JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 1/81

BEFORE: The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Carey, J.A.
The Hon. Mr. Justice Campbell, J.A. (Ag.)

BETWEEN	GEM HARRIS	PLAINTIFF/APPELLANT
A N D	EUGENE HARRIS	DEFENDANT/RESPONDENT

J.W. Kirlew Q.C. for Appellant

Lloyd Barnett for Respondent

25th, 26th, 27 November, 1981
22nd, 23rd March & July 30, 1982

CAREY J.A.

The parties in this appeal are now divorced but for convenience I shall refer to them as 'the husband' and 'the wife'. The appeal is concerned with certain property purchased in their joint names as tenants in common. In the court below the wife sought (inter alia) an Order under the Partition Act that:

> "The said premises be sold and that the rents and profits ..... received by the defendant (husband) be taken into account and that the sale price thereof be divided between the parties in such proportion as the court may deem just."

The husband counter claimed for "a declaration that he is the sole beneficial owner of the said property." Malcolm J. by an order dated 26th November, 1980 granted a declaration that the wife "had legal and beneficial interest (in the premises) and that the proceeds upon sale (which he directed should be divided as to 1/3 for the wife and as to 2/3 for the husband.

Both parties dissatisfied by this result, desire by this appeal, to have the order set aside. The wife for her part, seeks an order for the proceeds to be divided equally; the husband on the other hand maintain his original posture. The grounds of appeal filed on behalf of

the parties raise questions of facts and law.

The wife's case, which was somewhat deficient in evidence rested on two plinths. First, it was said on her behalf that she had contributed to a common fund from which the initial down payment was paid and secondly, the fact that the transfer was made to them jointly raises the presumption of advancement. As to the first, the wife averred in her statement of claim that:-

> "4. The said premises were purchased by the parties for the sum of three thousand nine hundred and fifty pounds. This said sum was financed by:
>
> (a) a downpayment of £470 made from the common funds of the Plaintiff and Defendant;
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> (b) mortgage No. 192273 dated the 4th October, 1966 for three thousand four hundred and sixty four pounds ten shillings from the Bank of Nova Scotia Trust Company of Jamaica Limited in the names of both parties."

The husband requested further and better particulars of "the common funds", and "where and by what means and in what manner and to whom did the wife make contributions referred to ....."

In reply the wife pleaded as follows:

> "1. In a Joint savings and Checking Accounts, Checking Account No. 155/B at Barclays Bank (as it then was) Spanish Town Post Office in the parish of Saint Catherine from 1957 to 1964. Later in 1964 the Barclays Bank Account was closed and a fresh joint Savings and Checking Account opened with the Bank of Nova Scotia Jamaica Limited at Adelaide Street, Spanish Town Post Office aforesaid.
>
> 2. From the Joint Checking Account No. 155/B and by various amounts payable from time to time by cheques from the said Account and to various creditors and donees including his mother the late Georgiana Harris and his sister Iris Martin.

The wife was however quite unable to substantiate the allegations that there existed either a joint savings account or a current account at the bank referred to. Malcolm J. as he then was bound to do, found accordingly which provoked Dr. Barnett not unnaturally to argue before us that there was no common fund (or alternatively there was no surplus in

that common fund) to assist in providing the deposit and consequently the learned judge erred in law in holding that the wife had nevertheless contributed to the purchase of the property. It was the husband's evidence that he had provided all the funds and he denied receiving any salary cheques from the wife. The judge did find, however, that there was evidence that the wife endorsed her salary cheques over to the husband who lodged them in his account and from this account gave her funds from time to time for house-keeping and other domestic purposes. He also found that she received an amount of approximately 1/4 of her salary to run the house.

I do not see how we could disagree with the finding that there was no joint account but that there was a common fund. It is right to say that where a fund is intended for the use of both parties, the method usually adopted is a joint account, but I do not understand that a common pool or fund requires anything other than an intention that it is for the joint use of the parties.

In Jones v. Maynard (1951) 1 All E.R. 802/a (1951) Ch. 572 husband and wife each had a banking account, but as the husband was to go abroad on war service, it was decided that their joint incomes should be paid into the husband's account on which the wife was given power to draw. From time to time money was withdrawn from the account by both parties for their own purposes, and in particular, for investments which were made in the name of the husband. The marriage ended in a divorce, it was held that the intention of the parties was to constitute a pool of their resources in the form of a joint account; it was not consistent with that intention to divide the moneys in the account and the investments made with moneys withdrawn therefrom by reference to the amounts respectively contributed to the account by each of them; and therefore, the husband must be regarded as trustee for the wife of one-half of the investments and of the balance of the account. Vaisey J. at p. 803 of the report said:

> "In my judgment, where there is a joint purse between husband and wife - a common pool into which they put all their resources - it is not consistent with that conception that the joint account should thereafter (in this case in the event of a divorce) be divided up with reference to the respective contributions of husband and wife, crediting the husband with the whole of his earnings and the wife with the whole of her dividends. I do not believe that when once the joint pool has been formed it ought to be, and can be, dissected in such a manner. I take the view that when spouses have a common purse and a pool of their resources, the husband's remuneration is earned on behalf of them both, and the idea that years afterwards one can dissect the contents of the pool by taking an elaborate account as to how much was paid in by the husband and how much was paid in by the wife is not consistent with the original fundamental idea of a joint purse or a common pool. When the money goes into the pool it is there as joint property."

