BENEFICIAL OWNERSHIP OF THE MATRIMONIAL HOME: MODERN TRENDS IN THE BRITISH COMMONWEALTH

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Considerations of marriage apart, the owner of property will normally be entitled to exclusive physical control over it if he has not granted this right to some other person. So, he will be able to claim the occupation of his land and the custody of his chattels against the whole world, unless that world can show some right or title in conflict with that of the owner. And if the ownership is divided, each joint owner is entitled to possession and no one of them can exclude the others without the approval of the court.[1]

Going no deeper than this bare question of property, therefore, if a married man owns the house in which he and his wife live, he will have the primary right of possession of it. But by his leave and licence—on this hypothesis there is no *right*—his wife can occupy it with him. How one can reconcile the absoluteness of the husband's property right with a duty to cohabit and still only produce *permissive* occupation for the wife, of course, defies explanation. Similarly, if they are joint tenants, they will both have rights of possession as *owners*[2] but not as *marriage-partners*, and in the case of dispute the court is faced with the difficult problem of reconciling the protection of the individual's *personal* claim to occupation with the proprietary rights of the other.

But it is now clear that it is the policy of the common law[3] that,

> cases between husband and wife ought not to be governed by the same

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[1] See, *e.g. Bull* v *Bull*, [1955] 1 Q.B. 234; [1955] 1 All E.R. 253.

[2] See *Cobb* v. *Cobb*, [1955] 2 All E.R. 696, esp. per Denning L.J., at p. 698, and per Romer L.J., at p. 700.

[3] It is perhaps strange that Scots law, with its background of community property, should insist on treating the fact of the marriage as irrelevant in property disputes between husband and wife: see *MacLure* v. *MacLure*, [1911] S.C. 200; *Millar* v. *Millar*, [1940] S.C. 56; Anton (1956), 19 Mod.L. Rev. 653.

> strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers. . .[4].

And so a husband may not treat his wife as a trespasser on his property when he tires of her company and seeks to eject her,[5] he cannot reap the benefits of his conspiracy with another person to feign a sale of the home and let the "purchaser" demand that she leave[6] and, to some extent, his wife will be able to claim protection even in the case of a *bona fide* sale to a purchaser for value.[7] And in relation to claims to beneficial ownership of matrimonial assets[8] and the family home in particular, the modern courts have borne in mind the human interests and economic needs of the parties before them and have attempted to mete out some variety of the "palm-tree justice"[9] most applicable in the domestic field.

The courts have definitely modified the substantive law relating to actions between husband and wife. Even though section 12[10] of the Married Women's Property Act of 1882 gives a wife full capacity to bring an action against her husband for "the protection and security of her own property"—which, in the opinion of Lord Goddard C.J. at least[11] means that her property rights stay free from attack—it is now clear that judicial practice has cut down the operation of this section. Actions concerning the "title to or possession of" the home will normally be treated as being subject to the same discretion as actions under section 17[12] and even the

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[4] Per Romer L.J., in *Rimmer* v. *Rimmer*, [1953] 1 Q.B. 63, at p. 76; [1952] 2 All E.R. 863, at p. 870.

[5] *Hutchinson* v. *Hutchinson*, [1947] 2 All E.R. 792; *Lee* v. *Lee*, [1952] 2 Q.B. 489n, [1952] 1 All E.R. 1299; *Carnochan* v. *Carnochan*, [1954] 4 D.L.R. 448, [1955] 4 D.L.R. 81; *Thomson* v. *Thomson*, [1944] N.Z.L.R. 469.

[6] *Ferris* v. *Weaven*, [1952] 2 All E.R. 233; *Street* v. *Denham*, [1954] 1 All E.R. 532.

[7] *Woodcock* v. *Hobbs*, [1955] 1 All E.R. 445; *Westminster Bank, Ltd.* v. *Lee*, [1956] Ch. 7, [1955] 2 All E.R. 883; *Churcher* v. *Street*, [1959] 1 All E.R. 23; *Shakespear* v. *Atkinson*, [1955] N.Z.L.R. 1011; *Cochrane* v. *Kneebone*, [1957] N.Z.L.R. 456; *Dickson* v. *McWhinnie*, (1958), S. R. (N.S.W.) 179.

[8] Although in this article, the writer is concerned nominally with rights in the home alone, the same principles will apply to other assets used jointly, e.g. furniture (see *Newgrosh* v. *Newgrosh* (1950), 100 L.J. 525; *W.* v. *W.*, [1951] 2 T.L.R. 1135.) or a joint bank-account (see *Jones* v. *Maynard*, [1951] Ch. 572, [1951] 1 All E.R. 802).

[9] Bucknill L.J., in *Newgrosh* v. *Newgrosh*, *ibid*; Evershed M.R., in *Rimmer* v. *Rimmer*, *supra*, footnote 4; Megarry, The Matrimonial Home in The Law in Action (vol. I, 1954), p. 38.

