

THE DEVELOPMENT OF THE REMEDIAL CONSTRUCTIVE TRUST

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Introduction

In *Pettkus v. Becker*¹ a majority of the Supreme Court of Canada² for the first time invoked the concept of a remedial constructive trust based on unjust enrichment in upholding the claim of the plaintiff against her *de facto* spouse of nineteen years to a one half interest in certain assets standing in the latter's name.³

Prior to this decision the availability of the constructive trust as a general equitable remedy in Canadian law had been uncertain. Until the mid-1970s, the major influence upon the development of the constructive trust in Canada had come from English law, which, for historical reasons, had treated the constructive trust as a "substantive institution"⁴ analogous to the express trust. However, because of the diversity of situations in which the constructive trust had been employed, and because of the absence of an underlying theme tying these situations together, the institutional analogy had proved inadequate, and had required modification. The predominant view of the constructive trust in England today, therefore, is that it is primarily institutional, but that in certain situations it serves a remedial function. There are, however, a number of recent decisions of the English Court of Appeal which have invoked "a constructive trust of a new

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¹ [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

² Dickson J., Laskin C.J.C., Estey, McIntyre, Chouinard and Lamer JJ. concurring.

³ This case is also analyzed *infra*.

⁴ Pound, *The Progress of the Law—Equity* (1920), 33 Harv. L. Rev. 420. *I.e.*, A type of trust; one which arises as a necessary legal consequence, and which necessarily connotes certain legal consequences, whenever certain facts, which are recognised by law as being essential to the creation of the trust, are found to exist. The "institutional" trust is contrasted with the "remedial" trust, which describes the use of trust machinery by a court (*i.e.*, the court *imposes* a trust) in order to remedy a perceived wrong. The remedial trust necessarily is not imposed until the hearing of the action; however, it is deemed to have arisen at the time of the wrongful act which gave rise to the claim: see *infra*, footnote 71.

model",⁵ which is to say that the constructive trust has been invoked as a broad remedial tool to do justice *inter partes*. This development has provoked strong criticism from some academics⁶ and judges,⁷ and has not yet received the approval of the House of Lords. If it prevails, it will bring the English constructive trust much more in line with the American constructive trust.

By way of contrast with English law, American law has long regarded the constructive trust as an equitable remedy based upon the principle of unjust enrichment, and not as a type of trust. The constructive trust bears no more relation to the express trust, the Americans would say, than a quasi-contractual obligation bears to a contract. There are a number of advantages to the American approach, not the least of which is that, despite the difficulty of defining the scope of unjust enrichment, the role of the constructive trust becomes immediately more comprehensible.

Even before *Pettkus v. Becker*,⁸ a number of Canadian judgments had explained the constructive trust in terms of the American model, though they do not appear to have made a significant impact on the development of the law until the judgment of Laskin J. (dissenting) in *Murdoch v. Murdoch*.⁹ Laskin J.'s views were adopted by three members of the Supreme Court in *Rathwell v. Rathwell*,¹⁰ and finally prevailed in *Pettkus v. Becker*.¹¹

The purpose of this article is to consider the development of the constructive trust as a general equitable remedy in common law Canada, and to suggest some implications of this development. To facilitate the discussion it is proposed, first, to outline the different approaches of English law and American law to the constructive trust. Against this background, certain English and Canadian decisions will be considered in which the concept of a remedial constructive trust has been developed or employed. Finally, some implications of the development will be considered.

⁵ *Eves v. Eves*, [1975] 3 All E.R. 768 (C.A.), per Lord Denning M.R., at p. 771.

⁶ See e.g., Maudsley, *Constructive Trusts* (1977), 28 N.I.L.Q. 123; Oakley, *Constructive Trusts* (1978), Ch. 1; Pettit, *Equity and the Law of Trusts* (4th ed., 1979), pp. 46-48; Underhill's *Law of Trusts and Trustees* (13th ed. by D.J. Hayton, 1979), pp. 318-323.

⁷ See e.g., *Cowcher v. Cowcher*, [1972] 1 All E.R. 943 (Fam. D.), per Bagnall J., at p. 948.

⁸ *Supra*, footnote 1.

⁹ [1975] 1 S.C.R. 423, at p. 439.

¹⁰ [1978] 2 S.C.R. 436, at p. 442, Dickson J., Laskin C.J.C. and Spence J. concurring.

¹¹ *Supra*, footnote 1.

I. *The Constructive Trust in English Law.*

A. *The Constructive Trust as a Substantive Institution.*

In English law the constructive trust has been traditionally regarded as a substantive institution, that is, a type of trust. The explanation for this is historical. From a very early stage in its development of the concept the Court of Chancery habitually analogized it to the express trust.¹² As a result of this practice, which is still carried on in the textbooks,¹³ the constructive trust and the express trust came to be regarded merely as different members of the same family. And, indeed, an obvious point of similarity does exist, for with both the express trust and the constructive trust the court is concerned with situations where title to property is in one person who, however, is regarded in equity as holding it for the benefit of another.

In emphasizing this point of similarity, however, attention is directed away from a fundamental point of distinction. This matter becomes apparent when one considers why, in a particular situation, equity requires the person in whom the legal title to the property is vested to hold it for the benefit of another. In the case of the express

¹² Waters, *The Constructive Trust* (1964), describes the process in some detail. At p. 39 he concludes: "The truth of the matter is that the constructive trust was coined as a term because Chancery was invited to adjudicate in disputes where the relationship of the parties was rooted in the common law, and upon which Chancery imposed the language of trust. The language of trust came naturally, moreover, when Chancery was invited to impose the rudiments of trust obligation upon persons who were not trustees by express or implied creation. But, unlike the doctrine of *Moses v. Macferlan*, [(1760), 2 Burr. 1005, 1 Wm. Bl. 219], there was never a theme behind the use of the constructive trust by Chancery. It was never any more than a convenient and available language medium through which for the Chancery mind the obligations of parties might be expressed or determined. Whereas the divided jurisdictions of law and Equity gave rise to the ready use of trust language where common law language might equally well have served, the dominance of the trust in all Chancery thinking after the 17th Century brought about the process of ready thinking by analogy. In short, a separated Court of Chancery gave us the term constructive trust, and the application of the term by analogy with the express trust was Chancery's practice from the beginning."

Professor Keeton, while accepting Professor Waters' major hypothesis, has taken issue with the supposition that the constructive trust was initially or primarily concerned with relationships which were "rooted in the common law". Referring to the work of Dr. Yale, [Yale II Nottingham's Chancery Cases 101, pp. 124 *et seq.*], he notes that the constructive trust as a device to control erring trustees was already firmly established in Lord Nottingham's day, and suggests that it was this relationship which Lord Nottingham had in mind when in *Cook v. Fountain* (1676), 3 Swanston App. 585, at p. 586 he referred to "... trusts, which are raised or created by act or construction of law". See Keeton and Sheridan, *The Law of Trusts* (10th ed., 1974), p. 193.

¹³ See e.g., Keeton and Sheridan, *op. cit.*, *ibid.*, p. 193; Nathan and Marshall, *Cases and Commentary on the Law of Trusts* (6th ed., by Hayton 1975), p. 351; Hanbury and Maudsley, *Modern Equity* (10th ed., 1976), p. 308. The writers limit the analogy by pointing out that the duties and responsibilities of a constructive trustee are not in every case coextensive with those of an express trustee, and furthermore, that constructive trustees as a class do not have the same obligations.

trust the answer is clear: a trust arises because of the manifestation of intention on the part of the settlor that it should do so. In the case of the constructive trust, however, English law is not able to give a satisfactory answer. By way of contrast with the express trust it is said that the constructive trust is imposed by operation of law irrespective of the intentions of the parties; but if one attempts to look beyond that characteristic for a principle which underlies the constructive trust situations and provides a unifying theme, one is forced to conclude that no such principle exists. As Nathan and Marshall state:¹⁴

. . . English law . . . affords relief, on the ground of the constructive trust, in specific situations, the limits of which are not fixed by reference to any satisfactory conceptual theory.

From time to time, efforts have been made to suggest a possible unifying theme. Thus, Goff and Jones in their work on *The Law of Restitution* have sought to explain many of the constructive trust situations on the basis of a theory of unjust enrichment.¹⁵ Another view, which was put forward by Edmund Davies L.J. in the case of *Carl Zeiss Stiftung v. Herbert Smith (No. 2)*,¹⁶ is that the concept of a "want of probity" in the person upon whom the constructive trust is imposed provides "a useful touchstone in considering circumstances said to give rise to constructive trusts. . .".¹⁷ However, no general acknowledgment of either of these theories is evident in the cases.¹⁸

The absence of such a theme has made it difficult to conceptualise or to define the constructive trust. Professor Maudsley has suggested that "[w]e may . . . think of constructive trusts as existing wherever the legal title is in one person, but the beneficial entitlement is, by operation of the rules of equity and independently of the intention of the parties, in another";¹⁹ and, without resorting to an enumeration of specific situations, we can take the matter no further than that.

B. Criticism of the Traditional English Position.

It has long been suggested that English courts should adopt the American approach to the constructive trust. One of the early proponents of this view was Professor D.W.M. Waters who, in his book,

¹⁴ Nathan and Marshall, *op. cit.*, footnote 13, p. 351.

¹⁵ (2nd ed., 1978), pp. 46-47. See also Lord Wright, *Legal Essays and Addresses* (1939), p. 7.

¹⁶ [1969] 2 Ch. 276 (C.A.).

¹⁷ *Ibid.*, at pp. 300-301.

