Appl Bryson v Bryant (1992) 16 FamLR 112
Appl Calverley v Green (1984) 56 ALR 483
Appl Kokotovich Constructions Pty Ltd v Wallington (1995) 17 ACSR 478
Foll Nelson v Nelson (1994) 116 FLR 15
Refd to Callaghan v Callaghan (1995) 64 SASR 396
Appl Singh v Singh (2004) 31 FamLR 242
Foll Killen v Rennie (2003) 48 ACSR 483

[HIGH COURT OF AUSTRALIA.]

CHARLES MARSHALL PROPRIETARY LIMITED AND OTHERS . . . } APPELLANTS;
DEFENDANTS,

AND

GRIMSLEY AND ANOTHER . . . RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 28, 29; *June* 15.

Dixon C.J., McTiernan, Williams, Fullagar and Taylor JJ.

Evidence—Presumptions—Advancement—Resulting trust—Allotment at direction of father of shares in company to daughters—Subsequent handing by daughters of share certificates signed in blank to father—Intention of parties—Whether presumption of advancement rebutted—Subsequent acts and declarations of parties—Admissibility.

A father allotted shares in a company which he controlled to the plaintiffs (his daughters by his first marriage) and their names were entered in the register of members; he then informed them of the fact and said there would be a dividend paid yearly when possible. At the same time he asked them to sign a number of documents which he said were for shares in the company and said that he would look after these for them. The documents were share certificates with transfers on the backs which the daughters signed in blank. He retained the certificates. The daughters received dividends proportionate to their number of shares whenever dividends were declared and when they were not the father made good the loss himself.

By his will the father bequeathed all his shares in the company to the defendants, who were his executors and trustees. They found the share certificates amongst his property in separate envelopes each bearing on the outside in the father's writing a statement indicating that the shares belonged to the respective daughters and each containing a document signed by the father stating that the shares belonged not to him but to the daughter named on the envelope. The defendants, who now controlled the company, filled in the blank transfers to themselves as transferees entitled thereto in equity and caused the shares to be transferred into their own names in the share register. They did not inform the plaintiffs of the discovery of the envelopes

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or the transfer of the shares, and the plaintiffs first learned about the envelopes and their contents when they were disclosed on discovery. One of the defendants, the daughter by a second marriage, gave evidence that the father, who had allotted shares to and obtained signatures in blank from her in the same way, had made it clear to all his daughters that the shares were not really theirs at all, but her evidence was not believed by the trial judge. The plaintiffs brought an action for rectification of the share register of the company.

Held, that the presumption of advancement in favour of the plaintiffs had not been rebutted and that they were entitled to the relief claimed.

The presumption of advancement can be rebutted or qualified by evidence manifesting a contrary intention, but apart from subsequent acts and declarations as against the parties doing or making them and the general circumstances, the acts and declarations of the parties before or at the time of the purchase (in this case the acquisition of the shares by allotment) or so immediately thereafter as to constitute a part of the transaction form the relevant and admissible evidence.

Decision of the Supreme Court of Victoria (*Herring* C.J.) affirmed.

APPEAL from the Supreme Court of Victoria.

On 24th March 1955 Harriett Grimsley and Rosina Graham commenced an action in the Supreme Court of Victoria against Charles Marshall Pty. Ltd., a company incorporated in the State of Victoria, Hugh Syme Hawes, Isobel Mary Hawes and Arthur Hamilton Pearcey.

The statement of claim in the action, so far as material, was as follows :—

2. In or about the month of April 1924 each of the plaintiffs was duly allotted 6,960 ordinary fully paid shares of one pound each in the defendant company and was duly entered in the share register of the defendant company as the holder of 6,960 shares.

3. Each of the plaintiffs remained so entered in the share register of the defendant company as the holder of 6,960 ordinary shares until the month of April 1954.

4. In or about the month of April 1954 the defendant company wrongfully and without the knowledge of or any authority from either of the plaintiffs removed the name of each of the plaintiffs from its share register and wrongfully entered in its share register the names of the individual defendants as the joint holders of the shares owned by each of the plaintiffs.

