JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 16/88

BEFORE: THE HON. MR. JUSTICE ROWE, P.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE FORTE, J.A.

BETWEEN	SLYDIE BASIL JOSEPH WHITTER	DEFENDANT/APPELLANT
AND	MONICA WHITTER	PLAINTIFF/RESPONDENT

Mr. Enos Grant for appellant

Mr. W. B. Frankson, Q.C. for respondent instructed by B. B. Frankson & Co.

July 21, 1988; March 2, 6, 7 and June 1, 1989

WRIGHT, J.A.:

On March 7, 1989 the Court dismissed this appeal from the Order made by Panton, J. on January 15, 1988 in resolving the question presented by the plaintiff/respondent (hereinafter referred to as 'the wife') for determination on an Originating Summons. We made certain orders which will appear later and promised to put our reasons in writing. My reasons for concurring in that decision follow.

In her Originating Summons the wife claims -

> "to be the registered owner of an estate in fee simple as Joint Tenant with Slydie Basil Joseph Whitter of all that parcel of land known as Fairfield in the Parish of St. James comprising 11 acres and 28½ perches and being the land comprised in Certificate of Title registered at Volume 1080 Folio 372 of the Register Book of Titles."

The question presented was -

> "whether the dissolution of the marriage which previously subsisted between the Plaintiff and the Defendant and the eviction of the Plaintiff from the aforesaid property by the Defendant inter alia constitutes a severance of the Joint Tenancy between them and the substitution of a tenancy in common in equal shares thereafter."

The Orders sought are -

> "in the event that the Honourable Court answers the aforesaid question in the affirmative, for an Order that the Joint Tenancy be and is severed and, be and is substituted by a tenancy in common in equal shares.
>
> And for an order that the said property be partitioned by sale or otherwise.
>
> And for an order that the costs of and incidental to this summons be paid by the defendant."

It is patent that the primary question for determination is whether the wife did acquire the claimed estate in the property. The first indication as to the route which would be taken by the search for the answer to the question is that the Contract for Purchase was signed by both parties and the title was issued in their names as Joint Tenants. From this point onwards the route becomes tortuous rendering an investigation of the relationship between the parties necessary.

The marriage relationship between the parties had subsisted from August 18, 1954 to June 13, 1984 when by decree of the Bromley County Court in England it was dissolved on the undefended Divorce Petition presented by the wife on the ground that the parties had lived apart for a continuous period of at least five years immediately preceding the presentation of the petition. That period was stated to have commenced on April 15, 1975.

The evidence before Panton, J. consisted of two affidavits by the wife and three by the defendant/appellant (hereinafter referred to as 'the husband') with related exhibits. By her first affidavit dated 28th May, 1987, the wife sought to establish her claim on the basis that the property in question, an exquisite dwelling house, was purchased as the matrimonial home. But the husband countered that that was not so, alleging that at the time of the purchase the matrimonial home was at 22 Edward Road, Bromley, Kent, England, where they had lived for twelve years. His account of the purchase was that on a visit to Jamaica in August 1974 he decided to purchase the property as an investment in Jamaica and informed his wife that the purchase would be made in their joint names for his own convenience and advantage. In support of that contention he alleged -

1. That all negotiations had been conducted by him alone without any assistance from the plaintiff/respondent;

2. The deposit of $15,000 was paid by him personally after which he took possession of the property;

3. A further deposit of $14,000 was paid by him via an over-draft facility with his bank;

4. That the final payment of $65,885.88 to complete the purchase price of $94,000.00 was paid by his bank on his behalf.

In support of this final contention he exhibited the copy of a letter which he maintained was sent to his Bank Manager but to which there is no further reference. It is dated November 10, 1974, a mere two months after the signing of the Contract for Purchase which is dated September 6, 1974. An observed peculiarity is that the Bank Manager in making payment of the amount to the

husband's attorney makes no reference to the letter of November 10, 1974 which reads:

"The Manager
Barclays Bank International Limited
77 King Street
Kingston
JAMAICA W.I

Dear Sir:

Re: Cromaty Fairfield Estate

I write to confirm our telephone conversation and my instruction for the bank for the loan overdraft facility given to me on my securities, to complete my propose purchased of Fairfield Estate.

