar-General of New South Wales, in which the statement of claim was substantially as follows :—

1. In or about July 1931 the plaintiff Stuart James Donaldson agreed to purchase from one Spencer Smith in the name of his wife, the plaintiff Margaret Jarden Donaldson, the whole of the land comprised in certificate of title vol. 3083 fol. 89.

2. By memorandum of transfer dated 26th October 1931 and registered No. C102152, Smith, by direction of Donaldson, transferred the land to Mrs. Donaldson in consideration of the sum of £350 paid to him and in further consideration of the execution by Mrs. Donaldson in his favour of a memorandum of mortgage, registered No. C102153, to secure the balance of purchase money, namely, the sum of £280 and interest. Mrs. Donaldson is now registered as the proprietor of the land for an estate in fee simple subject to the memorandum of mortgage.

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3. Mrs. Donaldson has always since that date held the land as trustee for Donaldson and not otherwise, and has never had any beneficial estate, right, title, or interest in the land.

4. The sum of £350 was paid to Smith by Donaldson out of his own moneys, and since that date he has also always paid the interest upon the memorandum of mortgage and the rates, taxes and other outgoings on the land out of his own moneys, and has also spent a large sum in improvements upon the land out of his own moneys, and has always been in possession thereof, and has always received the rents and profits thereof for his own use and benefit.

5. On or about 5th April 1932 Mrs. Donaldson executed a declaration of trust which set out that the sum of £350 paid to Smith was advanced by Donaldson to Mrs. Donaldson without consideration other than that she should hold the land on trust, that Donaldson had undertaken to pay the principal and interest due under the mortgage, and that Mrs. Donaldson held and had held the land on trust for Donaldson absolutely.

6. On or about 5th May 1932 the plaintiffs lodged an attested copy of the declaration of trust, No. 16391, with the defendant the Registrar-General who on or about that date lodged his caveat C119560 upon the certificate of title in respect thereof.

7. Mrs. Donaldson owed certain costs to the defendant Claudius John Freeson in respect of an action which she had brought against Freeson in this Court and on 8th April 1932 Freeson caused a writ of fieri facias issued out of this Court against Mrs. Donaldson in the action to be entered No. C115755 upon the certificate of title and purporting to act under the writ of fieri facias the sheriff of this Court on 15th July 1932 sold the right, title and interest of Mrs. Donaldson in the land to Freeson. Prior to the sale Freeson had notice that Mrs. Donaldson held the land as trustee only, and had no beneficial estate, right, title or interest in the land.

8. By memorandum of transfer dated 25th July 1932, No. C134402, the sheriff purported to transfer the land to Freeson, and the transfer was subsequently lodged for registration with the Registrar-General but has not been registered, and on or about 17th August 1932 the Registrar-General informed Mrs. Donaldson that he intended to withdraw his caveat C119560 lodged in respect of the declaration of

trust, and to register the transfer, but that registration would be delayed for a period of fourteen days from the service of the notice to permit of any action being taken by Mrs. Donaldson which she deemed to be necessary.

9. Prior to the expiration of that period the plaintiffs obtained the necessary injunction to prevent the registration of the transfer until the hearing of this suit.

The plaintiffs prayed (a) that each of the defendants their servants and agents be perpetually restrained from taking any further steps to register or from registering in respect of the land the memorandum of transfer from the sheriff to Freeson; (b) that the Registrar-General his servants and agents be restrained without the order of the Court from withdrawing caveat No. C119560 entered in respect of the declaration of trust; (c) that Freeson be ordered to pay the plaintiffs' costs of suit; and (d) that the plaintiffs might have such further or other relief as the nature of the case required.

In his statement of defence the defendant Freeson stated that he did not know and therefore was unable to admit (a) the matters set out in pars. 1, 3 and 4 of the statement of claim; (b) the contents of the memorandum of transfer referred to in par. 2 of the statement of claim, or that Smith by direction of Donaldson transferred the land to Mrs. Donaldson as alleged in that paragraph; (c) that Mrs. Donaldson at any time executed the declaration of trust referred to in par. 5 of the statement of claim, or that the contents of the alleged declaration of trust were sufficiently or correctly stated therein; and (d) that the registered document No. 16391 referred to in par. 6 of the statement of claim was a copy or an attested copy of the alleged declaration of trust. The defendant also stated that in further answer to par. 2 of the statement of claim he believed and charged it to be the fact that the land was transferred by Smith to Mrs. Donaldson for her benefit solely subject only to the mortgage mentioned in par. 3, and, in further answer to par. 4 of the statement of claim, that he believed and charged it to be the fact that the sum of £350 was paid to Smith by Mrs. Donaldson out of her own moneys. In answer to par. 7 of the statement of claim the defendant denied that prior to the sale he had notice that Mrs. Donaldson held the land as trustee only and had no beneficial estate, right, title or

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interest in it. Other material paragraphs of the statement of defence were substantially as follows :—

7. I charge and believe it to be the fact that the following recitals in the declaration of trust as set out in par. 5 of the statement of claim are untrue, namely :—And whereas the said sum of three hundred and fifty pounds was advanced to me by the said Stuart James Donaldson without consideration except as expressed hereafter And whereas it was agreed that the interest and principal under the said memorandum of mortgage should be paid by the said Stuart James Donaldson as and when the same should become due, and that the said alleged declaration of trust if it was in fact executed was not intended to create a valid and binding trust but was executed fraudulently for the sole purpose of attempting to defeat my just rights to recover the costs under the writ of fieri facias mentioned in par. 7 of the statement of claim.