5. The defendants Hugh Syme Hawes and Isobel Mary Hawes are directors of the defendant company.

6. The individual defendants and each of them in or about the month of April 1954 wrongfully procured their registration in the share register of the defendant company as the joint holders of the shares the property of each of the plaintiffs and formerly registered in the name of each of the plaintiffs.

7. The defendant company has wrongfully failed to pay to each of the plaintiffs the dividends declared on their shares in the financial years ending 30th June 1953 and 30th June 1954.

The plaintiffs and each of them claimed (a) rectification of the share register of the defendant company so as to reinstate therein the name of each of the plaintiffs as the holders of 6,960 shares; (b) an account of all dividends declared in respect of the said shares since 1st July 1952; (c) such further or other order as to the Court may seem just.

By their defence delivered 19th May 1955 the defendants pleaded to the statement of claim as follows:—

2. The defendants admit that on 31st March 1924 each of the plaintiffs were allotted 6,960 ordinary fully paid shares of one pound each in the defendant company and was entered in the share register of the defendant company as the holder of 6,960 shares but otherwise deny each and every allegation in par. 2 of the statement of claim.

3. The defendants admit par. 3 of the statement of claim.

4. The defendants admit that in or about the month of April 1954 the defendant company removed the name of each of the plaintiffs from its share register and entered in its share register the names of the individual defendants as joint holders of the shares owned by each of the plaintiffs but otherwise deny each and every allegation in par. 4 of the statement of claim.

5. The defendants admit par. 5 of the statement of claim.

6. The defendants admit that the individual defendants and each of them in or about the month of April 1954 procured their registration in the share register of the defendant company as the joint holders of the shares formerly registered in the name of each of the plaintiffs but otherwise deny each and every allegation in par. 6 of the statement of claim.

7. The defendants deny each and every allegation in par. 7 of the statement of claim.

8. At all material times the plaintiff Grimsley and the plaintiff Graham held the 6,960 shares referred to in par. 2 of the statement of claim as having been allotted to each of them respectively upon trust for their father Charles Marshall.

9. The said trusts arose from the following facts:—(a) neither of the said plaintiffs gave any consideration in cash or otherwise for

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the allotment of the said shares ; (b) at or about the time when the said shares were allotted to the plaintiffs the said Charles Marshall stated that the plaintiffs knew that he could take them back and the plaintiffs accepted the said shares upon this condition ; (c) the said Charles Marshall at all material times retained possession of the share certificates for the said shares and the said share certificates were never in the possession of the plaintiffs ; (d) on or about 31st March 1924 each of the plaintiffs signed a transfer in blank on the back of the share certificate for the shares allotted to her.

10. The said Charles Marshall died on 3rd April 1953 and on 7th May 1953 probate of his last will and two codicils thereto was granted to the individual defendants.

11. By reason of the matters set out in pars. 8 and 9 hereof, the said shares were the property of the said Charles Marshall and formed part of the assets of his estate.

12. On 17th December 1953, the individual defendants, as executors of the said Charles Marshall deceased, completed the said transfers of the said shares to them as such executors.

13. On 23rd April 1954 the defendant company registered the said transfers and removed the names of the plaintiffs from its share register and entered in its share register the names of the individual defendants as joint holders of the said shares.

By their reply delivered 3rd June 1955 after joining issue and admitting the allegations contained in par. 10 of the defence the plaintiffs pleaded as follows :—

2. As to par 9 (c) thereof, they say that if each of them signed a transfer in blank upon the back of the share certificate for the shares allotted her (which is not admitted) each of them signed such transfer under a total mistake as to its nature and contents and in the bona-fide belief that she was signing a document of a wholly different kind.

4. They further say that each of them is a daughter of the said Charles Marshall.

5. Even if the allegations contained in the defence (other than those admitted) are correct and if the said Charles Marshall had any authority to complete the said transfers in his own favour or at all (which is not admitted but denied) the said authority was revoked by the death of the said Charles Marshall and the individual defendants had no authority to complete the said transfers.

The action was heard before *Herring* C.J. who, in a written judgment delivered 12th December 1955, held that the plaintiffs were entitled to the relief claimed.

From this decision the defendants appealed to the High Court.

