[HIGH COURT OF AUSTRALIA.]

WIRTH . . . . . APPELLANT;
RESPONDENT,

AND

WIRTH . . . . . RESPONDENT.
APPLICANT,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1956.

BRISBANE. *July* 26;

MELBOURNE, *Oct.* 25.

Dixon C.J., McTiernan and Taylor JJ.

Trust and Trustees—Resulting trust—Presumption of advancement—Engaged couple purchasing land for matrimonial home in their joint names—Transfer by prospective husband of his half interest in the land to intended wife—Expressed to be for specified monetary consideration—No money paid—House afterwards erected on land—Each paying portion of the cost—Marriage—House used as matrimonial home—Summary application by husband to a judge for a declaration that wife held the land as trustee for the two of them—The Married Women's Property Acts 1890 *to* 1952 (*Q.*), *s.* 21.

The Married Women's Property Acts 1890 *to* 1952 (Q.), s. 21, so far as it is applicable to this case, provides:—" In any question between husband and wife as to the title to or possession of investments or other property, either party, or any person, bank, . . . in whose books any investments or property of either party are or is standing, may apply by summons or otherwise in a summary way to any judge of the Supreme Court . . . .

Such judge may, on such application, make such order with respect to the property in dispute and as to the costs of and consequent upon the application as he thinks fit . . . ".

The appellant and respondent, whilst engaged to be married, purchased for £200 as joint tenants land on which to build their future matrimonial home. The respondent paid £150 of the purchase money. Before their marriage he transferred his joint interest in the land to the appellant. The consideration was stated in the transfer to be £100, but no part of it was paid to him. The respondent's reason for the transfer, as stated in evidence, was that the appellant told him that " her mother had their home in her own name " and that it was a thing " their people believed in " and that he replied that if it was going to make her happier " we will do the same " and she promised

to look after his interest " for ever and a day after ". Subsequently a house was built on the land. Each of them paid part of the earlier progress payments for its cost and the balance was paid by means of an overdraft of £300 on a bank account in the appellant's name obtained on the security of the land. A receipt for the payment of the total cost, £626 10s. 6d., was given by the builder to the appellant in her own name. After many years of married life together in the house the respondent applied to a judge under s. 21 of *The Married Women's Property Acts* 1890 *to* 1952 (Q.) for and obtained an order declaring that the appellant held the land as trustee for the two of them. The wife appealed against the order.

Held, by *Dixon* C.J. and *McTiernan* J., *Taylor* J. dissenting, that a resulting trust did not arise from the transfer by the respondent to the appellant of his half interest in the land.

Per Dixon C.J. and *Taylor* J.: On applications under s. 21, of *The Married Women's Property Acts* 1890 *to* 1952 (Q.), the rights of the parties must be determined according to ordinary legal principles, the discretion vested in the judge being limited to the summary remedy to be granted.

Per Dixon C.J.: A transfer of property by a prospective husband to his intended wife made in contemplation of the marriage for which they had contracted raises a presumption of advancement just as a similar transfer made after the celebration of the marriage raises the same presumption.

Decision of the Supreme Court of Queensland (*Macrossan* C.J.), reversed.

APPEAL from the Supreme Court of Queensland.

This was an appeal from an order of *Macrossan* C.J. made on an application by a husband under s. 21 of *The Married Women's Property Acts* 1890 *to* 1952 (Q.) in which, *inter alia*, he declared that the wife of the applicant held certain land as trustee for herself, and her husband as joint tenants. The land had been purchased by them as joint tenants on 6th July 1922 when they were engaged to be married to one another, for the purpose of erecting on it their future matrimonial home. The purchase price was £200 of which he paid £150. On 9th July 1923, he transferred his half interest in the land to his intended wife. In the transfer the consideration was stated to be £100 but no money was paid to him. He gave as his reason for the transfer that he was pressed by his intended wife to do so as her mother had her family home in her own name and their people believed in that and she promised to look after his interest for ever. He told her that if it would make her happier they would do the same as her father and mother had done. About the time of this transfer the two of them had interviewed a builder about the erection of a house on the land and its erection was proceeded with. He paid £127 to the builder for progress payments and she paid sums from her own money, which she earned as a

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contract knitter for other progress payments. The balance of the cost of the house was paid out of an overdraft of £300 which the bank in pursuance of a previous arrangement with the two of them had allowed on the security of the property. The overdrawn account was in her name. At the same time there was a savings bank account in their joint names into which all his wages were paid by her after a small sum was deducted weekly for his pocket money. On 4th October 1923 the builder gave to the wife in her own maiden name a receipt for £626 10s. 6d., being the total payment for the erection of the dwelling. They were married on 10th November 1923.

H. T. Gibbs, for the appellant. By reason of the fact that the intending husband put the land in the name of his fiancée there arose a presumption of advancement: *Stewart Dawson & Co. (Vict.) Pty. Ltd.* v. *Federal Commissioner of Taxation* (1); *Moate* v. *Moate* (2). This presumption could only be rebutted by satisfactory evidence that the true intention of the intending husband at the time of the transfer was not to confer a full beneficial interest on his fiancée, and slight evidence would not be enough to rebut the presumption: *Crichton* v. *Crichton* (3); *Finch* v. *Finch* (4); *Shephard* v. *Cartwright* (5). There was no reason for putting the property in the name of the fiancée except to make her a gift: *Shephard* v. *Cartwright* (6). Her protestation that she would watch his interests is inconsistent with there being a resulting trust in his favour: *Drever* v. *Drever* (7); *Collett* v. *Nairn* (8). *Rimmer* v. *Rimmer* (9) is not an authority that the law as to the presumption of advancement may be disregarded on an application under s. 21 of *The Married Women's Property Acts* 1890 *to* 1952 (Q.). Questions of title arising for determination under that section must be determined according to legal principles and not according to any notion of "palm tree justice" (*Buchanan* v. *Buchanan* (10); *Lee* v. *Lee* (11)).