As I mentioned to you I am having domestic problems with my wife. Nevertheless, please take this as my instruction to transfer money from my overdraft facility to my Lawyer to complete my purchase in my name and my wife, for convenient reasons, Mrs. Monica Whitter who has agreed to hold same in trust for me. Many thanks for your kind assistant. See you soon.

Yours faithfully,
J. WHITTER & COMPANY

.....
S.B.J. Whitter"

The bank's letter dated 5th February, 1975 accompanying the cheque is as follows:

"Messrs. Nation, Lord & Co.,
Attorneys-at-law,
19a Union Street,
MONTEGO BAY

Dear Sirs:

Mr. and Mrs. S.B.J. Whitter -
Purchase of Property "Cromarty", Saint James

We refer to your letter of the 5th February, and enclose our cheque in the sum of $65,885.88 in full settlement of the purchase price of the above property.

The cheque is sent to you on the understanding that you will send us the relative Certificate of Title free of encumbrances.

"Please sign and return the attached copy of this letter as your acknowledgement.

Yours faithfully,

W. L. SMITH
ASSISTANT MANAGER
encls.
cc: 77 King St. Branch"

The wife's affidavit dated November 5, 1987 in reply admitted that at the relevant time the matrimonial home was indeed 22 Edward Road, Bromley, Kent which she alleged had been acquired by funds provided by both parties though the title was registered in her name alone. Further, she contended that the Fairfield property was acquired because they had decided to return to live in Jamaica in pursuance of which intention she was persuaded to sell 22 Edward Road the nett proceeds of which were used by her husband to meet certain liabilities in England. Her decision to sell the matrimonial home and give the proceeds of sale to her husband was based on the fact that they had acquired a permanent home at Fairfield. So vast was his indebtedness that the proceeds of the sale were insufficient to meet them and as a consequence he was declared a bankrupt in the United Kingdom. Further, she denied (it would seem prophetically) allegations in his counter affidavit that he had made adequate financial provisions for her by way of properties acquired for her in England and in Jamaica.

The final affidavit of the husband is dated November 16, 1987 by which he sought to put the wife's contentions to rest. In it he alleges that -

1. The wife was never able to and did not contribute to the acquisition of 22 Edward Road the sale of which was enforced by his bank to which it had been mortgaged in his favour although the title was in her name alone;

2. There was no decision to return to Jamaica and the Fairfield property ("Cromarty") was not purchased for that purpose but rather as one of his several investments in Jamaica. In proof of this it was operated as a guest house up to 1976 after which it was occupied by one of his business managers sent out from England. Then in September 1977 he took up residence there without his wife - the marriage had by then broken up. The wife took up residence there in November 1977 in a separate room and only left in November 1980 on the same day he was returning from a business trip which he had taken in 1979.

3. To set the disputed purchase in perspective as a "convenience" paragraph 8 of this affidavit notes:

> "As to paragraph 8 of her said Affidavit, I have been engaged in business enterprises, owned several properties and have promoted several companies; that acting on professional advice and according to the dictates of my business and for my own convenience and advantage, the titles of properties purchased by me have from time to time been issued either in the names of my companies, or in the name of the Plaintiff alone or in both our names or in my name alone; that the issuance of the title for Cromarty in both our names is in accordance with this policy."

4. Since acquiring "Cromarty" he had spent about $1,000,000 improving the property.

Rejecting the contention that Cromarty was acquired without any intention of benefiting his wife, Panton, J. held that:

> "the legal title is in the names of the parties jointly and that the beneficial interest is in them both as equitable tenants in common in equal shares."

He based his conclusion on two grounds, viz. -

1. The words of the title
2. The presumption of advancement.

Thereafter in keeping with the request in the Originating Summons, he ordered that the joint tenancy be severed and that a tenancy in common in equal shares be substituted therefor. Further, he ordered that the land be sold and that the proceeds be divided equally, either party to have first option to purchase the interest of the other. Costs of the Summons were also awarded the wife to be agreed or taxed.