Dr. *E. G. Coppel* Q.C. (with him *W. O. Harris*), for the appellants. The effect of the transaction in April 1924 was that the respondents held the shares allotted to them as trustees for Charles Marshall who was entitled to sell the shares or to become registered as legal owner. Until he did either of those things any claim by him to dividends would be met by the presumption of advancement. His rights would pass to his executors. In many cases courts have analysed the legal result of a transfer of shares signed in blank by the transferor. [He referred to *Hardoon* v. *Belilios* (1); *Colonial Bank* v. *Cady and Williams* (2); *Hutchison* v. *Colorado United Mining Co.* (3); *Fry* v. *Smellie* (4); *In re Tahiti Cotton Co.*; *Ex parte Sargent* (5); *Hunter* v. *Hunter* (6), per Lord *Atkin*; *In re Rose*; *Rose* v. *Inland Revenue Commissioners* (7).]

[WILLIAMS J. referred to *Beecher* v. *Major* (8).]

The intention of Charles Marshall was to make the respondents a present each year of a sum of money by way of income. That is borne out by the fact that in those years in which the company did not declare a dividend he gave to each of them a gift of a corresponding sum of money. If Charles Marshall's object in December 1935 was to surrender his beneficial interest in the shares he could have done it in a number of ways. Instead, by writing that the shares were the property of the respective respondents and putting the writing in a place where it would not be seen until after his death, he intended that his beneficial interest in the shares should cease after his death. If this is the true analysis of the situation the documents would be inoperative and the gift of the beneficial interest imperfect. The documents do not purport to create a trust. It is not necessary having regard to the facts and the relationship of the parties to infer an intention on the part of Charles Marshall that the respondents should have the whole legal and beneficial interest in the shares allotted to them. The operation of the presumption of advancement is shown by *Scott* v. *Pauly* (9) and *In re Kerrigan*; *Ex parte Jones* (10).

K. A. Aickin, for the respondents. Charles Marshall either gave to the respondents the entire beneficial as well as legal interest in the shares or alternatively the beneficial interest subject to the possibility of defeasance only by action on the part of the deceased

(1) (1901) A.C. 118.
(2) (1890) 15 App. Cas. 267, at pp. 277, 285.
(3) (1886) 3 T.L.R. 265.
(4) (1912) 3 K.B. 282.
(5) (1874) L.R. 17 Eq. 273.
(6) (1936) A.C. 222, at p. 261.
(7) (1952) 1 Ch. 499, at pp. 510, 513, 515, 517, 518.
(8) (1865) 2 Dr. & Sm. 431 [62 E.R. 684].
(9) (1917) 24 C.L.R. 274, at p. 281.
(10) (1947) 47 S.R. (N.S.W.) 76, at pp. 81, 86, 87.

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in his lifetime. The cases relating to the operations of transfers signed in blank are irrelevant. The legal effect of the handing of a transfer in blank to another depends on the intention with which it is handed over. [He referred to *Colonial Bank* v. *Cady and Williams* (1), per Lord *Watson*.] The writing whereby in 1935 Charles Marshall stated that the shares were the property of the respective respondents is an admission that at that time he had no beneficial interest in the shares and that what he had done in 1924 was to make a gift of the entire beneficial interest to the respective respondents. The respective presumptions of advancement and resulting trust do not compete but apply in different circumstances. [He referred to *Stewart Dawson & Co. (Vict.) Pty. Ltd.* v. *Federal Commissioner of Taxation* (2); *Sidmouth* v. *Sidmouth* (3); *Shephard* v. *Cartwright* (4); *Donaldson* v. *Freeson* (5).] Subsequent acts on the part of a parent can be used only for the purpose of constituting admissions against his interest and not for the purpose of showing that he gave less than he would otherwise appear to have given. Mere retention of title deeds by a parent does not rebut the presumption of advancement. [He referred to *Re Richardson*; *Weston* v. *Richardson* (6); *Scawin* v. *Scawin* (7).] The suggestion that the dividends were merely yearly gifts to the respective respondents ignores the fact that there had been another transaction and in particular that the share certificates were in the respective names of the respondents.

Dr. *E. G. Coppel* Q.C., in reply.

Cur. adv. vult.

June 15.