T. M. Barry Q.C. (with him *S. D. R. Cook*), for the respondent. There was clear evidence to support the finding that an express trust had been created and to negative any presumption of advancement in favour of the appellant. Although no consideration was

(1) (1933) 48 C.L.R. 683, at p. 690.
(2) (1948) 2 All E.R. 486.
(3) (1930) 43 C.L.R. 536, at p. 553.
(4) (1808) 15 Ves. Jun. 43, at p. 50 [33 E.R. 671, at p. 674].
(5) (1955) A.C. 431, at p. 445.
(6) (1955) A.C. 431, at p. 450.
(7) (1936) 42 A.L.R. 446, at p. 450; 10 A.L.J. 208.
(8) (1899) 9 Q.L.J. 164, at p. 169.
(9) (1953) 1 Q.B. 63.
(10) (1954) Q.S.R. 246, at p. 248.
(11) (1952) 2 Q.B. 489, at p. 491.

in fact paid in respect of the transfer of the respondent's half interest in the land, the transfer of it executed by the parties alleged that the sum of £100 was paid by the appellant to the respondent. If an advancement or gift had been intended the transfer ought to have shown it. The transaction is not to be governed by the same strict considerations as are applied to the ascertainment of rights between strangers. The ordinary incidents of commerce are not applicable as between husband and wife: *Rimmer* v. *Rimmer* (1). The presumption of absolute gift is of diminished importance where the parties are alive and give clear evidence as to the intention with which the transfer was made: *Buchanan* v. *Buchanan* (2). There was clear evidence as to the intention of the respondent. He said that he " entrusted " his wife over a period of time when she assured him when they were first married that she would hold this property in his interest, and that she promised to look after his interests " for ever and a day ". All contemporaneous documents confirm the respondent's evidence. If there was not an express trust, there was a resulting trust in favour of the respondent: *House* v. *Caffyn* (3).

H. T. Gibbs, in reply, referred to *Soar* v. *Ashwell* (4).

Cur. adv. vult.

Oct. 25.

The following written judgments were delivered:—

DIXON C.J. This is an appeal by a wife from an order made by *Macrossan* C.J. under s. 21 of *The Married Women's Property Acts* 1890 *to* 1952 (Q.). By that provision, which corresponds with s. 17 of the *Married Women's Property Act* 1882 (Imp.), in any question between husband and wife as to the title to or possession of property, either party may apply by summons in a summary way to a judge and the judge may make such order with respect to the property and to costs as he thinks fit. The discretion conferred on the judge by the last words doubtless enables him, in granting withholding or moulding an order, to take into account considerations which may go beyond the strict enforcement of proprietary or possessory rights, but the notion should be wholly rejected that the discretion affects anything more than the summary remedy. The law of property governs the ascertainment of the proprietary rights and interests of those who marry and those who do not. It has in the past contained special rules governing the title to property in the case

(1) (1953) 1 Q.B. 63, at p. 67.
(2) (1954) Q.S.R. 246, at p. 248.
(3) (1922) V.L.R. 67.
(4) (1893) 2 Q.B. 390.

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of husband and wife and the relation is such that it has not been found possible to discard all rules of the law of property which are founded upon its existence. But the title to property and proprietary rights in the case of married persons no less than in that of unmarried persons rests upon the law and not upon judicial discretion : cf. per *Romer* L.J. in *Cobb* v. *Cobb* (1).

The order from which the wife appeals declared that she held certain land as trustee for herself and her husband and ordered that she do all things necessary to vest in him a legal joint tenancy with her. The order also made some declarations about articles of furniture and household equipment, one only of which is in question upon this appeal. It is a declaration that a lounge suite is the joint property of the appellant and the respondent.

The litigation is a consequence of the breaking down in 1953 of a marriage celebrated on 10th November 1923. The parties met each other in 1919. In that year the respondent became a boarder with his future wife's parents. He was very young and so was she. He was employed in the Ambulance Brigade, first as bearer, later as a mechanic, as a driver bearer and finally as mechanic-in-charge ; his earnings were never large. She earned her living by contract knitting and apparently she was the better remunerated. In 1920 or perhaps the following year they engaged to marry. He had an account in the Queensland Government Savings Bank. It was his custom to hand his wages to her, subject to the deduction of a small amount for his personal expenses, and she paid the money into the account. One may conjecture that for this purpose she held the pass book. She too had a savings bank account and into this she paid what she saved from her earnings. At some time after they became engaged they decided to buy a piece of vacant land in Royal Avenue, Gregory Terrace, Brisbane, and build their future home upon it. To build a house it would be necessary to borrow, and on 20th February 1922 the appellant and the respondent interviewed the sub-manager of the bank of which her father was a customer. They said that the house when completed and the land would be worth £900 and that they might need £300. The sub-manager said that the bank would make that amount available against the security of the property. On or about 6th July 1922 they bought the allotment of land for £200. On that date £150 was withdrawn from the respondent's savings bank account, at which he had a credit of £177, and £60 was withdrawn from the appellant's savings bank account, at which she had a credit of £213. He says that he provided the whole of the purchase money of £200.

(1) (1955) 2 All E.R. 696, at p. 700 ; 1 W.L.R. 731, at p. 736.

