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June, 1972

CHAPTER I

INTRODUCTION

1. Property Rights of Husband and Wife at Common Law

At common law when a man and a woman contracted marriage their legal personalities were deemed to merge, forming a single entity.[1] This unity was reflected in the property relations of husband and wife. The husband gained seisin of the wife's freehold land on marriage or any land which she acquired during coverture. He was entitled to dispose of any rents or profits from such lands, without having to make any account for them to his wife. If the wife survived her husband she retained the land free from liability for her husband's debts. If the wife died first, the land descended to her heirs, subject to any right of courtesy. If the husband died first, his wife had the right of dower. Any land which was conveyed to them jointly created a tenancy by entireties which was a non-severable joint tenancy. Each was deemed to be seized of the whole and neither of a part, but the

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[1]The clearest exposition of the unity of husband and wife is that of Blackstone in Commentaries on the Law of England (4th ed.) 1771, Bk. I at 442.

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband, under whose wing, protection and cover, she performs everything.

husband alone was entitled to possession and to the rents and profits.[2]

As regards chattels real, the husband on marriage had the right to enjoy and dispose of all chattels real in his wife's possession at the time of the marriage or to which she became entitled during coverture. He could dispose of them inter vivos without the concurrence of his wife and he retained the proceeds. During coverture these chattels were liable to execution for the husband's debts. If the husband survived the wife, he became entitled jure mariti to all chattels real which had vested in him in possession during coverture and on taking out administration he became entitled to all his wife's reversionary interest in chattels real. If the husband died first, the wife was entitled to all chattels real which the husband had not disposed of during his lifetime. If the husband mortgaged a leasehold during his lifetime, the wife had a right to redeem the mortgage after his death.[3]

All chattels personal in the wife's possession at the time of marriage (including money) became the property of the husband. He also had a right to all personal

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[2] I Family Law Project, Ontario Law Reform Commission at 1-3.

[3] Ibid, at 5.

chattels acquired by the wife during coverture, which included monies earned by the wife in any employment or enterprise carried on by her separately from the husband. The husband could deal with such chattels inter vivos or by will. If the husband died intestate, the chattels did not revert to the wife, but passed as part of the husband's estate to his personal representative. The exception to this was the wife's paraphernalia.[4]

Choses in action vested in the husband if he could reduce them into possession during coverture and he could do so without his wife's consent. If he died before reducing a chose in action into possession, it passed to the wife. If the wife died first, the husband became entitled if he took administration to her estate. These principles applied to rights ex contractu and ex debit.[5]

A married woman had only limited testamentary power. In the Statute of Henry VIII which established the right to devise land, the will of a married woman was declared void. Later the Wills Act of 1837 enacted "That no will made by any married woman shall be valid, except such a will as might have been made by a married

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[4] Ibid. The law relating to paraphernalia is discussed below in the chapter dealing with Personal Property.

[5] Ibid. at 6.

woman before the passing of the Act." However, there were several exceptions to the general incapacity of a married woman to make a will. The most important exception was that a married woman had complete freedom to devise any separate property she might own, a freedom which will be discussed below with the other equitable modifications to the common law. A married woman could also make a will with the consent of her husband though that consent could be revoked at any time before the will was proved, and the husband's own death revoked such consent automatically. A married woman might also make a will under a special power to make a will. Finally, the wife of a person banished for life by Act of Parliament, or attainted, the wife of an alien enemy, or a convict transported for life, or of a person against whom a protection order has been obtained, was for testamentary purposes a feme sole as to property vested in her after the husband's disability has been incurred.[6]

2. Equitable Modifications to the Common Law

At the time the common law rules as to matrimonial property were developed the most important source of wealth was freehold land. Of this land the husband merely had the income during marriage and, provided a child had

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[6] W.S. Holdsworth and C.W. Vickers, The Law of Succession, Oxford (1899) at 70-73.

been born, the right of curtesy for his own life, the substance of the freehold land remaining with the woman's next of kin. With the rise of the mercantile and capitalist class however, the main source of wealth was no longer land, with the result that the law was no longer adequate to keep the family (kinship) property intact and to preserve it from being sacrificed to the husband's speculative undertakings or spendthrift habits. Thus by the sixteenth century the Court of Chancery began to develop several equitable doctrines to modify the rigors of the common law and allow the married woman to deal with any property, real or personal, that was devised or settled upon her, without interference from her husband. These equitable developments it must be remembered were not done in the name of the principle of equality of the sexes so it is no incongruity that one of these doctrines developed was the restraint on anticipation clause.[7] The following is a summary of these equitable doctrines.[8]

(1) The wife's equity to a settlement

The husband had a right jure mariti to the wife's equitable interests in property, for example,

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[7] O. Kahn-Freund, "Matrimonial Property Law in England" in Matrimonial Property Law (W. Friedmann, ed.) Toronto (1955) 267 at 274-76.

[8] The following description of the equitable modifications is quoted, with minor modifications, from the Ontario Law Reform Commission's Family Law Project, Vol. 1 at 8-10. A good description is also found in Kahn-Freund's article "Matrimonial Property Law in England", supra, n. 7 at 273-76.

the right to a legacy, or the right to a trust fund due to her. If the husband obtained possession of such equitable interest, his right was absolute. But if he invoked the aid of the Court of Chancery to obtain the property, the court applied the maxim "he who seeks equity must do equity." If the property was such that the husband could dispose of it once he obtained possession, Chancery required that he settle part of it on his wife and children for their maintenance, before they would enforce his claim. Thus the doctrine of the wife's equity to a settlement evolved. This right was personal to the wife and took priority over any assignment made by the husband, and the claims of his creditors.

(2) The wife's separate estate

The Court of Chancery assisted in carrying out the intentions of a donor or devisor, that a married woman, or one about to be married, should acquire the property, real or personal, for her sole benefit or enjoyment free from the control of her husband and from liability for his debts. Even though a wife could not hold the legal title to property, it could be held for her benefit by a trustee. Property could be conveyed to trustees for the separate use of a married woman, and by so doing, the married woman had the same rights in equity as a single woman. This doctrine applied whether the interest was realty or personalty, or whether in

possession or reversion. She could dispose of her separate estate inter vivos or by will. If she died intestate in respect of her separate property the husband obtained the same interest that he would have had in her equitable property had it not been settled to her separate use.

The necessity even to name a trustee in the instrument creating the separate use was later dispensed with. If property was settled on a married woman for her separate use, so that legal title vested in the husband jure mariti, the Court of Chancery decided that the husband was to hold it for the wife as trustee. It still remained her separate property and she was free to deal with it as she pleased. The husband obtained no greater interest in the property than if it had been conveyed to trustees named in the instrument. However, the intention to settle the property to the separate use of the married woman had to be made clear in the instrument.

(3) Restraint on anticipation

Equity developed a further doctrine to prevent the husband from persuading his wife to deal unwisely with her property or from assigning her interest to him. This was a restraint attached to the property settled, conveyed, or devised for a married woman's separate use. If a restraint upon anticipation was found in the instrument, it prevented the married woman from alienating the property, or charging it with her debts, or disposing of any income

before it fell due. The extent of the restraint depended on whether it was attached to the corpus or income or both. The restraint upon anticipation only operated during coverture, and therefore, a married woman could devise her separate property by will. The restraint ceased on her death. When the husband died, the restraint ceased, but if the widow remarried before having dealt with the property to which the restraint was attached, it revived on her re-marriage and attached to that property again.

The restraint was intended (a) to keep a married woman economically independent from her husband; (b) to ensure that the intentions of a settlor were carried out without being frustrated by the common law rules; and (c) to protect other members of the family entitled to her property on her death.[9]

These equitable doctrines however, only benefitted the daughters of the rich for they alone were able to make the complicated settlement arrangements. "The daughters of the poor suffered the severity and injustice of the common law."[10] Yet even for the wealthy married

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[9] Restraint on anticipation or alienation is still possible in Alberta. See Married Women's Act, 1970 R.S.A. c. 227, s.6(2).

[10] A.V. Dicey, Law and Public Opinion in England (2nd ed.) at 383.

woman the law was lacking in certain respects. Dicey points out that in equity a married woman did not become the equivalent to a single woman except in respect of her separate property.[11]

(i) The restraint upon anticipation, so far as found in marriage settlements, gave a married woman a strictly anomalous kind of protection. It protected the property of a married woman from the interference of her husband, but in so doing it also disenabled her from dealing with the property herself as long as the restraint was in effect.

(ii) Equity, while conferring upon a married woman power to dispose of her separate property by will, gave her no testamentary capacity with respect to any property which was not strictly separate property.

(iii) Equity never gave a married woman contractual capacity: she could not during coverture make a contract which bound her personally. She could only contract in respect of, and bind such separate property as belonged to her at the time the debt was incurred, and it rendered only such property liable to satisify that debt. Therefore, a contract made by a married woman, even though intended to bind her separate property, could only bind such separate property as she had at the moment of contract and could not bind any separate property she subsequently acquired.

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[11] Ibid at 381-83.

The situation of women in pioneer Canada was much the same as that of the poor women of England. Family settlements were complicated instruments requiring preparation by skilled conveyancers and counsel learned in Chancery practice. Not one in a thousand pioneer families had as much as heard of a family settlement and even today, few settlements, except those of the simplest nature are encountered.[12]

3. Legislation Development of the Separate Property Regime

Beginning in 1870 the English Parliament passed a series of measures known as the Married Women's Property Acts. These Acts, the last of which was passed in 1962, resulted in the implementation throughout England of the separate property regime. Today the married woman in England can acquire, hold and dispose as she wishes of an any property, and can make herself and be made liable in respect of any tort, contract, debt or obligation, whether with a stranger or with her husband. The only relic remaining of the common law principle of the legal unity of husband and wife is the rule that a wife can have no domicile other that that of her husband.

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[12] F.C. Auld "Matrimonial property Law in the Common Law Provinces of Canada" in Matrimonial Property Law (W. Friedmann, ed.) Toronto, 1955, 239 at 242.

In Western Canada by virtue of the Dominion North-West Territories Act, the laws of England in force on July 15, 1870 and "applicable to the Territories" were declared to be in force in the Territories.[13] When the new provinces of Alberta and Saskatchewan were established, the Dominion Acts bringing them into force contained a provision that the law existing in the Territories was to continue in the new provinces until modified by legislation.[14] The rules of the common law as to the property rights of women have already been described. In addition to the common law, two statutory enactments which had ameliorated somewhat the position of women were among the body of laws accepted. The first Act was the Divorce and Matrimonial Causes Act,[15] section 25 of which stated that a wife was deemed a feme sole with respect to any property she acquired or which may come to or devolve upon her while a judicial separation is in effect. Section 21 of that Act enabled a deserted wife to obtain an order from the court in

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[13] 49 Vict. c.25 s.3.

[14] The Alberta Act (Can.) 4-5 Ed.7 c.3 s.16; The Saskatchewan Act (Can.) 4-5 Ed.7 c.42 s.16.

[15] 20&21 Vict. c.85. See Board v. Board [1919] A.C. 956 (P.C.).

respect of property or earnings to which she became entitled, thus protecting her from her busband and his creditors after the desertion. Such property vested in her as if she were a feme sole.

The second statute was the Married Women's Reversionary Interest Act[16] which enabled a married woman, as fully as though she were a feme sole, to dispose by deed of any future or reversionary interest in any personal estate to which she might be entitled by any instrument made after December 31, 1857. She could also release and extinguish her right or equity to a settlement and to any personal estate to which she, or her husband in her right, may have been entitled, provided her husband concurred in the deed or disposition or release, and provided that there was no restraint to alienation. The Act did not apply where an interest in personal estate was settled on the wife at marriage.[17] The effect of these two Acts was to give the married woman the right under certain limited circumstances to deal with certain property as if she were a feme sole.

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[16] 20 &21 Vict. c.57

[17] This enactment though unrepealed is not of present day importance in view of the abolition of husband's powers of control over their wives' property.

The first Canadian modifications to the English law that were applicable to Western Canada were contained in the North-West Territories Act.[18] The provisions relating to married women extended the concept of separate property to all earnings and profits of married women from any occupation or trade carried on separately from her husband, or derived from any literary, artistic or scientific skill: all investments of such wages or profits were to be free from the debts or dispositions of the husband, the married woman having the freedom to dispose of such separate property as it she were a feme sole. This provision effectively nullified the provision in the Wills Act of 1837 which had stated that any will of a married woman which she might not have made before the passing of the Act, was invalid. While generally before the Act a married woman had been incapable of making a will, several exceptions had been made, the most important being as regards her separate estate in respect of which she had a complete right of alienation either inter vivos or by a will. A married woman's testamentary incapacity now extended only to such property not part of her separate estate, such property now representing only a small proportion of most women's property due to the statutory extention of the concept of separate property.

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[18] 49 Vict. c.25 ss.36-40

The North-West Territories Act also allowed a married woman the right to maintain an action in her own name, and have the same remedies, both civil and criminal, against all persons, for recovery and protection of any wages, earnings, money and property comprising her separate estate. She was also to be subject to legal proceedings separately from her husband as if she were unmarried, in respect of any of her separate debts, engagements, contracts or torts. A collateral provision stated that a husband shall not, by reason of marriage, be liable for his wife's debts contracted either before marriage or during marriage but in connection with any employment or business in which she is engaged on her own behalf.

The effect of these provisions was not to make a married woman a _feme sole_ for all purposes, but made her property "separate property". It did not give her a general capacity to contract because she could only bind herself to the extent of, and in respect to, her (statutory) separate property. In order to succeed a plaintiff suing a married woman had to prove she actually did have such separate property at the time the contract was made;[19] having proved that, any subsequent separate

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[19] _Tetley_ v. _Griffith_ (1887) 57 L.T. 673.

property acquired during coverture was also affected.[20] If it was not established that she had any separate property at the time of the contract, she was not bound.[21] Thus her capacity to contract depended on possession of separate property.

While the artificial concept of separate property was not abolished in England until 1935, and still continues in certain jurisdictions, such as Ontario,[22] Alberta had effectively abolished the concept by 1906. This was done in two stages: an 1890 North-West Territories Ordinance enacted that "a married woman shall in respect of personal property be under no disabilities whatsoever heretofore existing by reason of her coverture or otherwise, but in respect of the same have all the rights and be subject to all the liabilities of a feme sole";[23] then in

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[20] In Re Shakespeare (1885) 30 Ch. D. 169; McMichael v. Wilkie (1891) 18 O.A.R. 464.

[21] Pallise v. Gurney (1887) 19 Q.B.D. 519.

[22] 1 Family Law Project, Ontario Law Reform Commission at 18.

[23] An Ordinance Respecting the Personal Property of Married Women, No.20 of 1890 s.2, c.47 of the Consolidated Ordinances of the North-West Territories, 1898.

1906 the new Alberta Legislature enacted that a "married woman shall in respect of land acquired by her on January 1, 1887 have all the rights and be subject to all the liabilities of a feme sole".[24] In 1922 the first Married Women's Act[25] was passed which clarified the position of Alberta women. This Act stated that:

> A married woman shall be capable of acquiring, holding and disposing or otherwise dealing with all classes of real and personal property, and of contracting, suing and being sued in any form of action or prosecution as if she were a married woman.

Finally in 1936 the present Married Women's Act[26] was passed, an Act based mainly upon the English Law Reform (Married Women and Tortfeasors) Act.[27] (See Appendix A.). To some extent this Act was a codification of the law: thus it was declaratory when it dealt with the capabilities of married women regarding the acquisition and disposal of property and rights and liabilities in regards to suits in contract and tort. It was also declaratory when it stated that while a wife might sue her husband

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[24] Transfer and Descent of Land, S.A. 1906, c.19, s.10.

[25] The Married Women's Act 1922 S.A. c.10.

[26] 1971 R.S.A. c.227.

[27] 25&26 Geo. 5 c.30.

to protect her separate property,[28] her husband had no such reciprocal right.[29] And though it enacted for the first time that a married woman is subject to bankruptcy laws and to the enforcement of judgements and orders as if she were a married woman, the effect of previous enactments was to make this provision almost unnecessary. However the Act accomplished two things: it finally abolished the concept of separate property and it established that a husband is no longer liable for the torts of his wife by virtue only of his status as husband. The Act had no effect upon restrictions upon alienation or anticipation attached to the enjoyment of such property.

The effect of these statutes has been to give a married woman legal equality of status and capacity as regards property, and to implement the principle of separation of property. It is important to recognize however, that while these two principles have been implemented at the same time, there is no causal relationship. Many people, lawyers and laymen alike, lost sight of this fact: they operated under the misconception

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[28] North-West Territories Act, 49 Vict. c. 25 s.40.

[29] A husband has no right to sue his wife because of the common law unity of husband and wife. A statutory exception was made only for the wife. In England the Law Reform (Husband and Wife) Act, 1962 10&11 Eliz. 2 c.48 extended this right to the husband.

that a matrimonial regime of community of goods or administration was incompatible with the principle of the equality of the sexes. The U.S.S.R. and Sweden are two countries which have shown that this is an incorrect assumption. In considering whether the separate property system adequately meets the realities of family life, and in advocating any changes, no derogation of the principle of equality of the sexes is made if a form of community property regime is recommended.

As regards the principle of separation of property regime, the main criticism that can be brought is that it fails to recognize the household as an economic unit for consumption and use of goods and services: under this system, if it were implemented strictly, marriage effects no change upon the property of the spouses. There have been many modifications to the strict principle of the separation of property:[30] as a result it cannot be said that the law regards spouses as it would strangers. The question to be answered by this study is whether the law, taken as a whole, has given adequate recognition to the reality of the household unit.

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[30] For example, intestate succession laws; family relief legislation; maintenance laws; such common law rules as the wife's agency of necessity; the immunity of spouses as regards the law of theft in respect of each other's possessions and the laws of torts, with the exception of the wife's right to sue to protect her separate property; social security legislation.

To this end the study is divided into five chapters, this introduction, a general chapter outlining some familiar principles applicable to property owned by husband and wife, a chapter dealing with personal property, a chapter dealing with real property and a chapter drawing some general conclusions. In approaching each area, the present law will first be described and the problems to which the law is subject described. Possible specific reforms will then be outlined. It is the impression of many authorities who have written in this area that this "piece meal" approach is inadequate. Thus men of the calibre of Kahn-Freund have long advocated a complete alteration in the matrimonial property regime and the implementation of a "community of surplus" or "community of acquests." A complete change in our property system through legislation establishing some form of a community matrimonial regime would make unnecessary most of the specific reforms. For example, it would be unnecessary to pass a law granting a wife a half interest in any surplus housekeeping allowance if all acquisitions made while the marriage continued bacame part of a community to be divided equally at the end of marriage. These specific reforms then are really alternatives to a complete change in our matrimonial regime. A third alternative to be considered is the vesting in the court of complete discretion to settle matrimonial property upon the spouses at the end of the marriage. Any conclusions drawn from this study must be a result of a

full comparison and evaluation of these three alternatives: 1) specific reforms to the separate property regime; 2) some form of community property regime; 3) discretion in the court to make an overall review of the financial position of the parties and to effect a readjustment on equitable principles.

CHAPTER II

SOME GENERAL CONCEPTS

The question of who owns what in the family home is one that many couples never have to answer. They themselves consider everything to be "ours" and while this is generally not true from a legal point of view, practically it does not matter because when the marriage is dissolved by the death of one of the spouses, the surviving spouse will generally receive most, if not all, of the matrimonial assests either under the provisions of a will or under the provisions of the Intestate Succession Act.[1] For those couples however who have less than a harmonious relationship there will come a time when it will be necessary to determine who actually owns the family home, what share does each own of the joint bank account, who owns the colour television, and so on. The court in determining ownership has recourse to several principles and techniques, some common to the whole area of property law, some confined only to the area of matrimonial property law. Before dealing with specific types of property it is necessary to briefly describe these concepts.

1. Procedure in Matrimonial Property Disputes

The first step in determining the property rights of the spouses is to bring the action into court. Unlike

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[1] 1970 R.S.A. c.190.

most other common law jurisdictions Alberta lacks a summary procedure under the Married Women's Property Act[2] to dispose of matrimonial disputes. Such a procedure was established in the English Married Women's Property Act 1882 and has been adopted in the other provincial Married Women's Property Acts: it provides a relatively inexpensive and quick process whereby a husband and wife can apply "by summons or otherwise in a summary way" to have their property and possessory rights inter se decided by a judge of the High Court of Justice or a judge of the county court of the district. The judge is empowered to "make such order with respect to the property in dispute...as he thinks fit."[3] The jurisdiction of the section has twice been extended. In 1958 section 7 of the Matrimonial Causes (Property and Maintenance) Act extended the jurisdiction of the court to include the power to make a money judgement where the property in question is no longer in the hands of the defendant and the proceeds of the fund from such sale cannot be traced to an identifiable fund.[4] In 1970 section 39 of the Matrimonial Proceedings and Property Act further extended the jurisdiction of the court to include former spouses who make application within three years after

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[2] 1970 R.S.A. c.227 See Appendix A.

[3] See Appendix B. for text of section 17 of English Married Women's Property Act.

[4] Id for text of section 7.

their marriage has been annulled or dissolved.[5]

The extent of the discretion of the judge to make "such order... as he thinks fit" has been the subject of much judicial dissension. In Hine v. Hine[6] Denning L.J. (as he then was) asserted that the section granted to the court discretion to transcend all rights, legal or equitable. This was in direct contradiction to the narrow view established prior to this that section 17 only allows the court to ascertain rights and grants no discretion to vary them. The principle has been stated by Romer L.J. as follows[7]

> I know of no power that the court has under s.17 to vary agreed or established titles to the property. It has the power to ascertain the respective rights of husband and wife to disputed property, and frequently has to do so on very little material; but where, as here, the original rights to property are established by the evidence, and those rights have not been varied by subsequent agreement, the court cannot, in my opinion, under s.17 vary those rights merely because it thinks in the light of subsequent events the original agreement was unfair.

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[5] Id. for text of section 39.

[6] [1962] 1 W.L.R. 1124 (Eng. C.A.).

[7] Cobb v. Cobb [1955] 1 W.L.R. 731 at 736-7.

in National Provincial Bank, Ltd. v. Ainsworth[8] the House of Lords repudiated the Hine v. Hine viewpoint and upheld Romer L.J.'s view. Later in Pettitt v. Pettitt[9] the narrow interpretation was unanimously upheld. It is now accepted that section 17 is purely procedural: it grants no power to the courts to vary existing property rights, the only discretion granted under the section is as to remedies.[10]

The English procedure has been described in some detail because it is felt that Alberta should enact a similar summary procedure. At present spouses who wish to claim a beneficial interest not reflected in the legal title must proceed by statement of claim unless the dispute concerns land, in which case proceedings may be started by an originating notice of motion.[11] It is recommended that this summary method of procedure should be extended to all disputes between spouses. This end may be achieved either by a provision in the proposed legislation governing matrimonial property,[11a] to incorporate section 17 of the English Married Women's Property Act 1882, section 7

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[8][1965] 2 All E.R. 472, [1965] A.C. 1175, [1965] 3 W.L.R.1.

[9][1969] 2 W.L.R. 966, [1969] 2 All E.R. 385.

[10]In Canada, the Supreme Court accepted this narrow view of the limits on the judge's discretion in Carnochan v. Carnochan [1955] S.C.R. 699, 4 D.L.R. 81 and Thompson v. Thompson [1961] S.C.R. 3, (1960) 26 D.L.R. 1.

[11]Alberta Rules of Court, R. 410(c).

[11a]See Chapter 6, Appendix.

of the Matrimonial Causes (Property and Maintenance) Act 1958 and s. 39 of the Matrimonial Proceedings Property Act 1970, or by an amendment to the provisions in the Rules of Court dealing with originating notices of motion.

It should be added that inclusion of the provision in the Matrimonial Property Act would not only serve the purpose of providing some spouses a quicker and more inexpensive method of determining their property disputes, but would also grant to the husband the same remedies for the protection of his property his wife presently has as regards her separate property under s. 3 of Married Women's Act.[12] (As was stated in Chapter I, one of the remnants of the common law principle of unity of husband and wife is the rule that a husband cannot sue his wife in court.) Thus where a husband brought an action against his wife to recover the possession of the family home in which his wife continued to reside and claimed mesne profits, an order for the delivery of the furniture and his personal belongings as well as damages for injuries both to the premises and chattels, the Supreme Court of Canada found that these claims were claims in tort which a husband had no right to bring against his wife.[13] The court then converted the action into an application under the summary procedures section of the Ontario's

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12 Supra., n. 2

13 Minaker v. Minaker [1949] 1 D.L.R. 801, [1949] S.C.R. 397.

Married Women's Property Act. If Mr. Minaker, the plaintiff, had been an Albertan he would have had no such alternate remedy. Thus if the proposed summary method of disposition is achieved through an amendment to the Rules of Court, it is recommended that in view of this discrimination against husbands, the Institute undertake a study of the present day value of this inter-spousal tort immunity, with particular reference to the Law Reform (Husband and Wife) Act 1964[14] which abolished this Rule in England, and the Ontario Family Law Project which dealt in detail with the question of tort actions between spouses and made a recommendation that there should be an unrestricted right of action between spouses.[15]

2. Establishing the Right to a Beneficial Interest

Irregardless of the procedure employed, a spouse who claims a beneficial interest in property must be able to support this claim either by establishing the existence of a contract or of a constructive, resulting, or implied trust. The following discussion of the law applicable in establishing either of these claims will largely deal with the judgements in two recent House of

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[14] 10&11 Eliz.2 c.48.