In the present case, it would be unreasonable to suppose that the wife was making a gift of her salary cheques to her husband. The evidence shows that he was in the habit of giving her one quarter thereof for household and other domestic purposes. At this time it is plain they were living together in a married state that was reasonably satisfactory, according to the wife. There was a conflict on this aspect of the evidence but the learned judge preferred the wife's evidence and I can see no valid reason to impugn that finding. If then it is accepted that the wife contributed to the common pool, it thus became joint property out of which either would be entitled to draw, with the consent of the other, whether tacit or otherwise.

The parties having constituted a common pool from which the funds were provided to pay for the property, which was conveyed in their joint names, the only question which arises is in what proportion should each share. Since the fund from which the resources emanated should not be dissected to ascertain the extent of the respective contribution, it seems to me to follow, nor should any examination be made to see in what shares each holds the property. Put another way the joint property has been used to purchase property for the future enjoyment of both, and the court in doing what is just between the parties, should declare that they hold the property equally.

Alternatively, even if it were held that there was no common pool, since the property was acquired in their joint names, it becomes necessary to consider whether the presumption of advancement can be applied in the circumstances of the present case. Where a husband purchases property in the name of himself and his wife it is trite law that a gift to her is presumed in the absence of evidence to the contrary. The following dicta correctly states the law:-

> "..... if one of the spouses draws on the account to make a purchase in the joint names of the spouses the property purchased, since it is purchased in joint names, is prima facie, joint property and there is no equity to displace the joint legal ownership. There is, in my judgment, no room for any presumption which would constitute the joint holders as trustees for the parties in equal shares."

per Stamp J. (as he then was) in Re Bishop (dec'd) (1965) 1 All E.R. 249 at p. 253. See also Lord Upjohn in Pettit v. Pettit (1970) A.C. at p. 815.

> "So that, in the absence of all evidence, if a husband puts property into his wife's name, he intends it to be a gift to her, but if he puts it into joint names then (in the absence of all other evidence) the presumption is the same as a joint beneficial tenancy."

In the present case the husband sought to rebut the presumption by adducing evidence that the wife had signed the agreement for sale "for convenience", it being a pre-condition to the grant of a mortgage that the salary or joint-salary of the mortgagor or mortgagors should be three times the amount of the premium. He related in evidence that the marriage had broken down: the relationship he said was bad. The wife did admit that there were differences between them but denied that the relationship was bad. This conflict it would seem, the learned judge resolved in favour of the wife. The versions as to the acquision of the property were thus mutually exclusive. According to the wife, both herself and the husband negotiated for the purchase of the property. Both went to the mortgage office, read the agreement and signed the

agreement together. Both started paying the mortgage. She ceased to do so whn they separated. The husband sought to show that the purchase of the house was achieved solely on his initiative. He paid the deposit of £470 he said, and further there was no funds in the bank. Consequently, he obtained a loan from the Jamaica Civil Service Thrift Society and secured a mortgage, the repayment of which he made arrangements to discharge. He persuaded the wife to co-sign with him as the mortgagee insisted on its principle that the mortgagor's salary should be 3 times the premium. The addition of the wife's salary would assist in satisfying that condition. The husband alleges that he made it clear that she would never have any interest in the property. Again the learned judge rejected the husband's version and preferred the wife's. The husband did acknowledge however that he had since their separation offered the wife the house for sale at a price of $20,000.00. There was evidence that he valued the house at between $26.000.00 and $35.000.00. That being so, it is not unreasonable to infer that the husband was offering to sell his share in the property rather than offering to dispose of his property to the wife. It is but a short step to say that this was an indication of the respective shares in which he thought the property was held.

Malcolm J. saw and heard the parties and was in a better position to assess the respective reliability and credit of the parties. That advantage has been denied to us, and we would be loath to differ from him in this area of conflict. It can be said however that it seems most unlik[illegible]ing regard [illegible] state of the marriage on the husband's version, the husband would have been in a position to influence her to her disadvantage or that she would have undertaken the onerous responsibility of a mortgagor in respect of property to which she appreciated she was to have no interest. This is in contrast to the evidence that subsequent to the break up of the marriage he was offering her his property at an undervalue. It strains credulity to accept that

the wife would have signed the mortgage agreement "for his convenience".