She appears to have made the actual payment but he says that he gave her £150 from his savings bank and £50 in cash to do so. She on the other hand says that each of them paid £100; she had £40 in cash and she drew the other £60 from her savings bank account. An account was opened in the appellant's name in the bank which had agreed to make the advance to enable them to build. This account she has used freely ever since, but the earlier records are destroyed and the exact date when it was opened does not appear. In the transfer of the land from the vendor both the appellant and the respondent were named as transferees. They took the estate as joint tenants. They proceeded with the erection of their house upon the land. The bank granted her an overdraft on 27th August 1923 against the security of the title. The builder who contracted to erect the dwelling received progress payments, which she says were made either by overdrawing the account she had opened or by withdrawals from her savings bank account. At the same time furniture was bought. From her savings bank account it appears that she withdrew £440 between 6th August and 14th September 1923, and she says these moneys were applied in payments to the contractor and in payment for furniture. On his side the respondent points to a withdrawal of £100 on 28th July 1923 from his savings bank account and says that the amount was paid to the contractor. There is a withdrawal of £27 from his account recorded on 16th September 1923, and he says that he paid that to the builder. That left only thirty shillings in the account which a month later was closed. On 4th October 1923 the builder issued in her maiden name a final receipt for £626 10s. 6d. in respect of the erection of the dwelling.

In the meantime on 9th, or possibly 30th, July 1923 the respondent transferred his undivided interest in the land to his wife. The consideration was expressed in the transfer at £100. In his evidence to a question whether he received this consideration he answered: "No, not in actual money", an answer naturally leading to further questions. They resulted in his saying that he received nothing whatever. His account of how he came to transfer the property to his intended wife was, in effect, that he did it to please her and her parents. The latter, he said, had spoken of property being in the wife's name, and the appellant said to him when they decided to get married that "her mother had their property in her name", it was a thing "their people" or "their parents believed in". He answered that if it was something that would make the appellant happier they would do the same. He added that also at that time, which no doubt means not long before, he had been shot in the neck

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by one of two passengers he was driving in a taxi. The suggestion appears to be that she would be more secure if he were to be killed or if he died, though why, apart from death duty, she would be in a better position than if she were a surviving joint tenant was not stated.

He claimed that in furnishing the house he had paid for certain things. It is to be remarked that apart from the three withdrawals from his savings bank account already mentioned, viz. £150, £100 and £27, only four other withdrawals, totalling £12, were made from the opening of the account until it was closed, and none of these was made in 1923. The overdraft was paid off by credits to her current account but by what date is uncertain.

In November 1925 an adjoining piece of land was bought in the appellant's name for the sum of £62 10s. 0d. and she was registered as the proprietor. She says that she paid for it out of her own moneys. The respondent on the other hand claims that the money represented earnings of his and that her earnings by that time were small. But her earnings are shown to have been by no means inconsiderable and quite sufficient to enable her to pay the small purchase price of the adjoining land.

From the time of their marriage the financial affairs of the appellant and of the respondent were conducted in much the same way. From May 1932 until 1954 they had a savings bank account in their joint names. The respondent says it was fed from his wages but that some of them went into the current account she had opened and continued to maintain. Her earnings went into that account. But except for the purchase of the disputed lounge suite, all this subsequent history does not seem to matter. This suite was bought apparently in August 1936. The receipt of the seller for the balance of the price was made out in the name of " M. Wirth " and her name is May, but as a witness she seems to have accepted the suggestion that it was in his name. However she says she paid for it out of her account. Again he says that his moneys must have gone into it.

It is of course plain enough that throughout she regarded the management of budgetary and business matters as her responsibility. She drew cheques, paid rates and insurance, made up his returns of income for taxation (she returned none of her own) and decided that they should purchase a car, refrigerator and anything else involving expenditure of importance.

Troubles of a serious nature seem to have broken out between them about 1949. He says that she was irrationally jealous of other women : she says that he gave her cause. He charges her with intemperate behaviour and the use of unseemly and violent

language. But be her faults what they may, they seem to have nothing to do with the question who was entitled to the land and to the lounge suite. As to credibility, *Macrossan* C.J. said that the impression he formed of them as witnesses was that in the main the respondent's evidence was the more credible. He accepted the view that he had provided £150 of the purchase money of the land and that the sum of £100 and another of £27 drawn from his account was paid to the builder. This appears to imply the view that the appellant paid £50 towards the purchase price of the land. It is, moreover, difficult to see how the respondent could have provided more than £127 towards the building, that is to say save in so far as, if at all, his earnings went to pay off the overdraft. It means too that he could have provided very little towards the furniture. In short there can be little doubt that her £440 was applied in paying the builder and buying some of the furniture.

In the foregoing circumstances it is a question of no little importance whether there arises from the respondent's transfer of July 1923 to the appellant of his interest as joint tenant in the land a presumption of a resulting trust in his favour. At that date she had not become his wife. There is some evidence that the transfer was made without consideration. On those grounds it is said that it is a voluntary transfer to a stranger and until the contrary is shown it is to be presumed that she took upon trust for him.

