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IN THE HIGH COURT OF AUSTRALIA

ASHBY

*v.*

CRAIG

ORIGINAL

# REASONS FOR JUDGMENT

*Judgment delivered at* Melbourne,

*on* Thursday, 1st June, 1950.

H. E. Daw, Gov. Print., Melb.

C.12280/45

ASHBY v. CRAIG.

ORDER.

Appeal allowed. Decree of Supreme Court set aside. In lieu thereof declare that the estate of the late Alice Milham included and still includes the debt of £804 mentioned in the statement of claim. Suit remitted to Supreme Court for such further accounts enquiries and orders consequent thereon consistently with this order as it may seem proper to the Supreme Court to direct or make. Respondent to pay to appellant one half of the costs of the suit and one half of the costs of the appeal, further costs to be in the discretion of the Supreme Court.

J.G.P.

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REASONS FOR JUDGMENT. LATHAM C.J.

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REASONS FOR JUDGMENT. LATHAM C.J.

The appellant Mrs. Amy Ashby and the respondent Mrs. Eva Craig are the daughters of the late Mrs. Alice Milham and are executrices of her will. They are entitled in equal shares to the residue of her estate. Mrs. Ashby instituted an administration suit against Mrs. Craig, relying particularly upon allegations that Mrs. Craig had wrongly appropriated to her own use a quantity of money, consisting of a large number of florins concealed in a tin and jar, belonging to her mother, and that she had not repaid a loan of £804 made to her by her mother. Roper C.J. in Eq. gave judgment for the defendant. The plaintiff has appealed to this court. The questions which arise are entirely questions of fact. The findings of the learned judge as to the credibility of witnesses were not challenged by either appellant or respondent. The appellant contends that even if those findings are accepted she should have succeeded in the suit.

As to the money in the tin and the jar, it was found by the learned trial judge that the defendant did not tell the truth as to the time and circumstances of removal and opening of these receptacles. There are improbabilities in the story of the defendant that her husband out of his relatively small wages succeeded in saving during the relevant period the amount of money (over £400, perhaps £600) which was contained in the tin and the jar. But these justifiable criticisms of the defendant's case do not establish the plaintiff's case. The onus of proof that the money was the property of the plaintiff rested upon the plaintiff. There was no evidence for the plaintiff to show how the money was brought to the home of the defendant, where it was concealed. There was no evidence for the plaintiff to show that her father or her mother had saved the money in question, though the probabilities of the case are consistent with the father having done so. "Milham £2" was written upon papers in which the money or some of it was wrapped. There is no evidence as to when or by whom or for what purpose the writing was done. It is quite possible that the father owned the money, but this is not proved. There are no facts from which such ownership can be inferred with sufficient certainty to justify a finding for the plaintiff on this issue.

The case is different in my opinion with respect to the alleged loan of £804. The learned trial judge accepted the evidence of the plaintiff and her husband that the defendant admitted in reply to a question asked by the plaintiff that her/

mother had loaned her money for the purpose of purchasing a cottage. She said that she had repaid it, but this was shown to be untrue. The defendant gave evidence not only denying that she had made these statements but also asserting that the money which she spent in purchasing the cottage was a gift from her father. It was proved that in fact she drew the money from a bank account in the name of her mother and herself on 11th June 1944, four days after her father's death. The money in that account (she said) belonged to her father. He therefore did not give her the money, whether or not he had said in his life that he would give it to her. The defendant said that she withdrew the money with the consent of her mother.

