HELEN PAHARA AND ANOTHER (DEFENDANTS) ..... APPELLANTS;

AND

MIKE PAHARA (PLAINTIFF) ..... RESPONDENT.

1945

*Oct. 10, 11

*Dec. 21

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Trusts and trustees—Husband and wife—Property, acquired through joint efforts of husband, wife and children, purchased in name of husband —Reciprocal will of husband and wife—Statements with respect to alleged agreement for benefit of survivor and children—Properties transferred by husband to wife—Whether presumption of gifts to wife—Death of wife leaving will disposing of whole properties to daughters—Whether wife trustee for husband alone or for all children and husband equally.

*PRESENT:—Rinfret C.J and Kerwin, Hudson, Rand and Estey JJ.

(1) (1899) 30 Can. S.C.R. 130.

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The respondent, a coal miner, and his wife accumulated over a period of forty years, through slavish work and judicious thriftiness, considerable property consisting of city and farm lands, stock and equipment. With the exception of $700, which soon after their marriage was received by him from the sale of property in Europe, all the moneys with which the properties were gradually acquired by him were savings from his wages or the profits from his business shrewdness and the joint labours of himself, wife and five children in farming and dairying operations. In 1933, the respondent transferred to his wife all the titles to the lands then in his name. He testified, in explanation, that he did so at her desire and repeated request and because of a long standing agreement between them that the entire property was for the benefit of both while they lived and for the survivor whichever it might be and because in 1910 a reciprocal will had been signed by them under which each left all his or her property to the other, these facts making him regardless of the one in whom titles to the property would show. This reciprocal will was not produced, but the trial judge found that it had been made. The respondent did not know until his wife's death that such will had been revoked. By a new will made a few hours before her death, the wife gave substantially the whole of the estate to their two daughters, the appellants, with a request that they provide for the respondent during his lifetime. An action was brought by the husband, the statement of claim asking for a declaration that the property the wife purported to dispose of by will was in fact his property or in the alternative that he was entitled to a life estate in it. The trial judge held that all the property, lands and personalty had been and was the property of the respondent and that as to the transferred realty the testatrix was merely a trustee for him; but, on appeal, that judgment was modified to a trust for all the children and the husband equally. An appeal and a cross-appeal were brought before this Court by both interests.

Held, reversing the judgment of the Appellate Division ([1945] 1 W.W.R. 134) and restoring the judgment of the trial judge ([1944] 3 W.W.R. 100), that the circumstances of the case with the evidence of the respondent accepted by the trial judge both establish that the properties registered in the name of the wife were held in trust by her for her husband and furnish the rebuttal to any presumption of gift to the wife.

Per The Chief Justice and Kerwin, Hudson and Rand JJ:—The aim the respondent, in making the conveyances, had in mind, and the deceased understood, was, according to the evidence that regardless of the title to particular parcels each should hold the family lands for the benefit of both and the survivor. As against the wife, there was a trust, either express or implied in fact, of interests that can be called entireties which it is a fraud on the part of those who now represent her to repudiate. Against the unjust enrichment following that fraud, an equitable right to restitution is raised in favour of the respondent in the right which he originally sustained toward the property. This results from the operation of law and is consequently outside the prohibitions of the Statute of Frauds.

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Per Hudson and Estey JJ.—Upon the whole of the evidence, it has been established that the survivor should have the entire property and that it would be eventually for the benefit of the family, but there was no evidence of any intention to create an immediate beneficial interest in the members of the family.—Statement, with respect to the family to have the benefit of the estate, remained at all times a mere expression of an intention or a wish, but never was there any suggestion that the survivor should not be in a position to deal with the property as he or she might care to: under the authorities, words of this type do not create a trust.

APPEAL and CROSS-APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), modifying the judgment of the trial judge, Ives C.J. (2).

S. J. Helman K.C. for the appellants.

A. G. Virtue K.C. for the respondent.

The judgment of the Chief Justice and of Kerwin and Rand JJ. was delivered by

RAND J:—This is a contest between members of a family. The individual appellants are the daughters of the respondent, and there are also three sons. The mother died in 1942. Over a period of forty years the father and mother, by slavish work, had accumulated considerable property near Lethbridge, Alberta, and substantially the whole of it is claimed by the appellants under the will of their mother which was made a few hours before her death, and the material provisions of which are as follows:

I give, devise and bequeath unto my son, Alex Pahara, the farm land described as SW 19-9-20W 4th Mer., being the land which he is now farming.

