COMMENTS
COMMENTAIRES

TORTS — LIBEL — "PASSING OFF" OF ACTOR'S VOICE — APPROPRIATION OF ANOTHER'S PERSONALITY WITHOUT HIS CONSENT — AN EQUITABLE RIGHT OF PRIVACY? — The English Court of Appeal (Hodson, Morris and Willmer L.JJ.) in *Sim* v. *H. J. Heinz Co. Ltd. and anor*[1] recently drew attention to the existence of an interesting and unsolved problem of tortious liability. As, however, the proceedings were interlocutory and the appeal concerned the exercise of the trial judge's discretion, the court was able to avoid a full discussion of the issues involved. Fortunately, the court declined to make any *obiter* observations thereupon. Any court confronted by a similar situation in the future will therefore be able to give the matter the careful and entirely fresh examination that it deserves. Before stating the problem, and attempting its solution, it will be convenient to set out the facts.

The plaintiff was Alastair Sim, widely known as an actor and film star. The first defendants were food manufacturers and the second defendants the advertising firm whom they had engaged to arrange an extensive advertising programme for their wares on commercial television. As part of the programme, six short sketches were produced. These included a human figure in cartoon form who appeared on the screen accompanied by the voice of a commentator, an actor who had simulated the plaintiff's voice on the stage. The commentator denied that on the occasions in question he had used his impersonation of the plaintiff's voice. Some friends of the plaintiff nevertheless formed the view that the voice being reproduced was the plaintiff's and deposed that they thought that by allowing his voice to be used in this way, he was doing something that was beneath the dignity of his standing as an actor. A writ was issued claiming: (1) damages for libel and malicious falsehood; (2) damages for passing off; (3) an injunction to prevent further broadcasting of the sketches. A summons asking for an interlocutory injunction came before McNair J. who

[1] [1959] 1 W.L.R. 313 (C.A.); see note by Marsh, Civil Liberties in Europe (1959), 75 L.Q. Rev. 532, n. 5.

declined to grant it. In respect of the claim based on libel, the learned judge reached his conclusion by applying the principle sometimes known as the rule in *Bonnard* v. *Perryman*,[2] namely, that the court will exercise its jurisdiction only in a very clear case, so clear that any reasonable jury must decide that the matter complained of was libellous. The evidence as to the identity of the two voices did not pass this test; on the contrary, said the learned judge, the likelihood of confusion of the voices would be a "primary issue of fact" in the libel proceedings.

The wrong of malicious falsehood was passed over in silence.[3] In respect of the allegation that the defendants had "passed off" something as the plaintiff's voice, McNair J. referred to the essential conditions of a passing off action[4] and continued:[5]

> It was urged before me that in the case of a professional man like an actor, his reputation in the mind of the public, based upon his performances, is a right of property capable of invasion, just as the right of property contained in a particular kind of goods or method of get-up of goods, and that here the defendants were passing off as and for a performance by the plaintiff a performance not by him.

Alternatively, it was argued for the plaintiff that the sketches constituted an interference with the goodwill that the plaintiff had built up through his acting. On the analogy of the rule in *Bonnard* v. *Perryman*, McNair J. declined, and with respect, quite rightly, to rule upon these two submissions for the reason that they depended on issues of fact "almost identical" with the issues in the libel action, namely, whether the two voices were similar and whether the sketches really damaged plaintiff's reputation. Nevertheless his Lordship considered that it would be "a grave defect in the law if it were possible for a party, for the purpose of

[2] [1891] 2 Ch. 269 (C.A.). Earlier authorities to the same effect: *William Coulson & Sons* v. *James Coulson & Co.* (1887), 3 T.L.R. 846, *per* Lord Esher M.R., and *Liverpool Household Association* v. *Smith* (1887), 37 Ch.D. 170 (C.A.). Although not mentioned by McNair J. in *Sim* v. *H. J. Heinz Co. Ltd.*, the principle in *Bonnard* v. *Perryman* was reviewed by the Court of Appeal in *Monson* v. *Tussauds*, [1894] 1 Q.B. 671 where the court divided on the issue, the majority judgments (of Lopes and Davey L.JJ.) confirming the principle as an absolute rule, though the interlocutory injunction under appeal was rescinded because it appeared that the question of plaintiff's consent to the exhibition of the allegedly defamatory effigy would be raised at the trial. *Cf.* Hanbury, Modern Equity (7th ed., 1957), p. 571.

[3] Rightly so, for the facts disclosed no "false statement respecting any person or his property": Salmond on Torts (12th ed., 1957), p. 656. Nor had the plaintiff suffered the required special damage, either at common law or under the Defamation Act 1952, 1 Eliz. 2, c. 66, s. 3.

[4] The learned judge was content to refer to the speech of Lord Parker of Waddington in *A. G. Spalding & Bros.* v. *A. W. Gamage Ltd.* (1915), 32 R.P.C. 273, 31 T.L.R. 328 (H.L.).

[5] *Supra*, footnote 1, at p. 317.

commercial gain, to make use of the voice of another party without his consent".[6]

An appeal was dismissed by the Court of Appeal. Hodson L.J., delivering a judgment with which the other members of the court concurred, agreed entirely with McNair J.'s reasoning and saw no grounds for interfering with the latter's exercise of his discretion. The learned Lord Justice adverted to the novelty of this kind of passing off action.[7] But he was unwilling to pronounce upon the plaintiff's contentions that his voice was part of his stock-in-trade and therefore something he was entitled to protect as part of his goods; or upon the question whether the circumstances disclosed "anything in the nature of unfair trade competition in a common field".[8]

The problem with which one is initially faced is that raised by the facts of *Sim's* case itself, and is adequately stated in McNair J.'s own words. Can a person "make use of the voice of another party without his consent"? The way in which the learned judge put the possible "defect in the law" shows that he envisaged that such user would have the "purpose of commercial gain", but it will be necessary to answer the question uncomplicated by questions of purpose or motive, and then to ask whether, as an exception to the normal rule in cases of tort, the presence or absence of a particular motive has any bearing on the matter.

Upon a moment's reflection, however, it will be seen that the problem can and ought to be framed more broadly. The argument before McNair J. (apparently) made use of a more abstract notion than "voice"—that of "reputation". It was contended that an actor, having a "reputation in the mind of the public, based upon his performances" could, independently of any remedy that he might have in defamation, prevent "invasions" of that reputation. Now, to imitate an actor's voice is manifestly only one mode of invading his reputation, though it was the particular mode complained of in *Sim's* case, where it was not disputed that the plaintiff's voice was of a very distinctive character. But an actor's appearance is just as much part of his stock-in-trade, of his stage personality, as his voice, so what would be the position in the following hypothetical cases?:

(i) The defendants display a photo of the plaintiff without his consent, the commentator speaking in his (own) natural voice.

[6] *Ibid.*, at p. 317. [7] *Ibid.*, at p. 319. [8] *Ibid.*

(ii) The defendants display a cartoon, but the distortion is not so great as to prevent the "reasonable viewer" identifying the plaintiff's distinctive stage appearance (assuming that he can prove that he has got one!), the commentator again speaking in his natural voice.

(iii) The defendants act as in (i) or (ii) except that they make use of an imitation[9] of the plaintiff's voice.

Case (iii) plainly shows an appropriation of plaintiff's stage reputation for the benefit of the wares being advertised, but it is important to note that so do cases (i) and (ii), although in these the defendant's conduct may be less outrageous. An appropriation of the reputation of an actor (or of anyone else similarly in the public eye) may take place in any one of these several ways. This does not exhaust the possibilities. Let us suppose that the actor habitually appears under a fancy or nick-name, "Uncle Mac" or "Doctor Crock".[10] Can such names be inserted into television advertisements if they are the distinctive possessions of stage, screen or sound performers? What, finally, of the *real* names of the famous, if used without their consent? One wants an answer to a wider question: is there one principle which covers these various situations, and provides a remedy in each?

It is not proposed in this comment to investigate in detail the extent of the protection provided in some or all of these cases by the tort of libel. If all the requisites to the success of an action so based are present, the plaintiff need look no further for a remedy. In *Sim's* case itself, the available evidence would have been of considerable weight in support of an innuendo that the plaintiff was prepared to prostitute his reputation, or at least to do something beneath the dignity of his standing as an actor. One recalls the famous case of *Tolley* v. *Fry*[11] in which the plaintiff finally succeeded upon the House of Lords' decision that the caricature was reasonably capable of bearing the meaning assigned to it by the plaintiff's innuendo. In practice, the pleading of an innuendo is beset by difficulties of proof and may in the circumstances look more like a product of the pleader's ingenuity than what a jury could reasonably take from the words complained of as their hidden meaning. Moreover, it is not about the words as such, that is, their content, that the plaintiff in a case like *Sim's*

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[9] Another possibility which ought to be mentioned, despite its improbability, is that defendants surreptitiously "tape", and then reproduce, a private eulogy of the goods or services being advertised.

[10] See discussion *infra*.

[11] [1930] 1 K.B. 467 (C.A.) reversed [1931] A.C. 33 (H.L.).

case is complaining, but *the fact that the words were spoken.* Other defences to actions in defamation may conceivably be available, for instance, justification, fair comment and the defence of privilege. But the strongest line of defence in *Sim's* case, as in all the variants which have been imagined, is quite simply that, by the broadcast or telecast in question, the defendants have not brought the plaintiff into hatred, ridicule, or contempt. The plaintiff's reputation in the public mind (it could be said) has not suffered at all, and an essential ingredient of the wrong not established. The appropriation of another's *personality* does not necessarily damage or lower his *reputation.*

Whatever the strength of these various arguments, the plaintiff's advisers in *Sim's* case obviously felt that it was advisable to put their case upon an alternative ground, and accordingly endeavoured to show that the "facts" revealed by the affidavits brought the case within the purview of passing off. That tort normally and typically concerns the misleading production and sale of goods: hence the "novelty" which Hodson L.J. felt at its proposed application to a human voice. Hence also the artificiality of the plaintiff's argument that his voice was something that he was entitled to protect "as part of his goods". That the granting of a remedy under this head would involve a new departure, for the law of passing off does not seem to be a valid reason why the court should not so act. But would such an extension comply with the basic pre-suppositions of passing off? For reasons which will be given shortly, it is submitted that the answer is in the negative and that the tort of passing off has in fact no relevance.

Are plaintiffs without a remedy in cases where defamation proves fruitless? It is submitted not. I believe that by adopting an entirely different approach and by reasoning from a body of case law quite outside the boundaries of either defamation or passing off, a principle is obtainable which would enable a solution to our problem both as it was framed by McNair J. and in its larger aspect. That principle may be stated at once: "Where A, without B's consent, makes an unconscionable use of B's name, or any essential and identifiable part of B's personality for any purposes of his own and A's act has caused, or will probably cause, injury to B's reputation, or loss to him in his property, business or profession, the court will restrain A by injunction." It is my aim to show how this principle might be attained by, (a) observation of the way in which the courts in the exercise of their equitable jurisdiction have acted; (b) the application of the con-

clusion so reached to exactly parallel situations; and (c) the formulation of a generalization capable of embracing the results obtained from (a) and (b)—and to argue that the principle is a desirable one for the courts to aim at, although it might at first look suspiciously wide.

It must be admitted at the outset that the cases which are now to be cited in support of the principle dogmatically stated in the last paragraph are few in number, that most of these are not recent, and that their reasoning is often unsatisfactory. Moreover, expressions drawn from the law of libel and of passing off are of frequent occurrence, and the courts have been guilty of some confusion between the different bases of liability.

The typical situation is that where the defendant uses the plaintiff's *name* without the latter's authority and in a way which furthers some purpose of his own: the first instance of this which came before the courts was *Lord Byron* v. *Johnston*.[12] The defendant advertised a collection of poems for sale, representing them to have been written by Lord Byron. Upon these facts Lord Eldon L. C. granted an injunction restraining the defendant from publishing the poems in the plaintiff's name since he was unwilling to swear that they were really Byron's work. Equity, Lord Eldon indicated, regarding such conduct as unconscionable, would give a remedy. This decision usually receives a passing mention in textbooks on the law of torts in their sections labelled "Passing off",[13] but this classification is, it is submitted, unjustified. "Passing off", which is of comparatively recent growth, is that species of unfair competition which is met by a civil remedy. "Unfair competition" itself, it has been shown, except as a synonym for the tort of "passing off", is a concept devoid of legal connotation.[14] Nevertheless, the complaint that a competitor has adopted unfair trade practices of one kind or another has constantly underlain the actions which aggrieved persons have brought, hoping that the court will provide some redress. Those

[12] (1816), 2 Mer. 29, 35 E.R. 85.

[13] For instance, Salmond, *op. cit.*, *supra*, footnote 3, p. 660; Fleming, The Law of Torts (1957), p. 739.

[14] See W. L. Morison, Unfair Competition at Common Law (1953), 2 Ann. L. Rev. 34, who submits, and with force, that "unfair competition" "indicates a social and economic evil rather than a legal wrong". In the United States, there is controversy as to whether "unfair competition" is a tort in its own right. The Supreme Court in *International News Service* v. *Associated Press* (1918), 248 U.S. 215, approved a wide application of the concept, but the decision is an isolated one: see Z. Chafee, Unfair Competition (1940), 53 Harv. L. Rev. 1289.

actions came gradually to be characterized as "passing off".[15] Competition, then, between whom? The courts were first called on to provide remedies for the situation where one trader, A, was found selling his goods as the goods of another trader, B. Numerous developments and refinements have taken place since those early days as the courts have been faced with more and more complex forms of commercial immorality: one significant advance, for example, came when it was held that a representation by A that his goods were those of B, without an actual sale, would suffice to induce the court to give relief.[16] But the point is that that original situation, still quite commonly encountered, has coloured or, it may even be said, dominated the subsequent refinements.[17] By considering this original or pattern situation, one obtains the answer quite readily: there must be competition between two persons engaged in the production of similar goods or services. It follows that if A is not in the same, or at least a very similar, business to that of B, A and B are not competitors, and neither can sue the other in passing off. In *McCulloch* v. *May, Ltd.*,[18] which will require closer attention later, Wynn-Parry J. held for the defendants on the grounds that there was no "common field of activity" in which the plaintiff and the defendants were both engaged.

[15] See Morison, Unfair Competition and "Passing Off" (1956), 2 Sydney L. Rev. 50. After having discussed various ways in which the originally narrow tort of "passing off" had been widened by the English authorities, he admits that it would be "difficult to justify a proposition that [the defendant] need not be in competition with the plaintiff in a broad sense" (at p. 60), but considers it would be unfortunate, for reasons of economic policy set out by him, if English law were finally to be committed to the proposition that competition, however liberally the requirement might be interpreted, is an essential relationship between plaintiff and defendant in an action for passing off. He submits (at p. 61) that the courts have regarded competition or its absence not as a prerequisite to the existence of the tort, but as relevant to the existence of a misrepresentation and the likelihood of damage. But the plain fact of the matter seems to be that the courts, almost invariably confronted by a situation in which competition was present, have not considered this theoretical question at all.

[16] *Reddaway* v. *Banham and Co.*, [1896] A.C. 199; *A. G. Spalding and Bros.* v. *A. W. Gamage Ltd.*, *supra*, footnote 4, per Lord Halsbury at p. 204.

[17] The way in which text-writers approach their subject bears out this statement. And *cf.* Sir Wilfred Greene M.R. in *Draper* v. *Twist*, [1939] 3 All E.R. 513, at p. 517: ". . . the whole basis of the relief in a passing-off action is that, as a matter of fact, the goods (if it be a case of goods) are calculated to deceive when sold under the description or in the get-up, or whatever it may be—the way in which the defendants sell them and that they are in effect telling a falsehood about themselves." "The action of passing off . . . is essentially a cause of action arising out of confusion", per Harman J. in *Serville* v. *Constance* (1954), 71 R.P.C. 146, [1954] 1 W.L.R. 487, at p. 491, discussed *infra*.

[18] [1947] 2 All E.R. 845 discussed *infra*.

In *Lord Byron* v. *Johnston*[19], the plaintiff and the defendant were not in competition with each other. The one was a poet, the other a publisher: they were not in any sense professional rivals. The facts disclosed no unfair competition, it is submitted, yet we find the court deciding that it was unfair, and hence inequitable, for a publisher to put a poet's name to work which, because of its low standard, might lessen the poet's reputation with the reading public.

The next relevant decision in point of time is *Routh* v. *Webster*.[20] The provisional directors of a company had, without the plaintiff's authority, issued a prospectus naming the plaintiff as a trustee of the company. Lord Langdale M.R. granted an injunction against the directors as "a warning to them as well as to others not to use the names of other persons without their authority". Again, it will be noticed, plaintiff and defendant were not trade rivals and there was no question of passing off involved, but merely the unauthorized use of another's name, causing that other to be misrepresented in the public eye.

If the facts of *Clark* v. *Freeman*[21] were quite different, the complaint was similar. Sir James Clark was well known to the public as a specialist in consumptive diseases. The defendant manufactured pills and advertised one brand as "Sir J. Clarke's [sic] Consumption Pills". Lord Langdale M.R. declined to grant an injunction restraining him from so doing. The learned Master of the Rolls admitted that the imputation of selling quack medicines was a serious injury to the plaintiff "in the way of slander",[22] but he considered that the plaintiff's reputation had not been injured by the advertisements. On the other hand, he continued: "If Sir James Clark had been in the habit of manufacturing and selling pills, it would be very like the other cases in which the Court has interfered for the protection of property."[23] The "other cases" that he was thinking of were *Lord Byron* v. *Johnston*[24] and *Routh* v. *Webster*.[25] It seems that Langdale M.R. misinterpreted these as cases of passing off, which the above analysis has endeavoured to show was not the case. To distinguish them on the grounds that Sir James Clark was not himself in the pill business was certainly

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[19] *Supra*, footnote 12.

[20] (1847), 10 Beav. 561, 50 E.R. 698; Morison, *op. cit.*, *supra*, footnote 15, at p. 59, n. 88, denies that there is any authority for a distinction between the principle of *Routh* v. *Webster* and the tort of passing off. The present writer respectfully differs.

[21] (1848), 11 Beav. 112, 50 E.R. 759.

[22] *Ibid.*, at p. 117 (Beav.).

[23] *Ibid.*

[24] *Supra*, footnote 12.

[25] *Supra*, footnote 20.

unwarranted. Moreover, and with deference, the actual finding of fact, that the plaintiff's reputation had not been injured by the advertisement, was at variance with one's everyday knowledge of the effect that such an advertisement would be likely to have upon a doctor's professional standing.