8. On 25th February 1932 I caused to be issued out of this Court a writ of fieri facias directed against Mrs. Donaldson to enforce the payment of £399 1s. 9d., being the amount of a judgment for costs recovered by me against her in respect of the action referred to in par. 7 of the statement of claim. The said writ of fieri facias was lodged with the sheriff for execution on 12th March 1932.

9. On 31st March 1932 execution under the terms of the writ was levied upon the furniture in the house built upon the land which is the subject of the alleged declaration of trust.

10. The facts of the issue of the writ of fieri facias and execution thereunder, and that execution against the land was intended to be made in satisfaction of the writ, were prior to and at the time of the purported execution of the declaration of trust well known to the plaintiffs.

11. The alleged execution of the declaration of trust was feigned, covinous and fraudulent, and made with an intent to delay, hinder or defraud the defendant as a creditor contrary to the provisions of the statute 13 Eliz. c. 5 in such case made and provided.

14. On 7th April 1932 the writ of fieri facias was entered on the register of causes, writs and orders at the office of the Registrar-General and bound the land the subject of the alleged declaration of trust, namely, the land comprised in certificate of title vol. 3083 fol. 89.

The suit was heard before *Long Innes J.*, and according to evidence which he accepted, the land was purchased by Donaldson, who found all the purchase money that was paid, and, at his request, was transferred into the name of Mrs. Donaldson to enable him to evade payment of income tax. The receipts for the purchase money were given in the name of Mrs. Donaldson. It was also shown that Donaldson had expended a sum of £130 in converting certain buildings erected on the land prior to the transfer into semi-detached cottages, and that he had paid the legal costs in connection with the transfer, the insurance on the property, and interest moneys under the mortgage. He stated that the rent in respect of the property was either directly or indirectly paid to him. In affidavits sworn by Mrs. Donaldson on 26th April 1932 and 13th May 1932 respectively, in support of an application by her under the *Moratorium Act* for a stay of execution of the writ of fieri facias (which application was refused), she stated that the land was actually purchased by Donaldson, and he had the property put into her name, and also that the property "was bought for the sum of £630, and in respect of £280 of the purchase price a first mortgage was taken by the vendor, making the total of the cash payment £350 which money was supplied by Mr. Donaldson and which is still owing to him." Donaldson knew of the application and assisted in its preparation. Upon the levying of execution under the writ, as referred to in par. 9 of the statement of defence, Donaldson claimed that the furniture was his property. A solicitor gave evidence that towards the middle of April 1932 he received instructions from Donaldson to draw the declaration of trust which had been discussed for the first time on 31st March; that later in April he drew and engrossed the document, and handed it to Donaldson for execution by Mrs. Donaldson after he had, at Donaldson's request, dated it 5th April 1932, and that a few days later Donaldson returned the document to him duly executed by Mrs. Donaldson. Subsequently, by a letter dated 9th May 1932, he informed the sheriff's officer that he was instructed to advise that the property the subject of the writ of fieri facias referred to in par. 7 of the statement of claim was held by Mrs. M. J. Donaldson as trustee for S. J. Donaldson absolutely.

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A perpetual injunction was granted restraining the registration of the transfer from the sheriff to Freeson and the withdrawal, without the order of the Court, by the Registrar-General of the caveat referred to in par. 8 of the statement of claim. In the course of his judgment *Long Innes J.* said:—"From my observation in the box I formed the opinion that . . . Mrs. Donaldson was a mere dummy or tool in the hands of Mr. Donaldson . . . she did just what her husband wished or advised without exercising any independent thought in the matter herself. . . . I place no reliance whatever on the fact that a declaration of trust was subsequently executed by Mrs. Donaldson. . . . In itself it possesses, to my mind, no evidentiary value whatever, having regard to the fact that it was admittedly ante-dated with a view to bettering the case of the plaintiff S. J. Donaldson as against that of the defendant Freeson. On a review of the whole case, without shutting my eyes to the fact that I regard the plaintiff Mr. Donaldson as a very unsatisfactory witness, and that I am also extremely doubtful as to how much importance, if any, should be attached to Mrs. Donaldson's evidence—although in fairness to her I think I should say that there was nothing in her demeanour which caused me to doubt her veracity—on a review of the whole of the evidence, including the undisputed facts and the probabilities and improbabilities of the transaction, I have come to the conclusion that the plaintiffs have made out their case, and that the property was placed into the name of Mrs. Donaldson merely as trustee for her husband, and that she never had any beneficial interest therein." On the grounds that their case was based on deception; that they had from time to time made false and misleading statements which may have come to Freeson's knowledge and influenced his action; and that false evidence, that is to say, the ante-dated declaration of trust, had been produced, *Long Innes J.* refused the plaintiffs their costs of suit and ordered them to pay the costs of the Registrar-General. An appeal by Freeson from the decision of *Long Innes J.* was allowed by the Full Court of the Supreme Court, which gave as its reasons therefor that Donaldson should not be permitted to support a claim which was based upon a scheme that was of an immoral and deceptive nature and designed to defraud creditors, and that as Donaldson

