ILLEGAL TRUSTS

Mr. Justice Holmes is reputed to have said that he did not begrudge the sums he paid in taxes for he knew that with them he was able to buy civilization. This public-spirited view is not held by all taxpayers. Among the less elaborate stratagems employed to evade income taxes is the practice of transferring income-producing property to a close relative in a lower income bracket on the understanding that the transferor shall remain the beneficial owner of the property. The success of this scheme depends on the transferor and the transferee mutually remaining on good terms. If their relations should cease to be harmonious and if either of the parties should desire to obtain a curial declaration that he is the beneficial owner the legal principles applicable are not always readily discernible.

When X transfers the legal title to property to Y on the understanding that Y is to hold on trust for X and there is no dishonest intent in X or Y the transferor, X, would have little difficulty in obtaining a declaration that the transferee, Y, holds on trust for the transferor. Where the subject-matter is not land the absence of written evidence of the understanding between the parties does not debar the transferor from obtaining a declaration of the existence of an express trust in his favour. Where the subject-matter is land the absence of written evidence means, in many jurisdictions which have provisions based on the Statute of Frauds,[1] that the understanding can be proved by parol evidence not for the purpose of proving that Y was to hold on an express trust for X but for the purpose of proving that Y was not intended to have the beneficial interest. Proof that Y was not intended to have the beneficial interest gives rise to a resulting trust in favour of X. Since resulting trusts are not required to be evidenced in writing[2] the transferor of the legal title to land is in no worse position than if he had transferred the legal title to property of another kind.

Where there is no clear evidence that at the time of the transfer the transferee undertook to hold on trust for the transferor the question whether the transferee holds on trust for the transferor depends on the operation of the presumption of resulting trust or the presumption of advancement (as the case may be). Where the family status of transferor and transferee is such as to bring into play the presumption of advancement, as for example where the transfer is from husband to wife, proof that the transferor's motive was the avoidance of tax or escape from some provision of the law will not necessarily raise questions relevant

1. 29 Car. II. c. 3 (1677), s. 7.
2. *Ibid.,* s. 8.

to illegal trusts. This has been made clear by Dixon C.J. of the High Court of Australia:

> The argument that the reason or motive for causing the property to be purchased in the name of the wife was to make it possible to avoid tax or to escape some provision of the law must often be amphibolous. For it may be relied upon as a ground for saying that since tax could not lawfully be avoided or the provision of the law escaped lawfully unless the beneficial ownership was conferred with the legal property, the presumption is strengthened that it was so intended. On the other hand, it may be pressed further and used to show that the legal title was placed in the name of the wife or child as a nominee for no reason except to cloak the truth.[3]

Given that there is evidence that the transfer was not made with intent to give the transferee the beneficial interest but with the intent that the taxation authorities or creditors should be led to believe that the transferor no longer had a beneficial interest in the property transferred, what principles govern a claim by the transferor for a declaration that the transferee holds on trust for him?

Transferor's dishonest intent renders him unworthy of assistance

A claim for a declaration that a trust exists is a claim for equitable relief and the claimant might be thought to be subject to the maxim "He who comes to Equity must come with clean hands." [4] When this maxim is held to provide a defence the defendant escapes liability not because of the merits of his own case but because of the demerits of the plaintiff. One theory of this defence is that a court of Equity should be concerned about the conscience of the plaintiff as well as the conscience of the defendant.[5] If the transferee were to prove that the transferor intended to deceive taxation authorities or creditors he would be proving fraudulent intent *vis-a-vis* persons other than himself. Can a defendant resist a claim for equitable relief on the basis of a wrong by the plaintiff directed not at himself but at others? Early authority suggested that he could not: [6] but later cases indicate that he can[7] provided the plaintiff's wrong has an "immediate and necessary relation to the equity sued for." [8]

3. *Martin* v. *Martin* (1959) 33 A.L.J.R. 362, 366. See also *Noack* v. *Noack* [1959] V.R. 137; [1959] Argus L.R. 389, 392.