The admission found to have been made by the defendant related to the money "borrowed for the house next door". No suggestion was made by the defendant in her evidence to the effect that, though she had admitted that she had borrowed "some" money, the money borrowed was not the whole amount paid for the house. She denied that she had made any admission at all. Further, the admission was found to have been made in a conversation, to which both the plaintiff and her husband deposed, which took place in June 1947, three years after the death of the father, which took place in June 1944. The conversation related to what the plaintiff said was property of her mother - jewellery and the money for the house. The precise finding of the learned judge was:-

> "I accept Mr. and Mrs. Ashby as witnesses of truth. In particular I believe them as to the conversation in regard to the borrowed money which took place in June after the testatrix's death. In that conversation it is said that Mrs. Ashby asked her sister what was the position in regard to the money which her sister had borrowed from her mother for the purpose of purchasing the house next door and the sister replied that it had been repaid."

This admission is consistent with the withdrawal of the £804 from the joint account in the names of the mother and the daughter. The mother was the sole beneficiary under her husband's

will and could deal with her husband's money in that account as she thought proper - e.g. by lending it or by giving it to her daughter, the defendant. The defendant's admission is that the mother lent the money to her. The debt thereby created would be part of the mother's estate when she died and there is no evidence whatever that she had released the debt by deed or for consideration.

But the learned judge declined to act upon the admission of the defendant that she had borrowed the money by reason of a statutory declaration made on 3rd January 1946 by her mother, as executrix of her husband, that her husband had "at different times over the three years prior to" his death made a gift including the £804 in question to his daughter, the defendant, in various sums from time to time. Difficulties had arisen as to non-disclosure to the taxation authorities of property belonging to the father of the plaintiff and the defendant and it was for this reason that the mother made the statutory declaration. It was not true. The evidence showed quite plainly that the sum of £804 was drawn from a bank account, which consisted entirely of the father's money, at a time soon after his death. The evidence actually given on behalf of the defendant does not make a case for her that her father gave her the money in the bank during his life. If accepted, this evidence does no more than show that, when he spoke to the defendant about it, he intended to give it to her. Thus the statutory declaration of the mother cannot be accepted as true.

It is put, however, that, in and by the statutory declaration, the mother showed her intention that the £804 should be treated as belonging to the daughter. But, if the admission of the defendant that the money was lent (and not given) to her is taken as true the money was paid to the defendant as a loan. A loan from the mother (the admission) is quite different from a gift from the father (the statutorydeclaration). Even if the statutory declaration is interpreted (not in accordance with its terms) as indicating

an intention of the mother at the time when the declaration was made that the defendant should not or would not be called upon to repay the loan, such a declaration of intention produces no legal result because of the absence of a deed or agreement for consideration releasing the debt.

In my opinion the statutory declaration in all these circumstances should not be given such weight as to deprive of all force and significance the clear admission by the defendant that she had borrowed the money from her mother. If her father had given it to her some years before there was no reason why she should not have said so. It is found that this admission was made and there is no reason in the circumstances of the case for not believing it/as against the defendant who made it. She gives no explanation of it - she simply denies that she made it. What the defendant said in reply to the question whether she owed her mother the money spent in buying the house is the best evidence against her. It should not be rejected on the ground that another person (now deceased and not available as a witness) made a different statement - especially when that statement was shown to have been made for the purpose of extrication from difficulties created by the previous making of a statement by that same person which had been shown to be false. In my opinion the plaintiff established her case as to the loan of £804. The appeal should be allowed and in lieu of the decree of the Supreme Court it should be declared that the estate of the late Alice Milham included and still includes the debt of £804 mentioned in paragraph 8 of the statement of claim, and the case should be remitted to the Supreme Court for such further accounts/and enquiries as it may be thought proper to direct. The plaintiff has succeeded as to one claim and has failed as to the other. In the circumstances of this case all the members of the Court think that a fair order as to costs will be that the defendant pay one-half of the plaintiff's costs of the suit and of this appeal.

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JUDGMENT. WEBB J.

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ASHBY v. CRAIG.

REASONS FOR JUDGMENT. WEBB J.

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I would allow the appeal as regards the sum of £804 which the appellant, Mrs. Ashby claims was a loan and not a figt to the respondent Mrs. Craig.

