preference for according a lesser evidentiary status to such documents is to be applauded as having proper regard to their true probative value.[19]

3. Conclusion

The judicial shift effected by *Driscoll's* case away from the previous position of almost automatic admission upon tender of unsigned records of interview shown to have been adopted by the accused, towards a rejection of such documents pursuant to the judicial discretion in these matters, is a desirable trend. Though it is perhaps regrettable that a similar result was not reached by a re-evaluation of the logical inconsistency between the rationale of the primary exemption rule and the exception constituted by the adoption concept, the practical effects are essentially the same—the circumstances in which the jury may be enabled to attribute undue weight to an unsigned confession tendered as an exhibit have been significantly reduced, the likelihood of police being unable to secure convictions because of the new rules would seem doubtful, and the possibilities for fabrication of documentary evidence are minimized, if not eliminated.

Brent M. Young*

OGILVIE v. RYAN[1]

Ogilvie v. *Ryan*[1] is one of those odd cases produced by circumstances of unfriendly precedent on the one hand[2] and a deserving cause on the other. A decision was handed down by Holland J. that appeared to do perfect justice *inter partes* but has the potential to create nothing less than havoc if applied generally. The facts are of particular interest, in that if it cannot be assumed that the usual relationship of mistress and paramour prevailed, it may be possible therefore to conclude that the decision would be applicable to other kinds of relationships.[3]

In 1955 a man, Mr Ogilvie, came to live with the defendant, Miss Ryan, at a cottage she rented from a company of which Mr Ogilvie was the managing director. He paid board of £10.0.0. per week. Seven years later, when Miss Ryan's mother (who had also lived in the cottage) died, the couple began to live as "man and wife". Probably out of regard for delicacy in such matters, the defendant was not asked to explain in detail what she meant by describing her relationship in these terms. In 1969, the

[19] It may be noted that Gibbs J. acknowledged that the prosecution may support their version of the interrogation by use of audio-visual devices which would not be open to the same objection: ibid. p. 68.

* B.Juris. (Monash University).

[1] [1976] 2 N.S.W.L.R. 504.

[2] *Maddison* v. *Alderson* (1883) 8 App. Cas. 467, 479.

[3] For example, a homosexual relationship. Such extension of the general principles was of course foreshadowed by a number of earlier English decision including that of Lord Denning M.R. in *Cooke* v. *Head* [1972] 2 All E.R. 38, 41.

company sold the cottage and gave Miss Ryan notice. Mr Ogilvie proposed that, as an alternative to Miss Ryan finding other premises, he would buy a house in which they both could live, she taking care of him in return for which the house would be hers as long as she lived. A house was purchased and the couple moved in May 1970. Miss Ryan was then about 63 and Mr Ogilvie 84 years. For the next two years, Mr Ogilvie contributed $30.00 weekly to housekeeping expenses, but paid nothing to the defendant in remuneration for her services. Miss Ryan, on the other hand, cared for Mr Ogilvie as any devoted wife might have done. There was no doubt that the couple were on very close terms of affection. Mr Ogilvie died in July 1972 leaving a will in which Miss Ryan was not mentioned.

The case came before the court when Mr Ogilvie's son, executor of the will, sought an order for possession of the property. The defendant counterclaimed, *inter alia,* a declaration that the plaintiff held the property on trust for her during her life to permit her to occupy the same rent free so long as she desired to remain there.

Holland J., in reviewing the facts at some length, frequently commented upon the timid but honest nature of the defendant; he examined in detail the English authorities related to the imposition of a constructive, implied or resulting trust, concluding that there was indeed a general principle that could be extended to cover the situation before him. In the search for a general principle, the relevant authorities were divided into a number of categories.