The result reached in *Clark* v. *Freeman* was not to pass unchallenged. Its reasoning was subsequently examined and disapproved in *Maxwell* v. *Hogg*[26] and *Dixon* v. *Holden.*[27] In the former, Cairns L.J. referred in the course of argument[28] to *Clark* v. *Freeman* and thought that it might have been decided in favour of the plaintiff on the ground that he had a "property" in his own name and that that property had been interfered with. In the latter, the facts were that the plaintiff had once been, but later ceased to be, a partner in a certain firm. After his departure the firm had assigned its property for the benefit of creditors. The defendant, who retained a financial stake in the firm, persisted in describing the plaintiff as an additional solvent partner in advertisements and notices. Malins V.C. granted an injunction, relying on an earlier decision of his own in *Springhead Spinning Co.* v. *Riley*,[29] where he had said:". . . a man has a sufficient property in his own name to prevent another from falsely passing off, injuriously to his reputation, medicines as personally prescribed by him, which might cause a total destruction of his professional character." This *dictum* (for which he had adduced no authority) was, of course, contrary to the *ratio* of *Clark* v. *Freeman.* The granting of relief was thus based upon the notion that a man's name might be an object of property, in the same way as his land and his chattels. In *Dixon* v. *Holden* itself, he expressed himself at greater length, asking:[30] "What is property? One man has property in lands, another in goods, another in a business, another in skill, another in reputation; and whatever may have the effect of destroying property in any one of these things (even in a man's good name) is, in my opinion, destroying property of a most valuable description." The learned Vice Chancellor approved *Routh* v. *Webster*[31] and dissented from *Clark* v. *Freeman.*[32] He made the injunction against the defendant perpetual, it having been admitted that equity might act by injunction to protect

[26] (1867), 16 L.T. R. 131, L.R. 2 Ch. 307. (Plaintiff and defendant claimed to call their magazines by the same name.)
[27] (1869), 20 L.T.R. (N.S.) 357, L.R. 7 Eq. 488.
[28] *Supra*, footnote 27, at p. 310 (Ch.).
[29] (1868), L.R. 6 Eq. 561.
[30] *Supra*, footnote 27, at p. 492 (Eq.).
[31] *Supra*, footnote 20.
[32] *Supra*, footnote 21.

"property".[33] If we ask ourselves whether this was a case of passing off, we must again answer no: there was no common field of activity in which both the plaintiff and the defendant were engaged at the relevant time, that is, when the notices were issued.[34] Indeed, they had at no time been trade rivals, though they had once been partners in the same firm. The damage to the plaintiff was damage to his reputation as a businessman who carried on other business activities. This too, therefore, was not a case of "passing off".

In *Levy* v. *Walker*,[35] however, the plaintiff had ceased to pursue *any* business activities. The firm of "C and W" was dissolved and the defendant purchased all the partnership assets. The Court of Appeal held that C was not entitled to ask the court to restrain the defendant from carrying on business under the same firm name. This result could have been attained on the simple ground that the goodwill of the business included a right to use the old firm name, "C and W". Of the three members of the court, James L.J. had no doubt of the correctness of that proposition; Jessel M.R. agreed with James L.J but did not rest his judgment upon the ground that the goodwill had passed;[36] Bramwell L.J. was silent altogether on the point. The precise *ratio* of the case is therefore doubtful but the following passage appears in James L.J.'s judgment:[37]

> . . . the sole right to restrain anybody from using any name that he likes in the course of any business he chooses to carry on is a right in the nature of a trade-mark, that is to say, a man has a right to say, "You must not use a name, whether fictitious or real—you must not use a description, whether true or not, which is intended to represent or calculated to represent, to the world that your business is my business, and so, by a fraudulent misstatement, deprive me of the profits of the business which would otherwise come to me". That is the principle, and the sole principle, on which the Court interferes. The Court interferes solely for the purpose of protecting the owner of a trade or business from a fraudulent invasion of that business by

[33] *Cf. Gee* v. *Pritchard* (1817), 2 Sw. 402, at p. 413, 26 E.R. 670 where Lord Eldon restrained the threatened publication of private letters on the ground that the sender retained a property in them: this was one of the authorities relied on by Warren and Brandeis in their famous article on "The Right of Privacy" in (1890), 4 Harv. L. Rev. 193, as recognizing one type of interest in privacy.

[34] Nor did the bill or counsel for plaintiff in their reported argument mention libel as a cause of action; in fact, counsel for the defendant argued (*supra*, footnote 26, at p. 490) that the plaintiff's only remedy, if any, was at common law for libel, but this argument was expressly rejected.

[35] (1878), 10 Ch. D. 436 (C.A.)

[36] *Ibid.*, at p. 447.

[37] *Ibid.*, at pp. 447-8.

somebody else. It does not interfere to prevent the world outside from being misled into anything.

This broad language may be interpreted in different ways. It may be no more than an assertion that, in passing off, the plaintiff must show that he stands to suffer some economic loss, direct or indirect, and that it is not sufficient merely to show that the public are likely to be misled in some way by defendant's use of his name. Or it may be construed as a repudiation of the developing doctrine that equity will act to prevent the appropriation of anothers' name without his consent. It is submitted that the former interpretation is correct. If it was intended to overrule *Routh* v. *Webster*[38] and *Dixon* v. *Holden*[39], it is strange that neither was cited. In fact, the requirement of proof of some economic loss, actually suffered or in prospect, is common to two distinguishable doctrines. "C and W" had not run into financial difficulties, as had the defendant in *Dixon* v. *Holden.*[40] Nor, as has already been pointed out, was the plaintiff in *Levy* v. *Walker*[41] suing as a merchant interested in other business activities: these two factors, it is submitted, would be sufficient to distinguish and so reconcile the two cases, if it were necessary to do so.[42] The Court of Appeal's approach, therefore, is very similar to that which it had taken earlier the same year in *Day* v. *Brownrigg*[43], where it laid down the rule that no action would lie to restrain the imitation of the name of a private residence. That case is also normally, but awkwardly, referred to by textbooks in their chapter on "Passing off".[44]

Next comes Byrne J.'s "speedy decision" (as he described it) in *Walter* v. *Ashton.*[45] Here the learned judge granted an injunction against the defendant who had been selling cycles in such a manner (that is, by name, method of purchase and style of letter-

[38] *Supra*, footnote 20.
[39] *Supra*, footnote 21.
[40] *Ibid.*
[41] *Supra*, footnote 35.
[42] Jessel M.R., in argument *ibid.*, at p. 445, referred to the *dictum* of Malins V.C. in *Maxwell* v. *Hogg*, *supra*, footnote 26, as "not well considered". The context shows that Jessel M.R. was referring to the "property in a name" theory.
[43] (1878), 10 Ch. D. 294. *Cf.* also *Street* v. *Union Bank of Spain* (1885), 30 Ch. D. 156 where the adoption of the same telegraphic address by another firm caused inconvenience but the court declined to interfere.
[44] See, for instance, Salmond, *op. cit.*, *supra*, footnote 3, p. 667; *cf.* also Snell's Principles of Equity (25th ed., 1960), p. 580 ("No injunction to remedy mere inconvenience"). The court in *Day* v. *Brownrigg*, *ibid.*, did not advert to defendant's contention that *Dixon* v. *Holden*, *supra*, footnote 27, had been overruled by the Court of Appeal in Chancery in *Prudential Assurance Company* v. *Knott* (1875), 10 Ch. App. 147. Disapproval of *Dixon* v. *Holden* in the last-mentioned case was no more than *obiter*.
[45] [1902] 2 Ch. 282.

ing) as to suggest to the public that his business was somehow connected with "The Times" newspaper. Both plaintiff and defendant were in business, but in entirely different businesses. There was, therefore, no question of a dispute between trade rivals, but this fact did not, in the learned judge's opinion, in itself disentitle the plaintiff to the relief he sought, for he was emphatic that the "ordinary passing off equity" had no application.[46] There was, moreover, no evidence that aynone had actually been deceived into thinking that the cycles advertised were connected with the newspaper.[47] The learned judge considered that the two conditions precedent to the granting of an interlocutory injunction had been met, namely, that the plaintiffs had been represented as "responsibly connected with [defendant's] venture", and that there was tangible probability of injury to the property of the plaintiff (the proprietor of the newspaper) in consequence.[48] He held that the newspaper had suffered a similar risk of injury to its name and hence its reputation as the plaintiff in *Routh* v. *Webster*[49] and was entitled to the same relief. Once again, a remedy was given against the unauthorized use of a name (though there were other sources of confusion as well), because the defendant's conduct was regarded as unconscionable; and the remedy was expressed to be independent of the rules about "passing off".

But it may be objected that in *Dockrell* v. *Dougall*,[50] which had been decided three years previously, the Court of Appeal had effectively vetoed any further application of what may be described provisionally as "the *Routh* v. *Webster* equity". Dougall had stated in a circular that the plaintiff, a well-known doctor, was prescribing "Sallyco", Dougall's medicine, as an habitual drink and that he had said: "Nothing has done my gout so much good." Quite the reverse was true: the plaintiff thought that the liquid would prove "disastrous" if consumed by members of the public and alleged that he was likely to be brought into contempt

[46] *Ibid.*, at p. 288.

[47] *Ibid.*, at p. 289.

[48] *Ibid.*, at p. 288. This consisted in "the reasonable probability of 'The Times' being exposed to litigation, and possibly of being made responsible" (at p. 295). It is difficult to see *why* this result was probable.

[49] *Supra*, footnote 20.

[50] (1899), 80 L.T. 556 (C.A.); this was one of the two authorities relied on by Greer L.J. in *Tolley* v. *Fry*, *supra*, footnote 11, to support his proposition that: ". . . unless a man's photograph, caricature, or name be published in such a context that the publication can be said to be defamatory within the law of libel, it cannot be made the subject-matter of complaint by action at law." (at p. 478). The other was *Corelli* v. *Wall* (1906), 22 T.L.R. 532. See Winfield's note on these two cases and their relationship to *Tolley* v. *Fry* (which later reached the House of Lords)

among medical practitioners and be considered guilty of an attempt to advertise. The jury, however, found there had been no libel and its finding was not challenged in the Court of Appeal where argument turned instead around the question whether a person had a right of property in his own name *per se*. Their Lordships (Smith, Williams and Romer L.JJ.) unanimously decided that he did not and that the doctor had no remedy. The previous decisions were cited, and it was contended that the unauthorized use of the plaintiff's name by the defendant gave rise to a cause of action; further, that there was a right of property in a man's name so that unauthorized use would be actionable if it was to the detriment of the plaintiff in his profession. Both of these propositions were denied.[51] Dr. Dockrell, said Williams L.J.[52], had "failed to prove anything more than the user of his name by the defendant without authority".

This looks at first rather like a return to *Clark* v. *Freeman*.[53] It is remarkable that Dr. Dockrell had no remedy at all upon proving the facts as stated.[54] Such an advertisement is unquestionably damaging to a doctor's professional reputation and the plaintiff should, it is urged, have succeeded in libel upon establishing the necessary innuendo. It is submitted that the jury's verdict was perverse.

The Court of Appeal found itself in a difficult position; to have granted the injunction would have looked like overruling the jury, a course which was not open to it. That the Court of Appeal was so fettered detracts considerably from the weight to be attached to the case. As it stands, however, several points should be noted. First, the court did not expressly overrule *Routh* v. *Webster*[55] or any of the other earlier decisions. Secondly, the case establishes that a man cannot sue because there has been an unauthorized use of his name without more. According to Smith L.J.[56]: "In order . . . to be entitled to an injunction . . . the plaintiff must show injury to him in his property, business or profession."[57] This proposition constitutes the *ratio* and makes clear what had been unclear in, for example, *Lord Byron* v. *Johnston*[58] and *Routh*

supra, footnote 11, in his article on "Privacy" (1931), 47 L.Q. Rev. 23. If the submissions made in the present comment were adopted, Greer L.J.'s *dictum* could no longer be regarded as stating the law.

[51] See, for instance, the judgment of Romer L.J., *ibid.*, at p. 558.

[52] *Ibid.*

[53] *Supra*, footnote 21.

[54] Counsel for the respondent were not even called upon to argue.

[55] *Supra*, footnote 20.

[56] *Supra*, footnote 50, at p. 557.

[57] Citing Lord Selborne L.C. in *re Rivière's Trade Mark* (1886), 50 L.T.R. 763, 26 Ch. D. 48, at p. 53.

[58] *Supra*, footnote 12.

v. *Webster*,[59] namely, that there must be "injury" to the plaintiff, actual or reasonably probable: otherwise the unauthorized use of the plaintiff's name is not against conscience. Thirdly, the Court of Appeal explicitly condemned the theory that a man has a "property" in his own name. Some of the reasoning to be found in the older cases in support of that theory cannot, after its disapproval in *Dockrell* v. *Dougall*,[60] be regarded as valid. Finally, there being no trade competition between the plaintiff and the defendant, the case cannot be pigeonholed under "passing off". In short, *Dockrell* v. *Dougall* does not stand in the path of a "*Routh* v. *Webster* equity".

No case of importance relevant to this survey was reported between Byrne J's. decision in *Walter* v. *Ashton*[61] and that of Wynn-Parry J. in *McCulloch* v. *May Ltd.*[62] The facts of that case may be briefly restated. The plaintiff was well known as a broadcaster in the "Children's Hour" under the name of "Uncle Mac". Using the same name, he broadcast for charity, wrote books, gave lectures and attended fêtes. The defendants, who were agents for puffed wheat manufacturers, began distributing wheat under the name "Uncle Mac's Puffed Wheat" and the plaintiff sought an injunction and nominal damages for passing off. He abandoned a charge of fraud. Wynn-Parry J. found as a fact[63] that the plaintiff had acquired a very wide reputation among British Broadcasting Corporation listeners, but decided for the defendants on the ground that there was no "common field of activity" in which both plaintiff and defendant were engaged: the plaintiff was "not engaged in any degree in producing or marketing puffed wheat".[64] The requirement of a "common field of activity" was derived inductively from a number of little-known passing off cases.[65]

[59] *Supra*, footnote 20. [60] *Supra*, footnote 50. [61] *Supra*, footnote 45.

[62] *Supra*, footnote 18. *Cf. Landa* v. *Greenberg* (1907), 24 T.L.R. 441 (plaintiff successfully alleged that her penname, "Aunt Naomi" had been passed off); followed in *Hines* v. *Winnick*, [1947] Ch. 708 ("Dr. Crock") ". . . if a man, be he musician, portrait painter or writer of articles in newspapers, gets to be known under a particular name, that name becomes inevitably part of his stock-in-trade, and apart from such special contract or anything of that kind, he is entitled to say that it is his name, and that anyone who adopts . . . that name . . .is inflicting upon him an injury." (per Vaisey J. at p. 713). *Hines* v. *Winnick* was distinguished by Harman J. in *Serville* v. *Constance, supra*, footnote 17 (holding that use of the *title* "Welterweight Champion of Trinidad" did not confuse the public as between plaintiff and defendant). In all three, plaintiff and defendant were "professional" rivals.

[63] *Ibid.*, at p. 847. [64] *Ibid.*, at p. 851.

[65] *A.-G. and General Council of Medical Education of U.K.* v. *Barrett Proprietaries Ltd.* (1932), 50 R.P.C. 45; *B.M.A.* v. *Marsh* (1931), 48 R.P.C. 565 (in which *Clark* v. *Freeman* was discussed); *Hall of Arts and Sciences Corporation* v. *Hall* (1934), 51 R.P.C. 398; and *Clocks Ltd.* v. *Clock House Hotel Ltd.* (1936), 53 R.P.C. 269.

His Lordship thought that to decide in the plaintiff's favour would mean the establishment of "an entirely new remedy", though the evidence before him "might or might not be relevant in an action for libel, such as *Tolley* v. *Fry*".[66] He denied that a man could claim "exclusive proprietary rights in a fancy name *in vacuo*". The next sentence goes on: "His right to protection *in an action for passing off* must depend on his showing that he enjoys a reputation in that name in respect of some profession or business that he carries on or in respect of some goods which he sells."[67] The only claim before him was one for passing off, and the *ratio* of the case is restricted therefore to that tort. So understood, the result is not inimical to a "*Routh* v. *Webster* equity", the existence of which was not argued, and hence not considered, by the judge. Whether that equitable relief could have been granted on the facts in the "Uncle Mac" case, however, remains more than doubtful, for how, consonantly with *Dockrell* v. *Dougall*[68] and *Walter* v. *Ashton*,[69] could the plaintiff have shown injury, or the probability of injury, to himself as a broadcaster? Unless it could be shown that the puffed wheat was of inferior quality or positively harmful, he stood rather to earn additional public esteem by the publicity given to his "fancy name". The publicity *would* have been injurious if evidence were adduced to show that the public thought it beneath his dignity as a broadcaster to be associated in any way with puffed wheat: which, of course, brings us back to where we started, the case of *Sim* v. *H. J. Heinz Co. Ltd., and anor*,[70] where comparable evidence *would* have been forthcoming at the trial.

There is, it is submitted, a body of authority, rather slender no doubt, in favour of the "*Routh* v. *Webster* equity" which has never been overruled and which is left unscathed by both *Dockrell* v. *Dougall*[71] and Wynn-Parry J.'s judgment in *McCulloch* v. *May Ltd.*[72] The equity originated in remedies given on the grounds of general principle by courts of equity. If A had "unconscionably" appropriated B's name, and hence B's reputation, for some purpose of his own, they were prepared to give a remedy provided that B had suffered injury, or the likelihood of injury, to his reputation as a poet, businessman, doctor or whatever it might be. Exceptionally, Langdale M.R., in *Clark* v. *Freeman*,[73] denied relief but later cases cast grave doubt upon that decision.

[66] *Ibid.*, at pp. 851-2.
[67] *Ibid.*, at p. 849. Italics mine.
[68] *Supra*, footnote 50.
[69] *Supra*, footnote 45.
[70] *Supra*, footnote 1.
[71] *Supra*, footnote 50.
[72] *Supra*, footnote 18.
[73] *Supra*, footnote 21.

The jurisdiction was not made dependent on the defendant having brought the plaintiff into hatred, ridicule or contempt, the formula of a libel action. If the facts of the cases discussed above are reconsidered, it will be found that a remedy was given in factual situations, for instance, that in *Routh* v. *Webster*[74] itself, where that formula could not be made to apply. Moreover, *Routh* v. *Webster* and the cases which follow it come from courts of equity; whereas defamation is the child of the common law. Nor is the "*Routh* v. *Webster* equity" a branch of the tort of passing off. It is not merely a specialized application of a general principle. In passing off, the plaintiff and the defendant must be in some sense competitors. This requirement is unnecessary and would be unlikely to exist in fact in the case of the contrasted doctrine.

We are left with the "*Routh* v. *Webster* equity", intact and independent of defamation *and* passing off. The courts of equity have provided a remedy given that certain conditions are satisfied. *Ubi remedium ibi jus:* whenever an injunction has been granted in a number of similar situations, we are justified in speaking of an equitable right.[75] The right is to ask the court to stop someone else making an unconscionable and unauthorized use of your name. If it exists, then it is capable of adaptation to meet slightly variant factual situations. Protection has so far been given against the unauthorized and unconscionable use of another's *name*.[76] But the courts would hardly be justified in confining relief to that situation. A man's name is only one of the parts of his personality which are liable to appropriation.[77] Exactly parallel situations call for the same reaction from equity. Relief ought also to be given by analogy to remedy the appropriation of another's *picture or photograph*, provided that the public could reasonably be expected to identify the features as those of the plaintiff (a question of fact); a medical man, for instance, is just

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[74] *Supra*, footnote 20.

[75] See Sir Raymond Evershed M.R., Reflections on the Fusion of Law and Equity After Seventy Five Years (1954), 70 L.Q. Rev. 326, at p. 331 ". . . the availability of equitable remedies in every class of case, and particularly of the remedy of injunction, has undoubtedly given rise to the possibility that thereby new rights have been or may be created . . . .", citing Lord Parker's speech in *Sinclair* v. *Brougham*, [1914] A.C. 398, at p. 442.