4. For a full discussion of the development of this maxim see Chafee, *Some Problems in Equity* (1950), chapters I-III.

5. Pomeroy, *Equity Jurisprudence,* vol. 2, s. 398.

6. *Jones* v. *Lenthal* (1669) 1 Cas. in Ch. 154; 22 E.R. 739 (reporter's note that the iniquity must be done to the defendant himself).

7. *The Leather Cloth Company Ltd.* v. *The American Cloth Company Ltd.* (1865) 11 H.L.C. 523, 642, *per* Lord Cranworth; *Kettles and Gas Appliances Ltd.* v. *Anthony Hordern & Sons Ltd.* (1934) 35 S.R. (N.S.W.) 108.

8. *Dering* v. *Earl of Winchelsea* (1787) 1 Cox Eq. Cas. 318, 319, *per* Eyre C.B.; 26 E.R. 1184 and 1185; *Meyers* v. *Casey* (1913) 17 C.L.R. 90, 123-4, *per* Isaacs J.

A court will not take the view that because a plaintiff's hands were once dirty they can never be washed. Proof of discontinuance of the wrongdoing by the plaintiff may induce a court to grant equitable relief for which the plaintiff otherwise qualifies. [9] In some jurisdictions a transferor who transferred with an intent to evade taxes or creditors is entitled to a declaration that he is beneficial owner if he seeks that declaration before any taxes have been evaded or before any creditors have been delayed.[10] He is considered to have a *locus poenitentiae.* It is perhaps curious that in jurisdictions in which the courts are concerned whether the illegal object has been carried into effect and it is found that it has not been effectuated no subsequent enquiry is made as to whether the plaintiff lacks clean hands. The explanation may be that the plaintiff's request for equitable relief before the purpose has been carried into effect is equivalent to the washing of unclean hands. In Halsbury's discussion of the "clean hands" doctrine there is an assumption that when the transaction, the subject-matter of the litigation, is itself illegal there is no need to have recourse to the "clean hands" doctrine. [11] Ashburner treats *Birch* v. *Blagrave,*[12] the case from which the *locus poenitentiae* principle has been thought to arise, as an authority for the proposition that repentance before the illegal purpose is fulfilled provides an exception to the rule that equitable relief cannot be given to a plaintiff who lacks clean hands.[13]

Transferor must be denied relief if the formulation of his claim depends upon proof of his dishonest intent

In some jurisdictions considerable influence is accorded to the maxim *nemo allegans turpitudinem suam est audiendus.* [14] This principle differs from the "clean hands" doctrine: in the latter, the plaintiff's baseness may prevent him obtaining equitable relief even though it appears from sources other than the terms of the plaintiff's claim or the evidence on his behalf whereas under the former, baseness of the plaintiff not appearing from his claim or the evidence on his behalf is not a bar to relief. Moreover, the clean hands doctrine is relevant only to a claim for equitable relief: the other principle applies both at common law and in equity.

The principle preventing a plaintiff from founding a claim on his own wrong has operated in English courts in cases where transferors

9. *Kettles and Gas Appliances Ltd.* v. *Anthony Hordern and Sons Ltd.* (1934) 35 S.R. (N.S.W.) 108, 129, *per* Long Innes J.
10. *Infra.*
11. Halsbury's *Laws of England,* 3rd ed., vol. 14, p. 531.
12. (1755) Amb. 264; 27 E.R. 176.
13. *Principles of Equity,* 2nd ed., p. 472.
14. No one alleging his own baseness is to be heard. *Montefiori* v. *Montefiori* (1762) 1 Black W. 363; 96 E.R. 203, *per* Lord Mansfield: "That no man shall set up his own iniquity as a defence any more than as a cause of action."

have sought to avoid their transfers. In *Roberts* v. *Roberts*[15] a testator had executed a voluntary deed giving his brother a term of years. The deed had been delivered to the brother but he had never been in occupation of the land. The deed had been executed in order to give the brother a colourable qualification to kill game. Neither the brother nor any one else had made use of the deed. In a suit brought by persons claiming under the testator's will in the Court of Exchequer in its equitable jurisdiction to have the deed set aside it was held that the plaintiffs were not entitled to a re-conveyance regardless of whether anything had been done under the deed. Subsequently the brother sued in ejectment in the King's Bench.[16] It was held that the persons claiming under the testator's will could not be heard to say in defence that the deed executed by the testator was executed with fraudulent intent.