[15] Ontario Law Reform Commission, Family Law Project, Vol VI at 157-58. See also D. Mendes da Costa "Husband and Wife in the Law of Torts" in Studies in Canadian Tort Law (ed. A.M. Linden).

Lords decisions, Pettitt v. Pettitt[16] and Gissing v. Gissing[17]. In these two cases the House of Lords for the first time dealt directly with the law of matrimonial property: their judgements clarified and to some extent overruled the previous decisions in this area and thus are more valuable as an exposition of the law than any existing textbook. Today, the law in England in this area is still complex and generally unsatisfactory; in Canada the situation is complicated even more by the uncertainty as to whether Canadian courts will apply the House of Lords decisions in view of the decision in Thompson v. Thompson[18] which has been cited as authority for the proposition that English matrimonial property developments are not applicable in Canada. Despite this view the author takes the opposing position that in view of the recent Alberta Appellate Division decision in Trueman v. Trueman[19] where Johnson J.A. quoted at some length from the judgment of Judson J. in Thompson and concluded that nothing said in the House of Lords was in conflict with the judgement in Thompson,

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[16] Supra. n.9.

[17] Gissing v. Gissing [1970] 2 All E.R. 780, [1970] 3 W.L.R. 255.

[18] [1961] S.C.R. 3, (1960) 26 D.L.R. 1.

[19] [1971] 2 W.W.R. 688, 18 D.L.R. (3d) 109.

Since that there had been a majority finding in the latter case that the claimant spouse had made no contribution to the acquisition of the property. In view of this decision, as well as several other factors discussed below, it is submitted the law that will be applied in Alberta is the law stated in the House of Lords.

Thompson v. Thompson had been interpreted by several courts as having closed the question of the applicability in Canada of the English Court of Appeal decisions beginning with Rimmer v. Rimmer,[20] though other courts have recognized, as Johnson J.A. did, that the view that the "palm tree justice" cases were no longer applicable arose not from the actual decision in Thompson but from some critical remarks of Judson J. that were actually obiter dicta.[21]

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[20] [1952] 2 All E.R. 863, [1953] 1 Q.B. 63. See Lawson v. Lawson (1966) 56 W.W.R. 576, Affirming (1965) 54 W.W.R. 466 (B.C.C.A.), Re Married Women's Property Act; Re Stajcer and Stajcer (1961) 34 W.W.R. 424 (B.C.); Tscheidse v. Tscheidse (1963) 41 D.L.R. (2d) 138 (Sask.); and especially Weisgerber v. Weisgerber (1969) 71 W.W.R. 461, and Rooney v. Rooney (1969) 68 W.W.R. 641. The last two cases have almost the same factual situations as Trueman v. Trueman but opposite results.

[21] The following cases apply the reasoning of Rimmer v. Rimmer: Barleben v. Barleben (1964) 46 W.W.R. 683, Grunert v. Grunert (1960) 32 W.W.R. 509, Stanley v. Stanley (1960) 30 W.W.R. 686, Morasch v. Morasch (1962) 40 W.W.R. 50, Germain v. Germain (1969) 70 W.R.R. 120. Some courts have avoided the dilemma of which line of authority to apply by applying neither - see, for example, the partnership cases: Thomas v. Thomas (1961) 36 W.W.R. 23, 29 D.L.R. (2d) 576, Marx v. Marx [1964] S.C.R. 653.

The criticism centered around the scope of judicial discretion under section 12 of the Ontario Married Women's Property Act, and secondly, the development of a presumption of joint assets which Judson J. felt entitled a spouse to half interest no matter how insubstantial the contribution to the acquisition of the property, provided only that there was a contribution.

Since there is a possibility that other courts will not accept the statement of Johnson J.A. in the Trueman decision that the Thompson decision is distinguishable from the recent House of Lords decisions, and having regard to the status of the Judge making these criticisms, plus the weight that has been attached to them in subsequent decisions, it is necessary to consider their import today. Two recent House of Lords decisions, the previously mentioned decision of Pettitt v. Pettitt and the decision in National Provincial Banks v. Ainsworth,[22] have both dealt with the equivalent English section of the Ontario Married Women's Property Act. These cases have resulted in a recognition that the discretion under the Married Women's Property Act is limited to remedies: thus the criticism of Judson J. on this first point has been considered by no less an authority than the House of Lords, and been found valid.

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[22] Supra n.8.

As to the criticism of the presumption of joint assets, the Law Lords sitting in the Pettitt case all stated that there is no such presumption. Rimmer v. Rimmer[23] was approved only for those cases where there are substantial joint contributions and difficulty in determining respective joint shares; if the proportionate contributions are ascertainable, then, in the absence of an agreement that the parties share equally, the interest obtained is proportionate to the contribution made. The problem of course is how such an intention to share equally can be determined -- can it be imputed or must it be inferred. This controversy will be examined shortly but on the basis of Trueman v. Trueman it is certainly arguable that such an intention can be imputed, which would in essence give the same results as a presumption of joint assets. However, it is respectively submitted that the basis of this criticism was a misinterpretation of such a presumption. Judson J. had spoken of any contribution resulting in a half interest, while even in Rimmer v. Rimmer, Sir Evershed M.R. had spoken of "substantial contribution". And while an argreement to share equally may be imputed, there must be evidence upon which to base such an imputation -- the reasonable spouse cannot expect to share equally merely on the basis of the marriage relationship.

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[23] Supra n.20

Even if Judson's criticisms are based on a correct reading of the law it must be remembered that this was isolated dicta from only one of the five judges who handed down written decisions. The two dissenting justices, Kerwin C.J.C. and Cartwright J., who dissented only on the facts both applied the rationale of the palm tree justice cases without relying on them per se, actions which are at least equivocal as to support or non-support of Judson J. Martland J. held that since this was not a dispute over a matrimonial home but a business venture, the palm tree justice cases were not applicable. The remaining judge agreed with both Judson and Martland JJ., so it is difficult to know if he supported the critical dicta of Judson J. or not.

Moreover, Judson J., in criticizing the English cases, stated that Canadians Jurisprudence had not developed in the same manner as had the English. Judson J., in making this statement, ignored the many provincial court judgements which had applied the Rimmer line of cases,[24] and relied upon three Supreme Court decisions which, it is respectfully submitted, do not support such a sweeping contention. One,

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[24] See for example, Sopow v. Sopow (1958) 24 W.W.R. 625, Mitchelson v. Mitchelson [1953] 9 W.W.R. 316, Kropielnicki v. Kropeilnicki [1953] 1 W.W.R. 249, Atamanchuk v. Atamanchuk (1955) 15 W.W.R. 301, Sywack v. Sywack (1943) 51 Man. R. 108.

Minaker v. Minaker[25] was decided several years prior to the decision in Rimmer; another, Jackman v. Jackman,[26] is taken as a rejection because the presumption of advancement was held applicable, yet on the peculiar facts situation of that case it is submitted that this was a correct decision. Moreover, the English Court of Appeal had not found that the presumption did not apply but only that it was weakened, so that that Court applied the presumption in Silver v. Silver.[27] Finally, Carnochan v. Carnochan,[28] insofar as it was relevant to the palm tree justice cases, is consistent with Romer L.J.'s statement in Cobb v. Cobb[29] that the discretion under section 17 is not to vary existing titles but to decide in accordance with whatever the existing legal and equitable rights are, a position which is now being accepted by the House of Lords.

At present then matrimonial property law is in a state of flux, it remains to be decided whether in fact the Thompson decision is in fact still applicable. This paper

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[25] [1949] 1 D.L.R. 801, S.C.R. 397.

[26] (1959) 19 D.L.R. 317. (S.C.).

[27] (1958) 1 All E.R. 523.

[28] [1955] 4 D.L.R. 81, S.C.R. 699.

[29] [1955] 2 All E.R. 696, [1955]. 1 W.L.R. 731 (Eng. C.A.)

will approach the subject on the basis that it is not, and that the correct approach is the one used by the Law Lords in Gissing v. Gissing. In that case which was applied in the Trueman decision it was stated that the preferable approach to matrimonial property disputes is to use the law of trusts. Nethertheless a brief discussion of the applicable law of contract is in order.

(1) Contract

Contracts between parties can be express or they can be inferred or imputed from the conduct of the parties to the dispute. Leaving aside for the moment the controversy as to the permissibility of imputing rather than inferring an agreement, there are several common problems which arise even with express contracts between spouses, which while not peculiar to family contracts, arise more frequently in these contracts than in ordinary commercial ones. The first two of these concern the validity of the contract: the necessity to prove an intention to create legal obligations and the need to show valuable consideration. The third common problem relates mainly to contracts dealing with land, though any sale of goods which have a value of over $50 is also affected: to be enforceable there must be compliance with the requirements of The Statute of Frauds.[30]

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[30] Charles 2, c.3, s.4.

and the Sale of Goods Act[31] respectively.

Where there is not an express intention to create legal obligations there are two criteria to be considered in determining whether such an intention can be inferred from the facts -- the relationship of the parties and the nature of the transaction. The well-known decision of Balfour v. Balfour[32] is an illustration of the principle that domestic arrangements between husband and wife will prima facie not be considered to be legally binding contracts. But it must be recognized that the case turned not only on the marital relationship of the parties but on the nature of the transaction. A similar agreement between a man and his housekeeper concerning the quantum of a housekeeping allowance would also prima facie not be considered a contract. This case was recently considered by the House of Lords[33] where it was generally approved, though it was emphasized that the decision did not prevent legal consequences from following family arrangements, but only meant that the courts are slow to infer such legal obligations from a family agreement. Lord Upjohn

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[31] 1970 R.S.A. c.327 s.7.

[32] [1919] 2 K.B. 571, [1918-19] All E.R. Rep.860.

[33] Pettitt v. Pettitt, [1969] 2 All E.R. 385.

in addition, emphasized that the second element to be considered by the court was the nature of the transaction. He stated that the doctrine that spouses do not generally intend to contract legal obligations had little, if any, application to questions of title to the property of the spouses.[34] (Lord Diplock pointed out that an executed agreement composed of promises that could not have been enforced still has legal consequences as a result of the law of property rather than the law of contract.)[35] In summary then, while the relationship of husband and wife will cause courts to be wary of inferring that an agreement between them was intended to create legal obligations,[36] where the nature of the transaction is not a domestic matter such as payment of a housekeeping allowance, but a transaction involving valuable property, courts will likely infer that the agreement was intended to incur legal obligations. The test is again that of the reasonable man.

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[34] Id. at 408

[35] Id. at 413

[36] Though where husband and wife are estranged courts are much more likely to infer an intention to create legal obligations. See McGregor v. McGregor (1888) 21 Q.B.D. 424, Popiw v. Popiw [1959] V.L.R. 197; See also Jones v. Padavatlon [1969] 1 W.L.R. 328 (mother and daughter); Ford Motor Co. Ltd. v. Amalgamated Union of Engineering and Foundry Workers [1969] 1 W.L.R. 339 (collective bargaining agreement).

A second factor often overlooked by a husband and wife who attempt to contract with each other is the necessity for valuable consideration for all contracts not under seal, whether written or oral. Valuable consideration, which has been defined as some right, interest, profit or benefit accruing to the one party or some forebearance, detriment, loss or responsibility given, suffered or undertaken by the other at his request,[37] does not include natural love and affection.[38] Neither does it include the promise to perform an existing duty[39] which is a second type of consideration often mistakenly relied upon by spouses as support for the validity of the contract.

It is true that there has been some dissent from the view that a promise to perform an existing obligation is not valuable consideration; this dissent has been voiced by Denning L.J. (as he then was) in two Court of Appeal decisions.[40] In both cases the promisor was under an

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[37] Currie v. Misa (1875) L.R. 10 Exch. 153 at 162.

[38] Though in equity it is considered 'good' as distinguished from 'valuable' consideration, and is sufficient to rebut the presumption of the resulting trust. 8 Halisbury's Laws 118.

[39] Stilk v. Myrick (1809) 2 Com. 317.

[40] Ward v. Byham [1956] 2 All. E.R. 318, Williams v. Williams [1957] 1 W.L.R. 148.

existing legal duty to perform the actions relied upon as providing the consideration, but in both cases the members of the Court examined the promise carefully and in each case was able to find an additional benefit to the promisee, in each case almost equalling a peppercorn.[41] In neither case was the statement of Denning L.J. that a promise to perform an existing duty is sufficient consideration to support a promise, even commented upon by the other members of the Court, although this statement was later applied in an Australian case.[42] At present then it is submitted that such a promise is not a sufficient consideration, although the court will study the promises carefully to ensure that the plaintiff has not promised something more than he is already bound to perform.

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[41] For example, in Ward v. Byham, supra n.40, the mother of an illegitimate child who promised to look after her in return for £1 per week for the child's maintenance was found to have promised to do more than perform her statutory duty to maintain her child because she had promised to "look after the child well" and satisfy the defendant the child was "happy".

[42] Popiw v. Popiw [1959] V.L.R. 197, Hudson J. in this case also made an alternate finding that while the plaintiff wife was under a duty to return to her husband, since her husband had no means of compelling her to return, he received a benefit by her promise to return and the wife submitted to a detriment by returning to her husband, an act which she could not have been forced to perform.

The third pitfall that may trap the spouse who wishes to sue the other in regards to an agreement between them is non-compliance with the Statute of Frauds or the Sale of Goods Act. The Statute of Frauds proclaims that certain types of contracts must be in writing: a contract by an executor or administrator whereby he incurs a personal liability to discharge a debt or obligation of the testator or intestate; a promise to answer for the debt, or default or miscarriage of another person; a contract made in consideration of marriage; a contract for the sale or other disposition of land or any interest in land; a contract which is not to be performed within one year from the making thereof. The Sale of Goods Act states that a contract for the sale of goods of the value of $50 or more must be in writing unless "the buyer accepts part of the goods sold and actually receives the same or gives something in earnest to bind the contract or in part payment." Non-compliance with the requirement of either statute as to the requirement of writing does not make the contract invalid but renders it unenforceable.

It is important to recognize however that what is required to be in writing is not necessarily the agreement itself but a note or written memorandum of it containing all the essential terms of the contract and signed by the party to be charged. The document need not have been prepared as a memorandum and can contain a repudiation of the contract, provided only that it recognizes all the terms thereof and does not set out any fresh term. Thus

an affidavit[43] and a memorandum of pleadings[44] in an action have been held to constitute sufficient writing under the Statute of Frauds, provided that it was in existence at the time the action on the agreement began. This requirement can be achieved by starting an action and when the Statement of Defence or affidavit filed in defence complies with the requirements of the law as to the memorandum, either discontinuing the action[45] and beginning a new action, or where possible amending the statement of claim sufficiently so that it may be deemed a new action as in Farr, Smith & Co. v. Messers. Ltd.[46].

Where it is impossible to produce written evidence of the agreement, equity will enforce some parol agreements if certain acts of part performance have been performed.

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[43] Barkworth v. Young (1856) 4 Drew.1, Dudgeon v. Chie (1955) S.R. (N.S.W.) 450, Popiw v. Popiw [1959] 1 V.L.R. 197.

[44] Grindall v. Bass [1920] 2 Ch. 487; Farr, Smith & Co. v. Messers. Ltd. [1928] 1 K.B. 397.

[45] See Alberta Rules of Court, R.225-238.

[46] Supra n.44. The action was started against the defendants in the name of certain plaintiffs, and a Statement of Defence was filed which set out the terms of the agreement in question. Leave was then given to amend the Writ and Statement of Claim by striking out the original plaintiffs and substituting the plaintiff company. It was held that this new step was in effect the commencement of a new action, and the original Statement of Defence, signed by counsel as the defendant's agent, could therefore be regarded as a sufficient memorandum to satisfy the statute.

Four conditions must be satisfied before the doctrine can operate: these acts of part performance must be referrable only to the alleged contract and to no other title;[47] they must be such as to render it a fraud in the defendant to take advantage of the contract not being in writing;[48] the contract to which they refer must be such as in its own nature is enforceable by the Court, that is, it must be an action in which a Court of Equity would entertain a suit for specific performance; finally there must be a proper parol evidence of the contract, which is let in by acts of part performance.[49] In most situations where the law will impute a constructive contract, the doctrine of part performance will be applicable.

All problems associated with express contracts and more arise where the agreement between the parties is not an express one -- and of course this is the common situation where the purported agreement is between husband

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[47] For example, the possession of property is usually explicable only as a result of a parol contract, but where the relationship of husband and wife is involved, possession of the property is explicable as an incident of the marriage.

[48] See Breitenstein v. Munson (1914) 6 W.W.R. 188, 27 W.L.R. 303, 19 B.C.R. 495.

[49] Fry, Specific Performance (6th ed.) at 276, quoted in Cheshire and Fifoot, The Law of Contract (6th ed.) at 176.

and wife. Often the evidence of the conduct of the parties will be such that while the parties never expressly agreed, the court can infer or imply from the evidence an agreement. As well as these implied contracts the law will in certain circumstances impose legal obligations upon parties, quite apart from, and without regard to, the probable intention of the parties and sometimes even in opposition to their express or presumed intention.[50] These agreements implied by law and known as constructive contracts, are based on the legal axiom that no person will be permitted to take advantage of his own fraud or wrong. Thus money paid or services rendered as a result of the inducement of the defendant will result in the law imposing a promise of remuneration. Where there is no inducement and work is performed voluntarily, acceptance of the benefit and a subsequent promise of payment is not generally sufficient to give rise to a good claim, though exceptions are made for persons employed in a professional capacity,[51] and for situations where the plaintiff voluntarily does what the defendant was legally bound to do and the latter promises

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[50] 8 Halisbury 225. For example, the tradesman who supplies necessities to a deserted wife may sue the husband on an implied contract, notwithstanding that he may have recieved express instructions from the husband not to give credit to the wife.

[51] Miller v. Beal (1879) 27 W.R. 403, Manson v. Baillie (1855) 2 Macq. 80, Turner v. Reeve (1901) 17 T.L.R. 592.

to pay,[52] or where work is done for the benefit of the defendent's property and he adopts the benefit of it in such circumstances as give rise to an inference of a contract to pay.[53]

The question of the applicability of the principles of the constructive contract were not discussed by Canadian or British Courts prior to the House of Lords decision in Pettitt v. Pettitt.[54] Prior to that decision the English courts had decided that Section 17 of the English Married Women's Property Act granted the court discretion to vary existing property rights if equity demanded it, and thus it was not crucial to perform mental gynmastics in order to determine the property rights of the spouses.[55] As was previously

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[52] Wing v. Mill (1817) 1 B. & Ald. 104.

[53] Falcke v. Scottish Imperial Insurance Co. (1886) 34 Ch. D. 234 (C.A.). In this case the defendent was held not to have known of the benefit he had recieved, thus a fortiori he never adopted the benefit. It was regarded as settled by all members of the court that had he acquiesced to the plaintiff making the premium, then the court would have implied a contract between the plaintiff and the defendant.

[54] Supra n.9.

[55] See, for example, Denning L.J. in Hine v. Hine [1962] 3 All E.R. 345 at 347 for this liberal view of the extent of the court's jurisdiction under section 17 of the Married Women's Property Act.

stated the House of Lords has now declared that this approach is incorrect, and the actual property rights of the spouses must be determined and enforced. The result is that the applicability of the constructive contract became an important issue. In Canada the question has been important since the decision in Thompson v. Thompson but there has not been a discussion of the question per se in any subsequent case.

The permissibility of imputing an intention to the parties was discussed at length by the Law Lords in the Pettitt case, the facts of which concerned a husband who had made improvements on his wife's property.[56] Both Lords Diplock and Reid felt that the concept of the constructive contract (they did not use the term) was applicable and that the approach of the courts in matrimonial disputes where there was insufficient evidence to infer an agreement should be to "ask what the spouses,

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[56] There may be some significance to the fact that the contract approach was discussed in Pettitt v. Pettitt where the basis for the claim to the property was the improvements made to the defendant spouse's property at a time when the property had been completely paid for. Thus there was no contribution to the acquisition of property which might form the basis for a resulting trust. On the other hand, in the later case of Gissing v. Gissing [1970] 2 All E.R. 780 where the claimant spouse had by her payments for furniture, improvements on the house and clothing for herself and her son, indirectly contributed to the acquisition of the property by freeing her husband to meet the mortgage payments, the approach taken was that of trust. There is however nothing to suggest this division in any of the judgements except that of Lord Upjohn in Pettitt [1969] 2 All E.R. 385 at 409.

or reasonable persons in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who had contributed to the acquisition or improvement of property already owned by the other spouse."[57]

Lord Upjohn (the only Chancery judge) in effect also accepted the principle that it is permissible to impute to spouses an agreement, though he confined the operation of the principle to circumstances where there is a contribution to the acquisition of property.[58] Rather than deciding that

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[57] [1969] 2 W.L.R. 973, per Lord Reid; see also Lord Diplock at 999.

[58] Most commentators on Pettitt v. Pettitt have concluded that Lord Upjohn decided that it was not permissible to impute an agreement (See for example, S. Cretney "No Return from Contract to Status" (1969) 22 M.L.R. 570). On the one hand it is true that he stated that it was not permissible for the courts to try and decide what the parties as reasonable spouses would have agreed was to happen on the break-up had they thought about it. But he clarified this when he stated that the court was not able to use this test because one, an agreement contemplating the break up of marriage was void as against public policy, and two, title to property is established at the time of acquisition by either inferring the parties' intention from the evidence or by applying the presumptions of advancement or resulting trust (at 408). Thus he made it clear that where there were direct contributions, even in the absence of agreement, the law would impute an agreement through the application of the presumptions. However, where there was expenditure of money on improvements on the property of the other spouse he felt that the trust approach had no relevance and the claimant spouse had to show an express agreement that he or she was to be reimbursed or was to receive a beneficial interest in the land.

the court should impute an intention by means of a reasonable spouses test, Lord Upjohn in his judgement pointed the way to Gissing when he recognized that a contribution to the acquisition of property raised a rebuttable presumption of a resulting trust. He diverged from Lords Reid and Diplock however when he stated that where the claimant spouse had expended money on improvements to the property of the other spouse, that spouse had to show an express agreement in order to claim either a beneficial interest or reimbursement.

Only Lords Morris and Hodson found that an intention could not be imputed to the parties in any circumstances where clearly the evidence established that there had not been an agreement made between the spouses. In doing so it is submitted that they ignored the established principles of the general law of quasi-contract stated above, for though the contribution (financial or non-financial) is a voluntary one and thus does not automatically vest in the contributor a beneficial interest, it can be forcefully argued that where a spouse accepts a contribution to his or her property in such circumstances as will give rise to an inference to pay back the benefit or to share the beneficial interest, the courts can impute a contract, regardless of the fact that no such contract was made.

The law in Alberta is not at present subject to this difference of opinion as to the permissibility of imputing an intention. The issue has not been considered by the Supreme Court of Canada but in a recent decision

Johnson, J.A. in the Alberta Appellate Division while giving the judgement of the Court in Trueman v. Trueman did consider the problem and without referring to the dissention in the House of Lords accepted the view of Lord Reid as the correct approach.[59]

Even among those who state that an objective approach is the correct one, there are some who feel that a different approach should be taken for indirect contributions as opposed to direct contributions.[60] Lord Reid, although

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[59] [1971] 2 W.W.R. 688 at 693-94. In a note in the Alberta Law Review, Volume 10, No.1 this writer has suggested that having accepted that the correct approach to matrimonial property disputes is to apply the law of trusts, and that the facts may impose a constructive, resulting or implied trust, it was unnecessary to make a search for the intention of the parties since on the one hand if there is a constructive trust the intention of the parties is irrelevant, and on the other if there is a resulting or implied trust there is a presumption of the parties intention -- so the court only need consider whether the purported trustee has rebutted the presumption and not, as did Lord Morris and Viscount Dilhorne, put a reverse onus on the claimant spouse to prove the existence of the trust. Nethertheless Johnson J.A. did consider the issue so the case can be cited as authority for the acceptance of Lord Reid's views on the permissibility of imputing an intention.