One cannot be sure what is the explanation of the statement of the consideration in the transfer. None is offered and it is difficult to escape the feeling that in some way it represented what was regarded as the advantage he had gained by expenditure from her savings. It is or may be important to bear in mind that we are not dealing with a purchase in the name of another person. Where a purchase was made in the name of a stranger who provided none of the purchase money the law was clear from a very early time that a resulting trust was presumed and the stranger could take beneficially only if he proved affirmatively that it was so intended. But in the case of a conveyance of land, both before and after it was enacted by 8 & 9 Vict. c. 106, s. 2, that corporeal hereditaments should lie in grant, the *habendum* stated that the releasee or grantee, properly called a purchaser whether giving value or not, should hold unto and to the use of himself and his heirs. This expression of the use to the purchaser himself seems to have led to the conclusion that in the case of such a conveyance of land no resulting trust could be presumed simply from the absence of any consideration express or implied. Thus *Story* in his *Equity Jurisprudence*, 2nd English ed. (1892), par. 1197, wrote: "Another common transaction,

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which gives rise to the presumption of an implied resulting use or trust, is, where a conveyance is made of land or other property without any consideration, expressed or implied, or any distinct use or trust stated. In such a case the intent is presumed to be, that it shall be held by the grantee for the benefit of the grantor, as a resulting trust. But if there be an express declaration that it is to be in trust, or for the use of another person, nothing will be presumed against such a declaration. And if there be either a good or a valuable consideration, there equity will immediately raise a use or trust correspondent to such consideration, in the absence of any controlling declaration or other circumstances." See *Spence*, *Equitable Jurisprudence*, p. 199; *Sanders*, *Uses and Trusts* (1844), vol. 1, p. 267; *Lloyd* v. *Spillit* (1), per Lord *Hardwicke*; *Young* v. *Peachy* (2), per Lord *Hardwicke*; *Fordyce* v. *Willis* (3), per Lord *Thurlow*; *Fowkes* v. *Pascoe* (4), per *James* L.J. It is to be noticed that when by the *Law of Property Act* 1925 (Imp.), s. 207 and 7th sched., the *Statute of Uses* was repealed, it was provided by s. 60 (3) that in a voluntary conveyance a resulting trust for the grantor shall not be implied merely by reason that the property is not expressed to be conveyed for the use or benefit of the grantee: see *Nathan*, *Equity through the Cases*, 1st ed., pp. 96, 97. This provision does not form part of the law of Queensland. In any case the transfer in question was under *The Real Property Acts* 1861 *to* 1952 (*Q.*), and *Cussen* J. has decided that a voluntary transfer under the Torrens system is not governed by the rule laid down by the authorities cited with reference to voluntary conveyances expressing a use to the grantee or purchaser: *House* v. *Caffyn* (5). It is unnecessary to repeat what his Honour said in this valuable and important judgment. But is it compatible with the expression of the consideration of £100 to treat the conveyance as raising a presumption of a resulting trust? This also is a question discussed by *Cussen* J. in *House* v. *Caffyn* (6). The conclusion to which his Honour was disposed was that by reason of the expression of a substantial consideration there was no resulting trust. Perhaps what was said in *Coultwas* v. *Swan* (7) by *Stuart* V.C. (8) and by Lord *Hatherly* (9) tends to the contrary. But it must be remembered that if the consideration expressed was one agreed upon though it

(1) (1740) Barn. C. 385, at p. 387 [27 E.R. 689, at p. 690].
(2) (1741) 2 Atk. 255, at p. 257 [26 E.R. 557, at p. 558].
(3) (1792) 3 Bro. C.C. 577, at p. 587 [29 E.R. 708, at p. 713].
(4) (1875) L.R. 10 Ch. App. 343, at p. 348.
(5) (1922) V.L.R. 67, at pp. 75-79.
(6) (1922) V.L.R. 67, at pp. 79-81.
(7) (1870) 22 L.T. 539.
(8) (1870) 22 L.T., at p. 540.
(9) (1871) 19 W.R. 485, at p. 486.

was in fact unpaid or unsatisfied, the consequence is not a resulting trust but a lien in favour of the grantor. If on the other hand it is a false consideration, the reason for inserting it will bear directly upon the true character of the transaction and from that it will appear whether or not it was intended to transfer the beneficial interest as well as the legal estate. The present is not a case in which one can be sure that the consideration expressed was a mere sham. It is at least clear that before a presumption of a resulting trust can arise upon a transfer expressing a consideration, it must be shown that the expression of the consideration was false and the transfer was intended as a voluntary assurance. I am not prepared to say that the meagre evidence on the subject satisfactorily establishes so much. But however that may be the fact that the transfer was made to the appellant in contemplation of the marriage for which they had contracted appears to me to be a reason for treating the transfer as one giving rise to no presumption of a resulting trust. It is true that the relation of an engaged couple has not, before the decision in *Moate* v. *Moate* (1), been considered to raise a presumption of advancement. But what is important is that the transfer was made so to speak in preparation for the marriage and on the footing that the transferee became the transferor's wife but in advance of her doing so. While the presumption of advancement doubtless in its inception was concerned with relationships affording "good" consideration, it has in the course of its growth obtained a foundation or justification in the greater prima facie probability of a beneficial interest being intended in the situations to which the presumption has been applied. A hundred years ago in *Soar* v. *Foster* (2), *Page Wood* V.C. regretted that one at least of the extensions of the rule had been made and refused to apply the rule to the case of a deceased wife's sister to whom the grantor or assignor was invalidly married. The Vice-Chancellor said: "Upon the whole, therefore, the result of the authorities is this: The rule which raises a presumption that a purchase in the name of another was intended as an advancement or provision for the latter, so as to preclude a resulting trust from arising for the purchaser until that presumption has been rebutted, is applicable where the purchase was made in the name of a legitimate or illegitimate child, or in the name of a grandchild whose father is dead, or in the name of the wife of the purchaser. In all these cases the rule is definite and clear, that the purchase is prima facie to be taken as a provision or advancement for the person

(1) (1948) 2 All E.R. 486; 92 S.J. 484.

(2) (1858) 4 K. & J. 152 [70 E.R. 64].