[76] It should be made quite clear that there is no such thing as an exclusive right to the use of any name. Unless there is some tortious use made of it, any one can be given or assume any name he likes: *du Boulay* v. *du Boulay* (1869), L.R. 2 P.C. 430; *Cowley* v. *Cowley*, [1901] A.C. 450 (H.L.); *Brown Chemical Co.* v. *Meyer* (1891), 139 U.S. 540.

[77] See discussion, *supra*.

as likely to suffer professionally if his picture, as apart from his name, is associated with a quack medicine.[78] And if the doctrine is applied to the plaintiff's *name* and his *picture*, could it halt there? It is submitted not, and that if a *voice* used for the purposes of an advertisement can be identified with the plaintiff's voice, then unauthorized and unconscionable user of the voice might be restrained by injunction, but not through an extension of the tort of "passing off" as counsel for the plaintiff sought to show in *Sim's* case.[79] It is at once apparent that if our principle were extended to cover the case of a voice, it would be only on the rarest occasions that the test of identification would be satisfied; the allegations in *Sim's* case, if substantiated, demonstrate one such occasion.

The "*Routh* v. *Webster* equity", as notionally so extended, might then be generalized in this manner: "Where A, without B's consent, makes unconscionable use of B's name, or any essential and identifiable part of B's personality for any purposes of his own and A's act has caused, or will probably cause, tangible[80] injury to B's reputation, or loss to him in his property, business or profession, the court will restrain A by injunction."

If we think in terms of the plaintiff's "equitable right", the statement of that right will need to be expanded correspondingly. "Unconscionable" is admittedly vague. But greater precision is at present unattainable and might be undesirable. Cases which would *not* be regarded as breaches of the equitable right would include:

(i) The imitation or mimicry of (for example) an actor's voice for purposes of entertainment. Mere *imitation* of another's personality is to be distinguished from the *appropriation* of it. The test seems to be this: is it made to appear that the actor is *actually associated* with the *production* of the performance? If the answer is yes, there should be a remedy.

(ii) The ordinary cartoon portraying a public figure. To make a joke about the public figure's personality is again not to appropriate it. No association between the public figure and the *production* of the cartoon would be drawn by the reflective public.

[78] But most photographs contained in advertisements, when purporting to depict actual persons, have some description appended.

[79] *Supra* footnote 1.

[80] "Tangible" may perhaps be used to indicate that the injury must not be so negligible that an injunction would not be justified. The criterion of injury need not be the opinions of "right-thinking members of society", as in defamation, but the opinion of, for instance, the British Medical Association concerning a doctor who advertises, or of city men concerning a company director who associates with an insolvent company.

If name, picture and voice are to be brought within the rule, it is suggested that one is entitled to generalize the rule in terms of *any* essential part of B's personality for there might be other facets of a man's personality subject to appropriation. The type of injury which must be shown would need either to have actually occurred or be reasonably probable in the ordinary course of events.[81] There should be no remedy if the public has been misled, without more.[82] It is conceivable that A may suffer in his "property, business or profession",[83] and yet we would find it strange to speak of A's *reputation* having been affected. Hence the alternative phrasing of the proposed formulation.

Proof that A has been fraudulent should, it is submitted, be unnecessary. There is no authority for this, but the opposite rule would seem to introduce an undesirable limitation, and fraud is not required in the analogous passing off situation.[84] In the majority of cases, where A's conduct has been "unconscionable" it will also have been fraudulent, and where fraud is made out, the court could penalize A in damages.

Must A be acting for the "purposes of commercial gain", a point that was raised earlier in this comment, and prompted by the way in which McNair J. saw the problem in *Sim's* case?[85] While most reprehensible conduct of the type under consideration would no doubt have "commercial gain" as its object, an altruistic or non-profit making motive for an appropriation of another's personality is a possibility. It is suggested that the defendant's motive as such should be regarded as irrelevant, as it is in most branches of the law of torts, but that absence of desire to make a profit out of the appropriation might be relevant in considering whether the act ought to be characterized as "unconscionable".

Finally, the court should have a discretion in each case which arises whether to make an award of damages in addition to granting an injunction: the latter, however, should, for historical and practical reasons, be regarded as the primary remedy following breach of A's "equitable right".[86]

[81] See *Walter* v. *Ashton*, *supra*, footnote 45.

[82] See *Levy* v. *Walker*, *supra*, footnote 35 and *Dockrell* v. *Dougall*, *supra*, footnote 50.

[83] Smith L.J.'s words in *Dockrell* v. *Dougall*, *ibid.*

[84] *Millington* v. *Fox* (1838), 3 My. and Cr. 338. The practice grew of awarding an account of profits or an inquiry into damages where fraud was not proved and this received the sanction of the House of Lords in the *Spalding* case, *supra*, footnote 4; *cf. Draper* v. *Twist*, *supra*, footnote 17.

[85] *Supra*, footnote 1.

[86] Speed would be essential in practice; an interlocutory injunction ought to be granted by analogy to the rule in *Bonnard* v. *Perryman*, *supra*, footnote 2, that is, in cases where the facts were sufficiently proved

I am not contending for the theory that a man has a "property" in his own name.[87] As soon as it is admitted that the court will remedy an appropriation, it is usually of no significance to ask whether there was a "property" in the thing appropriated.[88] Courts of equity have in the past sometimes demanded to be shown a "property" interest before they would act,[89] but it is submitted that, in the present instance, they have succeeded in granting remedies making only passing reference to that theory,[90] and finally repudiating it.[91]

It is now proposed to make a few comments on the relationship of the equitable right advocated in this comment to what is usually discussed as the "right of privacy". The common law knows no tort called "invasion of privacy". By contrast, the American case law and literature on the subject is immense,[92] and one recent development, to be discussed, seems to me to be of particular interest. The impetus to the development of an American doctrine of privacy was given by Warren and Brandeis in a celebrated article.[93] Only four American States now reject a doctrine of privacy in any form, but three other states have pass-

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or admitted, and the jury's verdict could be impeached if it did not find the formula to be satisfied at the ensuing trial.

[87] There has been debate on this theory in France, but a right of property in one's name is denied by most writers. See, for instance, Planiol, *Traité Elémentaire de Droit Civil* (12th ed., 1939), vol. I, p. 213 (s. 525), Josserand, *Cours de Droit Civil*, vol. I, ss. 206-22, deal generally with "Name"; s. 217, with property in a name. Some of the decisions cited by Planiol show that around the turn of the century, the courts were inclined to hold that a name could be enjoyed and disposed of exactly as the owner thought fit: this idea has not (semble) received more recent support. Josserand argues that if there is a right of property in a name, it has none of the characteristics usually associated with "property", for instance, alienability or exclusiveness. *Cf.* Mr. Justice Brown, speaking for the United States Supreme Court in *Brown Chemical Co.* v. *Meyer*, *supra*, footnote 76 and *Uproar Co.* v. *N.B.C.* (1934), 8 F. Supp. 358 (Mass).

[88] "It seems quite pointless to dispute over whether such a right is to be classified as 'property'." *per* Prosser, Privacy (1960), 48 Cal. L.Rev. 383, at p. 406. Somewhat inconsistently, he proceeds to speak of its "proprietary nature".

[89] *Cf.* a discussion on this general question by Pound, Equitable Relief against Defamation and Injuries to Personality (1915), 29 Harv. L. Rev. 640.

[90] For instance, *Dixon* v. *Holden*, *supra*, footnote 27.

[91] *Dockrell* v. *Dougall*, *supra*, footnote 50.

[92] A few of the many possible references to the literature may be given here: Eldredge, Modern Tort Problems (1941), pp. 71 and 77 (lecture entitled "Tort Liability for Mental Distress"); Prosser, Law of Torts (2nd ed., 1955), Ch. 20 and a recent and valuable survey of the current position by the same author in an article already referred to, "Privacy", *supra*, footnote 88. See also the American Restatement, Torts (1954) s. 867 and the detailed annotation to the title "Privacy" given in (1942), 138 A.L.R. 22.

[93] *Supra*, footnote 33.

ed restrictive statutes upon the subject.[94] In England, the Court of Appeal's decision in *Tolley* v. *J. S. Fry & Sons Ltd.*[95] provoked an article by Professor Winfield on the extent to which trespass to land and nuisance protect privacy of property and defamation protects personal privacy.[96] The most significant single case bearing on a "right of privacy" decided since 1931, the year in which Winfield surveyed the position, is the decision of the High Court of Australia in *Victoria Park Racing Co.* v. *Taylor*[97], but this affects privacy of property, not personal privacy.

Indeed, as soon as one starts to discuss the cases in which an interest in privacy has been afforded protection expressly or indirectly in any jurisdiction, it becomes necessary to sort the cases into groups separated by more or less clear dividing lines. Thus Prosser regards "invasion of privacy" as "a complex of four distinct wrongs which have little in common except that each is an interference with the plaintiff's right 'to be let alone' ".[98] It will be helpful to set out his four wrongs, though only the third and fourth are directly relevant here:

1. Intrusion upon the plaintiff's seclusion or solitude, or into his private affairs.[99]
2. Public disclosure of embarrassing private facts about the plaintiff.[100]

[94] For details, see Prosser, *op. cit.*, *supra*, footnote 92, p. 637.

[95] *Supra*, footnote 11, especially Greer L.J. at pp. 477-8 (K.B.).

[96] *Supra*, footnote 50. *Cf.* also Professor Gutteridge's comparative treatment of the law of Germany and Switzerland, and Dr. Walton's survey of French law, in (1931), 47 L.Q. Rev. 203 and 219 respectively.

[97] (1937), 58 C.L.R. 479: ". . . no authority was cited which shows that any general right of privacy exists", per Latham C.J., at p. 496. See Paton in (1938), 54 L.Q. Rev. 319, and Broadcasting and Privacy (1938), 16 Can. Bar Rev. 425.

[98] Prosser, *op. cit.*, *supra*, footnote 92, p. 637.

[99] *Cf.* as to English law *Harrison* v. *Duke of Rutland*, [1893] 1 Q.B. 142; *Hickman* v. *Maisey*, [1900] 1 Q.B. 752; *Lyons & Sons* v. *Wilkins* [1899] 1 Ch. 255 ("watching and besetting" premises); but see the *Victoria Park* case, *supra*, footnote 97. As to intrusion upon "private affairs", see the recent case of *Williams* v. *Settle*, [1960] 1 W.L.R. 1072 (C.A.), (photographer sold negative of wedding group, containing plaintiff's father-in-law, subsequently murdered, to two newspapers) in which plaintiff succeeded on the ground of breach of copyright. Space precludes full discussion. See note by Dworkin, Privacy and the Press (1961), 24 Mod. L. Rev. 1. A Bill has been introduced into the House of Lords by Lord Mancroft to protect the right of privacy. At the date of writing, its fate was uncertain. It is aimed primarily at the press and semble would relate only to Prosser's first wrong; it does not therefore affect the main theme of this comment.

[100] In the United States, the leading cases are: *Brents* v. *Morgan* (1927), 55 A.L.R. 964 ("placarding" a debtor) with which contrast the Ontario case of *Green et ux.* v. *Minnes et al.* (1893), 22 O.R. 177, where the decision turned on libel and the defendant's failure to justify; and *Melvin* v. *Reid* (1931), 112 Cal. App. 285 (revelation of plaintiff's lurid past life as a prostitute).

3. Publicity which places the plaintiff in a false light in the public eye.[101]
4. Appropriation, for the defendant's advantage, of the plaintiff's name or likeness.[102]

This analysis can be improved by splitting up the first class into its two component parts: the invasion (a) of personality interests; (b) of (real) property interests. Further, the third and the fourth classes overlap.

A full discussion of the "right of privacy" as it appears in English law, not of course under that name but in the form of tendencies in other torts, cannot be undertaken here. The justification for raising the matter at all is that if the reasoning of this comment were accepted by the courts, the "right of privacy" might be regarded as existing in English law *to the extent* that cases which Prosser would place in his third and fourth classes also fall within my general formulation of the "equitable right". Equity has so far been powerless to remedy instances of "breach of privacy" coming within Prosser's first and second classes. But half a loaf is better than no bread. It is believed that the courts in their equity jurisdiction would be able, by bold generalization from the cases in which they have granted remedies in the past, to remedy *certain* cases of what might be labelled "invasions of privacy". But the label is unimportant. The essential question is what the courts will do. It is not submitted that they ought to do any more than provide remedies for cases properly falling within the generalization which has been set out previously.

Several limitations have developed, and various defences gradually worked out, as the privacy cases have been litigated in the American courts. These include in particular: the doctrine of

[101] Prosser places *Lord Byron* v. *Johnston*, *supra*, footnote 12, under this head; and all "fictitious testimonial" cases. The leading American example of the latter is *Pavesich* v. *New England Life Insce. Co.* (1904), 122 Ga. 190, 106 Am. St. Rep. 561 (picture used as advertisement, plaintiff recovered for breach of privacy), with which compare *Clark* v. *Freeman*, *supra*, footnote 21, and *Dockrell* v. *Dougall*, *supra*, footnote 50. Contrast a significant trend in the South African courts to give recognition to privacy as an interest of personality: *O'Keefe* v. *Argus Printing and Publishing Co. Ltd.*, [1954] 3 S.A. 244 (C); *Kidson and ors* v. *S. A. Associated Newspapers*, [1957] 3 S.A. 461 (W) and *Mhlongo* v. *Bailey and anor*, [1958] 1 S.A. 370 (W); W. A. Joubert in (1960), *Tydskrif vir Hedendaagse Romeins—Hollandse Reg.* 23. I am indebted to Mr. S. B. Kossuth for the latter reference. I have to thank him and Mr. S. P. Posner, both of University College, Oxford, for discussing the subject-matter of this comment with me.

[102] Prosser mentions *Pollard* v. *Photographic Co.* (1888), 40 Ch.D. 345; Winfield, *op. cit.*, *supra*, footnote 50, at p. 31 (remedy given for publishing photo based on implied contract).

implied waiver of privacy by a public figure or celebrity;[103] the rule that the defendant's conduct must have been "offensive to persons of ordinary sensibilities" and beyond the "limits of decency";[104] and the rule that the right of privacy, being a right of personality, is not assignable.[105] If A contracts with company B to allow that company to publish his picture in connection with an advertisement, and later purports to confer the same privilege on company C, the benefit of the contract from company B's point of view will largely or wholly disappear. It desired *exclusive* publishing rights and no doubt paid the appropriate price: an implication of exclusiveness would be necessary to give the contract "business efficacy". But company B will not be allowed to assert A's right of privacy against company C and an award of damages against A himself for breach of the implied term in the contract may prove an inadequate remedy.[106]

Another doctrine which goes some way towards meeting the last-mentioned difficulty has received some judicial recognition. In one case[107], the name "Graham", when used in reference to a popular radio announcer, was held to have acquired a substantial value. It was said that the announcer had a right of "property" in his name, and that equity would protect this right which could be assigned to the company which employed him, entitling the company to a "proprietary" action against another broadcasting company which made use of the name. In New York, an entertainer consented to perform at half-time in a game of football, but did not agree to the televising of his performance: in holding that he had lost his right of privacy through the operation of the doctrine of waiver, Mr. Justice Desmond commented (*obiter*): "Privacy is the one thing he [the plaintiff] did not want or need in his occupation. His real complaint . . . is that he was not paid for the telecasting of his show . . . ."[108] In other words, the plaintiff

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[103] For instance, *Gautier* v. *Pro-Football Inc.* (1952), 304 N.Y. 354, 107 N.E. 2d 485 and *Sidis* v. *F.-R. Publishing Company* (1937), 113 F. 2d. 806, 138 A.L.R. 16 (the complaint of the child prodigy who later withdrew into seclusion). The defence of waiver was recognized by Warren and Brandeis in their original article, *supra*, footnote 33, at p. 215.

[104] American Restatement, *supra*, footnote 92, s. 867, note (d).

[105] For details of these and other defences, see Prosser, *op. cit.*, *supra*, footnote 88, at p. 419 *et seq.* and discussion by Nimmer, The Right of Publicity (1954), 19 Law and Contemporary Problems 203.

[106] *Hanna Manufacturing Co.* v. *Hillerich and Bradsby* (1935), 78 F. 2d. 763 (5th Cir.); noted in (1936), 45 Yale L.J. 520. *Sed quaere*, whether an action for inducing a breach of contract against company C might not be successful in some cases.

[107] *Uproar Co.* v. *N.B.C.*, *supra*, footnote 87.

[108] *Gautier* v. *Pro-Football Inc.*, *supra*, footnote 88, at pp. 361 and

had built up a reputation which had publicity value and the television company had, without authority, and unconscionably cashed in on that asset: but the "right of privacy" was of no use in remedying this state of affairs.

Finally, the Court of Appeals for the Second Circuit, in an opinion written by Judge Jerome Frank,[109] has expressly recognized a "right of publicity" saying: ". . . a man has a right in the publicity value of his photograph, *i.e.* the right to grant the exclusive privilege of publishing his picture . . . such a grant may be validly made 'in gross' *i.e.* without any accompanying transfer of a business or anything else . . . this right may be called a 'right of publicity'."

A "right of publicity" along the lines suggested by Judge Frank seems to be required as much in England and other common-law jurisdictions as in the United States. Further, a legally recognized power to assign that right would, it is urged, be beneficial both to performers and promoters. It is, however, clear that English law does no more in this sphere than apply the normal remedies following a breach of contract.[110] The American "right of publicity" is not the same as, and is not to be confused with, the "*Routh* v. *Webster*[111] equity", nor, of course, can it legitimately be extracted from any of the English cases.

The cases supporting the equitable right proposed in this comment are few and those few concern whether protection is available against the unauthorized appropriation of one's *name*. *Sim* v. *H. J. Heinz Co. Ltd. and anor*[112] raises for the first time the question whether one's *voice* may be pirated. The dearth of decided cases may be partly explained by the consideration that the authorities discussed[113] are so little known, and no generaliza-

489-90 of the respective reports. See also *O'Brien* v. *Pabst Sales Co.*, (1941), 124 F. 2d. 167 (5th Cir.).

[109] *Haelan Laboratories Inc.* v. *Topps Chewing Gum Inc.* (1953), 202 F. 2d. 866 (2nd Circ.); notes in (1953), 62 Yale L.J. 1123 and 66 Harv. L. Rev. 1536. The decision has not yet been followed and in California it has been held that a "right of publicity" does not exist: *Strickler* v. *National Broadcasting Co.* (1958), 167 F. Supp. 68 (S. D. Cal.).

[110] If a theatrical manager or producer fails to carry out the terms of an engagement of an actor, the latter's "loss of publicity" is of great importance in assessing the damages: *Marby* v. *George Edwardes (Daly's Theatre) Ltd.*, [1928] 1 K.B. 269 (C.A.), at pp. 281, 288; *Clayton and ors.* v. *Oliver*, [1930] A.C. 209 (H.L.), per Lord Buckmaster, at p. 220; *Withers* v. *Gen. Theatre Corporation*, [1933] 2 K.B. 536 (C.A.). At p. 550, Scrutton L.J., explaining the *Clayton* case, compares "loss of reputation" and "loss of publicity".