[10] *Cf.* R.S.A., 1955, c. 193, s. 3(1); R.S.B.C., 1948, c. 202, s. 13; R.S.M., 1954, c. 156, s. 7(1); R.S.N.B., 1952, c. 140, s. 6(1); R.S. Nfld., 1952, c. 143, s. 14.; R.S.N.S., 1954, c. 168, s. 19(1); R.S.O., 1950, c. 223, s. 7; R.S.P.E.I., 1951, c. 92, s.9; R.S.S., 1953, c. 304, s. 8(1).

[11] *Tunstall* v. *Tunstall*, [1953] 2 All E.R. 310, at p. 312.

[12] See Kahn-Freund, Matrimonial Property Law in England, in Matrimonial Property Law, ed. Friedmann (1955), p. 300. *Cf. Gorulnick* v. *Gorulnick*, [1958] P. 47; [1958] 1 All E.R. 146.

otherwise uncritical Morton Commission on Marriage and Divorce[13] has expressed the opinion that perhaps section 12 was drafted too widely when considered in the light of modern disputes over the home. As a result, all the circumstances—encompassing the study of *actual legal ownership* only as one of the factors taken into account—must be before the court. Thus, in some circumstances, the courts have found it convenient to apply section 12 for the purpose of protecting the wife's physical and mental well-being as well as her property rights. In *Shipman* v. *Shipman*,[14] the husband's cruel and drunken conduct would have made it impossible for the wife to take lodgers into her house had he been allowed to live there. The court granted an injunction under section 12 to prevent him from resorting there.[15] And in *Symonds* v. *Hallett*,[16] where the matrimonial home and other property was settled for the wife's separate use, a claim by her deserting husband to use the house as and when he thought fit—not for the purpose of peaceful cohabitation but for his own ends—was summarily rejected by the Court of Appeal. Bearing in mind that the wife had filed a petition for divorce,[17] it issued an injunction restraining such an abuse of his position. On the other hand, a more recent Court of Appeal—in *Gorulnick* v. *Gorulnick*[18]—refused to base its judgment[19] on section 12 and was quite content, though probably mistaken, in refusing to grant an interlocutory injunction preventing the husband from living in the home owned by the wife.

An interesting illustration of the difficulties involved may be seen in the decision of Judge Howard in the Clerkenwell County Court in *Copeman* v. *Copeman*.[20] In that case the wife was the legal tenant of a flat for which she paid the rent. The husband paid her £6 per week when he was working which she used to pay household expenses. After several disagreements, which finally resulted in their maintaining virtually separate households within the flat, the wife claimed to eject her husband and the county court judge

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[13] Report, Cmd. 9678, 1956, s. 681.
[14] [1924] 2 Ch. 140.
[15] And *cf. Gorulnick* v. *Gorulnick*, *supra*, footnote 12.
[16] (1883), 24 Ch. D. 346. See also *Green* v. *Green* (1840), 5 Hare 399; *Weldon* v. *De Bathe* (1884), 1 T.L.R. 171.
[17] See per Bowen L.J., at p. 353.
[18] *Supra*, footnote 12. *Cf.* my note in (1958), 21 Mod. L.Rev. 315. On a new trial of the issue in another court, Diplock J. granted the wife a declaration that she was the owner of the home, an order for possession and an injunction excluding her husband from the house: see The Times, July 14th, 1958.
[19] See *ibid.*, per Hodson L.J., at pp. 50-51 and 147-148; per Morris L.J., at pp. 53 and 149.
[20] (1953), 103 L.J. 624.

formally approved of her action. Justification he found in *Shipman* v. *Shipman*[21] (although actual cruelty and prejudice to her proprietary rights had been proved there) and *Boyt* v. *Boyt*[22] (where the court was dealing with an application for possession *pendente lite*, in which cases, jurisdiction is exercised with very special interests in mind), but it is obvious that he found the defendant husband such a distasteful character that he was not prepared to allow him to trouble his wife further. *She* was the breadwinner of the family, *she* had the child of the marriage to look after and so she was entitled to a peaceful existence, free from the annoyance and disturbing influences of her husband. Perhaps at some time in the future he might ask to come back and the wife would then have to reconsider her decision but, for the moment, the learned judge took the wisest course in not prolonging the marital friction. He did, of course, use section 12 as the basis of his decision, but his consideration of *Shipman* v. *Shipman* and the imputation of unfair conduct to the husband shows that he was weighing *in his discretion* factors other than the wife's proprietary rights.