THE COURT delivered the following written judgment:—

This is an appeal by the defendants from a judgment of the Supreme Court of Victoria given by *Herring* C.J. on 12th December 1955 whereby it was ordered that the share register of Charles Marshall Pty. Ltd. be rectified so as to reinstate thereon the name of each of the plaintiffs (the present respondents) as the holder of 6,960 shares in that company and that an account be taken of the dividends declared in respect of these shares since 1st July 1952 and the amounts thereby found to be due to each plaintiff be paid to such plaintiff.

(1) (1890) 15 App. Cas. 267, at pp. 278, 285.
(2) (1933) 48 C.L.R. 683, at pp. 689 et seq.
(3) (1840) 2 Beav. 447 [48 E.R. 1254].
(4) (1955) A.C. 431, at pp. 451, 452.
(5) (1934) 51 C.L.R. 598, at pp. 614, 615.
(6) (1882) 47 L.T. 514.
(7) (1841) 1 Y. & C.C.C. 65 [62 E.R. 792].

The appellant company was incorporated in February 1924. It was formed to purchase from its founder, Charles Marshall (hereinafter called the donor), the engineering business he was then carrying on for £35,000 to be satisfied by the issue of 35,000 shares as fully paid. The donor decided to divide the whole of the 35,000 shares, except for 200 shares, into five parcels of 6,960 shares each and to direct the company to allot one of these parcels to himself and the other four parcels one each to his second wife, her daughter the defendant Isobel Mary Hawes, and the plaintiffs Mrs. Grimsley and Mrs. Graham, the two daughters of his first marriage, respectively. Of the parcel to be allotted to the donor 6,959 were called founder's shares and were to confer upon him whilst he was the holder but no longer the right at every meeting of the company to seven votes on each share held by him as against one vote on each of the ordinary shares in the company.

At the first meeting of the directors of the company which was held on 28th March 1924 the five parcels of shares were allotted in this manner and the names of these five persons were entered in the register of members of the company accordingly. About 3rd April 1924 the donor told the plaintiffs of the allotments. He summoned Mrs. Grimsley to his home and told her that he was changing his business into a company of five, that there would be herself, her mother (really stepmother), her two sisters (really sister and half-sister) and himself and that there would be a dividend every year provided the business paid. He asked her to sign a number of documents which he said were for shares in the company and said that he would look after them for her. The documents were in fact eight share certificates totalling 6,960 shares and they each contained transfers on the back which she signed in blank. He obtained her signature on behalf of the company to a receipt dated 3rd April 1924 acknowledging the receipt of the scrip from the company. He told her he would look after the documents for her and retained the certificates in his own custody. On or about the same date a similar transaction took place between the donor and Mrs. Graham at his office. He told her that he was forming his business into a company, that the same persons would be the shareholders, and that he wanted her to sign some documents which were also in fact eight certificates for 6,960 shares with transfers in blank on the back which she signed. He also obtained her signature on behalf of the company to a receipt dated 3rd April 1924 acknowledging the receipt of the scrip from the company. In her case also he retained the certificates in his own custody. Thereafter, during the rest of the donor's life, the plaintiffs received cheques in respect of their parcels of shares for

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dividends from the company whenever dividends were declared. These cheques were handed to the plaintiffs by the donor. The business prospered and dividends were declared in every year except in some years during the depression and in these years the donor made good the loss to the plaintiffs out of his own pocket. He never attempted to make any use of the transfers in blank on the backs of the certificates of the shares allotted to the plaintiffs.

The donor died on 3rd April 1953. By a second codicil to his will he appointed Mrs. Hawes, her husband and A. H. Pearcey, solicitor, his executors and trustees and bequeathed all his shares in the company to Mr. and Mrs. Hawes. A few days after his death Mrs. Hawes went to the bank where he kept his deed box and opened it and found in it two envelopes, one containing the certificates of the shares allotted to Mrs. Grimsley and the other the certificates of the shares allotted to Mrs. Graham. The envelope that contained Mrs. Grimsley's certificates bore on its face in the handwriting of the donor the words " The property of H. Grimsley, Charles Marshall " and also in typewriting the words " Charles Marshall Pty. Limited " and in an unknown hand written by a biro pen " 6,960 shares ". Within the envelope, there was also enclosed a sheet of paper dated 17th December 1935 signed by the donor on which were typewritten the words " These (shares) are not my property but belong to the within-named " followed by the name " Harriett Grimsley " in his handwriting. The other envelope contained a similar notation on its face in favour of Mrs. Graham, that is to say a statement signed by the donor that it was " The property of R. Graham ", in typewriting the words " Charles Marshall Pty. Limited " and in an unknown hand written by a biro pen " 6,960 shares ". Within the envelope in addition to the certificates there was a corresponding note dated 17th December 1935 signed by the donor that " These (shares) are not my property but belong to the within-named " (typewritten) followed by the name " R. Graham " in his handwriting.