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in whose name the purchase has been made" (1). But it is to be noted that *Molesworth* J. in *Murdock* v. *Aherne* (2) seems to have regarded the relation between a man and a woman whom the man had bigamously married and who knew it as within the presumption of advancement. No doubt in *Moate* v. *Moate* (3) *Jenkins* J. applied the presumption of advancement where it had not hitherto been applied. But the application was not inconsistent with any decided case and it accords with reason. To say that a transfer of property to an intended wife made in contemplation of the marriage raised a presumption of a resulting trust but a similar transfer made immediately after the celebration of the marriage raised a presumption of advancement involves almost a paradoxical distinction that does not accord with reason and can find a justification only on the ground that the doctrine depends in categories closed for historical reasons. That is not characteristic of doctrines of equity.

For the foregoing reasons I do not think that there is a presumption of a resulting trust in the case of the transfer of the respondent's undivided interest in the land. On the facts of the case I do not think that there is any ground upon which it can be found positively that the appellant was intended to take that interest as a trustee for her husband. Rather the facts point to a desire on the part of the appellant and her parents that she should be the beneficial owner of the property and to a preparedness on his part to rely upon the matrimonial relationship and their mutual ties of affection for his future enjoyment of what became hers in point of property. A statement that he made in evidence that when the property was put in his wife's name she promised to look after his interests for ever and a day also points rather in that direction.

The acquisition of the second piece of land was in her name and more probably out of her moneys. There is no reason why it should not be regarded as hers in point of beneficial ownership. His payments towards the building of the house can create no charge on the land in his favour and do not evidence any intention that the building should not become an accretion to the land which was hers.

The lounge suite is a matter upon which there must be some doubt but on the whole there seems to be no sufficient reason for supposing that she did not acquire the whole beneficial property of that set of furniture. It is a question which only comes before this Court because the value of the land suffices for the purpose of enabling the appellant to appeal as of right from the order as a whole.

(1) (1858) 4 K. & J., at pp. 160, 161 [70 E.R., at p. 67].
(2) (1878) 4 V.L.R. (E.) 244, at p. 249.
(3) (1948) 2 All E.R. 486; 92 S.J. 484.

I think that the appeal should be allowed. I think that so much of the order appealed from as relates to the two pieces of land and to the lounge suite should be discharged and in lieu thereof it should be declared that the appellant is entitled to the same as beneficial owner.

McTIERNAN J. I agree that this appeal should be allowed. The facts of the case are stated by the Chief Justice. The substantial question is whether the appellant acquired a title to the land on which the parties built their house free from any trust of a moiety thereof in his favour. They bought the land when they were engaged to be married and it was transferred by the vendor to them as joint tenants. Subsequently, before the marriage, the respondent transferred his interest as joint tenant to the appellant. He did not declare any trust in the transfer. The legal estate in the land was vested in the appellant. The onus therefore lay upon the respondent of making good his claim that she was a trustee of a moiety for him : *Tucker* v. *Burrow* (1). He alleged that he created a trust by parole. The evidence upon which he relied was his own evidence of entreaties by the appellant and her parents to him to transfer his interest in the land to her. The evidence which is at pp. 12 and 13 of the transcript is as follows :

" After the land was acquired, was there any talk between Miss Child's parents—mother and father—and herself and yourself ?—Yes, they were always discussing about it.

About what ?—About the wife having the property in her name.

By His Honour : Having what ?—Having the property in her name.

By Mr. Moynihan : Will you tell his Honour what was said about it ; I do not want to lead ?—When we decided to get married, my wife now did say that her mother had all their property in her name, it was something their people believed in.

By His Honour : What is that ?—It was something their parents believed in, having all the property in the wife's name.

For what reason ?—I merely said if it was going to make her happier, we would do the same.

What was to be the effect of putting it all in your wife's name ? Was there any arrangement about that ?—No arrangement to my knowledge—no definite arrangement about it.

By Mr. Moynihan : Was anything ever said about whether she would safeguard your interest in the land ?—She did. She often

(1) (1865) 2 H. & M. 515, at p. 525 [71 E.R. 563, at p. 567].

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brought up the matter. In latter years she has often threatened to put me out, as a matter of fact.

By His Honour: That was not a method of safeguarding your interests ?—

By Mr. Moynihan: Did she ever say anything about safeguarding your interests or minding your interests ?—No, that was not discussed.

Was there any other reason why the land should be put in her name ?—Yes. Also at that time, during my period in the garage, I met with an accident.

What was the accident ?—I was shot in the back of the neck.

By His Honour: You were shot ?—Yes. At that stage we did not know what would be the outcome of it, and my wife then thought if she got married I might die.

By Mr. Moynihan: This was before you were married, was it ?—Yes.

You still have the bullet in you ?—I still have the bullet.

And an Xray is necessary to show where the bullet is—still in the back of the base of your skull ?—Yes.

As a matter of fact, you said it was an accident ?—Yes.

Did anyone get any period of imprisonment over it ?—The man who did it got 12 years."

