fore the title which the defendant had in the *Newcastle Fisherman's Case* and which Ali would have in New South Wales is a title by estoppel. The result is the same as that at which the English courts have arrived, but the English courts have held affirmatively that where there is a contract which is executed in the sense that obligations have been fulfilled on both sides, then that contract is sufficient as an instrument of conveyance to transfer the property in the goods.

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HUSBAND AND WIFE AND RESULTING TRUSTS

MARTIN v. *MARTIN*

In the adjudication of disputes over property between husband and wife under the summary procedure provided for in the Married Women's Property legislation,[1] the courts sometimes have vacillated between two opposing interpretations of the effect of the statutory provision.[2] On one view the property rights of a husband and wife arise independently of their marital status, and disputes between them regarding their respective property rights should be determined according to ordinary proprietary principles. On another view, however, the Married Women's Property legislation gives the court power to override the normal rules governing proprietary rights and to exercise wide discretion in distributing the property of the parties *ex aequo et bono* according to the exigencies of each particular situation.[3] Australian courts have taken the attitude that the statutory provisions in question merely lay down procedure for ascertaining and enforcing existing rights.[4] The law of property governs the ascertainment of the proprietary rights and interests of those who marry and those who do not. . . . The title to property and proprietary rights in the case of married persons no less than in that of unmarried persons rests upon the law and not upon judicial discretion."[5]

While application of ordinary principles of property law may induce a greater degree of certainty and predictability in matrimonial property law than the discretionary principle, in many cases, especially in those in which the property in question forms part of assets used by all members of the family, the quest for *indicia* of title tends to assume an air of unreality. The truth of the matter is that all too often the spouses have been indifferent as to the *locus* of proprietary rights until the marriage begins to founder. What the court is obliged to do when the spouses appear before it is to establish their respective proprietary rights according to intentions which may never have existed at the time the property was acquired.

The difficulties confronting a court in ascertaining where the beneficial ownership of property employed in a joint matrimonial venture was intended

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[1] Married Women's Property Act. 1901 (N.S.W. s.22; Marriage Act, 1958 (Vic.) s.161; Married Women's Property Act, 1890-1952 (Queensland) s.21; Law of Property Act, 1936 (S.A.) s.105; Married Women's Property Act, 1935 (Tas.) s.8; Married Women's Property Act, 1892 (W.A.) s.17.

[2] See O. Kahn-Freund "Separation of Property Systems in England" in W. Friedmann (ed.), *Matrimonial Property Law* (1955) 295-98.

[3] Thus in *Ward* v. *Ward* (1958) V.R. 68, Smith, J., held that the discretionary powers given to the court under s.161 of the Victorian Act enabled the court to make orders inconsistent with strict proprietary rights. This view was disapproved by the Full Court in *Noach* v. *Noach* (1959) V.R. 137; followed by Sholl, J. in *Clark* v. *Clark* (1961) V.R. 181.

[4] *Wirth* v. *Wirth* (1956) 98 C.L.R. 228; *Martin* v. *Martin* (1959-60) 33 *A.L.J.R.* 362; *Bartke* v. *Bartke* (1961) 78 W.N. 1039. See also cases cited *supra* n. 3.

[5] *Wirth* v. *Wirth (supra)* at 231, *per* Dixon, J.

to reside is well illustrated by *Martin v. Martin.*[6] This case concerned the title to certain parcels of land which had been transferred to a wife by Memorandum of Transfer. The consideration of £700 was expressed to be paid by the wife, but in fact was paid by her husband. The marriage being subsequently dissolved, the husband took out a summons under the Married Women's Property Act (South Australia) to determine the beneficial ownership of the land.

The general rule is that where a husband places a title in property which he has purchased in the name of his wife, he is presumed to intend a gift of that property to his spouse. This presumption may be rebutted by clear evidence of a contrary intention.[7] In the past the courts have accepted bare assertions by the husband of his intentions as sufficient to rebut the presumption, but have emphasised that such evidence must be carefully scrutinised. The question of intent, it has been said, is "a very wide sea without very certain guides."[8] Evidence of this sort "must in every such case be liable to observations which tend to diminish its weight."[9]

Abbott, J., at first instance, characterised the issue before him as one depending "on what may be called the subjective intention of Martin and upon his wife's understanding of the effect of putting the title in her name."[10] At the hearing the husband testified that he never intended his wife to have the beneficial ownership of the property and that his reasons for wanting the title to be in his wife's name were to avoid tax and to evade other provisions of the law such as restrictions on the amount of wheat which could be grown by any one farmer. The wife gave evidence that at the time of the transfer she was prepared to do whatever her husband wished her to do with the land. Abbott, J. found that the husband "never intended that his wife should take as an advancement"[11] and accordingly ordered that the wife should transfer her estate and interest in the land to the husband.