allowed Mrs. Donaldson in the moratorium proceedings to hold herself out as the owner of the land, and by so doing permitted Freeson to be forced into the position of expending money on the continuance of his execution proceedings, Donaldson thereby elected in any event not to recall what, in the circumstances, amounted to a partial gift, but to be bound by the facts he adopted : *Donaldson v. Freeson* (1).

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From that decision the plaintiffs now appealed to the High Court. The Registrar-General, who had entered a submitting appearance, was served with a notice of the appeal, but did not appear at the hearing.

Further material facts appear in the judgments hereunder.

May (with him *Meares*), for the appellants. The grounds upon which the judgment of the Full Court was based were not argued before that Court, or the Court of first instance, by either party, and at no stage of the matter did the appellants have an opportunity of making submissions thereon. Relief on the basis of estoppel was not asked for by the respondents. The case on the pleadings was one of fraud, and evidence was directed to that issue only. In such circumstances it was inequitable for the Full Court, a Court of appeal, on that evidence to apply the doctrine of estoppel without affording the appellants an opportunity of submitting further evidence which may have had the effect of negating the estoppel (*Cairns v. Burgess* (2)). There is not any evidence which suggests that Freeson was misled, or that he in any way altered his position by reason of what he read in the affidavits. The issue as to what amounts to estoppel by acquiescence is not before the Court, and should not be considered, because no evidence was directed to it by the appellants. The affidavits should be read together, and so read show that the land was actually purchased by Donaldson and, at his direction, transferred into the name of his wife. The words "which is still owing to him" merely indicate the family position. The appellants' evidence as regards Donaldson's claim to the land is corroborated on several material points by independent witnesses.

(1) (1933) 33 S.R. (N.S.W.) 460; 50 W.N. (N.S.W.) 194.

(2) (1905) 2 C.L.R. 298, at pp. 308, 310.

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The probabilities of the case also favour the claim. There is no foundation for the suggestion by the Full Court that Donaldson did what he did with the intention of defeating his creditors. The evidence does not show that Donaldson had any creditors, or, assuming that he had, that such creditors were in any way prejudiced by his actions. Even if Donaldson did cause the land to be put into his wife's name with the intention of defeating his creditors, the Court will not on that ground refuse him relief unless his intention has been wholly or partly carried into effect (see *Farmers' Mart Ltd. v. Milne* (1)).

Teece K.C. (with him *Leaver*), for the respondent Freeson. It is a presumption of law that Donaldson made a gift to his wife of that part of the purchase money paid by him. The onus of displacing that presumption, which was upon the appellants, has not been discharged, because the only evidence given by them to that end was as to conversations between themselves. This evidence was uncorroborated and the trial Judge found that they were unreliable witnesses. Many facts were brought out in evidence which tend to show that Mrs. Donaldson was actually the purchaser of the land (*Union Trustee Co. of Australia v. Webb* (2)). In view of the obvious inaccuracies in Mrs. Donaldson's evidence and the remarks concerning Donaldson as a witness made by the trial Judge, he could not have believed either of them. His Honor's decision was arrived at, not on their evidence, but on his general view of the circumstances of the case, and, therefore was based on surmise and conjecture. As the appellants have been shown to be absolutely unreliable witnesses, this Court should hold that the trial Judge ought to have found that the presumption as to gift had not been displaced. This Court is not bound to accept the decision of the trial Judge, but may substitute its own decision therefor if, upon an examination of the evidence, it is of opinion that the decision of the trial Judge was wrong (*Craine v. Soden* (3) ; *Scott v. Pauly* (4) ; *Riekmann v. Thierry* (5)).

(1) (1915) A.C. 106.

(2) (1915) 19 C.L.R. 669, at p. 676.

(3) (1916) 21 C.L.R. 268.

(4) (1917) 24 C.L.R. 274.

(5) (1896) 14 R.P.C. 105, at pp. 116, 117.

[STARKE J. referred to *Federal Commissioner of Taxation v. Clarke* (1) and *Deputy Federal Commissioner of Taxation v. Purcell* (2).] H. C. OF A.
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This Court should find that the trial Judge ought not to have accepted the evidence of the appellants, who were unreliable persons. The inference from the facts is as drawn by the Full Court, that is, that the land was put into Mrs. Donaldson's name merely to suit Donaldson's convenience so that he might assert or repudiate ownership as, in his opinion, the occasion required in any contingency which might arise, thus enabling him to carry out a fraudulent scheme (*Farmers' Mart Ltd. v. Milne* (3)). The Court should not allow the appellants to profit from an illegal and fraudulent agreement. Apart from the evidence given by the appellants there are not any facts from which the Court can draw an inference of trust. Having regard to the circumstances of the case, particularly to the fact that title to the land is in the name of Mrs. Donaldson, and to her statements in the affidavits, it cannot be said that the presumption of advancement has been rebutted. The affidavits were made by Mrs. Donaldson at the instigation of Donaldson, and she thereby became his agent for that purpose. Both appellants are, therefore, estopped by the representations contained in those affidavits. Relying upon those representations, Freeson changed his position for the worse. If the land were Donaldson's property in equity there could not be any money owing to him as stated in one of the affidavits.

