SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

CIVIL APPEAL NO.12 OF 1996

BETWEEN

EUGENIA GORDON

Appellant

And

AUSTIN ALEXANDER GORDON

Respondent

Before:

The Hon. Mr. C.M. Dennis Byron	Chief Justice [Ag.]
The Hon. Mr. Albert Redhead	Justice of Appeal
The Hon. Mr. Albert N.J. Matthew	Justice of Appeal [Ag.]

Appearances:

Dr. R. Gonsales for the Appellant
Mr. O. Sylvester Q.C. and Ms. N. Sylvester
for the Respondent

1997: December 12;
1998: January 12.

Matrimonial Law – Settlement and distribution of matrimonial property on dissolution of marriage - Whether the appellant was entitled to a three-quarter share or any share of the two properties acquired during the marriage – Significance and effect of the existence of two sets of Deeds re. the same two portions of land only one of which referring to the parties as joint tenants - Whether a transfer of the properties by the respondent, in the joint names of he and appellant was sufficient to confer joint ownership in the parties, given the explanations/reasons proferred by the respondent for so transferring - Whether there was sufficient evidence of financial contribution by appellant in the purchase of the lands and building the dwelling house thereon so as to support her claim for a three-quarter share - Finding by trial judge that both parcels of land were given to respondent by his two

aunts and that he alone constructed the dwelling house - Application of the rules of equity - Halsbury's Laws of England, 4th ed. Vol. 12 paras. 1353, 1354 and 1478 applied in support [re. effect of a deed, rule against derogation and admission of extrinsic evidence to vary or add to a document - Whether the presumption of advancement applies in the circumstances – Halsbury's Laws of England referred to – Crabb v Crabb referred to – Whether a resulting trust of the property was created in favour of the respondent – Austin and Anor. v Austin [1978] 31 WIR 46; Pettitt v Pettitt [1969] 2 AER 385 considered. Appeal allowed. Declaration that each party is owner of half share of the property.

JUDGMENT

MATTHEW, J.A. [AG.]

The Appellant is about 60 years old and the Respondent about 71. They were married in Curacao on August 13, 1953 when the Appellant was 16 years old and the Respondent 27. They were wife and husband for 33 years before the marriage subsequently broke down while they were living in England. On April 13, 1986 a decree absolute in respect of the marriage was pronounced.

The Parties lived together for varying periods in Curacao, England and Saint Vincent and had seven children four of whom were born in Curacao between 1953 and 1959; two were born in England between 1963 and 1969; and the last was born in Saint Vincent and the Grenadines in 1970.

During the marriage two portions of land were acquired in Saint Vincent and the Grenadines and these portions of land and the erections on them constitute the subject matter of this appeal.

By suit 443 of 1983 the Appellant instituted an action against the Respondent in which she claimed a declaration that she was the owner of a three – quarter share of the properties. In his defence the Respondent denied that the Appellant was entitled to three-quarters or any other share in her own right.

On July 30, 1996 Cenac J dismissed the Appellant's claim. The Appellant was not satisfied with the decision and on September 9, 1996 she filed her notice of appeal alleging several grounds. Before this Court learned Counsel for the Appellant did not argue the grounds of appeal sequentially but rather expounded on his skeleton arguments. Counsel seems to have concentrated on his grounds 2, 5 and 7 which were the following:

- The learned Judge misdirected himself on facts and was wrong in law.
- The learned Judge erred in law and in fact in accepting the explanation given by the Defendant/Respondent for the two sets of Deeds.
- The learned Judge misdirected himself in fact and in law in stating that he accepted the Defendant's evidence for the reasons he gave for transferring the properties in their joint names in 1971 and holding that this act did not confer joint ownership in the parties.

