[HIGH COURT OF AUSTRALIA.]

ISABELLA GARRETT . . . . . APPELLANT;
PLAINTIFF,

AND

GUY STUART L'ESTRANGE . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 6, 7, 18.

Griffith C.J. Barton and O'Connor JJ.

Crown Lands—Conditional purchase—Agreement by husband to hold conditional purchase in trust for wife—Person other than the applicant—Unity of person between husband and wife—Crown Lands Act 1884 (*N.S.W.*), 48 *Vict. No.* 18, *sec.* 121—*Crown Lands Act* 1889 (*N.S.W.*), 53 *Vict. No.* 21, *s.* 47—*Trust and Trustee—Declaration of trust—Part performance—Resulting trust—Statute of Frauds*, 29 *Car. II. c.* 3, *sec.* 7.

The wife of an applicant for a conditional purchase is "a person other than the applicant" within the meaning of sec. 121 of the *Crown Lands Act* 1884. By that section, therefore, a husband is prohibited from taking up land in trust for his wife.

To constitute a declaration of trust of land there must be an intention on the part of the person who makes the declaration to divest himself of the beneficial interest, and constitute himself a trustee of the land for the other party.

A husband who had quarrelled with his wife wrote a letter to her at a time when she was not living with him in which he said, in reference to a conditional purchase: "I hope you will come home and see to your own home while I am away, as it is yours not mine. The residence is not done on it yet, so it will not do for both of us to be out of it," and in another passage, "come back to your dear home." *Held*, that this was not a declaration of trust by the husband in favour of the wife.

Possession to constitute part performance under the *Statute of Frauds* must be unequivocally attributable to independent ownership by the person claiming the land.

There cannot be a resulting trust contrary to the provisions of a Statute. Decision of *A. H. Simpson* Ch. J. in Eq., 28 W.N. (N..S.W), 112, affirmed.

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APPEAL from the Supreme Court of New South Wales.

The plaintiff brought a suit against the defendant, the executor of her deceased husband, claiming that she was entitled to a certain additional conditional purchase which had been taken up by her husband during his lifetime.

The suit was heard by *A. H. Simpson* Ch. J. in Eq., who held that the plaintiff was not so entitled (1).

From this decision the plaintiff now appealed to the High Court upon the grounds (1) that His Honor was in error in holding that an agreement to acquire and hold the said additional conditional purchase for the plaintiff, or under a promise to transfer to the plaintiff, was inoperative under the provisions of the Crown Lands Acts; (2) that His Honor was in error in holding that the *Statute of Frauds* was a defence to the suit; (3) that His Honor should have held that, after the application for the additional conditional purchase had been confirmed, it was agreed between the plaintiff and the late Joseph Garrett that, in consideration of improvements effected by the plaintiff, the said Joseph Garrett would transfer the said additional conditional purchase to her; (4) that upon the facts proved and admitted there was a resulting trust in favour of the plaintiff in respect of the said additional conditional purchase.

The facts are sufficiently stated in the judgment of *Griffith* C.J. hereunder.

Russell and *Nicholas*, for the appellant. An agreement by a husband, who takes up a conditional purchase, to hold it in trust for his wife, even if made before confirmation of the application, is not invalid under sec. 121 of the *Crown Lands Act* 1884. The husband and wife being in law one person, the wife is not "a person other than the applicant" within the meaning of that section. The legislature did not intend that a man who took up land for the support of his wife should be guilty of dummying. The prohibition is against land being taken up otherwise than for the benefit of the conditional purchaser. It is for the

(1) 28 W.N. (N.S.W.), 112.

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benefit of a husband that he should be enabled to take up land which would subsequently go to the support of his wife. Assuming that a trust was created, that is not in the circumstances opposed to the policy of the Act. Even if the plaintiff comes within the provisions of sec. 121, a promise made during the period of inhibition might afterwards become effective: *Hawker* v. *McLeod* (1). There was evidence that the agreement by which Joseph Garrett was to hold the additional conditional purchase in trust for the plaintiff, was made after confirmation of the application. There is sufficient evidence that after confirmation Joseph Garrett agreed to hold the land in trust for the plaintiff, and there was sufficient possession by the plaintiff to take the case out of the *Statute of Frauds*. Thirdly, as the deposit and survey fees were paid with the plaintiff's money, there is a resulting trust in her favour. [Reference was made to *Cadd* v. *Cadd* (2): *Rochefoucauld* v. *Boustead* (3): *Mercier* v. *Mercier* (4): *Dyer* v. *Dyer* (5): *Lewin on Trusts* 12th ed., p. 58].

Maughan and *Bonney*, for the respondent, the executor of Joseph Garrett, deceased, were not heard.