[60] See for example the judgements of Lord Upjohn in Pettitt v. Pettitt and Lord Diplock (who was referring to trust situation, but was dealing with same principle) in Gissing v. Gissing.

basing his judgement in Gissing on the law of trusts, made some remarks applicable equally to the contracts approach. He stated that there was no good reason for the distinction between indirect and direct contributions, and that in many cases it would be unworkable.[61] He felt that the approach should be the same even though he recognized that it would be more difficult to evaluate the share earned by such indirect contributions, and possibly he might concede that a different standard of proof would be used where contributions were indirect rather that direct. Johnson J.A. accepted the principle that there should be no distinction between direct and indirect contributions. He did not however find it necessary to decide the additional question of whether a spouse can acquire an interest in property standing in the name of the other and already paid for, other than by an express agreement between them.[62] Lord Reid in his judgement in Pettitt, the facts of which covered this point exactly, stated that where a spouse provides, with the assent of the spouse who owns the house, improvements of a capital or non-recurring nature, it is not necessary to prove an agreement before that spouse can acquire any right.[63] However as in the case of indirect contributions

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[61] [1970] 2 All E.R. 780 at 782.

[62] Supra n. 59 at 691.

[63] Supra n.60 at 389.

to the acquisition of property, Lord Reid's ally in Pettitt, Lord Diplock, did not support Lord Reid's position. In summary then, the law is by no means settled as regards either indirect contributions to the acquisition of property or contributions to improvement to property, the acquisition of which is completed, although in Alberta, Lord Reid's position is at present the accepted one in regards to the latter situation.[63a]

This discussion has in the main dealt with whether in fact the parties have contracted. A second major element of the contract to be considered is the terms. Have they agreed to share the beneficial interest, or is there only an agreement to repay the contributor? If there is an agreement to share the beneficial interest, in what proportions? The court can impute any terms it considers reasonable in the circumstances. If for example a claimant spouse establishes that there was a de facto partnership the court in the absence of a strong evidence leading to an alternate conclusion would find that one of the terms of the contract is that there should be a sharing of the beneficial interest. This claim which is often made where a small business or farm is involved, is in effect a claim that there is a contract to carry on a common business with a view to profit. A good illustration of a successful claim is an Alberta case which went to the Supreme Court of Canada, Marx v. Marx.[64] In this case a wife

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[63a] The English Court of Appeal has followed Lord Reid in this regard. See Davis v. Vale [1971] 2 All E.R. 1031; Falconer v. Falconer [1970] 3 All E.R. 449.

[64] [1964] S.C.R. 653.

alleged that was a partner with her husband in a bakery business in which they had worked together for many years, although admittedly the business was carried on under the husband's name, the bank account was also in his name alone and there was no evidence of an agreement that they would be partners. The Supreme Court upheld the Alberta Appellate Division finding that the parties were carrying on a business in common with a view to profit and thus fell within the definition of a partnership in The Partnership Act.[65] The decision as well as being an illustration of a good claim in partnership shows the willingness of Canadian courts to infer an agreement where no agreement was expressly made.[66]

Some cases have found a contract to have a partnership where no business is carried on with a view to profit,[67] but it is suggested that such decisions fail to distinguish between an ordinary contract and a contract of partnership.

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[65] Now, 1970 R.S.A. c.271 s.2(d)

[66] In an English case concerning a wife's claim to a beneficial share of her husband's property as a result of her efforts in his business which he had owned before marriage, the wife's efforts earned her a beneficial share in only one farm, but the judges all distinguished the case at hand with one where the business is acquired after marriage in which case as Lord Denning said "she becomes virtually a partner" in the business. Nixon v. Nixon [1969] 3 All E.R. 1133 at 1136 (C.A.)

[67] McKissock v. McKissock (1913) 18 B.C.R. 401, 4 W.W.R. 1327, 25 W.L.R. 95 (B.C.C.A.).

Thus in Klutz v. Klutz[68] Macdonald J. contrasted the case of a spouse who acquires an interest in property by virtue of a financial contribution, and one who acquires an interest by virtue of an agreement, that is a partnership, with no attempt to limit the latter case to disputes over businesses. Other cases concerning disputes over the ownership of farms have also emphasized more the fact of joint contributions as the basis for the courts decision, rather than the element of carrying on a business for profit, though in the latter cases this has always been present.[69] Generally it would appear that an arguement that a husband and wife are in partnership by virtue of a pooling of their seperate incomes to purchase a matrimonial home will not be an acceptable one.[70] The better approach in disputes over matrimonial assets that are not businesses, is to claim either that a contract existed, the terms of which were either one, to share the beneficial ownership in the property (that is, the spouses had contracted to establish a trust), or two, that the spouse in whom the legal title is vested had adopted the benefit and was subject to a promise to reimburse the claimant

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[68](1968) 2 D.L.R. (3d) 332 (Sask.).

[69]Atamanchuk v. Atamanchuk (1956) 21 W.W.R. 335 (Man. C.A.); Thomas v. Thomas (1961) 36 W.W.R. 23,29 D.L.R. (2d) 576 (Sask. C.A.).

[70]See 28 Halisbury 484.

spouse;[71] alternatively, it can be asserted that the circumstances gave rise to a resulting or constructive trust. Whether a claim that a contract existed which established a trust rather than a promise of repayment will succeed will depend on what inference can be drawn from the evidence of the parties' conduct and the nature of the contribution.

Where the contract the court infers or imputes results in a sharing of the beneficial interest, the size of each spouse's share will depend upon the proportionate contributions, unless there is an agreement to the contrary or there are substantial, but unascertainable, contributions. In the latter case in England the approach since Rimmer v. Rimmer has been to apply the maxim equity leans to equality, and declare that each spouse is entitled to a fifty per cent interest. This principle was reviewed by the House of Lords in Pettitt and upheld.[73] Later in

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[71] See Warm v. Warm; Re Married Women's Property Act (1969) 70 W.W.R. 207, where at the original hearing the wife obtained a lien for the amount of her contribution.

[72] [1952] 2 All E.R. 863, [1953] 1 Q.B. 63.

[73] [1969] 2 W.L.R. 966, per Lord Morris at 980-1; per Lord Upjohn at 991-2. The use of the reasonable spouses test by Lord Reid and Lord Diplock made it unnecessary for them to call in aid the equitable maxim.

Gissing Lord Reid suggested that the maxim had been over used and a rough evaluation of the contributions should be attempted in all cases.[74] Thus sometimes a fair estimate will be a half, but on occasion it will be a tenth or a quarter or sometimes more than a half. In Canada courts, both prior to and subsequent to the Thompson decision, had applied the Rimmer maxim, but on occasion the application of the principle has resulted in a small interest as opposed to one half.[75] Thus Canadian courts have leaned more towards the approach of Lord Reid as the fairest way to solve the problem. Finally it must be recognized that any court after having determined the proportionate interest each spouse is entitled to (whether exactly in the case of ascertainable contributions or roughly in case of unascertainable contributions) must determine whether the conduct of the parties is such that an alternate intention of the parties may be inferred--for example, that each party should share equally.[75a]

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[74] [1970] 2 All E.R. 780 at 783.

[75] Grunert v. Grunert (1960) 32 W.W.R. 509, where wife was given a fifteen percent interest on basis of a small contribution to the purchase price.

[75a] This was the situation in the leading case of Rimmer v. Rimmer [1952] 2 All E.R. 863, where the parties' contributions were calculated exactly, but the court applied the maxim equity leans to equality.

(2) Trusts

In Pettitt v. Pettitt,[76] the case where the House of Lords first considered the law of matrimonial property, the approach followed was that of the law of contract. Shortly after, however, in Gissing v. Gissing,[77] where a wife claimed an interest in the former matrimonial home the title of which was in her husband's name, the Law Lords stated that the better approach was to rely on the law of trusts.[78] This was not the introduction of a new approach for courts hearing matrimonial disputes had often resorted to the principle that Equity, in certain circumstances, will compel a person known as the trustee to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one) in such a way that the real benefit of the property accrues, not to the trustee but to the beneficiaries or other objects of the trust.[79] Indeed, in Alberta, as explained before, if the spouse wished to make a claim for property he had no option but to base his claim in either the law of contract or trusts. But

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[76] Supra n. 9.

[77] Supra n. 17.

[78] [1970] 2 All E.R. 780 at 782, 783, 787, 789.

[79] The definition of a trust is adapted from Keeton, The Law of Trusts (7th ed. 1957) at 3. For Canadian cases applying this principle, see Kropielnicki v. Kropielnicki [1935] 1 W.W.R. 249 (Man.), Gorash v. Gorash [1949] 4 D.L.R. 296 (B.C.), Henry v. Vakusha (1957) 21 W.W.R. 409 (Sask.), Nemeth v. Nemeth (1967) 64 D.L.R. (2d) 377 (B.C.). The House of Lords decision in Gissing has been applied by the Alberta Appellate Division in Trueman v. Trueman, supra n. 19.

in England with the development of palm tree justice there had been less emphasis on establishing property rights and more reliance on the discretion the court was said to have had under s.17 of the Married Women's Property Act. Thus courts for some time had talked loosely of agreement perhaps without realizing that they were dealing only with the first part of the trust relationship--the establishment of the equitable estate. Pettitt represented a return for English matrimonial law to a dependance on established property rights and while we in Canada, as a result of Thompson v. Thompson,[80] had not followed the deviations of the English Court of Appeal, and thus had always remained primarily concerned with determining property rights, the emphasis by the Law Lords on the constructive trust could represent an important turning point for our law as well.

Trusts may be classified as express or implied. A third category which is usually included in the text-books, the constructive trust, has been characterized in a recent treatise as a remedy only, not an institution.[81] Professor Waters, the author, quoted with approval from Scott, who also said the constructive trust is always a remedy: sometimes available for redress of a breach of an express trust, but also available in numerous and varied situations, wholly unconnected with express trusts. Scott listed as some examples of these varied circumstances

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[80] Supra n. 10.

[81] D. Waters, The Constructive Trust London (1964).

situations where property is obtained by mistake or fraud or by other wrong; where a profit is made by an agent or fiduciary who may not be a trustee; and where a person, whether or not he is a fiduciary, wrongfully disposes of property of another and acquires in exchange other property.[82] This, of course, is American not English or Canadian jurisprudence; but Professor Waters felt that no decisions blocked courts from developing English law along these paths, and certainly he convincingly argues that early Equity decisions support this reinterpretation of the constructive trust. For the purposes of this discussion, it is this view of the constructive trust which will be employed; and thus only two types of institutional trusts will be referred to.

If a trust is created by an express declaration, oral or written, of the person in whom the property is vested--though in matrimonial disputes this is not usually the case--it is called an express trust. Where such a trust exists there is generally no question of who has the beneficial interest and in what proportions. However, there is one complicating factor and that is the Statute of Frauds requirement of writing wherever there is an express trust in land, tenements or hereditaments.[83] The comments made previously[84] concerning the exact requirements of the writing in contracts are also

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[82]A. W. Scott, The Law of Trusts (2nd ed.) s.461 quoted by Waters supra n. 68 at 22.

[83]Charles 2, c.3, s.7.

[84]Supra at 38-39.

appropriate in regards to express trusts. The requirement is easier to evade, however, with trusts because section 8 of the Statute constitutes an express exception to this requirement for writing where a trust arises by implication or construction of law. Thus the constructive trust machinery may be able to circumvent the requirement of writing in section 7 of the Statute.

The second major classification in trusts are implied trusts which, while in some cases arise by operation of law, ultimately depend on the intention of the parties. The term 'implied trust' is commonly used for two situations: first, where the intention to create a trust is not clearly expressed but has to be discovered from indirect and ambiguous language; and secondly, (the situation which is more common in matrimonial property disputes) where one person has gratuituously transferred his property to another, or paid for property and had the property put into another's name. The intention of the transferor or purchaser by implication of Equity is that the transferee is to hold the property on trust for the transferor or purchaser, such implication arising out of the fact that Equity assumes bargains not gifts.[85] This presumption, however, is rebuttable and thus the implied trust in theory is one based on implied intent.

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[85]See Waters "The Doctrine of Resulting Trusts in Common Law Canada" (1970) 16 McGill L.J. 187 at 189.

The latter situation is often termed a resulting trust. The use of this term rather than implied trust more clearly indicates what occurs in these circumstances. The trust results back to the person who gave value for the property often solely because of the presumption that Equity assumes bargains because there are no other facts from which to imply an intention.

Another common example of an implied trust situation which falls somewhere between the two situations quoted from Professor Waters, is the situation whereby the intent of the parties can be implied from their actions. These are cases where two parties, neither of whom are volunteers, clearly acted pursuant to a non-verbal agreement that each should share in the beneficial interest in the property. A recent Alberta Appellate Division case, Trueman v. Trueman,[86] is clearly a situation which could have been decided on this basis, although admittedly this was not the reasoning used to find that a trust existed. In examining the law of trusts in Gissing there was unanimous agreement among the Law Lords that an agreement establishing a trust may be implied in the right circumstances.[87]

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[86] Supra n. 19.

[87] The problem arises when the evidence establishes only a contribution, but is insufficient to show an intention that the beneficial interest is to be shared. Will the courts impute an intention that the contributing party share in the beneficial interest.

The essential characteristic of all resulting trust situations is that the trustee has title to the property in question, and the claimant to the property seeks to have that title vested in himself on the basis that he provided property on equitable interest vested in the person bound by the trust.[88] The best known statement of the principle cited or quoted in many Canadian cases is that of Chief Baron Eyre in Dyer v. Dyer:[89]

> The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the name of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase money.

The claimant must first prove he advanced money or moneys worth[90] towards the purchase of the property. Parol

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[88] Waters, supra, n. 70 at 191-192.

[89] 2 Cox 92, 30 E.R. 42 at 43.

[90] See Trueman v. Trueman supra n. 19 for a successful claim based on a non-financial contribution; see also dicta in Gissing v. Gissing [1970] 2 All E.R. 780 at 782, per Lord Reid. Contra Rooney v. Rooney (1969) 68 W.W.R. 641. Weisgerber v. Weisgerber (1969) 71 W.W.R. 461. But non-financial contribution does not include the contribution of a wife or mother per se. Thus the decision in Trueman was very narrow in regards to what Mrs. Trueman's non-financial contribution consisted.

> Leaving aside the contribution of her work as a farm wife and mother, the share of the work usually done by the husband and his hired hands that was assumed and done by the appellant, has, I think, earned her an equal share in the ownership of the property.

[Continued on page 59]

evidence is admissible even if the subject of dispute is land because the resulting trust is excepted from the Statute of Frauds. Circumstantial evidence is also admissible.[91] The main difficulty with this requirement has always been how to accommodate indirect contributions. It is clearly unfair that spouse A who contributes $150 to the family budget, but earmarks it for the mortgage, will receive a beneficial interest in the matrimonial property, whereas spouse B who contributes a like amount to the budget, but earmarks it for food and clothing, will be denied such an interest.

Several Canadian cases have considered this problem of indirect contribution to the purchase of property. In Minaker v. Minaker[92] the Supreme Court denied a wife a share

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[90] [continued from page 58]
Cases where wives have worked with their husbands in business, and have been granted a share in the beneficial interest of property on this basis, are good examples of acceptable non-financial contributions. See Marx v. Marx [1964] S.C.R. 653; Nixon v. Nixon [1969] 3 All E.R. 1137; Re Cummins (deceased), Cummins v. Thompson and others [1971] 3 All E.R. 782.

Now as will be seen in the chapter discussing real property will improvements to property by "handy" spouses earn for the spouse an interest in that property. See Appleton v. Appleton [1965] 1 W.L.R. 25 and Jansen v. Jansen [1965] 3 W.L.R. 875, both cases in which the Court of Appeal had granted interests in the disputed property. Also Button v. Button [1968] 1 All E.R. 1064 where Lord Denning, M.R. made it clear that improvements that are simply "do-it-yourself jobs" would not entitle a spouse to an interest in the property; and Tiley, "The More-Than-Handy-Husband" [1969] Camb. L.J. 81. Contra Stanley v. Stanley (1960) 30 W.W.R. 686.

[91] See Vaselenak v. Vaselenak [1921] 1 W.W.R. 889, 16 Alta. L.R. 256, 57 D.L.R. 370 (C.A.).

[92] [1949] 1 D.L.R. 801, S.C.R. 397.

in the beneficial interest in the matrimonial home which she claimed on the basis of the contribution of her earnings in the early years of marriage. These earnings had gone into the general housekeeping budget and the court found it impossible to trace any part of the money so earned into the purchase of the land. An Alberta Appellate Division case, however, granted a person who cohabited with another a share in the beneficial interest in property as a result of similar indirect contributions.[93] More recently two British Columbia cases, Lawson v. Lawson[94] and Re Married Women's Property Act; Re Stajcer and Stajcer,[95] refused the claimant spouse a share in the beneficial ownership in the matrimonial home because the moneys had gone into a common fund, none of which could be traced to the payments on the house loans.

The English case of Allen v. Allen[96] (C.A.) was cited as support by the court in the Stajcer case. In that case the wife paid for the household expenses where the husband paid for the house. It was stated

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[93] Barleben v. Barleben (1964) 46 W.W.R. 683. The contributions of the 'wife' in this case continued throughout their cohabitation unlike in Minaker. The contribution recognized was not only her wages, but the court included as contribution her work as housekeeper to her boyfriend. Thus the 'common law wife' in this regard is treated more favourably by the law.

[94] (1966) 56 W.W.R. 576, affing (1965) 54 W.W.R. 466 (B.C.C.A.).

[95] (1961) 34 W.W.R. 424.

[96] [1961] 3 All E.R. 385 (Eng. C.A.).

> . . . ere is no settled principle of Engli[illegible]w that if a husband and wife are both [illegible] earners it must follow as a matter of co[illegible], and without more, that property acqui[illegible] during marriage is to be regarded as jo[illegible]ly acquired.

It is submitted, however, that this statement of principle was not a rejection of the concept of an indirect contribution, but merely a reiteration of the well-accepted principle that in determining whether a contribution, direct or indirect, will earn for the contributing spouse a share in the beneficial interest, the determining factor is the intention of the parties. Support for this contention is the fact that the Court of Appeal unanimously held that the case should be sent back to the judge as to his findings concerning the parties' intention when the house was bought. The judge of first instance was satisfied that the purchase was to be a joint venture and granted the wife a beneficial interest.[97] An earlier decision, Fribance v. Fribance[98] had also granted a wife who had contributed in a similar fashion a share in the beneficial interest. It is suggested that the principles espoused in these English cases are the correct principles; thus whether a spouse who has made an indirect contribution will get a share in the beneficial interest will depend on the parties' intention, not the fact of an indirect rather than a direct contribution.

It should be added that this discussion of the circumstances in which an indirect contribution can result in a

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[97](1962) 106 Sol. J. 174.

[98][1957] 1 W.W.R. 384, 1 All E.R. 357.

sharing of the beneficial interest will of necessity be limited generally to circumstances where the acquisition of the disputed property was a continuing process over a number of years (usually through a mortgage), rather than cases where the acquisition was completed in one payment.[99] There has been little or no judicial recognition of the fact that property, especially matrimonial homes, is rarely paid for in one payment. In one English case where the one payment consisted of a cash payment from the wife's savings and cash from a mortgage taken in the husband's name, the court held the cash raised from the mortgage was solely the husband's contribution though the wife helped pay off the mortgage in later years.[100]

Having proved that he made a contribution to the acquisition of the property, the claimant must establish that he acted throughout as a purchaser; he must show that he did not intend the money as a gift, and that he was not merely lending the money, or acting as the purchaser's agent. Two alternate rebuttable presumptions are employed by the courts in this situation where A has paid for the property but has had the title placed in the name of B, or himself and B jointly. (Where A

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[99]The obvious exception being where money is saved over a number of years in order to make one payment of cash, and one spouse paid the housekeeping expenses in order to allow the other spouse to save.

[100]Ulrich v. Ulrich July 7, 1967, per Baker J. On appeal ([1968] 1 All E.R. 67) Lord Denning, M.R. disagreed with the trial court judge saying he did not regard money on mortgage as equal to a cash contribution.

has transferred property he already owned to B who is a volunteer, the principles to be enunciated as to these presumptions are the same.) The first presumption is that of the resulting trust, already examined; this is the presumption which applies as to transactions between strangers and generally to transfers from a wife to a husband, subject to certain exceptions which will be enumerated below. The second presumption is that of advancement which arises where the person into whose name land was transferred is a child or wife of the grantee. Thus if a husband pays for land but has it transferred into his wife's name, the transfer will prima facie be considered an advance, and the wife will hold the beneficial as well as the legal interests. But if a wife paid for land and had it transferred into her husband's name, he would be treated as a stranger by the law and the presumption of resulting trust would apply, with the result that the husband will be held to be a trustee for his wife.

The presumption of advancement [which as mentioned also applies to transfers between a father--including a man standing in loco parentis--and his children] arose sometime in the eighteenth century, probably as public policy decisions based on the complete economic dependence of wives on their husbands. It does not apply to situations where a man and a woman are living together as husband and wife.[101]

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[101] Chuba v. Elchuk (1920) 21 O.W.N. 325; Clelland v. Clelland (or McNabb) [1944] 3 W.W.R. 234, 61 B.C.R. 19, [1944] 4 D.L.R. 703, affd. [1945] 2 W.W.R. 399, [1945] 3 D.L.R. 664 (C.A.); Smith v. Barre [1958] O.W.N. 284.

The relevance of the presumption of advancement today will be examined when the more recent cases are studied below.

The presumption of advancement has not been extended to circumstances where a spouse clearly makes a loan to the other. In the absence of any evidence that a gift is intended the spouse, husband or wife, is entitled to repayment.[102] The presumption of advancement is likewise not applicable to the guarantee of another spouse's credit;[103] however, where the husband has fulfilled the obligations of his wife, but has not done so pursuant to a written guarantee, the presumption has been held to apply.[104]

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[102] Paget v. Paget [1898] 1 ch. 470 (C.A.), Hall v. Hall [1911] 1 ch. 487; Warner v. Murray (1889) 16 S.C.R. 720 held that it is a question of fact whether the transaction is a gift or a loan; contra Hopkins v. Hopkins (1885) 7 O.R. 224 held that the claimant spouse must prove a contract for its repayment.

[103] Anson v. Anson [1953] 1 All E.R. 867, [1953] 1 Q.B. 636; In re Salisbury-Jones [1938] 3 All E.R. 459 the husband paid off the mortgage on which he had joined his wife as a surety but the presumption of advancement was held to be not applicable.

[104] Moate v. Moate [1948] 2 All E.R. 486, Silver v. Silver [1958] 1 All E.R. 486.

While as stated above, generally the presumption of the resulting trust is applicable to gifts from a wife to a husband, this is not so in the situation where a husband who has been living with his wife and maintaining her has received his wife's money and has either mixed the money with his own or purchased property with it.[106] In these cases, the courts have found that a gift from the wife to the husband is to be presumed. Although some of the cases in which a gift to the husband was presumed involved "donations" of the corpus of the wife's money,

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[105] Edward v. Cheyne (No.2) (1888) 13 App. Cas. 385 (H. of L.).

[106] Lett v. Commercial Bank of Canada (1865) 24 U.C.Q.B. 552 at 561, per Hagarty, J.

> It seems to me that the natural presumption in cases like the present would always be... that wherever chattel property like farming stock or implements, etc., are found in visible use and disposition of a man; and it was shown that they had been bought or paid for with his wife's money, then, as, to so much of her money, that it had been 'controlled and disposed of' by the husband with the wife's consent, and the property which it had paid for had passed from the protection of the Statute into the honest rule of the common law.

See also John Deere Plow Co. v. Bowen [1925] 1 W.W.R. 357, [1925] 1 D.L.R. 769 (Alta. C.A.), Adolf v. Adolf [1919] 2 W.W.R. 908, 47 D.L.R. 525, reversing [1919] 1 W.W.R. 878, 12 Sask. L.R. 109.

as well as "donations" of her income,[107] it was generally accepted that two different results would come from gifts of income and gifts of capital as the result of different presumptions: the presumption of gift applied only to the income, with the opposite presumption, that is, the presumption of the resulting trust, applicable where the wife's capital was involved.[108] However, the English Court of Appeal in Mercier v. Mercier[109] found that there is no difference in the presumption of law to be used for transfers of capital rather than income, but only a difference in the degree of evidence necessary to show a gift. Despite the Mercier decision, opinion seems to be divided as to whether in fact there is one general presumption with different standards of proof,[110] and even such eminent authorities as

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[107] Lett v. Commercial Bank of Canada, id was such a case where a gift of a wife's capital was presumed.

[108] Thompson v. Didion (1894) 10 Man. R. 246.

[109] [1903] 2 ch. 98 (C.A.) applied in Bartlett v. Bull (1912-14) 5 W.W.R. 1207, 26 W.L.R. 831, 16 D.L.R. 82 (Alta.), Walker v. Silk [1930] 2 W.W.R. 407, 43 B.C.R. 43, [1930] 4 D.L.R. 201.