Six Grounds of Appeal were filed against this determination of the question posed in the Originating Summons. But it is fair to say that apart from the issue raised in Ground 6, viz. that the learned trial judge had failed to order the making of relevant enquiries, a complaint with which the Court agreed, the dominant issue was really whether the wife had acquired any interest in the property. For if indeed she had acquired any such interest then she would be entitled to the Court's assistance in securing her interest.

The Grounds of Appeal are as follows:

"(1) The Learned Trial Judge failed to address his mind to and/or adjudicate on the specific questions and/or issues raised in the Originating Summons before him.

(2) Further and in the alternative, the Order of the learned Trial Judge is unreasonable, having regard to the evidence adduced before him.

(3) Further and in the alternative, the Learned Trial Judge erred in relying on the evidence in the affidavit of the Plaintiff/Respondent, having regard to:

(a) the patent conflict between the statements therein and those in her Petition on which she got the marriage between herself and the Defendant/Appellant dissolved; and/or

(b) the effect of the said affidavit in not making full disclosure of all material facts and/or attempting to mislead and/or misleading the Learned Trial Judge; and/or

(c) the uncontroverted and unchallenged evidence that:

(i) at the time of the purchase, the transfer in both names was done for the convenience of the Defendant/Appellant;

(ii) the subsequent conduct of the Plaintiff/Respondent which was consistent with her knowledge that she did not have any beneficial interest in the said property.

(d) the decisions in Sheppard v. Cartwright [1955] A.C. 431 and Marshall v. Crutwell 1875 L.R. Equity Cases 328.

(4) Further and in the alternative, the Learned Trial Judge misdirected himself in law on the interpretation of the Registration of Titles Act, in particular section 68.

(5) Further and in the alternative, the Learned Trial Judge misdirected himself in law by applying the following decisions to the facts before him:

(a) The decision of the Court of Appeal in Harris v. Harris, Supreme Court Civil Appeal No. 1/81;

(b) the decision in Pettitt v. Pettitt, (1969) 2 All E.R. 385.

(6) Further and in the alternative, on the evidence before the Learned Trial Judge, he erred in failing to order that the Registrar of the Supreme Court make enquiries as to the amount spent by the Defendant/Appellant on the property in dispute and/or that the Defendant/Appellant be given credit for the sum of $1,000,000 or any amount found by the Registrar to have been expended by the Defendant/Appellant on the said property in determining the quantum of the Plaintiff/Respondent's half interest in the said property."

However, the submissions did not follow the Grounds and I shall not myself endeavour to match arguments with Grounds. Rather, I propose to deal with the real question which was resolved in favour of the wife, that is, whether she did acquire a beneficial interest in the property known as Cromarty. But first of all it may be convenient to dispose of the contentions which have arisen because Panton, J. prayed in aid section 68 of the Registration of Titles Act in deciding that the wife acquired an equal share with her husband in the beneficial interest. Said he, at pages 58 and 59:

> "The title here indicates that there has been a transfer into the names of the parties as joint tenants. To my mind, in the absence of fraud or mistake, that conclusively declares the rights of the parties for all times. .....
> .....
>
> If I'm wrong in thinking that the words in the title mean what they say, as I'm encouraged to do by section 68 of the Registration of Titles Act, then I look towards the presumption of advancement as, after all, the parties are husband and wife."

Section 68 reads:

> "No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power."

It is common knowledge that the beneficial interest does not inevitably follow the legal interest. Otherwise, the operation of a resulting trust would be precluded where the legal estate or interest is in one person but the beneficial interest is really in another. Accordingly, despite the eloquent submissions of Mr. Frankson to the contrary, I find my reasoning persuaded to agree with Mr. Grant that section 68 is not determinative of the issue and to that extent it is irrelevant. Of course, the husband cannot proceed to deal with the title without the participation of his wife. Section 68 guarantees her position. But in my judgment section 68 has nothing to do with the beneficial interest. A case in point is Ivan Josephs v. Evelyn Josephs R.M.C.A. 13/84 dated October 30, 1985 (unreported) in which the legal title was in the name of the husband alone but the Court of Appeal upheld the award by the Resident Magistrate of a one-half share in the beneficial interest to the wife. And this is not a novel case.