Roper J. found that Mrs. Craig told Mrs. Ashby that this sum was a loan. This admission has a far reaching effect. It meets the requirements of strict proof where criminal conduct is alleged. It outweighs considerations such as might otherwise arise from Russell v. Scott (55. C.L.R. 454) and Mrs. Milham's declaration. I am now treating the admission as one made by a responsible person with knowledge of all the facts; which was not inconsistent with undoubted facts; and for which there was no explanation that would warrant its being disregarded. Mrs. Craig as a co-executrix of Mrs. Milham was in possession of or had access to the estate papers and records. However His Honour thought that Mrs. Milham's declaration, whether true or false, was a bar to Mrs. Ashby's claim, apparently because she too was a co-executrix of Mrs. Milham and was suing on behalf of the estate. But I think that Mrs. Ashby as plaintiff was in a position not less favourable for an attack on the declaration than that of the petitioner in Joliffe v. The Commissioner of Stamp Duties (28 C.L.R. 178), who was allowed to deny the truth of his statutory declaration, and thereby to resolve in his own favour a conflict of his duty with his interest, with double benefit to himself. He had obtained interest on a deposit of monies in the Government Savings Bank on the strength of the declaration that the deposit was his wife's money, and then on her death he escaped payment of duty by denying the truth of his declaration. Here Mrs. Ashby is not met by her own declaration but by her mother's, and this seems to

me to be contrary to the facts, as Mrs. Craig admitted during cross-examination that the monies in the joint names of her mother and herself belonged to her father. I prefer to act on this sworn admission rather than on the statutory declaration.

As regards the buried florins, I see no reason for differing from Roper J., and I have nothing to add to the judgments of the Chief Justice and Fullagar J.

ASHBY v. CRAIG.

JUDGMENT. FULLAGAR J.

ASHBY v. CRAIG.

JUDGMENT. FULLAGAR J.

This is an appeal from a judgment of Roper C.J. in Eq. dismissing a suit by one executrix against another. The plaintiff and the defendant are sisters and are co-executrices of the will of their mother, Alice Milham, who died on the 29th January 1947. The mother was the sole executrix and beneficiary under the will of her husband, Sydney Leaff Milham, who died on the 11th June 1944.

The plaintiff made two allegations against the defendant. The first was that the testatrix, Alice Milham, had in her lifetime lent to the defendant a sum of £804, which sum the defendant, claiming that that sum had been given, and not lent, to her, had refused to repay to the estate. The second was that the testatrix owned and possessed, at the date of her death, a sum of money in florins buried underground, which money the defendant had wrongfully taken and retained or used for her own purposes. As the case developed, it became plain that each of these allegations amounted to a charge of fraudulent - in the latter case, probably criminal - conduct. It is trite learning that such charges must be strictly proved.

The plaintiff's second claim may be disposed of in a very few words. A witness for the plaintiff, Mrs. Hearne, whose evidence was accepted by the learned Judge, said that the defendant had, in the presence of her mother, dug up in the grounds of the house occupied by the defendant a tin and a jar containing a large number of florins. She had then re-buried this "buried treasure" in another place, and had later dug it up again and taken it indoors. Later still she had spent some of the money on various articles. The defendant said that this silver

had been saved by her husband, who died in November 1946, and who had, during the critical days of the war, thought that it would be a wise precaution to have on hand a substantial amount in silver coins. The coins had been buried in the property occupied by the defendant ahd her husband. The suggestion seems to have been that the coins had been saved and secreted not by the defendant's husband but by her father. There was no direct evidence whatever of this. It was inherently unlikely, because the father, Mr. Milham, lived elsewhere until about five weeks before his death in June 1944, and was a very sick man when he came with his wife to live with the defendant. He might, of course, have brought the precious tin and jar with him. But the only evidence against the defendant was a statement by Mrs. Hearne, which His Honour accepted, that the paper wrappings of some of the disinterred coins bore the words "Milham £2". Even if it could be said that such evidence would support a finding in favour of the plaintiff, which I doubt, the learned Judge refused to draw the necessary inference. In my opinion, he was quite right in refusing to draw it. In any case, I think it out of the question for this Court to say that he was bound to draw it.