¹⁸ Oakley, *Has the Constructive Trust Become a General Equitable Remedy?* (1973), 26 *Current Leg. Prob.* 17, at p. 20. See also Waters, *Law of Trusts in Canada* (1974), p. 335.

¹⁹ Maudsley, *Proprietary Remedies for the Recovery of Money* (1959), 75 *L.Q. Rev.* 234, at p. 236.

The Constructive Trust,²⁰ argued that the English law of constructive trusts was in "a cul-de-sac of legal reasoning".²¹ He pointed out that the term "constructive trust" was used in English law to link together a number of disparate situations merely on the basis that the obligations imposed by law in these situations might in some way be likened to the obligations which were imposed upon an express trustee.²² Furthermore, he suggested that the mere fact of being able to draw these analogies was not a sufficient basis for classifying the constructive trust along with the express trust as a substantive legal institution, and that, in fact, the true basis of the trust institution disappeared when the element of intention was removed.²³ Waters concluded that the constructive trust could be usefully understood only as a remedy which was based on a theory of unjust enrichment, and that "a new attitude towards the precedents"²⁴ was required so that this change might be effected. He warned that until the constructive trust was given a satisfactory conceptual basis from which to develop, it was likely to remain an "academic backwater"²⁵ in English law.

Other writers²⁶ have taken a less radical approach. They have suggested that the constructive trust should be seen as having both an "institutional" and a "remedial" aspect; but, while acknowledging that the remedial aspect has been insufficiently recognized, and should, perhaps, be identified by a separate name,²⁷ they do not suggest that the institutional aspect can be discarded.²⁸

However, these writers disagree upon which situations should properly be considered institutional, and which remedial. Professor Maudsley, for example, sees the constructive trust as institutional in

²⁰ *Op. cit.*, footnote 12, p. 3.

²¹ *Ibid.*

²² *Ibid.*: "The vendor and the purchaser, the mortgagor and the mortgagee, the individual who acquires by fraud, the fiduciary, and then, at the other end of the scale, the secret trustee and the executor/trustee *de son tort* are all brought under the broad umbrella of the constructive trust, not, it should be noted, with any theme in mind, but because at different times and for different reasons each of these persons, because of his obligations, has been analogized with the express trustee." Footnotes omitted.

²³ *Ibid.*, p. 15.

²⁴ *Ibid.*, p. 43.

²⁵ *Ibid.*, p. 28.

²⁶ See e.g., Maudsley, *op. cit.*, footnote 19, at pp. 236-237; Maudsley, *Restitution in England* (1966), 19 *Vanderbilt L. Rev.* 1123, at pp. 1140-1141; Maudsley, *op. cit.*, footnote 6; Sealy, *Some Principles of Fiduciary Obligation*, [1963] *Camb. L.J.* 119, at pp. 119-124. The background to this article is found in Sealy, *Fiduciary Relationships*, [1962] *Camb. L.J.* 69.

²⁷ Maudsley suggests "constructive quasi-trust": see *op. cit.*, footnote 19, at p. 237. See also Lord Wright, *op. cit.*, footnote 15.

²⁸ In fact, Maudsley maintains that "the constructive trust as an institution cannot be discarded": see *op. cit.*, footnote 26, at p. 1140.

those situations only where an express or implied trust affects the property which has been wrongfully obtained, and the obligations arising under that trust are imposed by law upon the transferee of the property.²⁹ He regards the constructive trust as remedial in those situations where the court is concerned solely with the property of the plaintiff being wrongly in the hands of the defendant and, to compel its return to him, impresses the property with a trust in the plaintiff's favour.³⁰ On the authority of *Lister v. Stubbs*,³¹ he suggests that the remedial constructive trust does not extend to those situations where the plaintiff is claiming that money or property in the hands of the defendant *ought to be* his, (claim *in personam*), as opposed to the property being his, (claim *in rem*);³² so he would exclude from the realm of the constructive trust those cases involving the taking of bribes or secret commissions.

By comparison with Professor Maudsley, Professor Sealy views the constructive trust as institutional not only when a breach of an express or implied trust has occurred, but in any situation where the plaintiff is seeking to recover from another property in which he (the plaintiff) has a proprietary interest, or is suing *in personam* a holder with notice of that interest.³³ He regards the remedial constructive trust as coming into play only in those cases where the plaintiff is claiming that money or property in the hands of the defendant ought to be his, that is, where the plaintiff's claim is based "not on ownership in equity but on obligation in equity".³⁴

²⁹ He includes under this head the following situations: (1) renewal by a trustee of a lease in his own name, (citing *Keech v. Sandford* (1726), Sel. Cas. Ch. 61); (2) making of an unauthorized profit for himself by a trustee or other fiduciary during the course of administration of the trust, (citing *Phipps v. Boardman*, [1967] 2 A.C. 46 (H.L.)); (3) fraudulent acquisition of trust property by a purchaser with notice, (citing *Barnes v. Addy* (1874), 9 Ch. App. 255; *Nelson v. Larholt*, [1948] 1 K.B. 339); (4) secret trusts, (citing *McCormick v. Grogan* (1869), L.R. 4 H.L. 82); and (5) mutual wills, (citing *Re Green*, [1951] Ch. 148).

³⁰ Maudsley, *op. cit.*, footnote 19, at p. 237. For a recent example, see *Hussey v. Palmer*, [1972] 1 W.L.R. 1286 (C.A.).

³¹ (1890), 45 Ch.D.1.

³² Maudsley, *ibid.*, at p. 245. Cf. Needham, *Recovering the Profits of Bribery* (1979), 95 L.Q. Rev. 536, at pp. 540-545.

³³ *Some Principles of Fiduciary Obligation*, *op. cit.*, footnote 26, at pp. 119-122.

³⁴ *Ibid.*, at p. 123: "In such cases, the plaintiff has either effectively ceased to be or never has been beneficially entitled to the property. It is held adversely to him by the defendant, who may alienate or squander it as he pleases, and who may plead the Statutes of Limitation. The plaintiff's right is in no sense a *jus in rem*; it may be described as a *jus ad rem*, i.e., a claim *in personam* to a specific *res*. The right is available only against the defendant; the plaintiff cannot follow the property into other hands; indeed, he cannot even restrain the defendant from dealing with it. In the case of a money claim, the obligation is in the nature of an equitable debt, and not a trust. [Citing, *inter alia*, *Lister v. Stubbs* *supra* footnote 31.] There is, however, a possible source of

Professor Waters has used this disagreement among his colleagues to reinforce his position that a new approach is required in English law. He points to American law, which holds that "(a) putting right a breach of express or implied trust, (b) claiming one's own proprietary interest, and (c) claiming that property ought to be one's own, together make up the constructive trust, a trust which is always remedial",³⁵ and asserts that if the concept of a remedial constructive trust were adopted in English law, and unjust enrichment were acknowledged to be the principle underlying both the claim *in rem* and the claim *in personam*, then the whole basis of the Maudsley-Sealy disagreement would disappear. Nevertheless, until very recently at least, the idea of the institutional constructive trust has prevailed.³⁶

C. Importance of the Fiduciary Relationship.

It was largely as a result of the practice of analogizing the express trust and the constructive trust that the fiduciary relationship assumed such a central position in constructive trust thinking.³⁷ Thus many writers³⁸ have asserted that a pre-existing fiduciary relationship is a *sine qua non* to the imposition of a constructive trust, and accordingly have viewed the doctrine of constructive trusts as being exclusively concerned with the rule in *Keech v. Sandford*.³⁹ Hence the comment of the noted American author, Scott, that "in the English books they played up the Romford Market case [that is, *Keech v. Sandford*] as

confusion in the procedure followed by the court: as a first step in granting relief, it will decree the defendant to be a trustee of the property for the benefit of the plaintiff. . . . This "constructive" trust is purely a "remedial device". The court does not recognize the existence of a trust-relationship already constituted, but creates one where there previously was none."

³⁵ *Ibid.*, at p. 340.

³⁶ Maudsley, *op. cit.*, footnote 26, at p. 1141; Snell, *Principles of Equity* (27th ed. by Megarry and Baker, 1973), p. 186; Pettit, *op. cit.*, footnote 6, pp. 46-48; Oakley, *op. cit.*, footnote 18, at p. 17; Oakley, *op. cit.*, footnote 6, pp. 1-8; Underhill, *op. cit.*, footnote 6, pp. 316-323. Cf. Goode, *The Right to Trace and Its Impact in Commercial Transactions—II* (1976), 92 L.Q. Rev. 528, at p. 535; Goff and Jones, *op. cit.*, footnote 15, pp. 46-48, 62-63, 509-510.

³⁷ Waters, *op. cit.*, footnote 12, pp. 4, 17-19, 33 *et seq.*

³⁸ See e.g., Lewin, *The Law of Trusts* (16th ed. by Mowbray, 1964), p. 141; White and Tudor II, *Leading Cases in Equity* (8th ed. by Whittaker, 1912), p. 706; Yale, *op. cit.*, footnote 12, p. 124.

³⁹ *Supra*, footnote 29. *I.e.*, the rule that a fiduciary may not profit from his fiduciary position. *Keech v. Sandford* may also be cited as authority for the more limited rule applicable to trustees and other persons with limited or partial interests in property whereby in certain circumstances renewed or additional rights obtained by any such person are deemed to be an accretion to the original property, with the result that he is allowed no greater rights in regard to the accretion than he has or had in the property originally held. See Sealy, *supra*, footnote 26, at 77.

though it were *the* constructive trust".⁴⁰ While this approach is no longer generally favoured,⁴¹ it remains true that "the fiduciary relationship is clearly wed to the constructive trust over the whole, or little short of the whole, of the trusts's operation in English law".⁴² That fact has served in turn to reinforce the view of the constructive trust as a substantive legal institution, since the fiduciary relationship is seen as a common factor which ties the constructive trust situations together.