As I understand the law in relation to matters of this kind, two propositions can be stated where property is transferred into the joint names of husband and wife. The first is plainly stated in Cobb v. Cobb (1955) 2 All E.R. 696 namely that prima facie, the parties are to be treated as beneficially entitled in equal shares. Lord Denning M.R. at p. 698 said this:

> "..... when both husband and wife contribute to the cost and the property is intended to be a continuing provision for them during their joint lives, the court leans towards the view that the property belongs to them both jointly in equal shares. This is so even where the conveyance is taken in the name of one of them only and their contributions to the costs are unequal, and all the more so when the property is taken, as here, in their joint names and was intended to be owned by them in equal shares. The legal title is in them both jointly, and the beneficial interest is in them both as equitable tenants in common in equal shares."

The second is that where the intention of the parties as to whom the property is to belong to or in what definite shares each should hold is ascertainable, effect will be given to that intention. See Rimmer v. Rimmer (1953) 1 Q.B. 63: (1952) 2 All E.R. 863. I think some observations of Lord Upjohn in Pettit v. Pettit (1970) A.C. 777 at p. 813 are also helpful:

> "But the document may be silent as to the beneficial title. The property may be conveyed into the name of one or other or into the names of both spouses jointly in which case parol evidence is admissible as to the beneficial ownership that was intended by them at the time of acquisition and if, as very frequently happens as between husband and wife, such evidence is not forthcoming, the court may be able to draw an inference as to their intentions from their conduct. If there is no such available evidence then, what are called the presumptions came into play."

There was in my view evidence from the wife which showed that the intention of the parties was to secure a family home. Both were involved in the negotiations, both went to the mortgage office. There was thus conduct from which their intention could be ascertained, viz that the property was intended as a continuing provision for them during their joint lives.

The learned judge found that the presumption of advancement had not been rebutted and the husband did in fact intend an advancement. There was I have endeavoured to indicated evidence of conduct which showed the intention of the parties. It is not however clear to me why the learned judge having found contribution and that the husband intended an advancement, nevertheless declared that the respective shares should be in the order of 2/3 to husband and 1/3 to wife. The respective contributions were not made in that proportion. Equality is equality. I have come to the conclusion that on the facts as found and in principle, the parties should hold the beneficial interest of the property as equitable tenants in common. On sale therefore the proceeds should be divided equally. In the result I would vary the order of Malcolm J. in these terms.

One small matter remains and it relates to the question of costs. The learned judge made an order for the payment of costs from the proceeds of sale. I do not think that is right. It is an unusual order and there is in my view nothing unusual in these facts to warrant any departure from the usual order. The costs should be borne by the husband.

CAMPBELL, J.A. (AG.):

The appellant herein appeals from a judgment of Malcolm, J. delivered on November 26, 1980, in which the learned judge ordered that the property registered in the names of the appellant and respondent as tenants in common at Volume 1018 Folio 517 of the Register Book of Title be sold and that subject to the payment of the costs of the suit thereout, the proceeds should be divided as to one third for the appellant and two thirds for the respondent.

By this appeal the appellant seeks to have the learned judge's order for division and for costs vacated and for the substitution therefor of an order that the proceeds undiminished by the costs of the suit be divided equally between the parties and that the costs of the suit be paid by the respondent.

The respondent by a respondent's notice seeks an order varying the learned trial judge's order that the property be sold and divided and that there be substituted an order declaring him the sole beneficial owner of the property and further that certain consequential orders be made removing the appellant's name from the Register Book of Title and for the appellant to transfer the interest or estate registered in her name to him.

The appeal has its genesis in a dispute over property acquired during the subsistence of the marriage between the parties. Such disputes now all too often surface with the collapse or imminent collapse of the marriage with the tragic situation that the parties are invariably so incensed and antagonistic the one against the other that no just and amicable settlement can voluntarily be reached.

In this case the parties were married on January 5, 1957, at a time when each had practically no material wealth, the appellant was a primary school teacher and the respondent a youth club organiser who has now risen to the professional status of an attorney-at-law.

During all but one year of their marriage they lived in rented premises. In October 1966 they moved into the premises the subject matter of the dispute and the parties began living separate and apart about

October 1967, barely a year after, due to the irreparable break down of the marriage.

On November 29, 1965, the parties executed an agreement for the purchase of the property in dispute. They contracted to purchase as joint tenants. This agreement recited an undertaking by them to execute contemporaneously with the document of transfer of the property, a mortgage of the same to secure £3,464.10 of the purchase price with the remaining £470 deposit to be financed privately. The property was duly transferred by registered transfer dated September 20, 1966, and registered on October 4, 1966. A mortgage of the said property was also executed on September 20, 1966, and registered on October 4, 1966. In the registered transfer the parties are described no longer as joint tenants but as tenants in common.