With regard to the plaintiff's other allegation, the evidence may be summarised as follows. Before the death of Sydney Leaff Milham on 11th June 1944 there was a bank account in the names of Mrs. Milham and the defendant in the Commonwealth Savings Bank at Kingsford. Apparently either mother or daughter could operate on this account. It appears to have been common ground throughout that the beneficial ownership of the moneys standing to the credit of the account was originally in Mr. Milham. At his death the amount standing to the credit of this account was about £815. Four days after his death the defendant drew from this account the sum of £804, most of which she applied in paying the balance due under a contract for the purchase of a house next door to the house in which she and her husband lived at 154 Botany Road, Randwick. The contract, under which she and her husband

were purchasers, had been made on the 2nd February 1944, though a deposit appears to have been paid on the 26th October 1943. The substance of the plaintiff's allegation was that this sum had been lent by Mrs. Milham to her daughter, the defendant. If it was lent it had not been repaid.

There was one small piece of evidence which could perhaps be said to justify a finding in favour of the plaintiff that the defendant had borrowed the money in question from her mother. But, before considering this, it will be convenient to state the defendant's account of how she came to withdraw the sum of £804 from the Kingsford bank account. She said that the withdrawal of the sum of £804 from the Bank was made with her mother's consent, and indeed at her mother's request, her mother accompanying her to the Bank. She also said that her father had, during his lifetime given to her and her husband the sum of £100 in cash for the purpose of paying the deposit on the house next door, and had told them that there would be money in the Kingsford bank account which was to be a gift to her and her husband for the purpose of paying the balance of the purchase price. She said that her mother wished her after her father's death to take the £804 in order that her father's wishes expressed in his lifetime might be carried out. In this connexion, it is noteworthy that between June 1942 and October 1943 the balance at credit of the bank account increased only by about £7, whereas between October 1943 (when the deposit on the house was paid) and June 1944 (when the father died) considerably over £500 was paid into the account, and there were no withdrawals.

After Mr. Milham's death, the sum of £815 standing to the credit of the Kingsford bank account was not disclosed as an asset in his estate. Some eighteen months later, however, probably (p. 122) because of a question raised by the income tax authorities as to the source of the moneys by means of which Mr. and Mrs. Craig had purchased the house next door, a statutory declaration was made by Mrs. Milham, as her husband's executrix, and submitted to the Stamp Office. This declaration, which was

made on the 3rd January 1946, did not state as the omitted asset the amount standing to the credit of the Kingsford account, but purported to disclose a gift of £900 made by the deceased to Mr. and Mrs. Craig within three years before his death. (Such a gift is part of the dutiable estate under the Stamp Duties Act.) It proceeded:- "The gift mentioned above was made in several parts, at different times over the three years prior to the date of the death of the deceased, to his daughter for herself and her husband, and the total thereof amounted to £900 in all, such sum being used for the purchase of a home".

Now the mere fact of the opening of a bank account in the name of his wife and daughter would raise a presumption that Mr. Milham intended to benefit his wife and daughter jointly. The beneficial interest would be in them and the survivor of them. The presumption would not be rebutted by the fact that from time to time moneys were drawn from the account for his own purposes: see Russell v. Scott (1936) 55 C.L.R. at pp. 451-2. It seems to have been common ground that, up to a point, the beneficial interest in the account (really, of course, in the chose in action constituted by the debt owing by the bank) was in Mr. Milham, though the only evidence I can find on the point as to the period before October 1943 is that Mr. Webb (p. 70) asked the defendant: "And it was purely your father's account in your mother's and your name?" - to which the defendant replied:- "That is what I understood from father."