The next aspect to which I will now turn is the plea of convenience by the husband. Was the trial judge correct in rejecting this plea? Mr. Grant says he was not. It is essential that this plea be seen in its true perspective. Clearly, it is the husband's answer to the presumption in favour of the wife which arises from the fact of her name being on the title as a joint tenant and which if not rebutted would result in her being entitled to one-half the beneficial interest. And be it noted that such an entitlement carries with it the right of survivorship. It is my opinion that in order to displace this presumption which, interestingly enough, traces its origin to the contract of sale, there must be credible evidence establishing the contrary contention on a balance of

probabilities. Such evidence, Mr. Grant claimed, is supplied by -

(a) paragraph 8 of the husband's affidavit dated 16.11.87 (supra) and

(b) the letter to the bank.

But peculiar though it may seem the wife in her affidavit dated November 5, 1987 (supra) seems to have anticipated the affidavit dated November 16, 1987. Paragraph 8 of her affidavit met the plea of convenience head-on thus:

> "I categorically deny that Cromarty was purchased as an investment or that the property would be purchased in our joint names for the convenience and/or advantage of the Defendant and that I would be holding the property on a resulting trust for the Defendant."

Now it is patent that the contrary pleadings on the issue of convenience create a crisis for the resolution of which assistance must be sought elsewhere in the record since there is no viva voce evidence. In Mr. Frankson's opinion the letter to the bank, which is obviously self-serving, ought not to have been admitted and so deserves no weight. But the issue of its admission does not appear to have been debated before Panton, J. but whether or not it is plain that if he considerdd it, he was not persuaded to act upon it so it was given no weight.

Next, Mr. Frankson attacked the credit of the husband when he alleged that the wife was never in a financial position to make any contribution to any purchase which he made because she had had to care for their children and, "save for a time when she worked with one of his companies in Jamaica for a period of one year when she tried to run (sic) a Hairdressing Salon" which failed, she had never worked. Mr. Frankson made reference to certain documents exhibited to the husband's affidavit dated November 11, 1987. These include -

(a) letter from wife dated 17.3.81 and

(b) letter from wife dated 27.4.81 both demanding repayment of a loan of £10,000 (JA$60,000) by the wife to her husband.

(c) Writ of Summons dated 2.6.87 claiming recovery of the said loan

(d) the Defence filed paragraph 1 of which reads:

> "The Defendants admits that the Plaintiff lent the First Defendant (Trans Caribbean Jamaica Ltd) the sum of £10,000 but will say that the recovery of the said loan is statute barred as the said loan was made during 1980."

Having regard to his previous contention, I would have expected a strenuous denial of any such loan. But on the contrary his plea admits that she had funds from which she was able to and did make him and his company a loan of £10,000 from the repayment of which loan he now seeks refuge behind the Statute of Limitations. To my mind, irreparable damage to his credit results from this evidence on record.

Both Mr. Grant and Mr. Frankson rely on Marshal v. Crutwell (1875) L.R. Equity Cases 328. The headnote reads:

> "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; and he afterwards paid in considerable sums to this account. All cheques were afterwards drawn by the Plaintiff at 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 he was stated by the bank manager to have 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."

Jessel, M.R. heard the action brought by the wife against Crutwell, the co-executor, and other persons beneficially interested under the will to establish her right. He placed no credit on what he termed "loose conversations" between the husband and the bank manager at the time of the transfer of the account and holding himself as bound by the then recent decision in Fowkes v. Pascoe 2 My & K 262 which required that regard should be had not just to the document in question but to the surrounding circumstances, he rejected the wife's claim and held that the placing of her name on the account was merely a convenient mode of managing her husband's affairs.

The learned judge dealt thus with the matter at pages 330-331:

> "But here we have the actual fact, that the man was in such a state of health that he could not draw cheques, and the wife drew them. Looking at the fact that subsequent sums are paid in from time to time, and taking into view all the circumstances (as I understand I am bound to do), as a juryman, I think the circumstances shew that this was a mere arrangement for convenience, and that it was not intended to be a provision for the wife in the event which might happen, that at the husband's death there might be a fund standing to the credit of the banking account. I take into account the circumstance that the wife could draw upon the fund in the husband's lifetime, so that it would not necessarily be a provision for her after his death; and also the circumstance that the amount of the fund at his death must be altogether uncertain; and, having regard to the rule which is now binding on me, that I must infer from the surrounding circumstances what the nature of the transaction was, I come to the conclusion that

> "it was not intended to be a provision for the wife, but simply a mode of conveniently managing the testator's affairs, and that it leaves the money therefore still his property."