The appellant both by her pleadings and in evidence contended that during their marriage and until she left the matrimonial home, she and the respondent pooled their incomes in a common fund which was kept in joint savings and current accounts at Barclays Bank and later at Bank of Nova Scotia Jamaica Limited in Spanish Town. She endorsed over her cheques to the respondent. She further asserted that the down-payment on the property was made from their common funds with the balance of the purchase price provided by mortgage in which she joined.

The respondent to the contrary contended by his pleadings and in evidence that during the marriage they at no time operated any banking account in their joint names. He alone operated banking accounts and no salary cheques of the appellant was ever endorsed over to him which he placed in his account. He said their domestic arrangements was that he gave the appellant money for the upkeep of the house and paid the rent. He further said that when the contract of sale was signed their marriage had already broken down. He asked the appellant to append her signature to this contract and to the mortgage documents merely for convenience but without any intention of conferring any beneficial interest on her and this fact was communicated to and accepted by her. He however admitted in substance the appellant's evidence that in or about

1976 he had offered to sell the property to her for $20,0 0.00 based on a valuation of $35,000.00

On his behalf at the hearing learned counsel Dr. Barnett conceded, properly in our view, that the presumption of advancement prima facie arose because of the registration of the title in the joint names of the parties who are husband and wife. He however submitted that the presumption being rebuttable had on the evidence of the respondent been rebutted. Therefore the respondent was entitled to judgment on his counter-claim declaring him the sole beneficial owner of the property.

The learned trial judge having considered the evidence made the following specific findings:

> "1. That there was no joint current or savings account in the names of both parties;
>
> 2. That plaintiff as she testified endorsed her salary cheques and gave them to the defendant who lodged them in his account and from this he gave her amounts for housekeeping and domestic purposes;
>
> 3. That she got about ¼ of his salary to "run the house";
>
> 4. From the conduct of the parties the presumption of advancement has not been rebutted the defendant did in fact intend an advancement;
>
> 5. That the wife has a beneficial interest in the premises."

The grounds of appeal of the appellant are that:

> "(1) That learned trial judge having found:
>
> (a) That the plaintiff/appellant made contribution towards the purchase of the premises;
>
> (b) That in purchasing the premises in the names of the plaintiff/appellant and defendant/respondent, wife and husband, the defendant/respondent made an advancement the only order that could be made was for the proceeds to be divided equally.
>
> (2) The learned trial judge erred in ordering the costs to be paid out of the proceeds of sale instead of by the defendant/respondent."

The respondent's notice of variation on the other hand firstly attacked the foundation on which the learned trial judge had found albeit inferentially that the appellant contributed to the purchase of the property, secondly his finding that the presumption of advancement had not been rebutted. His grounds for variation are:

> "(1) The plaintiff/appellant having in the particulars of her pleadings specified the manner in which she contributed to the purchase of the said property failed to support it by any evidence;
>
> (2) The learned trial judge having found that there was no such joint accounts as alleged by the plaintiff/appellant erred in law on the facts in finding that she nevertheless contributed to the purchase of the said property;
>
> (3) There was overwhelming or uncontradicted evidence that the payment of the deposit, mortgage instalment, expenses and outgoings relating to the said property were provided by the defendant/respondent alone and the finding that the plaintiff/appellant contributed by delivering her salary cheques to the defendant/respondent is against the weight of the evidence and based on evidence which is a departure from her pleadings;
>
> (4) The weight of the evidence was in favour of the plaintiff/appellant's name being included in the documents of title for convenience only."

Considering Ground (1)(a) of the appellant's grounds of appeal and Grounds (1) (2) and (3) of the respondent's notice of variation, it seems that the respective counsels have overlooked the basis on which the learned trial judge's decision rested.

It is clear from the learned judge's findings of fact that he made no express finding that the appellant made contribution to the acquisition of the matrimonial home. It is true that what he said in effect, is that though there was no joint or savings account technically and legally, there had been a pooling of incomes in a common fund operated by the respondent in his name into which the monthly salaries of the appellant were deposited after being endorsed over to him. That out of this fund the appellant was given an amount equivalent to about ¼ of her salary to maintain the domestic establishment while the respondent retained control over the rest of the common fund.

It is equally true that an inference could be drawn from this domestic arrangement of the pooling of incomes that a matrimonial home acquired while such arrangement subsists would be contributed to by both parties. But the learned trial judge refrained from making any express finding thereon because the decision in his view could be and was founded on the invocation of the presumption of advancement which the respondent conceded was applicable and which on the evidence the learned judge found had not been rebutted.

Notwithstanding that this was the basis of the judgment, and despite Dr. Barnett's own comment on Ground (1)(a) of the appellant's grounds of appeal namely, that it was not based on any finding by the learned trial judge, he nevertheless in presenting his submissions on Grounds 1, 2 and 3 of the respondent's notice, proceeded on the hypothesis that the learned trial judge may have inferentially found that the wife had contributed to the acquisition of the house. Dr. Barnett therefore by recourse to the evidence, sought to establish that such a finding was wrong. This approach was necessary for the respondent's counter-claim in order to establish if the presumption of advancement is rebutted, that he was the exclusive and total beneficial owner.