Macrossan C.J. was satisfied upon this evidence that it was not the intention of the respondent that the appellant was to take his interest beneficially and that the appellant consented to be a trustee of it. This evidence leaves uncertain what arrangement was made between her father and mother as to their respective property. Did he convey his property to his wife upon trust or as beneficial owner ? As this matter is left obscure, it is open to doubt whether it was the respondent's desire to be made a trustee of the appellant's half interest or to be vested with both the whole legal and equitable estate in the property. Latitude of expression is allowed in declaring a trust but certainty of intention to create a trust is necessary. The respondent did not discharge the onus of proving that the appellant held the interest which passed under the transfer upon trust for him. It is consistent with the conversations proved by the evidence which has been quoted that the respondent intended the transfer of his interest in the land to be a real benefit to the appellant. If this is right, the evidence would weaken the presumption of a resulting trust, assuming it is a case in which such a presumption could come into play: see *Nicholson* v. *Mulligan* (1). The first difficulty which the respondent has in relying upon the

(1) (1869) 3 I.R. Eq. 308.

presumption of a resulting trust is that the transfer is expressed to be in consideration of £100. He denied that the transfer was made for value. *Macrossan* C.J. regarded the respondent as a trustworthy witness. But even though his evidence is sufficient to rebut the proof afforded by the transfer that it was made for value the respondent must overcome other difficulties. One arises from the want of unanimity among the authorities on the question whether a trust would as a matter of principle result from such a transfer as that now in question even though it was not for value: see *Maitland, Equity*, 2nd ed. (1936), p. 77 and the footnote; *Hanbury, Modern Equity*, 3rd ed. (1943), pp. 180-182 and 6th ed. (1952), p. 166. Other references are given in the judgment of the Chief Justice. If no trust resulted the respondent must fail even though the transfer was voluntary. But if the correct principle is that a trust would have resulted from the transfer because it was voluntary and declared no trust, could the presumption of a trust prevail over the inferences to be drawn from the circumstances of the case? First there are the conversations of which the respondent gave evidence. These are consistent with the intention to benefit the appellant. The appellant relied upon the case of *Moate* v. *Moate* (1). If there were a presumption of advancement that would be a complete answer to the respondent's claim that a trust in his favour resulted from the transfer. Referring to the presumption of advancement, Lord *Eldon* said in *Finch* v. *Finch* (2): "This principle of law and presumption is not to be frittered away by nice refinements" (3). I am not convinced that, if I were to say that this presumption does not apply to a conveyance without value in which no trust is declared, made by a man to the woman whom he is about to marry I would be doing what Lord *Eldon* condemned. But if the present case cannot be determined in the appellant's favour by that principle, I would think that the fact that the parties were about to marry coupled with the evidence given by the respondent of his motives for transferring his interest in the land to the appellant would rebut the presumption of a trust. I assume for this purpose that there was the presumption of a trust and not of a gift because the transfer was not for value and in it no trust was declared. Sir *George Mellish* said in *Fowkes* v. *Pascoe* (4) that the presumption of a trust must be of very different weight in different cases. He continued: "In some cases it would be very strong indeed. If, for instance, a man invested a sum of stock in the name of himself and his solicitor,

(1) (1948) 2 All E.R. 486; 92 S.J. 484.
(2) (1808) 15 Ves. Jun. 43 [33 E.R. 671].
(3) (1808) 15 Ves. Jun., at p. 50 [33 E.R., at p. 674].
(4) (1875) L.R. 10 Ch. App. 343.

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the inference would be very strong indeed that it was intended solely for the purpose of a trust, and the Court would require very strong evidence on the part of the solicitor to prove that it was intended as a gift; and certainly his own evidence would not be sufficient. On the other hand, a man may make an investment of stock in the name of himself and some person, although not a child or wife, yet in such a position to him as to make it extremely probable that the investment was intended as a gift. In such a case, although the rule of law, if there was no evidence at all, would compel the Court to say that the presumption of trust must prevail, even if the Court might not believe that the fact was in accordance with the presumption, yet, if there is evidence to rebut the presumption, then, in my opinion, the Court must go into the actual facts" (1). If there be no presumption of advancement in the present case, and the appellant has to rebut the presumption of a trust, when the actual facts of the case are considered and these include his impending marriage with the respondent, I think it is true to say she was in such a position to the respondent as to make it extremely probable that the transfer was intended as a gift. I would accordingly find in the appellant's favour.

TAYLOR J. The appellant and the respondent are, respectively, wife and husband, and this appeal is brought by the former from an order of the Supreme Court of Queensland (*Macrossan* C.J.) made in proceedings instituted by the latter pursuant to *The Married Women's Property Acts* 1890 *to* 1952 (Q.).

The dispute between the parties was concerned with the ownership of certain property, including a large number of items of household furniture and other chattels, but the main bone of contention was the ownership of a dwelling house and land, situated at North Brisbane, which, for a number of years, was their matrimonial home. By the order which is now under appeal many items of the household furniture and chattels were declared to be the property of the appellant whilst a number of others were declared to be joint property. The house and land shared the fate of the latter items and was, in effect, declared to be the joint property of the parties. This appeal is, however, of a limited character and is brought against so much of the order as declares that the appellant holds the said house and land as trustee for herself and the respondent as joint tenants and orders that the appellant do all things necessary to vest in the respondent a legal joint tenancy with her, and against so much of the order as declares that a lounge suite is joint property.

(1) (1875) L.R. 10 Ch. App., at pp. 352, 353.