I give, devise and bequeath the sum of one thousand ($1000.00) dollars, to be paid from my life insurance, to my husband, Mike Pahara.

I give, devise and bequeath all my houses and properties situated in Lethbridge, Alberta, being six (6) in number, my irrigated farm home property, my dry lands and all farm machinery and equipment and all livestock and all other personal property of whatsoever nature and description, unto my daughters, Helen Pahara and Annie Petrunia, in equal shares. And I request my daughters to take care of and provide for the necessities of my husband Mike Pahara, during his lifetime.

I give unto my said daughters, Helen Pahara and Annie Petrunia, the tract of land comprising twenty-eight (28) acres, to hold in trust for my son, Mike Pahara, Jr., and to give him the use thereof during his lifetime subject to the payment by him of the taxes, water rates and other charges each year levied and assessed against the said lands.

(1) [1945] 1 W.W.R. 134; [1945] 1 D.L.R. 763.
(2) [1944] 3 W.W.R. 100.

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All the rest and residue of my estate, property and effects, both real and personal, I give, devise and bequeath unto my 2 daughters and 3 sons in equal shares.

The respondent and the deceased were married in 1900. Until 1924 he worked in coal mines near Lethbridge. As early as 1904 he purchased lots in that city on which he built two houses. These were sold in 1910 at a good profit. Other lots were purchased in 1909 and in the following year. Later he acquired a homestead. In 1917 he bought an irrigated quarter section which became the family home. In the next fifteen years he had purchased and paid for another quarter section of dry land and 28 acres of irrigated land; and had entered into two contracts of purchase, one for a half section and the other for a quarter section, on which at the death of his wife there remained owing approximately the market value of each. During all of these years, he was gradually stocking the home farm with cattle, horses and equipment. All of this, with the exception of a sum of $700.00 or thereabouts received by him from the sale of property in Europe, was the product chiefly of his own industry and business shrewdness.

The first lots were registered in his own name as were about half of those later acquired as well as the homestead and one quarter section. The home farm, although contracted for in his name, was transferred from the vendor to his wife. The contract for the irrigated tract of 28 acres was in their joint names, but title issued in her's only. His remaining interests in the foregoing properties, except the homestead which had been sold, were transferred to the deceased in 1933. The contract for the half section was made in the names of both and that of the quarter section in his alone.

His wife with the help of the daughters sold and delivered milk under a licence which at times was issued to the father and at other times to the deceased. The buying and selling of the cattle, horses and equipment were done by the husband. There is a disclaimer by the appellants of a number of horses and a few insignificant items of personal property. With these exceptions and the two outstanding land contracts, the appellants claim that the entire product of the family effort over the forty

years belonged exclusively to the deceased, and the respondent at the age of 67 years finds himself virtually penniless.

Although he can read and write in Hungarian, in English he does not read and can write only his signature. Until about 1924 a bank account was carried in his name, but from then on until at least 1941 the whole of the family income was deposited in and disbursements made through an account in the name of the deceased.

His explanation of how it was that his wife had become the owner of property which he had worked for and managed and had been the chief factor in accumulating was, first that it was always understood between them that the property was for the benefit of both while they lived and for the survivor whichever it might be; that some time before the first World War a reciprocal will had been signed by them in which each gave to the other all their property, and that that fact made him regardless of the one in whom the titles to the property from time to time stood; and the persistent importuning of his wife for the transfers to her, implying that, under the circumstances, it was the easier course to comply with than resist. The trial judge found that such a will had been made.

The situation was, therefore, the not unusual one of an industrious family working together and bringing all earnings into a common fund under the direction of the parents. Both the trial judge and the Appellate Division have found that there was never any intention on the part of the respondent that his wife should enjoy the sole beneficial interest in the properties placed in her name, and with those findings I am entirely in accord. The trial judge found a trust for the respondent, but on appeal this was modified to a trust for all of the children and the husband equally, and from that holding appeals are brought here by both interests.

