1955 *Present :* Gratiaen, J., and Swan, J.

D. A. PERERA *et al.*, Appellants, *and* SCHOLASTICA PERERA, Respondent

S. C. 89—D. C. Negombo, 17,010

Trusts—Resulting trust—Transfer by person in loco parentis—Presumption of advancement—Rebuttability—Trusts Ordinance (Cap. 72), ss. 83, 84.

If a person transfers property to another to whom he stands *in loco parentis* there is a presumption of advancement, so that a resulting trust under section 84 of the Trusts Ordinance does not arise in favour of the transferor. But, under section 83 of the Trusts Ordinance, the presumption of advancement may be rebutted by proof that the transferor did not intend to dispose of the beneficial interest in the property unconditionally to the transferee.

Plaintiffs had deposited a total sum of Rs. 5,000 in favour of their younger sister, the defendant, in the Post Office Savings Bank. Although the account in the Post Office Savings Bank was in the name of the defendant, the Bank pass book was retained by the eldest brother (the 1st plaintiff). The attendant circumstances showed that the beneficial interest in the money was intended to be " given as dowry " to the defendant only if and when she would be " given in marriage " to a bridegroom approved by the family. Defendant, however, soon after she attained her majority, eloped with and married a man of her own selection without the approval of her parents or her brothers.

Held, that when the defendant contracted a marriage without the approval of her family, she became disentitled to receive the sum of Rs. 5,000. The money, therefore, belonged to the plaintiffs.

APPEAL from a judgment of the District Court, Negombo.

N. E. Weerasooria, Q. C., with *A. B. Perera* and *S. W. Walpita*, for the plaintiffs appellants.

A. K. Premadasa, with *S. M. H de Silva*, for the defendant respondent.

Cur. adv. vult.

May 26, 1955. GRATIAEN, J.—

All the plaintiffs, who are the elder brothers of the defendant, had met with a moderate degree of success in trade or business. Their father was himself a person of some substance, but he became a chronic invalid in 1942, with the result that the plaintiffs very commendably took over the responsibility of providing dowries in due course for their two unmarried sisters. Accordingly, a cash dowry of Rs. 5,000, towards which each brother made a proportionate contribution according to his means, was collected and handed over to their elder sister when she was " given out " in marriage in 1947. In July 1949, when the defendant was 19 years old,

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a Post Office Savings Bank account was opened in her name with the same object in view, and sums aggregating Rs. 5,000 were deposited from time to time to her credit by the plaintiffs. The Bank pass book was, however, retained for the time being by the eldest brother (the 1st plaintiff), and has never left his custody. The fact that this book was withheld from the young lady has some significance to the issues arising on this litigation.

In May 1951, the defendant, having but recently attained her majority, eloped with and married a young man of her own selection without the approval of her parents or her brothers. The plaintiffs claim that in these circumstances the sum of Rs. 5,000 provisionally ear-marked for her benefit never became her property ; she contends on the other hand that the money had passed to her absolutely as and when each item was deposited in her name with the Savings Bank.

The learned Judge rejected the plaintiffs' submission, and held that " when they deposited the money they intended that the defendant should have the benefit of it *and that this money should be her dowry* ". His decision was much influenced by the admitted absence of any express stipulation by the brothers (at the time when the money was deposited) that the right to draw the money would be conditional on her contracting a marriage approved by them.

The circumstances in which the money came to be deposited by the plaintiffs with the Savings Bank in the name of their unmarried sister certainly rules out the inference that they had committed themselves irrevocably to the granting of an unconditional gift to her. The brothers had no doubt placed themselves *in loco parentis* towards the defendant, so that the normal presumption of a resulting trust under section 84 of the Trusts Ordinance does not arise in their favour. *Fernando v. Fernando* [1], *Mutalibu v. Hameed* [2]. Under section 83 of the Ordinance, however, it was open to the brothers to rebut " the counter-presumption of advancement " by proof that they did not intend at the relevant dates to dispose of the beneficial interest in the money unconditionally to the defendant.

Sections 83 and 84 of our Trusts Ordinance have introduced the English law on this subject, and the true principle was recently elucidated in the House of Lords by Lord Simonds in *Shephard v. Cartwright* [3]. Where a man purchases property in the name of (or transfers property to) a stranger, a resulting trust is presumed in favour of the purchaser (or transferor) ; on the other hand, if the transfer is in the name of a child or one to whom the purchaser or transferor then stood *in loco parentis*, there is no such resulting trust but a presumption of advancement. The presumption may, however, be rebutted, but " it should not give way to slight circumstances ". The judgment proceeds to adopt the following passage from *Snell's Equity* (22nd ed.) page 122 as to the kind of evidence which would be admissible for the purpose of rebutting the presumption of advancement in any particular case :—

" The acts and declarations of the parties before or at the time of the (purchase) or so immediately after it as to constitute a part of the

[1] *(1918) 20 N. L. R. 244.* [2] *(1950) 52 N. L. R. 97.*
[3] *(1955) A. C. 431.*

transaction, are admissible in evidence either for or against the party who did the act or made the declaration ; subsequent acts and declarations are only admissible as evidence against the party who did or made them, and not in his favour."

The decision of the Court of Appeal as to the admissibility of evidence of subsequent statements or declarations in favour of the person making them has been over-ruled, but the following observations of Denning, L.J. in (*1953*) *1 Ch. 728 at 761* may be accepted as correctly setting out the general principle as to the presumption of advancement :

" If there is no (admissible) evidence on either side, an advancement will unhesitatingly be inferred ; but, if there is other evidence pointing one way or the other, then the tribunal of fact must, at the end of the case, come to its own conclusion whether an advancement was intended or not, giving proper weight to the natural inclination of a father (or a person *in loco parentis*) to provide for the child, but also taking into account all other circumstances. "

In the present case, the learned Judge correctly, in my opinion, accepted by implication the evidence that the plaintiffs did not intend an absolute and unqualified gift to come into operation as soon as each sum of money was deposited in the defendant's name. In other words, he was satisfied that the contemplated advancement was at any rate to be postponed until the time arrived for her to receive a dowry. But I cannot agree that she could ever have been intended to enjoy the beneficial ownership of the money if she ultimately chose to contract a marriage without the approval of her family. We are concerned only with the actual intention of the donors, and not with the desirability or otherwise of parents or persons *in loco parentis* imposing on a young woman (as a condition of their liberality) their own decision as to whom she ought to marry. If one pays regard to the habits and customs of the class of society to which these parties belong, the inference seems to me irresistible that the beneficial interest in the money provisionally ear-marked for her benefit was intended to be " given as dowry " to the young lady only if and when she was " given in marriage ", as her elder sister had been, to a bridegroom approved by the family. She elected instead to contract a marriage, " for better, for worse ", with someone of her own selection. The unfortunate consequence of that decision (which has, one hopes, been justified in all other respects) was that she became disentitled to receive a dowry which would otherwise have been available to her in accordance with her brothers' intentions. The conditions attaching to the completion of the gift having failed, I would allow the appeal and enter judgment for the plaintiffs as prayed for with costs in both Courts. The money belongs to them.

SWAN, J.—I agree.

Appeal allowed.