The evidence shows that the parties were married in Brisbane on 10th November 1923. The respondent had met the appellant in 1919 when he was about 19 years of age and shortly after meeting her he became a boarder at her parents' home. They became engaged in 1920 or 1921 and thereafter they applied themselves assiduously to the task of saving for the purpose of establishing a home. Both were working and earning money but it was the appellant who assumed charge of their joint finances. From the time of their engagement, it is said, the respondent each week handed his wages to his fiancée who, after making an allowance of a few shillings to the respondent, deposited the balance in a savings bank account in his name. Then, in the month of July 1922, arrangements were made for the purchase of a block of land in Gregory Terrace, Brisbane. The purchase price of the land was £200 and when the matter was completed a transfer was taken in the names of the parties as joint tenants. There is a dispute concerning the source of the purchase money, the respondent maintaining that he provided all of it whilst the appellant maintains that each contributed the sum of £100. The respondent says that the purchase price was made up by the sum of £150 withdrawn from his bank account on 6th July 1922—and such a withdrawal is clearly established—together with the sum of £50 which he held in cash at the time. On the other hand the appellant says that the amount of £100 contributed by her consisted of £60 withdrawn from her account, again on 6th July 1922, and £40 which she then held in cash. Later, about the middle of 1923, arrangements were made with a builder to erect a house on the land and by 4th October 1923 the sum of £626 10s. 6d. had been paid to the builder. A cumulative receipt given by the builder on this date purports to acknowledge receipt of this sum from the appellant. In that month the respondent's bank account was closed. The closure followed upon the withdrawal in July of the sum of £100 and in September of £27, the last-mentioned amount being practically the whole of the balance of the account at that time excluding interest not then credited. The respondent maintains that these moneys were paid to the builder; this is disputed by the appellant who claims that the moneys paid to the builder were wholly provided by her.

Shortly after the purchase of the land the appellant began pressing the respondent to transfer his joint interest to her. It is said that, on occasions the appellant's parents joined in the discussions and supported their daughter. Eventually the respondent agreed and on 13th July 1923 he took this step. This was, of course, just about the time when building operations commenced on the land and it

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was about four months before the marriage actually took place. Accordingly when financial assistance was sought from the National Bank in connexion with those operations it was the appellant who became the equitable mortgagor of the land to secure repayment to the bank of an advance of £300, though the arrangement with the sub-manager of the bank was made by both the appellant and the respondent. The sub-manager appears to have thought that he was dealing with " Mr. & Mrs. Wirth " who desired assistance in building their home. This advance provided a substantial proportion of the amount paid to the builder.

Some two years later, in November 1925, a further parcel of land adjoining the matrimonial home was purchased for the sum of £62 10s. 0d. This, the appellant claims, was purchased out of her own moneys and she claims to be entitled to this land to the exclusion of the respondent.

There was on many issues, as the learned trial judge observed, " a sharp conflict " between the evidence of the parties. But the impression which his Honour formed was that in the main the respondent's evidence was the more credible. In particular he rejected the appellant's evidence that each party contributed £100 to the purchase price of £200 originally paid; he was satisfied that the respondent paid £150. He was also satisfied that of the amount paid to the builder the respondent contributed, in two sums, £127 and that he took an active part in obtaining assistance from the National Bank. Further, his Honour formed the view, upon the evidence, that the respondent, for many years, handed his earnings to the appellant to be used by her for their mutual benefit and, no doubt, this arrangement contributed in a large measure to the discharge of the mortgage. The cost of repairs and painting from time to time and also the annual rates, it was found, were paid out of the respondent's earnings until 1950.

At this stage it should be mentioned that the evidence disclosed that the memorandum of transfer by which the respondent's half interest in the land was transferred to the appellant specified, as consideration for the transfer, the sum of £100. The memorandum itself was not, however, tendered in evidence and no suggestion was made by the appellant, or on her behalf, that the transfer was the result of a bargain made between herself and the respondent. Indeed it appears quite clearly that no part of the expressed consideration was ever paid and the irresistible inference is that neither party intended or contemplated that it would be paid. If one may be permitted to speculate it might be thought that the specification of a consideration equal to half the cost of the land when it was

purchased was, merely, a convenient device for stamp duty purposes. Nevertheless, the fact appears that the dealing purported to be for consideration and this was sufficient to require affirmative proof from the respondent that he executed the transfer conditionally upon his wife undertaking to hold the legal title for their joint benefit.

Upon the hearing counsel for each party appeared to be content to treat the dealing as a voluntary transfer and it was this circumstance which gave rise to a discussion whether the presumption of advancement operated in favour of the appellant. It was, no doubt, a result of the same circumstance that no evidence was given explaining why, in the consummation of a transaction which, clearly enough, was not that of sale and purchase, the transfer specified a consideration. The respondent, though asked in his examination in chief was quite unable to say why this had been done whilst the evidence of the respondent on the point was quite silent on the matter. There can be no doubt, however, that the specification of the consideration in no way resulted from the conclusion of a bargain between the parties but, the fact that it was specified throws upon the respondent the onus of establishing affirmatively that the transfer was subject to the retention by him of a beneficial interest in the land. This he endeavoured to do and the evidence is of such a character that no occasion arises for any further reference to the presumption of advancement. But in view of the decision *Moate* v. *Moate* (1) to which we were referred, I propose presently to revert briefly to this subject.

Some reference has already been made to the circumstances in which the respondent transferred his interest to the appellant. As already appears the transfer took place about twelve months after the original purchase and some four months before the marriage and it is of some importance to consider in such scanty detail as the evidence permits how this came about. There can be no question upon the evidence that the respondent provided a substantial portion of the purchase money and that before settlement the parties must have agreed quite definitely that they should become and remain joint owners of the land upon which the matrimonial home was to be erected. Further, it is incontestable that upon settlement they became joint owners and remained so until the month of July 1923 when the respondent transferred his interest. Indeed it may well be said that, in the intervening period, the respondent, in spite of pressure exerted both by the appellant and her parents, wished to leave the legal title undisturbed. Nevertheless, some four

(1) (1948) 2 All E.R. 486 ; 92 S.J. 484.