Mrs. Hawes opened these envelopes without consulting the plaintiffs and handed them and their contents to her co-executor A. H. Pearcey. He proceeded to obtain the opinion of senior counsel, presumably upon the question whether the shares allotted to the plaintiffs belonged to them or to the estate of the donor. But, as neither the case submitted for the opinion of counsel nor the opinion itself was tendered in evidence, we are left in the dark as to the specific questions or material submitted to him or as to his specific answers. What does appear, however, is that on receipt of the opinion the executors disclosed these shares as part of the donor's

estate for the purpose of death duties. On 17th December 1953 they filled in the blank transfers to themselves as transferees as entitled thereto in equity. On 23rd April 1954 they caused the shares to be transferred into their own names in the share register of the company. This was a simple manoeuvre to effect because Mr. and Mrs. Hawes were then the sole directors of the company. On 26th April 1954 and on 9th November 1954 dividends were declared by the company but the plaintiffs were not invited to participate. As will appear, the plaintiffs were not even told by Mrs. Hawes or by Mr. Pearcey that the envelopes had been found in the deed box or that the shares had been transferred from their names into those of the executors. The plaintiffs first learned about the envelopes and their contents when they were disclosed on discovery on 4th October 1955.

There is a quantity of other evidence in the case including evidence of the circumstances attending the allotment and registration in the books of the company of the two parcels of shares allotted to the second Mrs. Marshall and her daughter. This evidence consists of documents and the oral evidence of Mrs. Hawes. From this evidence it appears that the donor also got them to sign transfers in blank on the back of their certificates and give the company receipts for the scrip. It would appear that he had in his deed box envelopes bearing their names dated 17th December 1935 corresponding to those in the names of the plaintiffs containing their certificates although the envelope in favour of his second wife was apparently destroyed after her death. The second wife died on 30th January 1938. By her will she made her daughter her sole executrix and bequeathed to her all her property. The shares in the company allotted to her mother were disclosed for death duties by Mrs. Hawes and subsequently transferred to her in the share register of the company as the beneficiary under her mother's will. Mrs. Hawes gave evidence that when she signed the transfers in blank and other documents the donor told her that the shares would really not be hers because she was signing them all back to him and that the plaintiffs' shares were in the same position. She also gave evidence that when the plaintiffs attended the donor to receive their dividends he told them, when questioned by them on more than one occasion, that the shares were not theirs because they were signed on the back. The plaintiffs, on the other hand, said that all that the donor ever said to them when they were receiving the cheques was to be careful of the money and that he never said they were not the real owners of the shares.

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It is clear, for reasons which will hereinafter appear, that very little of this evidence is admissible. But the evidence of Mrs. Hawes, even if admissible, cannot be acted upon for the simple reason that his Honour considered her a completely unreliable witness. Her evidence to the effect that the respective parcels of shares were, to the knowledge of all the allottees, really held on trust by them for the donor is impossible to reconcile with the return by her of the shares allotted to her mother as part of her mother's estate for the purposes of death duties and the transfer of these shares into her own name. At one stage of the cross-examination Mrs. Hawes said that she understood her father was giving her the shares but he could take them back at any time and this statement, as will be seen, is not irreconcilable with one view of the facts, that is to say that the gifts of the shares were subject to a power of revocation by the donor if he chose to fill in the blank transfers and transfer the shares to himself or some other person. But, as will also be seen, this view does not assist the appellants.