In *Gascoigne* v. *Gascoigne* [17] the plaintiff had taken a lease in the name of his wife and had built a home on the land with his own money. At that time he was indebted to money-lenders and the lease was taken in the wife's name with the object of protecting the property from the husband's creditors. The parties subsequently separated, and on the wife's refusal to assign the lease to the plaintiff he brought an action in a County Court seeking a declaration that his wife was a trustee for him. He was successful in the County Court but the Divisional Court on appeal held in favour of the wife. The wife had never entered into any agreement to hold as trustee for the husband. Initially there was a presumption of advancement in favour of the wife. The only fact relied on by the husband as tending to rebut the presumption that his wife was beneficial owner was that of the scheme to defeat his creditors. Speaking for the Divisional Court, Lush J. said that the plaintiff could not be permitted to rebut the presumption of advancement "by setting up his own illegality and fraud, and to obtain relief in equity because he has succeeded in proving it." [18] This was so regardless of whether the point had been taken in the County Court. It is to be noted that although the husband had creditors at the time the lease was taken in his wife's name no enquiry was made as to whether any creditors had been delayed or defeated. If in *Gascoigne* v. *Gascoigne* the wife as legal owner of the lease had been suing her husband for equitable relief presumably she could have relied on the presumption of advancement and proof of her case would not have required reference by her to the fact that she had joined in a fraudulent scheme with her husband. This would be so if the only relevant principle was the inability of a party to base a claim on his own wrongdoing. If, however, the "clean hands" doctrine were relevant that doctrine might have debarred the wife from equitable relief.

15. (1818) Daniel 143; 159 E.R. 862.

16. (1819) 2 B. & Ald. 367; 106 E.R. 401.

17. [1918] 1 K.B. 223.

18. [1918] 1 K.B. 226.

The principle of *Gascoigne's Case* has recently been applied in *In re Emery's Investments Trusts* [19] by Wynn-Parry J. The plaintiff was a British subject and his wife was an American citizen. Property in respect of which the husband and his wife were co-owners of the beneficial interest was converted into common stock in American corporations. The husband's intention was that the beneficial interest in the stock should be as to one-half to his wife and the other half to him; but, in order to avoid payment of American withholding tax, which would be leviable against him as an alien under American federal law, the stock was registered in the name of the wife alone. Subsequently, the wife, having been asked for a divorce by the plaintiff, removed and sold the securities. The plaintiff sought half of the proceeds from the wife. Here again the initial presumption was one of advancement and in the words of Wynn-Parry J. it was "necessary for the husband, in his endeavour to rebut that presumption, to assert that the property in question was put into his wife's name in order to avoid the payment on his beneficial interest of tax which would otherwise have been payable, so that, upon the basis that the tax had been United Kingdom tax, it appears to me that *Gascoigne* v. *Gascoigne* completely covers the present case." [20] Wynn-Parry J. then proceeded to decide that American federal tax stood in no different position from United Kingdom tax for this purpose and concluded that the husband had not rebutted the presumption of advancement.[21]

According to some authorities the maxim *nemo allegans turpitudinem suam est audiendus* means that no one shall be heard in a court of justice to allege his own baseness as a foundation of a right or claim; not that a man shall not be heard who testifies to his own baseness, however much his testimony may be discredited by his character.

The drawing of a distinction between reliance on wrongdoing as a cause of action or a defence, on the one hand, and as merely an explanation of a matter of evidence, on the other, is illustrated by *Press* v. *Mathers.*[22] The defendant became registered as the person carrying on a real estate agent's business under a business name and also as the holder of a real estate agent's licence. She did this as a "dummy" for her brother who in fact carried on the business. The defendant took no part in the conduct of the business. The defendant's application for registration in each case indicated that she had an interest in the business. The

19. [1959] Ch. 410.

