REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

1935.

[HIGH COURT OF AUSTRALIA.]

BOOTH . . . . . APPELLANT;
PLAINTIFF,

AND

BOOTH . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE CENTRAL COURT OF THE TERRITORY OF NEW GUINEA.

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SYDNEY, 1934, *Nov.* 13-15.

1935, *April* 1.

Rich, Starke, and Dixon JJ.

Husband and Wife—Territory of New Guinea—Married woman—Legal capacity—Title to property — Joint venture — Lease taken up in name of wife — Lease transferred from nominee to wife—Beneficial ownership—Partnership—Money remitted by husband to wife for specified purpose—Failure of purpose—Retention of money by wife—Acquiescence by husband—Laws Repeal and Adopting Ordinance 1921-1933 (*N.G.*) (*No.* 1 *of* 1921—*No.* 25 *of* 1933), *secs.* 4, 11, 13, 14, 16.*

The capacity of a married woman in the Territory of New Guinea to acquire and enjoy property is not limited as at common law prior to the *Married Women's Property Acts.*

* The *Laws Repeal and Adopting Ordinance* 1921-1933 (N.G.) provides:—By sec. 4:—"(1) Subject to this ordinance, all Acts, statutes, laws and ordinances of the German Empire and of any German State, and all . . . legislative measures enacted . . . in the name of the German Emperor or the German Government by the competent authority for the time being, and expressed to extend to, or applied to or in force in the Territory shall, as from the commencement of this ordinance, cease to extend or apply

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The meaning and effect of the provision in sec. 16 of the *Laws Repeal and Adopting Ordinance* 1921-1933 (N.G.) that "the principles and rules of common law and equity that were in force in England on" 9th May 1921 "shall be in force in the Territory" of New Guinea, discussed.

In an action brought in the Territory of New Guinea by a husband against his wife he claimed that he was entitled to the beneficial ownership of, or, alternatively, that he was a partner in (*a*) a dredging and sluicing lease in the Territory taken up in his wife's name; (*b*) a similar lease, adjoining the former, taken up two years later in the name of a nominee who subsequently transferred it to his wife; and (*c*) the mining business conducted thereon. He also claimed a sum of money which had not been applied to the specific purpose for which it had been forwarded by him to his wife and had been retained by her. Payment for the leases was made by the wife. The husband and wife both held a miner's right. The actual work of management and direction of the operations on the leased land was done by the husband, but the wife assisted him so far as she was able. All necessary supplies were obtained upon his credit, and proceeds from the gold won were for a number of years credited to his account. The husband claimed that in the taking up of the first lease his wife had acted as his agent, and that the other lease had been taken up by the nominee in trust for him. This was denied by the wife. She also alleged that the money claimed by the husband was part of the proceeds of gold won from her leases, and, further, that he had acquiesced in its retention by her. The trial Judge found in favour of the wife, and the husband appealed to the High Court.

Held that there was evidence to support the Judge's findings, and the appeal should therefore be dismissed.

Decision of the Central Court of the Territory of New Guinea affirmed.

to, or be in force in, the Territory. (2) Nothing in the preceding sub-section shall affect . . . any existing status or capacity." By sec. 11: "Subject to this ordinance, the Acts of the Parliament of the Commonwealth specified in the First Schedule to this ordinance shall, so far as they are applicable, apply to the Territory." By sec. 13: "Those portions of the Acts and statutes of the State of Queensland specified in the Second Schedule to this ordinance that are in force in the said State at the commencement of this ordinance . . . are hereby adopted as laws of the Territory, so far as the same are applicable to the circumstances of the Territory." By sec. 14: "Those portions of the Acts, statutes and laws of England that are in force in the State of Queensland at the commencement of this ordinance, and that are applicable and can be applied to the Territory are, to the extent that they are in force in the said State at the commencement of this ordinance, hereby adopted as laws of the Territory, so far as the same are applicable to the circumstances of the Territory." By sec. 16:—"The principles and rules of common law and equity that were in force in England on the ninth day of May, one thousand nine hundred and twenty-one, shall be in force in the Territory so far as the same are applicable to the circumstances of the Territory, and are not repugnant to or inconsistent with the provisions of any Act, ordinance, law, regulation, rule, order or proclamation having the force of law that is expressed to extend to or applied to or made or promulgated in the Territory."

APPEAL from the Central Court of the Territory of New Guinea.

Charles Booth, of Wau, New Guinea, miner, brought an action in the Central Court of the Territory of New Guinea, against his wife, Doris Regina Booth, in which he claimed (1) that he was beneficially entitled to (*a*) a dredging or sluicing lease, known as "Cliffside," in the Morobe district, registered in the name of the defendant, all the improvements thereon, and the mining business carried on in connection with it, together with all the machinery, plant and tools used and employed in the business; (*b*) the dredging or sluicing lease known as "Clifftop," in the same district, registered in the name of the defendant, and that the transfer of the lease, dated 13th January 1932, from one Ruth Evelyn Mateer to the defendant was void and of no effect; and (2) the sum of £3,000 which he alleged belonged to him and was wrongfully retained by the defendant.

In her defence the defendant claimed that she was the beneficial as well as the legal owner of the two leases, and that all that the plaintiff had done in respect of those properties was done by him as her agent.

The plaintiff demurred to this defence on the ground that by reason of the principles and rules of common law and equity in force in the Territory of New Guinea, pursuant to sec. 16 of the *Laws Repeal and Adopting Ordinance* 1921-1933 (N.G.), he was the owner of the properties; that all his wife's property became his by the *jus mariti*. Chief Judge *Wanliss* overruled the demurrer.

The action subsequently came on for hearing before the Chief Judge. The defendant alleged that the sum of £3,000 claimed by the plaintiff was portion of the proceeds of gold won from the "Cliffside" lease and was her property.

The following statement of facts is substantially as appears in the judgment of the Chief Judge:—About 22nd March 1924 the plaintiff and the defendant left Rabaul for Salamaua with the intention of going to the Morobe goldfields. They had practically no capital. The plaintiff had an account with Burns, Philp & Co. Ltd. at Rabaul. That company in effect acted as plaintiff's bankers and into his account with them was, amongst other moneys, paid his war pension and also that of his wife, the defendant. Before

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leaving Rabaul the company supplied him on credit with a quantity of stores and mining material for his use on the fields and were apparently prepared to give on credit further supplies if necessary. On arriving about the end of May at Salamaua, at that time an uninhabited landing place, their stores were put ashore and for some weeks they remained there, living in a hut or under a tent fly. This delay was caused by the necessity of obtaining native carriers to transport their stores inland to the neighbourhood of what is known as the Wau, which was to be their destination. Both husband and wife took part in this and eventually, about the end of June, a sufficient number was obtained to enable them to start on their rough and difficult journey. A day or two after the start most of the carriers deserted, leaving them with about six, a number quite insufficient for the carriage of the stores. It was then decided that the plaintiff with four of the natives should push on to the goldfields, leaving his wife and two boys, to follow as best they could with the stores. As she had to obtain carriers from the native population adjacent to the road, this was a matter of great difficulty and the journey took some five weeks, weeks of hardship and not unattended by danger. After joining her husband they made a camp on the Bulolo and carried on mining operations. Each of them had a miner's right, but the defendant's share in the work was simply that of helping her husband so far as she was able. Of mining she had no experience. This continued until Christmas, the results of their efforts being about fruitless. On Christmas Day one of the older and more experienced and successful miners in the neighbourhood, named Park, gathered practically the whole of the small mining community to his camp for a Christmas dinner and amongst them were the plaintiff and the defendant. In the course of conversation it transpired that the defendant was the holder of a miner's right. Park was desirous of going to Rabaul and offered the defendant £5 a week if she would look after his lease in his absence. After discussing the matter with her husband the defendant agreed to do so. At this time the plaintiff and defendant were living and working at the Namie Creek, further up the Bulolo than the mouth of the Koranga Creek, where Park's camp was; his (Park's) lease extended for some distance down the Bulolo from his camp. A day or two