I think the whole of the evidence makes it clear that what the respondent in making the conveyances had in mind and the deceased understood was that regardless of the title to particular parcels each should hold the family lands for the benefit of both and the survivor. The

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motive for formal ownership is often complex, sometimes elusive and frequently hidden; there can be little doubt that the deceased was property-minded; but the accepted and avowable intention of the parties to preserve to both what they had together produced and to leave to the survivor the final responsibility of family distribution clearly appears. That such a purpose might exist in the husband only in intention or that, as trust, was not enforceable against him does not in the conditions of their life affect the understanding on which the various properties were conveyed to and accepted by his wife. As against her, there was a trust, either express or implied in fact, of interests that can be called entireties which it is a fraud on the part of those who now represent her to repudiate. Against the unjust enrichment following that fraud, an equitable right to restitution is raised in favour of the respondent in the right which he originally sustained toward the property. This results from the operation of law and is consequently outside the prohibitions of the Statute of Frauds. Whether his original right is an exclusive or a joint and survivor beneficial interest is in the circumstances academic.

The transfers of 1933 are challenged as intended to delay or hinder as creditor the vendor of the quarter section still unpaid for; but both courts below have found against this, and with that finding I agree. Whether the respondent has not in any event availed himself of a *locus penitentiae* in view of the continuing existence of the debt and has not as well met any presumption of the fact of delaying or hindering, need not therefore be considered: Duff J. (as he then was) in *Scheuerman* v. *Scheuerman* (1).

It was contended by Mr. Helman in his able argument that there has been no corroboration as required by the Alberta *Evidence Act,* but, as the courts below have held, the whole circumstances of the life of this couple are a corroboration of the respondent's case: *Cole* v. *Cole* (2). The reciprocal will gave him assurance that the joint interest which was all he desired was likewise the desire of his wife and that their intention was thus secured; that

(1) [1916] 52 Can. S.C.R. 625, at 636.
(2) [1944] S.C.R. 166.

was the purpose of the will, not that it should be a formal counter-control to a complete surrender of property that was in substance his. If his wife had lived to see the two outstanding contracts fully paid up, it is not an extravagant speculation that the titles as in the case of the other farm lands would have gone to her. I cannot accept the view that such a man would voluntarily and completely divest himself of all right in the property he originated and in largest measure accumulated, and expose himself to the possibility of destitution when his working days were over.

The same circumstances with the evidence of the respondent, accepted by the trial judge, both establish the trust and furnish the rebuttal to any presumption of gift to the wife. It is really inaccurate to speak of an advancement of the entire property of a husband to his wife; an advancement is essentially a share, and here the transfers were in substance of an entire establishment.

The appeal should, therefore, be dismissed and the cross-appeal allowed for the restoration of the trial judgment. The costs of the trial should be paid out of the property, but the respondent is entitled to the costs of both appeal and cross-appeal.

HUDSON J.—For the reasons given by the learned trial judge and those given by my brothers Rand and Estey, I would dismiss the appeal and allow the cross-appeal, both with costs.

ESTEY J.—The learned trial judge found that the several parcels of real estate registered in the name of the late Mary Pahara were held in trust by her for her husband, the respondent, Mike Pahara. The appellate court agreed with the learned trial judge in all his findings of fact but varied his judgment by directing that the late Mary Pahara held the real estate in trust for the respondent and members of his family. As regards the personalty both courts agreed that it had at all times been and remained the property of the respondent, except certain items to which the plaintiff made no claim.

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The appellants do not seek to set aside these concurrent findings of fact, but contend that, accepting these facts as found, the evidence does not establish that a trust was created by testimony clear, satisfactory and convincing, or such as to bring the existence of a trust within that range of reasonable certainty required by the law; that there is no corroboration as required by section 12 of the Alberta *Evidence Act,* which reads as follows:

12. In an action by or against the heirs, next of kin, executors, administrators, or assigns of a deceased person, an opposite or interested party shall not obtain a verdict, judgment or decision, on his own evidence, in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by some other material evidence.

and further, that there was no writing as required by the Statute of Frauds.

The judgment of the learned trial judge is reported (1). It gives a very thorough review of the facts, which have been accepted by the appellate court (2). The evidence is abundantly clear that a trust existed. The terms of this trust are not at all complicated, and in my opinion are repeatedly and clearly stated by the respondent.