Most recently, though, the focus of attention has shifted from the problems of the deserted wife to those of other forms of family disorganization and the interwoven claims to the ownership and possession of the home. They have shown that, as in other fields, bald legal ownership can never be enough by itself to outweigh the delicate emotional and economic considerations brought into balance. The courts now recognize that the old equitable presumptions of resulting trust or of gift when property is placed in the name of some other person by the beneficial owner are inadequate points of departure in disputes of this kind and the ultimate recognition of some form of marital "community" in cases where the lines of ownership are not clearly drawn has led to the judges' resorting to the absolute discretion of section 17 as the means of balancing proprietary and personal interests. Yet as so often happens, the courts have failed to verbalize the innumerable extra-legal factors which undoubtedly influenced their decisions—factors which a thorough appreciation of the authorities must never overlook. That the ends of justice have been served as well as existing formulae will allow, I cannot dispute: but I would earnestly suggest that a re-evaluation in terms of a differend kind of analysis —a more accurate factual analysis—is now due. The following two main sub-divisions will indicate some aspects of the focus of the re-assessment.

[21] *Supra*, footnote 14.

[22] [1948] 2 All E.R. 436.

I. *The Nature of the Claim*

It is clear that the responses of the court must take into account the varying nature of the claims presented to it under section 17 and its Dominion counterparts.[23] "Title" and "possession" are the subjects for inquiry contemplated by the section, but it is reasonably evident that the real emphasis lies properly on the *purpose and potential* result of the claims to title or possession. The flexible framework of the words used may well stay the same in all cases, but the number of different domestic dramas being acted out within these bounds is limited only by the variety of possible husband-wife disputes.

Take a claim for possession as the first illustration.[24] The conflicting interests in such a case will be so different from those in a claim for ownership that it is almost strange that the two categories should be alternatives for selection by the litigants. Yet, alternatives they are. In *McDowell* v. *McDowell*,[25] where the wife had already obtained a judicial separation, she asked the court for possession; in *Cobb* v. *Cobb*,[26] where her claim for a judicial separation was still pending, she claimed a beneficial interest and sale. In *Fribance* v. *Fribance*,[27] it was cash that the divorced wife was seeking; in *Masters* v. *Masters*,[28] she simply asked for possession. One of the most recent authorities, on the other hand—*Silver* v. *Silver*[29]—gives a neat illustration of fusion of the two different claims, for the Court of Appeal, in rejecting the husband's claim to a joint beneficial interest, gave the full beneficial ownership—and the implicit right to possession to his deserted, arthritis-crippled, near-penniless wife.[30]

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[23] See, *e.g.*, New Zealand Married Women's Property Act, 1952, s. 19, replacing s. 23 of the 1908 Act; New South Wales Married Women's Property Act, 1901, s. 22; Victoria Marriage (Property) Act, 1956, s. 7, replacing s. 20 of the 1928 Act; South Australia Law of Property Act, 1936, s. 105; Queensland Married Women's Property Acts, 1890-1952, s. 21; B.C., *supra*, footnote 10, s. 29; Man. *supra*, footnote 10, s. 8; Nfld. *supra*, footnote 10, s. 19; N.B., *supra*, footnote 10, s. 7; N.S., *supra*, footnote 10, s. 38(1); Ont., *supra*, footnote 10, s. 12(1); P.E.I., *supra*, footnote 10, s. 13(1); Sask., *supra*, footnote 10., s. 22(1).

[24] For fuller discussion and documentation of this particular problem, see my article in (1958), 108 L.J. 548.

[25] (1957), 107 L.J. 184, [1957] C.L.Y. 1626.

[26] *Supra*, footnote 1.

[27] [1957] 1 All E.R. 357.

[28] [1954] N.Z.L.R. 82.

[29] [1958] 1 All E.R. 523. And see my note on this case in (1958), 21 Mod.L.Rev. 419.

[30] The court in fact really went as far as it possibly could in favour of the wife. In circumstances of normal health, there may have been ample ground for applying the presumption of "joint assets" (see *infra*) without dilution; as it was, the failing health and utter helplessness of the wife compelled the court to provide for her latter years as best it could.

Again, even if the litigation is concerned with ownership, the purposes for which the declaration is required will vastly alter the interests involved. For example, there is no really *compelling* reason to decide a dispute over the beneficial ownership of property in a deceased's estate by the same criteria as a squabble over their home between a quarrelsome—and very much alive—husband and wife. In the one case, the court will have to take into account the interest of the state in collecting estate duty as counterbalanced by that of the deceased's dependents in securing ample provision out of the estate. In *Fenton* v. *Commissioner of Inland Revenue*,[31] on facts very similar to those in *Silver* v. *Silver* (the matrimonial home was bought by the husband in his wife's name; he took out a mortgage; repaid it himself; made improvements using his own money). The New Zealand Supreme Court (Shorland, J.) found that the whole house and not just half of it, as the husband alleged, formed part of the deceased wife's estate. The Commissioner thus collected his death duties—but still provided satisfactorily for the widower.[32]

Even the actual circumstances of the breach between husband and wife which has given rise to the action will not always be the same and so will not always light up the same policy headings when the legal question is fed into the judicial slot-machine. The court must always bear in mind the prospects of reconciliation where the parties are not already divorced, the amount of maintenance passing from one to the other where they are living apart under a judicial order and, only in the extreme of its making the order on or after a divorce should it attempt any final settlement of rights which cannot be subject to later review.