This preoccupation with the fiduciary relationship has created difficulties in the analysis of the constructive trust concept. To begin with, the courts have experienced the greatest difficulty in defining a fiduciary,⁴³ and it is probably correct to say that no satisfactory definition has ever been formulated, or, indeed, is possible; although several classifications have been attempted by the writers.⁴⁴ Because of its nature, the content and the intensity of the fiduciary relationship can be expressed only in very general terms until a specific case is presented for consideration.⁴⁵ Furthermore, the question of what circumstances will suffice to give rise to a fiduciary relationship has always been regarded as a question of fact for the court to decide; and yet very often, the courts have not made clear what facts persuaded them that a particular defendant was or was not a fiduciary.⁴⁶ Given the importance of the fiduciary relationship to the constructive trust, it will be appreciated that the vagueness of the former concept necessarily enhances the difficulty of defining the scope of the latter.

Proponents of the remedial constructive trust would argue further that the emphasis on the fiduciary relationship has played a large part

⁴⁰ Scott, *Constructive Trusts* (1955), 71 L.Q. Rev. 39, at p. 47.

⁴¹ See Waters, *op. cit.*, footnote 12, pp. 28-43.

⁴² *Ibid.*, p. 33.

⁴³ For a recent examination of this problem, see Shepherd, *Towards a Unified Concept of Fiduciary Relationships* (1981), 97 L.Q. Rev. 51.

⁴⁴ See e.g., Sealy, *Fiduciary Relationships*, *op. cit.*, footnote 26; Sealy, *Some Principles of Fiduciary Obligation*, *op. cit.*, footnote 26; Waters, *op. cit.*, footnote 12, pp. 68 *et seq.*, 339-343; Goff and Jones, *op. cit.*, footnote 15, pp. 55 n., 68. See also, *Evans v. Anderson* (1977), 76 D.L.R. (3d) 482, at pp. 496 *et seq.*, per Sinclair J.A. (dissenting) (Alta A.D.).

⁴⁵ Sealy, *Fiduciary Relationships*, *op. cit.*, footnote 26, at p. 73: "The word 'fiduciary', we find, is *not* definitive of a single class of relationships to which a fixed set of rules and principles apply. Each equitable remedy is available only in a limited number of fiduciary situations; and the mere statement that John is in a fiduciary relationship towards me means no more than that in some respects his position is trustee-like: it does not warrant the inference that any particular fiduciary principle or remedy can be applied." See also *Re Coomber: Coomber v. Coomber*, [1911] 1 Ch. 723, at p. 728, per Fletcher Moulton L.J.

⁴⁶ Waters, *op. cit.*, footnote 12, p. 242. See also, *Laskin v. Bache & Co. Inc.* (1971), 23 D.L.R. (3d) 385, at p. 392, per Arnup J.A.

in impeding the development of the constructive trust along remedial lines, since in determining whether a constructive trust should be imposed the courts have become accustomed to placing primary significance on the abuse of a relationship, rather than upon the wrongful nature of the act or event whereby the property was acquired.⁴⁷ By way of contrast, it is the latter factor which is of major importance in American law, where the fiduciary relationship is seen in most jurisdictions "not [as] a beginning point of restitution, it is merely a proximity of the parties which makes an event, otherwise not of sufficient gravity to lead to a decree, of heightened significance and therefore comparable with the events which without the special relationship would justify a decree".⁴⁸ It is this matter which Professor Waters had in mind when he spoke of the need for a new attitude towards the precedents in English law:⁴⁹

If English law is to possess a doctrine of constructive trusts which is to be remedial in character and therefore play the American role of giving to the deprived plaintiff a means of recovering more of his property, or what ought to be his property, than he is able to recover at law, it has got to think differently. It has got to think in terms of the act or event or occurrence lying behind the imposition of the constructive trust, and to cease to think of the abusing of relationships.

Despite these views, it seems that the very vagueness of the fiduciary concept has, on occasion, provided the avenue for the imposition in English law of a remedial constructive trust. Thus, in some cases, a fiduciary or quasi-fiduciary relationship appears to have been brought into existence by the very act of which the plaintiff complains.⁵⁰ In such cases, the finding of the fiduciary relationship would seem to be no more than a ritualistic incantation, which could well be discarded in favour of a frank discussion of the policy considerations upon which the court determined to permit the plaintiff to avail himself of the equitable remedy.

A similar development has occurred in the area of equitable tracing. One of the advantages which accrues to a beneficiary under a

⁴⁷ Waters, *op. cit.*, *ibid.*, footnote 12, p. 42; Goff and Jones, *op. cit.*, footnote 15, p. 61.

⁴⁸ Waters, *op. cit.*, p. 25.

⁴⁹ *Ibid.*, p. 42.

⁵⁰ See e.g., *Sinclair v. Brougham*, [1914] A.C. 398 (H.L.) esp. per Lord Parker at pp. 441-442, (and note the remarks by Fridman, *Quasi Contractual Aspects of Unjust Enrichment* (1956), 34 Can. Bar Rev. 393, at p. 402; Waters, *op. cit.*, *ibid.*, pp. 70-72; Goff and Jones, *op. cit.*, footnote 15, p. 54; *Bannister v. Bannister*, [1948] 2 All E.R. 133 (C.A.); *Reading v. A.G.*, [1949] 2 K.B. 232, at pp. 236, 238, per Asquith L.J.; [1951] A.C. 507, at pp. 516, per Lord Porter, 517, per Lord Normand; *English v. Dedham Vale Properties Ltd.*, [1978] 1 W.L.R. 93 (Ch.D.). In Canada, see e.g., *Stewart v. Molybdenum Mining and Production Co.* (1921), 60 D.L.R. 497 (B.C.C.A.); *Fraser v. Fraser*, [1933] 2 D.L.R. 513 (S.C.C.); *Follis v. Township of Albemarle*, [1941] 1 D.L.R. 178 (Ont. C.A.). Cf. Crawford, *Book Review* (1965), 16 U. of T.L.J. 240, at p. 241.

constructive trust who is able to claim a proprietary interest in the disputed property, is that he is entitled in equity to follow the trust property or its product into the hands of any transferee of the property, subject, however, to the defence of the *bona fide* purchaser for value without notice. In *Re Diplock*⁵¹ it was held that in order for a claimant to be entitled to trace in equity "either there must be a fiduciary relationship between him and the defendant who holds the property, or, as a result of a fiduciary relationship between the claimant and another person through whose hands the property has previously passed, some equitable proprietary interest must have become attached to the property".⁵² This requirement has been much criticised.⁵³ Thus, Professor Maudsley has pointed out that it is based on pre-Judicature Act authority, which would seem no longer to be appropriate to prevent a plaintiff, who is the legal owner of property, albeit with no trust attached, from relying on his equitable ownership in circumstances where the legal remedy is inadequate.⁵⁴ Various writers have suggested that capricious consequences would ensue as a result of the requirement, two commonly cited examples being as follows:

- (i) If B holds money as a fiduciary agent of A, and pays it by mistake to C who mixes it with money of his own, A can trace the money into C's hands, respecting C's rights if C is an innocent volunteer. And if C passes the property to D, A can trace against D. But if A and B were the same person, if A had the legal ownership as well as the beneficial, his rights would be taken away.⁵⁵
- (ii) Suppose that A's money is stolen by a stranger, B, who mixes the money with his own money in his bank account. On the authorities as they stand, A cannot follow his money in equity. But if the thief, B, had been A's fiduciary agent and had stolen money entrusted to him, then A could have followed his property in equity, since a fiduciary relationship would have existed between the parties. B will generally be a man of straw so that the contest will be between A and B's general creditors. In these circumstances A should surely have priority over the general creditors of B. It is unjust that the general

⁵¹ [1948] Ch. 465, at p. 530 (C.A.), *aff'd sub nom. Ministry of Health v. Simpson*, [1951] A.C. 251 (H.L.).

⁵² Goff and Jones, *The Law of Restitution* (1966), p. 40. For a contrary view of what was held in *Re Diplock* see e.g., Oakley, *The Prerequisites of an Equitable Tracing Claim* (1975), 28 *Current Leg. Prob.* 64, at p. 81; Pearce, *A Tracing Paper*, [1976] *Conv. (N.S.)* 277, at p. 287.

⁵³ To the lawyer who is accustomed to thinking in terms of unjust enrichment, the requirement has represented but one of a number of deficiencies in the tracing remedy as expounded in the *Diplock* case: e.g. Scott, *Restitution from an Innocent Transferee Who is not a Purchaser for Value* (1949), 62 *Harv. L. Rev.* 1002; Babafemi, *Tracing Assets: A Case for the Fusion of Common Law and Equity in English Law* (1971), 34 *Mod. L. Rev.* 12; Hanbury and Maudsley, *op. cit.*, footnote 13, pp. 569-576; Goode, *op. cit.*, footnote 36, at p. 563; Goff and Jones, *op. cit.*, footnote 15, pp. 60-63.

⁵⁴ Maudsley, *op. cit.*, footnote 19, at p. 241.