20. [1959] Ch. 420.

21. The catchwords at the beginning of the report of *Emery's Case* in the Law Reports refer to "Clean hands." There is no reference in the report to this rubric and it is not clear beyond doubt that the "clean hands" doctrine was employed to determine this case. Insofar as the decision is an application of *Gascoigne* v. *Gascoigne* it is more properly an application of the maxim *nemo allegans turpitudinem suam est audiendus.*

22. [1927] V.L.R. 326; [1927] Argus L.R. 197.

defendant's brother received certain money for the plaintiff for which he failed to account. The plaintiff sued for money had and received by the defendant to use of the plaintiff. One of the issues was whether the defendant's brother received the money payable to the plaintiff with the defendant's authority. To establish that authority the plaintiff relied upon the admission made by the defendant in her applications for registration that she was the person conducting the business. The plaintiff could not rely on the ordinary rule of estoppel because the plaintiff had not known of the applications for registration when the money was paid. The defendant then adduced evidence that her brother had no authority from her, and that she did not trade under the name of the business in the course of which her brother received the money. As Dixon A.-J.[23] speaking for the Full Court of the Victorian Supreme Court said:

> These negatives do not *per se* involve the assertion of any illegal, or fraudulent act upon the part of the defendant. The *facta probanda* upon which she relies are perfectly innocent. It is true that to gain credence for these denials she proceeds to explain her admissions by confessing conduct which may be illegal or fraudulent, although the ultimate facts which make it so are not stated in the Special Case. It was said that in doing so she was acting in opposition to the statement of Lord Mansfield in *Montefiori* v. *Montefiori*[24] — "No man shall set up his own iniquity as a defence, any more than as a cause of action." ... A party is not disabled by law from explaining a matter of evidence only, because his explanation consists of circumstances which include wrongdoing on his part.

Where a transferor seeks to rebut a presumption of advancement as in *Gascoigne* v. *Gascoigne* and *In re Emery's Investments Trusts* this distinction, if applicable at all, would seem to favour the transferor. When he seeks to rebut the presumption of advancement he is asserting that he did not intend to give the beneficial interest to the transferee: the statement that his basic reason for not wanting to give the beneficial interest was his desire to evade taxes or defeat creditors would seem to be merely evidentiary.[25]

In any event whatever its validity the distinction was not considered in *Gascoigne* v. *Gascoigne* or *In re Emery's Investments Trusts.* Those two cases demonstrate the difficulties in the way of a transferor who in an English court has to rebut the presumption of advancement in a transaction tainted with fraud or illegality. If in order to prove the trust for himself he has to confess his fraudulent intent he cannot recover. This is so whether the fraudulent plan has been carried into effect or not. If in either *Gascoigne's Case* or *Emery's Case* the wife

23. The present Chief Justice of the High Court of Australia, who was then an Acting-Justice of the Supreme Court of Victoria.

24. (1762) 1 Black W. 363; 96 E.R. 203.

25. In *Donaldson* v. *Freeson* (1934) 51 C.L.R. 598, 617, [1934] Argus L.R. 250, 254, McTiernan J. was of a view similar to this. *Infra.*

had made a written declaration of trust so that the husband would not have had to confess his fraudulent intent in order to prove the trust would the husband have been entitled to an order for the re-conveyance of the legal title? Or suppose that it was a case in which the transferor was the wife and the transferee the husband so that the initial presumption would be one of resulting trust and the wife would not have to confess her fraudulent intent in order to prove the trust. Would the wife have been entitled to an order for re-conveyance? Presumably it is still open to a court to refuse equitable relief on the basis of the "clean hands" doctrine if the defendant proves that the transferor had a fraudulent intent. As will be seen later an English court would make a further enquiry as to whether the fraudulent intent had been carried into effect. If it had not been carried into effect, the transferor may recover.[26]