May, in reply. The appellants are not relying upon an illegal arrangement in order to make out their case; on the contrary, assuming that the original intention was illegal, the present claim operates to defeat that intention (*Payne v. McDonald* (4)). Again, assuming the illegality of the original intention, there is not any evidence that that intention was either wholly or partly carried into effect (*Perpetual Executors and Trustees Association of Australia Ltd. v. Wright* (5)). There is not any evidence that Mrs. Donaldson was a party to any such intention. The findings of the trial Judge

(1) (1927) 40 C.L.R. 246, at p. 279.

(2) (1921) 29 C.L.R. 464, at pp. 466, 467, 470, 472, 473, 475.

(3) (1915) A.C., at p. 113.

(4) (1908) 6 C.L.R. 208.

(5) (1917) 23 C.L.R. 185.

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Cur. adv. vult.

May 23.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND STARKE J. The plaintiff Margaret Jarden Donaldson is the registered proprietor of certain land described in a certificate of title vol. 3083 fol. 89. She acquired it by transfer from one Spencer Smith, but mortgaged it to him to secure the balance of the purchase money due. The defendant Freeson obtained a judgment against Margaret Jarden Donaldson for about £400, and issued a writ of fieri facias out of the Supreme Court for the purpose of enforcing this judgment. The sheriff, pursuant to this writ, sold the land and executed a memorandum of transfer, dated in July 1932, of the land to Freeson, which was subsequently lodged with the Registrar-General for registration. The plaintiff Margaret Jarden Donaldson and her husband, Stuart James Donaldson, then commenced an action in which they asserted that the plaintiff Margaret Jarden Donaldson held the land as trustee for her husband, and had never had any beneficial estate, right, title or interest in it, and claimed an injunction against Freeson and the Registrar-General of New South Wales from registering the transfer from the sheriff to Freeson. The action was tried before *Long Innes J.*, and according to evidence which he accepted the land was purchased by Stuart James Donaldson, who found all the purchase money that was paid, and it was transferred into the name of his wife at his request.

If, said the learned Judge, these facts stood alone, the presumption would be that the land was transferred to the wife as an advancement or gift to her. But, upon the evidence given before him by both the husband and the wife, and after a careful investigation of the whole circumstances of the case, the learned Judge thus stated his conclusion: "On a review of the whole case, without shutting my eyes to the fact that I regard the plaintiff Mr. Donaldson, as a very unsatisfactory witness, and that I am also extremely doubtful as

(1) (1927) 40 C.L.R., at p. 264.

(2) (1928) 41 C.L.R. 62.

to how much importance, if any, should be attached to Mrs. Donaldson's evidence—although in fairness to her I think I should say that there was nothing in her demeanour which caused me to doubt her veracity—on a review of the whole of the evidence, including the undisputed facts and the probabilities and improbabilities of the transaction, I have come to the conclusion that the plaintiffs have made out their case, and that the property was placed into the name of Mrs. Donaldson merely as trustee for her husband, and that she never had any beneficial interest therein." A perpetual injunction was thereupon granted restraining the registration of the transfer from the sheriff to Freeson. But upon appeal to the Full Court of the Supreme Court this injunction was discharged and the suit dismissed.

A Court of appeal must no doubt act on its own conclusions of fact as well as of law, not disregarding the judgment of the trial Judge, but not shrinking from overruling it if of opinion that it is wrong. A Court of appeal must necessarily be guided by the finding of the trial Judge as to the credibility of witnesses, whom he saw and heard, and whom it did not. In the present case, the plaintiffs were examined and cross-examined before the trial Judge, and their credibility turns upon their manner and demeanour and the impression they made upon him. It would be unsafe and wrong, in our opinion, for any Court which had not seen and heard them to reverse his finding. The learned Judges in the Supreme Court did not actually dissent from the finding of the learned Judge, though they inferred a fraudulent scheme between husband and wife which the trial Judge had not found. But they reversed his order on another ground, namely that Donaldson, the husband, stood by and allowed his wife to represent herself as the owner of the property to Freeson, to Freeson's prejudice. "He allowed his wife," said *Davidson J.* speaking for the Court, "in the moratorium proceedings to hold herself out as the owner of the land, and by so doing permitted Mr. Freeson to be forced into the position of expending money on the continuance of his execution proceedings. It seems to me Mr. Donaldson thereby elected in any event not to recall his partial gift, but to be bound by the facts he adopted (1)."