Ground 5

I shall deal firstly with ground 5 that the learned Judge erred in law and in fact in accepting the explanation given by the Defendant/Respondent for the two sets of deeds. At the trial two indentures Nos. 2281/71 and 2282/71 and both dated January 9, 1959 from the Land Settlement and Development Board of Saint Vincent to Austin Gordon were tendered in evidence. They referred to lots 15 containing 3679 square feet and lot 68 containing 3764 square feet. Also put in evidence were two other deeds 1706 of 1987 and 1707 of 1987 in respect of the same two portions of land, lot 15 for 3679 square feet and lot 68 for 3764 square feet. The ground of appeal seeks to attack the acceptance by the Judge of the explanation given by the Respondent. At the trial the Defence produced a witness from the Department of Agriculture who

tendered deeds 1706/87 and 1707/87 made to the Respondent in respect of two portions of land. When the Respondent was cross-examined he was shown these two deeds and he said these two deeds were referring to the same pieces of land in respect of which he had made a deed of gift to his wife and putting the property in their joint names. He gave as his explanation for going back to the Department in 1987, the fact that the first two deeds were stolen when the Appellant broke his suitcase in England.

Learned Counsel for the Appellant submitted that the explanation which he gave is clearly unreasonable and unacceptable for all the Respondent had to do was to get certified copies of the original deeds from the Registry. Counsel submitted that the Respondent caused the new deeds to be made in full knowledge that under and by virtue of the 1971 conveyance, which was registered in 1973, himself and the Appellant held the property as joint tenants.

I understood at the hearing that learned Counsel for the Respondent was conceding that the 1987 deeds were null and of no effect.

I agree with learned Counsel for the Appellant that the explanation given by the Respondent for the second two deeds were unreasonable and perhaps unacceptable. The value of the original deeds was certainly affected by the 1971 conveyance which referred to them as the lands being conveyed to the Appellant and Respondent as joint tenants more specifically described in the schedules to the 1971 deed. Hence the 1987 deeds would not be representing a true picture of all the transactions pertaining to the land.

Grounds 2 and 7

These two grounds of appeal may be taken together. The thrust of the appeal so far as the Appellant is concerned is in

relation to the effect of a deed made by the Respondent on November 18, 1971 and registered in 1973 by which he gave his wife an interest in the property which he conveyed to himself and to her as joint tenants. The Respondent gave evidence indicating reasons why he executed the deed and this ground of appeal attacks the acceptance by the learned Judge of the evidence of the Respondent and the legal consequences which flowed from that acceptance.

At paragraph 4 of his defence the Respondent had pleaded the following:

> " The Defendant admits that prior to his leaving for England he conveyed the two [2] parcels of land and dwelling house in their joint names but did this on advice to avoid the Plaintiff having to pay death duties on his predeceasing the Plaintiff but for no other reason and denies the intention of the purchase as alleged in paragraph 4".

When he gave evidence at the trial the Respondent stated:

> "I did make a deed of settlement in regards to dwelling house. I had conveyed property to my wife as joint tenants. I did so because as I was going back to England she was behind me to do it. She made no monetary contribution to the building".

When he was cross-examined he said:

> "Then I made a deed of gift to wife putting property in both names – both of us. In case anything happen to me the children will get it also to avoid her paying estate duties".

In his judgment the learned Judge stated that he accepted the Respondent's evidence for the reasons he gave for transferring the properties in their joint names in 1971 and he held that this act did not confer joint ownership in the Parties.

Learned Counsel for the Appellant submits that this holding by the learned Judge is unreasonable. Counsel observed apart from the contradiction between the two bits of his evidence, firstly,

the children are mentioned no where in this particular deed; and secondly; the law in 1971 when the deed of settlement was made and in 1973 when it was registered did not exempt a surviving joint tenant from paying estate duties on the deceased's share or interest in the joint tenancy. Counsel referred to the Estate and Succession Duties Act, Cap 380 Laws of Saint Vincent and the Grenadines Revised edition 1990, section 7[e].