[111] *Supra*, footnote 20.

[112] *Supra*, footnote 1.

[113] See footnotes 12 to 60.

tion from them previously attempted. Even if this is so, the recognition of an equitable right along the lines suggested is not to be thought of as an urgent task confronting the judges. All reputable advertisers obtain the consent of prominent persons before incorporating their photographs in advertisements. The names of stage and screen celebrities are not bandied around indiscriminately. It would nevertheless be comforting to be assured that the courts have jurisdiction to grant an injunction to meet the exceptional case. If the need is not urgent, the facts which presented themselves in *Sim's* case,[114] and the doubts and difficulties which those facts raised for McNair J. and the Court of Appeal, provide a reminder that a problem certainly exists. If the courts do not take the way to its solution, pointed by the equitable injunction, there will indeed be a "grave defect" in that sphere of law which protects interests of personality.

D. L. MATHIESON*

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HUSBAND AND WIFE — MATRIMONIAL HOME — PRESUMPTION OF JOINT ASSETS — DISCRETION OF JUDGE UNDER ONTARIO MARRIED WOMEN'S PROPERTY ACT — PALM-TREE JUSTICE — FAMILY IN MODERN DEMOCRACY — A case of primary importance for property lawyers of the common-law provinces of Canada is *Thompson* v. *Thompson*[1] decided by the Supreme Court of Canada.

The facts are rather complicated and must be set out in full.

The parties were married in 1931, and it would seem that for the first nineteen years of their married life lived in rented quarters. The wife was a wage earner prior to the marriage and also afterwards and for a great portion of those nineteen years accumulated some monies in a bank account which was in her own name. This account she maintained throughout the marriage.

In 1945, the husband purchased a twenty-acre parcel of farm land on the outskirts of Toronto for $1,940.00, taking the conveyance in his own name. He paid $100.00 as a deposit; $1,440.00 was secured by a mortgage, leaving a balance of about $400.00 to be paid on closing. Prior to the date of closing but after the husband signed the offer to purchase, the wife put $300.00 into a joint

[114] *Supra*, footnote 1.

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[1] [1961] S.C.R. 3, (1961), 26 D.L.R. (2d) 1.

bank account, which had been established by the husband shortly before his going overseas in 1939. This was done to enable him to pay the balance by a cheque drawn thereon. Such deposit was the only one the wife ever made in this account, which had originally been in the husband's name only. Before 1945, the amount of money in the joint bank account, at any one time, does not seem to have been very much. It must also be noted that from 1940-1944, while the husband was overseas, he had sent monies to his wife who was then working, for deposit in the joint account, with the intention that he should have an emergency fund when he returned. This money she used on herself.

The husband alone was liable on the mortgage which he repaid out of his own monies although some were paid by cheques drawn on the joint bank account. Until 1950, he received all the rents from the land which he leased to neighbouring farmers. In 1948, he began to build a house on the land which was completed in 1951, and for this purpose obtained the assistance of a loan for $6,000.00 under the Veterans' Land Act.

In 1949, he received $1,400.00 from his wife as part of the building costs of the house under construction. This sum he repaid by endorsing his progress payments under the Veterans' Land Act, in the amount of $1,545.00 to his wife, which in turn, she deposited in her own bank account.

The parties moved into the new house in 1950 and until 1954 some portion of the land was farmed by the husband who was assisted in this by his wife.

In 1954, the land, other than the small portion on which the home stood, was sold for $40,000.00, half payable in cash. From such cash, after paying the amount owing under the Veterans' Land Act, the husband received a sum of $12,807.30, of which he gave one-half to his wife.

The husband, as sole mortgagee for the balance of the price received, retained all monies payable under the mortgage for a period of two years and until the institution of the action, the wife never made any claim. In 1957, the parties separated and the wife subsequently claimed a proprietary interest in the property and proceeds of the sale on the basis of her contribution to the down payment, and of her financial dealings with her husband.

At the trial, the wife's claim was dismissed on the ground that she had made no financial contribution to the purchase. Kelly J. found that the $300.00 provided by the wife to make up the $500.00 cash payment was not a contribution to the purchase price but

represented a reimbursement by the wife of monies which she had taken out of the joint account while her husband had been overseas. On consideration of the whole evidence, the trial judge concluded that the financial dealings between the spouses indicated no proprietary interest in the land and house on the part of the wife.

In Court of Appeal of Ontario,[2] on the other hand, per Laidlaw J.A. and McGillivray J.A., held that she was entitled to an equal share with her husband of the proceeds of the sale of part of the property sold by him including the proceeds of the mortgage given by the purchaser to him; and that the land and premises reserved by the husband from the sale (the two-acre lot) also belonged to each of the parties in equal shares.

MacKay J.A., in a dissenting opinion held that there was no reason to disturb the findings of the trial judge. There had been no intention between the parties either expressed or to be inferred from their conduct and dealings that the property was to be owned jointly.

In the Supreme Court of Canada, the judgment of the majority upheld the trial judgment stating: "The evidence satisfies me, as it did the learned trial judge and MacKay J.A. (dissenting in the Court of Appeal), that it was the husband who purchased the property with his own money and that there was no intention between the parties either expressed or to be inferred from their conduct and dealings that this property was to be held jointly."[3]

On these facts, it is submitted that the case was rightly decided. The wife made no financial contribution towards the purchase of the property. There was no indiscriminate allocation of funds between the spouses that might have given rise to an inference that they considered themselves jointly beneficially entitled. At the date of the purchase, the property was farm land to be considered as a business venture by the husband for speculative purposes.[4] The matrimonial home was not built until about five years later. It was clear that the property, when purchased, was intended to belong to the husband as the legal owner as well as the beneficial owner and there was no subsequent agreement to vary the husband's established title. It is interesting, however, to point out that in the two appellate courts, four of the justices dismissed the wife's claim while four were in favour of granting to her a joint interest in the property.

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[2] (1960), 22 D.L.R. (2d) 504, *per* Laidlaw J.A., at p. 506, *per* MacKay J.A., at p. 525.

[3] *Per* Judson J., writing for the majority, *supra*, footnote 1, at pp. 10 (S.C.R.), 6 (D.L.R.).

[4] *Per* Martland J., *ibid.*, at pp. 9 (S.C.R.), 5 (D.L.R.).

The *obiter* dictum of Mr. Justice Judson is perhaps the most significant aspect of this case. He states:

> . . . no case has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation and the fact the property in question is the matrimonial home. Yet, if the principle is sound when it is based on a financial contribution, no matter how modest, there seems to be no logical objection to its application and the exercise of the same discretion when there is no financial contribution when the other attributes of the matrimonial partnership are present.[5]

The importance of this opinion by the Supreme Court of Canada is due to the fact that it comes after a series of cases in England which have developed the presumption of joint assets in disputes between husband and wife over the matrimonial home and its contents.[6] The English presumption or rule is this: when both husband and wife contribute to the cost of the matrimonial home and its contents, and the property is intended to be for their joint use and benefit during their lives, the property belongs to them both jointly in equal shares. This is so even though the conveyance is taken in the name of one of them only and the contributions to the cost are unequal.[7] The basis for the creation of this presumption is the wide discretion given to the trial judge by virtue of section 17 of the English Married Women's Property Act,[8] which provides in part that: "In any question between husband and wife as to title to or possession of property . . . the judge . . . may make such order with respect to the property in dispute . . . as he shall think fit." [9]

The foundation on which this recent legal presumption rests has been summarily stated by Romer L.J. in *Rimmer* v. *Rimmer*[10] when he said:

> It seems to me that the only general principles which emerge from our decision are, first, that cases between husband and wife ought not to be governed by the same strict considerations both at law and equity, as are commonly applied to the ascertainment of the respective rights

[5] *Ibid.*, at pp. 14 (S.C.R.), 9 (D.L.R.).

[6] Beginning with the dissent of Denning L.J. in *Hoddinott* v. *Hoddinott*, [1949] 2 K.B. 406, at p. 414. The dissent was adopted in *Rimmer* v. *Rimmer*, [1952] 2 T.L.R. 767, [1952] 2 All E.R. 863, [1953] 1 Q.B. 63; *Cobb* v. *Cobb*, [1955] 1 W.L.R. 731, [1955] 2 All E.R. 696; *Silver* v. *Silver*, [1958] 1 All E.R. 523; *Richards* v. *Richards*, [1958] 3 All E.R. 513; *Fribance* v. *Fribance*, [1957] 1 W.L.R. 384, [1957] 1 All E.R. 357—all decided by the English Court of Appeal.

[7] See Denning L.J. in *Cobb* v. *Cobb*, *ibid.*, at p. 698.

[8] (1882), 45 & 46 Vict., c. 75.

[9] S. 12(1) of The [Ontario] Married Women's Property Act, R.S.O., 1950, c. 223, now R.S.O., 1960, c. 229.

[10] *Supra*, footnote 6, at p. 870.

> of strangers when each of them contributes to the purchase price of property, and secondly, that the old-established doctrine of "Equity leans toward equality" is peculiarly applicable to disputes of the character of that before us when the facts, as a whole, permit its application.

It could be said that the development of the joint-asset rule is an illustration of judicial law-making, which the Supreme Court of Canada is not prepared to undertake. The effect of the *obiter* dictum in the *Thompson* case is that it considerably weakens in Canada the influence which these recent English cases have had.[11] This is clear from Mr. Justice Judson's express disapproval of the English Court of Appeal's reasoning when he states that if any presumption of joint assets is to be created in matrimonial cases, then it should be accomplished by legislation rather than by the exercise of an immeasurable judicial discretion under section 12 of The Married Women's Property Act. There is, indeed, no precedent in the common-law provinces of Canada for the principle of community of property apart from statute.

The broad effect of the married women's property Acts[12] of most Canadian common-law jurisdictions is that neither spouse acquires any rights by marriage in the property of the other. By virtue of The Married Women's Property Act of Ontario, a married woman, generally, is capable of acquiring, holding and disposing by will and otherwise of any real or personal property as her separate property in the same manner as if she were a *femme sole* without the intervention of a trustee.[13] She is also entitled to have and to hold and to dispose of as her separate property, all real and personal property belonging to her at the time of the marriage.[14] Where in disputes over title to property between spouses, the wife tries to attach to it the quality of separate property, she must show some legal right or interest in the property, either by virtue of contract or gift.[15] A married woman is capable of contracting with her

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[11] *Re Married Women's Property Act, re Stajcer* v. *Stajcer* (1961), 34 W.W.R. 424.

[12] *Supra*, footnote 5. As to the history of the Ontario statutes see: 7 Canadian Encyclopaedic Digest, s. 20, p. 311, and Dicey, Lectures on the Relation Between Law and Public Opinion in England during the Nineteenth Century (2nd ed., 1930), p. 359 *et seq.*, for an outline of the historical development of the law as to the property of married women.

[13] *Supra*, footnote 9, s. 2(1).

[14] *Ibid.*, s. 2(2). Note that in Ontario, a married woman's property may still be subject to the restraint upon anticipation, *ibid.*, s. 10.

[15] *Hoddinott* v. *Hoddinott*, *supra*, footnote 6; *Rioux* v. *Rioux* (1922), 53 O.L.R. 152, approved of in *Minaker* v. *Minaker*, [1949] S.C.R. 397, at p. 399.

husband as with any one else;[16] and when she contracts with her husband, she is subject to the same requirements and obligations as she would be if contracting with a third party; but the agreement between spouses may, on the face of it, be of such a nature as to show an intention merely to make a domestic arrangement and not a legal contract whereon a cause of action can be founded.[17] As in the case of a stranger, it is a question of fact whether the wife handed money to her husband as a gift or as a loan.[18] In some instances, where a wife is shown to have contributed monies, she may be entitled to a lien, or to rank as a secured creditor, or to share in the proceeds of sale in the proportion in which she has contributed, depending upon the person who is entitled to the beneficial ownership. It is evident, therefore, that the courts have placed reliance on strict contractual and legal considerations based on the principle of separate property.

While it might be thought that under section 12 of The Ontario Married Women's Property Act,[19] a wide power is conferred upon the judge to make an order in disputes between spouses as to title to property as he thinks fit, the discretionary use of such power has not developed in the same way in Canada as it has in England and in other Commonwealth countries.[20] The Supreme Court of Canada, in cases coming before it, has limited this discretionary judicial power with respect to ownership of land and has applied the same strict rules of law and equity which would be applied in a contest between strangers, subject to the presumptions of advancement or resulting trust when the property purchased by one person is placed in the name of another. In *Minaker* v. *Minaker*,[21] wherein the husband sued for possession, the wife claimed she was either the owner, or jointly entitled, or that the husband held the property as trustee for her. Mr. Justice Rand (as he then was) stated:

> The facts tend, no doubt, to excite sympathy for the wife and child, but we must resist the danger of allowing it to *outrun rules too well and too long established to be disregarded.*[22] Viewing the evidence in the light most favourable to the wife, I can find nothing to warrant

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[16] The Married Women's Property Act, *supra*, footnote 9, s. 3; *Anderson* v. *McLaren* (1924), 56 O.L.R. 26, at p. 28.

[17] Lush, On Husband and Wife (4th ed., 1933), p. 262 and cases cited therein, particularly *Balfour* v. *Balfour*, [1919] 2 K.B. 571.

[18] *Warner* v. *Murray* (1889), 16 S.C.R. 720; See also for a similar principle *Young* v. *Spofford* (1916), 37 O.L.R. 663, at p. 664.

[19] *Supra*, footnote 9.

[20] See, for example, *Peychers* v. *Peychers*, [1955] N.Z.L.R. 564; *Wood* v. *Wood*, [1956] V.L.R. 478.

[21] *Supra*, footnote 15, at p. 402.

[22] Italics mine.

> the holding either that there was a contract between them by which any interest in the property was to be hers, or that any money belonging to her can be said to be represented by the land. In the early period of their married life, the wife accepted the difficulties of the situation courageously and for three or four years worked in outside employment at wages: but they went into a common fund used to carry the family life from day to day. It is impossible to trace any part of the money so earned into the purchase of the land or into the two properties whose purchase and sale preceded it.

Further in *Carnochan* v. *Carnochan*,[23] Cartwright J., who wrote the judgment for the Supreme Court, pointed out that in a question between husband and wife as to the title to property, the judge should not have a discretion to decide such questions otherwise than in accordance with the applicable rules of law and equity. In *Jackman* v. *Jackman*,[24] where the property, comprising the matrimonial home, was registered in the wife's name, the Supreme Court applied the legal presumption of advancement and considered that on all the evidence the presumption had not been rebutted.[25] The cases show that the primary task for the courts is to ascertain the intention of the parties — whether proved or presumed — as to the beneficial ownership of the property at the time it was purchased. This, however difficult it may be, they must do on the basis of the facts and of all the surrounding circumstances. The courts must find out whose is the property. *Prima facie*, the person in whom the legal estate is vested is also the beneficial owner, although this may be subject to a contrary arrangement specifically arrived at between the parties and to the presumption of a resulting trust or of advancement,[26] depending upon the case.

While it might be desirable that the judge should have the power to do what is fair and just in the circumstances of each case, it would seem that this discretionary judicial power would lead to uncertainty in the law of real property, for there are as many individual views of justice as there are judges. Furthermore, if the

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[23] [1955] 4 D.L.R. 81.

[24] [1959] S.C.R. 702, (1959), 19 D.L.R. (2d) 317.

[25] In the Alberta Court of Appeal (1958), 25 W.W.R. 131, it was held that the presumption of advancement had been rebutted and that the wife held the property which was the matrimonial home as trustee for her husband and herself. It was also held that when a family asset, acquired for their joint use as a home, is acquired with no thought of what is to happen should the marriage break down, common sense dictates that such an asset should be treated as the joint property of both, in the absence of evidence to the contrary. In *Mitchelson* v. *Mitchelson* (1953), 9 W.W.R. 316, the presumption of joint assets was applied.

[26] The rules and principles that have been applied by the courts are discussed in an article by E. F. George entitled Disputes Over the Matrimonial Home (1952), 16 Conveyancer and Property Lawyer 27.

presumption of joint assets is to be made applicable in the case of the matrimonial home, it should be universally applied; for, if the courts on one set of facts apply the presumption of advancement, as would happen if the husband conveyed or caused to be conveyed the property into the name of his wife, and on another set of facts apply the new presumption of joint assets, usually in cases where the legal title is in the name of the husband and the wife is shown to have contributed, then, it is submitted that the law would be uncertain and would seem to favour the wife. For instance, in *Silver* v. *Silver*,[27] the husband claimed a beneficial interest in the matrimonial home, purchased in the wife's name, but with the husband making the mortgage payments. The English Court of Appeal held that while the marriage subsisted there was a presumption that the mortgage monies paid by the husband were gifts to the wife. On the other hand, in *Rimmer* v. *Rimmer*[28] the same Court of Appeal considered that it was uncommon for spouses to have any positive intentions as to the beneficial ownership at the time they acquired the property, and so presumed that equality was the most equitable solution. English courts take into consideration the fact of the joint venture—a property purchased for their mutual benefit during marriage—together with the indiscriminate allocation of the assets of both parties. Economic and sociological factors also play their part, such as the arthritic wife in the *Silver* case, the windfall after the war in *Rimmer* and the pauper in *Peychers*.[29]

One must admit that it is difficult to determine the exact legal basis for the presumption that the matrimonial home is a joint asset of the spouses. Although it is conceded that husband and wife, at the time of purchase of the matrimonial home, seldom have any positive intentions, and that the efforts and monies of the wife for the upkeep of the home and otherwise should be given recognition, yet there is no provision in the statutes for giving a spouse rights in property otherwise than in accordance with the too well and long established rules of law and equity. In the words of Dicey: "The duty of a court—is not to remedy a particular grievance but to determine whether an alleged grievance is one for which the law supplies a remedy."[30] " If Parliament changes the law, the action of Parliament is known to every man and Parliament tries in general to respect acquired rights. If the Courts were to apply to the decision of substantially the same case, one principle

[27] *Supra*, footnote 6. [28] *Ibid.* [29] *Supra*, footnote 20.
[30] *Op. cit.*, *supra*, footnote 12, p. 363.

today and another principle tomorrow, men would lose rights which they already possessed; a law which was not certain would in reality be no law at all. Judicial legislation, then, is a form of law-making which aims at and tends towards the maintenance of a fixed legal system."[31] The attitude of the Supreme Court of Canada does not depart from established principles of jurisprudence.

ALDONA F. VASSAL*

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In *Thompson* v. *Thompson*,[1] the Supreme Court of Canada had the opportunity of applying the "palm-tree justice" enunciated by the English Court of Appeal in *Rimmer* v. *Rimmer*,[2] but chose to reject this doctrine. Kerwin C.J.C., although dissenting from the decision of the court said:[3]

> I am not suggesting that there is a community of the property in Ontario as between husband and wife, and I do not rely upon the palm-tree justice referred to in some decisions in England mentioned in the reasons for Judgment in the Court of Appeal; I place my conclusion upon the grounds that there is evidence in this record that the parties considered that each was entitled to a one-half interest in the land.