In New Zealand the principle of *Gascoigne's Case* has been applied in a case where property was paid for by a husband and put into his wife's name. The presumption of advancement could not be rebutted by evidence showing that the husband intended the transaction to take effect in fraud of the law.[27] The maxim *nemo allegans turpitudinem suam est audiendus* has had a similar operation in Canada.[28] In the United States case law there is a variety of opinions on the question whether a transferor should be entitled to recover if he can make out a case without having to adduce evidence that the purpose was illegal. Scott prefers the cases which hold that the question is whether on all the facts it appears that the conduct of the transferor was so blameworthy that it is against public policy to permit him to recover the property and that it is immaterial whether the evidence of illegality comes from the transferor or the transferee.[29]

In Australia the course of decisions in the High Court on illegal trusts might suggest that if *Gascoigne* v. *Gascoigne* and *In re Emery's Investments Trust* were to arise in Australia now the first enquiry would be whether the illegal purpose has been carried into effect without prior consideration of whether the maxim *nemo allegans turpitudinem suam est audiendus* should operate. This divergence does not appear in the earlier cases. In these the transferor confessed illegal intent but did not have to rebut a presumption of advancement. Thus in *Payne* v. *McDonald* [30] a daughter purchased an estate but had the title put in her

26 *Infra.*

27. *Preston* v. *Preston* [1960] N.Z.L.R. 385.

28. *Scheureman* v. *Scheureman* (1916) 28 D.L.R. 223; *Elford* v. *Elford* (1922) 69 D.L.R. 284; *Saik* v. *Saik* [1950] 2 D.L.R. 582.

29. Scott on *Trusts,* 2nd ed., s. 422.5. See also Annotation in (1939) 118 A.L.R. 1184.

30. (1908) 6 C.L.R. 208; 14 Argus L.R. 366.

mother's name: the daughter was favoured by a presumption of resulting trust. In *Perpetual Executors etc., Co. Ltd.* v. *Wright*[31] a husband purchased an estate and the title was put into his wife's name. The husband did not have to rebut any presumption of advancement because there was a written declaration of trust in his favour.

In *Donaldson* v. *Freeson*[32] a husband purchased an estate but had the title put in the name of his wife. When claiming against a purchaser in a sale following execution of a judgment against the wife there was no clear evidence in the trial court that the husband had a fraudulent intent to deceive creditors but in judgments in the High Court, on appeal, it is made clear that even if that intent had been proved the husband could recover from the wife if the illegal purpose had not been carried into effect. This case was one in which there would ordinarily be a presumption of advancement which the husband would have to rebut. However, the husband and wife joined as plaintiffs to resist the purchaser and the husband did not have to rely on his illegal intent to rebut the presumption of advancement because the wife admitted the trust.[33]

A case more like *Gascoigne* v. *Gascoigne* arose in *Drever* v. *Drever.*[34] The plaintiff was the registered proprietor of an estate which had been transferred to her by her husband, the defendant. The instrument of transfer was expressed to be for a pecuniary consideration which had not in fact been paid. The husband had retained the certificates of title. In an action by the wife for delivery of the certificates of title the husband testified that the transfer was made because his liabilities were large, that the conditions of the transfer gave him possession of the certificates of title during his life and the right to the rents and if discord arose he intended to insist on payment of the consideration stated. This appears to be a case in which the husband would have had to rebut a presumption of advancement or a presumption of a sale by evidence disclosing illegal intent. However, by this time the course of decision in Australia was such that it was assumed that the initial enquiry in a case like this was whether the illegal intent had been carried into effect. So deeply was this presumption entrenched that the wife's counsel disclaimed any argument that the husband's intention to defeat creditors could prevent the husband saying the wife was a trustee for him: apparently there was no evidence

31. (1917) 23 C.L.R. 185; 23 Argus L.R. 177.

32. (1934) 51 C.L.R. 598; [1934] Argus L.R. 250.