after Christmas the defendant took up her duties at Park's camp. Plaintiff broke up his camp on the Namie and on Park's advice went about three miles down the Bulolo from Park's camp prospecting until he came to a small creek which he named Regina Creek, Regina being the defendant's Christian name, and there found good prospects, and on or about 31st December 1924 pegged out a lease extending from a gorge in the river up to the lower end of Park's lease. The ground was pegged by him in the name of the defendant. The ground pegged out had previously been applied for as a lease by one Darling, who however had not complied with the legal requirements. Plaintiff informed his wife of what he had done and she applied for a dredging or sluicing lease of the ground pegged out in her name by her husband, at the same time applying for the forfeiture of Darling's land to the Warden at Morobe together with a withdrawal form on the savings bank at Morobe for the necessary fees and rent which together came to nearly £50. This amount—£50—had been advanced to her by Park. The plaintiff swore that, although it was pegged by him in his wife's name and although she applied for it in her own name and paid all the preliminary fees and rent required to be paid on application, she did all this as his agent and on the distinct understanding that the lease was his property and that she held it for him. The defendant, on the other hand, swears that at this Christmas time in 1924 at Park's camp, Park told the plaintiff that he would tell him of good ground for a lease if he, the plaintiff, would peg it out for her, that he would advance the necessary money for fees &c. out of her wages, that he did tell the plaintiff where to go down the Bulolo past the bottom of his, Park's, lease and that the ground had been applied for by one Darling, who had not done anything with it, but that it would be necessary to have that application forfeited. Admittedly Park did advise the plaintiff where to go; in fact the top boundary of Cliffside adjoins the bottom boundary of Kaindi 4, which is the name of Park's lease. Admittedly it was pegged and applied for in the defendant's name. Admittedly she applied for and obtained the forfeiture of Darling's lease. Admittedly the necessary fees and rent were paid by the defendant out of money advanced by Park to her. The name given by the plaintiff to the lease was Cliffside, the name of the defendant's house in Brisbane.

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The plaintiff named the creek where he first found gold on the lease, Regina Creek, Regina being the defendant's Christian name. I cannot accept the plaintiff's statement that he told her that he pegged it in her name because it would demonstrate that she was the first woman on the goldfields, and if he should get " knocked " while out prospecting she would have no difficulty in holding the ground, and although the lease was in her name it would still be his. He may have made the first two statements in a slightly different form, that getting the lease for her would demonstrate that she was the first woman and the lease being her's would save all difficulty with regard to probate in case he was knocked. The probabilities are all in favour of the view that he intended the lease to be her's, and so I hold.

The application for the lease called Cliffside was granted in June 1925. In the meantime the plaintiff had been working at the mouth of Regina Creek, within the area of land applied for, and was getting good returns. His wife joined him there about April 1925, a house was built and a garden formed, she assisting in the work. The gold won was consigned in the plaintiff's name to Burns, Philp & Co. Ltd., Rabaul. That company credited the plaintiff's account with its value ; supplied the plaintiff with stores and material and debited his account with the price. This continued until February 1926. The returns from Cliffside had been good, especially in January and the early part of February 1926.

In February 1926 one Royal discovered phenomenally rich gold on the Upper Edie Creek and let all the people on the Bulolo know of it. The plaintiff immediately left for the new find with boys, tools and stores. He pegged out two leases, which however were not granted, but from a claim he had he got very rich returns. He also recruited a number of natives. His activities at Edie Creek interfered materially with the mining operations at Cliffside because most of the labour from Cliffside was employed either in actual mining operations at Edie Creek or in taking stores and foodstuff from Cliffside to Edie, or in gardening operations at Cliffside and carrying stores from the coast to Cliffside. Cliffside at this time was more of a base camp for the plaintiff's operations at the Upper Edie than a gold-producing property. All stores for both places

came first to Cliffside. Large quantities of natives' foods were grown there for use both there and at the Edie, the labour for the Edie was supplied from there and the boys were sent down there from Edie for medical treatment and to recuperate. All gold won by the plaintiff at the Edie was sent to Cliffside and it, together with the gold produced at Cliffside, was sent down by the plaintiff, or in his absence, the defendant, at first to Burns, Philp & Co. Ltd., who credited it, together with the Cliffside gold, to the plaintiff's account with them, and, on the other hand, all stores for both places ordered from Burns, Philp & Co. at Rabaul were sent up and debited to the same account. In July 1926 the plaintiff opened an account with the Bank of New South Wales at Rabaul. After that the gold went down to that bank and was credited to plaintiff's account. Throughout 1926 the plaintiff, except when on recruiting expeditions, was at Edie Creek making very large profits. He paid frequent short visits to Cliffside and undoubtedly kept his eye on affairs there. Towards the end of 1926 the defendant informed him that a company —the Morobe Guinea Gold N.L.—had approached her for the sale of Cliffside to them, and asked what he thought about it. His reply was that if he thought the terms satisfactory "we should sell." After some months of negotiation between the company on one side and the defendant on the other an agreement was arrived at and executed by the company and the defendant by which for the sum of £5,000 the company was to have the option of purchasing Cliffside, with certain stores and labour, for a large sum in cash and shares. This agreement bears date 28th April 1927. It is probable from the evidence that it was executed by one Miller, a director of the company, on behalf of the company, on that date, and by the defendant on the following day. Whether executed by both parties on the same day or by one on the 28th and the other on the 29th is of no importance except for the fact that the plaintiff and defendant gave conflicting accounts of what took place and each impugned the veracity of the other, as indeed they did with great consistency throughout the case. Whichever version may be correct, it is common ground that on her executing the deed the defendant was given a crossed cheque of the company on the Bank of New South Wales in her favour for the sum of £5,000. The defendant paid the amount into her

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account with the Rabaul branch of the bank and drew a cheque in the plaintiff's favour for £2,500, which the plaintiff paid to the credit of his account current with the branch while the defendant placed the remaining £2,500 on fixed deposit in her name. The defendant's version was that she wanted to keep the whole £5,000 for herself, that it was her's and her's only, but that the plaintiff wanted her to give it to him to put to his account, that they quarrelled over it during the afternoon and the evening and that on the following day for peace sake she gave him half. He says that when she got it he said :—"This is bunce. We should each take half," that she at once consented and they went straight to the bank and each took £2,500. On the whole I am inclined to his rather than to her account. At any rate, each did take half and it cannot be said that there was coercion on the part of the plaintiff.