Mrs. Hawes' conduct towards the plaintiffs after her father's death was not such as to be likely to commend itself to any judge and it certainly did not commend itself to his Honour. Her attempts to justify her failure to disclose to the plaintiffs the presence in the deed box of the envelopes stated to be their property and to justify the subsequent secretive transfers of the shares from their names into the names of the executors in the share register of the company did not impress him. She must have been an optimist if she hoped that they would. His Honour believed Mrs. Grimsley when she said that shortly before his death the donor had told her that there was a letter in the deed box for her and that she asked Mrs. Hawes if she had not found one there. Mrs. Hawes admitted that she had denied that there was such a letter and attempted to excuse herself by saying that she did not regard the envelope as a letter and that she had never denied there was an envelope because she had not been asked if there was one. She said she had told them that their shares were in the deed box all bundled up together with their names on the bundles. She could not remember whether she said they were in envelopes. The only fair inference is that she did not tell them of the envelopes. She admits that she never told them about the very important pieces of paper in the envelopes. Her conduct, and that of Mr. Pearcey, in failing to inform the plaintiffs of the envelopes and their contents, was certainly open to comment. His Honour was certainly justified in refusing to accept Mrs. Hawes as a witness of truth. Counsel for the appellants did not, and indeed could not,

suggest that the appeal should be conducted on any other basis. On the other hand his Honour was justified in accepting the plaintiffs as truthful witnesses. Of them he said : " Having seen and having heard the evidence of the plaintiffs I am satisfied that neither of them could at any time have been regarded as a competent business woman, and I am satisfied that the deceased did not explain to either of them that the shares were not really to be their shares or that by signing as he directed them they were signing them back to him, so that he could take them back whenever he wanted to. The truth was, I think, that they trusted their father and were appreciative of receiving an interest in his business, and were prepared to sign wherever he told them to and whatever he told them to, and that he got them to sign the transfer in blank for some reason, which he did not disclose to them." One matter said to reflect on their credit perhaps requires comment. It relates to Mrs. Grimsley only. She was separated from her husband in 1932. He died early in 1952 and later in the year she applied for maintenance out of his estate. In her affidavit sworn on 23rd September 1952 she described herself as the nominal owner of 7,000 shares in Charles Marshall Pty. Ltd. which returned her an average of approximately five pounds per week. This statement was seized upon as an admission that she knew she was not the real beneficial owner of the shares. She said, however, that she did not know the significance of the word " nominal ", she was not certain what interest she had in the shares, but she thought she would at least get the income from them during the donor's lifetime. His Honour, after seeing Mrs. Grimsley and her daughter, who also used the same word in her affidavit, and observing them as they were cross-examined, was inclined to think that neither of them was responsible for the use of the word or really understood the various meanings that it could have. The word " nominal ", even if Mrs. Grimsley understood its meaning, is by no means inconsistent with the possible view of the facts already foreshadowed in referring to Mrs. Hawes' evidence, namely that her beneficial interest was nominal in the sense that it could be revoked at any time by the donor filling in the blank transfers and transferring the shares to himself or to some other person. When the affidavit was sworn the donor was, of course, still alive.

But, in any event, evidence of this sort, even if admissible, is of negligible value. We are in the presence of the familiar problem that arises whenever a person purchases and pays for property, real or personal, whatever its description may be, the legal title to which is transferred by his direction into the name of another person.

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If that person is a stranger, the presumption of a resulting trust arises and he holds the property on trust for the purchaser. But if the purchaser is the father of or a person *in loco parentis* to the legal owner, the presumption arises from the relationship of the parties that the father intended to purchase the property to advance his child and to make the child not only the legal but also the beneficial owner of the property. These presumptions were described as landmarks in the law by *Eyre* C.B. as far back as 1788 in the leading case of *Dyer* v. *Dyer* (1). In *Sidmouth* v. *Sidmouth* (2), decided in 1840, Lord *Langdale* M.R. said: "The law applicable to cases of this nature is subject to so little doubt that it has not been questioned in the argument of this case. Where property is purchased by a parent in the name of his child, the purchase is *prima facie* to be deemed an advancement; the resulting or implied trust which arises in favour of the person who pays the purchase-money, and takes a conveyance or transfer in the name of a stranger, does not arise in the case of a purchase by a parent in the name of a child; but still the relation of parent and child is only evidence of the intention of the parent to advance the child, and that evidence may be rebutted by other evidence, manifesting an intention that the child shall take as a trustee; and in this case, as in most others of the like kind, the only question is, whether there is such other evidence. That cotemporaneous acts and even cotemporaneous declarations of the parent may amount to such evidence, has often been decided. Subsequent acts and declarations of the parent are not evidence to support the trust, although subsequent acts and declarations of the child may be so; but, generally speaking, we are to look at what was said and done at the time" (3).