Dr. Barnett in relation to these grounds submitted that three issues arose for determination on the evidence namely:

(1) Was there a common fund out of which the down-payment on the house was made;

(2) How was the deposit on the purchase price of the house and the closing costs paid;

(3) Who paid the mortgage instalments, and did the appellant contribute directly or indirectly to those payments on the basis of a consensus or understanding that she had an interest in the property.

These issues in my view would be of profound importance when the Court has to consider the question of a resulting trust in favour of a wife in whom the legal estate in property is not vested. The issues would be equally of cardinal importance where the legal estate is vested in two persons who are strangers because here again the question of a resulting trust may arise.

However in cases where a presumption of advancement arises, the presumption of a resulting trust is ousted because the presumption of advancement rests on the presumption of a gift of the beneficial interest in the property to the person in whose name the legal estate is transferred. This presumption of advancement is not based on contribution to the purchase price, it is raised by implication of law as being consistent with an intention by a husband to satisfy an equitable obligation to support or make provision for a wife or a child or a person in relation to whom he stands in loco parentis.

As the judgment is based on the presumption of advancement and in the light of the conclusion reached by me it is not necessary for me to pronounce on the issues raised in these grounds of the respondent's notice. All that is necessary is to consider by reference to the evidence whether the trial judge was right in finding that the presumption of advancement had not been rebutted and if so what legal consequences follow. It is undoubtedly true that the presumption of advancement which arises as a matter of law may be strengthened by showing a contribution by the grantee to the purchase price of the property or by a conduct of pooling of resources by the parties but it certainly is not weakened or negatived by proof of absence of contribution, because this presumption as I have said, unlike the presumption of a resulting trust is not premised on any contribution whatsoever having been made by the person in whose favour the presumption of advancement is raised.

This brings me to consider Ground 4 of the respondent's notice of variation.

Ground 4 of the respondent's notice of variation states that:

> "The weight of the evidence was in favour of the plaintiff/appellant's name being included in the documents of title for convenience only."

Dr. Barnett in arguing this ground stated that the issue which the learned trial judge had to resolve was the reason for the wife's name being included in the documentations that is to say, the contract of sale, the registered title, and the mortgage.

In his submission Dr. Barnett said it was of great importance in the case that the respondent was saying that it was merely because of the requirement of the mortgage company why the appellant's name was put on the title. He attached importance to the fact that the appellant conceded that she was told by the respondent that it was necessary for their salaries to be aggregated to obtain the mortgage. He further attached importance to the fact that in her evidence the appellant had said that she could not recollect whether she had been merely asked to lend her signature, while the respondent in his evidence was definite that he had told her that her name was being included merely for convenience. The relevant parts of the respondent's evidence are as hereunder.

> "Know Frank Hall Housing Developer. He gave me certain information relating to a Housing Development. I went to his office and obtained information and brochure. I decided to purchase one of the houses in the scheme in Highfield, St. Catherine. I returned to his office. I had discussions with him in relation to financial conditions re scheme. The purchaser should be earning 3 times the amount of mortgage. The monthly mortgage payments would be £30.1.7. At that time my monthly salary was £80. I made arrangements with a relative Joy Francis Smith to co-sign with me for the purpose of getting the mortgage as a matter of convenience. At the time my marriage had almost broken up. The plaintiff was from 1963 very unco-operative. At end of 1965 I was still engaged in my studies. Her attitude did not improve. Mrs. Joy Francis Smith was ill and couldn't fit in with my arrangements for her to co-sign. I told Gem, the plaintiff what I had asked Smith to do and asked her to co-sign. She was at first hesitant. I told her that there was a request that my salary had to be 3 times the mortgage. I wasn't putting her into difficulty - it was a matter of convenience. She agreed to sign with me. We both went to the office of Frank Hall to sign the documents."

Under cross-examination the respondent gave evidence thus:

> "I explained the conditions under which she was to sign, I heard that my earnings had to be three times the mortgage. Consequently I wanted both of us to sign. This could be in 1965. I can't recall if the agreement and mortgage were signed at same time. I never got a copy of the mortgage agreement. I told her I was planning to buy this place and I would have to get someone to sign for me to bring my earnings to three times the mortgage. It was not my intention that

> she should have beneficial interest in the property. I made it quite clear she would never have any interest in the place. I don't know of husbands making wives co-owners without their paying one penny - when she signed paper marriage had broken down - had broken down in 1963. Kevin was born in 1964 January. During this time the relationship was bad. I asked her to sign because it was a private matter. If she hadn't signed I would have got someone else."