The company was a South Australian one, and under the contract the defendant or her husband was to become a director of the company. They left very shortly after the execution of the agreement, went to Australia, and visited Adelaide, the company's headquarters, to confer with the directors in connection with the Cliffside business. While there the defendant attended several meetings of the directors in her capacity as a director, she, and not the plaintiff, having been appointed a director. She returned to Rabaul, and in August both plaintiff and defendant went down to Australia. They went on to Adelaide, where the defendant attended directors' meetings as a director. The plaintiff was present at one at least of these meetings and discussed the Cliffside business with them. The board arranged that he should return to Cliffside for a month to assist their expert, who had no experience of conditions and labour in New Guinea, the plaintiff to be paid £50 for his month's service. In pursuance of this arrangement the plaintiff returned to the Bulolo and carried out his part of the agreement. During her first visit to Australia in connection with the agreement with the Morobe Guinea Gold company's contract, the plaintiff, about June 1927, had radioed his wife to procure some powers of attorney under the *Mining Ordinance*. He states that he did so to enable him to apply for a dredging or sluicing lease of what is now known as Clifftop. The defendant, who was in Sydney, procured from two of her friends, Mrs. Mateer

and Mrs. Chisholm, powers of attorney to her husband in the form required by the *Mining Ordinance*. These were registered in Rabaul and the plaintiff, as attorney for Mrs. Mateer, pegged out Clifftop, and on 11th July 1927 applied for it, in her name, as a dredging or sluicing lease. The power of attorney executed by Mrs. Chisholm was used by him to apply for another lease at the Upper Edie Creek. The land comprised in Clifftop lease consisted of two strips of land, one on each side of and adjoining the Cliffside land and extending from one end of Cliffside to the other, and if worked as one with Cliffside gave a width of 13 chains instead of the three chains which was the width of Cliffside. In his application for Clifftop the plaintiff stated that it was essential for the successful working of Cliffside. What Mrs. Mateer had to do with the efficient working of Cliffside he did not say, but it is clear beyond all doubt that she was a mere dummy, had no idea of how her power of attorney was to be used and in fact forgot all about the matter. The plaintiff stated in evidence that he and he alone appreciated the value of Clifftop, that if the sale to the Morobe Guinea Gold company was completed, that company would require the land, and if it did not it was still valuable as an adjunct to Cliffside, and that he knew it also contained gold. He also stated that he had never discussed the matter with his wife and that she had no idea of its value. She on her part swore that she did know of its importance; that she had talked the matter over with two experienced miners and also with her husband; that she was so impressed with the advisability of acquiring Clifftop or what was afterwards known as Clifftop, that she discussed the matter with the then Warden, who told her that if she wanted to acquire it she would have to surrender the lease of Cliffside and repeg the larger area and that that was dangerous at the time, and that she discussed the matter of applying for it in her own name before she went to Australia with her husband; and that it was arranged with him that when she went down she should procure from her relatives powers of attorney to her husband, not one only, but several, because, as he said, "you never know what might turn up on the fields." The reason for sending him powers of attorney from Mrs. Mateer and Mrs. Chisholm from Sydney was that he radioed urgently for them and she had been delayed in seeing her relatives and to

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save time got these two friends to give her their powers. In fact she did send up several others from her people in Brisbane shortly after, as well as one from herself. Although it is impossible to place reliance on the defendant's evidence, I feel that there is little doubt but that the question of acquiring what is now Clifftop was discussed by the plaintiff and defendant before she went away. In spite of her protestations to the contrary in the witness-box, at that time and for some time afterwards their relations were friendly and intimate and they discussed their mining operations and other business matters freely, and it is hard to imagine that this matter of Clifftop, so urgently required for the proper working of Cliffside and for the convenience of having gardens and a place for a home, should have remained secretly locked up in the plaintiff's mind. That he wanted to have powers of attorney made out to him is admitted: it is not likely that he withheld from his wife what he wanted them for.

While in Rabaul, between her two visits to Australia in connection with the Morobe Guinea Gold business, the defendant made inquiries about a proposed aeroplane company which her husband had told her he thought of putting money into: she says that in fact she came from Australia for that purpose. As a result of her inquiries she told the plaintiff that he would be foolish if he touched it and her dominating husband, as she described him, took her advice, although as far as the evidence goes he did not know that she came for that purpose. However, after they went back to Australia he still considered the possibilities of an air service to the goldfields and after some negotiations that failed he and the defendant met in Brisbane a Mr. Brain, who was employed by an air service company there, the Qantas. The plaintiff proposed that Brain should come to New Guinea and join him in starting an aeroplane service to the goldfields. The negotiations came nearly to completion. Brain was to join the plaintiff on terms agreed upon and 'planes were to be purchased and it only remained to get Brain's employer to release him from his contract with it. The plaintiff then left for New Guinea, leaving his wife in Brisbane with power to complete the contract. Either on the day of his arrival in the Territory or the following day, the plaintiff radioed down to his wife in Brisbane £3,000 to purchase the 'planes. In his evidence the plaintiff stated that he did so in

response to a radio from her to the effect that "business completed, send down money." The defendant denies that she sent any radio. In effect it does not matter much which version is true. From the fact that the plaintiff sent the money down immediately on his arrival it is probable that he had arranged to do so before leaving Brisbane. Again, even crediting her with the worst intentions, it is hardly likely that the defendant would have made use of such a subterfuge to obtain the money, if she knew that the business had not been and would not be completed. What did happen was that the business was not completed because Brain's employer would not release him from his contract with it and Brain's and the plaintiff's projected arrangement lapsed. The defendant, however, had the £3,000 in her possession and without consulting her husband or obtaining his consent or approval spent £500 of it, placed £1,500 on fixed deposit in her own name and bought £1,000 worth of Commonwealth bonds. This was in October 1927. The plaintiff's account of what subsequently happened in connection with the business is incredible. He says that he knew nothing about it until he next saw his wife at Salamaua or the fields, that he then said to her: "What happened to that aeroplane business?", that she said that the Qantas board of directors would not sell the 'planes if it would cause them to lose Brain's services, that he said: "What have you done with the money?", that she replied that she had spent £500, had put £1,500 on fixed deposit and had bought £1,000 worth of Commonwealth bonds. He said: "In whose name?" She said: "My own." He said: "You are pretty rough aren't you?" She said: "Don't be silly, what is mine is yours." He concluded the narrative by saying that he did not bother any further about it then. In fact the defendant was not at Salamaua or the fields before February 1929, well over a year after she received the money. In fact too, he did see her in Australia about February 1928, some four months after he sent her the money. If there is any truth in any part of his account, she must have told him then. It is, however, incredible that he sent down £3,000 to his wife because she radioed that the business was completed and got no acknowledgment of its receipt, got no word as to what arrangements were made or being made to start the service that he was so keen about, that he was left in

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complete ignorance of what had happened or was happening and made no inquiries until this casual talk with his wife. He had stated in an affidavit sworn in support of an application for an interim injunction in this action that when he heard what she had done he remonstrated with her but she declined to refund the money and that he did not enforce his claim. His remonstrations, according to his own evidence, were about as strong as a good-tempered husband might make to his wife because she had told him that she had bought a new hat and put it down to his account. The defendant, on the other hand, denies that she sent her husband a radio to the effect that the business was settled and to send the money. According to her he sent it without any request from her, and after its receipt she wrote telling him that the 'plane agreement had lapsed and further telling him what she had done with the money. This appears much more probable than his account except that if she told him how she had disposed of the money it could have hardly contained the news that she had spent £500 on herself. Assuming that her version is correct, as appears probable, it is hardly in accordance with the role she has assumed of a poor down-trodden wife dominated by a brutal husband. It rather is the attitude of a shrewd calculating woman dealing with a fond complaisant husband. She does not assert or infer that she obtained his consent to her disposal of the £3,000. According to her, she disposed of it first, wrote afterwards telling him what she had done and he acquiesced in her action. Neither version carries conviction. However, this money remained as she had disposed of it.