Judson J., speaking for the majority, was of the opinion that:[4]

> The judicial use of the discretionary power under Section 12 of The Married Women's Property Act, R.S.O., 1950, c. 223, in property disputes between husband and wife has not developed in the same way in the common-law provinces of Canada as it has in England. There is no hint of it in this Court in *Minaker* v. *Minaker*, [1949] 1 D.L.R. 801, S.C.R. 397 and there is an implicit rejection of the existence of any such power in *Carnochan* v. *Carnochan*, [1955] 4 D.L.R. 81, S.C.R. 669, where Cartwright J. stated that the problem was not one of the exercise of a discretionary power but one of application of the law to ascertained facts. Further, in *Jackman* v. *Jackman* (1959), 19 D.L.R. (2d) 317, [1959] S.C.R. 702, where the Alberta Court of Appeal, reversing the judgment at trial, had applied the line of decisions above referred to, this Court declined to support the exercise of the discretionary power in the rebuttal of the presumption of advancement in circumstances where the husband's contribution was very large and where it should not have been difficult to draw an inference of a joint interest in the matrimonial home. If a presumption of joint

[31] *Ibid.*, p. 365.

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[1] [1961] S.C.R. 3, (1961), 26 D.L.R. (2d) 1.

[2] [1952] 2 T.L.R. 767, [1952] 1 All E.R. 863, [1953] 1 Q.B. 63.

[3] *Supra*, footnote 1, at pp. 9 (S.C.R.), 7 (D.L.R.).

[4] *Ibid.*, at pp. 14 (S.C.R.), 9 (D.L.R.).

> assets is to be built up in these matrimonial cases, it seems to me that the better course would be to obtain this object by legislation rather than by the exercise of immeasurable judicial discretion under Section 12 of The Married Women's Property Act.

Rimmer v. *Rimmer* has been followed not only in England,[5] but in New Zealand,[6] and within Canada, in Manitoba,[7] and British Columbia.[8]

The decision in *Thompson* v. *Thompson* is one cast in a nineteenth century mould. Then, the husband was the breadwinner, the wife contributing little or nothing to the family finances directly unless she came from wealth. The settlement with restraint on anticipation was the device used to protect the independent means of the wife. With the "independent wealth" in mind, judicial decisions and legislation sought to protect her further by raising her position to that of a *femme sole*. The problem in the second half of the twentieth century is not that of the wife's ability to contract freely, nor her ability to hold and dispose of property independent of her husband's wishes, but to secure to the wife a portion of the family assets, the accumulation of which was made possible partly by her industry.[9]

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[5] *Cobb* v. *Cobb*, [1955] 1 W.L.R. 731, [1955] 2 All E.R. 696; *Fribance* v. *Fribance*, [1957] 1 W.L.R. 384, [1957] 1 All E.R. 357.

[6] *Peychers* v. *Peychers*, [1955] N.Z.L.R. 564; *Dillon* v. *Dillon*, [1956] N.Z.L.R. 162.

[7] *Mitchelson* v. *Mitchelson* (1953), 9 W.W.R. 316.

[8] *Sopow* v. *Sopow* (1958), 24 W.W.R. 625; but see now *Re Married Women's Property Act, re Stajcer and Stajcer* (1961), 34 W.W.R. 424, where Wilson J., at p. 425, had this to say: "I have, of course, been referred to *Rimmer* v. *Rimmer*, [1952] 2 T.L.R. 767, [1952] 2 All. E.R. 863, to *Fribance* v. *Fribance*, [1957] 1 W.L.R. 384, [1957] 1 All E.R. 357 and to *Sopow* v. *Sopow* (1958), 24 W.W.R. 625, in which my brother Lord followed those two decisions. But I do not consider that the facts here bring me within the *ratio decidendi* in those cases and, furthermore, I must hold that the judgment of the Supreme Court of Canada in *Thompson* v. *Thompson*, [1961] S.C.R. 3 considerably weakens in Canada the weight of all three cases."

[9] The English Royal Commission on Marriage and Divorce (Cmd. 9678) (1956), unanimously reported as follows (at p. 175, para. 644): "In the first place, we fully endorse the view that marriage should be regarded as a partnership in which husband and wife work together as equals and that the wife's contribution to the joint undertaking in running the home and looking after the children is just as valuable as that of the husband in providing the home and supporting the family. We think that the importance of the wife's contribution is not always sufficiently recognized. There are husbands who look on their income as their own to spend freely on themselves and grudgingly dole out small sums to their wives, but it is when the marriage breaks down that the wife, who has given all her energy to her work in the home, may have to face the situation that she has nothing she can call her own; even moneys they have saved over the years from the house-keeping allowance belongs in law to the husband. We recognize that real hardship may occur in this type of case." When the above was written, *Rimmer* v. *Rimmer*, *supra*, footnote 4, had

The facts in *Rimmer* v. *Rimmer*[10] were as follows: The parties were married in 1934 and, within a year of their marriage, a home was purchased for £460. The down payment of £29 was paid by the wife but the home was taken in the name of the husband and he alone executed the mortgage by which the balance of £431 was secured. Both husband and wife were wage earners, and the husband paid part of his weekly earnings to the wife towards the housekeeping. Prior to the war, the husband made all payments directly to the Building Society holding the mortgage. In May of 1942, the husband joined the Merchant Service and made allotments to his wife. Out of these allotments the wife made payments, on behalf of the husband, to the Building Society and, in addition to such payments, during the years 1944, 1945 and 1946, she made further payments totalling £280, with the result that the mortgage was totally redeemed. The husband returned to the wife at the war's end, but, in 1951, they separated and early in 1952 the husband sold the house. The sale realized the sum of £2,117. The wife applied to the County Court, under section 17[11] of The Married Women's Property Act, for a share of this sum. The evidence disclosed that the husband had paid in reduction of the mortgage £151. The wife had paid the balance of the purchase price, namely, £309.

The Registrar of the County Court held that the proceeds of the sale be divided in the same proportion as the contributions made by the parties—a solution giving the wife approximately two-thirds of the proceeds. The County Court judge, to whom an appeal was taken, held that the proceeds should be divided in the proportions of 431 to the husband and 29 to the wife, subject to his paying to her from his share the sum of £280, which was what the wife had directly contributed to reduce the principal amount of the mortgage. The Court of Appeal held that the proceeds should be divided equally.

The phrase "palm-tree justice" occurs in the judgment of the Master of the Rolls, Sir Raymond Evershed. After quoting *in*

already been decided and is indeed mentioned in the Commission's report.

It is to be noted that where the principle of *Rimmer* could not be applied, because of the sale of the property and disposal of the bulk of the proceeds of such sale, the Commission recommended an amendment to s. 17 of The Married Women's Property Act (1882), 45 & 46 Vict., c. 75, which would enable the principle enunciated in *Rimmer* to operate on such monies remaining in the spouse's hands. Such amendment was speedily enacted.

[10] *Supra*, footnote 2.

[11] *Supra*, footnote 9. Similar in wording to s. 12 of The Married Women's Property Act, R.S.O., 1950, c. 223, now R.S.O., 1960, c. 229.

extenso section 17 of The Married Women's Property Act, he purports to adopt as his test the observations made by Bucknill L.J. on this section, in *Newgrosh* v. *Newgrosh*.[12]

> I venture to take as my guide or test the observations of a wise Judge, Bucknill L.J., in a case which I think is not reported of *Newgrosh* v. *Newgrosh* decided on June 28th, 1950. Bucknill L.J. said: "That" — and he referred to the citation I have just made — "gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time, at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described here as 'Palm Tree Justice'. I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case."[13]

The ratio of the judgment of the Master of the Rolls is that:[14]

> Where the Court is satisfied that both parties have a beneficial interest, and a substantial beneficial interest, and where it is not possible or right to assume some more precise calculation of their shares, equality, I think almost necessarily follows.

In the judgment of Denning L.J., the following is said:

> In cases when it is clear that the beneficial interest in the matrimonial home or in the furniture belongs to one or the other absolutely or it is clear that they intended to hold it in definite shares, the court will give effect to their intention: see *In re Rogers Question*, [1948] 1 All E.R. 328, but when it is not clear to whom the beneficial interest belongs or in what proportions, then, in this matter, as in others, equality is equity.[15]

When considering *Thompson* v. *Thompson*,[16] it is tempting to say that the appellation "not followed" cannot be applied to *Rimmer* v. *Rimmer*,[17] and that instead it was distinguished on the facts by the Supreme Court of Canada on the ground that the trial judge found a clear intention at the outset that the property was to belong to the husband absolutely.

The difficulty in viewing the *Thompson* decision as merely distinguishing *Rimmer* stems from the very strong views expressed by Judson J. in his judgment and, indeed, the refusal of Kerwin C.J.C. and Cartwright J. to summon *Rimmer* in support of their dissenting views.

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[12] In *Rimmer* v. *Rimmer*, *Newgrosh* v. *Newgrosh* is said to be unreported but there is a brief report which appears in (1950), 100 L.J. 525.
[13] *Supra*, footnote 2.
[14] *Ibid.*, at p. 72.
[15] *Ibid.*, at p. 73. See also the judgment of Denning L.J. in *Fribance* v. *Fribance*, *supra*, footnote 5, at p. 387 (W.L.R.).
[16] *Supra*, footnote 1.
[17] *Supra*, footnote 2.

It is suggested that some of the opprobrium directed against *Rimmer* may stem from the phrase "palm-tree justice", and it is unfortunate that the phrase was employed. It conjures up a vision of a make-shift tribunal, untrammelled by rules invariably arriving at a Solomon's judgment of cutting everything down the middle, a vision entailing similar decisions on substantially different facts, or different decisions on substantially similar facts. In truth, the ratio in *Rimmer* is but another application of the maxim "Equity leans to equality".[18] The hardships that may be suffered by an estranged wife in Canada are no different from those enumerated by the English Royal Commission.[19] *Rimmer* v. *Rimmer*[20] is a good starting point[21] for decisions ameliorating these hard-

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[18] See Mr. R. E. Megarry's case note in (1953), 69 L.Q. Rev. 11, who, at pp. 12 and 13, has this to say:

> "The decision is a happy example, if one may say so, of an alliance between common sense and a well-established principle of equity. . . . But despite the emphasis on the facts of the case and the reference to "palm-tree justice", it may respectfully be suggested that the decision is, in fact, an important decision on principle. One of the qualities so often attributed to palm-tree justice is that there is no appeal. Freed from compliance with any legal rules or fixed principles, the Cadi does what seems to him to be justice on the facts of the particular case. It may be that no two Cadis would decide any one case in precisely the same way, for individual views of what is fair and just vary more than individual views of the law; yet for that reason, it is rarely possible to say with certitude that the decision of any Cadi is wrong; *quot palmae, tot sententiae.* In *Rimmer* v. *Rimmer*, three courts exhibited three inconsistent views. . . . On this footing, either *Rimmer* v. *Rimmer* is not a true palm-tree case or else both decisions below were wrong in principle."

[19] *Supra*, footnote 9. [20] *Supra*, footnote 2.

[21] Professor Kahn-Freund in a recent article: Matrimonial Property — Some Recent Developments (1959), 22 Mod. L. Rev. 241, discussing the rejection by the majority of the Royal Commission of the introduction by legislation of a modified community of property, writes at p. 251:

> "Nevertheless the problem of giving effect to what the Royal Commission calls the 'partnership of the spouses' requires a solution and it may be thought that through decisions such as *Jones* v. *Maynard*, *Rimmer* v. *Rimmer*, *Cobb* v. *Cobb* and *Fribance* v. *Fribance* and also through what was said but what was not decided in *Silver* v. *Silver*, the courts have pointed to a possible way out of the apparent impasse."

Rimmer v. *Rimmer* recognizes the rights of the spouses in "family assets" where each has contributed some money to its acquisition. Very frequently, however, such "family assets" are purchased ostensibly out of the savings of one spouse, these savings being made possible only by reason of the other spouse's earnings being used for the day to day expenditures of both. There are as yet no decisions in which one spouse's intangible contribution in such manner has been recognized but a pointer in this direction is contained in the judgment of Denning L.J. (as he then was) in *Fribance* v. *Fribance*, *supra*, footnote 5, at p. 387 (W.L.R.):

> "The title to the family assets does not depend on the mere chance on which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit either in food, in clothing and living expenses for which there was nothing

ships. It would be a pity if such fruitful ideas were to receive short shrift in Canada.

BENZION SISCHY*

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Today, probably more than ever before, decisions from one common-law jurisdiction are being considered by the courts of another in trying to find guidance to solve particular local disputes. These judicial ventures into applied comparative law, though, are seldom likely to be rewarding if all that is involved is the comparison of verbal formulae accepted in the different jurisdictions. If we are going to put any meat on to dry legal bones at all, we must accept as legitimate parts of the exercise the following two inquiries.

First, that the social conditions causing and being caused by the phenomenon investigated must be compared or contrasted. There is no point in applying a formula from one country to a social situation in another unless some of the same basic social, economic and political conditions exist in both. To say, for instance, that in the last five years 3,000 new butchers' shops have been opened in England, compared with only 100 in the same period in Canada, may on the face of it lead to conclusions about the relative demands for meat in the two countries and the activity of the trade in catering for these demands. We may go on to show, however, that two-thirds of the English butchers have since gone out of business, while in Canada the demand is so great that the sale of meat can no longer be expediently left to individual butchers but has been taken over by the super-marketing machinery. This contrast of demands and marketing structure—the "social conditions" of a few lines ago—puts the original statement on a better contextual footing.

Secondly, the results ultimately produced by the phenomenon studied are important in evaluating the phenomenon. Expedient

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to see or in the house and furniture which are family assets and the product of which should belong to them both jointly."

It would be an easy step to add to the words "house and furniture" the further words "family savings" and to follow and trace such family savings into whatever property it is converted.

Cf. however, *Dillon* v. *Dillon, supra,* footnote 6, where the wife's contribution to the family assets consisted not of monies but of work in the family business, a garage carried on from premises which was part of the matrimonial home. The court recognized her contribution to the family assets. The home, including the filling station, was sold and the court granted the wife one-half the beneficial interest in the goodwill resulting from the sale of the garage.

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though supermarketing may be, for example, studies may show that the demise of the individual customer-butcher personal relationship has proved harmful to the trade as a whole by decreasing public confidence in the selection and cutting of meat. We therefore need to evaluate the overall success of the venture in terms of the community's ultimate objectives in promoting trade of this sort.

This route leads deviously to *Thompson* v. *Thompson*[1] and *Re Married Women's Property Act, re Stajcer and Stajcer*,[2] decisions of the Supreme Court of Canada and the Supreme Court of British Columbia respectively. They both concern the methods of dividing the beneficial ownership of family property. They both maintain that specific rules apparently applicable in such cases in England ought not to be applied in Canada. And they both deal with the abstract application of these rules irrespective of their results. It is therefore important to consider these rules in the light of their English background and with a view to the functions they perform.

Modern English family property law

The treatment of family property—and particularly the family home—has followed a fascinating path through the English courts in the last twenty years. The social conditions to which the judges were reacting in developing specific theories were extremely important.

(1) The 1939-45 war had the effect of devastating England's housing. Bomb-damage, exaggerated war-time dilapidation, normal obsolescence and the wartime increase in the number of families by 250,000[3] called for the immediate provision of over two million new housing units.[4] The shortage of materials and manpower crippled the efforts at reconstruction and early hopes were never realized.[5] The late 1940s were years of "squatting" on disused army camps and the overfilling of huge new estates. It is some measure of the size of the problem and the difficulties and

[1] [1961] S.C.R. 3, (1961) 26 D.L.R. (2d) 1.

[2] (1961), 34 W.W.R. 424.

[3] For the very first time during the war years, marriages in England topped an annual mark of 400,000. Though the number fell below the mean in the later years of the war, it rose again to over 400,000 in 1946: Annual Abstracts of Statistics of the United Kingdom (1948-50).

[4] Madge, The Rehousing of Britain (1945), p. 21. Government estimates were considerably lower and were clearly geared to anticipated economic development: see, *e.g.*, the estimate of one and one quarter million, in Housing (Ministry of Reconstruction) (1945), Cmd. 6609.

[5] See the failures pointed up especially in the Economic Surveys for 1947 and 1948, Cmds. 7046, 7344.

hardships that it caused in the housing of families that even by 1960, only three and one quarter million houses and flats had been made available to meet the demand which had stood, remember, at over two million fifteen years before.[6] The Government has admitted only recently that modern developments have not been adequate: "... there remains some terribly bad housing. In some parts many families are still without a separate home, or are living in unfit houses, or in badly cramped and overcrowded conditions."[7]

(2) When, therefore, post-war maladjustments shot up the figures for family separations—and thus the numbers of people looking for separate homes—there were few houses and flats available for the dispersed members of families and certainly little money to meet the exaggerated expense of the accommodation which was available. It became correspondingly more difficult for the courts to find answers to the complex economic problems raised by the disorganization.

(3) The intangible element of the extent of "the emancipation of women" was also important. Developments from Mary Wollstonecraft's exhortations at the end of the eighteenth century, to Caroline Norton's efforts in getting recognition of the rights of mothers in the 1830s, to John Stuart Mill's political and philosophical agitation in the 1840s and 1850s, to the emancipatory property legislation of the last quarter of the nineteenth century, to the activities of Mrs. Pankhurst and her associates, and then to two world wars and their aftermaths must all be understood in placing the woman of the mid-twentieth century in perspective. The enforced solidarity of the Victorian family and many of its stratifications and repressions are gone. Women are active in the professions, in industry, in political life, in social organisation and economic management. Less and less are women looked upon as having a defined "place" in society; more and more they are obtaining equality of opportunity with men in public and domestic life. At the end of the 1939-45 war, they enjoyed a high status. More women had worked in England in the latter years of the war than at any other time;[8] a greater proportion of women be-

[6] Housing Return for England and Wales, December 31st, 1960 (1961), Cmd. 1271. 88,045 "temporary" houses were still being occupied and 2896 families were still living in former service camps.

[7] Housing in England and Wales (1961), Cmd. 1290.

[8] Over 90% of the single women 18-40 years of age; over 80% of the single women 18-59 years of age; nearly 81% of the married women and widows 18-40 years of age with no young children. In mid-1944, 7,120,000 women—48% of the working population—were fully employed: The War and Women's Employment, I.L.O. Studies and Reports (N.S.) (1946), No. 1, p. 13.

gan to take the initiative in dissolving their marriages;[9] the new Welfare State philosophy of taking care of those who needed help began to receive practical application; and the time was perhaps as ripe as ever it would be for the assertion of legal claims by wives which had in previous generations been thought impossible.

(4) The first development was within the technical framework of the Rent Restriction Acts. *Brown* v. *Draper*[10] in 1944 set in motion a train of decisions which gave a needy wife protection against her husband and his landlord when both wanted to turn her out of rented property constituting the family home. That she had nowhere else to go and no money to maintain herself was the frequent argument. By 1950, *Robson* v. *Headland*,[11] *Old Gate Estates* v. *Alexander*,[12] and *Middleton* v. *Baldock*,[13] had entrenched the position and the woman with perhaps a family and a deserting husband was protected in her occupation of property falling within the Rent Acts.[14] In 1945, Lord Denning, then in the High Court, began to give expression to a personal philosophy of economic protection for members of disorganized families. In *Smith* v. *Smith*,[15] it was his liberal interpretation of the section which later became section 25 of the Matrimonial Causes Act, 1950 (giving the courts power to vary ante- and post-nuptial settlements for the benefit of members of the family) which set the pattern for other courts to be able to award the wife the husband-owned or jointly-owned family home if the circumstances seemed

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[9] In England, the post-war peak of divorces, judicial separations and summary maintenance orders continued from 1947 until 1951, since when there has been a gradual decline. The divorce rate per thousand population is still, at .52 (1959, 24,017 decrees nisi) over three times that of the pre-war rate. The rate per thousand married women was 2.19 in 1957, compared with 2.54 in 1951 and .45 in 1931. Similarly, maintenance orders in magistrates' courts — 13,358 in 1959 — have more than halved since the peak of 1947.