This evidence adduced before the learned trial judge to rebut the presumption of advancement was in my view lacking both in cogency and persuasion and must have rightly been so found by the trial judge. It is inconceivable that a husband would honestly and reasonably expect his wife to sign a mortgage on a property which the husband states quite clearly and unequivocally would be his exclusively. The evidence lacks realism and persuasion that a wife would be so indulgent to a husband to co-sign a mortgage which imposes personal liability on her, merely to provide a house for a husband at a time when the marriage had broken down and where no provision is made for the wife herself in the event that, as would be highly probable, she may be compelled by circumstances as has happened in this case, to leave the very house towards the purchase of which she has, without consideration, incurred financial obligations.

The documentary evidence shows that the rights of the parties in the property most likely were re-evaluated subsequent to the signing of the contract and prior to the registration of the title because in the registered transfer the parties appear as tenants in common and no longer as joint tenants which was the position in the contract of sale. One would reasonably assume that if the respondent did not intend to confer a beneficial interest in the property on the appellant he would have ensured that there was some written acknowledgment of this fact prior to registration as there was a whole year between contract and registration to do so. Instead we have a situation where the proprietary ri
right of the appellant has been enlarged by her being registered not as a joint tenant but as a tenant in common so enabling her to dispose of her undivided interest in the property not only inter vivos but by will.

Like equity the respondent appeared to have disliked the inequality of the jus accrescendi inherent in a joint tenancy particularly with the dissolution of their marriage a seeming albeit unhappy reality.

Again the frail and unreliable evidence of the respondent was assailed if not eroded by his admission that sometime in 1976 he had offered the house to the appellant for $20,000.00 at a time when on the uncontradicted evidence of the appellant he the respondent had put valuation of $35,000.00 thereon. This offer in my view is more reasonably explicable on the basis that the respondent before the commencement of proceedings appreciated that he was not the sole beneficial owner than that the offer at that price was the manifestation of a sudden spontaneous act of kindness to the appellant.

The circumstance in which the respondent claims that the inclusion of the appellant's name in the contract of sale as a joint tenant was solely for convenience, is completely different from cases in which this question of convenience have been raised to rebut the presumption of advancement, such as Marshal v. Crutwell (1875) L.R. 20 E.Q. 328.

In Marshal v. Crutwell (supra) which is the leading case establishing that the presumption of advancement is applicable to a joint banking account opened by a husband in his and his wife's name, it was held that if the joint account was established as merely a convenient arrangement for conducting the husband's affairs and that it was not intended to be a provision for the wife then no presumption of a gift of the sum remaining in the account on the death of the husband arises: In that case the facts were that:

> "The husband of the plaintiff being in failing health transferred his banking account from his own name into the joint names of himself and his wife, and directed the bankers to honour cheques drawn either by himself or his wife. He afterwards paid considerable sums into this account. All cheques were afterwards drawn by the plaintiff on the direction of her husband and the proceeds were applied in payment of household and other expenses. The husband never explained to the plaintiff what his intention was in transferring the account but it was stated by the bank manager that the husband had remarked at the time of the transfer that the balance of the account would belong to the survivor of himself and his wife.

> After the death of her husband (which took place a few months after the transfer) the plaintiff claimed to be entitled to the balance."

It was held that the transfer of the account was not intended to be a provision for the plaintiff, but merely a mode of conveniently managing her husband's affairs, and consequently that she was not entitled.

A careful consideration of this case reveals that the husband already owned the asset which he later transferred into his and his wife's name. He was not acquiring an asset in circumstances where in the absence of financial support or at least promised financial support from his wife he would be unable to acquire the asset. The transfer into the joint names of the husband and wife in Marshal v. Crutwell did not, as in our instant case involve the immediate involvement of the wife in financial obligations which could be enforced against her.

What the respondent in this case is asserting as a signature for convenience is the gratuitous undertaking by the appellant of personal financial obligations under a mortgage to enable him to acquire a house in which he will have the entire beneficial interest. If there is default in the mortgage payments, the appellant could be sued at the option of the mortgagee for the arrears. Such a situation could equally arise if the property is sold under the powers of the mortgage and result in a shortfall in the mortgage sum due and outstanding. There is no enforceable contract of indemnity between the appellant and the respondent to which she can resort to recover from him monies which she may have been compelled to pay.

Thus the principle of convenience exemplified in Marshal v. Crutwell (supra) as rebutting the presumption of advancement is dependent on a composite of facts which is totally absent in the present case.

The finding of the learned trial judge that the presumption of advancement had not been rebutted is in my view well founded on the evidence which was before him and I see no reason to differ from him. Accordingly Ground 4 of the respondent's grounds for variation fails.

Reverting to Ground 1(b) of the appellant's grounds of appeal Dr. Barnett submits that it is not the law that once a presumption of advancement is raised by reason of the purchase of property in the joint names of husband and wife, the order of the Court if the presumption is not rebutted must inevitably be for equal division of the property.