II. *The Presumption of Joint Assets*

As late as 1948 and the decision in *Re Rogers' Question*,[33] the courts were invariably content to accept a minute division of beneficial ownership in terms of pounds and shillings as representing a satisfactory and domestically accurate state of affairs. Their argument was simple. The husband and wife contributed particular amounts

[31] [1957] N.Z.L.R. 564.

[32] *Cf.* Trew, The Family Assets (1952), 78 Jo. Inst. Bankers 154, at p. 157, contemplating such a situation after the decision in *Fribance v. Fribance*, *supra*, footnote 27. To say, however, as Trew did, that the implication of the "joint assets" cases, below, are important *on death*, is to give only half of the picture. They are important merely as a set of presumptions which may cancel each other out: it is the *policies* the courts are pursuing in using the presumptions that are vital.

[33] [1948] 1 All E.R. 328.

to the purchase of the property: therefore they must have intended their beneficial interests to be marked off in the same way and on a sale of the property to divide the proceeds proportionately. So, in *Rogers*, the Court of Appeal split the proceeds of sale of the home into ten parts and allocated nine to the husband and one to the wife—the proportions in which they had originally contributed the purchase-price. More recently, in *Sutherland* v. *Sutherland*,[34] Turner J. in the New Zealand Supreme Court made a similar order on a wife's application for the sale and the division of the proceeds of their joint family home.[35] But this case in particular points up the difficulties a court may encounter in bearing in mind the public interest in reconciling the parties and preventing the legal dissolution of the marriage, to which I have just referred. The Sutherlands had been married only five years at the time of their action; they had parted, the judge found, without any great deliberation—the husband drank and gambled and his wife decided that she would not live with him. Despite his claim to reformation, she unconditionally refused to return to him and prevailed on him to sign a separation agreement and then brought the present action. The house had been registered as a joint family home[35] and the judge decided that the application for sale and partition was premature under the machinery provided by the controlling legislation. The great bulk of the purchase money—in fact, seven-eighths—had come from the husband's own pocket and Turner, J. expressed the opinion that the wife's determination not to go back to her husband might easily have been buttressed by the prospect of making easy money if she could get an immediate cash-payment in respect of some share in the home. If, he said, she still refused to return to her husband after ample time to reflect, a court might be willing to divide the home and abandon all attempts to preserve it as a basic stabilizer of the marriage, but the time was not ripe for decision.

The judgment could well have stopped here. The judge had found that the application was premature and there was no need to make any decision of the basis of the extent of the parties' rights in the property. Yet he did so, in the following inadvisable language:

[34] [1955] N.Z.L.R. 689.

[35] Under the New Zealand Joint Family Homes Act, 1950, as amended, spouses may settle their home on themselves as joint tenants and there then comes into operation a protective scheme similar to the homestead system in the United States and Canada. In that the machinery is merely optional, however, it affords no guarantee of security to the large numbers of husbands and wives who have not taken advantage of it.

> In a case where a substantial period has supervened upon registration before the marriage breaks up, I would think that with the passage of time, the Court may increasingly incline towards equal division, notwithstanding that the share of the parties may have been unequal in the first place; but here, where registration was effected only some eight months before separation, I do not think that the period of married life with mutual duties faithfully performed which supervened upon registration, is sufficient for the court to take it into account as a substantial factor.[36]

He therefore assessed the proportions to which each party would be entitled if the home was sold on the basis of their contributions to the purchase-price. It is hard to appreciate the usefulness of such an attitude. The judge himself recognizes that *in time* the attitude of a court may be different: presumably the wife's share would creep nearer to equality as the years passed and, if she returned to her husband, she would be in a better economic position to break up the marriage at a later date! Yet, not only is such an assumption unwarranted—the discretion involved in such a case is *absolute*[37]—but is it socially progressive to encourage a couple to go through the formality of reconciliation by simply living together? With due respect, reconciliation involves more than the empty picture of two people and a common roof and it is hardly for a court to encourage such a situation with financial bait.

But this, together with *Rogers*, present only isolated examples of rather formal judicial thinking. By and large, starting with the brilliant dissent of Denning L.J. in *Hoddinott* v. *Hoddinott*,[38] the climate of judicial opinion has changed radically. Now a unanimous string of Court of Appeal decisions in England and higher court judgments in a number of Commonwealth jurisdictions have almost completely upset the basic point of departure used in *Rogers*. The exclusive emphasis on individual property rights is gone and an attitude far more in keeping with contemporary family realities has been substituted.

The change has come about under the auspices of the wide discretion of section 17 of the Married Women's Property Act and its counterparts.[39] After Denning L.J. had made his original suggestion in *Hoddinott* that the property relations of husband and wife were on a very special footing—with very little distinction drawn by them on the basis of individual ownership—the Court

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[36] *Supra*, footnote 34, at p. 694.