Since the equalization of the grounds of divorce in 1923, wives have consistently presented a large proportion of divorce petitions and, since 1950, have averaged 55% of the annual petitions. Their percentage of petitions for nullity has always been lower, averaging 45% of the demand since the war. For some reason, wives' petitions have accounted for over 90% of petitions for judicial separation ever since the beginning of the century. Figures are taken from the annual Civil Judicial Statistics and Criminal Statistics, the Registrar-General's Annual Statistical Review, and the Annual Abstract of Statistics of the United Kingdom.

[10] [1944] K.B. 309, [1944] 1 All E.R. 246.

[11] (1948), 64 T.L.R. 598.

[12] [1950] 1 K.B. 311, [1949] 2 All E.R. 822.

[13] [1950] 1 K.B. 657, [1950] 1 All E.R. 708.

[14] The trend continued in *Wabe* v. *Taylor*, [1952] 2 Q.B. 735, [1952] 2 All E.R. 420. *Cf.* the criticisms of the development by Birkett L.J. and Lord Goddard C.J. in *Dando* v. *Hitchcock*, [1954] 2 Q.B. 317, at pp. 322, 325, [1954] 2 All E.R. 335, at pp. 337, 338.

[15] [1945] 1 All E.R. 584.

to require it.[16] In 1947, his use in *Hutchinson* v. *Hutchinson*[17] of the discretion to award possession of the home in an action under section 17 of The Married Women's Property Act, showed how he visualized strict proprietary rights as qualified by the claims of the family. The same features are prominent in cases dating from the same period, in which providing temporary accommodation in the family home pending the hearing of divorce or separation proceedings was in issue.[18]

Again, in 1949, it was Lord Denning (now in the Court of Appeal) who, in splendid dissent in *Hoddinott* v. *Hoddinott*,[19] expressed a doctrine of democratic division of the beneficial ownership of family assets which within a few years was to give rise to *Rimmer* v. *Rimmer*[20] and a host of "equal division" cases. In 1952, his efforts to keep the law alive to the realities of the English social and economic scene reached their peak with his judgment in *Bendall* v. *McWhirter*.[21] The "deserted wife's equity" which he envisaged gave deserted wives some rights to keep possession of the home against both their husbands and purchasers from their husbands. Only the year previously, Roxburgh J. had demonstrated that the Chancery Division knew no such creature as this "equity"[22]—but it was Lord Justice Denning's solution which was immediately acclaimed and applied by the courts.[23]

All this is by way of context-giving. These were the social conditions and this was the general drift of judicial opinion at the time when a doctrine of equal division of family assets was first being discussed by the courts. The problem was straightforward: how to dispose of certain property which had formerly

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[16] *Cf. Bacon* v. *Bacon*, [1947] P. 151, [1947] 2 All E.R. 327; *Halpern* v. *Halpern*, [1951] P. 204, [1951] 1 All E.R. 315; *Parrington* v. *Parrington*, [1951] 2 All E.R. 916; *Brown* v. *Brown*, [1959] 2 All E.R. 266.

[17] [1947] 2 All E.R. 792.

[18] *E.g., Boyt* v. *Boyt*, [1948] 2 All E.R. 436; *Stewart* v. *Stewart*, [1948] 1 K.B. 507, [1947] 2 All E.R. 813; *Richman* v. *Richman*, [1950] W.N. 233, (1950), 66 T.L.R. (2) 44; *Teakle* v. *Teakle*, [1950] W.N. 452, (1950), 66 T.L.R. (2) 588; *Silverstone* v. *Silverstone*, [1953] P. 174, [1953] 1 All E.R. 566; *Massing* v. *Massing*, The Times, August 29th, 1958, [1958] C.L.Y. 1494. Contrast, for unrealistic decisions in similar circumstances, *Gorulnick* v. *Gorulnick*, [1958] P. 47, [1958] 1 All E.R. 146; *Breeze* v. *Breeze*, The Times, August, 29th, 1958, [1958] C.L.Y. 1473.

[19] [1949] 2 K.B. 406, at p. 414.

[20] [1953] 1 Q.B. 63, [1952] 2 All E.R. 863, [1952] 2 T.L.R. 767.

[21] [1952] 2 Q.B. 466, [1952] 1 All E.R. 1307.

[22] *Thompson* v. *Earthy*, [1951] 2 K.B. 596, [1951] 2 All E.R. 235.

[23] *E.g., Ferris* v. *Weaven*, [1952] 2 All E.R. 233; *Lloyd's Bank* v. *Oliver's Trustees*, [1953] 2 All E.R. 1443; *Barclay's Bank* v. *Bird*, [1954] Ch. 274, [1954] 1 All E.R. 449; *Street* v. *Denham*, [1954] 1 All E.R. 532; *Woodcock* v. *Hobbs*, [1955] 1 All E.R. 445; *Westminster Bank* v. *Lee*, [1956] Ch. 7, [1955] 2 All E.R. 883; *Churcher* v. *Street*, [1959] 1 All E.R. 23.

been used for family purposes when the family was no longer functioning. Was recorded legal ownership to be the criterion? Or was beneficial ownership to be divided in proportion to contributions to the purchase-price? Were equitable presumptions adequate to the task of reaching results which could be considered "fair" by modern standards? Or was it possible simply to make an equal division of the property in default of any other solution?

Lord Denning's dissent in *Hoddinott* apropos a wife's football pool winnings on a stake provided from the housekeeping money, and Vaisey J.'s decision about the equal distribution of the money in a joint bank account in *Jones* v. *Maynard*,[24] were finally overshadowed by the Court of Appeal's decision in *Rimmer* v. *Rimmer*.[25] A wife brought an action for a share in the proceeds of the sale of the family home. She and her husband indiscriminately applied their respective earnings to the buying and furnishing of their home and to ordinary living expenses, without ever contemplating how beneficial ownership of the individual items would be divided if their marriage broke up. The home was the principal item acquired and, quite incidentally and without any particular scheme in mind, they bought it in the husband's name. The Court of Appeal looked behind the façade of legal ownership but could find no specific intentions to support either a claim to division proportionate to contribution (if in fact the precise contributions could be discovered) or to sole ownership by either husband or wife. The only certain thing was that they had bought the house for their joint use and had both contributed to its purchase when they were able. In the end, the court thought that the best way to resolve the problem was by using the last-resort equitable maxim of "equality" being "equity"—and so divided the proceeds equally.

This point about intentions is an important one. The courts have quite properly indicated a number of times[26] that in cases dealing with ownership (and not merely possession) of property, they will only give effect to established legal and equitable titles and will not exercise any discretionary powers. This is well and

[24] [1951] Ch. 572, [1951] 1 All E.R. 802.

[25] *Supra*, footnote 20.

[26] *E.g.*, *Kelner* v. *Kelner*, [1939] P. 411, [1939] 3 All E.R. 957; *Lee* v. *Lee*, [1952] 2 Q.B. 489n, at p. 491, [1952] 2 All E.R. 1299, at p. 1301; *Cobb* v. *Cobb*, [1955] 2 All E.R. 696, at p. 700, [1955] 1 W.L.R. 731. *Cf.* similar statements in *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*, [1954] N.Z.L.R. 82, at p. 83; *Miller* v. *Miller*, [1946] Qd. W.N. 31; *Buchanan* v. *Buchanan*, [1954] St. R. Qd. 246.

good—*if* this legal or equitable title can be established by the evidence. The whole point of the modern English cases is that the courts have largely stopped pretending to be aware of the parties' "intentions" and have frankly admitted that in many of the disputes before them, the husband and wife had *no* specific intentions about the allocation of ownership.[27] Whether the legal ownership of their home was in the one name or the other, or in joint names, was not important: they were going to live in it and use it jointly. It was *their* home. And the courts, tacitly accepting that it was the "normal" thing for husbands and wives today to behave as partners in a joint enterprise, saw no reason why they should not share equally the results of this enterprise.

But other methods of division have not been and cannot be discredited. If the equality-equity notion is to be used at all in this field, the courts have made it quite clear that it is only in those cases in which clear intentions as to the destination of the beneficial ownership are not discoverable. Where they are—and where there is no possibility of their being watered down by subsequent joint efforts or use—then the courts will give effect to them. In *Richards* v. *Richards*,[28] the husband and wife had only lived together for a few weeks in their married life of thirteen years and the Court of Appeal was not prepared to allow the husband (on the strength of maintenance payments to the wife) a share in the house bought by the wife and her parents as a house for them. There was not only no "joint venture", but the husband was never in any way intended to participate. Or, in *Re Knight's Question*,[29] there was convincing evidence that the property in dispute was part of the husband's business venture and totally unconnected with his domestic arrangements. Again, his wife was not allowed a share.

It should be clear, too, that although "equality" may be "equity" in some cases, it will certainly not be "equity" in all. The courts must always have an eye to the relative economic positions of the two contestants and not merely to the apparent fairness of equal division of one family asset. At one exaggerated extreme, it might seem ludicrous to the court that it should divide the home equally between a deserting millionaire husband and

[27] *Rimmer* v. *Rimmer*, *supra* footnote 20, at pp. 72-3 (Q.B.), 866 (All E.R.), *per* Evershed M.R.; *Cobb* v. *Cobb*, *ibid.*, at p. 699, *per* Romer L.J.; *Fribance* v. *Fribance*, [1957] 1 All E.R. 357, at pp. 359-60, *per* Denning L.J. and at p. 361, *per* Morris L.J.

[28] [1958] 3 All E.R. 513. *Cf. Spellman* v. *Spellman*, [1961] 2 All E.R. 498.

[29] [1958] 1 All E.R. 812.

his penniless and ailing wife; at a more mundane level, the situation may best be dealt with by allocating the house to the house-tied, unskilled wife with several small children and leaving the working and able husband to look after himself.

There are, of course, the equitable presumptions of gift and resulting trust available for the courts to use.[30] Just as with our earlier quests for intentions, so here too the subjectivities of fact-finding give great scope for manoeuvre. To suggest that the presumptions are always used blindly by the courts, heedless of the consequences, would be to do less than justice to the judges. There have certainly been cases in which the approach of providing in cash or kind for the needs of the dependent members of the family has been readily apparent. A New Zealand judge was once very explicit in this respect when dealing with a wife's claim to share ownership and obtain possession of the house:

> The husband could no doubt pay the higher maintenance that the wife would require and be entitled to receive if she were required to pay rent. The wife's share of the proceeds of sale would not enable her to purchase another home. So long as the wife and daughter continue in occupation of the home, the husband's share therein is discharging some portion of the obligation which rests upon him to provide maintenance and support for the wife and daughter. The husband's financial position is such that he does not require the moneys represented by his share in the property. The interests of the daughter point in the direction of the wife and daughter being enabled to continue living in the family home.[31]

In *Silver* v. *Silver*[32] and *Richards* v. *Richards*,[33] the English Court of Appeal, after lip-service to ideas of equal division, actually made orders which had the effect in one case of giving a deserted, arthritic and near-penniless wife ownership (and so continued occupation) of the home and in the other, doing the same for a wife carrying the burden of looking after her sick mother. On the same lines, one can see much more point in the dissenting judgment of Donovan J. in *Jones* v. *Challenger*[34] than in the majority judg-

[30] See, *e.g.*, Snell's Principles of Equity (24th ed., Megarry & Baker, 1954), pp. 150-4.

[31] Shorland J. in *Henson* v. *Henson*, [1958] N.Z.L.R. 684.

[32] [1958] 1 All E.R. 525.

[33] *Supra*, footnote 28. Kahn-Freund (Matrimonial Property—Some Recent Developments (1959), 22 Mod. L. Rev. at pp. 252-3) has suggested that the decision in *Silver* was "regrettable" and that in *Richards* perhaps "inevitable in the very exceptional circumstances of that case". In so far as these comments may be taken as approving some doctrine of equal division as necessarily virtuous in itself, however, I am unable to share his regrets. Equal division cannot, in my opinion, be justified if it fails to meet pressing economic need on the part of one spouse, whilst actually supplying a credit balance to the other.

[34] [1960] 1 All E.R. 785, at p. 790 *et seq.*

ment of Ormerod and Devlin L.JJ. In a dispute between a divorced couple who had contributed equally to buying the leasehold of their former home, Donovan J. would have required the husband to buy out his former wife's share—thus ensuring a home for him (which he wanted) and recouping the now remarried wife the extent of her investment (which was what *she* wanted). In the end, however, the majority ordered the sale of the leasehold and equal division of the proceeds.

Another alternative to equal division will be that based on the ability to trace money into its product. The whole idea behind, for example, *Re Rogers' Question*,[35] the majority judgment in *Hoddinott* v. *Hoddinott*,[36] and the recent Court of Appeal decision in *Samson* v. *Samson*,[37] was that in some cases division may be fairer if it is made either by tracing actual contributions to their source and either repaying the amount or dividing the common fund in proportion to the contributions. In *Samson*, this idea was used to allocate to husband and wife wedding presents given by friends of each, the gifts being traced back to the spouse through whom they came into the marriage. From one point of view, this is far too facile a way of handling a serious problem and one which could produce some unfortunate results in individual cases. From another, one gets the feeling of a great deal of artificiality in the way the courts impute intentions here: can one reasonably say that the bride *really* intended to own two-fifths of the dining furniture and the husband three-fifths? Looking at these cases functionally, it is impossible to criticize in the abstract. In the circumstances of the individual case, this method of division may have caused no hardship. There may have been no economic need to offset by equal division, or there may in fact have *been* economic need which *was* offset by a proportionate division favourable to the needy spouse.

The Canadian social and legal background

Having to some extent considered the modern English legal developments in terms of their causes and functions, we are now in a position to begin our comparative study in earnest. The problem is that of how far the same social conditions prevail in Canada and how similar are the objectives of English and Canadian family property law.

It is usual to place the cultures of Canada on the same plane as England in so far as aspirations are concerned and on perhaps

[35] [1948] 1 All E.R. 328.
[36] *Supra*, footnote 19.
[37] [1960] 1 All E.R. 653.

a slightly higher plane so far as concerns the speed of actual social and economic achievement. It is easy to see how in many ways North American attitudes are similar, though of course the pressures of more recent immigration into Canada have tended to keep it more identified with its European ancestry than has been the case in the United States. To take one particularly relevant part of the culture, the status of women is generally the same in Canada as in the United States and, to some extent, in England. For speed, of course, the North American countries far outstripped all European countries in "emancipation", if for no other reason than that the spirit of immigration and resettlement in a new country always demanded it.

On the other hand, the Second World War did not give as strong an impetus to an "equal rights" movement in Canada as it did throughout Europe. Perhaps, as seems very likely, none was needed.[38] But even if this were so, some of the same economic and social repercussions of the war were felt in Canada as in England. By 1951, the population was over two and one half millions greater than it had been in 1941, accounted for by increasing immigration and the rising war-time and post-war birth rate. After the war, more Canadians married than before, the average annual rate from 1946-50 being over 126,000 compared with under 97,000 from 1936-40. And whereas the 1930s yielded an annual divorce rate of about 1,500, the 1940s produced one of over 5,000, peaking in 1947 at 8,199. With more children, more immigrants, more marriages and more separated families swelling the population and the house-construction industry crippled by the war, it is hardly surprising that Canada, like many other countries, faced serious post-war housing problems.[39]

And it is no less surprising that the same spirit which had once fostered the family-protecting homestead legislation in the western provinces[40] began to activate some of the judges faced with troublesome family problems. The validity of a deserted wife's claims to possession of the family home against her husband and his successors in title was recognized in principle.[41] A liberal interpretation

[38] In Canada, the female part of the labour force only amounted to 27.1% at the height of the war effort in 1944, since when it has declined to a more or less consistent 20%.

[39] Comments in this paragraph are made on the basis of statements and statistics in the Canada Year Books.

[40] *Cf.* my article, A Homestead Act for England? (1959), 22 Mod. L. Rev. 458, which deals in detail with aspects of the Canadian and American homestead legislation.

[41] *Carnochan* v. *Carnochan*, [1954] 1 D.L.R. 87, at p. 94; *Re Jollow & Jollow*, [1955] 1 D.L.R. 601, at pp. 605-6.

was given to a divorce statute to allow the court to deal with the home as best it could.[42] And it seemed that the broad powers wielded by the English courts with regard to disposing of the beneficial ownership of the home were being looked on favourably in Canada.[43]

The Canadian beneficial ownership cases

But now, in *Thompson*, the Supreme Court of Canada has put a heavy shoulder against the door and stopped it opening any further. Taking a lead from this, the Supreme Court of British Columbia has begun to turn the key in the lock in that province with its decision in *Re Stajcer and Stajcer*. Simply, they say that a development which recognized the courts' power to impute intentions that family property should be divided equally would not be legitimate for Canada. This seems to present at least three separate problems:

(1) As I have tried to explain above, the type of solution to a property dispute suggested by *Rimmer* and the cases following it, is not an invariable one. If, therefore, the Supreme Court is trying to suggest that just because some English courts have gone through this particular verbal process, *all* English courts are *obliged* to do the same, then it is wrong.

But this should perhaps be one of the least of Canada's worries. What seems to be much more serious is that the Supreme Court may for the time being be ruling out the possibility of ever reaching a solution such as that in the *Rimmer* type of case. And this in the face of the endless variety of factual situations presented by family disorganization. The only way in which the Canadian courts will in future be able to divide family property equally—and the social and economic desirability of doing so in an individual case will have to go by the board—will be by discovering positive intentions of the husband and wife to divide it equally. Perhaps the Supreme Court thinks this is not too hard to do. Certainly, there will be cases which will lend themselves to this type of decision, such as those where the property is held jointly by husband and wife and where, on the face of it, an equal investment was contemplated for husband and wife.[44] Two things arise from this: by looking for intentions, the courts will have to rule out the consideration of results; and in looking for intentions, the courts

[42] *E.g.*, *Hicks* v. *Kennedy* (1956), 4 D.L.R. (2d) 320.
[43] *E.g.*, *Mitchelson* v. *Mitchelson* (1953), 3 W.W.R. 316; *Sopow* v. *Sopow* (1958), 24 W.W.R. (N.S.) 625.
[44] *E.g.*, as in *Cobb* v. *Cobb*, *supra*, footnote 26.

will surely, in the very nature of things, often be disappointed. This, as I have said before, is the gap filled by cases such as *Rimmer* —there are no intentions to be found and so the court looks at the surrounding circumstances of the married life, the consequences of alternative methods of division, and sometimes comes out for equal division.

(2) On a purely formal level, one can very easily argue that the Supreme Court's denial of this power of equal division can be legitimately reconsidered. The court's majority found that the wife had made no financial contribution to the purchase of the property and on the strength of that felt that she could not maintain her claim. But it then went further and generalized about what the position would have been if she had made a contribution.