In February 1928 the Morobe Guinea Gold company declined to exercise its option of purchase and Cliffside was let on tribute to two men for two years. The plaintiff arranged the terms and drew up the agreement, but the parties were the two men on one part and the defendant on the other. The plaintiff and the defendant were still on good terms with each other in spite of the defendant's protestations to the contrary in the witness-box. In February 1928 they went together for a prolonged visit to America and Europe, from which they did not return until February or March 1929. The defendant swore that during this period the plaintiff squandered many thousands of pounds and that she had to use money which she had invested

in safe securities in order to pay his debts and their return fares. She did in fact obtain from Australia some £1,100 in all, which was paid into his account in London and elsewhere. This £1,100 was part of the money sent by him to her to buy aeroplanes, which as already described she annexed and diverted into her own pocket. Had she wished not to pay the £1,100 she could have declined. That would have cut short their stay in London, which she no doubt found very pleasant and interesting. In truth, except for a rather absurd purchase of land at Hollywood, the defendant appears to have had quite as great a share in the expenditure of money as the plaintiff.

By March 1929 they were both back in the Territory. The plaintiff rented and furnished a house near Rabaul for his wife while he returned to the goldfields. The two men were still in possession of Cliffside and continued so until March 1930. Mrs. Booth paid a short visit to Cliffside and returned to the house her husband had taken for her while he remained up on the fields. He arranged two tributes over parts of Cliffside, the latter, according to her, against her wishes, at least as regarded some of its terms. In the latter half of 1930 the defendant suggested to her husband that she would like to get her brother Norman Wilde up from Queensland. The plaintiff agreed and she wrote to him to come. He did so and on his arrival the plaintiff engaged him at a salary of £1 per day and his keep. His keep meant that he lived at Cliffside as one of the family. He was a sawyer by occupation and was principally employed in cutting and preparing timber for a new house and superintending under the plaintiff a big water race in course of construction. About Easter the following year Wilde married and he and his wife lived at Cliffside. In June 1931 the defendant went to Australia. She returned to Cliffside where the plaintiff was, in August. Shortly after her return he noticed a marked coldness in her manner to him, and in October she confessed to a love affair with a man whose name she refused to disclose and asked the plaintiff to divorce her. Subsequently she asked the plaintiff to make a new start in their married life. He agreed to do so provided she and the man ceased all further communication. She broke her word within a day or two. However, their life returned outwardly to normal.

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In December the defendant on the advice of her medical man went to Australia and the plaintiff accompanied her. She disembarked at Brisbane, where her parents live. He went on to Sydney, where he had business to attend to. While in Sydney, the plaintiff received a letter, dated 13th June 1932, from a firm of Sydney solicitors informing him that his wife had consulted them and she refused to live with him again and that he was not to interfere with her, her property or affairs. This was the first indication he had of any such thing. They had parted in Brisbane amicably. All attempts by the plaintiff to effect a reconciliation failed. About September, the defendant, without the plaintiff's knowledge, returned to Cliffside and took possession there.

Just before leaving for Australia at the end of December 1931 the plaintiff and the defendant each appointed the defendant's brother, Wilde, his and her agent under the terms of the *Mining Ordinance*. The plaintiff also authorized Wilde to operate on his account in the Bank of New South Wales, Salamaua. Out of that account the plaintiff had been paying all the expenses of his mining operations and those in connection with Cliffside, and into it went the proceeds of all gold won from these sources except what the defendant may have had put to her credit in one of her accounts. In addition to appointing Wilde her agent, the defendant gave him a very wide power of attorney. This fact she concealed from her husband. In her evidence she stated that she had made up her mind before leaving Cliffside that she would have nothing more to do with her husband, and that Wilde was to manage Cliffside until she was able to return there and take charge. This she must have told Wilde and they must have agreed to deliberately despoil the plaintiff. From the day of his departure Wilde, instead of paying the moneys he received into plaintiff's account, paid them into the defendant's account. At the same time he drew cheques on the plaintiff's account for all expenses, including his own salary. This continued for some months, when the plaintiff, hearing of Wilde's actions, terminated his authority to Wilde to operate on his, the plaintiff's, account. In addition, the plaintiff had told Wilde that probably a company would pay a sum of £1,000 as a first instalment of the purchase money for some claims that the company was purchasing from a syndicate of which the

plaintiff was trustee and one of which claims was in the name of the defendant. A cheque for £1,000 was received from the company by Wilde and, in defiance of his instructions, paid into the defendant's account, and all the time he was the plaintiff's trusted servant and drawing his salary by cheque, signed by himself, drawn on the plaintiff's account. Greater treachery it would be hard to find. Some time before December 1931 the plaintiff became the holder of a miner's homestead lease close to Cliffside. On it he commenced to build a house, which at the time of plaintiff's and defendant's departure at the end of 1931 was nearing completion. It was to this house that the defendant went on her return in September 1932, and of which she then took possession. It is not asserted or claimed that she had any right to the house. It is on what is admittedly the plaintiff's land and was built by him and furnished by him. In it was, besides the furniture, all the personal belongings that he had left at the old house when he went to Australia with his wife in December 1931.

The plaintiff on his arrival at the Bulolo in December 1932 went to this house. His way was barred by his wife and another woman, and he was met by insults and attacked by two male friends of the defendant and was denied access to his papers and documents. When the defendant's new house was ready she went to it, taking everything from the plaintiff's house with her. When she left she left the place open and unguarded, for anybody to make free with. She did not communicate to the plaintiff the fact that she had gone, and it was only sometime after the plaintiff knew what had happened. Unfortunately, apart from formal matters, the only evidence of any importance before the Court is that of the plaintiff and the defendant: on neither can reliance be placed. Some of the plaintiff's evidence was incredible and much was exaggerated. His whole attitude is that from the start the defendant was little more than a lay figure. That he was the head and front of all the business, that he managed and decided all the mining operations, conducted all negotiations, drew up all agreements or contracts and where the defendant was a party to an agreement or a contract she was only nominally so, was only his nominee or agent. The fact is that, as was natural with a married couple being on good terms with each

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other, the two of them discussed each other's business and got the benefit of the other's advice. Much of the correspondence in which the defendant was a principal was typed, and often, no doubt, composed, by the plaintiff, as were several agreements to which the defendant was a party. He also took a great part in the management and conduct of mining operations at Cliffside and his success as a recruiter was of great value in the working of the property. So, on the other hand, was the work done by the defendant in the care of the garden, the management of the natives, the conduct of the hospital on the grounds and in other directions. Unfortunately the defendant's evidence is quite unreliable. Prior to the incident of the love affair, the plaintiff and the defendant lived to all appearances as an ordinary happy married couple. After the plaintiff's discovery of the defendant's conduct and in spite of her compact with her husband to start their married life afresh, her attitude towards him has been one of hatred and deceit. This state of mind has tainted her evidence throughout. According to her, from the first, he treated her badly and by his bullying methods dominated her. That, she says, is why she allowed the proceeds of the gold to be placed with, first, his account with Burns Philp & Co. and later to his bank account. That is why she had no bank account of her own. The fact is that, when in 1924 she went to Morobe, the plaintiff had a running account with Burns, Philp & Co., and it was continued. Burns, Philp & Co. did not know her and for her to have asked for a separate account and to be financed by them would have been ridiculous. That being the state of things at the start, so it continued and quite naturally. All the profits from Cliffside went into that account, so did all the profits from Edie Creek: and all the expenses for both places were paid out of that account and all the stores for both places debited to it. This continued until she broke off relations with the plaintiff in January 1932, except that for some years the plaintiff had accounts at the Bank of New South Wales at Rabaul and Salamaua and the gold was consigned to them instead of Burns, Philp & Co. Notwithstanding her assertions that her husband refused to let her have a banking account of her own, it is a fact that she had one at Rabaul from about the middle of 1926 into which he paid about £600 as a beginning and a

further like sum in the first half of 1927, and, although it was not made absolutely clear, probably another like sum later. She also had in 1927 a current account with a bank in Adelaide and, either then or later, another in Brisbane. In addition, she drew on her husband's account with Burns, Philp & Co. for hundreds of pounds, and it is not improbable that she, unknown to her husband, placed some of the gold or its proceeds to one or the other of her accounts.