[37] Under the New Zealand Married Women's Property Act, *supra*, footnote 23.

[38] [1949] 2 K.B. 406, at p. 414 *et seqq.*

[39] *Supra*, footnote 23.

of Appeal carried the matter further in *Rimmer* v. *Rimmer*.[40] In that case we have the first actual decision based on the realization that it is very uncommon for husbands and wives to have *any* positive intentions as to ultimate ownership at the time they acquire property and, as a result, presumed that equality was the most equitable solution.[41] And if there *are* no definite intentions, what then happens to the beneficial ownership? In *Rogers*, the Court of Appeal had worked on the basis that the husband and wife had *intended* from the very beginning to hold the property in distinct shares on the basis of their contributions to the purchase-price[42] and in its decision simply put these intentions into effect. But now even the desire to look for intentions is becoming *de trop*. The courts are instead looking to the fact of the joint venture, the indiscriminate allocation of the assets of both parties to the support of the family, as the controlling state of affairs.[43] Only in cases where the property is not a family asset but rather part of a business-venture unconnected with the family or in which one spouse has had no occupational or proprietary right, should intentions to hold as separate property become of importance.[44] The courts may well be presenting an accurate picture when they say that they

[40] *Supra*, footnote 4.

[41] See per Evershed M.R., at pp. 72-3, 866. And *cf.* per Romer L.J., in *Cobb* v. *Cobb*, *supra*, footnote 1, at p. 699; Denning and Morris L.JJ. in *Fribance* v. *Fribance*, *supra*, footnote 27, at pp. 359-60 and 361.

[42] Although all the members of the court could only *infer* as much from the evidence: see per Evershed and Asquith L.JJ. and Lord Greene M.R., *supra*, footnote 33, at p. 330; *Rimmer* v. *Rimmer*, *supra*, footnote 4, per Evershed M.R., at pp. 71, 866, per Denning L.J., at pp. 73, 868, per Romer L.J., at pp. 75, 869.

[43] *Rimmer* v. *Rimmer*, *ibid.*, per Denning L.J., at pp. 74, 867; *Fribance* v. *Fribance*, *supra*, footnote 27, per Denning L.J., at p. 360; *Silver* v. *Silver*, *supra*, footnote 29, per Lord Evershed M.R., at p. 525, per Parker L.J., at p. 528.

[44] *E.g.* as in *Re Knight's Question*, [1958] 1 All E.R. 812. In *Taylor* v. *Taylor*, [1956] N.Z.L.R. 99, the husband spent nearly £300 in building a shed on his wife's land (the value of the permanent improvement was nearer £700), which he alone used and which, in fact, he transformed into his home when the marriage broke up. Although the Supreme Court found that the land was still in the wife's ownership, it gave the husband possession until a further order of the court or until his wife paid him the full value of the shed. In one situation, however, namely that where the *home* is intended as an *investment* for one of the spouses only, in the event of the earlier death of the other, the courts will feel more inclined to give effect to the original intentions (*cf. Rayher* v. *Rayher* (1953), 14 N.J. 174, 101 A.2d 524, Annot. 43 A.L.R. 2d 909; *Silver* v. *Silver*, *supra*, footnote 29, per Parker L.J., at p. 528). Here again, though, if the action is upon the break-up of the marriage rather than upon the death of one party to it the court should consider the situation at the time of the break-up and the needs of both parties, rather than the mere fact of ownership. There is already very respectable authority in support of the limited machinery to enable this on divorce: see *Smith* v. *Smith*, [1945] 1 All E.R. 584; *Halpern* v. *Halpern*, [1951] P. 204, [1951] 1 All E.R. 916; *Hicks* v. *Kennedy* (1956), 4 D.L.R. (2d) 320.

cannot amend proprietary rights *once established*[45] but what if the extent of the beneficial rights is too uncertain to be measured? Section 17 provides the machinery by allowing the courts to make such orders as they think fit in all the circumstances of the cases.

Attention thus focusses on the married life of the two parties: not simply on the narrow field of their rights in one asset but on all their attitudes and inter-relationships on both an economic and a personal level. The length and timbre of the marriage,[46] the particular disorganization which makes the action necessary, the relative financial positions of the husband and wife at all times[47]— these are only a few of the subjects for judicial inquiry. It should not be a search for intentions,[48] for the courts normally presuppose that there are none, but rather for a scheme of living. How did the couple treat their assets: as for their *separate* or their *joint* use? If they have spent their resources for their common good, they must both have a beneficial interest in what they have acquired— interests which "will not depend on how they happened to allocate their earnings and their expenditure for their joint benefit . . . and the product should belong to them jointly."[49]

That the particular positions of the husband and wife at the time of the trial are of immeasurable importance has recently been

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[45] See *Kelner* v. *Kelner*, [1939] P. 411, [1939] 3 All E.R. 957; *Lee* v. *Lee*, *supra*, footnote 5, at pp. 491, 1301; *Cobb* v. *Cobb*, *supra*, footnote 1, at p. 700; *Barrow* v. *Barrow*, [1946] N.Z.L.R. 438, at p. 443; *Simpson* v. *Simpson*, [1952] N.Z.L.R. 278, at pp. 284-5; *Watson* v. *Watson*, [1952] N.Z.L.R. 892; *Masters* v. *Masters*, *supra*, footnote 28, at p. 83. *Miller* v. *Miller*, [1946] Qd. W.N. 31; *Buchanan* v. *Buchanan*, [1954] St. R. Qd. 246, at p. 248. *Wirth* v. *Wirth* (1956), 30 A.L.J. 586 (Qd.).