The wife appealed to the High Court on the ground that a resulting trust had not been made out by any satisfactory evidence and that in any event, on the case made for the husband, the purpose of the trust would be unlawful and therefore he could not rely on his own unlawful purpose to support it. In rejecting the appeal the High Court obviously had misgivings about the rulings of Abbott, J. on the question of the husband's intention, but their Honours were not prepared to overrule the Judge's finding.

It will be observed that in the present case the presumption of advancement was rebutted exclusively by evidence of the husband, unsupported by any other evidence, as to what was his own subjective intention many years before the hearing. It has been observed above that although the husband who provided the money may testify as to his own intention, the courts have emphasised repeatedly that such evidence must be carefully scrutinised. At first glance it might appear that *Martin* v. *Martin* marks a departure from the past reluctance of the courts to accept *ex post facto* declarations of intention as conclusive. However, it is not without significance that the High Court expressed reservations as to the satisfactoriness of the evidence tendered. The Court considered that the husband could not carry great weight as a witness as "on the subject of

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[6] (1959-60) 33 A.L.J.R. 362.

[7] *Crichton* v. *Crichton* (1930) 43 C.L.R. 536; *Bennet* v. *Bennet* (1879) 10 Ch. D. 474; *Re Ashton, Ingram* v. *Papillon* (1897) 2 Ch. 574; *Gascoigne* v. *Gascoigne* (1918) 1 K.B. 223; *Drever* v. *Drever* (1936) A.L.R. 446; *Martin* v. *Martin* (1959-60) 33 A.L.J.R. 362.

[8] *Dyer* v. *Dyer* (1788) 2 *Cox* 92, at 94, *per* Lord Chief Baron Eyre.

[9] *Dumper* v. *Dumper* (1862) 3 Giff. 583, 590 *per* Stuart, V.C.; see also *Devoy* v. *Devoy* (1857) 3 Sm. & G. 403; *Davies* v. *National Trustees Executors & Agency Co. of Australasia* (1912) V.L.R. 397, 403, *per* Cussen, J.; *Stewart Dawson & Co. (Vic.) Pty. Ltd.* v. *Federal Commissioner of Taxation* (1933) 48 C.L.R. 683, 690, *per* Dixon, J.

[10] *Martin* v. *Martin supra* n. 4 at 364.

[11] *Id.* at 366.

his real intention he had put forward inconsistent stories and had founded inconsistent claims upon them".[12] "In the circumstances," the Court observed, "perhaps the presumption of equity might have formed a safer guide than Martin's [i.e., the husband's] evidence".[13] Had the Court been sitting at first instance it is not improbable that it would not have regarded the evidence as sufficient to rebut the presumption, but as a court of appeal it must, their Honours said, "exercise great caution in setting aside a finding upon a question of intention by the Judge who has seen and heard the parties as witnesses."[14]

The fact that the parties very frequently have no definite intention as to in whom the beneficial ownership is to be vested presents additional complications. Evidence that the husband clearly intended to maintain some beneficial interest in the property cannot of itself be accepted as conclusive that the wife was to act solely as trustee and was not to derive any benefits from the property standing in her name. The correct inference may well be that the husband "acts in simple confidence that as legal and beneficial owner of the property his wife will always consult his interests and probably comply with his wishes in exercising her proprietary rights."[15] Such was the inference drawn by the High Court in *Wirth* v. *Wirth*,[16] a case in which the respondent had, while engaged to be married, transferred property to his fiancée, later his wife, (the appellant in the case), in order, as he said, to please his fiancée and her parents. Dixon, C.J. (with whom McTiernan, J. agreed; Taylor, J. dissenting) held that the presumption of advancement had not been rebutted, and remarked that far from indicating an intention on the part of the respondent that the appellant should hold as a trustee for him, the facts rather pointed "to a desire on the part of the appellant and her parents that she should be the beneficial owner of the property and to a preparedness on his part to rely upon the matrimonial relationship and their mutual ties of affection for his future enjoyment of what became hers in point of property."[17]

