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Husband and Wife -- Agreement in Contemplation of Marriage -- Constitution and Terms of an Express Trust

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HUSBAND AND WIFE—AGREEMENT IN CONTEMPLATION OF MARRIAGE—CONSTITUTION AND TERMS OF AN EXPRESS TRUST.—The simplest facts are not always susceptible to the most straightforward legal analysis. Although not exactly commonplace, the facts in *Re Merikallio*[1] were simple enough. Shortly before their marriage in 1960, the deceased and his intended bride visited the latter's solicitor and, in contemplation of marriage, executed an agreement under seal. The agreement recited that the deceased desired to make "certain provisions for his future wife" and "to assure her financial security and well-being".[2] There followed a number of convenants of which the first read as follows:

> That the Party of the first part [the deceased] shall forthwith deposit the sum of $20,000.00 in bonds or other negotiable securities for the purpose of buying a house together with the Party of the second part . . . and the said property to be held as joint tenants and not as tenants in common, and the Parties covenant further that this type of ownership shall not in the future be changed or amended and the said sum of $20,000.00 in bonds or otherwise shall be forthwith delivered to . . . [the wife's solicitor] . . . and he shall hold in trust the said bonds which will in all probability be registered in the name of the Party of the first part and the said bonds will be held until the purchasing of the said home together with other furniture or other requirements up to the amount of $20,000.00 or until both parties by written direction do instruct him otherwise or until any competent Court would adjudge the question of the said bonds.

The bonds were delivered to the solicitor on the same day and remained in his possession until the death of the deceased in

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[1] [1970] 1 O.R. 244, 8 D.L.R. (3d) 142. An appeal from this decision was dismissed by the Court of Appeal on May 13th, 1970.

[2] These recitals are not mentioned in the report of the case at first instance. The writer is grateful to Mr. P. A. Vesa, B.A., LL.B., for an opportunity to read the documents in the case.

1966. In due course, as no house had been purchased, an application was made to the late Mr. Justice Ferguson to determine whether the bonds belonged to the widow or formed part of the deceased's estate.

The learned judge found in favour of the widow. His reasons consisted of a statement that the solicitor held the bonds subject to an express trust and a quotation from *Williams on Executors*[3] which was described as providing the "answer to the problem".[4]

The finding that the solicitor was a trustee is not without interest. The bonds were merely deposited with him, there appears to have been no change in registration and, at the most, he could have been trustee of an equitable interest only. To accept this conclusion is to treat the deceased as being in the same position as if he had declared himself a trustee of his legal interest for the solicitor who was to hold the equitable trust on further trusts. Although an unusual and awkward construction it is difficult to see how else the finding can be explained. It does not appear to be inconsistent with basic principles of equity. In the words of Sir Raymond Evershed M.R. in *Re Rose*:[5]

> If a man executes a document transferring all his equitable interest, say, in shares, that document, operating and intending to operate, as a transfer, will give rise to and take effect as a trust; for the assignor will then be a trustee of the legal estate in the shares for the person in whose favour he has made an assignment of his beneficial interest.

Any objection based on the principle that equity will not perfect an imperfect gift would seem to be met by the clear indication on the face of the agreement that the deceased might remain registered as legal owner of the bonds. The principle applies only where the legal owner attempts ineffectually to make a transfer of the legal title, as in *Milroy* v. *Lord*[6] and many other cases.[7] The wording of the agreement supports a conclusion that the deceased intended to constitute the solicitor a trustee while retaining the legal title: that, in other words, he intended to transfer merely an equitable interest.

The reference to *Williams on Executors* is rather more perplexing. In the first place, it is not easy to see the connexion between the finding that the solicitor was a trustee and the passage

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[3] (11th ed., 1921), p. 504.
[4] *Supra*, footnote 1, at pp. 246 (O.R.), 144 (D.L.R.).
[5] [1952] Ch. 499, at p. 510.
[6] (1862), 4 De G.F. & J. 264.
[7] *E.g., Gott* v. *Gott* (1862), 9 Gr. 165; *McGee* v. *Lewis and McGee* (1967), 59 D.L.R. (2d) 362 (Alta A.D.); *Macedo* v. *Stroud*, [1922] 2 A.C. 330; *Re Wale*, [1956] 1 W.L.R. 1346 (Ch.D.); *Olsson* v. *Dyson* (1969), 43 A.L.J.R. 77; *Cope* v. *Keene* (1968), 42 A.L.J.R. 169; *cf. Nesbitt* v. *Chester*, [1969] 1 O.R. 143; *Re Mellen*, [1933] O.W.N. 118, 246; *Re Halley Estate* (1959), 43 M.P.R. 79 (S.C. Nfld); *Taylor* v. *Deputy Commissioner of Taxation* (1969), 43 A.L.J.R. 237.