> "One category could be said to be cases where the constructive trustee attained his legal title from the *cestui que trust,* and obtained it only by having agreed that the *cestui que trust* would have a beneficial interest in the property."[4]

Bannister v. *Bannister*[5] and *Last* v. *Rosenfeld*[6] were stated to be in this category. *Binions* v. *Evans,*[7] his Honour said, could be regarded as an extension of this category to a case where the constructive trustee, whilst not obtaining his legal title from the *cestui que trust,* obtained it from the transferor to him on terms that he would recognize a beneficial interest in the *cestui que trust* by which the transferor was bound. "In this category the basis of the constructive trust could be the fraud in asserting the legal title to defeat the beneficial interest on the basis of which it was obtained."[8]

Another category was where the constructive trustee acquired property in his own name and, having so acquired it, had its value increased by means of direct or indirect financial contributions, or work and labour provided by the *cestui que trust* on a common understanding, express, implied or imputed, that the *cestui que trust* would have a beneficial interest in the property. In support of this category, *Cooke* v. *Head,*[9]

[4] [1976] 2 N.S.W.L.R. 504, 517.
[5] [1948] 2 All E.R. 133.
[6] [1972] 2 N.S.W.L.R. 923.
[7] [1972] Ch. 359.
[8] [1976] 2 N.S.W.L.R. 504, 517.
[9] [1972] 2 All E.R. 38.

Hussey v. *Palmer*,[10] *Doohan* v. *Nelson*,[11] *Fraser* v. *Gough*[12] and *Eves* v. *Eves*[13] were cited. The basis of the constructive trust was here seen as ". . . the prevention of the fraud of using the legal title to retain benefits gained only because of the common understanding, yet defeat the beneficial interests for which the benefits were given".[14]

It is likely that the observations regarding the second category were based upon the remarks of Lord Denning M.R. in *Hussey* v. *Palmer,* which Holland J. had quoted earlier. In any event, it was through this explanation of the underlying principle in the second category that the defendant was to find her salvation. Although the facts of the case indicated that it was not exactly on all fours with any of the precedents referred to, his Honour saw nothing to confine the underlying principle of the second category to benefits recovered by the constructive trustee that were related to the acquisition or improvement of the property. "Why" he asked, "should it [a constructive trust] not arise if, by their arrangement and common intention, the benefits to be taken by the deceased were of a different character?"[15] Accordingly, it was found that the defendant was entitled to a declaration as sought.

In short, a proprietary interest was declared to exist in the defendant as a result of an agreement, evidence of which came only from the defendant, and under the terms of which she was to live with and care for the deceased in return for a home so long as she lived. One might be excused for wondering what would have been the result had Mr Ogilvie lived and, tiring of the defendant's company, requested her to leave; or, put another way, if the estate was in danger of being insolvent if the property was not sold free of encumbrances (as was the situation in *Horrocks and Another* v. *Forray*[16])?

Holland J. rejected an alternative claim for specific performance of a contract, on the basis that the specific acts of part performance done in execution of the contract were not unequivocally referrable to the existence of the contract; therefore the necessity for writing, as required by the *Statute of Frauds,* had not been displaced. He considered himself bound by the decisions of the Australian High Court which had twice endorsed the narrow approach to part performance as laid down in *Maddison* v. *Alderson*.[17] Had he been at liberty to follow the modern and more liberal approach of the House of Lords[18] to part performance, then doubtlessly a contractual licence would have been found sufficient to do justice to the defendant's claim. There would have been authority for this approach,[19] and the results would not have been quite so startling.

[10] [1972] 3 All E.R. 744.
[11] [1973] 2 N.S.W.L.R. 320.
[12] [1975] 1 N.Z.L.R. 138.
[13] [1975] 3 All E.R. 768.
[14] [1976] 2 N.S.W.L.R. 504, 517.
[15] *Ibid.* 518.
[16] [1976] 1 All E.R. 737.
[17] (1883) 8 App. Cas. 467, 479.
[18] *Steadman* v. *Steadman* [1974] 2 All E.R. 977.
[19] *Tanner* v. *Tanner* [1975] 3 All E.R. 776.

The Constructive Trust as a Remedy

The English authority cited in the decision, if it is good authority, does without question support the imposition of a constructive trust as a general equitable remedy, to be applied to effect justice *inter partes* without regard to the much wider implications of the institution. The imposition of a trust (as an institution, not a remedial device) places upon the trustee serious obligations and liabilities.[20] There is a duty to account with interest to the beneficiary and, if it is not a limited trust (as in the present case), to sell the property if called for by the beneficiaries, and account to them for the proceeds of the sale. There is of course a power in the beneficiaries to trace trust property as far as a bona fide purchaser without notice,[21] and of course in the event of a trustee's bankruptcy, the beneficiaries will be entitled to priority over his general creditors. The ramifications of a trust may indeed reach well beyond the parties before the court.