GRIFFITH C.J. We agree with the learned Chief Judge in Equity on all points. The appellant is the widow of Joseph Garrett, whom she married in 1900, and who died in 1910. In October 1897 Garrett took up an original conditional purchase. In 1901 he applied, as he was entitled to do, for an additional conditional purchase of 60 acres, which was confirmed in February 1902. He died after making a will by which he did not leave this land to his widow. She claims in this suit to be entitled to the additional conditional purchase, and puts her case forward in three ways—first, she says he took up the additional conditional purchase as trustee for her; secondly, that, if he did not take it up as trustee for her, afterwards while he was the holder of it he constituted himself trustee of it for her; and thirdly, that under the circumstances there was a resulting trust in her favour, although Garrett took up the land in his own name. The first

(1) 10 C.L.R., 628.
(2) 9 C.L.R., 171.
(3) (1897) 1 Ch. 196.
(4) (1903) 2 Ch., 98.
(5) 2 Cox Cas. in Ch., 92.

point, that he took it up as trustee for her, is disposed of by sec. 121 of the *Crown Lands Act* 1884, which provides that—

"Every devise contract lease agreement or security made entered into or given before at or after the date of any application to make a conditional purchase conditional lease or homestead lease with the intent or having the effect of enabling any person other than the applicant to acquire by purchase or otherwise the land applied for shall be illegal and absolutely void both at law and in equity."

It is contended that this does not apply to a wife. I do not know why. She is a person other than the applicant. Sec. 124 provided that a married woman should not be capable of holding a conditional lease or licence, except as separate estate, by virtue of any law in force protecting the property of married women. An additional conditional purchase is appendant or appurtenant to the original conditional purchase and cannot be held apart from it. If there was any doubt as to the meaning of sec. 124, it it was removed by the Act of 1889, which provided, by sec. 47, that—

"Any married woman who shall, under an order for judicial separation made by any Court of competent jurisdiction, be living apart from her husband, may, out of moneys belonging to her for her separate use, purchase or lease land, conditionally or otherwise; and such land shall form part of her separate estate, and she shall have the same powers of dealing with, and disposing of the same both at law, and in equity, as if she were a *femme sole*, and her husband shall not be entitled to any interest in such land as tenant by the curtesy or *jure mariti*. Except as aforesaid a married woman shall not be entitled to lease or conditionally purchase Crown land under the Principal Act or this Act."

So that the acquisition of the additional conditional purchase by the wife was absolutely forbidden by law and taking it up by the husband for anyone but himself was also forbidden. It is hopeless therefore to contend that he took it up as trustee for the appellant.

As to the second contention, it was pointed out in the course of the argument that a declaration of trust must be definite,—some-

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thing more than mere casual statements of good will or intention. The same principles apply as in the case of a contract, in which there must be an *animus contrahendi*. So in the case of a declaration of trust there must be an intention on the part of the person who makes the declaration to divest himself of the beneficial interest and constitute himself a trustee for the other party. The *Statute of Frauds* requires such a declaration to be manifested and proved by some writing signed by the party. The only fragment of writing that can be put forward in this case is in a letter of 7th June 1907, written at a time when the selections were not alienable. At that time the parties had quarrelled, and the appellant was living away from her husband. He was anxious that she should come home and he wrote to her a letter in which he said—

"I am very sick . . . and I may have to go to the hospital. I hope you will come home and see to your own home while I am away as it is yours not mine. The residence is not done on it yet so it will not do for both of us to be out of it. If you will not come back for my sake come back for your dear father's sake and do not worry him in his old age." In another passage he says "do come back to your dear home."

It is impossible to suggest that a letter written under these circumstances was written with the intention of divesting himself of his property and becoming a trustee of it for his wife. Moreover the land referred to is not the subject matter of this suit. The home where they lived was not upon that land but upon the original conditional purchase. True, he says "it is yours, not mine," but he says also "the residence is not done on it yet." The residence had to be performed upon the original purchase and not on the land now claimed. The learned Judge pointed out, that, although there may be no declaration of trust in writing, yet, if there is possession by the alleged beneficial owner of such a character as to be inconsistent with any other hypothesis than the existence of a trust, the fact may be established by oral evidence. But, as he also pointed out, this is an ordinary case of a husband and wife not even living together, and the wife had no possession unequivocally attributable to independent ownership.

Then, as to the suggested resulting trust. The resulting trust is said to have arisen in this way. The first deposit required to make the application was £13 or £14, which was provided by the applicant from his own money. It was laid down by Lord *Eldon* a long time ago (*Ex parte Houghton* (1)), that there can not be a resulting trust contrary to the provisions of an Act of Parliament. The suggestion of an implication of law contrary to a positive law is indeed a contradiction in terms. This contention is, therefore, negatived by the same considerations which negative the alleged express trust. Thus on all points the plaintiff's claim fails. We may be sorry for her, but it is only fair to say that the learned Judge gave her some relief which she might perhaps not have obtained in the face of more strenuous opposition. The appeal must be dismissed with the ordinary consequences.

BARTON, J., and O'CONNOR, J., concurred.

Appeal dismissed.

Solicitors, for the appellant, *Sullivan & McDermott*, Lismore, by *McEvilly & McEvilly*.

Solicitors, for the respondent, *Bowman & MacKenzie*.

C. E. W.

(1) 17 Ves., 251.