Counsel submitted that the pleadings and the reasons proffered were contrived and sought to hide the real reason for the joint tenancy: that the Respondent decided to give effect to the Appellant's contribution to the lands and buildings and their earlier common intention to acquire these parcels of lands and to build thereon.

Learned Counsel for the Respondent submitted that the suit by the Appellant was in respect of a specific claim by the Appellant based on a purchase of two parcels of land in 1955 and that they had built a house in 1960 on one piece of the land and the Appellant had practically rebuilt the house in 1968 through 1982 at a cost of $52,000.00 and she had built a garage in 1979 for $35,000.00 on the other piece of land and spent $2,718.00 for repairs to the garage.

Counsel submitted that the Appellant did not base her claim to the properties on the deed of settlement dated 18th day of November 1971 and registered as Deed No. 684 of 1973; but that she based her claim on the fact that she purchased the lands jointly with the Respondent and they together built the dwelling house thereon.

Counsel states that the deed was only pleaded as evidencing the intention which they had at the time of the purchase. Counsel asked the Court to look at the deed in the light of the evidence led before the trial Judge and the pleadings. In his three findings on the

issues the learned Judge found firstly, that both parcels of land were given to the Respondent by his two aunts and that he alone constructed the dwelling house; secondly, that the Appellant had done minor repairs to the house but there was no evidence as to the amount spent; and thirdly that he accepts the Respondent's evidence for the reasons he gave for transferring the properties in their joint names in 1971 and hold that this act did not confer joint ownership in the Parties. The learned Judge, it seems to me, adjudicated on the effect of the 1971 deed.

I am unable to see the 1971 deed as a mere collateral issue to the subject matter of this suit. It was pleaded as indicating a transaction which took place 25 years before the trial and the Appellant simply gave her view of the conveyance in the pleading in much the same way as the Respondent gave his view of it. I think the learned trial Judge was correct to deal with it just as I intend to do forthwith.

Legal Effect of 1971 deed

The case for the Respondent as presented in the skeleton arguments filed on his behalf is basically that the Appellant's claim is not based on the deed executed on November 18,1971 and nothing is said of its left effect. During the hearing however, learned Counsel for the Respondent submitted that the 1971 deed would indicate that the Parties hold the legal interest with a resulting trust in favour of the Respondent. In answer to the Court Counsel conceded that in ordinary cases it would be difficult for a resulting trust to arise in such circumstances but he said this case was exceptional.

Learned Counsel for the Appellant on the other hand submitted that the deed explicitly creates a joint tenancy between the Parties and since the deed did not specify the precise share or

interest of each Party the rules of equity determine that they hold in equal shares.

The 1971 deed begins by describing the Respondent as the Grantor, the Appellant as the Grantee, and both of them as the Beneficiaries. The first recital mentions the two indentures bearing even date of January 9, 1959 made between the Land Settlement and Development Board of St.Vincent and the Grantor. The deed goes on:

> "AND WHEREAS the Grantor is desirous of giving the Grantee his wife an interest in the said hereditaments and premises to himself and the Grantee as Joint Tenants.
> NOW THIS INDENTURE WITNESSETH that in pursuance of the premises and in consideration of the natural love and affection of the Grantor to the Grantee and for divers good reason the Grantor hereby Grants and Conveys UNTO the BENEFICIARIES ALL and SINGULAR the said hereditaments and premises as are more particularly described in the Schedules hereto AND ALL the Estate right title interest claim and demand of the Grantor in to and upon the said herediataments and premises and every part thereof TO HAVE and TO HOLD the same UNTO and TO THE USE of the BENEFICIARIES in fee simple as Joint Tenants".

The learned authors of Lewin on Trusts 4th edition [1964] at page 140 state:

> "Where a husband buys property in the joint names of himself and his wife they are presumed to be joint tenants in equity".

I agree with learned Counsel for the Appellant that the rules of equity, which did not favour joint tenancy, would determine that the Parties hold the beneficial interest of the property concerned in equal shares.