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(1) (1933) 33 S.R. (N.S.W.), at p. 468; 50 W.N. (N.S.W.), at p. 196.

H. C. OF A. 1934. The moratorium proceedings were an application by Mrs. Donaldson for the postponement of payment of the amount of the judgment against her. It was dismissed. The basis of the application was that Mrs. Donaldson owned the land and that the realization of her assets under a writ of fieri facias would deprive her of the sole means of subsistence which she, her husband and her son possessed. Donaldson knew of this application, and assisted in its prosecution. Assuming that Donaldson was under a duty to speak and assert his title at the time of the moratorium proceedings (see *Ewart on Estoppel* (1900), p. 26), the position of Freeson in law was not changed as a result of those proceedings: he had his judgment, and was in the same position as before to enforce it, and suffered no detriment. So soon as the sheriff proceeded with the execution of the writ of fieri facias, Donaldson, through his solicitor, gave notice to the sheriff's officer that "the property subject to the writ is held by Mrs. M. J. Donaldson as trustee for S. J. Donaldson absolutely." Freeson does not himself venture to state that he would have changed his course of conduct had Donaldson stated that his wife was a trustee for him. He is in fact now proceeding, though Donaldson makes that statement on oath. The moratorium proceedings affected the credibility of the story told by the Donaldsons that the property was transferred into the name of the wife in trust for her husband, but if that story be accepted as true, those proceedings create no estoppel or election contrary to the real rights of the parties.

Another contention insisted upon before us was that the transfer from the husband to the wife was for an illegal purpose, namely for the purpose of defeating the husband's creditors, or, as the learned Judges in the Supreme Court said, "so that, if he were attacked by creditors he could say it was hers, whilst if she became the object of attack he would claim that there was a trust for himself" (1). The trial Judge found that the property was put in the name of the wife for the purpose of deceiving the Commissioner of Taxation and evading payment of income tax. But whichever intention be attributed to Donaldson, he is not, in seeking to protect or recover his property, carrying out any illegal transaction. No creditors

(1) (1933) 33 S.R. (N.S.W.), at p. 468 ; 50 W.N. (N.S.W.), at p. 196.

have been defrauded, and no illegal purpose has ever been carried into effect. Everyone is in the same position as before the transfer was made (*Perpetual Executors and Trustees Association of Australia Ltd. v. Wright* (1)). In any case there is not any evidence that the wife was a party to the suggested scheme, and mere motive in the husband is of no importance if the wife honestly adopted the trust.

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The points made in the Supreme Court were not taken before the trial Judge nor in the notice of appeal to that Court. "The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And . . . no care is exercised in the elucidation of facts not material to them " (*The Tasmania* (2)). A Court can itself take notice of an illegal purpose in any transaction, and if necessary refuse the plaintiff relief, but the illegality should be beyond dispute or question. In the present case, it is possible that the plaintiffs might have elucidated their position and the reasons of the transfer, had the questions of estoppel, election or illegality been raised.

But for the reasons already given, the appeal should be allowed, the judgment of the Supreme Court reversed, and that of *Long Innes J.* restored. The appellants must have the costs here and in the Supreme Court on the appeal from *Long Innes J.*

McTIERNAN J. The appellants are husband and wife. The wife was unsuccessful in an action at law against the respondent Freeson, and on 19th June 1929 he obtained judgment against her for his costs of the action. Subsequently Mrs. Donaldson became the registered proprietor in fee simple under the provisions of the *Real Property Act* of New South Wales of certain lands with a house thereon, situate at Wingham in New South Wales. On 25th February 1932 Freeson issued a writ of fieri facias to obtain satisfaction of his judgment, and on 15th July 1932, Mrs. Donaldson's right, title and interest in the property was sold to him by the sheriff. Freeson proceeded to register the memorandum of transfer of the property, but the appellants instituted a suit in the Supreme Court in its equitable jurisdiction in which they claimed an injunction restraining Freeson and the Registrar-General, from registering the transfer, on the

(1) (1917) 23 C.L.R. 185.

(2) (1890) 15 App. Cas. 223, at p. 225.

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ground that the wife was a trustee of the property for her husband, and that she had no beneficial interest therein. The respondent Freeson resisted the appellants' claim on the ground that the wife was the beneficial owner of the property. The evidence in the suit showed that the property was purchased from Spencer Smith for the sum of £630, the transaction commencing in July 1931 and concluding in December 1931. The property was transferred into the name of Mrs. Donaldson and a mortgage was given in her name to the vendor to secure an unpaid balance of the purchase money. *Long Innes J.* who heard the suit made the following finding: "On a review of the whole case, without shutting my eyes to the fact that I regard the plaintiff Mr. Donaldson as a very unsatisfactory witness, and that I am also extremely doubtful as to how much importance, if any, should be attached to Mrs. Donaldson's evidence—although in fairness to her I think I should say that there was nothing in her demeanour which caused me to doubt her veracity—on a review of the whole of the evidence, including the undisputed facts and the probabilities and improbabilities of the transaction, I have come to the conclusion that the plaintiffs have made out their case, and that the property was placed into the name of Mrs. Donaldson merely as a trustee for her husband, and that she never had any beneficial interest therein."