[46] See *Sutherland* v. *Sutherland*, *supra*, footnote 34.

[47] With the increasing attention on the *needs* of the parties at the time of the action, *i.e.* when the marriage is in fact breaking up, perhaps the opinion of Romer L.J., in *Cobb* v. *Cobb*, *supra*, footnote 1, at p. 700, that "the court cannot . . . vary [the rights of husband and wife] merely because it thinks that, in the light of subsequent events, the original agreement was unfair," needs revision. This, of course, is emphatically denied by the bulk of the authorities: see those collected in footnote 45. Yet an openly paternalistic court, advancing the goal of providing against economic need, will be able to mold these "rights of husband and wife" in whatsoever way it wishes. See especially the judgments of Smith, J. in *Wood* v. *Wood*, [1956] V.L.R. 478 and *Ward* v. *Ward*, [1958] V.L.R. 68, [1958] Argus L.R. 216.

[48] See *supra*, p. 481

[49] Denning L.J., in *Fribance* v. *Fribance*, *supra*, footnote 27, at p. 360. Similarly, where the court needs to provide against a wife's need, it may hesitate to presume that there has been any "joint venture" and, as a result, dispose of beneficial ownership in the way best calculated to advance economic democracy within the marriage: see *Richards* v. *Richards*, [1958] 3 All E.R. 513, where the Court of Appeal refused to consider husband and wife as taking part in any joint enterprise when the wife and her parents bought the home without the husband even knowing and when he merely contributed towards the price of certain household equipment and increased his maintenance payments on hearing of the purchase.

illustrated vividly. In *Silver* v. *Silver*,[50] where the financial contributions to the actual purchase-price of the home in dispute were largely from the husband, the Court of Appeal came to the conclusion that the wife was entitled to the full beneficial ownership as well as her undisputed legal ownership. It formally applied the presumption of gift from husband to wife, at the same time pointing out how easily one could rebut it,[51] but only in passing does Lord Evershed M.R. mention the vital factors which decided the case in favour of the wife. It appears that after twenty-five years of married life, the husband had deserted his wife, leaving her crippled with arthritis and incapable of earning her living. Further, she had never been a wage-earner during her life and one must assume that she had little or no capital. By deciding in her favour, therefore, the court guaranteed her continued occupation of the home and her right to the full proceeds of any future sale.

Again, there are two interesting illustrations from New Zealand of the fact that the intentions *at the time of the purchase* will not be the sole factor for consideration. Both *Peychers* v. *Peychers*[52] and *Reeves* v. *Reeves*[53] show the impossibility of *imputing* intentions to the parties (though in both cases F.B. Adams J. goes through the ritual of trying to discover what they are likely to have been) and the need to balance the circumstances existing at the time of the action against the way the parties have treated the property during the marriage. To call such an attitude sympathetic to the party less well-provided-for at the time of the action would of course be accurate—and as the judge is to make his decision as he "thinks fit," one can only applaud such an attitude. If there is a discretion, the court will do much better to use it to avoid any possible hardship rather than simply aggravating the injustice already caused. If one may venture into the land of hypothetical intention for a moment, it would be a guess of high probability to say that husbands and wives do *not* intend that the marriage shall force either of them into destitution!

In *Peychers* the whole of the purchase-price of the land and the home built on it was supplied by the husband. Even the mortgage installments and capital were repaid from his earnings, yet he still took the title in the name of his wife. Moreover, although she helped his green-grocery business and joined in eking out the family resources during the business depression by taking in dress-

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[50] *Supra*, footnote 29. And see (1958), 21 Mod.L.Rev. 419.
[51] *Ibid.*, Lord Evershed M.R., at p. 525, Parker L.J., at p. 528.
[52] [1955] N.Z.L.R. 564. [53] [1958] N.Z.L.R. 317.

making and doing other outside work, there was no evidence that she had made any direct contribution to the buying of the house. F. B. Adams J. made a declaration that the wife held the legal title on trust for both of them as beneficial tenants *in common* and —a fine touch of practicality[54]—made this order simply in the realization that he would be making the inevitable partition a much easier process. The original intentions (or presumed intentions) were not important: it only mattered to hand down the judgment best suited to conditions at the time of the trial. The judgment is a carefully-prepared lesson in judicial common-sense and the following passage in particular shows the conflicting values and interests which the judge found it necessary to balance:

> Except for what was expended on furniture, [the home] has in fact absorbed all their savings for a third of a century. If it belongs absolutely to the wife, then the husband, whose industry has undoubtedly been the main source of the savings, is practically penniless after all these years. Is the Court to attribute to the wife in 1921 an intention that the husband might be so meanly treated as the outcome of their future married life, and to attribute to the husband so complete an abandonment of all beneficial interest in the property which was to represent his life's savings? Or is the Court to attribute to them both an intention more in accord with common sense and fair dealings between them?[55]

Reeves resulted in a little more complex decision. Since the wife had bought the land and paid the extra cash required for building purposes and yet allowed her husband to take the title in his own name, the judge found it "impossible to resist the inference, upon the whole of the evidence, that *ab initio* it was the intention of the parties that the wife should have an interest in the property jointly with her husband."[56] Making a possession order in her favour, too, he took into account that she had three young children to look after, that to live with her mother (as she had been doing) was no longer practicable and that the husband was currently living in the home in dispute. As a result, he gave the husband six weeks notice to leave and find alternative living accommodation.

The cases in the last five or six years represent one of the most welcome and important developments in the common-law regulation of marital property dealings. The judges have slowly felt their way to a position from which they may formally recognize that "despite the separation of property of husband and wife, the merger of many of their worldly possessions is and remains a fact."[57]

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[54] And see a similar position in *Reeves* v. *Reeves*, *ibid.*, at p. 319.
[55] *Supra*, footnote 52, at p. 570. [56] *Supra*, footnote 53, at p. 318.
[57] Kahn-Freund, (1952), 15 Mod.L.Rev. 133, at p. 136.

It is, admittedly, nothing more than the adoption of a new point of departure; in familiar terms, simply another rebuttable presumption of fact, taking its place alongside those of advancement and resulting trust. But in that it is the basic point to which the court will *return* if it finds no distressing circumstances which it has the power to remedy, we must welcome the innovation.

The discretion under section 17 and its counterparts being so absolute, the judges can select whichever of the approaches leads to the end at which they want to arrive. The suitability will, naturally, depend on the way the husband and wife have chosen to allocate their legal interests, for nominal division of ownership, however unreflected in reality, will be the house of cards the litigation aims at toppling. In some cases,[58] a legal title in the name of either the husband or the wife alone has spawned beneficial interests to them *jointly*; in others[59] legal joint tenancy has fostered equitable joint tenancy; and in others again[60] presumptions of gift have settled the complete beneficial title in the hands of the sole legal owner. In the first two types of case, there will have been no circumstances of desperate need to upset the basic equality of ownership; in the last, "having regard not merely to what occurred at the time when the property was originally purchased [and] also having regard to the light which the conduct of husband and wife throws on their relationship as contributors to the acquisition of the property which was their joint matrimonial home,"[61] it has been necessary to provide for one at the expense of the other.

But there is still one step to take to establish the "joint venture" as the universal point of departure—still one set of facts which has yet to arise and call for decision—and on this may well depend the future of English matrimonial property law. In all the cases which have arisen so far, there has always been some *financial* contribution by both spouses to the purchase of the matrimonial home. It may have been minute, as the £20 contribution by the wife in *Fribance*; it may have been indirect, as the gift of £90 by the wife's parents in *Silver*; but it has always been there. What

[58] *E.g. Rimmer* v. *Rimmer*, *supra*, footnote 4; *Fribance* v. *Fribance*, *supra*, footnote 27; *Peychers* v. *Peychers*, *supra*, footnote 52; *Reeves* v. *Reeves*, *supra*, footnote 53; *Thomson* v. *Thomson*, *supra*, footnote 5; *Dillon* v. *Dillon*, [1956] N.Z.L.R. 162; *Mitchelson* v. *Mitchelson* (1953), 3 W.W.R. (N.S.) 316 (Man. Q.B.); *Sopow* v. *Sopow* (1958), 24 W.W.R. (N.S.) 625 (B.C.).

[59] *Cobb* v. *Cobb*, *supra*, footnote 1; *Barrow* v. *Barrow*, *supra*, footnote 45.

[60] *Silver* v. *Silver*, *supra*, footnote 29; *Masters* v. *Masters*, *supra*, footnote 28; *Thomas* v. *Thomas*, [1956] N.Z.L.R. 99.

[61] Evershed M.R., in *Rimmer*, *supra*, footnote 4.

is left is this: for a wife to claim a proprietary right in her husband's property simply by reason of (a) the marriage and (b) the fact that the property was the matrimonial home . . . and for the court to grant it.