The law applicable to cases of this nature can, as Lord *Langdale* said, no longer be the subject of argument. It is not surprising, therefore, to find it stated in almost identical language in the most recent illustration, that is, in the decision of the House of Lords in *Shephard* v. *Cartwright* (4). That is a case where a father had caused shares for which he subscribed in cash to be allotted in the names of himself, his wife, two sons and a daughter. At the risk of repetition, because of their high authority, some passages from the speech of Viscount *Simonds* should be cited. His Lordship said: "My Lords, I do not distinguish between the purchase of shares and the acquisition of shares upon allotment, and I think that the law is

(1) (1788) 2 Cox 92 [30 E.R. 42].
(2) (1840) 2 Beav. 447 [48 E.R. 1254].
(3) (1840) 2 Beav., at p. 454 [48 E.R., at p. 1257].
(4) (1955) A.C. 431.

clear that on the one hand where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of the purchaser ; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood in loco parentis, there is no such resulting trust but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not, as Lord *Eldon* said, give way to slight circumstances : *Finch* v. *Finch* (1) " (2). On the same page his Lordship referred to the evidence by which the presumptions can be rebutted. He cited a passage from *Snell's Equity*, 24th ed. (1954), p. 153 : " The acts and 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 as evidence only against the party who made them, and not in his favour." His Lordship, after criticising some earlier judgments, said : " the burden of authority in favour of the broad proposition as stated in the passage I have cited is overwhelming and should not be disturbed " (3).

In the present case the first thing that happened was that the donor directed the company to allot the shares to the plaintiffs and to register them as shareholders. As Viscount *Simonds* said, there is no distinction between the purchase of shares and the acquisition of shares upon allotment. Exactly the same presumption arises. The plaintiffs are the daughters of the donor and the initial presumption is that he intended to give the shares to them or, in other words, to make them the absolute beneficial as well as the legal owners of the shares. The plaintiffs start with this advantage. The presumption can be rebutted or qualified by evidence which manifests an intention to the contrary. Apart from admissions the only evidence that is relevant and admissible comprises the acts and declarations of the parties before or at the time of the purchase (in this case before or at the time of the acquisition of the shares by allotment) or so immediately thereafter as to constitute a part of the transaction. If that evidence is insufficient to rebut the presumption the beneficial gift, absolute or subject only to qualifications imposed upon it at the time, is complete and no subsequent changes of mind or dealings with the property inconsistent with the trust by the donor can as between himself and the donees alter the beneficial interest. In *Murless* v. *Franklin* (4), in a passage cited by

(1) (1808) 15 Ves. Jun. 43 [33 E.R. 671].
(2) (1955) A.C., at p. 445.
(3) (1955) A.C., at p. 446.
(4) (1818) 1 Swans. 13 [36 E.R. 278].

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Viscount *Simonds* in *Shephard* v. *Cartwright* (1), Lord *Eldon* said that: " the evidence of the intention of the father must apply to the time of the purchase : subsequent acts will not enable him to convert an advancement for his sons into a beneficial purchase for himself " (2). The same thing had been said by the Chancellor in *Ebrand* v. *Dancer* (3) 138 years before in a case where a grandfather purchased bonds in the names of his grandchildren, the father being dead : " It shall not be judged trusts, but provision for the grand-child, unless it be otherwise declared at the same time " (4).