⁵⁵ *Ibid.*, at p. 243.

creditors should fortuitously benefit at the claimant's expense from the act of the bankrupt.⁵⁶

However, recent case authority suggests that the requirement is not nearly so formidable an obstacle to pursuing an equitable tracing claim as was previously supposed. Thus, in *Chase Manhattan Bank NA v. Israel - British Bank (London) Ltd*⁵⁷ the plaintiff paid a large sum of money under a mistake of fact to the defendant. Upon discovering the mistake the plaintiff sued for a declaration that the defendant was a trustee for it of the sum so paid, and sought to trace and recover the sum in equity. It was held that: "a person who pays money to another under a factual mistake retains an equitable property in it and the conscience of that other is subjected to a fiduciary duty to respect his proprietary right."⁵⁸ Hence, the requirement of fiduciary relationship was satisfied. In *Goodbody v. Bank of Montreal; Goodbody v. Lester*,⁵⁹ the court permitted the plaintiffs to trace in equity and recover the sale proceeds of certain share warrants belonging to them which had been wrongfully acquired and sold by the defendant, Lester. In answer to the defendant's submission that the equitable remedy was not available in the absence of a fiduciary relationship it was held that, in view of the defendant's guilty involvement in the acquisition and sale of the warrants: "*the Court will establish a fiduciary relationship to enable the plaintiffs to follow their property in equity into Lester's bank account.*"⁶⁰

These decisions represent an important step in the development of the tracing remedy and, as a corollary, in the development of the English style remedial constructive trust, in that they concentrate on the circumstances in which the property of the plaintiff came to be in the hands of the defendant and hold fiduciary relationship to arise in light of those circumstances. It should be noted that in American law the significant development which marked the transformation of the constructive trust into a generalised remedial device was the dispensing by the courts with any necessary connection with fiduciary relationship as a prerequisite to its imposition and to the granting of the tracing remedy.⁶¹ The decisions just noted have taken a considerable step in this direction.

⁵⁶ Goff and Jones, *op. cit.*, footnote 52, at p. 41.

⁵⁷ [1979] 3 All E.R. 1025 (Ch.D.). See Youdan, Comment (1980), 6 E.T.R. 72.

⁵⁸ *Ibid.*, per Goulding J., at p. 1032.

⁵⁹ (1974), 47 D.L.R. (3d) 335 (Ont.). See also, *B.C. Teachers' Credit Union v. Betterly* (1975), 61 D.L.R. (3d) 755 (B.C.); *Roblin v. Jackson* (1901), 13 Man. R. 328 (Man. C.A.).

⁶⁰ *Ibid.*, per Lacourciere J., at p. 339. Emphasis added.

⁶¹ See e.g., *Newton v. Porter* (1877), 69 N.Y. 133 (N.Y. C.A.). See also Dawson, Unjust Enrichment (1951), p. 28; Dawson, Restitution or Damages? (1959), 20 Ohio St. L.J. 175, at p. 182; Dawson and Palmer, Cases on Restitution (2nd ed., 1969), p. 16; Palmer, I Law of Restitution (1978), para. 1.3.

II. *The Constructive Trust in American Law.*

A. *The Constructive Trust as a Remedial Device.*

By way of contrast with English law, American law for many years has recognized that "the differences between the express trust and the constructive trust are greater than the similarities".⁶² Inasmuch as the term "constructive trust" might appear to suggest a fiduciary relationship which is analogous to an express trust, it is acknowledged to be not a completely happy expression in the American context.⁶³ It is conceded that there is a superficial resemblance between the two concepts,⁶⁴ but basically the constructive trust is regarded as a quite distinct legal entity from the express trust.⁶⁵ It is not a substantive institution at all, but rather a remedial device which may be invoked in a wide variety of situations to compel the transfer of specific property to the claimant by the defendant in order to prevent the latter's unjust enrichment. Thus, Professor A. W. Scott states:⁶⁶

A constructive trust arises where a person who holds title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. When a person holds the title to property which he is under an obligation to convey to another, and when that obligation does not arise merely because he has voluntarily assumed it, he is said to hold the property on a constructive trust for the other and he is called a constructive trustee of the property. He is not compelled to convey the property because he is a constructive trustee; it is because he can be compelled to convey it that he is a constructive trustee.

It is said that constructive trusts and express trusts may be contrasted in the same general way as may quasi-contractual obligations and contracts.⁶⁷ That is to say, while with both contractual relationships and express trusts a manifestation of an intention to be bound is essential to their validity, in the case of quasi-contracts and constructive trusts the absence of such an intention is irrelevant. At the same time, a quasi-contractual obligation and a constructive trust closely resemble each other.⁶⁸ In imposing a quasi-contractual obligation it may be said that the court treats the defendant who has

⁶² Scott, (3rd ed., 1967), Vol. V., para. 461. This was not always so: see text at footnote 61.

⁶³ American Law Institute, Restatement of the Law of Restitution (1937), para. 160, comment a.

⁶⁴ See e.g., Scott, *op. cit.*, footnote 40, at p. 40.

⁶⁵ "An express trust and a constructive trust are not divisions of the same fundamental concept. They are not species of the same genus. They are distinct concepts." American Law Institute, *op. cit.*, footnote 63, para. 160, comment a.

⁶⁶ Scott, *op. cit.*, footnote 62, para. 462. See also Pound, *op. cit.*, footnote 4; American Law Institute, footnote 63, para. 160, comment a, Scott, *op. cit.*, footnote 40.

⁶⁷ American Law Institute, *op. cit.*, *ibid.*, para. 160, comment a; Scott, *op. cit.*, *ibid.*, para. 462.1.

⁶⁸ *Ibid.*

unjustly received a benefit at the expense of the plaintiff as if he had agreed to pay the plaintiff for it. Similarly, in imposing a constructive trust the court treats the defendant, who is the legal owner of property which has been unjustly acquired or retained at the plaintiff's expense, as if he had agreed to hold it on trust for the plaintiff, or it had been conveyed to him by one who intended that he so hold it.⁶⁹ Of course, in the former case there is no contract, and in the latter case there is no trust: the quasi-contract and the constructive trust are simply remedial devices employed by the court to prevent the unjust enrichment of the defendant.

The essential distinction between a quasi-contractual obligation and a constructive trust is that the former is regarded as a purely personal obligation, and is enforced by a money judgment, whereas the latter involves the creation of an equitable proprietary interest in some thing.⁷⁰ Consequently—and this is the significant feature of a constructive trust—a plaintiff in whose favour a constructive trust has been imposed has a right to the property *in specie*, and can obtain a preference over the general creditors of an insolvent defendant, so long as the transferee is not a *bona fide* purchaser. However, in situations where the remedy at law is adequate, the constructive trust obligation generally will not be specifically enforced.⁷¹

The constructive trust in American law is the most important of the equitable restitutionary remedies.⁷² It is complemented by the equitable lien, which gives the plaintiff a preferred claim against property, while not entitling him to ownership thereof,⁷³ and, in

⁶⁹ Lacy, *Constructive Trusts and Equitable Liens in Iowa* (1954-55), 40 Iowa L. Rev. 107, at p. 114.

⁷⁰ *Ibid.*

⁷¹ This does not mean, however, that in such situations the defendant is not holding the property on a constructive trust: American Law Institute, *op. cit.*, footnote 63, para. 160, comment f; Scott, *op. cit.*, footnote 62, para. 462.3. The following appear to be the situations in which the constructive trust will be specifically enforced: (1) where the legal title to the property has been transferred away by the wrongdoer (here the true owner may follow the property until it reaches the hands of a *bona fide* purchaser, or may claim that property received by the wrongdoer in exchange for his property is impressed with a trust); (2) where the legal title remains in the hands of the wrongdoer, and the *res* consists of land, or a unique chattel; or the defendant is insolvent; or the defendant's wrongful act is in breach of a fiduciary or quasi-fiduciary relationship. See Note, *Must the Remedy at Law Be Inadequate Before a Constructive Trust Will be Impressed?* (1951), 25 St. John's L. Rev. 283, and Scott, *ibid.*; but cf. Bogert, *Trusts and Trustees* (2nd ed., 1959), Vol. V, para. 472; Jennings and Shapiro, *The Minnesota Law of Constructive Trusts and Analogous Equitable Remedies* (1941), 25 Minn. L. Rev. 666, at pp. 674-678; Palmer, *op. cit.*, footnote 61, para. 1.4. Professor Scott's view was accepted as correctly stating the American position in *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd*, *supra*, footnote 57, at p. 1039.

⁷² Scott, *op. cit.*, footnote 62, para. 461.

⁷³ *Ibid.*, para. 463. See also Lacy, *op. cit.*, footnote 69, at pp. 116, 145-155.

appropriate circumstances, by the equitable remedy of subrogation.⁷⁴ These are available, together with the legal remedies, whenever the defendant is unconscionably withholding property from the plaintiff. It is for the court to decide which is the most appropriate remedy in the circumstances,⁷⁵ taking into account such factors as the adequacy of the remedy at law, and whether the plaintiff should be entitled to a preference over the general creditors of the defendant.⁷⁶

B. *Unjust Enrichment*.

Viewed as a remedy, and not as a type of trust, the constructive trust is a much more comprehensible concept. That is not to suggest, however, that the American concept is without its own difficulties of analysis. These centre on the scope of the unjust enrichment principle. A finding of unjust enrichment in a particular case "signifies a legal conclusion that because of the circumstances of its receipt a defendant should not be allowed to retain, or should make compensation for, a benefit he has received".⁷⁷ However, the *basis* for that conclusion is often not made clear, and the view has been expressed that "[o]pinions in close cases often suggest that the decision was based mainly on an instinctive feeling that relief should be allowed".⁷⁸ Thus, while the basic moral idea inherent in the principle is easy enough to grasp,⁷⁹ the courts have been slow to develop "a systematic definition of the elements"⁸⁰ of unjust enrichment. They have been content instead to invoke it on a case-by-case basis. While it may be conceded that this approach has, on the whole, provided a satisfactory resolution of specific problems, the absence of any systematic approach has led to uncertainty. Thus, Professor Dawson in his work on *Unjust Enrichment* refers to "... a serious and growing confusion in analysis, a lack of overall intelligibility, and much difficulty in prediction".⁸¹

⁷⁴ Scott, *op. cit.*, footnote 62, para. 464.