The situation is easy to visualize. The wife may have used her capital to cover household expenses, clothing, children's maintenance and the husband paid exclusively for the home. It follows from the joint venture principle that what they have worked for together, they must own jointly—and so a wife who has had money but has not spent it on the home may find herself a part owner of it. Go even further, though, and assume that the wife has had no money and has never been a wage-earner during the marriage but has simply maintained the home and cared for her husband and the children. Is this not a sufficient division of labour and talents to merit a share in the marital assets—or are the duties of a housewife and mother so negligible as to amount to no appreciable contribution to the joint enterprise of marriage?

Only two cases approach this extreme of full "judicial community-property." In *Dillon* v. *Dillon*,[62] the wife's contribution to the marriage included working in the filling-station which comprised their home. After they had sold it, the court granted her a beneficial interest in half the goodwill, even though it was totally in her husband's name. *Mitchelson* v. *Mitchelson*[63] in the Manitoba Court of Queen's Bench, though, is more significant. There, since her husband had only a small income, the wife took boarders in their home for several years. When they decided to buy a larger house, she signed the agreement for sale and purchase, but the attorney to whom she and her husband entrusted the final completion put the title in the husband's name only. Then, for thirteen years from 1937 to 1950, the wife did all the housekeeping, cleaning, laundering and other chores for her husband and their son as well as for as many as twelve boarders at one time, aggregating about $600.00 per annum in rents in addition to her allowance from her husband for food and clothes. All this gross amount went to her husband. Finally, after she had divorced her husband for adultery, she brought an action for a declaration of a half-share in the house and partition of the alleged joint tenancy. In granting her application, the attitude of the court illustrates to the full the possibilities of the joint venture idea. The wife, it said,

> in putting her time, labour and earnings[64] into the home, did not

[62] *Supra*, footnote 58. [63] *Ibid.*

[64] It is hard to see how the wife had any earnings which she could call

intend thereby to make any gift to her husband, but rather to devote them to the acquisition of the house which would belong to them both and serve them as a common home.[65]

The Royal Commission on Marriage and Divorce[66] recommended against introducing any form of community property in England,[67] with a notable dissent by seven members, six of whom were, significantly enough, married women.[68] Yet, the whole trend of modern English and Dominion authority is in favour of recognizing the existence of this limited form of community—limited, that is, purely to the household assets and to the family home in particular. Moreover, it is interesting that elsewhere,[69] the Commission expressed the opinion that on divorce, the court should be able to "give effective recognition, in appropriate cases, to the wife's contribution to the marriage, whether by her work in the home or by the help she has given her husband in building up or running his business." Need divorce—the ultimate dissolution of a broken marriage—be the only contingency which gives birth to this attitude? Or, rather, should not every case of marital disorganization—evidenced at least by the conflicting claims to possession and ownership of the home—be the signal for a fair disposition of property rights?

Certainly, this attitude may have valuable repercussions in that other troubled and closely related field of the deserted wife's rights against a purchaser from her husband. If the wife becomes a joint tenant of the home simply as a result of her husband's buying it,[70] he will have no authority to dispose of it without her consent and *Bendall* v. *McWhirter*[71] *Woodcock* v. *Hobbs*[72] and *Westminster Bank, Ltd.* v. *Lee*[73] become cases of the past. On the other hand, the nebulousness of a wife's rights—based, of course, merely on a *presumption* of joint ownership raised under section 17 in the discretion of the court—hardly afford a prospective purchaser or mortgagee notice of the divided ownership of the property without his having to litigate the question. Perhaps in these circumstances, barring the introduction of a complete matri-

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exclusively her own. If both the original home and the one in dispute were owned jointly, then the earnings, *i.e.* the rents, etc. received, would be joint property. And, of course, until the present court categorized the home as joint property, one would assume that it belonged exclusively to the legal owner, the husband.

[65] *Supra*, footnote 58, at p. 319. [66] *Supra*, footnote 13.

[67] *Ibid.*, s. 651. [68] *Ibid.*, ss. 652-3. [69] *Ibid.*, s. 692.

[70] It is not difficult to imagine the presumption stretching as far as this in a vast number of marriages.

[71] [1952] 2 Q.B. 466, [1952] 1 All E.R. 1307.

[72] *Supra*, footnote 7. [73] *Ibid.*

monial property regime, a modified form of compulsory homestead registration would be the answer.[74]

Upon marriage, the blackly-drawn lines of ownership of property will fade and uncertain shades of grey—representing the unwillingness of spouses to make any hard and fast claims to ownership as against each other—take their place. The course of usage of marital assets almost amounts to an implicit waiver of exclusive proprietary rights by the strict legal owner and the beneficial use, both in intention and reality, becomes split between the spouses. It is in the solutions given to many of these problems of "ownership" that the modern courts have begun to inch their way forward, leaving behind the former Victorian concepts of patriarchal control and the legal insignificance of women. But the journey away from these retentive bonds is slow—and there is still a lot of ground to cover.

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[74] See my note Policy-Orientation in Matrimonial Property Law, in (1959), 22 Mod.L. Rev. 207.