Assuming that the beneficial interest in the account was in Mr. Milham and remained in him up to his death, then that beneficial interest was an asset in his estate. If, however, the beneficial interest had ceased to be in him at his death, then it was not an asset in his estate, but if it had passed from him by voluntary disposition within three years of his death, the Stamp Duties Act would treat it as part of the estate and dutiable accordingly. And this was exactly what the defendant maintained

throughout had taken place. She said that her father in or about October 1943 had given her £100 and had said to her mother and herself that the money in the account was to belong to her and her husband for the purpose of purchasing the house. She and her mother (legal owners of the chose in action) consenting, all that was necessary to constitute them trustees of that chose in action for herself and her husband had been done. The amount then standing to the credit of the account and all sums thereafter paid in belonged beneficially to Mr. and Mrs. Craig. And the sums paid in from time to time were, for the purposes of the Stamp Duties Act, sums "given" by Mr. Milham to the defendant and her husband. Mrs. Milham's statutory declaration (which was prepared by solicitors) was, therefore, entirely consistent with the evidence which the defendant gave in Court. And, if her story were true, it was substantially accurate and stated correctly the legal position.

Roper C.J. in Eq. held that the statutory declaration made by the mother was conclusive in favour of the defendant. I can see no possibility of questioning the propriety of the learned Judge's view. The plaintiff sued as executrix of her mother, and she said that her mother had lent £804 to her sister and co-executrix, the defendant. A statement by the mother, unquestionably admissible against the executrix, is produced - made, it may be mentioned, on the advice of solicitors of standing and subject to those sanctions which attach to a statement on oath - which says, in effect, that she had not lent the money to the defendant at all, but had acquiesced in her taking it in pursuance of a gift which her husband and the defendant's father had made or promised to make. There is not the slightest suggestion that the mother, although she was an elderly woman, was not in full possession of her faculties or that any fraud or undue influence was practised upon her. There is, indeed, strong evidence that she was fully capable of transacting business. I am unable to imagine a clearer or more cogent refutation of a claim by an executor.

The ground on which this Court is asked to allow the appeal will not, in my opinion, bear examination. The plaintiff deposed that in June 1947 (about six months after the mother's death) she, in the presence of her husband, asked the defendant: "What is the position regarding the money you borrowed for the house next door?" She said that to this question the defendant replied: "That was paid back long ago". This account of the conversation was corroborated by the plaintiff's husband, who said that the words "borrowed from mother" were the words used, and the learned Judge expressly said that he accepted their evidence on this point. The defendant denied that any such conversation ever took place. His Honour, on the other hand, took an unfavourable view of the defendant as a witness. His Honour said:- "I found the defendant an unreliable and evasive witness, and I think it is unsafe to rely on her evidence except where it is clearly correct, as, for instance, where it is against her interest or where it is corroborated by documents or otherwise". The mother's declaration is very strong corroboration of the defendant's evidence as to how she came to get the sum of £804. The learned Judge accepted that declaration. He could not, in my opinion, have done otherwise. He treated it as decisive evidence that that sum had not been lent by the mother to the defendant. He could not, in my opinion, have done otherwise. He accepted evidence that the defendant had told her sister that money borrowed to pay for the house had been repaid. But it is impossible to say that, having found that such a conversation took place, he was bound to say, in the face of unanswerable evidence to the contrary, that the sum of £804 had been lent to the defendant by her mother. The conversation in question provides, in any case, feeble enough evidence on which to find fraudulent conduct.

To ask this Court to allow this appeal is, in my opinion, to ask a Court of appeal, in effect, to find fraud

against a defendant in a case in which (a) even if the plaintiff's evidence be considered alone, that evidence is weak, (b) the learned trial Judge has expressly negatived fraud, (c) there was very strong affirmative evidence of innocence, and (d) that affirmative evidence was accepted by the trial Judge - who, indeed, could hardly have refused to accept it.

In my opinion, this appeal should be dismissed.