The execution of the transfers in blank on the back of the certificates by the plaintiffs and the retention of the certificates by their father constituted a part of the transaction. So did the statements of the donor that there were to be five shareholders in the company and his statement to Mrs. Grimsley that he was keeping her certificates not because the shares were really his but so that he could look after them for her. These statements, so far as they go, favour the plaintiffs. But they do not go far. In any event they cannot favour the appellants. A father does not usually promise his daughter to look after his own property. The execution of the transfers in blank is more important. But the significance of even this part of the transaction is equivocal. The donor may well have thought that he could look after property he gave his daughters better than they could and have wished to prevent them disposing of the shares otherwise than with his consent. He may have wished to be in a position to dispose of the undertaking of the company by selling all the shares if he thought fit and for that purpose to be in a position to sell the plaintiffs' shares on their behalf. The onus was on the defendants to rebut the initial presumption of advancement. As Lord *Langdale* said, as between parent and child the presumption of a resulting trust does not arise ; it has to be proved. Subsequent statements or acts by the donor could only be evidence not for but against him so far as they were admissions that the plaintiffs were the beneficial owners of the shares. Subsequent statements or acts by the plaintiffs could only be evidence not for but against them so far as they were admissions that the shares were allotted to them as trustees for their father. But the evidence of subsequent events, far from rebutting the presumption, supports it. The payment of the dividends to the daughters, the cheques being handed to them by the donor himself, are a clear admission by him that he intended

(1) (1955) A.C., at p. 446.
(2) (1818) 1 Swans., at p. 19 [36 E.R., at p. 280].
(3) (1680) 2 Ch. Ca. 26 [22 E.R. 829].
(4) (1680) 2 Ch. Ca., at p. 26 [22 E.R., at p. 829].

the plaintiffs to be the beneficial owners of the shares. The envelopes, their inscription, and the notes they contained are an even clearer admission. It might be possible to infer from the execution of the transfers in blank that the donor intended the gifts to be subject to a power of revocation. Such intention was inferred by *Kindersley* V.C. in *Beecher* v. *Major* (1). The facts in that case, except that the gift was by an aunt to a niece and it was held that the aunt was not *in loco parentis* so that the niece had in the first instance to rebut the resulting trust, bear a close resemblance to the present facts. The aunt purchased stock in the name of her niece and wrote her a letter stating that she had done so and that she intended it for the niece's benefit. In the letter she enclosed a bank power which she stated was to enable her to receive dividends for her life, which power she requested the niece to execute and return to her, and also to destroy the letter; both of which the niece accordingly did. It afterwards turned out that the bank power authorised the aunt to sell out the stock as well as receive the dividends. *Kindersley* V.C. said: "And, in the next place, Mrs. Beecher's procuring the power of attorney shewed no intention to retain beneficial ownership; it was only reserving to herself a power to defeat Mary Major's interest, and it stands on the same footing as if Mrs. Beecher had executed a formal declaration of trust in Mary Major's favour, with a power of revocation. The reservation of the power of revocation would not have destroyed the trust if the power was not exercised" (2). That case was one of the cases relied upon as an authority for the passage that occurs in *Kauter* v. *Hilton* (3), where it is said: "The fact that the depositor (in this case the donor) reserved a right to revoke the trust would not prevent an immediate trust arising and if the trust was not revoked by the depositor (donor) in his lifetime the beneficiary would be just as much entitled to the money (in this case shares) as a beneficiary under an irrevocable trust" (4). So that, even if the donor did reserve a power of revocation, since he did not exercise it, the appellants do not establish their case. The appellants sought to derive some advantage from the fact that the donor made payments out of his own pocket to the plaintiffs in lieu of dividends in the years when the company did not make sufficient profits to declare a dividend. But these payments were not contemporaneous with the allotment of the shares and could not be evidence to rebut the presumption, even if they could have any probative

(1) (1865) 2 Dr. & Sm. 431 [62 E.R. 684].
(2) (1865) 2 Dr. & Sm., at p. 437 [62 E.R., at p. 687].
(3) (1953) 90 C.L.R. 86.
(4) (1953) 90 C.L.R., at p. 100.

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value. They could only be evidence of admissions by the donor to support it. But they have no real probative value at all. They simply exemplify what any affectionate father might do in the circumstances. If they exemplify anything more, they indicate a desire on his part to prevent the plaintiffs being disappointed in not receiving the annual benefits from the shares that he intended them to receive and to that extent they are an admission that he meant the shares to be theirs.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *W. E. Pearcey & Ivey.*
Solicitors for the respondents, *Malleson Stewart & Co.*

R. D. B.