quoted from the treatise. It is true that the ultimate decision that the bonds did not form part of the deceased's testamentary estate presupposed the existence of a trust *inter vivos*. The quotation, however, contains a description of the equitable doctrine of conversion according to which "land is under some circumstances regarded as money, and money as land". Granted that the solicitor was a trustee, it is clear that his obligation under the trust did not extend beyond retaining possession of the bonds until the occurrence of one of the events specified in the agreement. He was under no duty to purchase a house for the parties and it is difficult to see any useful analogy between his position and that of a trustee with an obligation to convert personalty into realty. Moreover, even if one focuses not on the solicitor but on the deceased as the trustee with a duty to purchase the property, the doctrine of conversion appears to have no relevance. As the bonds were held not to form part of the deceased's estate, the widow's right to the bonds must have arisen under the trust and the establishment of that right could not depend upon whether the bonds were to be treated as realty or personalty. If she had died shortly after her husband and had left her realty to one person and her personalty to another, the principles of conversion would have had some relevance. This was not so where the existence of her own beneficial rights was in question.[8]

At the hearing of an appeal from the decision of Ferguson J., counsel for the widow was not called upon and no written or oral reasons for the decision were delivered at the termination of the appellant's argument. As had been done in the court below, it was assumed that the solicitor was a trustee and counsel for the appellant sought to establish a resulting trust in favour of the deceased.[9] He argued first that the doctrine of conversion was inapplicable in the absence of an imperative duty to purchase a house. The members of the court appear to have taken the view that the duty existed and that the purchase of a house was not merely one of three optional courses of action contemplated in the agreement. When it was then argued that the purpose for which the trust had been established had failed, MacKay J.A., referred with approval to the old principle that a party shall not be allowed to take advantage of his own wrongdoing.[10] His Lordship expressed the opinion that, in the absence of evidence, the court

[8] The quotation begins with a reference to the principle on which the doctrine of conversion is based, *viz.* "things shall be considered as actually done, which ought to have been done". Although, at first blush, this principle might seem to have some relevance to the problem before the court, it is submitted that it was no more relevant than it is to any case in which a beneficiary claims to enforce an active duty imposed on the trustee.

[9] The writer was present at the hearing of the appeal.

[10] His lordship cited *New Zealand Shipping Company* v. *Société des Ateliers et Chantiers de France*, [1919] A.C. 1, at p. 8.

would have to regard the failure to make the purchase as a default on the part of the deceased. The other members of the court appeared to agree with this reasoning.

Given that the deceased had assumed an obligation to purchase a house, the conclusions drawn by MacKay J.A., are above criticism. If the deceased's failure to purchase the house was *prima facie* a breach of trust, the estate could not rely on that failure to establish a resulting trust without first displacing the *prima facie* presumption.

It had been argued for the appellant, however, that the deceased had not assumed any such obligation. If he had done so, then, in the absence of evidence of waiver or estoppel, the widow was clearly entitled to succeed either under a trust or, indeed, in contract. If he had not done so, the arguments in her favour, although by no means hopeless, were less compelling.

Certainly the terms of the agreement were open to the construction that it was designed merely to ensure that the bonds were removed from the possession of the deceased until he wished to use them for the purchase of a house or until he and his wife agreed to use them for some other purpose. On this view of the document there was no imperative duty to purchase a house and, in order to succeed, it would have been vital for the widow to convince the court that the bonds were impressed with an immediate trust for the joint benefit of the parties whatever event might occur in the future. To this end, she could rely only on the stipulation that the house which might be bought should be retained in joint ownership, the statement that the deceased wished to ensure his future wife's "financial security and well-being" and the provision for instructions to be given to the solicitor by *both* parties in writing. These matters received no judicial discussion as it is implicit in the reasoning of Ferguson J., that the husband had assumed the duty to make the purchase and, as has been seen, the members of the Court of Appeal appeared to favour the same conclusion.

It is unfortunate that only the proceedings at first instance produced a written opinion which will be preserved in the law reports. That opinion is, at the best, misleading in its treatment and application of basic equitable principles.

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