With these rules and principles in mind, it is unquestionably clear that the category of situation in which a trust should be imposed should not be dictated only by the demands of justice in the particular circumstances before the courts, but regard must be had to the principles of law that are being formulated and their general application. General principles should not be formulated from cases decided upon grounds only applicable to that case. This unfortunately appears to have already happened, not only in *Ogilvie* v. *Ryan,* but in the English authority upon which it relied.

The Authorities Relied Upon

In formulating his two categories under which a constructive trust should be imposed, Holland J. referred to a number of authorities, apart from *Bannister* v. *Bannister,* that purported to follow the House of Lords' decision in *Gissing* v. *Gissing.*[22] A careful study of that decision reveals that the now classic statement of Lord Diplock, so often quoted,[23] has been isolated from its context and taken to support a proposition that his Lordship could never have intended. His Lordship said this

> "A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trusts—is created by a transaction between the trustee and the *cestui que trust* in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be

[20] It is assumed here that the courts in this case and the cases cited to support it are applying the traditional English view of a trust as an institution; the constructive, resulting or implied trust—not the trust as a remedy well known in the American context as relief available to a plaintiff opposing a defendant who has been unjustly enriched at his expense.

[21] Perhaps even further. H. G. Hanbury states "Equity will go further in defence of the interest of the *cestui que trust* than common law will go in defence of a legal owner" "The Field of Modern Equity" (1929), 45 L.Q.R. 196, 198.

[22] [1970] 2 All E.R. 780.

[23] See *Haseltine* v. *Haseltine* [1971] 1 All E.R. 952 per Lord Denning M.R. at p. 955. *Binions* v. *Evans* [1972] Ch. 359, 368 per Lord Denning M.R. *Cooke* v. *Head* [1972] 2 All E.R. 38, 42 per Lord Denning M.R. *Hussey* v. *Palmer* [1972] 3 All E.R. 744, 747 per Lord Denning M.R.

inequitable to deny the *cestui que trust* a beneficial interest in the land acquired."[24]

That his Lordship placed an immediate qualification on his statement has generally been ignored by the Court of Appeal. His Lordship went on to say

"And he will be held so to have conducted himself if by his words or conduct he has induced the *cestui que trust* to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

The Court of Appeal worked on this limited principle with such enthusiasm that in no time at all it was considered to support the imposition of a trust "whenever justice and good conscience required it. . . . It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution".[25] The prevailing attitude of the Court of Appeal has become such that it was but a short step for Holland J. to extend one of the more specific requirements of the general principle, that of benefit obtained by the legal owner at the expense of the *cestui que trust,* to include a benefit not necessarily pertaining to the value of the trust property.

If and when the House of Lords has another opportunity to consider this area of the law, the writer believes, with little doubt, Lord Denning M.R. and any who follow him will be severely called to task.

Immoral Contract

It would seem that the defence of immoral contract has little if any relevance today, if indeed it was not raised by the circumstances of this case. The point is not expressly adverted to in the judgment, but it is submitted that it follows from the decision. The defendant was the deceased's mistress when she moved into the deceased's house, and the relationship was accepted from the evidence to have continued right up to July 1972. It can hardly be questioned that this was a circumstance which was valued by the deceased. That there may have been no sexual intercourse between the parties does not appear to take the case outside the accepted area of immorality which courts of past generations have set out to discourage. However, there were other considerations of an acceptable nature, for example, housekeeping duties, and as such one can only assume that any immoral content in the consideration can and will be severed to allow the lawful consideration to stand and support the agreement. It is doubtful if the immorality doctrine as stated in the text books is still good law, particularly in the light of social and judicial developments in the last 20 years. Although the law should always embody societal ideals, the norms and ideas of society change, and when they do the law must change with them. An eloquent statement of this fundamental concept of common law is contained in the judgment of Stable J.

[24] *Gissing* v. *Gissing* [1970] 2 All E.R. 780, 790.
[25] *Hussey* v. *Palmer* [1972] 3 All E.R. 744, 747 per Lord Denning M.R.

in the Queensland Supreme Court decision of *Andrews* v. *Parker*.[26] No doubt courts of higher jurisdiction will eventually endorse the realities of this judgment, but until such time as this is specifically done, one is probably safe to assume that silence is golden.