This case, submits Mr. Grant, supports his client's claim of convenience because, as in that case, the wife, in the present case, did not contribute to the acquisition of the property. It is obvious that neither the facts nor the rationale of this case bears any resemblance to the instant case and cannot avail the husband. Further, he contended that the surrounding circumstances outlined by the husband clearly demonstrates that the wife took no part in the acquisition of the property. This latter submission does not merit serious consideration because in a husband-and-wife relationship it cannot be unusual for a husband to play a leading role such as this husband played. But what does call for serious attention, bearing in mind the wife's contradiction and the reasons she advanced, is the significance of her name on the relevant documents, viz. the Contract of Sale and the Title assigning to her the status of a joint tenant. Bearing in mind that only affidavit evidence is available much depends on the credit of the parties. Speaking for myself, I find that the husband's credit is severely damaged by the issue related to the loan of £10,000. I must confess that I am not favourably impressed with his performance in this matter. And I am not at all impressed with the letter to the bank despite Mr. Grant's unqualified belief in its efficacy. One important factor which apparently is ignored in Mr. Grant's submission, favouring the acceptance and intended effect of this letter, is that it is not competent for the husband to make any declaration in derogation of the wife's legal interest. If he were purporting to enlarge her interests

then I could see no reason why he should not be free to do so unknown to her. But where they are co-equals it is my opinion that any declaration adversely affecting her position requires her participation.

Shepherd v. Cartwright (1955) A.C. 431 was also cited in support of Mr. Grant's contention. In that case a father bought and registered shares in the names of his children. Proceeds from the dealings with those shares were credited to accounts in the children's names though the father managed the accounts. It was held that the shares registered in the children's names were an advancement. Reliance is placed on a portion of Viscount Simond's speech at page 445 where he cites with approval from Snell's Equity 24th Edition page 153 as follows:

> "The acts and declarations of the parties before or so immediately after it as to constitute a part of the transaction are admissible in evidence either for or against the party who did the act or made the declaration. ..... But subsequent declarations are admissible as evidence only against the party who made them and not in his favour."

This letter is advanced as such a declaration which enures for the benefit of the husband, the maker thereof. I think, however, that I have shown sufficiently that without the participation of the wife who has an equal legal interest no declaration can be effectual to diminish or in any way adversely affect her interest. I have no quarrel with the principle stated in Snell but it cannot be accommodated by the facts of this case. Indeed, the case is singularly unhelpful to Mr. Grant.

The final question for determination is whether there is any evidence, direct or inferential, of a common intention that the wife should share in the beneficial interest. Pettitt v. Pettitt (1969) 2 All E.R. 385:

Gissing v. Gissing (1970) 2 All E.R. 780 (H.L.). It was submitted that she holds on a resulting trust for the husband. The natural query is where is the evidence? Having dismissed the letter to the bank as a mere convenience I search in vain for such evidence.

Mr. Frankson submitted that although section 68 of the Registration of Titles Act makes no provision for the recognition of trusts yet the husband was not without remedy, if indeed there was a trust in his favour. He could have availed himself of the provisions of section 60 which reads:

> "The Registrar shall not enter in the Register Book notice of any trust, whether express, implied or constructive; but trusts may be declared by any document, and a duplicate or an attested copy thereof may be deposited with the Registrar for safe custody and reference; and the Registrar, should it appear to him expedient so to do, may protect in any way he may deem advisable the rights of the persons for the time being beneficially interested thereunder, or thereby required to give any consent; but the rights incident to any proprietorship or to any instrument, dealing or matter, registered under this Act, shall not be in any manner affected by the deposit of such duplicate or copy, nor shall the same be registered."