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months before the marriage he capitulated. But he did so in circumstances which indicate to me that he had no intention of abandoning his beneficial interest and that this was known quite clearly to the appellant. No substantial detail of the discussions which took place between the respondent, on the one hand, and the appellant and her parents, on the other, is given but the respondent says that the appellant said that: "Her mother and father had all *their* property in her name. It was something their people believed in." When asked earlier, whether there was any discussion between him and the appellant and her parents on the subject after the land had been purchased in their joint names he said: "Yes, they were always discussing it" and it is reasonable to infer that the discussions from time to time were along the general lines indicated. On at least one occasion the appellant referred to the fact that, some little time before, the respondent had, whilst at work in a garage, been the victim of a shooting affray and that a bullet, which lodged in the base of his skull, had not been extracted. "At that stage," he said, "we did not know what the outcome would be" and the appellant expressed the view that it might cause his early death. Such a circumstance might, quite possibly, have provided a reason for the respondent making a transfer of his beneficial interest but the observation appears to have been made to illustrate the wisdom of the practice which, as was pressed upon him from time to time, had been adopted by the appellant's parents of having *their* property in her mother's name. Upon my view of the evidence his execution of the transfer in July 1923 resulted from his ultimate acquiescence in and the adoption of a state of affairs which was represented, both by the appellant and her parents as a convenient arrangement with respect to the joint property of married couples. None of the evidence given by the respondent on this point was denied in any way by the appellant and it satifies me that both parties understood that the land was to be held by the appellant for the joint benefit of both parties. It may be fair criticism of this view to say that the evidence which leads to it is without great weight but formal or precise declarations of trust are not to be expected in matters of this character and the evidence does appear to me to be of considerable significance.

The evidence concerning the circumstances in which the further small parcel of land was purchased in 1925 is very meagre indeed. As already indicated the appellant claims that she paid the whole of the purchase money for this land. But the probabilities are that the purchase money, or at least a substantial part of it, was paid out of moneys which were the joint property of the parties.

In addition, this further portion of land was used exclusively as part of the land appurtenant to the matrimonial home and there can be no reason for thinking that the beneficial owners of this land were any different from those who owned the matrimonial home. Accordingly, I can see no reason for thinking that it should not share the same fate.

The lounge suite referred to earlier was purchased more than twenty years ago for approximately £27. The evidence concerning the circumstances of the purchase is scanty, but it does appear that the receipt for the purchase money, less a small initial deposit, was issued by the vendor in the name of the respondent. Notwithstanding this fact the appellant claimed that the whole of the purchase money was paid by her out of moneys withdrawn from her bank account. But a perusal of the evidence leaves ample room for doubt whether such moneys were the separate property of the appellant. However that may be the lounge suite is of little value at this stage and it is, at the least, surprising that either party should, in view of the fact that they did not challenge the findings of the trial judge concerning the many other chattels the ownership of which was in dispute originally, now wish to dispute further about this item. The attention of counsel was drawn to the fact that further contest on this item might well involve each party in expense far beyond its value and, additionally, mean an unjustifiable expenditure of public time and money. Nevertheless, though the parties, ultimately, did not address us on this item neither was prepared to withdraw and the matter must, therefore, be dealt with. But it can, in my view, be adequately and appropriately dealt with by saying that consideration of the reasons given by *Macrossan* C.J. provides no grounds for thinking that his finding on this issue should be disturbed.

The foregoing conclusions do not require for their support any assistance from the so-called principle of "palm tree justice" referred to in *Rimmer* v. *Rimmer* (1) and *Newgrosh* v. *Newgrosh* (not reported but referred to in the former case). That expression appears to suggest the existence of some special judicial discretion for the determination of matters of this character but I agree with *Dixon* C.J. that they must be determined according to ordinary legal principles. It may well be that in cases between husband and wife, where one does not expect to find formal contracts or solemn declarations of trust, the question of the beneficial ownership of property used by both in the course of the matrimonial relationship, will, almost invariably, fall to be decided by consideration of casual and informal

(1) (1953) 1 Q.B. 63.

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incidents rather than of studied and deliberate pronouncements. But to say this is to say no more than that the circumstances calling for investigation in such cases are special and require to be considered in the light of that fact. This may mean that in such cases it will frequently be difficult to ascertain the facts but once they are judicially ascertained, either by the acceptance of express evidence, or by inference, or by presumption, the position will be that the rights of the parties must be determined according to ordinary legal principles.

Finally, reference should be made to the fact that during the course of the appeal the submission was made that transactions between engaged couples may call for the application of the presumption of advancement and, in support, of this proposition, the decision in *Moate* v. *Moate* (1) was relied upon. I mention the matter, however, merely for the purpose of observing that I wish to reserve my opinion on this point. Observations made in *Dyer* v. *Dyer* (2); *Soar* v. *Foster* (3) and *Rider* v. *Kidder* (4) contain statements of principle which tend strongly to the contrary but in view of the fact that the question does not arise directly in this case I find it unnecessary to say more.

For the reasons which I have given the appeal should, in my view, be dismissed.

Appeal allowed with costs. Discharge so much of the order of the Supreme Court as related to the property sub-division 14 *and resub-division* 1 *of sub-division* 15 *of allotment* 252, *County of Stanley, Parish of North Brisbane, and to the lounge suite. In lieu thereof declare that the appellant May Eileen Wirth is entitled to the said property and to the lounge suite as beneficial owner.*

Solicitor for the appellant, *G. H. Kirby.*
Solicitor for the respondent, *L. B. Moynihan.*

T. J. L.

(1) (1948) 2 All E.R. 486; 92 S.J. 484.
(2) (1788) 2 Cox 92 [30 E.R. 42].
(3) (1858) 4 K. & J. 152 [70 E.R. 64].
(4) (1805) 10 Ves. Jun. 360 [32 E.R. 884].