The respondent states that about the time he transferred his first property to his wife a will was made signed by both of them. This will could not be found, but he stated that under the will it was provided that in the event of death of either of them all the property was left to the other. That thereafter all transfers of his property to his late wife were made at her request and upon the basis of the understanding embodied in this will, and the further understanding that should he ever need them they would be transferred to him.

His evidence that such a will existed and as to its contents was corroborated by John Pahara whose evidence was accepted by the learned trial judge. John Pahara states that when he was assisting his mother in framing her marriage certificate he read this will, which had been kept with the marriage certificate in a trunk where many papers were kept relevant to the family business. This

(1) [1944] 3 W.W.R. 100. (2) [1945] 1 W.W.R. 134.

evidence on the part of John Pahara constitutes other material evidence corroborating that of the respondent: *Thompson* v. *Coulter* (1).

Then further, with respect to corroboration, Taschereau C.J., in *McDonald* v. *McDonald* (2), states:

> The statute (Ontario Act corresponding to Alberta sec. 12) does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that the fact sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the trust of the fact deposed to, are, in law, corroborative evidence.

The respondent and his late wife, Mary Pahara, were married in 1900. The respondent provided the initial capital. By the thrift and labour of his wife and himself, and later his family, they accumulated a substantial estate. Apart from signing his name he can neither read nor write. In the early days he had a bank account in his own name, but in the early 20's an account was opened in his wife's name and thereafter it was through that bank account that all business was transacted. The money from any and all sources was paid into that account and bills paid therefrom, regardless of the type of obligation or what member of the family incurred same. Neither salary nor wages were paid to any member of the family but each received sufficient for his necessities out of that account. Nor was there any change with respect thereto when in 1933 several properties were transferred to the late Mary Pahara; nor when she made the will in 1935, nor indeed up to the time of her death on July 9th, 1942. The disbursements for all purposes and for all the family were made from that account.

The late Mary Pahara was constantly asking her husband to transfer his property to her, which from time to time he did, but I have found no act upon her part where she asserted ownership until she drew the two wills hereinafter mentioned.

Counsel for the appellants contended that prior to 1933 the then parcels of real estate were held in equal number by the husband and wife. Two factors are in this connection important. On the basis of value there was no

(1) (1903) 34 Can. S.C.R. 261.

(2) (1902) 33 Can. S.C.R. 145, at 152.

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equality in the holdings of the respective parties. Then when he desired to expend money thereon and for that purpose money had to be borrowed the titles were transferred by the parties as the conditions of the loan dictated.

Moreover, the transfers of the respective properties made no difference with respect to the operation thereof. The respondent continued to direct all operations and was at all times dealt with as the owner of the property. The cattle and horses were branded with brands registered in his name; he purchased land, machinery and livestock; he effected trades and made sales and in every respect he acted as owner while his late wife made the payments from the bank account.

All these circumstances corroborate the evidence of the respondent that the property was not transferred to her in her own right but was held in trust.

It is significant under all the circumstances of this case that in 1935, when they had accumulated a very substantial estate, that the late Mary Pahara should make a will leaving all of the property to her children and making no provision for her husband. Moreover, that she should do all this without any mention thereof to her husband. Then again, she executes another will immediately before her death, the effect of which, apart from a life interest in twenty-eight acres to her son Mike Pahara Jr., gives all the property, real and personal, to her daughters, Helen Pahara and Annie Petrunia, and merely provided with respect to her husband,

> And I request my daughters to take care of and provide for the necessities of my husband Mike Pahara, during his lifetime.

It is also significant that while the respondent, Mike Pahara, knew nothing of either of these wills until after her death, immediately he did learn of them he proceeded at once to ascertain their contents and to take the position which he maintained at this trial. In my opinion every circumstance corroborates the position expressed by Mike Pahara at the trial and supports the statement of the learned trial judge that,

> the whole conduct of their married life corroborates the Plaintiff's evidence that the property from time to time acquired was for the benefit of them all.