Experienced developer as he claims to be, he should not have been ignorant of those provisions which offer him protection. See Chettiar v. Chettiar (1962) 1 All E.R. 494. Indeed, there is no written evidence of a trust and the existence of a trust is denied by the wife. I am prepared to agree with Panton, J.'s implied acceptance of the denial.

Mr. Frankson sought to support the wife's claim in two submissions but even he, I think, found difficulty with the first one. Both submissions have to do with the interpretation of the fact that the total nett proceeds of the sale of the matrimonial home at 22 Edward Road, Bromley,

Kent, England, were handed over to the husband for his sole benefit although they jointly owned the beneficial interest. His first submission was that for her generosity, in so doing, she was rewarded with a gift, a share in the beneficial interest in Cromarty. She does not so contend and it would be difficult to do so when the title to Cromarty making her a joint tenant was issued on 24. 2. 75 some three years prior to the sale of the matrimonial home. The second submission is more consonant with the reasons put forward by the wife and with good sense which is that it was meant at the time of purchase to be their matrimonial home and the registration of her name as a joint tenant was by way of advancement.

Her evidence is that at the time of acquisition of Cromarty they had decided to return to Jamaica and make it the matrimonial home. From the evidence they could not return immediately because the husband was deeply indebted for income tax and otherwise. In an effort to meet those liabilities he persuaded her to sell the matrimonial home since they already had Cromarty as their new matrimonial home, and let him have all the proceeds of the sale to be used to extricate himself from his financial difficulties. She acceded to his request but alas those funds were swallowed up by his debts and he ended up being declared a bankrupt. If her account is not true I need to be persuaded by cogent evidence as to why, with the knowledge, as the husband contends, that she knew she had no interest in Cromarty and at a time when their marriage was not too rosy, would she sell the roof above her head and hand over all the money to her husband whose financial standing was so precarious that she could not hope to benefit financially from so doing.

It is my belief that at the time they entered into the contract to purchase Cromarty there was evinced a common intention that they would own the beneficial interest jointly

in keeping with the joint tenancy declared in the title and that secure in the knowledge that she would not be left shelterless and in an effort to rescue an imperiled marriage she let him have the proceeds of the sale of that matrimonial home.

But in addition to disputing the wife's version, Mr. Grant was unrelenting in his contention that without making any contribution she had not established her claim to a share in the beneficial interest. And, indeed, there are decisions of the Courts applying the principle in Pettitt (supra):

See Murdock v. Murdock Suit No. E 72/80 (19.10.81)

Trouth v. Trouth SCCA No. 27/81 (30.11.81) (unreported)

Harris v. Harris SCCA No. 1/81 (30.7.82) (unreported)

Forrester v. Forrester No. CLF 108/78 (12.11.82)

Burnett v. Burnett No. CLF 219/81 (22.3.84)

Contribution was found to have been made by the claiming spouse in all these cases.

But I am not aware of any authority which has declared positively that presumption of advancement is dead. It is true that today it has lost some of the lustre it bore in Victorian days. Certain of their Lordships in Pettitt (supra) adverted to this question. Lord Hodson at page 404 had this to say:

> "Reference has been made to the 'presumption of advancement' in favour of a wife in receipt of a benefit from her husband. In old days when a wife's right to property was limited, the presumption no doubt had great importance and today, when there are no living witnesses to a transaction and inferences have to be drawn, there may be no other guide to a decision as to property rights than by resort to the presumption of advancement. I do not think it would

> "often happen that when evidence had been given, the presumption would today have any decisive effect."

The comment I make is that by "evidence" Lord Hodson could only have meant evidence satisfactorily explaining the position such as to displace the presumption. Lord Upjohn's opinion was expressed thus at page 497:

> "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."

Earlier in the report on the case Lord Reid, while not displaying any great love for the presumption, nevertheless, did not sing its requiem. After postulating on the possible origin of the presumption he had this to say at page 389A:

> "These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the Courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished. I do not think that it would be proper to apply it to the circumstances of the present case."