In determining a husband's intention, the courts appear to have attached some relevance to the nature of the property in dispute and to the purposes to which that property is applied. With stocks and shares placed in the wife's name for the purpose of reducing the incidence of taxation,[18] as with a family asset such as a home designed for joint use by the spouse,[19] the presumption is readily rebutted. In other cases, such as that in which property has been acquired for the wife's personal use, the position is otherwise.[20] A good example of the former class of case is to be found in the recent case of *Bartke* v. *Bartke*,[21] where a business was acquired in the name of the wife, largely with monies standing to the credit of a Savings Bank Account in the name of the wife. Part of this sum represented the earnings of the husband which had been paid into the account. These had been "treated as part of the general funds of the family unit", which were to be applied towards the purchase of premises which would serve not only as a business but also as a home. In view of these considerations, Else-Mitchell, J. found that the husband did not intend to make a gift to his wife of any interest in the business. Similar circumstances were present in *Martin* v. *Martin*. There the land in question formed part of a farm which was worked by both parties[22] and which therefore could be regarded as being in the nature of a

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[12] *Id.* at 367. [13] *Ibid.* [14] *Ibid.*

[15] *Id.* at 366. See also *Schubert* v. *Schubert*, (1949) 66 W.N. (N.S.W.) 173, 175, *per* Herron, J.

[16] *Supra*, at 228. [17] *Supra*, at 238.

[18] *Martin* v. *Martin*, *supra*, at 366.

[19] *Silver* v. *Silver* (1958) 1 W.L.R. 259, 265, *per* Parker, L.J.; approved by Morris, L.J., in *Richards* v. *Richards* (1958) 1 W.L.R. 1116, 1124, and by Else-Mitchell, J., in *Bartke* v. *Bartke (supra)* at 1045.

[20] *Silver* v. *Silver*, *supra*, at 265.

[21] *Supra*. [22] *Id.* at 363.

family asset, and this may well have been one of the factors which influenced the court in reaching its decision.

The decision in *Martin* v. *Martin* is also, it is submitted, a warning against inferring from the use of the word "presumption" in stating the rules as to the presumption of advancement, that the presumption may never be displaced except by strong affirmative evidence. Perhaps the use of the term "presumption" has tended to lead to some confusion on this point, and there have been suggestions that the term is not quite appropriate. In *Martin* v. *Martin* the Court observed that "it is rather the absence of any reason for assuming that a trust arose or in other words that the equitable right is not at home with the legal title."[23] Ashburner was of the opinion that, strictly speaking, there was no presumption at all[24] and in *Sidmouth* v. *Sidmouth*[25] Lord Langdale described the relationship of parent and child as "only evidence of intention of the parent to advance the child" which "may be rebutted by other evidence manifesting an intention that the child is to take as trustee". Be this as it may, it clearly remains true to say that:

> A presumption of this character may be of value where there is no evidence at all or only scanty evidence about the matter in issue. . . . But it is a mistake to treat the presumption as something which can never be displaced except by strong affirmative evidence. In each case where there is some evidence relevant to the matters in issue . . . the tribunal to which their interpretation is entrusted must reach a judgment on them drawing whatever inference it thinks proper and having regard to the balance of probabilities; its task is not to ascertain ultimate verities.[26]

Perhaps the most noteworthy aspect of the case is the manner in which the High Court treated the wife's contention that, on the husband's own case, his purpose in having title to the property transferred to her was illegal, namely, to avoid federal land tax. Such an argument, the Court said:

> . . . must often be amphibolous. For it may be relied upon as a ground for saying that since tax could not lawfully be avoided or the provision of the law escaped lawfully unless the beneficial ownership was conferred with the legal property, the presumption is strengthened that it was so intended. On the other hand, it may be pressed further and used to show that the legal title was placed in the name of the wife or child as a nominee for no reason except to clothe the truth.[27]

When evidence is adduced by the intending law-breaker as to his own illegal purpose, it is clear that (at least under Australian law) he will not be prevented from relying upon such evidence to rebut the presumption of advancement provided that the illegal purpose has neither wholly nor partially been carried into effect and that he is not by his action seeking to carry it out. Where, however, the transaction has not remained "innocent in all but a mental intention"[28] the husband will not be allowed to succeed for the court will not assist him to effectuate his illegal purpose.[29] A distinction must therefore be drawn between the