Whatever she thought about the legal position with regard to the ownership of Cliffside and assuming that she considered herself the equitable as well as the legal owner, I have no doubt that she consented to the proceeds of Cliffside gold going to her husband's credit, that she was willing that he should have it, that she was willing to hand over her money to her husband, just as he was willing to manage for her and to pay all necessary outgoings and to give his time and skill to her affairs and to supply her with ample funds for herself. To neither of them at the time did it matter whose the lease was in law or whose the money in law; what each owned was there for the comfort of both. Hence I find, subject to what I have to say hereafter in dealing with the specific claims and defences, that although the money derived from Cliffside mining operations was the property of the defendant, she handed it all over to the plaintiff, and once she gave it to him, as she did for years, it became his. She trusted him and felt that she would get all she wanted as long as he had it. And in fact, until the love affair there, was no difficulty. In the same way the plaintiff paid out of his account or accounts for all stores, tools, and labour used in connection with Cliffside. But all through it was the plaintiff's account. When the defendant paid money into it she gave it to him and it became his. In like manner, when he provided goods and stores for Cliffside, he in effect gave them to the defendant. Each of them could have terminated the arrangement at any time, but as long as she paid money or sent gold to his account it became his. So long as he provided stores and material they became hers. She could at any time have refused to pay moneys or consign gold to his account. She did not do so until December 1931, and then in an underhand manner. He did not discontinue supplying her with stores or money for expenses until he discovered her and Wilde's

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treachery about February 1932. Dealing now with what the plaintiff claims :—(1) The plaintiff's claim to be the equitable owner of Cliffside and the mining business in connection with it fails for the reasons I have given. (2) The next claim is that the plaintiff is beneficially entitled to Clifftop and that the transfer of the lease of it dated 13th January 1932 from Mrs. Mateer to the defendant is void and of no effect. Other relevant facts are that on 13th January 1932, just at the time the defendant broke off her relations with the plaintiff, she sent for Mrs. Mateer in Sydney and prevailed upon her to transfer the lease to her, the defendant, to cancel her, Mrs. Mateer's, power of attorney to the plaintiff and to give one to the defendant. It was part of the defendant's scheme to strip the plaintiff of everything she could. She gave Mrs. Mateer, through her solicitors, a cheque for £100 apparently by way of consideration for the transfer, although Mrs. Mateer was quite willing to oblige her friend without being paid. However, the transfer was made out and the defendant registered as owner of the lease. I cannot see anything to prevent Mrs. Mateer doing what she did. She had given to the plaintiff a power of attorney which enabled him as her attorney to apply for a lease. He did so and it was granted to her. There was no agreement between them that she was to, or did, hold it in trust for him. She incurred all the obligations and liabilities of a lessee. She did what in law she was entitled to do, effected a transfer of it. If there is any question of it being held in trust, it will be remembered that in the application for the lease, made out by the plaintiff, the reason given for the application was that it was essential for the successful working of Cliffside. Cliffside was the property of the defendant, not the plaintiff, and, as the plaintiff himself swore, Cliffside and Clifftop were always worked and treated as one property. Under these circumstances the *cestui que trust*, if there was a trust, was the defendant, not the plaintiff. Alternatively with the claims for beneficial ownership of these two leases and the mining business, it was claimed that the plaintiff and defendant were partners in them. I need only say that this claim fails. There is nothing to support it. The claim for the £3,000 I have already dealt with, and for the reasons I have given also fails.

From this decision the plaintiff now, by leave, appealed to the High Court.

Teece K.C. (with him *W. J. V. Windeyer*), for the appellant. The respondent was a trustee of the mining properties for the appellant, or, alternatively, on the facts, there was a partnership between the parties in respect to those properties. Both the appellant and the respondent were unreliable as witnesses; therefore this Court is just as capable as the trial Judge of determining what are the proper inferences to be drawn from the facts. It is significant that, with the exception of one item, all the gold obtained from Cliffside was paid by the respondent herself into the appellant's bank account, although she had a separate bank account. The facts proved, e.g., proceeds paid into and expenses paid from the appellant's account, the supplying by him of all the labour required, official returns completed by the respondent at material dates, the circumstances surrounding the sale of the option, the division in equal shares of the amount obtained for the option, and the subsequent agreement for the working of the property, are inconsistent with sole beneficial ownership of Cliffside by the respondent. The respondent's evidence in regard to this matter is at variance with documentary evidence before the Court. The respondent's name appears in that working agreement merely because she was the registered owner of Cliffside. What was done under that agreement affords strong evidence that she was not the sole beneficial owner. The facts that, from the time the lease was taken up until differences arose between them, all the proceeds were paid to, and all the expenses were paid by, the appellant, that he did the active managing of the property and supplied all the labour, show that the appellant was the beneficial owner. In order to establish a partnership it is not necessary to prove expressly any agreement: it can be inferred from the evidence (*Peacock* v. *Peacock* (1); *Lindley* on *Partnership*, 9th ed. (1924), pp. 110, 111). Alternatively, if the appellant was not the beneficial owner, then inasmuch as they were carrying on a business in common with a view to profit the appellant and the respondent were partners (*Partnership Ordinance* 1912 (Papua), sec. 5). The

(1) (1809) 2 Camp. 45; 170 E.R. 1076; 16 Ves. 49; 33 E.R. 902.

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appellant cannot be regarded as having made an advancement in favour of his wife (*Marshal* v. *Crutwell* (1); *Hoyes* v. *Kindersley* (2)).

[DIXON J. referred to *Davies* v. *National Trustees Executors and Agency Co. of Australasia* (3).]

That case shows that the important fact is: What was the intention of the advancor at the time the property was put into the name of the advancee? The Court disregards a presumption of advancement; it decides on the evidence (*Ex parte Cooper*; *In re Foster* (4); *Lewin* on *Trusts*, 13th ed. (1928), pp. 183, 188). In the absence of evidence to the contrary co-partnership in profits means co-partnership in the assets by which those profits were made (*Gallagher* v. *Talty* (5); *Syers* v. *Syers* (6)). Where there is not any express evidence as to their respective shares in the partnership property, the partners are entitled to a moiety therein (*Peacock* v. *Peacock* (7)). This principle is in force in New Guinea (*Partnership Ordinance* 1912 (Papua), secs. 23, 27). Recognition is given by secs. 86 and 88 of the *Mining Ordinance* 1928-1933 (N.G.) to partnership interests in leases taken up thereunder. A partnership may be dissolved only by a notice to that effect expressed in clear and definite terms (*Halsbury's Laws of England*, 1st ed., vol. 22, p. 85). Mere exclusion does not amount to a dissolution (*Bentley* v. *Bates* (8); *Lindley* on *Partnership*, 9th ed. (1924), p. 605). The circumstances surrounding the taking up of the property known as Clifftop show that it was taken up in the name only of a third party, who had no real interest in the matter, for the benefit of the appellant solely or of the partnership between the appellant and the respondent. The evidence shows that the sum of £3,000 was the property of the appellant and remained so. It was, without his consent, applied by the respondent to purposes other than the specific purpose for which it was forwarded by him to her. Under the law applicable to New Guinea the respondent, as a married woman, did not have a legal capacity independent of her husband. The expression

(1) (1875) L.R. 20 Eq. 328.
(2) (1854) 2 Sm. & G. 195; 65 E.R. 362.
(3) (1912) V.L.R. 397.
(4) (1882) W.N. 96.
(5) (1888) 7 N.Z.L.R. 35.
(6) (1876) 1 App. Cas. 174.
(7) (1809) 16 Ves., at p. 56; 33 E.R., at pp. 904, 905.
(8) (1840) 4 Y. & C. Ex. 182; 160 E.R. 971.