33. The only justice who adverted to the maxim *nemo allegans turpitudinem suam est audiendus* was McTiernan J. After stating that *Gascoigne's Case* was inconsistent with *Payne* v. *McDonald* and *Perpetual Executors, etc., Co. Ltd.* v. *Wright* — a view which, as will be seen, is questionable — observed that any confession of illegal intent was merely evidentiary and not the foundation of the suit (51 C.L.R. 617; [1934] Argus L.R. 255). This distinction has been discussed above.

34. [1936] Argus L.R. 446.

that creditors had in fact been delayed or defeated. The husband had, however, arranged for the rents to be included in his wife's income tax return and the wife's counsel relied on intention to defeat the Commissioner of Taxation as the illegal purpose for which the original transfer was made. But in the trial court there was no proof of intention to defeat the Commissioner of Taxation at the time of the original transfer. The High Court held by a majority that the husband should succeed.

It could be that the disparity between English and Australian decisions is more apparent than real and that there is really only one case, *Drever* v. *Drever,* in which the maxim *nemo allegans turpitudem suam est audiendus* was improperly ignored. It is noteworthy that Dixon J. dissented in *Drever* v. *Drever* on the basis that the husband could not say that the false appearance of ownership was created, but never used, for purposes of deception. The husband had designed the false appearance of ownership to deceive creditors in a contingency which never arose but he had used it to deceive the Commissioner of Taxation. What is more important in this context is that he accepted the principle that would prevent the husband rebutting the presumption of advancement by setting up a design of clothing his wife with a false appearance of ownership lest he should be unable to meet his liabilities.

Transferor must be denied relief if the fraudulent or illegal purpose has been carried into effect

Many English texts[35] on this subject state that a transferor who has transferred with a fraudulent intention and who sues for recovery of the property before the fraudulent intention has been carried into effect may recover. This must be understood as being subject to the qualification that a presumption of advancement cannot be rebutted by evidence disclosing fraudulent intent.

An early authority relied on by many texts for the principle that the transferor can recover if the illegal purpose remains unfulfilled is *Birch* v. *Blagrave*.[36] W.P. conveyed estates to his daughter, Anna, in fee. Anna was never told of the conveyances. W.P. retained possession of the estates except such part as he later sold. It was proved that he made the conveyances in order to disqualify himself from becoming Sheriff of London by reducing his estate to a value below £15,000. But he later changed his mind and instead of swearing that he was not worth £15,000 and so being excused the office, he submitted to pay the usual fine for not accepting the office. In proceedings by the devisees of W.P.

35. *E.g.* Halsbury, *Laws of England,* 2nd ed., vol. 33, pp. 143, 148, 153; Underhill, *Law of Trusts and Trustees,* 11th ed., pp. 181-185; Lewin on *Trusts,* 15th ed., p. 131.

36. (1755) Amb. 264; 27 E.R. 176.

against the heirs of the daughter, Lord Hardwicke held that the conveyances to Anna were not effective. He said:

> In the present [case] I lay aside all considerations of fraud and trust; the ground I go on is mistake .... I am of opinion, the conveyance ought not to take effect against his intention, unless he had actually taken the oath; that would have been against conscience, and in fraud of the law; .... In this case, Petty found his mistake, and instead of taking the oath, paid the fine as qualified.[37]

In early nineteenth century cases referring to *Birch* v. *Blagrave* the point of the case is regarded as being not the non-fulfilment of the fraudulent purpose but the non-delivery of the deeds of conveyance. This was the explanation given by Abbott C.J. in *Roberts* v. *Roberts.*[38] In *Groves* v. *Groves*[39] the plaintiff alleged that he paid purchase money to the vendor of an estate which was conveyed into the name of the plaintiff's brother on the understanding that the estate was to be held on trust for the plaintiff. The plaintiff also alleged that the title was put in the name of his brother "to make him a vote for the county." In proceedings in the Court of Exchequer in its equitable jurisdiction the plaintiff sought a decree for the execution of a conveyance in his favour by his brother's heir. The plaintiff failed because he did not prove that he had paid the purchase money. Alexander L.C.B. was also prepared to hold against him on the ground of his fraudulent intent. In the present context it is noteworthy that the plaintiff argued that the purpose had not been carried into effect inasmuch as the brother had never voted and that therefore illegality of object should not debar the plaintiff from relief. Alexander L.C.B. rejected this argument and distinguished *Birch* v. *Blagrave.* He said :