⁷⁵ See e.g., *Beatty v. Guggenheim Exploration Co.* (1919), 225 N.Y. 380 (N.Y. C.A.), at 389 per Cardozo J.: "The equity of the transaction must shape the measure of relief."

⁷⁶ It should be noted that the equitable lien and the remedy of subrogation do not inevitably involve the granting of a preference. See Lacy, *op. cit.*, footnote 69, at p. 116; Scott, *op. cit.*, footnote 62, para. 464.

⁷⁷ Lacy, *op. cit.*, *ibid.*, at p. 108.

⁷⁸ *Ibid.*

⁷⁹ "For this by nature is equitable, that no one be made richer through another's loss."; Pomponius, cited in Dawson, *Unjust Enrichment*, *op. cit.*, footnote 61, at p. 3.

⁸⁰ Carlston, *Restitution—The Search for a Philosophy* (1953-54), 6 J. Leg. Ed. 330, at p. 334.

⁸¹ Dawson, *op. cit.*, footnote 61, at p. 112. The comment was directed at the whole field of restitutionary remedies, and not only the constructive trust.

These difficulties are by no means insurmountable. It has been pointed out that the principle of unjust enrichment "is no more vague than the tortious principle that a man must pay for harm which he negligently causes another, or the contractual principle that *pacta sunt servanda*"⁸² and it may reasonably be expected that, over time, more precise guidelines from particular cases will emerge.⁸³ Furthermore, it is suggested that the principle of unjust enrichment is in any event a more appropriate starting point for the enquiry whether a constructive trust should be imposed than is the English search for a fiduciary relationship, since it focuses attention on the relevant issues, namely, the facts and circumstances surrounding the obtaining or retention by the defendant of the property in question.⁸⁴

As in England, the treatise writers⁸⁵ have assisted in establishing some order out of the cases by developing a classification of the main types of situations in which unjust enrichment has been found to exist, and a constructive trust imposed. The situations discussed by Professor Scott,⁸⁶ for example, are as follows: (1) conveyance procured by fraud, duress, undue influence or mistake;⁸⁷ (2) acquisition of an interest in land under an oral agreement; (3) acquisition of property on death (including secret trusts and acquisition of property by murder); (4) acquisition of property by a fiduciary; (5) acquisition of property from a fiduciary who in breach of his duty transfers it to one who is not a *bona fide* purchaser.

By way of marked contrast with many English texts, there is tied in with the discussion of the constructive trust situations a discussion of the rules relating to the "following of property into its product". The basic principle is expressed as follows in the *Restatement of the Law of Restitution*:⁸⁸

Where a person wrongfully disposes of property of another knowing that the disposition is wrongful and acquires in exchange other property, the other is

⁸² Goff and Jones, *op. cit.*, footnote 15, at p. 11.

⁸³ See e.g., Dawson, *op. cit.*, footnote 61, at pp. 117 *et seq.*; Palmer, *op. cit.*, footnote 61, para. 1.7; Goff and Jones, *op. cit.*, footnote 15, pp 11 *et seq.* In Canada see Kippert, *The Juridical Nature of Unjust Enrichment* (1980), 30 U. of T.L.J. 356.

⁸⁴ "If he does not yet know all the answers, the American is asking the right questions. . . .": Waters, *op. cit.*, footnote 12, p. 25.

⁸⁵ See e.g., Bogert, *op. cit.*, footnote 71, paras 471 *et seq.* Scott, *op. cit.*, footnote 62, paras 461 *et seq.* Cf. the classification in Newman, *Trusts* (2nd ed., 1955), p. 254.

⁸⁶ Scott, *op. cit.*, *ibid.*, paras 465 *et seq.* See also, Scott, *op. cit.*, footnote 40, at p. 41.

⁸⁷ On mistake and the constructive trust in English law, see: Waters, *op. cit.*, footnote 12, pp. 46 *et seq.*; Goff and Jones, *op. cit.*, footnote 15, p. 89; *Chase Manhattan Bank NA v. Israel - British Bank (London) Ltd*, *supra*, footnote 57. In Canada, see: *Re Wayne Coal Co.* (1920), 55 D.L.R. 327 (Alta).

⁸⁸ American Law Institute, *op. cit.*, footnote 63, para. 202.

entitled at his option to enforce either (a) a constructive trust of the property so acquired, or (b) an equitable lien upon it to secure his claim for reimbursement from the wrongdoer.

It will be noted that the principle thus laid down is applicable to all conscious wrongdoers, even in the absence of a pre-existing fiduciary relationship.

III. *The Constructive Trust in Common Law Canada.*

Canadian decisions concerning constructive trusts, in keeping with Canadian legal tradition,⁸⁹ have tended to follow the English approach. In the same way, therefore, the constructive trust has been seen as primarily institutional, while serving a remedial function in those situations where the disputed property was not originally subject to an express or implied trust.⁹⁰

Canadian courts perhaps have been more ready than their English counterparts to use trust law generally in a remedial way.⁹¹ Thus, there are instances of a court either finding that the facts before it gave rise to a trust (express or implied), or that they warranted the imposition of a trust (resulting or constructive), where such a finding would assist the court to achieve a desired equitable result.⁹² On at least one occasion, the court has frankly acknowledged this practice.⁹³ The cases in which a constructive trust has been used for such purpose may be regarded as extensions of the category of fraudulent and unconscionable conduct.⁹⁴

⁸⁹ See *e.g.*, Laskin, *The British Tradition in Canadian Law* (1969), pp. 49 *et seq.*

⁹⁰ Waters, *op. cit.*, footnote 18, p. 335.

⁹¹ See *e.g.*, J.D. Davies, *Trusts*, [1969] A.S.C.L. 365, at pp. 380, 388, where he refers to "the remedial nature of trust law in Canada". The cases cited by Mr. Davies are: *Whonnock Lumber Co. Ltd v. G. and F. Logging Co.* (1968), 69 D.L.R. (2d) 561 (B.C.C.A.) (which, however, seems to be a straightforward case of an express trust); *Roman v. Crichton* (1969), 3 D.L.R. (3d) 673 (S.C.C.); *Re Bank of Western Canada* (1968), 70 D.L.R. (2d) 113, rev'd (1970), 8 D.L.R. (3d) 593 (Ont. C.A.).

⁹² The discussion in the text will be confined to the remedial constructive trust cases. For cases where an express or implied trust appears to have been "found" as a means of achieving the desired result, see *e.g.*: *Bobbie v. Gilchrist* (1953), 9 W.W.R. 458 (Man. Q.B.); *Smarzik v. Bogdalik* (1959), 29 W.W.R. 481 (Man. Q.B.); *Croft v. Humphrey* (1971), 18 D.L.R. (3d) 20 (N.S.S.C.); *Shabinsky v. Horwitz*, [1973] 1 O.R. 745 (Ont. H.C.); *Re Wozney and Wozney* (1974), 44 D.L.R. (3d) 637 (Man.). A resulting trust appears to have been "found" in *Wilkinson v. Wilkinson* (1976), 67 D.L.R. (3d) 385 (Ont. C.A.).

⁹³ See *e.g.*, the comment of Laskin J.A. in *Crichton v. Roman* (1968), 67 D.L.R. (2d) 669, at p. 674: "In the present case, the declaration of trusteeship was the remedial method of resolving the original contest as to the beneficial ownership of company shares which were nominally held in the name of a third person in trust for [the defendant]".

⁹⁴ See *infra*, Part IV.

Furthermore, in recent years, the American influence has become increasingly apparent. Thus, there are a number of decisions in which the constructive trust has been imposed as a remedy to prevent unjust enrichment. While it is unlikely that Canadian courts will abandon the learning and the classifications which have grown up in connection with the English constructive trust, it is submitted that the adoption of the American style constructive trust by the Supreme Court of Canada in *Pettkus v. Becker*⁹⁵ will profoundly influence the future development of Canadian trust law.⁹⁶

IV. *The Development of the English Style Remedial Trust.*

A. *Introduction.*

In English and Canadian law there is no general agreement as to precisely which situations give rise to a constructive trust,⁹⁷ though there are certain general categories of cases in which it is agreed that a constructive trust does arise.⁹⁸ One such category involves cases where a trust is imposed to frustrate fraudulent or unconscionable conduct, and it is this category which the English courts in particular have extended to develop the constructive trust as a general equitable remedy.⁹⁹

B. *The "Fraudulent and Unconscionable Conduct" Cases.*

It has long been maintained that where one person has acquired property in consequence of his fraud upon another, the former will be liable as a constructive trustee for the benefit of the latter.¹⁰⁰ As Professor Sheridan has shown,¹⁰¹ "fraud" in equity is used to cover a

⁹⁵ *Supra*, footnote 1.

⁹⁶ See *infra*, Part V.