I cited above the clear terms of the habendum of the 1971 deed which was executed by the Respondent in 1971. At the trial

before the learned Judge the Respondent seems to have given evidence which sought either to derogate from the grant or to contradict, vary or add to the terms of the document. I do not think he should be allowed to do this some twenty five years after he executed the document or at all. In support I refer to Halsbury's Laws of England, Fourth Edition, Volume 12, paragraphs 1353, 1354 and 1478 which I reproduce below in part:

> "[4] EFFECT OF A DEED
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> 1353. General effect. By executing a deed in accordance with all the requirements for such execution, the party whose act and deed it is becomes, as a general rule, conclusively bound by what he is stated in the deed to be effecting, undertaking or permitting. He is, in general, so bound even though another party has not executed the deed, or he has himself executed it in a false name. He is, as a rule, estopped from averring and proving by extrinsic evidence that the contents of the deed did not in truth express his intentions or did not correctly express them, or that there are reasons why he should not be obliged to give effect to the deed. This is equally the case whether the deed is expressed to operate as a conveyance of property or as a contract or otherwise. In an action founded on the deed, an executing party is also in general estopped from denying the truth of a precise and unambiguous representation of fact contained in the deed where the representation is material to the transaction effected by the deed and appears clearly enough to have been made or adopted by him with a view to the other party's relying on it. But to all these general principles there are exceptions, cases where the deed may be a nullity or may be avoided or corrected.
>
> 1354. RULE AGAINST DEROGATION
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> It is a well established rule that a Grantor cannot be permitted to derogate from his grant.
>
> [3] ADMISSION OF EXTRINSIC EVIDENCE
>
> [I] To Vary or Add to Document

> 1478 Extrinsic evidence generally excluded.
> Where the intention of the parties has been reduced to writing it is, in general, not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements, either to show that intention or to contradict, vary, or add to the terms of the document. This principle applies to records, arbitrator's awards, bills of exchange and promissory notes bills of lading and charterprties, bonds, descriptions of boundaries, guarantees, leases, contracts for the sale of goods, and wills. Verbal statements made by an auctioneer may or may not be part of the contract of sale. Extrinsic evidence cannot be received in order to prove the object with which a document was executed, or that the intention of the parties was other than that appearing on the face of the instrument."

PRESUMPTION OF ADVANCEMENT

Learned Counsel for the Appellant submitted that on the facts of this case a presumption of advancement clearly arises and it has not been rebutted. The reply of learned Counsel for the Respondent is that you cannot presume advancement here for the intention of the Appellant was clearly stated.

The learned authors of Halsburys Laws of England, Fourth edition, Volume 48 at paragraph 609 deal with Transactions between Husband and Wife. They state inter alia:

> " A transfer of property by a husband in or into the joint names of himself and his wife, is presumed to be for the benefit of his wife if she survives him, but if he survives her the property reverts to him".

Just before that passage the authors had spoken of an absolute advancement or gift to the wife if the husband had purchased or transferred property in her sole name.

The authors of Underhill's Law of Trusts and Trustees 11th edition [1959] at page 189 also speak of the presumption of advancement. They state:

> "Presumption of advancement

> The rule was stated thus by Viscount Simons in Shephard v. Cartwright [d]:
> 'The law is clear that, on the one hand, where a man purchases shares and they are registered in the name of a stranger there is a resulting trust in favour of the purchaser; on the other hand, if they are registered in the name of a child or one to whom the purchaser then stood *in loco parentis* there is no such resulting trust, but a presumption of advancement. Equally it is clear that the presumption may be rebutted but should not give way to slight circumstances.'

Where the presumption has arisen and not been rebutted it will not be destroyed by anything [such as change of mind on the part of the donor] that happens subsequently.