Purely incidentally to this, of course, is the problem of what constitutes enough of a "contribution". As the Supreme Court rightly said,[45] there seems "no logical objection" to the application of the equal division principle "when there is no *financial* contribution when the other attributes of the matrimonial partnership are present". This stems from Lord Denning's suggestion in *Fribance* v. *Fribance*[46] that: "It does not depend on how [the husband and wife] happened to allocate their earnings and expenditure. The whole of their resources were expended for their joint benefit—either in food and clothes and living expenses for which there was nothing to see or in the house and furniture which are family assets—and the product should belong to them jointly. It belongs to them in equal shares." Broad though this may be, it is surely the only acceptable meaning which can be given to "contribution" here. It is the *efforts* of husband and wife towards a common end which has been one of the touchstones of the equal division doctrine developed in England.

When, therefore, Judson J. says in *Thompson* that no English case "has yet held that, in the absence of some financial contribution, the wife is entitled to a proprietary interest from the mere fact of marriage and cohabitation",[47] he is certainly right. The simple fact is that the English courts have been concerned to look for an *effort* —and merely being married and cohabiting does not necessarily mean that there has been an effort. Anyone who wishes to be helped must be prepared to help himself, is a doctrine very popular in the English courts dealing with family economic

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[45] *Supra*, footnote 1 at pp. 13 (S.C.R.), 9 (D.L.R.).
[46] *Supra*, footnote 27, at p. 360.
[47] *Supra*, footnote 1, at pp. 13 (S.C.R.), 9 (D.L.R.).

problems.[48] Other courts have taken up this "effort" idea. In *Dillon* v. *Dillon* in New Zealand,[49] the court gave the wife half the value of the goodwill of her husband's filling-station, when this goodwill had been built up partly through her efforts in working there. The Manitoba decision in *Mitchelson* v. *Mitchelson*[50] is just as much to the point. There, since the husband's income was small, his wife took boarders into their home for a number of years. Their new home was bought in the husband's name but for the next thirteen years the wife did all the housekeeping, cleaning, laundering and other chores for her husband and son as well as for as many as twelve boarders at one time. She received money from her husband for food and clothes but in turn gave him the $600 annual income from rents, and so on. The Court of Queen's Bench recognized her claim to a half-share in the house. The wife, it said:

> In putting her time, labour and earnings[51] into the home, did not 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.[52]

(3) The Supreme Court majority based its general denial of the existence of these powers on three earlier cases in the same court. Not one of the three offers very plausible support to the generalizations.

(a) *Minaker* v. *Minaker*[53] admittedly dealt in part with a wife's claim to joint ownership of family assets based on her alleged contribution to family resources. In the words of Rand J.:

> . . . in the early period of their married life the wife accepted the difficulties of the situation courageously and for three or four years worked in outside employment at wages; but they went into the common fund used to carry the family life from day to day.[54]

[48] See, for instance, the consideration given to a wife's earning capacity in assessing the extent of her husband's liability to maintain her; *Rose* v. *Rose*, [1951] P. 29; *Griffith* v. *Griffith*, [1957] 1 All E.R. 494. Recent official discussions of the problem have concluded by finding it not necessary to specify by statute that such consideration should be given as the practice was so well established: see Report of the Royal Commission on Marriage and Divorce (1956), Cmd. 9678, ss. 483, 494; Report of the Departmental Committee on Matrimonial Proceedings in Magistrates' Courts (1959), Cmd. 638, p. 29; House of Lords debates on the Matrimonial Proceedings (Magistrates' Courts) Bill, 1960, 220 H.L. Deb. cols. 951-9.

[49] [1956] N.Z.L.R. 162.

[50] *Supra*, footnote 43.

[51] It is hard to see on the facts given how she had any earnings which she could call exclusively her own. If both the original home and the one in dispute were owned jointly, then the earnings, *i.e.*, rents *etc.* received, would be joint property. And, of course, until the present court categorized the home as joint property, one would have assumed that it belonged to the legal owner, the husband.

[52] *Supra*, footnote 43, at p. 319.

[53] [1949] 1 D.L.R. 801.

[54] *Ibid.*, at p. 805.

Despite this, the court could find no intentions that the home bought in the husband's name should belong to them jointly, could not specifically trace any of the wife's contributions to the "common fund" into the purchase of property, and so confirmed the husband in complete ownership of it. Judson J. in *Thompson* could find "no hint" of the joint assets doctrine in *Minaker*. Since *Hoddinott* v. *Hoddinott* was not decided in England until ten weeks after judgment had been given in *Minaker*, and Lord Denning had not had the opportunity of expressing his thoughts about joint assets for the first time, it is hardly surprising. If we are to look for authorities for a modern doctrine, we must look at modern cases.

(b) *Carnochan* v. *Carnochan*,[55] Judson J. felt, involved "an implicit rejection of any such power" as the one to divide assets equally. The problem seen by the judge in that case was, he thought, "not one of the exercise of a discretionary power but one of application of the law to ascertained facts". No one, I think, will deny that such a statement is applicable to most legal disputes—and the fact that it was made here as an *obiter* dictum in a case not concerned with title but with the very different question of possession is quite irrelevant. Unfortunately, merely to make the statement solves no problems at all where, as happens so often in this type of case, the relevant facts (*viz.* the intentions of the husband and wife) *cannot* be ascertained. Where no evidence can be given about them, the case cannot simply be left on the shelf: it still has to be decided.

(c) *Jackman* v. *Jackman*[56] is perhaps one of the best cases to point up the weakness of the Supreme Court's argument in *Thompson*. It is cited by Judson J. as a case in which "the court declined to support the exercise of the discretionary power". The husband had put the title of the family home in the wife's name after she had insisted on this as security. After the break-up of the marriage, he brought an action claiming possession (she was still in occupation) and ownership. The Supreme Court found that there had never been anything other than a complete understanding that the house was in the wife's name as an investment for her; that the possibility of the family's breaking up was very much present in their minds after two previous separations; and that, accordingly, the beneficial ownership followed the legal ownership into the wife's hands. The English joint assets doctrine (then

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[55] [1955] 4 D.L.R. 81.

[56] (1959), 19 D.L.R. (2d) 317.

expressed most recently by Parker L.J. in *Silver* v. *Silver*[57]) was considered and disregarded as inapplicable.

As with all appealed cases, we know so little here about the actual facts of the family relationship. There was evidence that Mrs. Jackman was a teacher earning as big a salary as her husband: what happened to all this money? Did she save every penny of it while living on her husband's income, or did some of it dribble into the household resources? The report says that Mrs. Jackman was awarded a decree of separation and custody of the child without maintenance: how far then did the liability to support the child and the award of the home offset each other? Was there an actual need situation on the part of the wife to which the judges were reacting, or did they rather have at the back of their minds the abstract ideal of protecting the normally-economically-dependent (and here "innocent") sex? Without knowing the answers to some of these questions, there can be no really telling criticism of the decision. In distributing family resources and liabilities between the separated members of the unit, the court may have solved more problems by using the presumption-of-advancement technique than by taking advantage of a resulting trust or a joint-assets technique. Only by knowing and studying overall social consequences can we discover the effectiveness—and so, to a significant extent, the merit—of particular legal formulae.

Conclusions

The ultimate objectives of the legal regulation of family property accepted in both England and Canada are maximizing equality of opportunity and benefit between husband and wife and minimizing economic need on the part of any member of the family unit. If this is so, then it is obviously not of primary importance whether the particular technique used should be, for instance, that of community property or that of separate property. The frank recognition of the ends is more vital than the choice of any particular means. After the last war, with the social and economic disorganization which prevailed, the ends of family property law were perhaps silhouetted more clearly against the background of general legal regulations. Now that many of the pressures which produced the immediate postwar decisions have lessened in intensity and the number of urgent problems perhaps diminished as well, the objectives of the law might tend to be overlooked. It is essential to re-emphasize them constantly, for the nature of

[57] *Supra*, footnote 32, at p. 527.

those problems which we have to solve has stayed the same.

The particular means of regulating family property to which most of the English, Canadian and American jurisdictions are committed is that of individual property-holding, but everywhere with some modifications taking account of the husband-wife relationship. A particular couple may choose to hold assets in their joint names but even if they do not, restrictions of various sorts are placed on disposal, use and even enjoyment of the proceeds of the family's property for the benefit of the rest of the family. By and large, where these restrictions exist, they will apply equally to husband and wife—and the "equality of opportunity" may therefore be achieved. It is in "maximizing equality of benefit" and "minimizing economic need" that the balancing process may assume troublesome proportions.

We must accept that flexibility in the legal machinery is necessary for promoting these objectives. No single form of words will be so complete and unambiguous that it will produce a satisfactory solution every time. First of all, however, we must encourage the provision of machinery which will either permit the courts to adjudicate on the division of the *whole* of the family's assets at the same time, or we must make it possible for the courts to sort out the immediate claims to particular assets against the background of the relative economic positions of the contestants.

Concentrating predominantly on the ascertained intentions of property-owners is admittedly shutting one's eyes to the consequences. An approach which wherever possible considers the social and economic implications of possible divisions of the property, which accepts that people should not normally suffer economic hardship as a result of the breakdown of their personal family relationships, and which holds that hard work is as much a contribution to family life as a pay-packet, seems more in touch with social realities. It is the balancing of these factors which will surely produce results better suited to dealing with the variety of human situations coming before the courts. When we have to wait for a court's decision before we can be certain about property rights there is unquestionably some interim uncertainty. One merely wonders whether the uncertainty produced in this way is not greater than the uncertainty we may already have. Given the desirability of a "joint assets" approach in suitable cases, one would have thought that the almost limitless subjectivity involved in judicial fact-finding would have made such an approach possible. However, if the Supreme Court of Canada chooses to say that this

approach is not a legitimate one, so be it. One need only add that in a fragile modern society such as ours, the opportunities for hardship and discrimination are still all too common. No more need be created by overlooking human problems on the pretext of legal regulation.

ALAN MILNER*

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CONVEYANCING — COMMUNITY PLANNING LAW — THE ONTARIO PLANNING AMENDMENT ACT, 1960-61. — The ambiguous state of conveyancing law in Ontario due to the uncertain effect of section 24(1) of The Planning Act, 1955, as interpreted in three cases, commented on in these pages two years ago,[1] has now been authoritatively resolved both by the Supreme Court of Canada and by the Ontario legislature, in neither case entirely satisfactorily. The three cases were *Zhilka* v. *Turney and Turney*,[2] *Glenn and Glenn* v. *Harvic Construction Limited*[3] and *Re Karrys Investments Limited*.[4] The ambiguity, it will be remembered, is illustrated by the *Zhilka* and *Harvic* cases. If the parties to an agreement of sale intend that The Planning Act, 1955 shall be complied with in the course of dealing, the agreement is enforceable subject to planning board consent. That is the *Zhilka* case. The *Harvic* case held that the intention of the parties is irrelevant, the statutory prohibition is absolute and the consent must be had before the agreement is entered into or no rights can arise. No case has decided whether title passes on execution of a conveyance in violation of the Act.

The case that reached the Supreme Court of Canada was none of these three. *Queensway Construction Limited and Frances Truman* v. *Trusteel Corporation (Canada) Limited* was unreported when the first note was published but had been referred to and distinguished by Schatz J. in the *Karrys Investments* case.

The *Trusteel* case involved the sale in 1956 by Trusteel of ninety-four out of ninety-five lots on a proposed plan of subdivision to Queensway Construction Limited, whose trustee in bankruptcy assigned all rights in the agreement to Frances Truman in 1957. Later that year Trusteel applied for a declaration that sec-

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[1] (1959), 37 Can. Bar Rev. 636.

[2] (1959), 18 D.L.R. (2d) 447 (S.C.C.); (1956), 3 D.L.R. (2d) 5 and (1957), 6 D.L.R. (2d) 223 (C.A.).

[3] (1958), 16 D.L.R. (2d) 232 (C.A.).

[4] [1959] O.W.N. 358, (1959) 19 D.L.R. (2d) 760.

tion 24 of The Planning Act, 1955, prohibited the agreement. Counsel agreed that there was a sub-division control by-law in force, that less than one acre of land was being retained by the vendor, no plan of subdivision had been registered, no consent of the planning board had been obtained, and that the land referred to was sold pursuant to a plan *to be* registered by the vendor in compliance with the Act. At the hearing Wilson J. held the agreement prohibited and then ordered the return of the deposit of $2,500.00, neither counsel objecting.

The order for the return of the deposit was not appealed, but Frances Truman appealed the first order as to the prohibition of the agreement. Laidlaw J.A., for the Court of Appeal, affirmed the order, following the *Harvic* case and taking some pains to point out that in the *Zhilka* case the Court of Appeal had not found it necessary to consider the question of illegality of the agreement.[5] As the precise language of the Court of Appeal in the *Zhilka* case was not commented on in the first note, and since it clearly represents the "contrary line of authority"[6] on the effect of section 24, it may be helpful to reproduce it here. Aylesworth J.A., speaking for the Court of Appeal, said:

> . . . since the other conditions in the subsection do not apply, respondent may comply with the statute only by securing the approval of the Township of Toronto Planning Board or the Minister to the conveyance to him in accordance with cl. (d) of s. 24(1) as re-enacted. I agree that respondent should be given a reasonable time to secure such approval . . . .[7]

At the rehearing after the death of Chevrier J.A., Aylesworth J.A., again speaking for the court, affirmed the earlier disposition of the appeal for the same reasons. Beyond remarking that "Respondent has been and is being accorded not inconsiderable indulgence by way of opportunity to clarify the existing situation relative to compliance with the conditions of s. 24 . . ."[8] he said nothing to indicate that the reasons for judgment were not the view of the court on the application of section 24.

On the appeal of the *Trusteel* case to the Supreme Court of Canada,[9] the court was unanimous in its view of the proper interpretation and application of section 24 of The Planning Act, 1955, but Martland J. dissented from the majority in his interpretation

[5] (1960), 22 D.L.R. (2d) 616, esp. at p. 620.
[6] The language used by Judson J. in the Supreme Court of Canada in the *Trusteel* case, (1961), 28 D.L.R. (2d) 480, at p. 484.
[7] (1956), 3 D.L.R. (2d) 5, at p. 8.
[8] (1957), 6 D.L.R. (2d) 223, at p. 224.
[9] (1961), 28 D.L.R. (2d) 480.

of the facts of the case. The court accepted the *Zhilka* view. As Judson J. pointed out:

> . . . this contract was entered into in contemplation of compliance with the statute and, as I read s. 24, the statute provides for this very situation by way of exception to the prohibition. The exception speaks of consent to a conveyance or agreement not of consent to a proposed conveyance or agreement. The statute permits vendor and purchaser to enter into a contract subject to the condition of subsequent consent and this is all that the parties have done in this case.[10]

The only difficulty with Judson J.'s explanation is that the "exception to the prohibition" to which he refers, the consent of the local planning board, almost certainly was not in the contemplation of either party when the agreement of sale was entered into. The sale proposed was a sale by plan of subdivision, and a planning board cannot consent to a sale of land described by plan of subdivision. The plan must be approved by the Minister of Municipal Affairs. It was this aspect of the facts that troubled Martland J. He pointed out that, "there is nothing in the agreement to indicate that there was any intention that application should be made to the planning board to give its consent to the agreement".[11] After acknowledging that the parties did intend that the plan should be approved by the Minister, Martland J. concluded that, "the fact that it [the agreement] contemplated the future registration of a plan does not take it out of that prohibition [of section 24]".[12]

With respect, while Judson J. might have been more specific than he was in referring to "contemplation of compliance with the statute" or less specific than he was in referring to the "consent" provisions as evidence of the exception, it is difficult to see the strength of the distinction taken by Martland J. between anticipation of consent by the planning board and anticipation of approval of the plan by the Minister of Planning and Development (now the Minister of Municipal Affairs). As Judson J. remarked: "The purpose of the prohibition is by the very terms of the section defined as subdivision control and there is nothing in this contract to do anything but carry out this purpose".[13] As long as the court is prepared to interpret the Act according to its purpose (as conceived by the court), and I can think of no better principle of interpretation, there is as much justification for allowing parties to anticipate the Minister's approval of a plan of subdivision as there is to allow them to anticipate the planning board's consent.

[10] *Ibid.*, at p. 483.
[11] *Ibid.*, at p. 481.
[12] *Ibid.*
[13] *Ibid.*, at p. 483.

In neither case is there any intention to avoid the full effect of public control. "Compliance with the statute", rather than compliance with section 24 of the statute is perhaps the more suitable language.

Under the narrow terms of the appeal, as Judson J. pointed out, it was unnecessary for the court to express any opinion on the rights and obligations of the parties relating to the performance of this contract. But one interesting question may arise. The contract was clearly entered into on the assumption by both parties that the Minister would approve the plan. If he did not, for instance, on the ground of prematurity, has the purchaser any right to ask for specific performance of the contract if the planning board would consent? A planning board might quite properly consent to the division of the land into two parcels, the one being sold being described by metes and bounds. If some suitable plan could still be worked out for the remainder when the land was ready for subdivision, there might be no reason to refuse consent. Unlike the *Zhilka* case, where the agreement was entered into before the plan of subdivision was designed, the *Trusteel* case is one where the vendor might have an interest in the particular plan, as modified by the Minister. If the board consented, the ultimate disposition of the land is completely out of the vendor's control. He might well say: "I am happy enough to sell my land if it is subdivided as I planned, even as modified by the Minister, but I am not interested in selling if some different plan, or even some different use of the land from the contemplated residential use, is to be imposed on me." An argument can reasonably be made for saying that specific performance in a case like *Trusteel* ought to be granted only if the Minister approves the plan.

Two months before the Supreme Court of Canada decided the *Trusteel* case, the Ontario Legislature drastically revised section 24, by then section 26 of The Planning Act, R.S.O., 1960, c. 296.[14] The question of the civil effect of the penal provision is nicely answered by removing the penal provision. A penalty is no longer necessary because section 26(4) now provides:

> An agreement, conveyance, mortgage or charge made in contravention of this section or a predecessor thereof does not create or convey any interest in land, but this section does not affect an agreement entered into, subject to the express condition contained therein that such agreement is to be effective only if the provisions of this section are complied with.[15]

[14] The Planning Amendment Act, S.O., 1960-61, c. 76.

[15] See *ibid.*, ss. (2), (3) and (4) for a limitation of the retroactive effect of s. 26(4).

Depending upon the way the courts might have decided on the legal effect of a deed executed without planning board consent, and opinions on this point differ, this section may be regarded as a radical change in Ontario conveyancing law, but the change may prove as ambiguous as its predecessor. The new section 26(4) obviously tries to incorporate the *Zhilka* case and anticipates the Supreme Court of Canada view in the *Trusteel* case. But section 26(4) requires two things that were certainly not present in either case. The section requires (1) that the agreement be "subject to the *express* condition contained therein" and (2) that the agreement is to be effective only if the provisions of "this section" are complied with.