"common law" in sec. 16 of the *Laws Repeal and Adopting Ordinance* 1921-1933 (N.G.) means common law as distinct from statute law (*Levy's Lessee* v. *M'Cartee* (1)); therefore the *Married Women's Property Acts* of England and Queensland are not incorporated in the law of New Guinea. The doctrine of unity of husband and wife is part of the common law still in force and must be applied under the ordinance to New Guinea. Assuming that the leases were obtained by the respondent in her own right, they were acquired under coverture. Neither the leases nor the item of £3,000 are her separate property. Even if the respondent took up the lease for her own benefit, merely utilizing her husband as agent, and she made the preliminary application with moneys she had earned, the moneys earned by her for her labour were under the common law the property of her husband, (*Fleet* v. *Perrins* (2)). Alternatively, if under sec. 16 of the *Laws Repeal and Adopting Ordinance* the doctrine of unity of husband and wife is not in force in New Guinea, the German law in respect to status and capacity remained in force pursuant to the provision that any existing status or capacity shall not be affected.

Abrahams K.C. (with him *Stephen*), for the respondent. The law incorporated in the law of New Guinea by the operation of sec. 16 of the *Laws Repeal and Adopting Ordinance* 1921-1933 (N.G.) includes both the written and the unwritten law. This is evidenced by the use in that section of the words "principles and rules . . . in force" on 9th May 1921 and by a reference to secs. 11-14. The common law was adopted only so far as it had not been affected by statute. The old common law rule of the unity of husband and wife was not in force. Restrictions on the independent legal capacity of married women were not part of the principles and rules of common law in force in England on 9th May 1921. The effect of legislation in respect of married women's property is discussed in *Halsbury's Laws of England*, 1st ed., vol. 16, pp. 321 et seq., and in *Lush* on the *Law of Husband and Wife*, 3rd ed. (1910), p. 41. The common law in this regard was completely set aside (*Halsbury's Statutes of England*, vol. 9, p. 314).

(1) (1832) 31 U.S. 102 ; 8 Law. Ed. 334 ; 10 Curt. Dec. 47.
(2) (1869) L.R. 4 Q.B. 500.

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[STARKE J. referred to *Butler* v. *Butler* (1).

[DIXON J. referred to *In re Jupp*; *Jupp* v. *Buckwell* (2).]

Sec. 16 of the *Laws Repeal and Adopting Ordinance*, as originally framed and as now framed, should be similarly construed. Under the common law in force on 19th May 1921 the respondent was and is in the position of a *feme sole*. In the circumstances of this case the explanation of every action is that the parties were husband and wife living together in amity. The facts show that Cliffside was not an advancement made by the appellant to the respondent. The acts of the parties do not establish a trust. The property was her separate property. The position is that whilst the parties were living together in amity as husband and wife, the respondent allowed the appellant to receive proceeds from that property, which proceeds became his except in certain specific circumstances (*In re Young*; *Young* v. *Young* (3); *Halsbury's Laws of England*, 1st ed., vol. 16, p. 397). As to Clifftop, there is not any evidence that the donor of the power of attorney agreed that the property was taken up and held in trust for the appellant or for anybody. There was not a partnership between the appellant and the respondent relating either to Cliffside or to Clifftop. The evidence relating to those properties does not disclose any of the usual and essential *indicia* of partnership (*Badeley* v. *Consolidated Bank Ltd.* (4); *Peacock* v. *Peacock* (5)). The Cliffside and Clifftop properties are the respondent's separate estate in equity because by clear acts the appellant has manifested an intention that they should be her separate estate (*Slanning* v. *Style* (6); *Mews* v. *Mews* (7); *Ex parte Whitehead*; *In re Whitehead* (8)), even if the *Married Women's Property Act* does not apply to New Guinea. As regards the item of £3,000, the evidence shows that the appellant acquiesced in the position for six years; during four of those years the parties lived together in amity. This item, held by the respondent without any demur from the appellant, was a rebuttal as to certain of the respondent's moneys received or held by, or under the control of, the appellant.

(1) (1885) 14 Q.B.D. 831.
(2) (1888) 39 Ch. D. 148.
(3) (1913) 29 T.L.R. 391.
(4) (1888) 38 Ch. D. 238.
(5) (1809) 2 Camp. 45; 170 E.R. 1076; 16 Ves. 49; 33 E.R. 902.
(6) (1734) 3 P.Wms. 334, at p. 337; 24 E.R. 1089, at p. 1090.
(7) (1852) 15 Beav. 529; 51 E.R. 643.
(8) (1885) 14 Q.B.D. 419.

Teece K.C., in reply. The doctrine of the unity of husband and wife has not been set aside; it has been modified only (*Edwards* v. *Porter* (1)). The expression "principles and rules . . . in force" in the ordinance means the principles and rules of common law and equity which for the time being are applied in determining legal rights in England. The mere fact that there were not any accounts or aliquot proportion of shares or division of profits between the parties does not indicate the non-existence of a partnership (*Peacock* v. *Peacock* (2)). The facts here are materially different from those in *Badeley* v. *Consolidated Bank Ltd.* (3), which is, therefore, distinguishable. The carrying on of a business by two or more people who participate in the profits therein constitutes a partnership. Here the parties carried on a joint venture with a view to profit; therefore they intended a partnership.

Cur. adv. vult.

1935, April 1.

The following written judgments were delivered:—

RICH AND DIXON JJ. By the order under appeal the Supreme Court of the Territory of New Guinea determined against a husband three claims made by him in a suit against his wife.

The first claim related to a dredging and sluicing lease in the district of Morobe, called "Cliffside," which, in 1924, had been taken up in her name. The second related to a neighbouring dredging and sluicing lease, called "Clifftop," which, in 1927, had been taken up in the name of a nominee from whom she subsequently took a transfer. The third claim was made in respect of a sum of £3,000 which she had received from her husband in October 1927. The husband claimed that none of these pieces of property was his wife's, but that, either they were his exclusively, or else he and she owned them in common, as partners, or simply as co-owners.

The parties were married in 1919 and came to New Guinea in the following year. In 1924 they set out together for the Morobe Goldfields, and, after an arduous journey, established themselves on the Bulolo River. Each obtained a miner's right. At the end

(1) (1925) A.C. 1.
(2) (1809) 2 Camp. 45; 170 E.R. 1076; 16 Ves. 49; 33 E.R. 902.
(3) (1888) 38 Ch. D. 238.

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of that year the husband, Booth, on the advice of a man who was already conducting some successful mining operations there and who had arranged that Mrs. Booth should take charge of his place during a short absence, went prospecting two or three miles down the Bulolo River where he found encouraging conditions near a small creek flowing into the river. He named the creek after his wife and pegged out two claims extending about 100 chains up the river and a chain and a half on each side from midstream. He wrote out a notice of application for a lease in his wife's name and placed it in a tin which he nailed to one of the pegs. Next day he made some alteration in his pegs so that the claim was for one large area. But the notice of application remained as it was. On his return to his wife, he made out an application for a dredging and sluicing lease in her name and she signed it. About £50 was required for fees and rent payable upon the application and this sum she borrowed. Booth gave evidence to the effect that he gave his wife to understand that she would hold the lease for him as his agent; but his Honor, Chief Judge *Wanliss*, who heard the suit, did not accept this testimony and found that Booth intended the lease to be his wife's property.