> Thus in *Crabb v. Crabb [e]:*
> a father transferred a sum of stock from his own name into the joint names of his son and of a broker, and told the latter to carry the dividends to the son's account. The father by a codicil to his will, executed subsequently, bequeathed the stock to another;

but it was held that the son took absolutely. Lord BROUGHAM, L.C., said:

> 'If the transfer is not ambiguous, but a clear and unequivocal act, as I must take it to be on the authorities, for explanation there is plainly no place…. The transfer being held an advancement, nothing contained in the codicil, nor any other matter *ex post facto*, can ever be allowed to alter what has been already done'
>
> Similarly it has been held that even a subsequent decree of nullity of marriage does not destroy the presumption of advancement which exists where the husband had transferred property into the name of the wife [f], and such a transfer is not a "settlement" which can be varied under the Matrimonial Causes Act, 1950, s. 25 [g]."

Crabb's case is relevant here for the Respondent says there can be no advancement for the intention of the Appellant was clearly stated. The question to be asked is when was that intention

stated. When the statement of claim was drafted? The presumption of advancement took effect on November 18, 1971.

Volume 17 of the Fourth Edition of Halbury's Laws refer to other presumptions and I refer to it because it was the view of learned Counsel for the Respondent that a resulting trust of the property could have been created in favour of the Respondent even while the Parties held the legal estate. Paragraph 121 of Volume 17 is as follows:

> "121. Other Presumptions. Various presumptions are dealt with elsewhere in this work. These include the presumptions of a resulting trust on a conveyance to a stranger; of advancement or a conveyance to a wife or child; of performance of covenants to purchase and settle land by a purchase of suitable land; of presumptions for and against merger; as to the boundaries of property; as to easements; as to the existence and ownership of copyright; of legitimacy; of sanity and the continuance of insanity; in matrimonial proceedings; and as to the construction of statutes."

Both sides drew attention to the case AUSTIN and ANOTHER V AUSTIN [1978] 31 WIR 46. In that case there was at first a common law relationship between the first Plaintiff and the Defendant although they later got married. The other person in the case was their illegitimate daughter who was the second Plaintiff. The Defendant in 1962 purchased a portion of land in the names of the first Plaintiff and himself. Worrel J. held that when the land was purchased no presumption of advancement had arisen since at that time the first Plaintiff had been the Defendant's mistress and not his wife, accordingly, the first Plaintiff held her moiety of the land purchased on a resulting trust for the Defendant.

In the course of his judgment Worrel J. referred to the case of PETTITT v PETTITT 1970 AC 777 at page 814 where Lord Upjohn dealing with resulting trusts remarked:

> "In the absence of evidence to the contrary if the property be conveyed in the name of a stranger he will hold it as trustee for the person putting up the purchase money".

Lord Upjohn went on to support this proposition by long outstanding authority making reference to the judgment of Eyre C.B in 1788 in the leading case of Dyer v Dyer [1788] 2 Cox Eq. Case 92. Eyre C.B gives the circumstances where this resulting trust may be rebutted e.g. the circumstance of one or more of the nominees being a child or children of the purchaser operating to rebut the resulting trust.

In PETTIT v PETTIT also reported at 1969 2 AER 385 at page 406 Lord Upjohn states:

> "The remarks of Eyre C.B., in relation to a child being a nominee are equally applicable to the case where a wife is the nominee. Though normally referred to as a presumption of advancement it is no more that a circumstance of evidence which may rebut the presumption of resulting trust.".

I disagree with the learned trial Judge when he held that the 1971 deed executed by the Respondent in favour of himself and his wife did not confer joint ownership on the Parties.
I would therefore allow the appeal, vary the order of the learned Judge to reflect and declare that each of the Parties is owner of one half share of the property, the subject matter of this appeal.

I would also order that the Respondent pay the Petitioner her costs of the appeal.

ALBERT N. J. MATTHEW
Justice of Appeal [Ag.]

C.M. DENNIS BYRON
Chief Justice [Ag.]

ALBERT REDHEAD
Justice of Appeal