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[23] *Id.* at 365.
[24] D. Browne (ed.) *Ashburner's Principles of Equity* (1933), 110.
[25] (1840) 2 Beav. 447, 454.
[26] *Bartke* v. *Bartke (supra)*, at 1044, *per* Else-Mitchell, J.
[27] *Supra*, at 366.
[28] *Drever* v. *Drever* (1936) A.L.R. 446, at 1450, *per* Dixon, J.
[29] *Payne* v. *McDonald* (1908) C.L.R. 208; *Perpetual Executors and Trustees' Association of Australia Ltd.* v. *Wright* (1917) 23 C.L.R. 185; *Petherpermal Chetty* v. *Muniandi Servai* (1908) L.R. 35 Ind. App. 98; *Symes* v. *Hughes* (1870) L.R. 9 Eq. 475; *Donaldson* v. *Freeson* (1934) 51 C.L.R. 598; *Drever* v. *Drever (supra)*; *Press* v. *Mathers* (1927) A.L.R. 197.

In one respect the application of the rule is perhaps not quite clear. An examination of the dissenting judgment of Dixon, C. J. (in which Evatt, J. concurred) in *Drever* v. *Drever (supra)* suggests that, where A conveys land to his wife in order to accomplish a particular illegal purpose, and later in fact accomplishes not the purpose he had in

situation where a plaintiff sets up his own illegality as the foundation of his suit and where he seeks to explain certain actions by showing that they were motivated by a desire to evade legal liability or controls if ever the occasion should arise for their imposition.

In the latter situation the husband is not really setting up any illegality on his part in order to establish a beneficial title. In the first place, if no occasion has in fact arisen for the imposition of tax or other legal controls, it cannot be said that his unlawful purpose has been carried out. In the second place, by contending that the beneficial title remained with him he is, in effect, repudiating his intention to effectuate his original purpose. The true test, according to the High Court in *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Wright*[30] is "whether the illegal purpose from which the plaintiff insists on retiring still exists in intention only."

On the evidence before it in *Martin* v. *Martin* the High Court was satisfied that no illegal purpose had been carried out. Rather it was inclined to the view that there was no illegal purpose whatsoever and the evidence given by the husband as to his motives in having the legal title placed in his wife's name tended "to strengthen, if somewhat artificially, the presumption of advancement."[31] In the present case, the Court said:[32]

> . . . the purpose by which Martin claims that he was actuated, though involving thoughts of evading land tax if ever he might otherwise become chargeable, and of avoiding the operation of other controls, were all nebulous and in fact lay in future possibilities or contingencies and not in present necessities or imminent dangers. There was no definite liability or disadvantage which would have been incurred if Martin had acquired the land for himself in his own name.

Although the matter is by no means as clear as one would wish, it seems that on the question of whether illegality of purpose precludes a husband from setting up a resulting trust, there is some divergence between English and Australian authority. In two English cases, *Gascoigne* v. *Gascoigne*[33] and *Re Emery's Investment Trusts*[34] it was stated quite baldly that a husband is precluded from rebutting the presumption of advancement by proof of his illegal purpose. In neither case did the Court consider it relevant to inquire whether that purpose had been carried out to any degree. However, in both instances it would seem that it had been effected either wholly or in part. At all events, the High Court of Australia would appear to regard these cases as inconsistent with Australian authority.[35] The reasons for this view have not been spelt out but it probably is true to say that the essential difference consists in the fact that in Australia, where a husband or father seeks to rebut the presumption of advancement by showing that legal title was vested in his wife or child to disguise the facts of ownership, the unlawfulness of his purpose will not preclude him setting up the resulting trust unless that ". . . purpose was in any degree carried out or, on the other hand, the intending law-breaker recanted before any necessity arose of using the cover he had thus provided or else virtuously refrained from using it."[36]

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mind at the time, but another purpose which is also illegal, he will not be allowed to recover the property by asserting that the presumption of advancement has been rebutted. Latham, C. J. considered that the point did not arise, and the other two judges (Starke and McTiernan, JJ.) who, together with the Chief Justice, formed the majority, did not allude to it.

[30] *Supra*, at 196. See also *Donaldson* v. *Freeson* (1934) 51 C.L.R. 598, 617.

[31] At 366. [32] *Ibid.* [33] (1918) 1 K.B. 223.

[34] (1959) 1 All E.R. 577.

[35] *Drever* v. *Drever*, *supra*, at 449 *per* Dixon, J.; *Donaldson* v. *Freeson*, *supra*, at 617, *per* McTiernan, J.; *Martin* v. *Martin*, *supra*, at 366.

[36] *Martin* v. *Martin* at 366.