⁹⁷ For example, do the secret trusts and mutual wills cases involve the imposition of a constructive trust? Compare Nathan and Marshall, *op. cit.*, footnote 13, at pp. 412-420; Waters, *op. cit.*, footnote 12, pp. 59-60; Waters, *op. cit.*, footnote 18, pp. 219-224, 355-356. See also Sheridan, *The Floating Trust: Mutual Wills* (1977), 15 *Alta L. Rev.* 211, at pp. 220, 240-242.

⁹⁸ *E.g.*, (1) where an express trustee or other fiduciary obtains an advantage in breach of his fiduciary duty (*Keech v. Sandford*, *supra*, footnote 29; *Canadian Aero Service Ltd v. O'Malley* (1973), 40 D.L.R. (3d) 371 (S.C.C.)); (2) where a stranger, not being a *bonafide* purchaser, receives, or knowingly deals with, or knowingly assists with a fraudulent design respecting property which is subject to a trust (*Ankorn v. Stewart* (1920), 54 D.L.R. 74 (Ont. A.D.); *Maguire v. Maguire and Toronto General Trusts Corporation* (1921), 64 D.L.R. 204 (Ont. S.C.); *MacDonald v. Hauer* (1977), 72 D.L.R. (3d) 110 (Sask. C.A.)); (3) where a defendant seeks to obtain an advantage by fraudulent or unconscionable conduct (*infra*).

⁹⁹ Oakley, *op. cit.*, footnote 18, at p. 20; Oakley, *op. cit.*, footnote 6, p. 12.

¹⁰⁰ See *e.g.*, *McCormick v. Grogan* (1869), L.R. 4 H.L. 82, per Lord Westbury, at p. 97.

¹⁰¹ Sheridan, *Fraud in Equity* (1957).

wide variety of conduct. At common law, fraud is limited basically to those situations involving a fraudulent misrepresentation, that is, a false statement of fact, made by the defendant to the plaintiff knowingly, or without belief in its truth, or recklessly, with the intent that it should be acted upon; which is in fact acted upon by the plaintiff.¹⁰² Equity recognizes this "actual fraud", and in addition is prepared to remedy situations involving "constructive fraud"¹⁰³—a term which is not readily susceptible of definition, but which may be taken to include "all conduct which equity treats as unfair, unconscionable, and unjust".¹⁰⁴

Used in this broad sense, the idea of "fraud prevention" may be seen to pervade virtually the whole field of constructive trusts.¹⁰⁵ However, the cases which are usually thought of as coming within this category are those where a trust is imposed:

- (1) to prevent the retention of a benefit acquired by "undue influence";¹⁰⁶
- (2) to prevent a criminal profiting from his crime;¹⁰⁷
- (3) to prevent a transferee of property passing under a will or on an intestacy from setting up the absolute nature of the transfer to him to defeat the beneficiaries of a "secret trust";¹⁰⁸

¹⁰² Snell, *op. cit.*, footnote 36, p. 543. See also, *Derry v. Peek* (1889), 14 App. Cas. 337 (H.L.).

¹⁰³ See generally, Snell, *op. cit.*, *ibid.*, pp. 545-560.

¹⁰⁴ Bogert, *op. cit.*, footnote 71, para. 471.

¹⁰⁵ Thus, fraud is specifically mentioned as an element—though not a prerequisite—in many of the cases involving the making of an unauthorised profit by a fiduciary: see *e.g.*, *Regal (Hastings) Ltd v. Gulliver*, [1942] 1 All E.R. 378 (H.L.), per Lord Russell of Killowen, at p. 386.

¹⁰⁶ See *e.g.*, *Lloyds Bank Ltd v. Bundy*, [1975] Q.B. 326 (C.A.); *Irvine v. Irvine*, [1977] 3 W.W.R. 37 (B.C.C.A.). See also, Stapleton, *The Presumption of Undue Influence* (1967), 17 U.N.B.L.J. 46.

¹⁰⁷ See *e.g.*, *Schobelt v. Barber* (1967), 59 D.L.R. (2d) 519 (Ont.); *Re Dreger* (1976), 69 D.L.R. (3d) 47 (Ont.). See further, Youdan, *Acquisition of Property by Killing* (1973), 89 L.Q. Rev. 235, at p. 253; Earnshaw and Pace, *Let the Hand Receiving It Be Ever so Chaste* (1974), 37 Mod. L. Rev. 481.

¹⁰⁸ It is beyond the scope of this article to debate the juridical nature of secret trusts, it being sufficient for present purposes to note that a number of cases have stated that a constructive trust in the terms of the informal agreement to hold the property for the benefit of some third person or persons is imposed on the transferee (promisor) in order to prevent a fraud on the promisee: see *e.g.*, *Blackwell v. Blackwell*, [1929] A.C. 318 (H.L.) per Viscount Sumner, at p. 335; *Ottaway v. Norman*, [1972] 2 W.L.R. 50 (Ch. D.), per Brightman J., at pp. 57 *et seq.* However, it is not conceded that this reasoning satisfactorily explains those cases where there is no question of the transferee seeking to use the property for his own benefit, and yet the trust is enforced onwards in favour of the beneficiaries of the secret trust: see *e.g.*, *Re Snowden (Deceased)*, [1979] 2 All E.R. 172 (Ch.D.), per Megarry V.C., at p. 178.

- (4) to prevent a transferee of property acquired *inter vivos* from setting up the absolute nature of the transfer to him in contravention of an oral agreement by him to hold either for the benefit of the transferor or for some third party.¹⁰⁹

An important case falling within this last head is *Bannister v. Bannister*.¹¹⁰ There, the defendant contracted to sell two cottages to the plaintiff at a price well below market value, on the latter's undertaking that the defendant could continue to live in one of the cottages rent free for as long as she wished. Subsequently, the plaintiff brought action against the defendant to recover possession of the cottage in which she was living. The defendant counterclaimed for a declaration that the plaintiff held the cottage in trust for her for her life. The plaintiff sought to rely on the absence of writing required by statute¹¹¹ for the creation of such an interest. However, the Court of Appeal found in favour of the defendant. Scott L.J., who delivered the judgment of the court, said:¹¹²

It is, we think, clearly a mistake to suppose that the equitable principle on which a constructive trust is raised against a person who insists on the absolute character of a conveyance to himself for the purpose of defeating a beneficial interest, which, according to the true bargain, was to belong to another, is confined to cases in which the conveyance itself was fraudulently obtained. The fraud which brings the principle into play arises as soon as the absolute character of the conveyance is set up for the purpose of defeating the beneficial interest, and that is the fraud to cover which the Statute of Frauds or the corresponding provisions of the Law of Property Act, 1925, cannot be called in aid in cases in which no written evidence of the real bargain is available. Nor is it, in our opinion, necessary that the bargain in which the absolute conveyance is made should include any express stipulation that the grantee is in so many words to hold as trustee. It is enough that the bargain should have included a stipulation under which some sufficiently defined beneficial interest in the property was to be taken by another.

In the earlier cases in which an informal agreement had been enforced by the courts the arrangement had either spelled out an express trust, or the court had been prepared to treat it as creating a trust obligation, (that is, an implied trust), and had admitted parol evidence thereof in order to prevent a fraud upon a statute.¹¹³ In the view of many commentators,¹¹⁴ *Bannister v. Bannister* is merely

¹⁰⁹ See e.g., *Davies v. Otty* (No. 2) (1865), 35 Beav. 208; *Haigh v. Kaye* (1892), L.R. 7 Ch. App. 469; *Booth v. Turle* (1873), L.R. 16 Eq. 182; *Re Duke of Marlborough*, [1894] 2 Ch. 133; *Bannister v. Bannister*, *supra*, footnote 50; *Langille v. Nass* (1917), 36 D.L.R. 368 (N.S.). Cf. *Rochevoucauld v. Boustead*, [1897] 1 Ch. 196 (C.A.); *Brown v. Storoschuk*, [1947] 1 D.L.R. 227 (B.C.C.A.).

¹¹⁰ *Ibid.*

¹¹¹ Law of Property Act, 1925, c. 20, s. 53(1)(b).

¹¹² *Supra*, footnote 50, at p. 136.

¹¹³ See e.g., *Haigh v. Kaye*, *supra*, footnote 109; *Booth v. Turle*, *supra*, footnote 109; *Re Duke of Marlborough*, *supra*, footnote 109; *Rouchefoucauld v. Boustead*, *supra*, footnote 109.

¹¹⁴ See e.g., *Snell, op. cit.*, footnote 36, p. 106; *Oakley, op. cit.*, footnote 18, at p. 23; *Smith, Licences and Constructive Trusts*—"The Law is What it Ought to Be"

another such case: the defendant's wrongful act facilitated proof of the informal express trust, and a constructive trust in the same terms as the express trust was imposed to avoid the statutory requirement of writing.¹¹⁵ But if this is the correct view of the case, it is difficult to see why the court did not simply enforce the express trust.¹¹⁶ The better view of *Bannister*, it is submitted, is that the court did not regard the arrangement itself as creating a trust, but *imposed* a trust, having regard to the plaintiff's unconscionable conduct in attempting to set up the absolute nature of the conveyance to defeat the defendant's claim, and effective from the time of that conduct. In other words, here we see quite clearly the constructive trust being used as a remedial device to do justice *inter partes*.

That the implications of the decision were broader than has been generally recognized is borne out by *Neale v. Willis*,¹¹⁷ a case which, unlike *Bannister*, involved a "three party" situation, that is, where the beneficiary under the trust was someone other than the original transferor. The facts of the case were as follows. The defendant borrowed money from his mother-in-law to put towards the purchase

(1973), 32 Camb. L.J. 123, at p. 143; Pettit, *op. cit.*, footnote 6, p. 64. But cf. Waters, *op. cit.*, footnote 12, p. 62, *Chandler v. Kerley*, [1978] 2 All E.R. 942 (C.A.), per Lord Scarman at p. 946.