The appellants allege that any property transferred by the respondent to his late wife was for a "good and valuable consideration". An examination of the transfers discloses that in some instances the property was purchased in the name of the respondent and the transfer made direct from the vendor to his late wife. Sometimes the respondent would take title and later transfer the same to his late wife. The properties were usually purchased upon terms extending payments of the purchase price over a period of years. The important fact is that in every case the payments were made from the one bank account and that, as already intimated, the taking of title in one or the other made no difference with respect to the operation and management of the property.

It is not suggested that his late wife ever made any contribution toward the purchase price of these properties which could be earmarked as her own separate money or property. The purchase price in all cases was realized from the respondent's wages earned apart from any operations on his own or from the farm and associated operations. The initial funds were supplied by the respondent and he never ceased to manage, direct and carry on these operations as owner. It is true that his late wife at all times worked hard and assisted him and no doubt contributed materially to his success.

Money received by a married woman out of the proceeds of her husband's business, or saved by her out of money given by him for household purposes, dress or the like, and invested by her in her own name, belongs to her husband. *Barrack* v. *McCulloch* (1).

This paragraph has often been quoted with approval. A perusal of the *Married Women's Act,* 1942, R.S.A. c. 30 does not contain a provision contrary to the foregoing.

It is also contended that the respondent cannot now obtain retransfer of these lands, particularly those transferred in 1933, because they were made for the purpose of hindering, delaying and defeating his creditors and in particular Mr. Ingram, to whom, at the time of the transfer, he was then in default in a matter of about $850. The only evidence brought forward to support the allegation are some statements alleged to have been made by the respondent which do not, as found by the learned trial

(1) (1886) 3 Kay & J. 110.

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judge, establish such to be the fact. The essential point is that it is the appellants who make this allegation and who seek to establish it. Such an allegation was not made by the respondent nor was it necessary to his case. The fact is he denied any such reasons for such transfers and said they were made for the same reason as those given prior thereto.

The appellants allege non-compliance with section 7 of the Statute of Frauds. It is found that the deceased wife held the property in trust and it is not with her and therefore not with her executors to rely upon the Statute of Frauds to deny to the cestui que trust the benefit of the trust. As stated by Lindley L. J. in *Rochefoucauld* v. *Boustead* (1):

It is further established by a series of cases, the propriety of which cannot now be questioned, that the Statute of Frauds does not prevent the proof of a fraud. It is a fraud on the part of a person to whom land is conveyed as a trustee and who knows it was so conveyed to deny the trust and claim the land himself.

There is a concurrent finding of fact with respect to the chattel property that at all times it was the respondent's, and the evidence entirely supports this conclusion.

The learned trial judge held that the respondent was the beneficiary under the trust. The Appellate Division varied the decision that he and the five children were beneficiaries and that each was entitled to an undivided 1/6 share. The only trust alleged is that in favour of the respondent, which is denied by the defence but an alternative trust in favour of the children is not suggested.

It is true that in the course of his evidence the respondent states:

No, when I married never make anything like that at all, but in 1909 when I bought them lots she asked me about it and I said all right, "But if I going to die," she said that is mine then; if I am die that is hers; it is all for the family to have the benefit of it.

And again:

Well, we always figure like this, if any one die that is belong to other one then, belong to whole family to have the benefit of it.

Statements to this effect are repeated from time to time in the course of his evidence.

(1) [1897] 1 Ch. D. 196, at 206.

Upon the whole of the evidence it is clear that the survivor should have the entire property and that it would be eventually for the benefit of the family, but I cannot find evidence of any intention to create an immediate beneficial interest in the members of the family. Although the date of the will is not established, it is clear that it was made at a time when the children were very young.

This statement with respect to the family remained at all times a mere expression of an intention or a wish, but never was there any suggestion that the survivor should not be in a position to deal with the property as he or she might care to. Under the authorities words of this type do not create a trust. *Lambe* v. *Eames* (1); *Hill* v. *Hill* (2); *In re Hill: Public Trustee* v. *O'Donnell* (3).

In my opinion the judgment of the learned trial judge should be restored, this appeal dismissed with costs and the cross-appeal allowed with costs.

Appeal dismissed and cross-appeal allowed, with costs.

Solicitors for the appellants: *Helman & Mahaffy.*

Solicitor for the respondent: *A. G. Virtue.*