[110] For example, see John Deere Plow Co. v. Bowen, supra n. 105, and note the excellent dissent of Beck, J.A. who wanted to apply Mercier v. Mercier.

Halisbury[111] continue to talk in terms of two presumptions, one for capital and one for income. Whether it is a different presumption or not, the general propensity for courts to find a gift of income was described in a manner consistent with both views In re Young; Young v. Young.[112]

> Where a married couple were living together in amity and the husband, with the consent of his wife, received her separate income, in the absence of an agreement express or to be inferred from the circumstances, he was to be taken to receive it in his capacity as head of the family, to be entitled to deal with it as he pleased, and not to be liable to account for it to his wife or to repay any part of it to her.

Today in view of other developments in the law to be discussed shortly, it is possible that the presumptions in their entirety are of historical interest, and that in each case whether the donee is the husband or wife, the subject income or corpus, the courts will evaluate all available evidence without the aid of any presumption. These developments will be outlined below, but prior to this a discussion of what evidence is necessary to rebut the presumptions is in order.

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[111] 19 Halisbury at 835-36.

[112] (1913) 29 T.L.R. 391 (Chancery).

Professor Waters in his article on resulting trusts[113] states that while there is a question whether the trusts which arise when A purchases in the name of another, or in the names of himself and another, and when A voluntarily transfers inter vivos to another or into the names of himself and another, should be described as a trust arising by operation of law, it is beyond question that that trust may be rebutted by evidence showing that what A had in mind was a gift. Such evidence may be written or parol; circumstantial evidence is also acceptable.[114]

Evidence introduced to support or rebut the presumption in question must concern only the intention of the parties at the date of purchase or transfer. Viscount Simonds in Shephard v. Cartwright[115] quoted from Snell's Principles of Equity on this point:

> The acts and declarations of the parties before or at the time of purchase [or of

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[113] Supra n. 85 at 202.

[114] Id See Downing v. Home Insurance Co. [1934] 20 L.R. 617, 8 M.P.R. 1.

[115] [1955] A.C. 431 at 445; [1945] 3 All E.R. 649 at 652. See also Klemkowich v. Klemkowich (1955) 14 W.W.R. 418, Cole v. Cole [1943] 3 W.W.R. 532, 59 B.C.R. 372, [1944] D.L.R. 37, affd. [1944] S.C.R. 166, [1944] 2 D.L.R. 798.

> the voluntary transfer], or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration . . . But subsequent declarations are admissible as evidence only against the party who made them, and not in his favour.

The claimant to land under a resulting trust or one seeking to rebut a presumption of advancement may bring his action long after the title has vested in the other. But while a presumption of a resulting trust will not be rebutted by the passage of time,[116] the court will examine the facts very critically in these circumstances.[117] Laches apply and may defeat the claimant on the basis that the claimant by his delay has effectively acquiesced to the defendant's title.[118]

It is well established, both in equity and at law, that the transferor may not set up his own illegality or fraud to defeat the presumption of advancement.[119]

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[116] Waters, supra n. 85 at 204. Authority for this statement is Briggs v. Wilson (1897) 240 A.R. 521 at 525, per Boyd, C.

[117] Taylor v. Wallbridge [1879] 2 S.C.R. 616 at 656 and 687.

[118] Fonseca v. Jones (1910) 14 W.L.R. 148, 21 Man.R. 168, affd. 18 W.L.R. 259, 21 Man.R. 168 (C.A.).

[119] As early as 1775 Lord Mansfield stated that "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act." Holman v. Jackson (1775) 1 Cowp. 341 at 343. Applied by the Privy Council as recently as 1962 in Palaniappa Chettiar v. Arunasalam Chettiar [1962] A.C. 294.

Thus if a husband wished to rebut the presumption of advancement that arose when he transferred property to his wife, he could not do so by stating that the transfer was in breach of the Statute of 13 Eliz. c.5 or the Fraudulent Preferences Act,[120] or was an attempt to evade income tax.[121] Though as regards tax evasion, there is a difference between acting in contravention of law and arranging affairs as to legally avoid taxes. As Lord Macnaghten stated in Commissioner of Stamp Duties v. Byrnes:[122]

> [N]o one is bound to leave his property at the mercy of the revenue authorities if he can legally escape their grasp.

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[120] Rousille v. Miron (1924) 260 O.W.N. 142. But see Cole v. Cole [1943] 3 W.W.R. 532 at 535, 59 B.C.R. 372 at 378, [1944] 1 D.L.R. 37, affd. [1944] S.C.R. 166, [1944] 2 D.L.R. 798. McDonald, C.J.B.C. stated that

> [I]t is impossible for us to lay down as a principle of law that under such circumstances [the plaintiff under heavy liabilities, and even "fighting off bankruptcy"] every transfer of property taken in another's name must be presumed to be fraudulent. This must be a question of fact in each case.

[121] In re Emery's Investment Trusts, Emery v. Emery [1959] 1 ch. 410. In this case the husband attempted to rebut a presumption of advancement in regards to foreign securities by adducing evidence of a desire to avoid American tax laws. The court refused to grant relief in respect of a transaction carried out in contravention of law, albeit a foreign revenue law. See also Coplan v. Coplan (1958) 12 D.L.R. (2d) 460 (Ont.).

[122] [1911] A.C. 386 at 392, 27 T.L.R. 408 at 413.

The rationale for this refusal by the courts to accept evidence of illegality as sufficient evidence to rebut a presumption of advancement is said to rest on the equitable principle that "he who comes to equity must come with clean hands." This adoption of the "clean hands" principle has resulted in a series of cases where, although the illegal purpose was not carried into effect, the fraudulent intent of the person seeking to rebut the presumption of advancement was sufficient for the courts to refuse to relieve the plaintiff of the consequences of his actions done with intent to violate the law. This view was rejected by the Privy Council in Petherpermal Chetty v. Muniandy Servai,[123] but in view of what is considered to be the leading case in Canada, Scheuerman v. Scheuerman,[124] it has been argued that the "clean hands" doctrine applies in Canada.

In Scheuerman the husband had attempted to rebut the presumption of advancement in regards to a house placed in his wife's name by setting up a parol agreement by which the parties had agreed that the wife would hold the

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[123](1908) 24 T.L.R. 462.

[124](1915) 10 W.W.R. 379, 52 S.C.R. 625, 28 D.L.R. 233, reversing 7 W.W.R. 1308 which affd. 7 W.W.R. 522. The Privy Council decision was rejected in Walsh v. Walsh [1948] 1 D.L.R. 630, on the basis that it was not a binding authority as it was not a decision based on a Canadian case.

property as his trustee in order to protect the property from proceedings by a creditor. At the time of the transfer the property was exempt from seizure under Alberta law because its value was less than $1500. The debt was later paid; the value of the property at the trial was over $1500. The initial conveyance thus was not a transfer prohibited by the Statute of 13 Eliz.[125] Only Duff, J. felt that an illegal act may have been committed: he stated that the creditors were hindered if the property's value went over the value of $1500, and that the onus was on the husband to show that the creditors had not been so hindered, an onus he had not discharged. As a consequence Duff, J. agreed with the three justices who gave judgements in support of the wife: these latter three, however, Fitzgerald, C.J., Brodeur and Idington, J.J. all expressly found that fraudulent intent could not be relied upon to rebut the presumption of advancement. To them it was irrelevant whether or not a fraudulent act had actually been performed. Anglin, J. dissented on the basis that the illegal purpose must have been carried out.

Scheuerman v. Scheuerman has generally been cited as authority for the principle that illegal intent

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[125] Robin Hood v. Maple Leaf (1916) 9 W.W.R. 1453, 33 W.L.R. 776, 26 Man.R. 238; Banque Canadienne Nationale v. Tencha [1928] S.C.R. 26, [1927] 4 D.L.R. 665, reversing [1926] 3 W.W.R. 532, 36 Man.R. 135, [1926] 4 D.L.R. 1089.

cannot be relied upon to rebut the presumption of advancement even if no illegal act has been performed. However, that case and many of the cases in this area since have been cases involving an illegal intent[126] but possibly an illegal act as well, although some cases have been examples solely of illegal intent. A later Supreme Court of Canada decision, Krys v. Krys,[127] held that the facts in the Scheuerman case were special, and that the decision depended upon its own facts. Moreover, it was remarked that there was not the unanimity necessary in the judges constituting the majority that is necessary for a ruling case. More recently the Ontario Court of Appeal[128]

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[126]Walsh v. Walsh [1948] D.R. 81, [1948] 1 D.L.R. 630, affd. [1948] O.W.N. 688, [1948] 4 D.L.R. 876 (C.A.). The court followed Scheuerman and said that it didn't matter if creditors not prejudiced, but if even if that were a necessary element of the case the husband had not discharged the onus upon him to show that in fact no creditors had actually been prejudiced. Two examples of cases where no illegal purpose was carried out are Trumbell v. Trumbell [1919] 2 W.W.R. 198, 27 B.C.R. 161; and Harrington v. Harrington (1925) 56 O.L.R. 568, [1925] 2 D.L.R. 849 (C.A.).

[127][1929] S.C.R. 153, [1929] 1 D.L.R. 289 at 299.

[128]Goodfriend v. Goodfriend (1971) 15 D.L.R. (3d) 513 (Ont. C.A.). The husband in the case had been wife-swapping with a neighbour for several years and transferred his property to his wife when threatened by a suit for alienation of affections, a suit which was never brought. Thus no harm was done to any creditors.

also distinguished Scheuerman v. Scheuerman on the basis of Krys v. Krys, and in a parallel development the Ontario High Court refused to apply the "clean hands" principle in Re Szymczak v. Szymczak[129] on the basis that it would produce an unjust result.

In summary then there are two opposing views on the question of whether an intention to perform an illegal act, without the actual performance of such an act, will prevent a resulting trust from arising. The Australian decisions,[130] Privy Council[131] and the later Canadian cases find that illegal intent alone will rebut the presumption of advancement. The English decisions[132] and the Scheuerman v. Scheuerman line of cases on the other hand reject this view and apply the "clean hands" doctrine strictly.

As has been pointed out, by certain writers,[133] if the courts exclude evidence of illegality or fraud,

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[129](1970) 12 D.L.R. (3d) 582.

[130]See Case Comment on Martin v. Martin (1959-60) 2 M.U.L.R. 550.

[131]Supra n. 123 and surrounding text.

[132]Gasciogne v. Gasciogne [1918] 1 K.B. 233 (Dir. Ct.), Re Emery's Investment Trusts (1959) ch. 410.

[133]See, for example, Waters, supra n. 85 at 215.

thus giving no assistance to the claimant and allowing the property to remain where it lies, the most equitable result is not necessarily produced where the parties, normally husband and wife, have colluded in the scheme to defraud. The object of the rule is to prevent the courts from being asked to further the aims of a person whose intent was to carry out an illegal act, but often the rule takes the form that it denies the assistance of the court to any person who must rely to his illegal purpose to substantiate his claim to property. This judicial approach works well when only one party acted wrongfully, but it is at least questionable whether that approach is appropriate when there existed a collusive scheme.

An example of such an unjust result occurred in Elford v. Elford[134] where a fraudulent conveyance was made to the wife who then executed a wide power of attorney to her husband in order that he might deal with the land. This general power did not include a power to execute a conveyance in favour of the agent himself, which is what the husband did. When the wife sought to have her husband declared a trustee for her, she did not have to rely on an illegal contract but simply her agent's illegal act. The court, therefore, found in her favour since her husband to succeed had to set up his own fraud. In other words, the evidence of fraud must be central to the case of the claimant who is seeking

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[134] [1922] 3 W.W.R. 339, 64 S.C.R. 125, affing. [1921] 2 W.W.R. 963, which reversed [1921] 1 W.W.R. 341.

to rebut the presumption of advancement.[135]

The standard of proof necessary to rebut the presumption of advancement or the presumption of resulting trust was at one time much higher than it is today. In 1876 in McManus v. McManus[136] it was stated that where written evidence was not available, "verbal testimony of a clear, satisfactory and convincing character" was necessary. In Spratafora v. Spratafora[137] where the plaintiff tried to rebut the presumption of advancement raised when he purchased a house in joint tenancy, the court held that "testimony amounting to proof little, if at all inferior to a written document in efficacy

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[135] See also Spurgeon and the Public Trustee v. Aasen (1965) 52 W.W.R. 641, where the plaintiff claiming under a promissory note was met with the defence that the transaction was essentially a tax evasion scheme. The court found that the scheme was only to avoid taxes but even if it were an illegal transaction of property the plaintiff would still succeed because he did not have to rely on the collateral illegal contract in order to enforce his note.

[136] (1876) 24 Gr. 118 at 124. Followed in Hyman v. Hyman [1934] 4 D.L.R. 532 at 538. See also Harron v. MacBean (1957) 22 W.W.R. 68; Vaselenak v. Vaselenak [1921] 1 W.W.R. 889; Greggain v. Greggain (1970) 73 W.W.R. 677, Ingersoll v. Nettleton [1956] O.W.N. 738.

[137] [1952] O.W.N. 757. The statements made in this case are probably correct when considered in connection with the presumption of a joint asset raised simply by virtue of the joint tenancy. This presumption reinforces the presumption of advancement. However, where the property is in the sole name of the wife as in Jackman v. Jackman (1959) 19 D.L.R. 317 (S.C.), the questions as to the correctness of the Spratafora statement of the standard of proof necessary to rebut the presumption that the wife is the owner of the property, are probably valid.

must be submitted to the court to establish a resulting in favour of the husband." More recently, however, the strength of the presumptions has been much questioned.[138] In Pettitt v. Pettitt[139] three of the four Law Lords who commented on the presumption of advancement found that that presumption was out-of-date; and even Lord Upjohn, who thought that the presumptions of advancement and resulting trust were still important, thought that the presumptions were readily rebuttable with slight evidence.[140] If this part of the Pettitt decision is applied in Canada, as is quite likely in view of the tradition of Canadian courts relying upon English authority, these older Canadian decisions may no longer be correct law. Moreover, according to Professor Waters there has been in Canada evidence of some judicial desire to approach the facts of each case with an open mind and to weigh the evidence before the court, rather than deciding what the intentions of the parties were by the use of a presumption.[141]

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[138] See Loades-Carter v. Loades-Carter 110 Sol.J. 51; Silver v. Silver [1958] 1 W.L.R. 259.

[139] [1969] 2 W.L.R. 966 at 971, 988 and 991.

[140] Id at 990-91. Lord Upjohn also limited the applicability of the presumptions to cases where only one spouse had contributed to the acquisition of the property. Where both spouses had made substantial contributions, he felt that their intention was to hold the property jointly.

[141] Waters, supra n. 85 at 208-9.

What then is the status of the presumptions of resulting trust and advancement in Canada today? To say that the presumptions are of no value in view of the liberation of women from their role as housewives, as was implicit in the statements made in the Pettitt decision, is to ignore the realities of present-day society. For the majority of married women, their major role in life is that of homemaker and mother: this is a role which the law has not seen fit to recognize as a financial contribution to the acquisition of property. Yet at the same time society encourages women to remain in their home and care for their children. If we abolish the presumption of advancement completely, many married women today, whose only asset is the half interest in a home held in joint tenancy, will no longer have a right to such property. Moreover, to abolish the use of any presumptions is to ignore the fact that in many cases there is insufficient evidence upon which to decide what the intention of the parties was at the time of the acquisition of property.

For these reasons, the approach of Lord Upjohn in the Pettitt case may well be the approach which Canadian courts will accept. Lord Upjohn did not feel that the presumptions were so out-of-date that they could be ignored, and he also recognized that many cases would have to be decided in which the evidence of the intentions of the parties would not be sufficient to make a decision in the case without the aid of some presumption.[142]

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[142] Supra n. 140.

However, he felt that the straight-forward application of the presumption of the resulting trust or the presumption of advancement should be confined to cases where there had been a single contributor to the acquisition of matrimonial property. For example, if the husband was the sole contributor to the purchase of the matrimonial home, and this home was placed in the name of the wife, Lord Upjohn would apply the presumption of advancement and find that the home was the sole property of the wife. Similarly, if the wife was the sole contributor to property placed in her husband's name alone, Lord Upjohn would find that the presumption of a resulting trust was applicable, and that the beneficial interest was held by the wife. But in cases where both husband and wife made substantial contributions to the acquisition of property, Lord Upjohn would apply the presumption of a resulting trust in order to grant the spouse whose name did not appear on the title a share in the beneficial interest. If both husband and wife made contributions (Lord Upjohn did not specify whether he would accept indirect contributions), and the property was placed only in the name of the wife, Lord Upjohn would find that by the application of a rebuttable resulting trust the husband should share in the beneficial interest in the property. Thus he indirectly achieves a presumption of joint assets at least where both parties made contributions to the property.[143]

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[143]This approach is consistent with the Alberta Appellate Division view as expressed in Trueman v. Trueman. While it may not seem like a radical departure from the previous judicial decisions, there are those members of the judiciary who reject the use of such presumptions and state that in order for parties to share in the beneficial interest in property there must be evidence of an actual agreement to this effect. Lord Morris in his judgments in Pettitt v. Pettitt and Gissing v. Gissing, Lord Hodson in Pettitt v. Pettitt and Viscount Dilhorne in Gissing v. [continued on next page].

The extent of the beneficial interest held on trust by the resulting trustee will vary in accordance with the principles discussed previously in relation to matrimonial claims based on contract.[144] Suffice it to repeat at this point that the principle equity leans to equality will be applicable in many situations.

The third tool which is used in the determination of which spouse has the beneficial interest in property is that of the constructive trust referred to above. This trust, or remedy as Professor Waters would say, occurs in situations where the law feels that the facts impose upon a person the role of trustee. It is the machinery imposed to force A to disgorge to B the property belonging to B but unjustly held by A. Waters is not clear as to whether a fiduciary relationship is necessary before the constructive trust arises. He seems to say that the older cases indicate that such a relationship is not necessary and that it is only the more recent cases, that is in the last 200 years or so,

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[143] [continued from page 82] Gissing are all reputable members of the judiciary who share this latter view. Their Lordships thus place the onus for proving the claim on the claimant spouse rather than placing the onus on the legal owner to rebut the presumption of a resulting trust as does Lord Upjohn.

Lords Reid and Diplock, although they might not be happy about applying the presumptions of advancement and resulting trust where there was only one substantial contributor, accept this approach where both spouses contribute. However, they may be willing to go further than applying a resulting trust and apply a constructive trust, a possibility to be discussed shortly.

[144] Supra at 51-52.

that have added the necessity of the fiduciary relationship.[145]

In Gissing v. Gissing the decisions of four of the five Law Lords who gave judgments stated that the facts might give rise to an implied, resulting or constructive trust. This was defined by Lord Diplock as:[146]

> . . . a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of the legal estate and land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. 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.

It is submitted that this definition best describes the constructive trust, which is the only one of the three trusts in which the intention of the parties is irrelevant. The application of such a trust as defined above, no matter what it is called, would result in a definite acceptance of the principle that the law may impute intentions to parties, an acceptance which was not clear in the Pettitt v. Pettitt decision. However, there are two or three problems raised by the decision which make it impossible to state with certainty that this is in fact the law in England today.

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[145] Waters, The Constructive Trust at 22.

[146] [1970] 2 All E.R. 780 at 789.

First, the fact that the Law Lords did fail to distinguish between resulting and constructive trusts resulted in confusion as to the correct state of the law. For we do not know exactly what is the relevance of the intention of the parties--if a resulting trust exists, then intention is relevant insofar as evidence of such intention may be adduced to rebut the presumption of the resulting trust. On the other hand, if a constructive trust is found to exist, then the intention of the parties is irrelevant and, as Lord Diplock pointed out in the above definition, it is only a question of whether or not the constructive trustee is estopped from denying that he has acted in such a way as to induce in the cestui que trust to think that he was acquiring a beneficial interest in the land.[147] If the two terms are equated, then was the reference to the substantive resulting trust or the constructive trust?

For the rest of this discussion it will be assumed that it was recognized that the two terms indicated two different trusts which apply in different situations, though the constructive trust remedy overlaps the resulting trust. Then whether a resulting trust or a constructive trust will be found, the use of the one concept rather than the other will often be academic, insofar as in most cases no evidence will be available to rebut the presumption. If the constructive

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[147] Yet Lord Diplock had felt that he was overruled in the Pettitt decision as regards the permissibility of imputing a contract. He seemed contrite in his judgment in Gissing, but he has achieved the same end by a different means--he has suggested at least in some cases that a trust can be imputed, a position quite consistent with former authorities.

trust is a remedy, presumably the courts will freely impose this machinery to prevent unjust enrichment so that in conjunction with the resulting trust, the two principles will ensure that a spouse who contributes to the acquisition of property will get a share in the beneficial interest in the property.

A second problem which arose in Gissing v. Gissing, as well as the Alberta Trueman v. Trueman decision, was the failure by some to accept the consequences of the trust situation which all agreed arose in matrimonial property situations. Both Lord Morris and Viscount Dilhorne recognize that circumstances could give rise to a "resulting, implied, or constructive trust",[148] yet both continued to talk of the impossibility of inferring an agreement between the parties where clearly none had existed. Yet if the evidence established that the trustee who is the legal owner is a trustee for the other spouse, such intention is imputed to the spouse either by the rebuttable resulting trust or by means of the constructive trust. Only in the first case is the actual intent of the parties relevant, and even there the onus is upon the spouse who is the legal owner to rebut that presumption of trust, not upon the claimant spouse to show that there was an intention that she would share in the property. This contradiction in the judgments of Lord Morris and Viscount Dilhorne is more important than merely a change of onus from one spouse to the other spouse as to proving the intention of the party--it is a contradiction which leads one to question whether or not their Lordships had intended that a resulting

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[148] [1970] 2 All E.R. 780 at 783-85.

or constructive trust would not arise in matrimonial property situations. (Though, of course, these trusts have been arising for several hundreds of years.)

Unfortunately this contradiction in the judgments was ted by Johnson, J.A. in his decision in Trueman v. an. Johnson, J.A. felt that the judgments in Gissing sented a clarification of the earlier Pettitt judgments that the trust approach was the superior method of lysis. But once he stated that resulting, implied or constructive trusts arose, it is submitted that it was unnecessary for him to do 'verbal acrobatics' in order to find a common intention that Mrs. Trueman should share in the beneficial interest in the farm. If the trust approach of Gissing is to be used, then evidence of intent of the party is necessary only if the trustee spouse wishes to rebut the resulting trust, if that is the trust which arises rather than the constructive trust.

Moreover, when one begins to attempt to find the common intention of parties, one becomes involved in the controversy as to whether or not one can impute intention as opposed to only inferring intention. It is the submission of this author that by accepting the resulting or constructive trust approach one has already accepted the principle that one can impute intention. Yet this is exactly what Lord Morris, Viscount Dilhorne, and Lord Diplock felt that the law would not allow. (Lord Diplock in his judgment in Pettitt v. Pettitt had felt that it was permissible at law to impute an intention to the parties by using the test of reasonable spouses; however, in Gissing he felt that he had been overruled by the majority in the Pettitt decision, and therefore he stated that when one was looking for the

intention of the parties one had to infer the intention on the basis of the available evidence. This seems quite a contradiction from the definition, quoted above, that he gave for a resulting or constructive trust.) Both Lord Reid and Lord Pearson gave judgements consistent with an acceptance of the principle that the law may in appropriate cases impute an intention.

Johnson, J.A. however, ignored this controversy when he embarked on his search for intention. He stated that the test for finding the intention of the parties had been laid down in the Pettitt v. Pettitt decision, and he felt that of the five decisions in that case the clearest was that of Lord Reid. Now Lord Reid had stated that the test to be employed in determining the intention of the parties was to see what the spouses, or reasonable spouses in their shoes, would have decided had they thought about the matter. Johnson, J.A. in accepting the judgement of Lord Reid made no mention of the other judgements in that particular case which had disagreed with this approach.[149] It is submitted that in accepting this approach Johnson, J.A. accepted

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[149]In the previous discussion of this case it was suggested that the court divided two to one to two on the controversy: that is Lords Reid and Diplock felt that an intention could be imputed, Lord Upjohn's judgement is consistent with both sides of the argument, and Lords Morris and Hodson felt that the law had no right to impute an agreement where clearly none existed.

the correct law, and that though Lord Diplock, when he was giving his decision in Gissing, felt he and Lord Reid had been overruled, Lord Reid himself did not entertain such a feeling; and as has been pointed out, there was definite evidence to support Lord Reid's view of the majority decision in Pettitt.

It is appropriate at this time to make a brief summary of the approaches to be made by the court in matrimonial property disputes. This is best achieved by the use of a concrete example. Let us suppose the husband and wife each contribute in a substantial manner to the acquisition of the matrimonial property, the title of which is placed in the name of only one spouse. As was stated by the English Court of Appeal in Allen v. Allen:[150]

> There is no settled principle of English law that if a husband and wife are both wage earners it must follow as a matter of course, and without more, that property acquired during marriage is to be regarded as jointly acquired.