The Decision Assessed

In the field of matrimonial property, the law as it now stands would seem to offer extensive economic protection to the wife. There is seldom any inquiry into whether the wife has performed her household duties satisfactorily and never, it seems, is the husband's support of the wife during the marriage set off against the lump sum payment she is in a position to receive at the conclusion of the marriage. This position of privilege, it now appears, is going to be shared by the mistress, or perhaps a more suitable term would be the "unmarried housewife".[27] *Ogilvie* v. *Ryan* is a striking illustration of the manner in which ancient and inconvenient principles, which are not practical to abolish outright, can be largely circumvented; it is this very degree of flexibility which allows the common law to reflect the norms of society. At least one commentator in this area[28] abhors the judicial efforts to effect reform in this manner. Matters which involve important questions of marriage and society are better, he considers, left to Parliament. With respect, the writer must disagree.

Society at large is generally unaware and unappreciative of the vanguard of social attitudes, and unless confronted with specific example of need for change, will oppose it. The Australian Parliamentary experience with divorce law and abortion law reform are but two outstanding examples. It would be all but impossible to improve the lot of the unmarried housewife by blanket legislation. If it then is accepted that the common law[29] process of evolution is the most obvious vehicle for change, one must then ask: is the progress to date satisfactory? To answer this question with regard to *Ogilvie* v. *Ryan,* the answer must unfortunately be no. There are a number of reasons. The precedent relied upon in the decision has already been discussed; it is in considerable danger from future House of Lords scrutiny. Had the defendant sought, or the trial judge granted, relief of a less proprietary nature, such as *quantum meruit,* then, conceivably the decision would be left to rest in peace, achieving a small but sure step in the evolutionary process. A superior court, faced with the pressures of changing social attitudes will sometimes, if for no other reason than policy, uphold a mildly innovative decision.

[26] [1973] Qd. R. 93.

[27] Lord Kilbrandon in *Davis* v. *Johnson* (The Times 9/3/78) preferred the use of this term to that of "mistress" which he considered had more clandestine overtones. All the Lords who participated in this decision on the *Domestic Violence and Matrimonial Proceedings Act* 1976 (Eng.) hesitated to use the term "mistress" in that context.

[28] Alastair Bissett-Johnson (1975) *N.L.J.* 614.

[29] It should be remembered that until 1972 N.S.W. had separate jurisdictions of law and equity; this fact has been of no significance in the N.S.W. Courts' acceptance and application of the English decisions.

The problems of *Ogilvie* v. *Ryan* could well be summed up with the words of Bagnall J. in *Cowcher* v. *Cowcher*[30] where he said

> "In any individual case, the appreciation of [*Pettitt* v. *Pettitt*[31] and *Gissing* v. *Gissing*[32]] may produce a result which appears unfair. So be it; in my view that is not injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity, the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate—by precedent out of principle."

C. BARTLETT*

SCHILLER v. SOUTHERN MEMORIAL HOSPITAL[1]

To what extent can objections be sustained upon an application for a town planning permit on the grounds that it contains technical defects? This question arose in *Schiller* v. *Southern Memorial Hospital* when the Supreme Court of Victoria heard an appeal from the Town Planning Appeals Tribunal pursuant to s. 22B(3) of the *Town and Country Planning Act* 1961, which enables the Court to hear appeals limited to questions of law.

By a Notice of Determination dated the 9th October 1975 the City of Moorabbin, which was a responsible authority under the Melbourne and Metropolitan Planning Scheme, granted to the Southern Memorial Hospital a town planning permit for the erection of a community health centre. The health centre was to provide medical care in the East Bentleigh area and was to be financed by the Commonwealth Government. The only persons to lodge objections against the development were five doctors in general practice in the area who feared the likely effect upon their practice of medical care being provided at the health centre. A Notice of Appeal was lodged with the Town Planning Appeals Tribunal by the doctors and subsequently some 79 other persons (most of whom were of a non-medical occupation) objected to the granting of the permit by the responsible authority.

The Tribunal rejected the appeal and upheld the determination of the responsible authority, but whilst doing so added certain restrictive conditions to the issue of the permit. These conditions related purely to the physical setting of the development, and included the provision of parking

30 [1972] 1 All E.R. 943, 948.
31 [1970] A.C. 777.
32 [1970] 2 All E.R. 780.
* B.Juris., LL.B. (Monash).

1 [1976] V.R. 484.