Lord Diplock was less generous in his treatment of the matter. Said he at page 414C-I:

> "The consensus of judicial opinion which gave rise to the presumptions of 'advancement' and 'resulting trust' in transactions between husband and wife is to be found in cases relating to the propertied classes of the nineteenth century and the first quarter of the twentieth century among whom marriage settlements were common, and it was unusual for the wife to contribute by her earnings to the family income. It was not until after World War II that the courts were required to consider the proprietary rights in family assets of a different social class. The advent of legal aid, the wider

> "employment of married women in industry, commerce and the professions and the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society owning, democracy has compelled the courts to direct their attention to this during the last 20 years. It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generations of married couples 'presumptions' which are based on inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era."

But, however the viewsswere expressed, there is the clear indication that the issue was recognised as one to be resolved on the evidence. See also Falconer vs. Falconer (1970) 3 All E.R. in which both Lord Denning, M.R. and McGaw, L.J. expressed themselves as not being too enthused with the presumption.

In Falconer (supra) a plot of land had been acquired by the wife with the assistance of her mother. Subsequently, a house was built on the land to which both the wife and her husband contributed substantially. In an action to determine their respective shares in the beneficial ownership the County Court judge decided that the plot of land belonged solely to the wife but that the beneficial interest in the house belonged to them in equal shares. The Court of Appeal referred to both Cissing and Pettitt (supra) in upholding the decision of the lower court. The wife had contended that the husband's contribution ought to be viewed as an advancement to her but the Courts did not agree. The decisions of the Courts were well supported by the evidence.

In the instant case, as I trust I have succeeded in demonstrating, the course which the evidence indicates

is that an advancement to the wife was intended.

Finally, let me call attention to an important question which in my opinion cannot be ignored. If indeed, as I have held, the reasons for disposing of the matrimonial home at 22 Edward Road, was that advanced by the wife would equity not hold the husband to his word and prevent him from resiling? I think the answer must be yes.

To my mind the preponderant view of the evidence favours the wife's claim and consequently the upholding of Panton, J's decision. On that basis I agreed with the judgment of the Court which was as follows:

"1. Appeal dismissed.

2. Order of Mr. Justice Panton varied as follows:

(i) that the joint tenancy be and is hereby severed and there is substituted a Tenancy in common in equal shares as and from the date of the Decree Absolute, 13th June, 1984;

(ii) it is further ordered that the property be valued and sold and the proceeds thereof be divided equally between the parties after the deduction therefrom of the assessed increase in the value of the property directly referable to any improvement effected by the Appellant subsequent to 13th June, 1984.

3. That the accounts be taken as follows:-

(a) the parties agree on the appointment of an accountant and of a valuator.

(b) a valuation of the property as of 13th June, 1984 be obtained.

(c) all expenditure on improvement and outgoings by the Appellant be verified by bills and vouchers.

(d) the Respondent to pay half of maintenance and property tax since 13th June, 1984.

(e) subject to sub-paragraph (d) above, the mesne profits, that

" is, half the estimated rent of the property be obtained from a valuator for the period commencing 13th June, 1984 up to the time of sale and be paid by the Appellant to the Respondent.

4. Costs to the Respondent to be agreed or taxed."

ROWE, P.:

I concur.

FORTE, J.A.:

I have read the judgment of Wright, J.A., the reasoning in which are consistent with my own. Consequently, I have nothing further to add.

Cases referred to

1. Shephard v Cartwright (1955) A.C 431.
2. Marshall v Cruttwell (1875) L.R Equity Cases 328.
3. Harris v Harris S.C.Civ Appeal No 1/81 (unreported)
4. Pettitt v Pettitt (1969) 2 All ER 385
5. Stran Jadhav v Evelyn Jadhav R.M.C.A 13/84, 30/10/85 (unreported).
6. Fowkes v Pascoe 2 My & K 262.
7. Gissing v Gissing (1970) 2 All ER 780 (H.L.)
8. Chettiar v Chettiar (1962) 1 All ER 494
9. Murdock v Murdock Suit No. E 7/80 (19.10.81)
10. Trouth v Tract SCCA 27/81 (30.11.81)
11. Forrester v Forrester No CLF 108/78 (12.11.82)
12. Burnett v Burnett No CLB 219/82 (22.3.84)
13. Falconer v Falconer (1970) 3 All ER ?