What is necessary, of course, is to determine the intention of the parties. It may be that there is sufficient evidence of an express agreement between the parties as to the beneficial interest of the property. In such a case this intention will govern. Or there may be sufficient evidence to infer that the parties had

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[150] [1961] 3 All E.R. 385.

agreed, thought without great discussion of the matter, If the only evidence available is the fact that there were substantial contributions by both parties, the law will apply either a resulting or a constructive trust. As has been suggested, in this case there is no necessity for the court to search for a further intention of the parties--intention will be relevant only if a resulting trust is found; then the resulting trustee can rebut the presumption of trust. But the onus of proof is not on the claimant spouse to show an agreement. Alternatively, if the court feels that the circumstances will impose a constructive trust upon the person in whom the legal title is vested, the court need not consider any evidence of intention.

At the end of the first chapter, some evaluations were made concerning the present separation of property regime. It was suggested that the system was inequitable. At this point this author would like to suggest that not only is the system inequitable, it is uncertain. First, it is not clear exactly what will be recognized at law as a contribution to the acquisition of property. The more recent cases have suggested that direct and indirect contributions are to be evaluated equally: but, for example, if acquisition of an asset is not to be recognized as a continuing process, this will not bring any effective change in the present law. Moreover, such highly regarded judges as Lord Diplock in his judgement in Gissing v. Gissing have suggested that where indirect contributions exist, in order for a claimant spouse to achieve the beneficial interest in property, she must prove an express agreement as opposed to where there is a direct

contribution, in which case the law will infer or impute an agreement that she should get a beneficial interest in property. Also, contributions of the spouse who does the housekeeping and looks after the children still are not recognized as a sufficient contribution to the acquisition of property that that spouse may gain a share in the beneficial interest in the property. Improvements may or may not be a contribution to the acquisition of property.

Secondly, even if the law was clear as to what constitutes contribution, unless the courts are going to use the concept of the constructive trust with great abandon, in effect the law will always depend upon the intention that the parties had when acquiring that property. Very often, as we all know from our own experiences, no intention was espoused at the time of the purchase of a particular asset. If the law is to be such that a judge cannot impute an agreement in the absence of evidence upon which he can infer an agreement, then only the sophistocated wife who has been told what the law is would probably be able to produce some vague evidence which would enable a sympathetic judge to do justice by finding in her favour. As Lord Reid said in Gissing v. Gissing, this would not be a very creditable state in which to leave the law.[151] More will be said upon this matter in the concluding chapter when general recommendations will be made.

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[151] [1970] 2 All E.R. 780 at 783.

5. Ante-Nuptial and Post-Nuptial Settlements

Finally a short note must be made of the power of the courts to affect property rights which the law must so tortuously determine using the principles ennunciated above. Reference, of course, is made to the power of the court, by virtue of the Domestic Relations Act,[152] to vary ante-nuptial or post-nuptial settlements on pronunciation of a decree absolute or a declaration of nullity of marriage, in favour of the children of the marriage or of the parties to the marriage or both. The question which arises is of what does the nuptial settlement consist. Prima facie two elements must be present in order for the court to vary the spouse's property rights under the section: a settlement and a nuptial element, that is, the settlement must have been made having regard to the other person in his or her character as husband or wife. Given a wide interpretation of the term nuptial settlement, it is possible, for example, that a wife who has a joint legal title in the matrimonial home may find that this joint interest is returned to her husband, or placed in trust for her children, as a result of the exercise of the courts' powers under the Domestic Relations Act. Yet if she had been aware of the law of trusts, she would have thought that that half interest was hers by virtue of a presumption of advancement.

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[152]Domestic Relations Act, 1970 R.S.A., c.113.

Most of the decided cases in this area are English. The weight of authority in that country is that the term settlement is not used in the narrow conveyancing sense but is to have a wide meaning.[153] Although there has not been a definitive positive definition of the term, one widely quoted description is that of Hill, J. in Prinsep v. Prinsep:[154]

> The particular form of it does not matter. It may be a settlement in the strictest sense of the term; it may be a covenant by one spouse to pay to another, or by a third person to a spouse. What does matter is that it should provide for the financial benefit of one or other or both of the spouses as spouses and with reference to their married state.

In deciding whether a transaction is a settlement, courts have stressed the fact that it must be a continuing provision for the spouse and not an absolute gift. This has led to a conflict in the cases as to the extent of periodicity necessary. On the one hand there are decisions where the assignment of a leasehold house

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[153] Bosworthick v. Bosworthick 136 L.T.Rep. 211, [1927] P. 64, Prinsep v. Prinsep [1929] P. 225, Smith v. Smith (1945) 61 T.L.R. 331, [1945] 1 All E.R. 584, Lort-Williams v. Lort-Williams [1951] P. 395, [1951] 2 T.L.R. 200, [1951] 2 All E.R. 241 (C.A.), Cook v. Cook [1962] 3 W.L.R. 441, [1962] 2 All E.R. 811 (C.A.), Young v. Young (No.1) [1962] P. 27, [1961] 3 W.L.R. 1109, [1961] 3 All E.R. 695, Ulrich v. Ulrich and Fenton [1968] 1 W.L.R. 180, [1968] 1 All E.R. 67 (C.A.).

[154] [1929] P. 225 at 232.

and furniture,[155] the purchase of an annuity,[156] and seemingly outright gifts of large sums of money[157] have been found not to be settlements because they lack the element of a continuing provision. On the other hand, the weight of more recent English authorities[158] have accepted the view of Denning, J. as he was then in Smith v. Smith[159] where he made a decision that a matrimonial home (or an annuity) could be as much in the nature of a continuing provision as periodic payments.

The second requirement of a nuptial settlement is that the settlement must have been made "because of" the marriage.[160] This test, however, is not meant to invite or require a search for a sale or a proximate cause or even a causa cine qua non; it does mean that the particular marriage must be a fact of which the settlor takes account in framing the settlement.[161]

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[155] Hubbard v. Hubbard [1901] P. 157 (C.A.).

[156] Brown v. Brown [1936] 2 All E.R. 1616.

[157] Hindley v. Hindley [1957] 1 W.L.R. 898.

[158] Cook v. Cook [1962] 3 W.L.R. 441, [1962] 2 All E.R. 811 (C.A.); Radziej (orse Sierkowska) v. Radziej [1967] 1 W.L.R. 659, 1 All E.R. 944, affd. [1968] 1 W.L.R. 7928, [1968] 3 All E.R. 624, Ulrich v. Ulrich.

[159] (1945) 61 T.L.R. 331, [1945] 1 All E.R. 584.

[160] Prinsep v. Prinsep [1929] P. 225, Hargreaves v. Hargreaves [1926] P. 42.

[161] Joss v. Joss [1943] 1 All E.R. 102 at 103-4.

In Alberta the two leading cases on what constitutes a nuptial settlement have both concerned a jointly held matrimonial home, and in both cases neither the Supreme Court nor the Appellate judges expressed any doubt as to whether a matrimonial home could be a nuptial settlement.[162] There is some doubt, however, as to how the "because of marriage test" is to be applied and whether the presumption of advancement must be rebutted before a nuptial settlement can be found.

In the Appellate Division Johnson, J.A. gave the decision for the court in both cases; and while in one case he found there was a settlement and in another case the presumption of advancement was not rebutted, the difference may have been an evidentiary one. There is reason to believe, however, that a different standard was used in the later decision of Redgrove v. Unruh since no mention of the necessity of rebutting the presumption of advancement had been made in Hicks v. Kennedy where the decision of the court had been that the house did constitute a nuptial settlement.

The difference in the Redgrove v. Unruh approach is even clearer in the trial court decision of Riley, J., who having reviewed some of the English nuptial settlement and Canadian matrimonial decisions, stated that in order to rebut the presumption of advancement "clear, distinct and precise testimony" of a definite trust had to be adduced. Thus in

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[162] Hicks v. Kennedy; Re Partition Act 1868 Imp. and R. 474 (1957) 20 W.W.R. 517, 6 D.L.R. 567, reversing in part (1956) 18 W.W.R. 367, 4 D.L.R. (2d) 320. Redgrove v. Unruh (1961) 35 W.W.R. 682, 31 D.L.R. (2d) 555, affd. (1962) 39 W.W.R. 317, 35 D.L.R. 688.

Alberta, unlike in England, the courts are not [illegible]kely to imply that a husband who purchases a house in j[illegible] tenancy with his wife has made a post-nuptial settlement [illegible] her favour which may be varied by the court.

In summary then an Albertan spouse is not as likely as an English spouse to find his or her property rights subject to variation by a court on a pronouncement of a decree absolute or a declaration of annulment. The reasons for such a course are to some extent policy ones as evidenced by the following passage from the judgment of Riley, J. in Redgrove v. Unruh.[163]

> To suggest that the transfer of a half interest to the wife by the husband [in the ordinary, every-day purchase of a home in joint tenancy] is a post-nuptial settlement and not a gift would invite voluminous litigation to vary the settlements of those parties who eventually separate and perhaps obtain a divorce, and such a finding would ignore and overlook completely the presumption of advancement. No wife could ever be sure that anything given to her by reason of marriage, such as rings, fur coats, wedding presents, etc., were hers. She could never be sure that she only retained them while she enjoyed her capacity as a wife and whilst she remained a wife.

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[163](1961) 35 W.W.R. 682 at 692-93.

4. Summary of Recommendations made in Chapter II

1. It is recommended that a summary method of procedure should be provided for all matrimonial property disputes between the spouses, either by means of a provision included in the proposed Matrimonial Property Act, such amendments to incorporate section 17 of the English Married Women's Property Act 1882, section 7 of Matrimonial Causes (Property and Maintenance) Act 1958 and section 39 of the Matrimonial Proceedings and Property Act 1970; or alternatively, by amendment to the provisions in the Rules of Court dealing with originating notice of motion.

2. If the proposed summary method of disposition is achieved through an amendment to the Rules of Court, it is recommended that in view of the present discrimination against husbands who are unable to bring action in court to protect their property, the Institute undertake a study of the value of the entire inter-spousal tort immunity.

CHAPTER III

PERSONAL PROPERTY

Up to this point the discussion has been confined to the general principles applicable to the ownership of property, and in particular matrimonial property. In this chapter these principles will be applied to the ownership of personal property, often the only property that husband and wife will hold. The basic principle upon which questions as to the ownership of such property are to be decided is the rule of separation of property, discussed in Chapter I.

1. Money: Housekeeping Allowances and Payments from Boarders

Probably one of the most common transactions between a husband and wife is the payment by the husband to his wife of a periodic sum for household expenses. Frequently the thrifty housewife is able to save parts of this fund which she then puts to either her own use or to the joint use of the husband and wife. Generally if a housewife is asked whose money she is spending when she is spending such savings she will say that it is her money. As the law stands today however this is not the situation.[1] In the absence of any

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[1]The leading English decision on this point is Blackwell v. Blackwell [1943] 2 All E.R. 579 (C.A.). An editorial note attached to that case points out that this is a direct decision on a point really settled by previous authority. Some little doube had been felt as to whether the legal position had been affected by social change and the various statutes dealing with the property of married women. The previous authority [continued on next page].

gift by the husband, any such savings remain the property of the husband. Any funds which are invested in a bank account are held on a resulting trust for the husband;[2] any property purchased with these monies is held in trust for the husband.[3] The law as regards pin money, that is the allowance made by a husband to his wife for the purchase of dresses and ornaments, in order that his dignity in society may be maintained, is basically the same.[4]

The rule had its origin in the dictum of Page - Wood V.-C. in Barrack v. M'Culloch.[5] It has been cogently argued

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[1][continued from page 95]referred to were Montgomery v. Blows [1916] 1 K.B. 899, Barrack v. M'Culloch (1856) 3 K & J 110. See also Birkett v. Birkett (1908) 98 L.T.N.S. 540; Harrods v. Tester [1937] 2 All E.R. 236; Hoddinott v. Hoddinott [1949] 2 K.B. 406.

In Canada the courts have also applied Barrack v. M'Culloch. See Southby v. Southby (1917) 40 D.L.R. 429, 13 O.W.N. 67, 38 D.L.R. 700; Rioux v. Rioux (1922) 53 O.L.R. 152, (C.A.); Wakshinsky v. Wakshinsky [1924] 2 W.W.R. 1174, [1924] 4 D.L.R. 231; Mousseau v. Mousseau [1946] O.W.N. 826; Zebberman v. Zebberman [1948] 2 D.L.R. 269 (N.B.Ch.); Calder v. Cleland (1971) 16 D.L.R. (3d) 369.

[2]See, for example Blackwell v. Blackwell [1943] 2 All E.R. 579.

[3]In the well known case of Hoddinott v. Hoddinott [1949] 2 K.B. 406 (C.A.) the stake money for the pools was supplied from savings from the wife's housekeeping allowance. Winnings from the game were placed in a joint bank account and then used to buy furniture. The wife was denied a share in the ownership of the furniture. The dissent of Denning L.J. (as he then was) was the basis for the Married Women's Property Act 1964.

[4]19 Halisbury 838, 842.

[5](1956) 3 K & J 110.

by Kahn-Freund that while this case was decided correctly on the basis that in 1856 a married woman, living with her husband, was incapable of having property in money unless it had been given to her for her separate use, the decision had no application after the passage of the Married Women's Property Act of 1882.[6] Be that as it may, unfortunately in England, Canada, and Australia[7] it is now considered settled law that in the absence of a contrary agreement a wife will have no share in any savings from funds given to her by her husband for the purpose of housekeeping allowance or dress. As recently as 1971 a Canadian Court held that where a wife deposited savings from the housekeeping allowance given to her by her husband into a private savings account then paid this money toward the purchase of a home to which she then claimed a beneficial interest, the money from the housekeeping allowance belonged to the husband and could not be the basis

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[6](1953) 16 M.L.R. 35-39. Kahn-Freund traced the development of the rule to Birkett v. Birkett (1908) 98 L.T.N.S. 540. The decision he stated, saw "a dictum of 1856 based on a rule of law abrogated by Parliament in 1882 . . . raised to the dignity of a legal principle standing, as it were, on its own feet."

[7]Ewing v. Ewing (1946) W.N. (N.S.W.) 116. However in New South Wales and Victoria a provision of the Married Women's Property Acts which is also present in the English Act, though not in the Alberta one, has been relied upon to give sole ownership to a woman who invests savings from a housekeeping allowance in a bank account in her name alone. The provisions in the Act create a prima facie presumption not rebutted by showing that the monies are savings from a housekeeping allowance. See Jack v. Snail (1905) 2 C.L.R. 684 and Morrow v. Morrow (1948) Q.S.R. 6. Also C.A. Walsh "Savings by a Wife from Housekeeping Allowance" (1945) 19 A.L.J. 259.

for a share in the ownership of the house.[8]

In England, however, the situation has changed with passage of the Married Women's Property Act 1964, section 1 of which stated that

> . . . if any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall in the absence of any agreement between them to the contrary, be treated as belonging to the husband and the wife in equal shares.

Thus the principle of separation of property has been modified in England and a step taken towards the recognition of the marriage relationship as a partnership. However while it is accepted that this Act is an improvement as regards the housewife's economic rights, there is no question that it has raised a number of important problems. For example, if it should happen that the wife is the breadwinner, and she provides the running expenses of the home, the Act does not give her husband an equal share in any surplus or proceeds from the housekeeping allowance granted to him by his wife. While this situation would be an unusual one, it is a real one. For example, in Re Sylvester,[9] a husband gave up his employment at the age of forty two when he married his sick wife, and thereafter did all the housework and nursed her when she was ill, for she would employ no one in the house. On her death she willed him only £1 a week from her estate

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[8] Calder v. Cleland (1971) 16 D.L.R. 369.

[9] [1941] Ch. 87.

of £19,000, most of which she left to charities. Even after the passage of the 1964 Act, any savings which he had made in the twenty-six years during which he received from his wife a housekeeping allowance would be held on a resulting trust for his wife.

Secondly, the Act which was passed by the English Parliament differed from the unanimous recommendation of the Report of the Royal Commission on Marriage and Divorce, 1955[10] upon which the Act is based, and referred to "money derived from any allowance made by the husband for the expenses of the matrimonial home or similar purposes" rather than to "savings made from money contributed for the purpose of meeting housekeeping expenses." Admittedly the word "savings" might have created difficulty, but the term "housekeeping expenses" is a fairly precise term which obviously covers normal expenditure on food and possibly heating and lighting of a household. "The expenses of the matrimonial home" however, seems a much wider term and presumably would include such expenditures as rent, repairs to the structure of the home and mortgage repayments on its purchase. Added to this is the wide term "similar purposes" and it becomes apparent that there is some uncertainty as to the scope of the Act. Furthermore the principle of survivorship does not apply: the money or property is to be held by the parties in equal shares as tenants in common and not as joint tenants.

Finally this measure, which has been described as quite inadequate and lopsided, has been criticized because

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[10]Cmd. 9678, Para. 701.

it awards the housewife's thrift if she has been able to make savings from what the husband gave her, but not if he was able to make savings because, knowing her to be thrifty he was able to pay her less for household expenses. Thus the husband of the thrifty wife can give his wife an allowance smaller than would have been necessary had she been extravagant, and if he has used the difference to buy the furniture, that money was never "derived from any allowance made by the husband for the expenses of the matrimonial home" and thus the furniture belongs to the husband alone. Professor Olive Stone pointed out the effect of the Act will vary considerably with the arrangements made in a particular household.[11] In the above example there would have been no scope for the operation of a new provision; if the husband opened a bank account in his own or joint names, upon which the wife has the power to draw, presumably the Act will operate as regards a definite sum say £10 a week which it will infer is the amount allocated to housekeeping expenses, for before the Act can operate there must be a definite allowance. On the other hand, in those households which one reads about in which the husband hands over his entire pay cheque to his wife, who then allocates it for the various purposes, presumably only the "spending money" handed back to the husband will be free from the operation of the Act. Professor Stone asked the interesting question as to whether there would be a tendency for husbands to try to make their wives more strictly accountable for their expenditures than before, or having regard to the Act would make contrary agreements as to the disposition of the savings.

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[11] "Married Women's Property Act, 1964" (1964) 27 M.L.R. 576 at 579. See also A. Samuels "The Married Women's Property Act, 1964" (1964) 108 Sol. J. 287.

Kahn-Freund described this Act as one of those scraps of reform which can only be justified as pacemakers for more systematic measures.[12] However, should the Institute decide that it will not recommend an overall reform of the laws relating to matrimonial property, it is recommended that the Alberta legislature be asked to pass a bill based on the principles of the English Married Women's Property Act 1964, having regard for those failures of the English Act which can be avoided.[13]

The second major source of income for many women who stay at home is money received for taking in lodgers. Very often the situation is that the house and furniture is owned by the husband, and the wife will provide room and board for a third person in return for money which she generally considers her own. The law however is clearly to the contrary: it has been decided in several cases that these monies are the property of the husband.[14] The basis of these decisions are that as the food, shelter, linen, and so on are supplied by the husband, after making due allowances for the same, the net amount attributable to the labours of the wife would not amount to a great deal.[15] The amount which could

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12 [12] "Recent Legislation on Matrimonial Property" 33 M.L.R. 601 at 604.

[13] See Recommendation 3.

[14] Montgomery v. Blows [1916] 1 K.B. 899, 85 L.J.K.B. 794, 114 L.T. 867; Chuba v. Elchuk (1922) 21 O.W.N. 325; Rioux v. Rioux (1922) 53 O.L.R. 152 (C.A.); Hannaford v. Hannaford (1923) 24 O.W.N. 15; Moore v. Knight (1927) 32 O.W.N. 10.

[15] Furness v. Furness (unreported) April 23, 1945 (Ont. H. Ct.)

be claimed for performing such services to the boarders is generally ignored and the total amount of the monies attributed to such a business are declared to be the husbands. Any property bought with such money is declared to be held on trust for the husband.

A possible recommendation that could be made as regards property accumulated by a family in such circumstances is that the courts make some effort to place a value on the services rendered by the wife to the boarder.

However, as judges have an aversion for departing from precedent, and the authorities are clearly to the effect that the courts will not take into account such services, an alternative solution is necessary. Given the difficulty in placing a value on the services performed by the "landlady" it is suggested that the legislature statutorily define the interest of the wife on one half of all monies realized from lodgers. Thus as in Mitchelson v. Mitchelson[16] a joint venture would be implied, though now by statute, and each party would be entitled to one half the proceeds from the boarders.

This recommendation is again predicated on the Institute failing to make a recommendation as to an overall revision of the law. The legislation should allow for a contrary agreement between the spouses, but in the absence of such agreement, each spouse should share equally in the gross amount realized from the business of taking in boarders.

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[16](1953) 9 W.W.R. 316.

2. Chattels

Generally the laws relating to the ownership of chattels is the same for husbands and wives as for strangers: that is, in general, the beneficial ownership belongs to the person or persons who provided the purchase price, or to whom the property was given. Some elaboration should be given as regards the law relating to that special group of chattels comprised of wedding gifts.

Wedding gifts today often form the largest proportion of a married couple's possessions for the first several years of married life. While some etiquette books incorrectly assign the ownership of all such gifts to the wife, in actual fact the law looks at several elements in deciding whether the chattel in question (or where the chattel was purchased with money given as a gift, the money) belongs to the husband or wife. The most important element considered is who gave the present and any intention (either express or implied) of the donor that may be ascertained as to whether the husband or the wife is to be the donee. A second factor is the nature of the present: is it a bedroom suite or a piece of personal jewellery?[17] There have been few decided cases relating to wedding presents but of those, it is the first element that the majority of the Canadian and English cases have relied upon. Generally speaking there is no express intention on the donor's part to give a present either solely to the husband or solely to the wife. Rather than inferring an intention

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[17] Newgrosh v. Newgrosh [1950] 100 L.J. 525, 210 L.T. 108 (C.A.).

that all presents are given jointly to the bride and groom the English courts have used a presumption that all gifts from the wife's kin and friends belong to her, and all gifts from the husband's kin and friends belong to the husband.[18] This presumption, based on the judicial observation that wedding gifts are usually given to a relative and not to a stranger marrying the relative, has not been articulated in the two reported Canadian decisions which have stated that the ownership is a question of fact.[19] Yet in both decisions the question of fact was resolved almost solely by reference to whose family gave the presents. Thus in East v. East it was first stated that wedding presents given to newly married couples may be given to the wife or to the husband or both jointly. The court then held that the family silver received as a gift from the wife's family was the property of the wife.

This approach, it is suggested, is not a realistic one, especially where a marriage has continued for some time. A more recent case, Samson v. Samson,[20] has an important dictum which it is submitted may be the most practical answer in these circumstances (though it would only be a partial answer to the problem, given the briefer and briefer marriages of today). It was suggested there that property given at the time of wedding to one spouse or the other may later become joint property by the conduct of the parties. Thus presumably

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[18] Hichens v. Hichens [1945] 1 All E.R. 451 (C.A.).

[19] A v. B(A) (1905) 15 Man. R. 483, 3 W.L.R. 113; East v. East (1917-18) 13 O.W.N. 316.

[20] [1960] 1 W.L.R. 190 (C.A.).

if a marriage lasts for many years the law will find the wedding presents to be jointly owned.

The question of who owns the wedding gifts is not one which very many people have litigated. It is suggested however that these chattels are a very significant part of the modern couple's possessions with, for example, a middle class Ukrainian wedding resulting in several thousand dollars in goods to the fortunate pair. After several years of marriage it is difficult to trace what was purchased with Uncle Karl's hundred dollars and who gave the electric blanket. Moreover, such an accounting is a denial of the concept of the marriage relationship as a partnership.

In the absence of a general reform of the law relating to matrimonial property, it is submitted that to avoid this dilemma, as well as to revive some certainty in the law, the American jurisprudence be statutorily adopted.[21] In a typical

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[21] 38 Am. Jur. (2d) 880-81. Wedding gifts of household furniture or household furnishings as such, or items of that kind purchased with wedding gifts of money, donated to either of the spouses and commonly intended for general use in the household, are considered as the joint property of the spouses rather than exclusive property of either, in the absence of a contrary intention on the part of the donor. Kantor v. Kantor 133 N.J. Eq. 491, 33 A. (2d) 110; Plohn v. Plohn 206 Misc. 969, 135 N.Y.S. (2d) 135 mod. on other grounds 1 App. Div. 2d 885, 150 N.Y.S. 2d 778; Rapkin v. Israel 88 Pa. D & C 20, 4 Fiduciary R 57; Mandelbaum v. Weiss 11 N.J. Super. 27, 77 A. 2d 493 (App. Div. 1950); Avnet v. Avnet (1952) 124 N.Y. Supp. 2d 517.