The lease, which was granted, was worked with very great success. Booth did the actual work of management and direction. All necessary supplies were obtained by him upon his credit. For more than a year the greater part of the gold won was sent to the suppliers, who placed the proceeds to the credit of his account with them. Then the gold was sent to a bank, which also placed the proceeds to his account.

The second lease, that of Clifftop, was pegged out two years and a half after the first, namely, 11th July 1927. Booth and his wife had gone to Australia earlier in the year in connection with a proposed sale of Cliffside, which in the end did not go through, and he had just returned, leaving his wife behind. A dummy seems to have been thought necessary or desirable for a second lease and Booth requested his wife to obtain powers of attorney from persons in Australia. One of Mrs. Booth's friends put her signature to a form of power of attorney in favour of Booth, who, on receipt of the document, pegged out a claim and made an application in the lady's name.

She had little comprehension at the time of what she was asked to do and less recollection afterwards. The areas pegged out adjoined the Cliffside lease on either side and the application made the somewhat naive statement that the area was essential for the successful working of the Cliffside lease. Early in 1932, Mrs. Booth decided to leave her husband. She took the precaution to obtain from her friend whose name had been used for the application for Clifftop a transfer of that lease. Thus both Cliffside and Clifftop stand in Mrs. Booth's name.

The sum of £3,000, which forms the third subject of claim, was sent by Booth from New Guinea to his wife in Brisbane on 5th October 1927. After lodging the application for the Clifftop lease, Booth had again visited Australia, and, before leaving, he had entered into some negotiations for the purchase of two aeroplanes with a view to establishing an air service in New Guinea. These negotiations were incomplete when he returned to New Guinea and he authorized his wife to conclude the bargain. Believing that she had done so, as he says, he sent the money to her. However the negotiations went off and she did not repay the £3,000 to her husband. Instead, she spent £500, invested £1,000 in Commonwealth bonds and £1,500 on fixed deposit in her own name. Contradictory accounts of what took place in reference to the money were given by the parties. The learned Judge was decided in rejecting the husband's version and accepted that of Mrs. Booth, but with feelings of less certainty. According to her, she wrote to her husband telling him that the transaction had gone off and describing what she had done with the money, and she said that he made no complaint or remonstrance. About eighteen months afterwards, when they were in London, he asked her to transfer some money there, because he had not enough. She, accordingly, caused £1,500 to be remitted to her in three sums, which she paid into his account. At least £1,200, if not all, of this sum came from that which she had invested.

This narrative states sufficiently the facts surrounding the acquisition by Mrs. Booth of the pieces of property the beneficial ownership of which is now in dispute. But these facts occurred as incidents in a long course of business and adventure in which the parties were associated. The manner in which they were so associated is probably

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the consideration of most weight in deciding the question whether they, or, at any rate Booth, did not intend that his wife should take the beneficial ownership. Chief Judge *Wanliss* has reviewed at length the greater part of the material events which befell them, and it is unnecessary to recount those facts. It is sufficient to state shortly what are the chief additional matters relied upon by the appellant in support of his contentions. All the expenses of operating claims standing in the name of either of them was borne by accounts in Booth's name. In dealing with the gold produced from Cliffside and that produced from other claims taken up in Booth's name no discrimination was practised. Until the middle of 1926, current accounts were opened by the parties in a bank at Rabaul: all the gold was consigned to the commercial house which provided the stores and other supplies. When the bank accounts had been opened, most of the gold was despatched through the bank on Booth's account, but two parcels, each worth something over £600, were sent through the bank on his wife's account, and these parcels came, not from Cliffside, but from the claim taken up in Booth's name. When, in April 1927, a deposit of £5,000 was paid by the proposing purchasers of Cliffside, a deposit ultimately forfeited, the amount was divided between Booth and his wife. The transaction was carried out in her name and the cheque for the deposit was paid into her bank account, but she gave him a cheque for £2,500 and invested the remaining £2,500 on fixed deposit in her own name. According to his evidence, which on this point was accepted, he proposed the division and she at once assented. The assets, in respect of which the deposit was paid, consisted of the lease of Cliffside, which was in Mrs. Booth's name, the plant and stores which had been acquired by him in his own name and the benefit of the native labour which had been recruited by him. They were all included in an agreement in which she was the vendor and he was not a party. In relation to native labour on Cliffside, it seems almost to be an accident whether official returns were made in his name or hers. Then in their financial relations before the break between them, no effort was made to distinguish funds either in reference to their source or in their application.

The contention of the appellant is that, from the whole case, it appears that neither Mrs. Booth nor her husband intended or considered her to be the beneficial owner of Cliffside and that all that remains is to decide between the alternatives of trusteeship for him exclusively and partnership or some other co-ownership.

But the true explanation of all the conduct upon which the appellant relies appears to be that the parties placed complete confidence in one another and each desired no better title to the enjoyment of the benefits arising from property vested in the other than the matrimonial relationship gave. When Mrs. Booth applied in her own name for the lease of Cliffside, all the probabilities are that her husband had no thought of her occupying the position of trustee, still less of nominee. Although he did the work of prospecting and of pegging out the claim, it is not a case of a husband acquiring property in his wife's name. The property, the lease of Cliffside, was acquired by an application made by Mrs. Booth herself and by a payment which she made out of money lent to her. Booth's motives for encouraging this course cannot, perhaps, be determined with certainty upon the conflicting testimony which the parties gave. But, with the absolute confidence in her which he then apparently possessed, he probably disregarded the possibility of any question of property arising between them and thought that she ought, as against the outside world, to be established as owner of one of the claims taken up. She had not the least objection to an affectionate husband's management of the claim and to his assumption of control over the revenue produced. But all this affords no ground for the inference that she intended to constitute herself a trustee or that he considered himself the beneficial owner. Partnership is a relation springing from agreement express or implied. There is no ground for imputing to the parties any tacit agreement to operate the claims or any of them as partners. Some expressions in the book she published were relied upon, but, whether she used them herself, or they were the product of the mind whose aid in literary composition she acknowledges, the allusions they contain to the firm of Booth & Booth are but figurative. There is no trace in the evidence of any intention to share in any fixed proportion either profits or capital. All that they did is distinctly referable to

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the relationship of husband and wife. The beneficial ownership of the lease of Cliffside rested where the legal ownership was placed.

The lease of Clifftop presents, perhaps, another question, because the nominee who gave the power of attorney, although the repository of the legal title, clearly meant to assert no claim to the beneficial ownership and probably gave little or no thought at the time she gave the power to the question whether the beneficial ownership was to be in Mrs. Booth or her husband. But she was Mrs. Booth's friend and lent her name at her request. The purpose of taking up the Clifftop lease was to extend the boundaries within which the working of Cliffside was confined, and the application acknowledges that it was ancillary to Cliffside, which, as Booth knew, belonged to his wife. It is incumbent on the plaintiff to establish affirmatively that a trust in his favour existed, and, in face of these considerations, it is necessarily very difficult for him to do so. In other circumstances, the fact that it was he who pegged out the lease and framed the application and paid the fees might be enough. But the fees came out of funds which included money arising from Cliffside, and the statement in the application itself suggests that he regarded the properties as a unit. The circumstances are at least consistent with, if they do not establish, the inference that he meant his wife to enlarge her property in Cliffside by the acquisition of Clifftop.