Dr. Barnett submits that the instrument by which the property is vested in the joint names of husband and wife may have specified how the beneficial interest should be dealt with and the Court would be bound to give effect thereto. This is undoubtedly true. However Dr. Barnett submits further that where the instrument does not effect the apportionment of the beneficial interest the Court has to consider all the circumstances including the contributions of the parties to determine their intention as to the apportionment of the beneficial interest.

While no doubt evidence of acts done and statements made prior to or contemporaneous with the transaction is generally admissible to determine how the beneficial interest in property was intended to be apportioned where the legal estate is in the joint names of husband and wife, this rule in my view is subject to this important qualification namely, that evidence of relative contribution by the husband and wife is per se totally irrelevant to support a claim by a husband to a share of the beneficial interest greater than that which would be implied in law by reference exclusively to the instrument creating or vesting the legal estate in the parties. Thus the vesting of the legal estate in the parties as joint tenants carries precise implications in law namely, that the interest of each joint tenant is the same in extent, nature and duration and that though in theory of law each joint tenant has up to and including the whole of the property, the rents and profits of the land are to be divided equally between them until the death of one of the joint tenants, at which time the jus accrescendi springs into being in favour of the survivor.

These implications of law illustrated in the case of a joint tenancy, cannot be affected adversely to a wife - solely by evidence that the husband contributed two-thirds of the purchase price of the property or even the whole, because as I have already said the presumption of advancement is not dependent on any contribution whatsoever of the wife. It arises wholly and exclusively from the recognition of an equitable obligation by a husband to support and or make provision for his wife.

An illustration of this principle is revealed in Silver v. Silver (1958) 1 W.L.R. 259 - the facts of which were as follows:

> A husband and wife purchased successively four dwelling houses for use as their matrimonial home. In each case the property had been purchased in the name of the wife. In respect of the first purchase, the down-payment of £90 was provided not by the wife but by her parents, while the balance of £805 was provided by mortgage all the instalment payments of which were made by the husband. This house was sold at a profit and in the three succeeding purchases the deposit was in each case provided out of the sale of the immediately preceding house and the balance of the purchase price in each case was also obtained on mortgage with the instalment payments being paid exclusively by the husband. After the last dwelling house was purchased in the wife's name and when £1,300 remained unpaid on the mortgage the husband left the wife and applied under Section 17 of the Married Women's Property Act, 1882 for an order that the house was held by the wife upon trust for herself and himself jointly.

The County Court Judge held that there was nothing in the evidence to rebut the equitable presumption that in having the house purchased in his wife's name and in paying the instalments due under the mortgage, the husband intended to make an advancement and the wife was not a trustee of the house in whole or in part for the husband.

In the Court of Appeal it was held unanimously that on the facts, the findings of the County Court Judge should not be disturbed and that since the matrimonial home was purchased in the name of the wife it was presumed to be a gift by the husband to the wife in the absence of evidence of a contrary intention

The real significance of this case in my view is that it establishes that notwithstanding that a substantial contribution towards the purchase price or even the entire purchase price of the property is

made by a husband, this fact per se provides no evidence of a contrary intention to that which is to be inferred from the property having been purchased either in the name of the wife exclusively or in the joint names of husband and wife. There can be no question of apportionment solely by reference to the relative contributions of husband and wife where the presumption of advancement arises. Either the instrument vesting the legal estate in the parties must prescribe the beneficial interest which each party is to take or there must be credible evidence other than evidence of the relative contributions of the parties to the purchase price to establish an apportionment different from that which the transfer document impliedly bespeaks.

In the instant case there was no evidence adduced by the respondent before the learned trial judge other than evidence designed to establish that he alone made financial contribution, including mortgage payments, towards the acquisition of the house. This was irrelevant to affect the implication of law arising from the documents evidencing title to the property. The contract of sale dated 29th November, 1965, was signed by the parties as "Joint Tenants." In altering their proprietary rights from joint tenants to those of tenants in common in the registered transfer, it must be inferred, as I have earlier said that the respondent then with noble intention towards the appellant his wife did like equity delight in equality both in life and in death. The unhappy event of their parting company subsequently, cannot divest the appellant of the right to equal share of the rents and profits of the property to which she was entitled under the contract of sale which right was subsequently modified advantageously to her to enable her to dispose by will of her undivided share in the property. This share cannot, in the absence of clear and express agreement, be less than that which she enjoyed jointly with the respondent as joint tenants, namely equality of interest.

There being no sufficient evidence adduced to rebut the presumption of advancement or any relevant contrary evidence as to what share each was to have in the event the presumption was not rebutted,

a half share interest is by implication of law advanced to the appellant. This implication arises by reference to the contract of sale as well as to the registered transfer. The learned trial judge in my view fell into error when he adjudged the appellant entitled to a one-third share only instead of to a half share. I would accordingly allow the appeal based on Ground 1(b) of the appellant's grounds of appeal.