Some decisions however have ruled that gifts belong to the party whose future happiness induced the gift. Ilgenfritz v. Ilgenfritz 49 Mo. App. 127 (Kansas City Ct. of App., 1892); Warness v. Jenkins 110 Misc. 21, 180 N.Y. Supp. 627 (N.Y. City Ct., 1920).

American decision it was stated that[22]

> . . . [a]ll wedding gifts, whether from the bride's side or from the groom's, except such items which are peculiarly adaptable to personal use of either spouse, and those gifts which are specifically and unequivocally "earmarked" as intended for one or the other of the spouses, . . . are the joint property of both parties to the marriage.

This solution would introduce a partnership into the marriage which would cover well over one half of the possessions of most young couples.[23]

A possible exception to the statement that the laws relating to the ownership of chattels is the same for husbands and wives as for strangers is the law relating to paraphernalia, which may well be obsolete. Paraphernalia comprises jewels and ornaments--exclusive of old family jewels--and other wearing apparrel, which belong to the husband, but which the wife is permitted to wear for the decoration of her person.[24] During the lifetime of the husband, paraphernalia cannot be disposed of by the wife although they may be pledged, sold, or given away by the husband. On the death of the husband paraphernalia belongs to the wife, subject to the liability for the husband's debts on failure of other assets. The husband therefore cannot dispose of them by will, and if he has pledged them during his lifetime, his widow is entitled to

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[22] Avnet v. Avnet (1952) 124 N.Y. Supp. 2d 517 at 524.

[23] See Recommendation 5. Also A Milner "Wedding Presents" in (1960) 23 M.L.R. 440.

[24] 19 Halisbury 838.

have them redeemed out of his personalty to the prejudice of other legatees. Jewels and trinkets given to the wife by relatives and friends are generally considered her property and not paraphernalia. In the case of gifts given by the husband at Christmas, birthdays, or to settle differences, there is a presumption that the gifts are absolute and not gifts of paraphernalia.[25]

This obscure law is probably no longer applicable, although the situation is not clear. In Masson Templier and Co. v. DeFries[26] it was stated that the law of paraphernalia is no longer applicable since the passage of the Married Women's Property Act 1882. Obiter in Tasker v. Tasker[27] to the opposite effect was expressly disapproved. It was stated that at common law all the wife's personal property became the property of the husband without a trustee's intervention. The right to paraphernalia was the right of the widow to claim on her husband's death certain apparel and jewellry of which she had personal use. With the passing of the Married Women's Property Act this right was no longer necessary. A husband could still pass conditional gifts but he would have to prove the condition. There was no longer any limitation upon the wife's right to receive an absolute gift. However Kennedy J. held that the law as to paraphernalia might perhaps still be raised in a dispute as to the possession of property in the nature of ornaments and the like articles between a wife and a

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[25] Id.

[26] [1909] 2 K.B. 831 (C.A.). Action by judgment debtor of wife who had seized the wife's wearing apparel which the husband then claimed was his by virtue of the law of paraphernalia.

[27] [1895] p. 1.

representative of the deceased husband. As between the husband and wife, during their lifetime, or between either of them and the execution creditor of the other, the only question as to the property and such articles can be whether they belong to the husband as his own or separate property of the wife.

But even assuming that the law of paraphernalia is obsolete today, it must be remembered that it is still possible to give conditional gifts. Thus in one case the husband and wife agreed that husband would purchase all the wife's clothing, the clothing to be his absolute property.[28] He was entitled to dispose of them as and when and how he pleased. His wife having no right or title to them, except to wear them during his pleasure. In an action by the execution creditor it was claimed such an agreement is invalid because it is a fraud on his wife's creditor and contrary to public policy. The English Court of Appeal held that the agreement was satisfactorily proven and was valid in law against the execution creditors of the wife. A husband is bound to provide his wife with necessary apparel but he is not bound to give it to her. The presumption that clothing is owned by the possessor was rebutted. Thus it is seen that while generally the statement that personal chattels belong to the purchaser or the donee, this is not always the case.

(1) Transfer of chattels between husbands and wives

The problem of the ownership of chattels is not confined to the question of who is the initial owner of the chattel, a question discussed above. It may be claimed that subsequent to the acquisition of the chattel it was the subject of either

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[28] Rondeau, Le Grand & Co. v. Marks [1918] 1 K.B. 75 (C.A.) affing [1917] 2 K.B. 636.

a gift or a sale from the husband to the wife or from the wife to the husband. Such a claim may occur in a dispute between a husband and wife as to the ownership of the chattels; more often a third party--usually an execution creditor, the trustee in bankruptcy of one of the spouses, or a residuary legatee--is involved. To determine the question of the ownership of the chattels, it is necessary to apply the general rules of the laws of gifts and sales. These rules are such that unless the gift is evidenced by a deed, or a bill of sale is registered, the transfer will rarely be valid.

In order for there to be a good gift there must be first, clear evidence of intention to make a gift; second, a delivery[29] or the execution of a deed or declaration of trust; third, a gift must be made freely and voluntarily with full knowledge and understanding of the nature of the transaction;[30] fourth, there must be an acceptance as well

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[29] Cochrane v. Moore (1890) 25 Q.B.D. 57; Irons v. Smallpiece 2 B & A 551.

[30] There is no general rule that the rule of equity that where two persons are in a fiduciary relationship and one receives a voluntary benefit which is to the other's prejudice, the transaction will be set aside unless the donee can show that the donor understood the transaction and that no undue influence was exercised, will be applied to husbands and wives. Howes v. Bishop [1909] 2 K.B. 390 (C.A.). Thus the burden of proof is upon those who wish to show undue influence. Bank of Montreal v. Stuart [1911] A.C. 120, 80 L.J.P.C. 75, [1911] A.C. 4 D.L.R. 1, [1934] 2 W.W.R. 620. Contra Re Blenkarn; O'Neil v. Blenkarn [1944] O.W.N. 79, [1944] 2 D.L.R. 122, affd. [1945] O.W.N. 60, [1945] 1 D.L.R. 352.

as the giving.[31]

Since in ordinary circumstances a deed of gift is not made, the hardest requirement to prove is usually the fact of delivery. This requirement is particularly difficult to meet where the donor and the donee share a common establishment, particularly where the nature of the chattel is not conducive to a manual delivery.[32] The evidence must be above suspicion and unequivocal;[33] there is a heavier onus on the husband and wife then on strangers--a spouse must show that there was an act which amounted to a delivery, and that there was an intention that there should be an absolute gift, not merely the giving of permission to the spouse to use the chattel.[34] If the facts proved are equally consistent with the idea that he intended to keep it as his own property, then the wife fails to make out her case.[35]

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[31] Cochrane v. Moore (1890) 25 Q.B.D. 57, Johnstone v. Johnstone (1913) 280 L.R. 334. But acceptance is presumed until dissent is signified. Standing v. Bowring 31 Ch.D. 282, 55 L.J.Ch. 218, 54 L.T. 191, 34 W.R. 204; Sherratt v. Merchants Bank 21 O.A.R. 473.

[32] For example, a gift of a chesterfield from a husband to his wife.

[33] Thompson v. Doyle (1896) 16 C.L.T. Occ. N. 286 at 287; Sullivan v. Trustees of School District No. 11 in the Parish of Kent (1920) 47 N.B.R. 514, 53 D.L.R.724; Bachand v. Bachand (1916) 9 W.W.R. 1184, 33 W.L.R. 743 (Alta); Kingsmill v. Kingsmill (1917) 46 O.L.R. 238.

[34] Bashall v. Bashall (1894) 11 T.L.R. 152 (C.A.); Seale v. Gray [1932] 3 D.L.R. 567.

[35] Bashall v. Bashall (1894) 11 T.L.R. 152.

There has been much discussion by legal writers on the rationale behind the requirement of delivery, and some have even questioned whether or not delivery is a useful requirement in a modern or functional sense.[36] However, the courts have clearly established, at least in England,[37] that this requirement of delivery will not be waived, no matter how inconvenient it might be to deliver the goods. But physical delivery is not always necessary; where the physical delivery would be unnecessary and an "idle and artificial act due to the nature of the gift and the position of the parties" the court will consider the circumstances, the nature of the chattel, and the relationship of the parties, to decide whether a constructive delivery might be sufficient.[38]

Constructive delivery has been divided into three distinct kinds.[39] Where the goods are bulky, constructive delivery can consist of the delivery of a key or the documents

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[36] See Patrick Rohan "The Continuing Question of Delivery in the Law of Gifts" (1962) 38 Ind. L.J. 1; S. Stoljar "The Delivery of Chattels" (1958) 21 Mod. L.R. 27; J.W.A. Thornely "Transfer of Choses in Possession between Members of a Common Household" (1953) 11 C.L.J. 355.

[37] Hislop v. Hislop (1950) W.N. 124; In Re Cole, A Bankrupt [1964] 1 Ch. 175, [1963] 3 All E.R. 433 (C.A.).

[38] Langer v. McTavish Bros. Ltd. (1932) 45 B.C.R. 494, [1932] 2 D.L.R. 90 (C.A.); See also Kiplin v. Ratley [1892] 1 Q.B. 582, 66 L.J. 797; Tellier v. Dijardin (1906) 6 W.L.R. 1, 16 Man. R. 423; Standard Trusts Co. v. Hill [1922] 2 W.W.R. 1003, 18 Alta. L.R. 137, 68 D.L.R. 722 (Alta.)

[39] Stoljar, supra n. 36.

of title, a bill of lading, or some other means of reducing the chattels to the donee's possession. A second type of constructive delivery is said to occur where the donor changes his status by becoming a bailee for the donee. This is said to be analogous to the case where a person verbally bought some horses and requested that the seller keep them at livery for him, the vendor from the time of sale possessed them, not as the owner of the horses, but as any other livery stable keeper might.[40] However, there is no decision where this proposition has been applied to a gift, as opposed to a sale, though in the leading case which established the necessity of delivery, Cochrane v. Moore, the donative statement when communicated to a mortgagee was construed as a declaration of trust for the donee, and the mortgagee of the donor's property was held to be a trustee for the donee to the extent of the gift.

It is doubtful whether the third type of constructive delivery suggested exists today. Stoljar states that where the donee is already in possession of the chattel, either solely or jointly with the donor, the delivery requirement disappears. Thus in the leading case of Kiplin v. Ratley,[41] Mrs. Ratley had some furniture in her house which belonged to her father. On a visit, the father pointed to the furniture and said, "I give you [Mrs. Ratley] this furniture; it will be something for you." In this particular case the court found that there had been sufficient delivery, because the donor, using words of present gift, left the donee in

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[40] Elmore v. Stone (1809) 1 Taunt. 458.

[41] [1892] 1 Q.B. 582.

possession of the things, and also because the donor could not be expected to take the furniture in order to re-deliver it. Nor was it necessary for the father to handle or touch the chattels when uttering his donative words; his mere pointing at the furniture was sufficient.

This decision has been followed in several early Canadian cases.[42] In one such case the plaintiff's father had purchased a piano and gave it to his daughter with whom he lived. The daughter later married and moved away but never removed the piano. The defendant in the case claimed that the deceased father had sold him the piano, and further that there was not a good gift to the daughter because there had been no delivery. The court held that while a legal possession was common to both, by the gift he transferred the legal title to the plaintiff and she became the full legal owner. Being in actual possession and assenting to the gift, she became fully possessed in her own right. Where the possession is changed in consequence of a verbal gift--as where possession has been held in one capacity up until the time of the gift, and from that time it is held in another capacity--in this case as owner--the gift is completed. Thus if the gift is distinctly made and proved no change in the use of the chattel is necessary, the possession is changed in law by following the title.[43]

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[42] See cases supra n. 10; Also, White v. Canadian Guaranty Trust Co. (1916) 31 D.L.R. 560 (Man.).

[43] Tellier v. Dujardin (1906) 6 W.L.R. 1, 16 Man.R. 423.

Later cases, however, pointed out that while it is true that the law will attribute possession to the one having legal title over the goods, the title cannot pass without delivery in the case of gifts.[44] Thus the old cases were based on circular reasoning. In the more recent decisions, whether the furniture was already in the house at the time of the gift,[45] or was subsequently delivered to the matrimonial home,[46] words of present gift, without at least a symbolic delivery, have not been held sufficient to constitute a gift.

A leading English case, In Re Cole, A Bankrupt,[47] is indicative of the injustice that can result from this insistence on some actual delivery. In that case the husband, at that time a rich man, brought his wife to view their new house which was filled with new furniture, stating that all the furniture was hers. Sixteen years later after the death of an associate the husband became involved in litigation and went into bankruptcy; the trustee in bankruptcy now claimed the furniture from the wife. It was held that it is necessary to prove delivery in the case of a parole gift.

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[44] Kingmill v. Kingmill (1917) 46 O.L.R. 238. Symbolic delivery was expressly recognized as possible, but a constructive delivery by virtue of a change in possession by a change in title was held to be wrong in law.

[45] Kingmill v. Kingmill id.; Hislop v. Hislop [1950] W.N. 124; Spurgeon and Public Trustee v. Anson (1965) 52 W.W.R. 641 (B.C.).

[46] In Re Evans [1946] Q.S.R. 20.

[47] [1964] 1 Ch. 175, [1963] 3 All E.R. 433 (C.A.).

Here there was no apparent change in possession--the wife had the use of the furniture even before the gift was purportedly made by virtue of her position as wife. In order for the chattels to pass to the wife, there had to be an unequivocal delivery; here the acts relied upon by the wife were equally consistent with an intention of the husband to retain possession of the furniture, but give his wife the use and enjoyment of such furniture. The wife, therefore, could not support her claim.

It has been suggested that a person may utter words of gift and promptly desert the wife and the matrimonial home:[48] in such a case it is said possession will pass and there is a valid gift. But in See v. See[49] where the husband left his wife and children in possession of a furnished flat stating that he did not want anything but a couple of blankets and she could have the "damned lot", the husband four years later was able to successfully claim the furniture. It was held that the intention to give was not sufficiently proven, nor was there such delivery as was necessary by law.

Where the spouse's claim that the furniture was sold from one to the other, not only is there a necessity to prove a delivery of the goods, but there must be a change of possession. Section 3 of The Bills of Sale Act[50] states that

> Every sale or mortgage not accompanied by an immediate delivery and an actual and continued

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[48] F. W. Taylor "Gift of Furniture to the Feme Covert" (1964) 108 Sol.J. 190 at 192.

[49] (1946) 63 W.N. (N.S.W.) 181.

[50] 1970 R.S.A. c. 29.

> change of possession of the chattels sold or mortgaged is absolutely void as against
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> (a) creditors and
> (b) subsequent purchasers or mortgagees claiming from or under the grantor in good faith, for valuable consideration and without notice, whose conveyances or mortgages have been duly registered or are valid without registration
>
> unless the sale or mortgage is evidenced by a bill of sale duly registered.

Section 2(c) of the same Act defines a change of possession as "such change of possession as is open and reasonably sufficient to afford public notice thereof". This requirement has been judicially defined as such change of possession that a person doing business upon the premises and reasonably exercising the faculties of an ordinary man would know that he was no longer dealing with the seller.[51] Further it has been said that it cannot be taken into account that the circumstances did not admit of such a change: if the change cannot be carried out in such a way as to afford notice of it to the public, the sale must be in writing and registered.[52] Thus there are three conditions which must be fulfilled: (1) that the transferor shall completely divest himself of all possession, actual or constructive; (2) that he shall divest himself of the apparent possession, that is, of the

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[51] McMillan v. Jones & Brownstone & Jones (1923) 17 Sask.L.R. 66, [1923] 2 W.W.R. 641, 3 D.L.R. 821, approving [1923] 1 W.W.R. 295. See also Bernhart v. McCutcheon (1899) 12 Man.R. 394; Dominion Lumber Co. v. Alberta Fish Co. [1921] 3 W.W.R. 619, 62 D.L.R. 93.

[52] Spruhus v. Gregoryk and Boycun (1930) 38 Man.R. 477, [1930] 1 D.L.R. 896, [1930] 1 W.W.R. 378.

appearance of possession; (3) that the actual possession shall, as far as the nature of the property and circumstances admit, be vested in the transferee or in some person for him.[53]

These principles are equally applicable to sales between a husband and wife, so it is clear that in order for there to be a valid sale between spouses living in amity it is necessary that the bill of sale should be registered. The Canadian law is different from the English position as established in Ramsey v. Margrett.[54] There it was held that a sale between a husband and wife living in amity was valid despite the fact that it was not registered, because the goods were not, after the expiration of seven days from the giving of the receipt "in the possession or apparent possession of the husband". When the title changed between the husband and wife there was an actual change in possession as a result of the application of the principle that where possession is doubtful, it will follow the title. Obviously this reasoning involved a vicious circle. The question was whether, as against the husband's creditor, the wife had acquired the legal title to the furniture. But in order for her to have obtained the legal title, the bill of sale would either have had to have been registered, or there would have had to have been an apparent change of possession. The court found that there was an apparent change of possession because there was a change of title. Kahn-Freund suggested that this was almost a text book example of "begging the question".[55]

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[53] Bernhart v. McCutcheon (1899) 12 Man.R. 394.

[54] [1894] 2 Q.B. 18.

[55] Kahn-Freund, "Inconsistencies and Injustices in the Law of Husband and Wife" in (1953) 16 M.L.R. 148 at 154.

Ramsay v. Margrett was followed in an early Saskatchewan case[56] and is still the law in England.[57] But as early as 1894 the Ontario divisional court held that a constructive change of possession is not the change of possession necessary under the Ontario Bills of Sale Act. Merely because delivery is highly inconvenient is not to say that the Bills of Sale Act does not apply.[58] In Canada for the change of possession to be sufficient, the change must be open and apparent to all.

The law in England is subject to the criticism that a creditor who has obtained a judgment against a husband or a wife will often be faced with "insuperable difficulties" if he tries to enforce the judgment aginst household assets.[59] The Canadian law is subject to no such criticism. Kahn-Freund has suggested that the English courts should not have overlooked the unreality

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[56] Houlding v. Canadian Credit Men's Trust Association 2 C.B.R. 27, [1921] 2 W.W.R. 899, 14 Sask.L.R. 356, 60 D.L.R. 533.

[57] French v. Gething [1922] 1 K.B. 236 (C.A.). In recent years the decision in Ramsay v. Margrett has been heavily criticized and will likely be confined to sales between husbands and wives. See Kahn-Freund, supra n.27. See also Youngs v. Youngs [1940] 1 All E.R. 349, [1940] 1 K.B. 760 ; Hislop v. Hislop [1950] W.N. 124.

[58] Hogaboom v. Graydon (1894) 26 O.R. 298. See also McMillan v. Jones & Brownstone & Jones [1923] 2 W.W.R. 641, 17 Sask.L.R. 66, [1923] 3 D.L.R. 821, approving [1923] 1 W.W.R. 295; Lipman v. Traders Finance Co. Ltd. et al. [1951] O.R. 838, [1951] O.W.N. 886.

[59] Kahn-Freund, supra n.27 at 148.

of transfers of property between the spouses, the courts should have treated a married couple as a unit within which no change in the property situation can be allowed to affect the outside world. Indeed creditors' rights should be protected, but it is suggested that protection to the extent that it is almost impossible for a couple not conversant with the intricate law of gifts to make a gift of furniture between the husband and the wife is over-protection of creditors. In the case of Re Cole, A Bankrupt the gift from the husband to the wife preceded by sixteen years the act of bankruptcy, which was an unexpected result from the death of a business associate. Yet because of the technical nature of the law the gift to the wife was not allowed to stand.

Even if the Alberta Legislature enacts a partnership of acquisitions property regime, this problem of transactions between a husband and wife will continue. It is submitted that the existence of the Statute of 13 Elizabeth c.5 and the Fraudulent Preferences Act[60] are sufficient to protect creditors from fraudulent transfers. While not advocating that the Canadian courts adopt the unreal position espoused in Ramsay v. Margrett, which is a negation of the excellent policy behind The Bills of Sale Act, it is suggested that with regards to gifts between husbands and wives the present law is unrealistic. The needed changes are not solely in relation to gifts between a husband and wife; there is a need for general changes in the law of gifts. (Such general changes, however, would affect mainly husbands and wives.) It is suggested that at some time the Alberta Institute of Law

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[60] 1970 R.S.A. c.148.

Research and Reform study the neglected law of gifts to determine whether the concept of delivery is still serviceable and necessary.[61]

3. Joint Bank Accounts

Today, more than fifty years after the judgment of Middleton J. in Re Hodgson[62] it is still possible to echo his words: "Many cases have arisen as to the effect of joint accounts which at first sight are not easy to reconcile."[63] Since the same basic principles applicable to bank accounts jointly held by husband and wife apply to bank accounts held separately by each spouse, separate accounts will be looked at first because the mechanics of these principles are easier to illustrate with the cases of separate accounts than with the possibly not only "at first sight" confusing mass of cases dealing with joint accounts.

(A) Separate accounts

In situations where a spouse deposits money into an account standing in the sole name of the other spouse, the courts have applied the equitable presumptions of resulting

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[61]The opinion that the present law of gifts is in much need of change is one shared by many legal scholars. See, for example, P. Rohan "The Continuing Question of Delivery in the Law of Gifts" (1962) 38 Ind. L.J. 1.

[62](1921) 50 O.L.R. 531, 67 D.L.R. 252.

[63]Id at (1921) 67 D.L.R. 253.

trust and advancement.[64] One of the earliest cases where the presumption of resulting trust was enunciated was Dyer v. Dyer where Eyre C.B. said:[65]

> The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive, results to the man who advances the purchase-money.

Although Eyre C.B. was speaking of land, the principle has also been held to apply to personal property, including bank accounts.[66] If, therefore, A deposits money into B's bank account, B, if he has not given valuable consideration, will hold this money on a resulting trust for A. However, if A happens to be B's husband, the presumption of resulting trust will be rebutted by the presumption of advancement, i.e., in this situation equity presumes that A intended to

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[64]At the outset, it should be kept in mind that recently it was held by the House of Lords in Pettitt v. Pettitt [1970] A.C. 777, [1969] 2 W.L.R. 966 that the strength of the presumptions is much diminished (Lord Reid [1969] 2 W.L.R. 966 at 971), that they are out of date (Lord Diplock at 999), that they will be rarely of any importance (Lord Hodson at 988). Moreover Lord Upjohn (at 990-991) held that the presumptions are still important but are readily rebutted by slight evidence. This enabled Lord Diplock in Gissing v. Gissing [1970] 2 All E.R. 780, [1969] 3 W.L.R. 966 to state that in the case where both spouses are alive, even if the presumption of advancement is applied, it will seldom be of decisive influence. It seems that as yet no Canadian court has expressed an opinion on this.

[65](1788) 2 Cox Eq. 92 at 93 (already cited at p. 58).

[66]Re Hodgson, supra, n. 62; Re Simpson Estate, [1941] 3 W.W.R. 268 (Sask.).

make a gift to his wife. This presumption in turn can be rebutted. How the presumption of advancement is applied cannot be put more clearly than in Lush on Husband and Wife as quoted by McPhee, Surr. Ct. J.:[67]

> Where money is deposited by a husband into the account of a wife at a bank a presumption is raised of an intention to confer a gift. This presumption may be rebutted, it may be shown that the transfer was made for convenience only and that the account was treated as an agency account only. And the evidence of the husband after the death of his wife was always accepted as perfectly good for this purpose though entirely uncorroborated.[68]

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[67] Re Simpson Estate, supra, n. 66, at 270.

[68] This statement may be too sweeping. In Re Northage 10 M.P.R. 248, [1946] 2 D.L.R. 78 Chisholm C.J. of the Supreme Court of Nova Scotia held that the evidence given by the husband lacked the corroboration required by section 37 of the Evidence Act, R.S.N.S. 1923, c. 225. This section is similar to section 13 of the Evidence Act, R.S.A. 1970, c. 127 which reads:

> In an action by or against the heirs, next of kin, executors, administrators or assigns of a deceased person, an opposed or interested party shall not obtain a verdict, judgment or decision on his own evidence in respect of any matter occurring before the death of the deceased person, unless the evidence is corroborated by other material evidence.

On the other hand, as pointed out by the dissenting judge in Re Northage, Hall J. at 100, it was held by Taschereau C.J. in McDonald v. McDonald (1902) 33 S.C.R. 145 at 152 with respect to this section that

> The statute does not necessarily require another witness who swears to the same thing. Circumstantial evidence and fair inferences of fact arising from other facts proved, that render it improbable that

There is no such presumption of an intention to make a gift if it is the wife who deposits money in her husband's separate account. In such a situation the normal presumption, as between strangers, of resulting trust applies. This presumption can be rebutted by evidence of an actual intention by the wife to make a gift to her husband. There is a dearth of cases concerning separate bank accounts but as Walsh J. of the Alberta Supreme Court held in Bartlett v. Bull[69] with respect to the general situation where property of the wife is transferred into the name of the husband: "The question in each case is whether or not the facts prove a gift from her to him."[70], and, ". . . the husband is presumed to be a trustee for her unless a contrary intention is evidenced."[71] In one case[72] where the wife deposited money in the husband's bank account there was,

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[68] [continued from page 122]

> the fact sworn to be not true and reasonably tend to give certainty to the contention which it supports and are consistent with the truth of the fact deposed to, are, in law, corroborative evidence.