A decree was made whereby the respondents were restrained from proceeding to register the transfer of the property to Freeson. He appealed to the Full Court of the Supreme Court which discharged the decree on grounds not taken at the hearing of the suit. But the Full Court did not disagree with the above-mentioned finding of the learned primary Judge.

In his argument before us Mr. *Teece* submitted that the finding of *Long Innes J.* should be set aside on the ground that the proper inference from the evidence was that the wife was the purchaser of the property. It is, as the learned Judge found, and the Full Court affirmed, beyond question that the purchase price of the property was partially discharged out of moneys belonging to the husband, although the receipts for such moneys were, it is true, given in the wife's name. In support of this submission Mr. *Teece* mainly relied upon the evidence of the vendor's wife and son, which tended to

show that Mrs. Donaldson carried out the negotiations and purchased the property for herself. There was no written contract. *Long Innes* J. did not reject this evidence as untrustworthy, but gave reasons, not inconsistent with it, for the conclusion that Mrs. Donaldson did not purchase the property on her own behalf. His Honor said that if Mrs. Donaldson so conducted herself as to appear to be the purchaser, the disapproval which Mrs. Smith, the vendor's wife, so emphatically expressed of any dealing between her husband and Donaldson, would be sufficient to account for the deception which was practised by the Donaldsons as to the identity of the real purchaser. The conclusion that Mrs. Donaldson was the principal would involve the assumption that her husband made either a gift or a loan to her of the moneys which were paid on account of the purchase price. Mrs. Donaldson was at that time heavily in debt and had no assets. The learned Judge who had the advantage of hearing her and her husband give evidence said:—"Under the circumstances which existed at that time, to the knowledge of Mr. Donaldson, it would seem to be extremely improbable that a gentleman of his astuteness would have made a gift of this nature to his wife. He might, however, have been willing to give her a chance of getting on her feet, so to speak, by making a loan to her provided he was secured; but, as Mr. *May* suggests, it seems to me that it is extremely improbable that he would have hazarded his loan without taking security." In my opinion, the finding that the husband was the purchaser should not be disturbed. He spent £130 on remodelling the premises, paid the interest on the mortgage, and instructed the solicitor who acted for both vendor and purchaser to put the transfer from the vendor and the mortgage to him in Mrs. Donaldson's name. These facts point strongly to the conclusion that the husband was the purchaser.

When Freeson issued execution to obtain satisfaction of his judgment against Mrs. Donaldson she applied for a stay of execution under the *Moratorium Act* 1930-1931. She deposed, in one of her affidavits which she filed in support of this application, that the sum of £350 which was paid in partial discharge of the price of the property now in question, was "supplied by Mr. Donaldson" and was "still owing to him." Mr. *Teece* relied also upon this sworn statement

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and the general purport of the affidavits to prove that Mrs. Donaldson was in fact the purchaser of the property. *Long Innes J.* formed the opinion that Mrs. Donaldson was a “mere dummy or tool in the hands of Mr. Donaldson,” and there is no doubt that the husband was aware of the contents of these affidavits at the time when they were sworn by the wife. The appellants were cross-examined on these matters at the hearing of the suit. But the learned Judge was not prepared to allow these admissions of the wife, made, as it would appear, with the concurrence of the husband, to prevail against other facts in the case which strongly tended to show that the husband was the purchaser of the property. I agree in that conclusion.

The appeal must, therefore, be decided upon the basis that Donaldson was the purchaser and that he had the property conveyed into his wife's name. The principles of law which are applicable were stated by *Cussen J.* in *Davies v. National Trustees Executors and Agency Co. of Australasia* (1):—“Where a husband or father (as the case may be) purchases property in the name of his wife or child, and is proved to have paid the purchase money in the character of a purchaser, a prima facie but rebuttable presumption arises that the wife or child takes by way of advancement—that is to say, takes beneficially. Evidence may be given to rebut this presumption and to show that the husband or father did not intend the wife or child to take by way of advancement, and on the other hand evidence may, where necessary, be given to support the presumption. If on the whole of the evidence the Court is satisfied 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. Similar rules apply where a transfer or assurance of property is made without consideration by a husband or father to a wife or child. It has been suggested in some cases that the presumption in favour of advancement is stronger in the case of a transfer than it is in the case of a purchase; but, although this may be so in some circumstances, I think that no substantial distinction applicable universally can be drawn. On the assumptions which were made for the purposes of the argument, the only question of fact which

(1) (1912) V.L.R. 397, at pp. 401, 402.

becomes really important is—Has the presumption of advancement been rebutted ? And that can be stated still more precisely in this form—On the whole of the evidence is it shown that the purchases or transfers referred to in the pleadings were not intended at the respective times they were made to be by way of advancement, or was the intention of William John Davies at the time of each such transaction that it should not be by way of advancement ? ” This statement was described by *Dixon J.* in *Stewart Dawson & Co. (Victoria) Pty. Ltd. v. Federal Commissioner of Taxation* (1) as “perhaps the best modern statement of the whole doctrine.”