The appellant in Ground 2 of her grounds of appeal, appeals against the order made by the learned trial judge in respect of costs, namely, that they should be paid out of the proceeds of sale of the property.

The learned trial judge regrettably has not given any reason why he has deprived the successful applicant before him of having her costs paid by the unsuccessful respondent. In the absence of special circumstances to be stated by the trial judge a successful litigant is entitled ex debito justitiae to have his costs paid by his unsuccessful adversary and in the present case there being no stated reason or satisfactory basis for the departure by the learned trial judge from this principle, he in my view fell into error in making the order for costs in the manner complained of. I would accordingly also allow the appeal against the order for costs.

For the reasons given I would allow the appeal and order that the judgment be varied by ordering that the appellant be paid a half share of the proceeds of sale of the property registered at Volume 1019 Folio 517 of the Register Book of Title undiminished by the costs of the proceedings and that the respondent do pay the appellant her costs of those proceedings.

The appellant is entitled to her costs in this appeal.

CARBERRY, J.A.:

I agree with the conclusions that have been reached in the judgments of Carey and Campbell, J.J.A. and the reasons which have led to those conclusions.

Arguing for the husband, Dr. Barnett remarked that the crucial principle in these cases is what was the intent of the parties at the time of the acquisition of the property, the subject of the dispute. This has been a consistent theme through all the cases: Re. Rogers Question (1948) 1 All E.R. 328 per Evershed L.J. at 328 H; Jones v. Maynard (1951) 1 All E.R. 802; (1951) Ch. 572 per Vaisey, J. at page 803; Rimmer v. Rimmer (1952) 2 All E.R. 863; (1953) 1 Q.B. 63.

Where the intent is not readily discoverable then recourse must be had to equitable doctrines, whether of resulting trust, advancement, or of imputing a trust: as in Pettit v. Pettit (1970) A.C. 777 and Gissing v. Gissing (1970) 3 W.L.R. 255.

In this case the intention of the parties at the time of the transaction was reasonably clear. They contracted to take the house as Joint Tenants. The title, a registered one, was issued to them as Tenants in Common. Nothing indicates other than that they meant not only that the wife should take an interest, but that interest should be an equal one. Where she was meant to have no interest (she denies this) the land was vested in the husband only, as in the case of their first acquisition of land at Sligo. This led to friction when it was discovered, and against that background the fact that the later acquisition was in both names can lead to but one inference.

The learned trial judge had no difficulty in accepting the wife's version of the transaction at issue in this case. He found that she had a beneficial interest in the premises. Whether it be regarded as a case of acquisition through a common fund consisting of a bank account or bank accounts in the name of the husband only but into which all the wife's salary cheques went, or on the basis of the presumption of advancement, not as strong as it was in older days, but still a valuable guide.

Where I think the learned judge went wrong was to assume that his power to do what was just allowed him to divide the property as he did, one third to wife two thirds to husband. To quote part of a very famous quotation from the judgment of Romer, L.J. in Cobb v. Cobb (1955) 2 All E.R. page 696 at 700 G-H:

> "..... but where, as here, the original rights to property are established by evidence and those rights have not been varied by subsequent agreement, the court cannot in my opinion under s. 17 vary those rights merely because it thinks that, in the light of subsequent events, the original agreement was unfair."

This point of view, not without strenuous opposition from learned judges who saw the Courts as invested with larger powers, must be taken to have prevailed so far as the original legislation is concerned, and Romer, J.'s dictum was cited with approval by several of their Lordships in Pettit v. Pettit (1970) A.C. 777 see for example Lord Morris at page 800D-G and Lord Hodson at 807 - 808.

In our context of a registered title system where there is no question of trusts appearing on the title, and we do not have a system by which conveyances deal as of course with both the legal and the beneficial interests separately, but both are assumed to run together, unless a trust is clearly established by evidence aliunde, or in rare cases in the conveyance itself, when parties contract to take and do take title in their joint names, without any attempt to differentiate the quantum of their respective interests, they take both equally and beneficially.

Cases such as Wilson v. Wilson (1963) 2 All E.R. 447 and Leake (Bruzzi) v. Bruzzi 1974 2 All E.R. 1196 clearly apply, and to cite a small passage from page 1198 b of the latter case, where speaking of the trust deed accompanying the conveyance Stephenson, L.J. observed it:

> "..... concludes this appeal in favour of the wife and compels this court, as it should have compelled the register, to decide that the wife is entitled not to one third only of the proceeds of the sale of this house, but to one half, subject to a possible deduction crediting the husband with part of the mortgage repayments which he has made since February 1971."

The possibility of crediting the husband with such repayments was not argued and does not arise in this case, inasmuch as since the parties separated he has been either in occupation of the house, or in receipt of all its rents and profits: these go to meet any rights to repayment of the mortgage instalments, and the question does not therefore arise. The simple declaration will be that the learned judges Order is varied, and the wife to get one half of the proceeds of sale, and her costs here and below.