Booth's claim to the £3,000 transmitted to his wife fails for other reasons. All but £500 was invested in a form which for some time preserved its identity. If he had chosen to assert a claim to these investments at the time, he might have established a beneficial or equitable title to them. But he clearly acquiesced in his wife's assumption of control over the fund and indicated, with as much certainty as if he had made a formal gift to her, that he was content that she should retain it as her own. It would not be strange for a husband to take such a course in ordinary circumstances, but when to the relationship of husband and wife is added the fact that the money was gained from a venture in which she took so active a part and from mining claims of which an important one was taken up in her name, it appears most natural for him to acquiesce in her retention of the money. The £500 had been spent in travelling expenses and the like, the money for which, otherwise, he would

have found. This expenditure he ratified. His possible equitable title to the investments representing the balance he abandoned, and thus gave her full beneficial ownership. (See *Crichton* v. *Crichton* (1).)

For these reasons, assuming that Mrs. Booth has a legal capacity independent of her husband such as arises from the *Married Women's Property Act*, she is entitled to retain the property which Booth claims in this appeal. But he contends that under the law of New Guinea she has not such a capacity. This contention depends upon the manner in which English law has been introduced into the Mandated Territory. The *Laws Repeal and Adopting Ordinance* 1921-1933, made under the *New Guinea Act* 1920-1932, excludes German law (sec. 4). By sec. 11 certain Commonwealth statutes are brought into operation in New Guinea. By sec. 13, it applies to the Territory certain statutes of Queensland which do not include the *Married Women's Property Act*. By sec. 14, the Acts, statutes and laws of England that are in force in Queensland and are applicable to New Guinea are adopted as laws of the Territory. But this section does not refer to English statutes in force in Queensland only in the sense that the Parliament of that State has enacted legislation based upon or transcribed from them. The English *Married Women's Property Acts* are not in force in Queensland except in that sense. Sec. 15 of the *Laws Repeal and Adopting Ordinance* applies to New Guinea certain Papuan ordinances, but none of these affects the matter. Sec. 16 then provides that the principles and rules of common law and equity that were in force in England on 9th May 1921 shall be in force in the Territory so far as applicable and so far as not repugnant to the provisions of any Act, ordinance, or the like having the force of law there. It may, of course, be said that the English *Married Women's Property Act* forms no part of the principles and rules of common law and equity. On the other hand, it displaced principles and rules of common law which, accordingly, were not " in force " in England in May 1921. But, except for local ordinances, the whole of the law of New Guinea appears to be derived from or through the provisions quoted from the *Laws Repeal and Adopting Ordinance*. Accordingly, if the suggested interpretations were placed upon that ordinance, there would, on

(1) (1930) 43 C.L.R. 536, at pp. 562, 563.

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the subject of married women's property, be a legal vacuum. There would be no law at all upon the subject. The German law is excluded: the common law would not be introduced, because no longer "in force" in England, and the legislation is omitted from the statutes specifically applied. If this were the case, it might be right to regard a married woman's status as involving in New Guinea no restrictions on her contractual and proprietary capacity. As no law affecting that capacity would be introduced, she would not differ from a *feme sole* in that respect. But it is impossible to suppose that the ordinance really meant to leave outside the scope of the law the whole topic of married women's property. It is so evidently the intention of the ordinance to introduce, subject to local ordinances and to the specified enactments of Queensland and Papua, the whole content of English law applicable to the circumstances of New Guinea that a very wide meaning should be given to sec. 16 in spite of the difficulties which its language presents. Probably the principles and rules of common law must be taken subject to and together with the statutory modifications in their application which had been made in England before 9th May 1921. But, in any case, it is impossible to give effect to the contention that New Guinea received from the common law the doctrine of the unity of personality of husband and wife so that, except when in equity a separate estate would exist, separate ownership by the wife would be beyond her capacity.

For these reasons the appeal should be dismissed with costs.

STARKE J. Appeal from the Central Court of the Territory of New Guinea. Charles Booth sued his wife, Doris Regina Booth, in that Court, and claimed (1) the beneficial ownership of a dredging or sluicing lease known as "Cliffside," in the Morobe district of the Territory of New Guinea, taken up and registered in the name of his wife; (2) the beneficial ownership of a dredging or sluicing lease known as "Clifftop," in the same district and adjoining "Cliffside," which was taken up in the name of Ruth Evelyn Mateer and transferred to and registered in the name of Doris Regina Booth; (3) £3,000 paid by Booth to his wife.

The action was tried before the Chief Judge of the Territory, who gave judgment on these claims in favour of the wife. It is a singularly unfortunate dispute, for the properties were taken up during arduous and in fact daring adventures by the husband and wife in search of gold on the Bulolo goldfields in the Territory. They were successful in their quest, and rich returns of gold were obtained from the dredging and sluicing leases already mentioned, and also from other leases and claims in the name of the husband. The financial side of the adventure was operated through accounts in the name of the husband. In October of 1927, the husband transmitted to his wife in Brisbane, Queensland, the sum of £3,000. It represented, no doubt, part of the proceeds of gold won in New Guinea. The precise source of the gold is unproved, but the fact is of no importance.

It is unnecessary to traverse all the evidence given in this case, which I have considered with the assistance of the exhaustive judgment of the learned Chief Judge and the arguments addressed to us by learned counsel. In my opinion, the findings of fact made by the Chief Judge cannot be disturbed, and ought to be acted upon.

The appellant, however, contends that, under the law of New Guinea, the respondent, as a married woman, is not capable of independent acquisition and enjoyment of property. What then are the mutual proprietary rights and obligations of a husband and wife in the Territory of New Guinea? The *Mining Ordinance* 1922-1923 empowers the administrator to grant sluicing or dredging leases to any person, but it does not regulate the relations of husband and wife. The *Laws Repeal and Adopting Ordinance* 1921-1933 applies certain laws of the Commonwealth, of the State of Queensland, and of the administration during the British military occupation, to the Territory. But none of these laws regulates the relation of husband and wife. Sec. 16 of the *Laws Repeal and Adopting Ordinance* also provides that "the principles and rules of common law and equity that were in force in England on the ninth day of May, one thousand nine hundred and twenty-one, shall be in force in the Territory so far as the same are applicable to the circumstances of the Territory, and are not repugnant to or inconsistent with the provisions of any Act, ordinance, law, regulation, rule, order or proclamation having the force of law that is expressed to extend to

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or applied to or made or promulgated in the Territory." By the rules of the common law, a wife was incapable of acquiring or enjoying property, real or personal, independently of her husband. But in equity, if property were given to a wife in such terms as to show an intention that she should enjoy it separately, then effect was given to that intention. Gradually the rules of the common law with regard to the acquisition and enjoyment of property by a wife were altered, by the *Married Women's Property Acts*, and married women became entitled to hold, acquire and dispose of property, real and personal, as if unmarried. The development of the rules of English law relating to the proprietary rights of husband and wife has been continuous, and the rules of the common law, the doctrines of equity, and statutes, have all played a part in this development. The provisions of the *Married Women's Property Acts* in force in England on 9th May 1921 may therefore be regarded as part of " the principles and rules of common law and equity " referred to in sec. 16 of the *Laws Repeal and Adopting Ordinance*. Indeed, I doubt if the words " the principles and rules of common law and equity " can be distinguished from the phrase found in 9 Geo. IV. c. 83, sec. 24—the " laws and statutes in force within the realm of England . . . shall be applied in the administration of justice in the Courts of New South Wales and Van Dieman's Land . . . so far as the same can be applied within the said Colonies." Consequently, in my opinion, a married woman in the Territory of New Guinea is capable of acquiring and enjoying property as if she were a *feme sole*, or unmarried.

The result is that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *V. A. Florance*, Rabaul, New Guinea, by *F. E. McElhone*.

Solicitors for the respondent, *McLennan & Clark*, Rabaul, New Guinea, by *Dawson, Waldron, Edwards & Nicholls*.

J. B.