McDonald v. McDonald was also cited by Ford C.J.A. in Kobylanski v. Public Trustee (1958) 27 W.W.R. 268 at 273 as establishing that corroborating evidence may be afforded by circumstances.

[69] (1914) 5 W.W.R. 1207, 16 D.L.R. 82.

[70] Id. at (1914) 5 W.W.R. 1208.

[71] Id. cf. however, Pettitt v. Pettitt, supra n. 64, [1969] 2 W.L.R. 966 per Lord Upjohn at 991: "If a wife puts property into her husband's name it may be that in the absence of all other evidence he is a trustee for her, but in practice there will in almost every case be some explanation (however slight) of this (today) rather unusual course."

[72] McDougall v. Paille (1913) 24 O.W.R. 912, 13 D.L.R. 661.

unfortunately, no discussion of any presumptions. However, the court[73] held that since the wife was of unsound mind, she could not have intended to make a gift to her husband so that the result would have been the same, had it been found that the presumption of resulting trust had not been rebutted by evidence of an intention to make a gift.

The law does not seem to be entirely clear on what happens in the case where a husband turns over his earnings to his wife who then deposits the money in her own bank account. In Re Northage,[74] for example, it was held that the balance of the wife's bank account, although admittedly almost entirely derived from the husband's wages, formed part of the wife's estate. The judge of first instance, Yeoman Registrar, held that "[t]he law is clear that where a husband places money or securities in his wife's name, there is a presumption of a gift in favour of the wife."[75] It may be observed here that, strictly speaking, the husband had not placed the money in his wife's name, although he had acquiesced in her depositing the money in her own name. This judgment was reversed by Murray J., Judge of Probate whose judgment in turn was reversed by the Nova Scotia Supreme Court. Although therefore the decision of the trial judge had been restored and Chisholm C.J. did speak of a presumption of gift[76] it seems likely that the case was

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[73]Ontario Supreme Court, Britton J.

[74]Supra, n. 68.

[75]Re Northage, supra n. 68 at [1946] 2 D.L.R. 79.

[76]Id. at 98.

decided on the statutory presumption that the investments standing in the sole name of a married woman shall be deemed to be her separate property, unless and until the contrary is shown, as laid down in the Married Women's Property Act.[77] There is no equivalent provision in the Alberta Married Women's Act. In D'Amrosio v. D'Ambrosio[78] a contrary decision was reached by the Ontario Court of Appeal. The balance of the wife's bank account at the date of separation was held to belong to the husband since the husband handed over his earnings to his wife who then deposited the money. It was found that the wife was a trustee for her husband because the latter had entrusted her with the money since he was unable to read and write and his ability to understand English was limited so that any presumption of advancement or intention to make a gift was negated. Presumably, in a similar case, Alberta courts would come to the same conclusion. This would also be in accord with the analogous cases where a wife deposits savings from household money given to her by her husband into a bank account in her sole name. Here she is a resulting trustee for her husband with respect to this money.[79]

There remains to be considered the case where the parties have one bank account, in the sole name of one of

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[77] R.S.N.S. 1923, c. 141, ss. 7(1)(2).

[78] (1959) 20 D.L.R. (2d) 177, reversing in part 13 D.L.R. (2d) 18.

[79] e.g., Blackwell v. Blackwell; Calder v. Clelland, see the discussion supra at pages 98 and 99.

the spouses but into which both spouses have deposited money and where there is evidence of a pooling of assets and an intention to hold one common purse. In S. v. S.,[80] for example, Campbell J. of the Manitoba Queen's Bench held that the spouse in whose name the bank account stood, in this case the husband, held one-half of the balance on trust for his wife when they separated. He held that it was immaterial that the husband had probably contributed more to the account than the wife,[81] thus applying the equitable maxim "equity is equality".

(B) Joint accounts

(1) Relationship between the spouses/account holders and the bank

(a) Where no joint deposit agreement has been signed

In Canada, the courts have been content to assume[82] that on opening the joint account, the account holders will sign an agreement with the bank which makes all of them, in the case of husband and wife both of them, parties to the

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[80](1952) 5 W.W.R. 523.

[81]See the discussion of the pooling of assets with respect to joint bank accounts, infra, p. 153 et seq. Cf. also Pettitt v. Pettitt, supra, n. 64 [1969] 2 W.L.R. 966 at 991 per Lord Upjohn: ". . . where both spouses contribute to the acquisition of property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners and this is so whether the purchase be in the joint names or in the name of one" (italics added).

[82]Donovan W. M. Waters, The Doctrine of Resulting Trusts in Common Law Canada, (1970) 16 McGill L.J. 187 at 225.

contract.[83] However, it should be considered what the effect is of A opening an account in the joint names of himself and B, without B contributing any money. What are B's rights against the bank in the absence of a joint deposit agreement with the bank?

As Waters points out,[84] Niles v. Lake[85] was the first Canadian case where the court made a clear distinction between legal rights created by the mere fact of the opening of a joint account and the equitable rights which, depending on A's intention, may or may not accrue to B. Prior to Niles v. Lake the question of intention to make a gift was usually the only one discussed[86] which seems to suggest that B is either made a gift, or he takes no interest at all. In the latter case he would not even take a joint legal title during the joint lives of A and B and on the death of A by survivorship the legal title in his sole name. This is illustrated by the case of Re Mailman[87] where Crocket J., of the Supreme Court of Canada, stated that if the joint deposit agreement with the bank had not contained the provision that the survivor could withdraw the balance, B would not have had the right to withdraw any money from

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[83] See further discussion, infra, p. 134 et seq.

[84] Supra, n. 82 at 223-225.

[85] [1947] S.C.R. 291, [1947] 2 D.L.R. 248.

[86] Re Daly; Daly v. Brown (1907) 39 S.C.R. 122 at 131, Shorthill v. Grannen (1920) 47 N.B.R. 463; Re Vessey; McLean v. Vessey 10 M.P.R. 16, [1935] 4 D.L.R. 170.

[87] [1941] S.C.R. 368.

the account after A's death.[88] The same could presumably by analogy be held to be the case as far as withdrawals by B during A's life are concerned. This conclusion is borne out by the fact that Crocket J. consistently took the view that if a joint tenancy was created by the opening of the joint account this would necessarily take away the exclusive ownership by the wife who was the sole contributor in this case, thus disregarding the distinction between the legal and the equitable title.[89] He held "[t]hat both law and equity interpose . . . a presumption against an intention to create a joint tenancy. . . ."[90]

Since Crocket J. held that this presumption against joint tenancy was not rebutted, would B have had any legal rights against the bank in the absence of the express provision in the joint deposit agreement that he had the legal right to withdraw money from the account both during the joint lives of A and B and after A's death? The answer, it is submitted, can only be in the negative. Although since Niles v. Lake[91] a proper distinction has been made between legal and equitable rights also in this case a joint deposit agreement had been signed by A and B. It is true that Kellock J. held that "[t]he mere transfer into the joint names of purchase in joint names is sufficient to constitute

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[88] Id. at 377.

[89] Id. at 373-374.

[90] Id. at 374.

[91] Supra, n. 85.

joint ownership. . [92] but both Kerwin J.[93] and Taschereau J.[94] made it clear that the joint ownership at law was a result of the joint deposit agreement.

Since therefore no judicial opinion appears to ever have been given in Canada as to the rights of B against the bank in the absence of a joint deposit agreement, it seems advisable to consider if there are any grounds on which a Canadian court could rest its decision should it ever be called upon to do so in such a situation. Several theories have been propounded to explain why B, if he is a volunteer, would have a right to sue the bank if it refuses to allow him to withdraw money from the account.[95] According to the agency theory as put forward by Lord Atkin in McEvoy v. The Belfast Banking Co. Ltd.,[96] A, when opening the account, acts as B's agent. B, when presenting his cheque to the bank, as principal ratifies the agency. The explanation provided by the quasi-contract approach is that the bank has received the money and has promised to hold it for the particular purpose specified by A, namely for the use of A and B. If B has received notice of this promise, the

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[92] Supra, n. 85 [1947] 2 D.L.R. 248 at 263.

[93] Id. at 252.

[94] Id. at 254: ". . . the execution by both of them of the bank agreement gave to [B] as the survivor upon the death of [A] a legal title . . ." (Taschereau J.'s italics).

[95] See Willis, The Nature of a Joint Account, (1936) 14 Can. Bar Rev. 457; Ford, Arrangements Inter Vivos as Substitutes for Wills, (1964) 2 Adelaide L. Rev. 176; Cullity, Joint Bank Accounts with Volunteers, (1969) 85 L.Q.R. 530; Waters, supra, n. 82 at 218-223.

[96] [1935] A.C. 24.

reasoning goes, he can bring an action against the bank in quasi-contract.[97] The trust approach sees A as constituting himself a constructive or implied trustee who holds the legal title for himself and B as cestui que trust[ent]. It is possible to subject these theories to severe criticisms.[98] However, it seems more worthwhile to dwell somewhat longer on a fourth theory, that of statutory assignment since there is some evidence that this is the one which has been accepted by Canadian courts. The theory has been enunciated by Professor Willis in his article The Nature of a Joint Account[99] and, put succinctly, suggests that A, on depositing money in the joint names of A and B, acquires the legal title to a chose-in-action which he simultaneously assigns to himself and B jointly. Willis argues that all requirements for such a statutory assignment have been fulfilled.[100] One problem arises, however. Section 34(15), which contains the relevant provisions of the Judicature Act[101] speaks of ". . . express notice in writing has been given to the debtor. . . ." Since Willis, as the Canadian courts have done,[102] assumes that a joint deposit agreement exists between A and B on the one hand and the bank on the other, this requirement of notice in writing poses no problem for

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[97] Cullity, supra, n. 95 at 536-537.

[98] See the articles referred to supra, n. 95.

[99] Supra, n. 95, at 461-462

[100] Id.

[101] R.S.A. 1970, c. 193.

[102] Infra, p. 134 et seq.

his theory. If, however, no such joint deposit agreement exists, the theory cannot apply. Be that as it may, there are some indications that Canadian courts would be more willing to accept this rationalization than any other. Several of the judges of the Supreme Court in Niles v. Lake[103] refer to assignment but not too much value can be attached to this since the joint deposit agreement itself in that case stated that ". . . each of the undersigned in order effectually to constitute the said joint deposit account hereby assigns and transfer to all of the undersigned jointly."[104] Somewhat clearer, however, is MacKay J.A.'s judgment in Edwards v. Bradley[105] where the following account is given of the legal effect of opening a joint bank account:

> Where A deposits money in a joint account in the names of himself and B the legal title to the money vests in the bank and the relationship

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[103] Supra, n. 85

[104] Supra, n. 85 at 250. Kellock J. uses these exact words to describe what happened on the creation of the joint account (at 263).

[105] [1956] O.R. 225, [1956] 2 D.L.R. (2d) 382. This case was reversed in the Supreme Court of Canada [1957] S.C.R. 599, (1957) 9 D.L.R. (2d) 673 but the reversal concerned only the finding of the Ontario Court of Appeal that there was either a presumption of advancement with regard to the mother-daughter relationship or that the mother actually intended to make a gift to her daughter. The Supreme Court disagreed. However, so far MacKay J.A.'s statement of the law as to what happens on the opening of a joint account has been held to have survived this reversal in two cases: Re Cameron (1967) 53 M.P.R. 214, (1967) D.L.R. (2d) 389 (Cowan C.J.T.D.) and Re Kong Chee Ming Estate (1969) 69 W.W.R. 759 (Macdonald J. of the Supreme Court of B.C. (Probate)), Cf. Waters, supra, n. 82 at 225.

> between the bank and the depositor is that of debtor and creditor. The right of the depositor is the right to withdraw or demand payment of the money from the bank. It is a chose-in-action that may be assigned and by the terms of the joint deposit agreement with the bank [italics added], signed by both A and B, A assigns the legal right to withdraw the money to himself and B jointly, with the right to the survivor to withdraw the balance in the event of the death of A or B.[106]

Even if on the strength of one of the theories set out above, it is held that B has a right to sue the bank if it does not allow him to make withdrawals either before or after A's death because privity has been established between B and the bank, there remains the problem of consideration. As Cullity points out, it has long been thought that there is no distinction at common law between "... a contract made between X and Y under which X promises Y to pay Z and a contract made between X on the one hand and Y and Z on the other under which X promises Y and Z to pay Z...."[107] In neither case could Z enforce X's promise if he had not provided valuable consideration. This problem does not seem to have been considered by a Canadian court, possibly because the situation has never arisen. If a bank has been called upon to pay B, it has probably always done so on the basis of the joint deposit agreement. However, the problem is then still not solved as to whether B can successfully sue the bank, in view of the fact that he is a volunteer, even if there is a joint deposit agreement.

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[106] Edwards v. Bradley, supra, n. 105 [1956] 2 D.L.R. (2d) 382 at 387.

[107] Cullity, supra, n. 95 at 532.

There is some authority now, that in the case where consideration has been given by one of the promisees, the promisor can be forced to honour his obligations. As pointed out by Cullity,[108] there are some intimations of this in the McEvoy case. Both Lord Atkin and Lord Thankerton thought that a volunteer can have a promise enforced that was made to him and a person who had provided consideration jointly.[109] Moreover, the High Court of Australia has voiced the same opinion in Coulls v. Bagot's Executor and Trustee Co. Ltd.[110] in that ". . . consideration need only move from one of the co-promisees. . . ."[111] No Canadian court seems to have had an occasion to comment on this case.

It must be concluded, therefore, that there is no Canadian authority with respect to the position of the volunteer who has not signed a deposit agreement with the bank jointly with a person who has provided consideration.

It would seem that only appropriate federal legislation will be able to finally clarify and confirm the rights and duties existing between the joint account holders and the bank.

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[108] Id. at 533.

[109] Supra, n. 96 at 43 and 52.

[110] (1967) 40 A.L.J.R. 471.

[111] Waters, supra, n. 82 at 221.

(b) Where there is a joint deposit agreement

As discussed before,[112] even if a joint deposit agreement has been signed, technically the volunteer would not be able to sue unless the Coulls rationale is accepted. The problem of consideration would of course not arise if the depositing of money by A in the joint names of A and B, would be considered to give legal rights to B by way of statutory assignment.[113] The fact that the problem of consideration has not been paid more attention to in the Canadian courts seems to be another slight indication that they may tacitly have accepted Willis' assignment theory.

Assuming the apparently generally accepted practice of Canadian banks to have the parties to a joint account sign a joint deposit agreement, what rights does B acquire by means of this agreement? It seems to be firmly settled now that the agreement does not give B any beneficial interest in the money in the account[114] but it is just as firmly settled that the agreement creates a joint tenancy so that the legal title to the chose-in-action is vested in A and B jointly. Consequently B will be able to sue the bank if it refuses to honour his cheques on the account. As Harrison J. of the Supreme Court of New Brunswick (Chancery Division) said in Bourque v. Landry[115] ". . . while the

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[112] Supra, p. 132.

[113] Supra, p. 130 et seq.

[114] Infra, p. 139 et seq.

[115] (1936) 10 M.P.R. 108.

instrument containing the joint account agreement and direction to the bank no doubt establishes the title to the money in law, it does not determine the rights of the parties in equity." In the case of Re Mailman[116] it is submitted that although the result of Crocket J.'s reasoning is the same as that in Bourque v. Landry as far as the legal ownership is concerned,[117] his judgment is not clear because of his failure to distinguish between the legal and equitable ownership.[118] In Niles v. Lake,[119] however, Kerwin, Taschereau and Kellock JJ. were unequivocal in their statements that there is a distinction between the legal and equitable title to a joint bank account. Taschereau J.'s judgment is clearest. In his opinion

> . . . the bank agreement gave to [B] as the survivor upon the death of [A] a legal title[120] to the debt of the bank created by the opening of the account but . . . the position in equity is otherwise, and . . . in order to have the beneficial interest[121] transferred to the donee, there must be satisfactory affirmative proof of intention on the part of the donor to do so.[122]

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[116] Supra, n. 87.

[117] Id. at 376-378.

[118] Supra, p. 127 et seq.

[119] Supra, n. 85.

[120] Taschereau J.'s italics.

[121] Id.

[122] Supra, n. 85 at 254.

This exposition of the law has been followed ever since. As Waters points out,[123] in the cases where the courts have considered joint deposit agreements all documents referred to "we" as the account holders so that it was made clear that they jointly and severally gave a discharge to the bank for payments made by it to anyone of them.[124]

The conclusion therefore has to be that

> . . . [t]he title to the chose in action being vested in A and B jointly on the execution of the agreement with the bank, each, under the terms of the agreement has a legal right [to make withdrawals].[125]

The volunteer when he wants to enforce this right will have to join his joint tenant during their joint lives but he can sue in his own name if he is the survivor.

The foregoing discussion has been restricted to the situation where B is a volunteer. The same reasoning will, a fortiori, apply to the case where he has provided consideration. Here he will be able to sue in his own name, also during the joint lives.

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[123] Supra, n. 82 at 223.

[124] e.g., in Niles v. Lake (supra, n. 85) and Edwards v. Edwards (supra, n. 105) it was the agreement provided by the Royal Bank of Canada. In French v. French [1952] O.R. 889 that of the Bank of Montreal and in Re Kettle; Mercer v. Kettle (1965) 51 M.P.R. 1 that of the Bank of Nova Scotia.

[125] Edwards v. Bradley, supra, n. 105, [1956] 2 D.L.R. (2d) 382 at 387.

(2) Relationship between the parties inter se

(a) On the death of one of the spouses: survivorship

If the deceased spouse has not contributed to the joint account it is clear that the surviving spouse, the one who has provided consideration, will now have the legal title to the chose-in-action vested in his sole name by means of the survivorship principle. No question should arise as to the beneficial interest.[126]

However, the case is different where the deceased spouse is the one who has provided consideration so that the volunteer now holds the legal title in his sole name. The question that arises is whether the volunteer/survivor now has both the legal and equitable interests vested in himself or whether he holds the beneficial interest on a resulting trust for the estate of the deceased. In order to answer this question the intention of A, the depositor, will have to be ascertained. Did he intend to make a gift of the beneficial interest in the chose-in-action to B, the volunteer? In order to ascertain this intention, the courts employ the equitable presumption of advancement to rebut the resulting trust which is created as soon as A opens an account in the joint names of A and B.[127] This presumption is applied to situations ". . . where a father

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[126] See, however, infra, p. 150 et seq.

[127] For the operation of the presumptions to separate accounts, see supra, p. 121 et seq.

makes a . . . bank deposit in the names of himself and a natural or adopted child or a husband does so in the names of himself and his wife . . ."[128] Such a presumption has also been held to apply to cases where A has placed himself in loco parentis to B.[129] For the purposes of this paper, therefore, it suffices to note that if A is the sole depositor/husband and B is the volunteer/wife, the presumption of advancement rebuts the presumption of resulting trust so that B on the death of A will hold both the legal title and the sole beneficial interest in the chose-in-action, i.e., the balance of the joint account.

However, this presumption of advancement can be, in turn, rebutted. This can be done by evidence of A's actual intention.[130] He may have opened the account, not with the

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[128] Re Mailman, supra, n. 87 at 374.

[129] Bourque v. Landry, supra, n. 115.

[130] It has been held that the only evidence relevant here is that of A's intention at the time of opening the joint account. It is immaterial that A may have changed his mind later. (Re Hodgson, supra, n. 62). It follows that A cannot, for example, dispose of the balance of the account by will if there was evidence that his intention, when opening the account, was to make a gift to B (Weese v. Weese (1916) 37 O.L.R. 49). This situation is analogous to the cases where it has been held that A, having opened a joint account with B in circumstances to which the presumption of advancement applied, could not dispose of the money in the account by will. See Freeman and Wootton v. Johnston [1942] 1 D.L.R. 502, Brown v. Brown (1953) 32 M.P.R. 29.

However, in a recent English decision (Re Figgis [1969] Ch. 123) Megarry J. held that "[i]f after the account is opened the husband changes his intention, I see no reason why effect should not be given to that change" (at 145). Although these words are general enough, Megarry J. may

[continued on next page]

intention to benefit B, but because it was more convenient to do so, for example because he was ill[131] or too old[132] and could therefore not go to the bank himself, or because he was illiterate.[133]

It should be emphasized here, that the terms of the joint deposit agreement are immaterial when it is attempted to ascertain A's intention. This has not always been the case. In Re Hodgson,[134] for example, Middleton J. held that parol evidence to show A's actual intention could not be introduced if it contradicted the written terms of the joint deposit agreement

> . . . unless it is proved that the document is not intended to define the rights of the parties as between themselves and is a mere memorandum defining the rights and duties of the bank.[135]

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130 [continued from page 138] have meant only the situation which he contemplated: an account which could have been opened merely for convenience but which later was intended to serve to take care of the wife after the husband's death. His words may not necessarily apply to the converse situation.

131 Vanwart v. Diocesan Synod of Fredericton (1912) 42 N.B.R., 5 D.L.R. 776 (Supreme Court of New Brunswick).

132 Stadder v. Can. Bank of Commerce 64 O.L.R. 69, [1929] 3 D.L.R. 651 (Ontario Supreme Court, Appellate Division).

133 Rioux v. Rioux 53 O.L.R. [1923] 1 D.L.R. 121 (Ontario Supreme Court, Appellate Division).

134 Supra, n. 62.

135 Id. at 534.

This latter conclusion is precisely the one to which Crocket J. came in Re Mailman.[136] He held that the joint deposit agreement served merely "for the bank's own protection and convenience"[137] and was "no more indicative of [A]'s intention to make [B] a joint tenant with her of the deposit moneys than the deposit account itself."[138] This decision was applied in Niles v. Lake[139] in that the Supreme Court of Canada held there that the document signed contained no evidence of A's intention since it was "prepared by a bank for its own protection."[140] In Edwards v. Bradley the Supreme Court reaffirmed this conclusion: ". . . documents of this nature are drawn by the bank and cannot affect the resulting trust."[141] There have been some aberrations from this[142] but in view of the fact that the Supreme Court has come to the same conclusion three times,[143] it may now be

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[136] Supra, n. 87 at 376/378.

[137] Id. at 377.

[138] Id. at 378.

[139] Supra, n. 85.

[140] Id. [1947] 2 D.L.R. 248 at 253 (Kerwin J.).

[141] Supra, n. 105 [1957] S.C.R. 599 at 600 (Kerwin, C.J.)

[142] e.g., in Freeman and Wootton v. Johnston, supra, n. 130, [1942] 1 D.L.R. 502 where Plaxton J. of the Ontario High Court distinguished Re Mailman and held that the document signed did govern the relationship between the account holders inter se.

[143] Re Mailman, supra, n. 87; Niles v. Lake, n. 85 Edwards v. Bradley, supra, n. 105. In one of the most recent decisions on joint bank accounts, Re Armstrong, (1970) 7 D.L.R. (3d) 36 Cowan C.J.T.D. of the Nova Scotia Supreme Court again applied Niles v. Lake and held that the agreement signed was merely for the bank's protection.

considered settled that the terms of the joint deposit agreement will not be taken into account by the courts in their attempt to ascertain A's intention.

So far, the situation discussed was that of a husband depositing money into the joint names of himself and his wife. If it is the wife who deposits money into the joint names of herself and her husband there is no presumption comparable to the presumption of advancement to rebut the resulting trust. If, therefore, there is no evidence that A, the wife, intended to make a gift of the beneficial interest in the chose-in-action , that is, the joint account, to her husband B, the latter will hold the title on a resulting trust for his wife's estate.[144]

It is recommended that legislation be introduced to make the result of both situations: the husband depositing in joint names and the wife depositing in joint names the same, so that there will be a statutory presumption of gift as to the balance of the account at the death of the spouse who deposited the money where either the husband or the wife deposits money in his or her own name and that of his or her spouse jointly. As Lord Diplock remarked in Pettitt v. Pettitt:

> A presumption of fact is no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference

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[144] Payne v. Marshall (1809) 18 O.R. 488; Re Mailman, supra, n. 87; Tevine v. Tevine (1953) 8 W.W.R. (N.S.) 130, [1953] 2 D.L.R. 125. Cf., however, Pettitt v. Pettitt, supra, n. 64 [1969] 2 W.L.R. 966 at 991 per Lord Upjohn: "If a wife puts property into their joint names I would myself think that a joint beneficial tenancy was intended, for I can see no other reason for it."