> When a grantor, so far as he can, completes the transaction for an illegal purpose, and leaves it in the power of the grantee, during his whole life, to make, at his pleasure, the illegal use of the gift originally intended, he deserves all the consequences attached to the illegality of his act. If the crime is not completed, the merit is not his, and therefore, in such a case, I should not think myself bound to relieve him, against the heir of the grantee. The plaintiff asks for equity and does not come with clean hands to receive it.[40]

Thus, whereas courts in later cases have regarded completion of the illegal purpose as the critical factor debarring recovery, the earlier courts were concerned with completion of the transaction of conveyance. In the earlier cases attention is focused on the transferor and he will be debarred from recovery if he has done something to put the illegal intent

37. (1755) Amb. 265; 27 E.R. 176.

38. (1819) 2 B. & Ald. 367; 106 E.R. 401.

39. (1828) 2 Y. & J. 163; 148 E.R. 1136.

40. Compare Parke B.'s statement in *R.* v. *Eagleton* (1854) Dears. 515; 169 E.R. 826 in relation to attempts to obtain money by false pretences that once the defendant has done the last act, depending on himself, there is a completed attempt.

into effect: he is not discriminated against for merely having the intent but for doing something in pursuance of that intent whether or not harm to others has in fact flowed from that attempt.

The later more lenient approach is exemplified by *Symes* v. *Hughes.*[41] Here the plaintiff had assigned by deed certain leaseholds to a woman. She was not one of his relations and there could not be an initial presumption of advancement. At the time of the assignment the plaintiff was in financial difficulties: a default judgment had been made against him and execution had issued under it. The grantee subsequently assigned the leaseholds to the defendant. The plaintiff possessed the title deeds. The defendant sued at law to obtain the title deeds. The plaintiff sued in equity seeking a declaration that the defendant was a trustee for him. Before the cause in equity was heard the plaintiff was adjudicated bankrupt. By an arrangement with his creditors the plaintiff had his property re-vested in him and he covenanted to prosecute a suit for the recovery of the leaseholds. The plaintiff argued that he was entitled to recover so long as the illegal purpose had not been carried into effect and relied on *Birch* v. *Blagrave.* In a very short judgment Lord Romilly M.R. accepted the argument. As well as saying that no harm had been done to any creditor he pointed out that, in fact, the suit was being prosecuted for the purpose of enabling the creditors to recover something. This fact might very well have limited the authority of *Symes* v. *Hughes* to cases where the illegal purpose is more likely to be carried into effect by leaving the property with the transferee than by allowing the transferor to recover.

In some later cases it has been said that if the illegal purpose has not been carried into effect the transferor has a *locus poenitentiae.* Does this mean that he must repent while the illegal or fraudulent purpose remains capable of fulfilment: that if for extraneous causes the purpose disappears it is too late for the transferor to seek recovery? This idea has had an influence in some cases about illegal contracts. Thus, in *Lowry* v. *Bourdieu*[42] an attempt was made after the safe arrival of a ship to recover premiums paid on a policy of marine assurance. The defendants, the underwriters, argued that although they would not have been legally liable to pay, they would have felt bound in honour to pay. Thus, if the ship had been lost, the plaintiffs would have been paid on their policy; if the plaintiffs waited until their ship arrived safely they could not recover back the premiums. Buller J. said if the plaintiffs had acted fairly and "had brought their action before the risk was over, and the voyage finished, they might have had a ground for their demand; but they waited till the risk (such as it was, not indeed founded in law, but resting on the honour of the defendant), had been completely run." [43]

41. (1870) L.R. 9 Eq. 475. See also *Petherpermal Chetty* v. *Muniandy Servai* (1908) 24 T.L.R. 462 (J.C.).
42. (1780) 2 Doug. 469; 99 E.R. 299.
43. 2 Doug. 471; 99 E.R. 300.