How "express" must the condition be? In the *Karrys Investments* case, which Judson J. said "correctly . . . followed the principle" that the Supreme Court adopted, Schatz J. found the agreement, because it contained a provision that a plan be registered, "was *expressly* made conditional on compliance" with the Act.[16] In fact in all these cases the compliance is inferred from the conduct of the parties *and* the language of their agreement. In the *Zhilka* case the agreement clearly contemplated ministerial approval of the plan, but the provision from which this contemplation was inferred was waived, and Spence J. in effect imposed the condition of planning board consent himself since the court could otherwise hardly entertain an application for specific performance. Clearly the Act should be amended by deleting the words "express" and "contained therein," which can only cause trouble. The judicial language "compliance with the statute" is perhaps more suitable. The exception in the section applies only to an agreement; (apparently the conveyance itself must have consent before title passes) and in an action for specific performance of the agreement a court is quite competent to find the fact of intended compliance if the intent exists or ought to be presumed. The various real estate boards might also amend their forms to ensure that the "express condition" is unambiguous in the contract, whatever its meaning in the Act. For their part the planning boards are still in doubt whether they can properly consent to an executed conveyance, although the Supreme Court of Canada clearly thought so under the former section.

The second requirement of section 26(4) unfortunately involves the distinction taken by Martland J. between the Minister's approval of a plan and the planning board's consent. Only the

[16] *Supra*, footnote 4, at p. 763 (D.L.R.).

latter is referred to directly by the language of section 26(4), because it refers to "the provisions of this section" and except for the indirect reference in section 26(1) to a registered plan of subdivision the provisions to be complied with relate to planning board approval. Registered plan approval is covered by section 28. If the Supreme Court decision in the *Trusteel* case can be applied to the new section 26, it could still be argued that an agreement made in contemplation of the Minister's approval of a plan of subdivision is enforceable subject to the approval. But there is always the danger that a court will disregard the purpose of the statute and hide behind the Latin of *expressio unius exclusio alterius*. The subsection should be amended to substitute the word "Act" for the word "section," so that the case of the Minister's approval is clearly covered.

The drastic revision of section 26 included a number of other changes. For years lawyers concerned with subdivision control have questioned whether "convey" in section 26(1) included mortgage. This doubt is removed by adding the word so that the section clearly applies to "an agreement, conveyance, mortgage or charge". This addition indicates a curious uncertainty in the technical language of real property law. It used to be said that real property law was exact, positive, technical law. When it was, a mortgage was a conveyance.

Subsections (1)(b) and 3(b) are elaborate changes from the previous subsection, which exempted from the subdivision control by-law the sale of a parcel that was the whole part remaining of a parcel described in a registered conveyance to the vendor. The object of the exemption was to permit a change of ownership where there was no change of boundaries, that is, no division of land, involved. The old section permitted the owner of a parcel containing two acres, from which one had been sold by metes and bounds description with planning board consent, to convey the remainder without consent. But it also permitted the owner to convey the whole of the two acres in one sale, by a deed that described the two acres as two separately described abutting parcels each one acre in area. The purchaser could then convey the whole of either of the acre parcels. In this way control could be sidestepped completely.

Subsections (1)(b) and 3(b) now limit this exemption to the case where "the grantor, mortgagor or vendor does not retain the fee or the equity of redemption in any land abutting the land that is being conveyed or otherwise dealt with". This clearly covers the

weakness of the former section, because the purchaser of the two lots described in the one deed cannot now sell the whole of either lot separately described in his deed as long as he retains abutting land.

As often happens, the amendment embraces more than the case toward which it was clearly directed. If an owner, by inheritance, has separate title to two abutting five acre parcels, he cannot sell the whole of either without planning board consent, although the twin ownership is "accidental" and no obvious public interest is adversely affected by the separation of the ownership.

Subsection (3)(b) applies the same rule to "part lot control," that is, where a new plan of subdivision is brought within subdivision control so that a lot may not be further subdivided without planning board consent. Subsection (3) now makes it clear, too, that a council may provide in its subdivision control by-law that a plan of subdivision registered after the by-law is passed is immediately subject to part lot control. It was not clear before whether a new subdivision control by-law (or amendment) had to be passed after each new subdivision was registered before part lot control became effective.

A limitation has also been added to the power of a council to "deregister" a registered plan. Hitherto a council has been free to enact, in its subdivision control by-law, that a plan, or part of a plan, registered before the passing of the by-law, shall be deemed not to be a registered plan for purposes of subsection (1) of section 26. This power could be, and was, exercised to "deregister" a plan approved less than a year before the by-law was passed. Subsection (2) now limits the control to plans that have been registered eight years or more. Since subdivision control is quite separate from approval of plans of subdivision, it can still happen that the Minister will be asked to approve a plan where there is no official plan, no planning board and no subdivision control. If the next week a board is set up, and an official plan approved that makes the subdivision just registered undesirable development, the council may regret not having the power to "deregister," but such cases must arise very infrequently and stability of registration is perhaps a more desirable goal than control of development.

One provision of section 26 remains as obscure as ever. Subsection (12), which re-enacts subsection (7) of the previous section 26, provides that an area of subdivision control shall not be altered or dissolved without the approval of the Minister. In a case where subsection (2) is being applied to a registered plan of,

for instance, thirty years standing, which is discovered, unsold, two years after the subdivision control by-law is first passed, the amendment is sometimes regarded as an alteration of the area, and the Minister's approval sought. It seems to me clear enough that the "area" is not being altered or dissolved, but the law is being made to apply differently within the area. Subsection (1) provides that "no person shall convey land in the area . . . unless the land is described in accordance with and is within a registered plan of subdivision", which seems to assume that the land in the plan is in the "area". A simple amendment could clarify this ambiguity.

Subsection (1)(d) adds a new exemption to section 26: land that is being acquired or disposed of by Her Majesty in right of Canada or Ontario, or by any municipality, metropolitan municipality or county. The faith expressed in the good judgment of local councils is becoming indeed. Local hydro-electric commissions and school boards are not similarly regarded.

The new requirement of subsection (5), that a subdivision control by-law is not effective until the procedural requirements of subsections (6) to (11) have been complied with means that a solicitor searching title, when he finds a by-law has been registered, must now write or go to the Minister's office to see whether the clerk of the municipality has lodged two copies in the office as he is required to do by subsection (6). The requirement of this additional search seems to me to be wholly unjustified and subsection (5) should be amended to delete the reference to subsection (6).

The *Harvie* decision[17] depended not only upon the effect of the prohibition in the old section 24, it also held that a planning board could not attach conditions to its consent. Subsection (13) now authorizes the board to attach such conditions as it considers necessary to ensure that the matters referred to in section 28(4), for which the board must now have regard, and which guide the Minister in approving plans of subdivision, are effectively provided for and maintained. This is the first statutory statement of the grounds upon which a planning board should act. A new right of appeal to the Municipal Board is provided by subsection (14).

By subsection (15) an agreement, conveyance, mortgage or charge is not in contravention if a consent has been given although the conditions have not all been met. Just what sanction remains by which the municipality may enforce the board's undischarged

[17] *Supra*, footnote 3.

condition is not clear. There is no penalty provided in section 26.

J. B. MILNER*

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PROVINCE DE QUÉBEC—LOI DES COMPAGNIES—CONTRÔLE—CONVENTION ENTRE ACTIONNAIRES—DIRECTEURS—LÉGALITÉ—ORDRE PUBLIC—CLAUSE PÉNALE.—*Ringuet et al.* v. *Bergeron*,[1] un arrêt recent rendu par la Cour suprême du Canada sanctionne, en matière de compagnies, la validité d'une convention, de plus en plus fréquemment utilisée, par laquelle plusieurs actionnaires s'engagent les uns envers les autres à s'unir pour s'assurer le contrôle d'une compagnie.

Cet arrêt illustre aussi les obligations des directeurs envers la compagnie et la distinction entre leur rôle et celui des actionnaires.

Trois actionnaires, le demandeur Bergeron et les défendeurs Ringuet et Pagé, détenant chacun un nombre égal d'actions de St. Maurice Knitting Mills Limited, avaient, par un contrat notarié du 3 août 1949, convenu, entre autres, de voter ensemble pour assurer en permanence leur élection respective comme directeurs de la compagnie (clause 14), d'assurer l'élection du défendeur Ringuet comme président (clauses 5 et 8), du défendeur Pagé comme vice-président et gérant général (clauses 5 et 9) et du demandeur Bergeron comme secrétaire-trésorier et assistant-gérant général de la compagnie (clauses 5 et 9), d'assurer un salaire déterminé à chacun d'eux (clause 4) et par la clause 11 qu'il convient de citer, ils avaient convenu comme suit:

> 11. Dans toutes assemblées de ladite compagnie, les parties aux présentes s'engagent et s'obligent à voter unanimement sur tout objet qui nécessite un vote.
>
> Aucune des parties aux présentes ne pourra différer d'opinion avec ses co-parties contractantes en ce qui concerne le vote. Le vote prépondérant du Président devra toujours être en faveur des deux parties contractantes.

Le contrat prévoyait d'autre part la sanction suivante:

> 12. Si une des parties ne se conforme pas à la présente convention, ses actions seront cédées et transportées aux deux autres parties contractantes en parts égales et ce gratuitement.
>
> Telle est la sanction de la non-exécution d'aucune des clauses de la présente convention par l'une des parties contractantes.

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[1] [1960] S.C.R. 672.

Après trois années de bonne entente au cours desquelles toutes les parties avaient respecté les termes de leur contrat, le 14 juin 1952, à une assemblée du bureau de direction, deux résolutions furent adoptées à la majorité des défendeurs Ringuet et Pagé, le demandeur Bergeron votant contre.

Le 21 juillet de la même année, à une assemblée spéciale des actionnaires, les deux défendeurs, de même qu'un certain M. Jean actionnaire, furent élus directeurs; le demandeur Bergeron, qui était absent, ne fut même pas mis en nomination. Le même jour, le nouveau bureau de direction élisait le défendeur Ringuet président, le défendeur Pagé vice-président et le nouveau directeur Jean, secrétaire-trésorier en remplacement du demandeur Bergeron. Le bureau de direction adoptait en même temps une résolution annulant une résolution antérieure relative au salaire du demandeur Bergeron.

D'où poursuite de Bergeron demandant que par application de la clause 12 du contrat, il soit déclaré propriétaire des actions détenues par chacun des défendeurs.

Le juge de première instance rejeta l'action pour des motifs qui ne furent pas retenus par les juges des tribunaux supérieurs.

Son jugement fut infirmé et l'action maintenue par la Cour d'appel à la majorité formée de MM. les juges Galipeault et Owen; M. le juge Pratte exprimant une dissidence.[2]

Les défendeurs pour toute défense soutenaient que le contrat était nul comme contraire à la loi, à l'ordre public et aux bonnes moeurs.

M. le juge en chef Galipeault conclut qu'il n'y avait, dans ce contrat, aucune clause contraire à la loi, à l'ordre public et aux bonnes moeurs, sauf peut-être la clause 10 par laquelle les parties s'engageaient à ne pas demander la modification du contrat et à ne pas l'attaquer en justice. Mais, suivant l'opinion qu'il exprime, cette clause n'avait pas d'importance dans le litige et le contrat existait bien sans elle.

M. le juge Pratte fut cependant d'avis que le clause 11 s'appliquait tout autant aux assemblées des directeurs qu'aux assemblées des actionnaires; qu'au regard des assemblées des directeurs, elle était contraire à l'ordre public et que, par suite, en raison de l'interdépendance des conditions du contrat et du rôle déterminant que cette clause avait joué dans la conclusion du contrat, elle viciait toute la convention qu'elle rendait nulle en entier vu les dispositions de l'article 13 du Code civil.

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[2] [1958] B.R. 222 et commentaire par Kenneth S. Howard, dans (1957), 35 Can. Bar Rev. 1108.

Le passage suivant de ses notes établit bien la distinction entre les actionnaires et les directeurs et les obligations de ces derniers:[3]

> La compagnie à fonds social est une créature de la loi, une personne morale qui ne peut manifester de vie que par les organes dont la loi prévoit la constitution et auxquels elle attribue des fonctions déterminées: le bureau de direction, dont les membres sont désignés par les actionnaires, et l'assemblée des actionnaires. Et toutes les dispositions de la loi qui concernent soit l'organisation de la compagnie, soit la constitution ou le fonctionnement de ses organes doivent être tenues comme étant d'ordre public.
>
> Que l'actionnaire soit libre d'user de son droit de vote comme il l'entend, cela ne fait pas doute. Aussi, je ne vois rien à redire à l'engagement que les parties ont pris de s'élire directeurs, encore qu'on puisse se demander s'il est permis de s'engager ainsi pour toujours.
>
> Mais la situation des directeurs est bien différente de celle des actionnaires. Le directeur est désigné par les actionnaires, mais il n'est pas à proprement parler leur mandataire; il est un administrateur chargé par la loi de gérer un patrimoine qui n'est ni le sien, ni celui de ses codirecteurs, ni celui des actionnaires, mais celui de la compagnie, une personne juridique absolument distincte à la fois de ceux qui la dirigent et de ceux qui en possèdent le capital-actions. En cette qualité, le directeur doit agir en bonne conscience, dans le seul intérêt du patrimoine confié à sa gestion. Cela suppose qu'il a la liberté de choisir, au moment d'une décision à prendre, celle qui lui paraît la plus conforme aux intérêts sur lesquels la loi lui impose le devoir de veiller.

M. le juge Owen semble partager l'opinion de M. le juge Pratte à l'effet qu'un engagement des directeurs, comme tels, de voter dans un sens et de restreindre leur libre choix serait contraire à l'ordre public. Il ne se prononce pas cependant sur la question de savoir si la clause 11 devait s'appliquer aux assemblées des directeurs comme aux assemblées des actionnaires et si elle etait nulle, en totalité ou en partie, dans la mesure où elle pouvait s'appliquer aux assemblées des directeurs, car il est d'avis que, de toute façon la nullité de cette clause n'entraînerait pas la nullité de tout le contrat, et que, dès lors, cette clause pouvait être extraite du contrat sans affecter le reste. Et, par suite de la violation par les défendeurs d'autres clauses du contrat pourvoyant au salaire du demandeur (clause 4) et à son élection comme directeur (clause 14) et comme secrétaire-trésorier et assistant-gérant général (clauses 5 et 9), il se rallie au juge en chef Galipeault pour maintenir l'action contre les défendeurs.

En Cour suprême, MM. les juges Taschereau et Fauteux fondent leur dissidence sur des raisons qui sont, en substance, celles

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[3] *Ibid.*, aux pp. 235-236.

données par M. le juge Pratte, en Cour d'appel, ainsi que l'indique dans ses notes M. le juge Fauteux.[4]

M. le juge Judson exprimant l'opinion de la majorité qui comprenait MM. les juges Abbott et Ritchie, conclut d'abord que la clause 11 n'avait pas trait aux assemblées des directeurs mais seulement aux assemblées des actionnaires. Et il partage l'opinion du juge en chef Galipeault qu'il cite à l'effet qu'il n'y a rien "qui répugne à la loi, à l'ordre public et aux bonnes moeurs qu'un groupe d'actionnaires s'entendent pour contrôler et diriger une compagnie, pour devenir ses administrateurs, ses principaux officiers . . . . L'engagement des co-contractants à voter unanimement leurs actions dans les assemblées de la compagnie ne saurait lui-même, à mon avis, être invalide; après tout, chacun des comparants n'a pas renoncé à la délibération, à la discussion, au droit de faire triompher son opinion avant de se ranger à l'avis de la majorité qui en principe doit gouverner".[5]

Ainsi, la Cour suprême confirme l'arrêt de la Cour d'appel et décide que par application de la clause 12 du contrat, le demandeur est le seul propriétaire des actions ayant appartenu aux défendeurs; c'est la reconnaissance de ces ententes devenues courantes entre actionnaires d'une même compagnie.

Cependant, ainsi qu'il fut exposé plus haut, M. le juge Owen, à la suite de M. le juge Pratte, semble d'avis qu'une pareille entente de solidarité entre des directeurs qui restreindrait leur liberté de vote aux assemblées du bureau de direction est contraire à l'ordre public.

MM. les juges Taschereau et Fauteux partagent cet avis. MM. les juges Abbott, Judson et Ritchie qui formaient la majorité de la Cour, paraissent également favoriser cette opinion. Après avoir cité l'exposé de principe de M. le juge Pratte, M. le juge Judson écrit[6]: "There can be no objection to the general principle stated in this passage, but, in my view, it was not offended by this agreement." En effet comme nous l'avons indiqué plus haut M. le juge Judson conclut que la clause 11, la seule envisagée sous ce rapport, ne s'applique qu'aux assemblées des actionnaires.

Toutefois, l'occasion s'offrait peut-être de décider de la nullité d'une telle convention en ce qui concerne les devoirs des directeurs. Car de fait, indépendamment de la clause 11, certaines autres clauses violées et pour lesquelles l'action a été maintenue (obligation de nommer le demandeur secrétaire-trésorier et assistant-

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[4] *Supra*, note 1, à la p. 680.
[5] *Ibid.*
[6] *Ibid.*, à la p. 683.

gérant général de la compagnie (clauses 5 et 9), et de lui voter son salaire (clause 4)) traitaient de matières qui étaient du ressort du bureau de direction.[7] Il en est de même des avantages similaires réservés aux demandeurs par les clauses 4, 5, 8 et 9. Ce n'est donc pas seulement comme actionnaires, mais bien comme directeurs, que les parties s'engageaient à se nommer respectivement aux postes qu'ils s'étaient réservés par leur contrat et à se voter leurs salaires. Comme directeurs, ils n'étaient plus libres de donner en ces matières un avis indépendant, suivant leur bonne conscience, et dans le meilleur intérêt de la compagnie.

Et si l'engagement pris par les co-contractants, comme actionnaires, de s'élire directeurs était valide, il semble que leur engagement, comme directeurs, de s'élire aux postes de principaux officiers de la compagnie et de se voter des salaires ne le serait pas.

Il est vrai que, pour les fins de cette cause, le seul fait d'avoir omis d'élire le demandeur au poste de directeur contrairement à la clause 14, eût été suffisant pour donner ouverture à l'application de la clause 12 et pour faire condamner les défendeurs. Mais, en fait, la Cour suprême comme la Cour d'appel, a aussi retenu contre eux, sans distinction, la violation des clauses 4, 5, 8 et 9 par lesquelles ils s'engageaient à faire nommer le demandeur au poste de secrétaire-trésorier et assistant-gérant général et à lui assurer son salaire. Sous cet aspect, la décision nous parait difficilement conciliable avec l'opinion exprimée unanimement par tous les juges de la Cour d'appel et de la Cour suprême à l'effet qu'un engagement des directeurs relatif à leur vote serait contraire à l'ordre public.

Il est possible qu'une fois mis de côté l'argument tiré de la clause 11, de portée générale, dont on a jugé qu'elle ne s'appliquait qu'aux assemblées des actionnaires, le jugement final fondé sur la seule clause 14 eût pu être le même, pourvu toutefois que la nullité des clauses 4, 5, 8 et 9 comme contraires à l'ordre public n'eut pas entraîné la nullité de tout le contrat.

Souhaitons qu'un autre arrêt vienne bientôt consacrer la distinction importante entre les directeurs et les actionnaires et le devoir des directeurs de sauvegarder le libre exercice de leur vote.

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[7] Loi des compagnies de Québec, R.S.Q., 1941, c. 276, arts 86 (4) et 88.

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