¹¹⁵ See Law of Property Act, 1925, *supra*, footnote 111, ss 53(1) and (2). In Alberta, The Statute of Frauds, 1677, 29 Car. II. c. 3, ss 7 and 8, still applies. S. 7 requires a declaration or creation of a trust of land to be evidenced in writing, signed by the declarant. S. 8 exempts (*inter alia*) constructive trusts from the requirement of writing.

¹¹⁶ See e.g., *Rocheffoucauld v. Boustead*, *supra*, footnote 109, per Lindley L.J., at p. 207. See further, Pettit, *op. cit.*, footnote 6, p. 65; but cf., *Thompson v. Thompson*, [1961] S.C.R. 3, per Judson J., at p. 13; Waters, *op. cit.*, footnote 18, p. 194. Canadian decisions in which the express trust has been enforced include *Brown v. Storoschuk*, [1947] 1 D.L.R. 227 (B.C.C.A.); *David v. Szoke* (1973), 39 D.L.R. (3d) 707 (B.C.). The device of invoking the maxim that "Equity will not permit the Statute of Frauds to be used as an instrument of fraud" in order to enforce the express trust, notwithstanding the statutory writing requirement, has given rise to controversy. So, too, has the alternative device of imposing a constructive trust to carry out the terms of an otherwise unenforceable express trust. In *Scheuerman v. Scheuerman* (1916), 28 D.L.R. 223 (S.C.C.), Duff J. suggested that the only appropriate action in such circumstances was an action by the transferor against the transferee for *restitutio in integrum*, based on the latter's fraudulent refusal to give effect to the terms of the express trust: *ibid.*, at p. 230. See also in support of this view, *Pahara v. Pahara*, [1946] 1 D.L.R. 433 (S.C.C.), per Rand J., at p. 437; Editorial Note to *Brown v. Storoschuk*, [1947] 1 D.L.R. 227 (B.C.C.A.), at p. 228; Waters, *op. cit.*, footnote 18, pp. 192-201. But cf. *Langille v. Nass* (1917), 36 D.L.R. 368 (N.S.), where a constructive trust was imposed to restrain the defendants from claiming to hold the disputed property on trusts other than those justified by the informally expressed intentions of the donors; *Peffer v. Rigg*, [1977] 1 W.L.R. 285 (Ch. D.), where a constructive trust was imposed to prevent the recipient of trust property from relying on the beneficial owner's non-compliance with the registration provisions of a statute.

¹¹⁷ (1968), 19 P. & C.R. 836 (C.A.).

of a house, on the basis of a promise that the house would be purchased in the joint names of himself and the plaintiff, who was then his wife. The defendant in fact, without disclosing the matter to his mother-in-law or to the plaintiff, took the conveyance in his name alone. Some years later, the plaintiff and the defendant were divorced. After the divorce the plaintiff sought a declaration that the property was owned by the defendant and herself in equal shares. The Court of Appeal upheld the plaintiff's claim, and declared that the defendant held the property on a constructive trust for himself and his former wife jointly. The leading judgment was delivered by Lord Denning M.R., who stated:¹¹⁸

The agreement by the husband with the mother-in-law, Mrs. Gething, was a perfectly good agreement. It was an agreement for the benefit of the wife—a third person—and was binding on the husband. That is clear from the decision of the House of Lords in *Beswick v. Beswick*.¹¹⁹ It could clearly be enforced by Mrs. Gething by specific performance. Mr. Bowyer objects that Mrs. Gething—the contracting party—is not a party to these proceedings. He distinguishes *Beswick v. Beswick*¹²⁰ on the grounds that there the action for specific performance was brought by the party to the contract, whereas the action here is brought by the third person, the wife. I am not impressed by this distinction. This was a binding contract and the Court of Equity will not allow the husband to go back on it. It will enforce it by holding that the husband holds the property on a constructive trust for himself and his wife. This follows from *Bannister v. Bannister*.¹²¹ That case shows that if a person who takes a conveyance to himself, which is absolute in form, nevertheless has made a bargain that he will give a beneficial interest to another, he will be held to be a constructive trustee for it for the other. He cannot insist on the absolute character of the conveyance to himself and to him alone. He does it for the purpose of defeating a beneficial interest which according to the true bargain was to belong to his wife. He holds it on a constructive trust to carry out the bargain. Seeing that there was a constructive trust, there is no need for any writing. Section 53 of the Law of Property Act 1925 does not affect the operation of a constructive trust.

Lord Denning M.R., therefore, accepted that the defendant was in breach of a contractual, and not a trust arrangement; but basing himself on *Bannister v. Bannister*,¹²² he invoked a remedial constructive trust to overcome the privity problem and grant relief to the plaintiff.¹²³ In enforcing the agreement onwards in favour of the wife,

¹¹⁸ *Ibid.*, at p. 839.

¹¹⁹ [1968] A.C. 59.

¹²⁰ *Ibid.*

¹²¹ *Supra*, footnote 50.

¹²² *Ibid.*

¹²³ For a recent Canadian decision where this technique was used, see *Robitaille and Robitaille v. Sandberg*, [1977] 3 W.W.R. 669 (B.C.). See also *Re Union Construction Ltd and Nova Scotia Power Corp. Ltd et al.* (1980), 111 D.L.R. (3d) 728 (N.S.), per Burchell J., at pp. 743-745 (overruled, *ibid.*, at p. 747 (N.S.A.D.)). An earlier decision which should be noted is *Lord Strathcona S.S. Co. Ltd v. Dominion Coal Co. Ltd*, [1926] 1 D.L.R. 873 (P.C. on appeal from N.S.C.A.), where the purchasers of a ship under charter, who expressly agreed with the transferors to carry out the terms of

some would suggest that Lord Denning M.R. went beyond a theory of unjust enrichment, which operates to work a *restitutio in integrum*.¹²⁴ The constructive trust was employed to do indirectly (that is, enforce the agreement) what, because of a procedural deficiency, could not be done directly.

In similar vein, in the recent decision in *Binions v. Evans*,¹²⁵ Lord Denning M.R. invoked a constructive trust to ensure that the defendant received the benefit of an agreement which had been entered into for her protection between the trustees of the Tredegar Estate and the plaintiffs, which the plaintiffs subsequently attempted to ignore. The trustees had agreed with the defendant that she might remain in a cottage rent free for the rest of her life. They then sold the cottage to the plaintiffs subject to the defendant's interest,¹²⁶ in

the charterparty, subsequently denied, as against the charterers, any obligation to do so. The charterers obtained an injunction to restrain the purchasers from violating the conditions of purchase to their prejudice on the basis that, being affected with notice of the charterparty, the latter were constructive trustees: *ibid.*, per Lord Shaw, at pp. 883-884. The finding of trusteeship here "described the obligation of the purchaser under threat of injunction to recognize the charterparty of which he had had full notice at the time of purchase", (Waters, *op. cit.*, footnote 18, p. 59), the relief granted being tailored to suit the particular circumstances of the case. This is consistent with the American idea that "the equity of the transaction must shape the measure of relief", *Beatty v. Guggenheim Exploration Co.* (1919), 225 N.Y. 380 (N.Y.C.A.), per Cardozo J., at p. 389, and suggests a flexibility to the English style constructive trust that has not generally been appreciated. For further discussion of the desirability of flexibility of remedies consequent upon the imposition of a constructive trust, see Davies, *Constructive Trusts, Contract and Estoppels: Proprietary and Non Proprietary Remedies for Informal Arrangements Affecting Land* (1980), 7 *Adelaide L. Rev.* 200, at p. 212, n. 58. For further comments on the *Lord Strathcona* case, see Waters, *op. cit.*, footnote 18, pp. 57-60, 347; *Port Line Ltd v. Ben Line Steamers Ltd*, [1958] 2 Q.B. 146, per Diplock J., at p. 166; *Swiss Bank Corporation v. Lloyds Bank Ltd*, [1979] 1 Ch. 548, per Browne-Wilkinson J., at pp. 571-574 (overruled, [1980] 2 All E.R. 419 (C.A.)).

¹²⁴ See e.g., *Scheuerman v. Scheuerman*, *supra*, footnote 116, per Duff J., at p. 230; *Pahara v. Pahara*, *supra*, footnote 116, per Rand J., at p. 437. But cf. the secret trust and mutual wills cases; and see Palmer, *op. cit.*, footnote 61, para. 1.1, p. 4: "The term 'restitution' . . . is not wholly apt since it suggests restoration to the successful party of some benefit obtained from him. Usually this will be the case where relief is given, but by no means always. There are cases in which the successful party obtains restitution of something he did not have before, for example a benefit received by the defendant from a third person which justly should go to the plaintiff."

¹²⁵ [1972] Ch. 359. See also Smith, *op. cit.*, footnote 114; Oakley, *op. cit.*, footnote 6, pp. 25-27.