This moral approach by which attention is focused on the attitude of the fraudulent party rather than on the objective effects of his transaction found favour with all members of the Court of Appeal who decided *In re Great Berlin Steamboat Company.*[44] The appellant had paid £1,000 to the credit of a company at its bankers for the purpose of impressing certain Berlin bankers with whom the creditors were trying to place shares of the company. It was understood that the sum was not to be spent by the company without the appellant's leave. He did consent to part of the £1,000 being spent for the purposes of the company. Following a winding-up order the appellant claimed the balance standing to the company's credit as his on the footing that the company had agreed that the original £1,000 was held by it on trust for the appellant. No Berlin banker had ever made any enquiry as to funds held to the credit of the company. Thus, in a sense the illegal purpose of defrauding Berlin bankers had never been effectuated and the appellant sought recovery on the authority of *Symes* v. *Hughes*[45] and *Taylor* v. *Bowers.*[46] But all members of the Court of Appeal were agreed that the appellant was too late; he had waited until after the winding-up order had been made. If the principle that the transferor is required to show repentance while the illegal purpose remains capable of fulfilment is carried too far it would mean that once the transferee resisted a claim by the transferor that he held on trust for the transferor the illegal purpose would be frustrated. Australian decisions have allowed recovery to the transferor against a personal representative of the transferee where it was clear that the transferor was moved to seek recovery not by repentance but by the frustration of the purpose by the transferee's death.[47] In *Donaldson* v. *Freeson*[48] where husband-transferor and wife-transferee combined to seek a decision that the transferee held on trust for the transferor the principle in *Symes* v. *Hughes* was thought to enable the finding of a trust even though the decision was sought against a purchaser at an execution sale following judgment against the transferee.[49] These Australian cases disclose a shift from concern as to whether the individual transferor is personally unworthy of relief to a concern as to whether he has caused harm to others.

44. (1884) 26 Ch.D. 616.

45. (1870) L.R. 9 Eq. 475.

46. (1876) 1 Q.B.D. 291.

47. *McDonald* v. *Payne* (1908) 6 C.L.R. 208; 14 Argus L.R. 366; *Perpetual Executors etc., Co. Ltd.* v. *Wright* (1917) 23 C.L.R. 185; 23 Argus L.R. 177.

48. (1934) 51 C.L.R. 598; [1934] Argus L.R. 250.

49. The question of illegality of purpose had not been raised at the trial but it is apparent from the joint judgment of Gavan Duffy C.J. and Starke J. that if an illegal purpose had been proved the intervention of a judgment creditor of the transferee against the transferee would not have prevented recovery by the transferor.

Conclusion

A survey of decisions on illegal trusts shows that the courts have progressively looked with more favour on a grantor who seeks to recover property conveyed with intent to defeat future creditors or the revenue authorities. The older less liberal decisions are consistent with a policy that he who would convey with that intent should be left at the mercy of his grantee. Although this may lead to unjust enrichment of an unmeritorious grantee the refusal of the civil courts to allow recovery is justified as providing a deterrent to persons who might intend to work frauds. A disposition of property with intent to defeat revenue authorities may well be a penal offence in many jurisdictions but because offences of this kind are notoriously difficult to prove, a civil court's refusal to assist a fraudulent grantor may have positive value as being in aid of the penal law. The more lenient doctrine which permits recovery if the illegal purpose has not been carried into effect leaves it possible for the grantor to subvert the established indicia of ownership without any good reason. If his creditors seek to execute judgments against his property he will normally wish to deny that he had any beneficial interest in the property conveyed: if the grantee's creditors seek to execute against the grantee's property the grantor will claim that it is held on trust for him.

Whatever may be the merits as between these two doctrines it is apparent that in English case law there is now a lack of balance in the basic policy which operates. If the conveyance gives rise to the presumption of advancement the grantor is debarred from relief by his own unworthiness but if the conveyance does not give rise to that presumption the grantor, although no less unworthy, may recover if harm has not been caused to others. The life of the common law may have been experience rather than logic but even pragmatic development may require a degree of logical consistency.

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