> of fact to be drawn in the absence of any evidence to the contrary. . . . . the most likely inference as to a person's intention in the transactions of his every-day life depends upon the social environment in which he lives and the common habits of thought of those who live in it. The consensus of judicial opinion which gave rise to the [presumption] of advancement . . . in transactions between husband and wife is to be found in cases relating to the propertied classes of the nineteenth century and the first quarter of the twentieth century. . . . It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples "presumptions" which are based upon inferences of fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to propertied classes of a different social era.[145]

The discussion thus far has been restricted to the situation where one of the spouses is a volunteer. What would happen to the balance of the joint account into which both spouses have deposited money? Here the courts have applied the same principles as in the case of where one of the spouses is a volunteer. The courts will look for evidence of an intention to benefit the other spouse. If there is no such evidence, the courts will apply the presumption of advancement where the wife is the survivor,[146] she will take the balance of the account also beneficially since it is presumed that the husband intended to make a gift to her of

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[145] Supra, n. 64 [1970] A.C. 777 at 823-824.

[146] Re Ryan (1900) 32 O.R. 224.

the benefits derived from the joint tenancy and its incidents, in this case the application of the survivorship principle.[147] This presumption is again rebuttable: if it is proved that the account had been opened merely for convenience, the balance of the account will go to the husband's estate.[148]

There does not appear to be any authority on what would happen if the husband is the survivor. It would seem that the presumption of resulting trust would be held to apply since the presumption of advancement is used in the case where the wife survives. This would produce the anamolous result that the husband would hold the balance of the account on a resulting trust for his wife's estate, although it consists partly of his own money.[149] This is presumably the reason why Stamp J. of the Chancery Division of the English High Court in Re Bishop[150] refused to make a a distinction between the case where the legal title is in the sole name of the husband and where the legal title is in the sole name of the wife. He rejected the argument that

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[147] Re Cameron, supra, n. 105

[148] Re Vessey; Mclean v. Vessey, supra, n. 86. This, of course, provides a strange result since, in effect, a gift is made to the husband's estate of the money contributed by the wife. Perhaps the court came to this conclusion because the initial deposit had been made by the husband or because the wife's contribution was thought to be not substantial enough, although unascertainable.

[149] See also n. 148.

[150] Re Bishop; National Provincial Bank Ltd. v. Bishop et al., [1965] 1 Ch. 450, [1965] 2 W.L.R. 188, [1965] 1 All E.R. 249.

"the money standing to the credit of the joint account is to be regarded as belonging to the spouses in equal shares"[151] so that when the husband draws money out of the account and invests it in his sole name "that investment is . . . held on trust for the husband and the wife in equal shares"[152] but if the wife does the same thing, then "the share which the husband would be entitled to by the effect of the doctrine of equality is to be deemed to be given by him to his wife by the effect of the doctrine of advancement."[153] Stamp J. came to the conclusion that the wife, as survivor, was beneficially entitled to the balance in the joint account not because he applied the presumption of advancement, but because there was "no equity to disturb the legal ownership."[154] It is submitted that Stamp J. by a process of reasoning analogous to that which he used in the situation where either the husband or the wife held the legal title to investments purchased with money taken from the joint account in his or her sole name, would come to the conclusion that it makes no difference whether the husband, or whether the wife would be the survivor and thus end up with the legal title to the balance of the account in his or her sole name. Also in the case where the husband is the survivor he would hold that there is "no equity to disturb the legal ownership."[155]

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[151] Id., [1965] 1 All E.R. 241 at 254.

[152] Id.

[153] Id. at 254-255.

[154] Id. at 257.

[155] Id.

It is not impossible that a Canadian court could come to the same conclusion since Cowan C.J.T.D. in Re Cameron,[156] although he applied the presumption of advancement,[157] specifically approved Stamp J.'s reasoning in Re Bishop and found that the latter's decision supported the conclusion to which he himself had already come, namely that the wife took the balance of the account beneficially.[158]

It should be emphasized that in all the cases referred to, the courts found that they could not ascertain the contributions made by each spouse which would seem to be the type of situation which can be expected to occur most often. If, however, the court is able to ascertain the contributions made by each spouse there are indications that it would not apply the principles that govern situations where the parties are not husband and wife. If, for example, the contributions made are exactly equal, then if the parties are not husband and wife, prima facie the survivor will hold one half beneficial interest on a resulting trust for the estate of the deceased.[159] "In equity, that is, the survivor is a tenant in common."[160] It may be observed that this does not seem to be in accordance with general equity principles. "Equity leans against joint tenancy," but only where the contributions made are unequal. In any case, if the court

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[156] Supra, n. 105, 53 M.P.R. 214.

[157] Id., at 225.

[158] Id. at 233.

[159] Frosch v. Dadd [1960] O.R. 435.

[160] Waters, supra, n. 82 at 226.

should apply the Re Bishop reasoning[161] no problem as to joint tenancy or tenancy in common would arise where the parties are husband and wife even where their contributions are ascertainable.

Another general principle that is not applied by the courts is that of unequal contributions. In the cases referred to[162] where both spouses made unascertainable contributions it was sometimes quite obvious that the one spouse had contributed much more than the other,[163] but the courts have not come to the conclusion that this in equity created a tenancy in common so that the survivor held on a resulting trust proportionately for his or her spouse's estate. Of course it is possible to rationalize the existing state of the law as follows:

> Although the general principle is that, where property is owned by two persons jointly at law, they will be presumed to be joint tenants in equity only if they contributed equally to its purchase, and that if they contributed unequally, they will be tenants in common proportionately to the amount of their contributions, these are merely rebuttable presumptions; on the facts, it may appear that a tenancy in common was intended although the contributions were equal or that a joint tenancy was intended although they were unequal, and in such cases equity follows the intentions of the parties.[164]

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[161] Supra, p. 143 et seq.

[162] Supra, p. 146 et seq.

[163] Re Ryan, supra, n. 146, Re Bishop, supra, n. 150.

[164] Johnson, Family Law, London, Sweet and Maxwell, 1965, 2nd ed., at 95.

However, in view of the existing confusion it seems highly recommendable that legislation be introduced creating a statutory presumption that where a joint account is opened, by a husband and wife jointly, regardless of whether or not both spouses contribute or if they do, how large their contributions are, that they held the account on a joint tenancy, both legally and beneficially so that the balance will go to the survivor. This presumption should be able to be rebutted by evidence that the spouses did not intend to be joint tenants in equity.

(b) Gift inter vivos or testamentary disposition?

Even if it is found that the survivor should take the balance of the account beneficially, one last hurdle has to be cleared. Some Canadian decisions have held that "the rights of [B] were intended to arise only upon and after [A]'s death. This is, in substance and in fact, a testamentary gift, and, as such, ineffectual."[165] It is true that B, in these cases, had been told that he could not draw on the account during the joint lives of A and B. However, in Re Reid[166] where B had been similarly instructed, the court held that the beneficial interest passed to B during the joint lives of A and B, so that there was no

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[165] Anglin J. of the Ontario Supreme Court in Hill v. Hill (1904) 8 O.L.R. 710. This decision was followed among others in Larondeau v. Laurendeau [1954] O.W.N. 722. Such a testamentary gift would be ineffectual because the requirements of the Wills Act have not been complied with (in Alberta: The Wills Act, R.S.A. 1970, c. 393, ss. 4, 5, 7, 8).

[166] (1921) 50 O.L.R. 595, (1922) 64 D.L.R. 598.

testamentary disposition but a "gift inter vivos of a joint interest. . . ."[167] The courts, incidentally, do not seem to have been unduly worried about the fact that if a gift inter vivos is held to have been made, A can take away B's beneficial interest entirely by cleaning out the account,[168] whereas, if B attempts to do the same thing he will hold on a resulting trust for A.

The view laid down in Re Reid was adopted in England[169] and the High Court of Australia came to the same conclusion.[170] Also in Canada it seems to be the accepted view now. In Edwards v. Bradley,[171] it is true, the Supreme Court left the question open but in the Ontario Court of Appeal McKay J.A. stated that

> [t]he legal right to take the balance in the account if A predeceases him being vested in B on the opening of the account, it cannot

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[167] Id. (1922) 64 D.L.R. 598 at 608 (Ferguson J.A. of the Ontario Court of Appeal).

[168] In Edwards v. Bradley, supra, n. 105, [1956] O.R. 225, [1956] 2 D.L.R. (2d) 382, McKay J.A. merely refers to this possibility. However, Thurlow J. in Conway v. M.N.R. (1965) 65 D.T.C. 5169 was of the opinion that A could withdraw the money but that this did not change the ownership of it. Since he found that B took a beneficial interest in the money in the account during the joint lives, he was of the opinion that A could not dispose of it without B's consent and that A would be accountable to B for his interest in it.

[169] Young v. Sealey [1949] Ch. 278.

[170] Russell v. Scott (1936) 55 C.L.R. 440.

[171] Supra, n. 105.

> be the subject of a testamentary disposition. If A's intention was that B should also have the beneficial interest, B already has the legal title and there is nothing further to be done to complete the gift of the beneficial interest. If A's intention was that B should not take the beneficial interest, it belongs to A or his estate and he is not attempting to dispose of it by means of the joint account.[172]

In Conway v. M.N.R.,[173] Thurlow J. of the Exchequer Court found that A's purpose was not to confer a benefit on B that was to take effect only on A's death. To the contrary, it was "a present gift to her of a joint interest" so that "[t]he case [was] not one of an intended testamentary disposition which is ineffective because of failure to comply with the formalities involved in making such a disposition. . . ."[174] Consequently, B

> . . . was entitled to an undivided half interest in the balance standing in the account at the time of the death of [A] and . . . the extent of any beneficial interest in the account which arose or accrued to her by survivorship or otherwise on [A]'s death amounted to no more than the other undivided half of the said balance that is to say the undivided half thereof held by [A] at the time of his death.[175]

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[172] Supra, n. 105, [1956] 2 D.L.R. (2d) 382 at 387.

[173] Supra n. 168, (1965) 65 D.T.C. 5169. This case was followed in Goeglein v. M.N.R. (1968) 68 D.T.C. 5271.

[174] Id. at 5175.

[175] Id.

Unfortunately, as Waters[176] points out, Thurlow J. made it clear that the situation in the Conway case was different from that in Hill v. Hill[177] and Larondeau v. Laurendeau[178] in that in the former case B had not been told that he could not make withdrawals from the account during the joint lives as was the situation in the latter two cases. Therefore, in future, any court disposed to do so, may conceivably distinguish the Conway decision on this ground, especially since the Supreme Court has not yet given any opinion on this point.

A possible solution to the problem might be to amend the Wills Act so as to incorporate a provision that the taking of the balance of a joint account by the survivor is not subject to the requirements of the Act. More preferable would be new legislation laying down when the beneficial interest in a joint bank account passes to a volunteer, as well as dealing with the question of whether or not the sole depositor should have a power of revocation after the beneficial interest is considered to have vested. At the same time it should be laid down that the beneficial interest reverts to the sole depositor if he turns out to be the survivor.[179]

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[176] Supra, n. 82 at 232.

[177] Supra 165.

[178] Id.

[179] Supra, p. 137.

This new legislation could prevent two problems arising in the Kong Chee Ming[180] situation. Here B, the volunteer, predeceased A. McDonald J. found that B took no beneficial interest during A's life so that no interest passed to B's estate. He did so, however, on the express finding that B could only make withdrawals "on the express instructions of [A]."[181] However, this creates a second problem since the conclusion that B took no beneficial interest during A's life has as its inevitable corollary that he must take that beneficial interest on A's death. McDonald J. did not want to say this. He cited McKay J.A.'s judgment in Edwards v. Bradley[182] and held that "[B] having died first it is unnecessary to decide whether [A] intended [B] to have the beneficial interest on his death. . . ."[183]

(c) Relationship between the parties inter se: during their joint lives

There does not seem to be much authority on the ownership of the income arising out of the property held in joint tenancy, that is the interest paid by the bank on the money in the joint account, probably because normally this is just added on to the balance. Thurlow J. in Conway v. M.N.R.[184] was of the opinion that there was

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[180] Supra, n. 105 (1969) 69 W.W.R. 759.

[181] Id. at 764.

[182] Supra, n. 105.

[183] Supra, n. 105, (1969) 69 W.W.R. 759 at 764.

[184] Supra, n. 168 at 5174.

> . . . no sufficient reason for raising with respect to income any different presumption from that applicable in respect to the capital but whether there is a different presumption or not it is clear that it is rebuttable and must yield to the proper inference to be drawn from the circumstances of the particular case.[185]

Also with regard to money withdrawn from the joint account the normal presumptions of resulting trust and advancement are applied by the courts.[186] Whether a volunteer will be allowed to take beneficially money withdrawn by him from a joint account, depends on the intention of the sole depositor which will be ascertained with the help of the usual rebuttable presumptions. However, there is a dearth of authority on this point and courts may in future cases well come to the conclusion that the volunteer B holds the money withdrawn and property bought with it on trust for A and B jointly, in other words, the courts may well find that the spouses intended to hold their belongings, including their joint bank account, in joint beneficial tenancy.[187]

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[185] Id.

[186] Winbigler v. Winbigler (1953) 10 W.W.R. (N.S.) 131. In this case Macfarlane J. of the British Columbia Supreme Court held that the presumption of advancement was rebutted by evidence that the spouses intended to share all their belongings equally.

[187] Cf. Lord Upjohn in Pettitt v. Pettitt, supra, n. 64 [1969] 2 W.L.R. 966 at 991.

Certainly where both spouses contribute to the joint account the courts will readily infer an intention to, as it has been variously called, form a common pool or hold in joint beneficial tenancy or a tenancy-in-common in equal shares. The line of reasoning is the one followed in the English and Canadian cases following the decision of Vaisey J. in Jones v. Maynard[188] who held that ". . . money which goes into the pool becomes joint property."[189] It is true that some doubt has been thrown on the validity of these decisions by Judson J. in Thompson v. Thompson[190] but it is submitted that, in view of Johnson J.A.'s remarks in Trueman v. Trueman[191] with respect to Judson J.'s judgment that they are still good law in Alberta.[192] If, therefore, money has been withdrawn from the joint account and property bought with it which is put in joint names, the court will presume that a joint tenancy in that property was intended.[193] However, a difficulty

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[188] [1951] Ch. 572, [1951] 1 All E.R. 802. Some of the Canadian decisions: S. v. S. (1952) 5 W.W.R. 523 (Man.); Tevine v. Tevine, supra, n. 144 Re Cameron, supra, n. 105.

[189] Id. at 575, 803.

[190] [1961] S.C.R. 3, (1960) 26 D.L.R. 1

[191] [1971] 2 W.W.R. 688, (1971) 18 D.L.R. (3d) 109, followed by McIntyre J. of the British Columbia Supreme Court in Wiley v. Wiley (1971) 23 D.L.R. (3d) 484.

[192] See the discussion earlier in this paper p. 27 et seq.

[193] National Provincial Bank Ltd. v. Ainsworth [1965] 3 W.L.R. 1 at 24 per Lord Upjohn.

arises where the property is put in the sole name of either the husband, or the wife. Some cases have held that here the presumptions of resulting trust and advancement apply again so that if the property is put in the sole name of the husband, a tenancy-in-common in equal shares is created[194] but if it is put in the sole name of the wife she holds the entire legal and beneficial title.[195] These principles would also apply where no property is bought with the money withdrawn, but the money is simply kept by the withdrawing spouse or put in a separate account.[196]

As mentioned before,[197] Stamp J. disagreed with this in Re Bishop.[198] He refused to apply the equitable presumptions and held that the property bought by one of the spouses with money withdrawn from the joint account belongs absolutely and beneficially to that spouse because the equitable title follows the legal title: "there is . . . no equity in the other spouse to displace the legal ownership of the one in whose name the investment is purchased."[199]

Cullity agrees with this because "[a]s between [the spouses] themselves the arrangement is best presumed to have

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[194] Jones v. Maynard, supra, n. 188 [1951] 1 All E.R. 802 at 804.

[195] Id.

[196] Tevine v. Tevine, supra, n. 144

[197] Supra, p. 143 et seq.

[198] Supra, n. 150.

[199] Id. [1965] 1 All E.R. 249 at 252.

been of mutual trust or confidence rather than one creating legal rights and duties."[200] This sounds magnificent, but since not all spouses are perfect it is submitted that the approach advocated by Samuels[201] is much more realistic and in accordance with the view of marriage as a partnership held by most modern young couples. As Samuels puts it:

> The presumption should be that prima facie--and many of these issues resolve themselves ultimately into questions of burden of proof--investments purchased out of joint moneys are to be held on trust for both spouses jointly and beneficially in the absence of any compelling evidence of an agreement or understanding to the contrary. If the husband initially pays his earnings . . . into a joint account rather than a separate account, so that the account represents "our money" or "our savings", then surely it must be supposed that in purchasing investments the husband is buying something for "us". Usually he will draw the cheque in his own name and the investments will be purchased in his sole name simply as a matter of business practice and convenience.[202]

The same presumption should be applied, it is submitted, where it is the wife who draws money from the account and purchases something in her sole name. That this result will be reached by the courts where both spouses have contributed to the

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[200] Cullity, supra, n. 95 at 541.

[201] Alec Samuels, Matrimonial Bank Accounts (II), The Law Journal, Vol. CXV, May 28, 1965 at 365.

[202] Id.

joint account cannot now be doubted,[203] although the spouses will probably both have to contribute proportionately substantial amounts.[204] That Canadian courts will adopt Samuel's approach in cases where one of the spouses is a volunteer seems unlikely at the moment. Where the wife is the volunteer, there should be no problem since the courts will apply the presumption of advancement and so find that the husband holds the property purchased with money from the joint account as a trustee for himself and his wife jointly.[205] Where, however, the husband is the volunteer the inequitable conclusion will usually be reached that the wife alone is entitled absolutely and beneficially in the absence of any evidence that she intended to benefit her husband.

The principles set out above[206] also apply when the court determines the ownership of the joint account on the divorce or judicial separation of the spouses.[207] If

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[203] Cf. Warm v. Warm (1969) 70 W.W.R. 207, 8 D.L.R. (3d) 466 where Macdonald, J. of the British Columbia Supreme Court doubted Re Bishop, supra, n. 150, as sound law. See also Pettitt v. Pettitt, supra, n. 64 [1969] 2 W.L.R. 966 per Lord Upjohn at 991

[204] Pettitt v. Pettitt, supra, n. 64 [1969] 2 W.L.R. 966 per Lord Upjohn at 991. Cf. also Rimmer v. Rimmer [1952] 2 All E.R. 863, [1953] 1 Q.B. 63, approved in Pettitt v. Pettitt at 980-981 (Lord Morris) 991-992 (Lord Upjohn), 987 (Lord Hodson).

[205] Jones v. Maynard, supra, n.188.

[206] Supra, p. 151 et seq.

[207] Cf. the virtually unanimous opinion of the House of Lords in Pettitt v. Pettitt, supra, n. 64 that the fact that the marriage has broken down should not affect the decision of the court.

therefore the account consists of money contributed exclusively by the husband, the result is that of a joint beneficial tenancy and both will take one half of the balance.[208] If, on the other hand, it is the wife who has contributed all the money, there is no presumption of advancement to rebut the resulting trust so that the wife will take the balance. However, it should be observed that, as mentioned before, the strength of the presumptions has been held to be much diminished[209] and in the case of the wife contributing all the money to the account Lord Upjohn has held that he could only find ". . . that a joint beneficial tenancy was intended for [his Lordship] can see no other reason for it."[210]

Where both spouses have contributed, it is submitted the courts will invariably find a common intention of the spouses to share their property equally by pooling all assets.[211] Consequently the court will order a fifty-fifty distribution. Even if there is no evidence of such a common intention, it is submitted that the courts can and should impute such an intention.[212]

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[208] Pettitt v. Pettitt, supra, n. 64, [1969] 2 W.L.R. 966 at 991 per Lord Upjohn.

[209] Supra, n. 64.

[210] Pettitt v. Pettitt, supra, n. 64 [1969] 2 W.L.R. 966 at 991.

[211] Supra, p.153.

[212] On the permissibility of imputing an intention to the spouses, see supra, p. 43 et seq. A fortiori this should apply to the case where the spouses opened a joint bank account.

It is recommended that, rather than leaving this important matter to the courts, legislation be proposed which, in view of the changed social climate and in conformance with the practice of many married couples, makes the intention of the spouses to share all their belongings jointly and beneficially the ordinary statutory presumption. This should a fortiori be the case with a joint bank account. Very clear evidence that the account was opened with some other intention in mind should be required to rebut this presumption. Moreover, it is submitted that it should be made immaterial whether one of the spouses is a volunteer or whether both have contributed to the account. Neither Jones v. Maynard,[213] nor Re Bishop[214] present the most practical and most equitable solution possible. In Samuels words:

> . . . the presumption of a beneficial joint tenancy in amity and a beneficial tenancy in common [in equal shares] in acrimony is the only logical, realistic and fair presumption to apply in an age when marriage is rightly looked upon as an equal partnership.[215]

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[213] Supra, n. 188.

[214] Supra, n. 150.

[215] Alec Samuels, The Joint Matrimonial Banking Account and Its Proceeds, (1965) 28 M.L.R. 482. This article has been judicially noted by Macdonald, J. of the British Columbia Supreme Court in Warm v. Warm, supra, n. 203. His Lordship seemed to intimate that Samuels' approach should be the one adopted by legislative reform (at 214).

(2) Garnishee orders

In Alberta, as the law stands at the moment, moneys in a joint bank account cannot be attached by a garnishing order.[216] It is true that there is a Canadian decision to the contrary. In Empire Fertilizers Ltd. v. Cioci[217] the Ontario Court of Appeal held that the judgment creditor could have recourse to money in a bank account standing in the joint names of the judgment debtor and his wife. The Ontario Law Reform Commission in its Study of the Family Law Project[218] tries to distinguish this case on the facts from a decision of the English Court of Appeal in Hirschhorn v. Evans (Barclays Bank Limited, Garnishees)[219] where the opposite conclusion was reached. This does not seem necessary for the purposes of this paper in view of the Alberta decision on this point[220] and the fact that the British Columbia Supreme Court disapproved of the Empire Fertilizers case and followed the Hirschhorn case in Re Davis, Nash and Davis v. Royal Bank of Canada,[221] a decision not referred to in the Ontario study.[222] The British Columbia case could, however,

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[216] Runk v. Jackson [1917] 1 W.W.R. 485 (Winter, D.C.J.).

[217] [1934] 4 D.L.R. 804, O.W.N. 535.

[218] Vol. I, Property Subjects, Toronto, 1967, p. 60.

[219] [1938] 3 All E.R. 491.

[220] Supra, n. 216.

[221] (1958) 13 D.L.R. (2d) 411, 25 W.W.R. 630.

[222] Neither Empire Fertilizers nor the Re Davis case referred to the Alberta decision, supra, n. 216.

conceivably be distinguished by a court which in future is called upon to take a decision on this issue. Such a distinction could be made since Lord J. found that there was no evidence before him with respect to the respective contributions of the spouses or possibly, that only one of the spouses had contributed.[223] If a court should find that only one of the spouses had beneficial rights to the money in the account, it seems equitable that a garnishing order should be able to attach to the account if that spouse is the judgment debtor. Quaere whether this should also be the case where the court finds, as in Conway v. M.N.R.,[224] that both spouses during the joint lives are entitled to an undivided half interest each.

4. Summary of Recommendations made in Chapter III

The following recommendations are based on the condition that the Institute does not recommend a partnership of acquests for Alberta. If such a proposal is made then the recommendations, unless otherwise stated, would be superfluous.

1. It is recommended that Alberta pass an Act which incorporates the principles of the English Married Women's Property Act 1964. The proposed legislation should incorporate the principle of the equality of the sexes, and should include the phrase "savings

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[223] Runk v. Jackson, supra, n. 216 was silent on this point.

[224] Supra, n. 168.

from an allowance for the purpose of meeting household expenses" rather than "the expenses of the matrimonial home" which is used in the English Act of 1964.

2. It is recommended that a provision be included in the above recommended Act that, subject to a contrary agreement between the spouses, each spouse shall share equally in the gross amount realized from the business of taking in boarders.

3. It is recommended that this same Act include a provision that, subject to an express contrary intention on the part of the donor, all wedding gifts, except those by their nature clearly intended to be used only by the husband or the wife, be considered the joint property of the spouses.

4. It is recommended that at some time the Alberta Institute of Law Research and Reform study the neglected law of gifts to determine whether the concept of delivery is still serviceable and necessary.

5. It is further recommended that the proposed legislation include a provision that in the case where a husband and wife own a bank account in their joint names, they are presumed to hold title to this account in joint beneficial tenancy so that the balance of the account passes automatically to the survivor absolutely and beneficially. This

presumption should operate in such a way that on dissolution of the marriage the balance will be distributed between the spouses equally, regardless of the amounts contributed by each spouse, if any. The legislation should clearly state that the beneficial interest in the joint account passes during the joint lives so that the transaction will not be void for infringement of the Wills Act.