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It is not contended by the appellants or the respondent that either the learned primary Judge’s or the Full Court’s statement of the doctrine affords any ground for dispute. But Mr. *Teece* submits that, assuming that the husband was in fact the purchaser, the evidence does not justify the finding that he did not advance the wife, and that there was a resulting trust in his favour. The learned Judges of the Full Court made a searching criticism of Donaldson’s credibility, but they did not disagree with the finding that the husband did not intend to give the property to the wife for her benefit. *Long Innes J.* refused Donaldson his costs of the suit and ordered him to pay the costs of the Registrar-General because he was of opinion that he had manufactured certain evidence to assist his case. But his Honor did not take the view that the whole of Donaldson’s evidence should be disbelieved. Without recapitulating the evidence in detail, Donaldson’s evidence was in certain material respects corroborated by the evidence of the solicitor who acted on the sale and purchase of the property, and the reason which Donaldson gave for putting the property in his wife’s name was accepted by the learned primary Judge, before whom he was cross-examined. His Honor said : “ A question which I have to consider is why he did it on this particular occasion, and he says —I won’t say frankly, but he says, and I accept his evidence in that respect—that he did it with the intention of deceiving the Commissioner of Taxation and of evading the payment of income tax which he thought might be claimed in respect apparently of the income which might be derived from this particular investment.”

(1) (1933) 48 C.L.R. 683, at p. 690.

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The property was converted into two semi-detached cottages after it was purchased. The Donaldsons occupied one part of the building and let the other part. In the evidence as to the contemporaneous declarations made by the husband there is ample evidence to support the finding that the husband did not intend to advance the wife, but to make her his dummy in the transaction. The learned Judge also took into consideration the probabilities of the case. In *Fowkes v. Pascoe* (1), where the question was whether the presumption of a resulting trust was rebutted—the converse of the present case—Sir *G. Mellish* said:—“Now, the Master of the Rolls appears to have thought that because the presumption that it was a trust and not a gift must prevail if there were no evidence to rebut the presumption, therefore when there was evidence to rebut the presumption he ought not to consider the probability or improbability of the circumstances of the case, and whether the presumption was really true or not, but ought to decide the case on the ground that the evidence of *Pascoe* and his wife taken alone was not satisfactory. But, in my opinion, where there is once evidence to rebut the presumption, the Court is put in the same position as a jury would be, and then we cannot give such influence to the presumption in point of law as to disregard the circumstances of the investment, and to say that neither the circumstances nor the evidence are sufficient to rebut the presumption (2).” The finding that the presumption of advancement was rebutted by the evidence should not, in my opinion, be disturbed.

Donaldson denied that he had the property conveyed to his wife as a dummy for him with the object of defeating his creditors and the provisions of the *Bankruptcy Act*. *Long Innes J.* accepted Donaldson’s statement that his object in the present case was to evade income tax. But the Full Court adopted the view that Donaldson’s object was to defraud creditors. That intention, too, as the Full Court said, was inconsistent with a gift. It held, however, that the appellants’ suit should be dismissed on two grounds. The first was that the Court would not lend its aid to enable Donaldson’s scheme to defraud creditors to be carried out. There is no evidence that either the illegal purposes of evading income tax or of defrauding

(1) (1875) 10 Ch. App. 343.

(2) (1875) 10 Ch. App., at p. 352.

creditors has been wholly or partially carried out. The cases of *Payne v. McDonald* (1) and *Perpetual Executors and Trustees Association of Australia Ltd. v. Wright* (2) are decisive against the validity of the first ground. But *Gascoigne v. Gascoigne* (3), would appear to be inconsistent with these decisions. In the present case, the suit was not brought to enforce either the illegal trust found by *Long Innes J.* or that found by the Full Court. It is true that, for the purpose of proving that the property was conveyed to the wife with the intention that she should be a trustee and not a beneficial owner, it was necessary for Donaldson to confess that he intended to carry out an illegal purpose. His statement of this illegal purpose is evidentiary, but is not the foundation of the suit. (Cf. *Press v. Mathers* (4).) In *Taylor v. Bowers* (5), *Cockburn C.J.*, delivering the judgment of the Court (*Cockburn C.J.*, *Mellor and Quain JJ.*), cited with approval the following passage in the judgment of *Bramwell J.* in *Bone v. Eckless* (6):—"Clearly an authority to pay over money for an illegal purpose may be revoked before the money is paid over. In *Hastelow v. Jackson* (7) that proposition of law was laid down, although there the plaintiff had to prove as part of his case that he had entered into an illegal contract; he did not, however, seek to recover upon it. . . . The law is in favour of undoing or defeating an illegal purpose, and is therefore in favour of the recovery of the money before the illegal purpose is fulfilled, not afterwards."

On appeal, *Grove J.* said:—"If that be the case, then the plaintiff is not setting up his own fraud in order to make a title, but he is repudiating the fraud and setting up his own prior rightful claim as owner of the goods. No doubt he is admitting that the goods got into Alcock's hands through his, the plaintiff's, own sham transfer for the fraudulent purpose of deceiving the creditors, but is not setting up that fraudulent purpose in order to get the goods, but, on the contrary, he is setting it aside" (8). (See also *Symes v. Hughes* (9),

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(1) (1908) 6 C.L.R. 208.
(2) (1917) 23 C.L.R. 185, at pp. 193, 194, 197, 198.

(3) (1918) 1 K.B. 223.

(4) (1927) V.L.R. 326; (1927) A.L.R. 197, at p. 201.

(5) (1876) 1 Q.B.D. 291, at pp. 295, 296.

(6) (1860) 29 L.J. (Ex.) 438, at p. 440; 5 H. & N. 925, at p. 928; 157 E.R. 1450, at p. 1452.

(7) (1828) 8 B. & C. 221; 108 E.R. 1026.

(8) (1876) 1 Q.B.D., at p. 301.

(9) (1870) L.R. 9 Eq. 475, at p. 479.

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per Lord *Romilly* M.R. Cf. *Wilkinson v. Sporting Life Publications Ltd.* (1).) Here there is no proof of any violation of the income tax laws. (Cf. *Commissioner of Stamp Duties (Q.) v. Jolliffe* (2), per *Isaacs J.* This was a dissenting judgment. But in that case there was a definite and accomplished breach of the statute).

The Full Court rested its judgment mainly on a second ground, namely, that Donaldson was estopped from asserting his equitable right to the property because he allowed his wife in the proceedings under the *Moratorium Act* to hold herself out as the owner of the land, and by so doing permitted the respondent to be forced into the position of expending money on the continuance of the execution proceedings. The Court held that Donaldson's acquiescence should be deemed to be a fraud on Freeson within the meaning of the rule laid down in *Willmot v. Barber* (3), and that all the elements necessary for the application of the rule were present. Referring particularly to the last of the conditions enumerated by *Fry J.* (4), the evidence does not justify the conclusion that Donaldson encouraged Freeson in expending money in proceeding with the execution after the unsuccessful application under the *Moratorium Act*, either directly or by abstaining from asserting his equitable interest. Freeson took his chance that the wife was the beneficial as well as the legal owner of the property. There was no representation by or on behalf of Donaldson that he had an equitable interest which he would not assert, or that the legal ownership of the wife was not saddled with an equity. The question really is whether Donaldson is estopped by acquiescing in an assertion by the wife of a right inconsistent with his right. There is, in my opinion, no evidence of any acquiescence on the part of Donaldson leading to the assumption which Freeson made, that the wife was not a trustee of the legal estate. (Cf. *Thompson v. Palmer* (5) and *Richardson v. Federal Commissioner of Taxation* (6).)

In my opinion the appeal should be allowed.

(1) (1933) 49 C.L.R. 365.

(2) (1920) 28 C.L.R. 178, at p. 192.

(3) (1880) 15 Ch. D. 96, at pp. 105, 106; (1881) 17 Ch. D. 772.

(4) (1880) 15 Ch. D., at pp. 105, 106.

(5) (1933) 49 C.L.R. 507.

(6) (1932) 48 C.L.R. 192, at pp. 205, 206.

Appeal allowed. Order of Supreme Court of New South Wales in Full Court discharged. Order of Long Innes J. restored. Respondent to pay costs of this appeal and of appeal to Supreme Court of New South Wales in Full Court.

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Solicitor for the appellants, *E. R. Stack*, Wingham, by *J. G. Nicholas*.

Solicitors for the respondent *Freeson, Smithers, Warren & Lyons*.

J. B.

Refd to
*Edmunds v
Pickering*
(1999) 75
SASR 407

Cons
*Pickering v
Smoothpool*
Nominees
(2001) 81
SASR 175

Appl
Or v Ford 84
ALR 146

Appl
*Baburin v
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[HIGH COURT OF AUSTRALIA.]

HOURIGAN APPELLANT ;
PLAINTIFF,

AND

THE TRUSTEES EXECUTORS AND AGENCY }
COMPANY LIMITED AND OTHERS . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Will—Trust—Gift to widow to educate and provide for children—Effect—Widow entitled to beneficial interest subject to educating and providing for children—Account—Whether donee liable to account.

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Laches—Delay—Acquiescence—Statutes of Limitations—Property Law Act 1928 (Vict.) (No. 3754), secs. 276, 296-299—Supreme Court Act 1928 (Vict.) (No. 3783), secs. 62, 82 (1) (c) (III.), (IV.), (V.)—Trustee Act 1928 (Vict.) (No. 3792), sec. 67.

MELBOURNE,
May 11, 23.
SYDNEY,
Aug. 3.

Rich, Starke
and Dixon JJ.

By his will the testator devised and bequeathed all his real and personal estate to his wife “to be disposed of by her as follows A sum of five hundred pounds stg. to be paid to each one of my six daughters on the completion of the twentieth year of each one respectively . . . The residue of my property to be vested in . . . my wife to be used by her at ” discretion “in educating and providing for my two sons.”