¹²⁶ A majority of the court characterised this as an equitable life interest, making the defendant a tenant for life under the Settled Land Act, 1925: [1972] Ch. 359, per Megaw and Stephenson L. JJ., at pp. 370 and 372 respectively; but cf. Hornby, *Tenancy for Life or Licence* (1977), 93 L.Q. Rev. 561. Lord Denning M.R. held that upon a proper construction of the agreement the defendant had a contractual licence, which he held gave her an equitable interest in land: *ibid.*, at p. 368. Cf. Smith, *op. cit.*, footnote 114, at p. 135. Even if the defendant did not have an equitable interest at the outset, he said, she certainly acquired one when the trustees sold the cottage to the plaintiffs subject to her rights under the agreement: [1972] Ch. 359, at p. 368.

consequence of which a lower purchase price was paid. Shortly afterwards, the plaintiffs gave notice to the defendant and brought an action for possession. Once again, Lord Denning M.R. fastened on the unconscionable nature of the plaintiff's conduct as a basis for imposing a constructive trust.¹²⁷

The trustees stipulated with the plaintiffs that they were to take the house "subject to" the defendant's rights under the agreement. They supplied the plaintiffs with a copy of the contract: and the plaintiffs paid less because of her right to stay there. In these circumstances, this Court will impose on the plaintiffs a constructive trust for her benefit: for the simple reason that it would be utterly inequitable for the plaintiffs to turn the defendant out contrary to the stipulation subject to which they took the premises. That seems to me clear from the important decision of *Bannister v. Bannister*¹²⁸ . . . I know that there are some who have doubted whether a contractual licensee has any protection against a purchaser, even one who takes with full notice¹²⁹ . . . None of these doubts can prevail however, when the situation gives rise to a constructive trust. Whenever the owner sells the land to a purchaser, and at the same time stipulates that he shall take it "subject to" a contractual licence, I think it plain that a court of equity will impose on the purchaser a constructive trust in favour of the beneficiary. It is true that the stipulation . . . is . . . for the benefit of one who is not a party to the contract for sale; but, as Lord Upjohn said in *Beswick v. Beswick*¹³⁰ . . . that is just the very case in which equity will "come to the aid of common law". It does so by imposing a constructive trust on the purchaser. It would be utterly inequitable that the purchaser should be able to turn out the beneficiary.

In further support of the concept of a remedial constructive trust Lord Denning M.R. cited dicta from two well-known authorities, one American and one English.¹³¹ From the judgment of Cardozo J. in *Beatty v. Guggenheim Exploration Co.*¹³² he adopted the statement that: "A constructive trust is the formula through which the conscience of equity finds expression"; and from the speech of Lord Diplock in *Gissing v. Gissing*,¹³³ the statement that a constructive trust is created "whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land acquired". The suggestion that the American and English positions on the nature of the constructive trust are the same

¹²⁷ *Supra*, footnote 125, at p. 368.

¹²⁸ *Supra*, footnote 50.

¹²⁹ Citing *Wade, Licences and Third Parties* (1952), 68 L.Q. Rev. 337; *Re Solomon*, [1967] Ch. 573. See also, *National Provincial Bank Ltd v. Ainsworth*, [1965] A.C. 1175; *Crane, Estoppel Interests in Land* (1967), 31 Conv. (N.S.) 332. The view propounded by Lord Denning M.R., that a contractual licensee acquires an equitable interest in the land which will be protected by the imposition of a constructive trust, was approved and followed in *DHN Distributors Ltd v. London Borough of Tower Hamlets*, [1976] 3 All E.R. 462 (C.A.). See also *In re Sharpe*, [1980] 1 W.L.R. 219 (Ch. D.).

¹³⁰ *Supra*, footnote 119, at p. 98.

¹³¹ *Supra*, footnote 125, at p. 368.

¹³² (1919), 225 N.Y. 280, at p. 386.

¹³³ [1971] A.C. 886, at p. 905.

represents a characteristically bold move by Lord Denning M.R. It appears to be borne out by the words quoted from Lord Diplock in the *Gissing*¹³⁴ case; but, as will be shortly discussed, there is some dispute as to the significance of this passage. However, before turning to consider the "matrimonial property" cases, of which *Gissing v. Gissing*¹³⁵ is one, attention should be drawn to the recent Court of Appeal decision in *Hussey v. Palmer*,¹³⁶ where once again Lord Denning M.R. took the opportunity to develop his views on the matter of the remedial constructive trust.

The facts were that the plaintiff, an elderly widow, was invited by her daughter and son-in-law, the defendant, to live in their house. A bedroom was built on as an extension for the plaintiff, she paying the cost of the extension directly to the builder. At the time, nothing was said by any of the parties about repayment of the money, and it appears likely that little, if any, thought was given to the matter. The assumption on both sides appears to have been that the plaintiff would live at the house until her death, whereupon the defendant would become beneficially entitled to the extension. However, differences arose between the plaintiff and her daughter, and as a result, after about fifteen months, the plaintiff moved out of the house. The plaintiff then claimed the cost of the extension from the defendant, arguing at various stages¹³⁷ on the basis of a loan and of a resulting trust. The defence was that the payment was in the nature of a gift. In the Court of Appeal, the claim was put on the basis of a resulting trust, and was upheld by Lord Denning M.R. and Phillimore L.J., Cairns L.J. dissenting.¹³⁸

The leading judgment for the majority was delivered by Lord Denning M.R. who said:¹³⁹

Although the plaintiff alleged that there was a resulting trust, I should have thought that the trust in this case, if there is one, was more in the nature of a

¹³⁴ *Ibid.*

¹³⁵ *Ibid.*

¹³⁶ [1972] 1 W.L.R. 1286. See also Strathy, *The Constructive Trust as a Restitutionary Remedy: The case of Hussey v. Palmer* (1974), 32 U. of T. Fac. of L. Rev. 83; Note (1973), 89 L.Q. Rev. 2.

¹³⁷ *Ibid.*, per Lord Denning M.R., at pp. 1288-1289 for an account of the previous proceedings.

¹³⁸ *Ibid.*, at p. 1292. Cairns L.J. agreed with the trial judge that the plaintiff had failed to establish the cause of action which she had set up. He held that this was a case of a loan, which would put the parties in the relationship of creditor and debtor, and not of *cestui que trust* and trustee. (See further Underhill, *op. cit.*, footnote 6, pp. 272; Waters, *The Doctrine of Resulting Trusts in Common Law Canada* (1970), 16 McGill L.J. 187, at p. 195.) Had it not been for the view taken by the two other members of the court, Cairns L.J. would have been prepared to allow the plaintiff to amend her pleadings and have the matter retried; but in the event, this course was unnecessary.

¹³⁹ *Supra*, footnote 30, at pp. 1289-1290.

constructive trust; but this is more a matter of words than anything else. The two go together. By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or the benefit of it or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the court can enable an aggrieved party to obtain restitution.

In the result, it was held that the plaintiff was entitled to an interest in the property proportionate to her contribution, thereby giving the decision a distinctly American flavour.¹⁴⁰ The plaintiff, however, was content to be repaid the sum which she had actually paid out, and nothing more.

Presumably in this case, the court could have invoked the equitable maxim that "Equity presumes bargains and not gifts", and found in favour of the plaintiff on the basis of well-established resulting trust principles.¹⁴¹ There was no need to resort to the remedial constructive trust at all. However, the opportunity to do so was evidently welcomed. The suggestion by Lord Denning M.R. that the trust may arise at the outset, when the property is acquired, or subsequent to the acquisition of the property, as the circumstances may require, echoes the view which had been earlier put forward by Scott L.J. in the *Bannister*¹⁴² case, although *Bannister* was not directly mentioned. In further support of his decision Lord Denning M.R. referred to *Binions v. Evans*,¹⁴³ and to several of the "matrimonial property" cases¹⁴⁴ in which the *Gissing*¹⁴⁵ decision had been treated as acknowledging the existence of a remedial constructive trust.

C. The Matrimonial Property Cases.

In addition to the decisions just discussed which developed the idea of a remedial constructive trust from the judgment of Scott L.J. in *Bannister v. Bannister*,¹⁴⁶ attention should be drawn to the line of cases, which are here called the "matrimonial property" cases, (though they involve claims by both married and unmarried couples),

¹⁴⁰ See e.g., Waters, *op. cit.*, footnote 18, p. 336; Hanbury and Maudsley, *op. cit.*, footnote 13, p. 572.

¹⁴¹ See e.g., Lesser, *The Acquisition of Inter Vivos Matrimonial Property Rights in English Law: A Doctrinal Melting Pot* (1973), 23 U. of T. L.J. 148, at p. 202; Waters, *op. cit.*, footnote 138, at pp. 194 *et seq.*

¹⁴² *Supra*, footnote 50, at p. 136.

¹⁴³ *Supra*, footnote 125.

¹⁴⁴ *Heseltine v. Heseltine*, [1971] 1 All E.R. 952 (C.A.); *Falconer v. Falconer*, [1970] 3 All E.R. 499 (C.A.); *Cooke v. Head*, [1972] 2 All E.R. 38 (C.A.).

¹⁴⁵ *Supra*, footnote 133.

¹⁴⁶ *Supra*, footnote 50.

which developed the idea of a remedial constructive trust from the statement of Lord Diplock in *Gissing v. Gissing*¹⁴⁷ that:

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

Some doubts have been expressed as to whether in fact Lord Diplock by this statement intended to lend support to the concept of a remedial trust,¹⁴⁸ and in order to attempt an assessment of the significance of the statement it is proposed to give a brief background to the *Gissing*¹⁴⁹ case.

The facts of the matrimonial property cases fit the same general pattern: on the breakdown of the marriage, or the *de facto* relationship, as the case may be,¹⁵⁰ one of the parties claims to be entitled, by virtue of contributions of a direct or indirect nature, to a beneficial interest in property, usually the family home, the legal title to which is in the sole name of the other. Traditionally, these claims have been settled by an application of the ordinary rules of property law as modified by resulting trust principles, including, where

¹⁴⁷ *Supra*, footnote 133, at p. 905.

¹⁴⁸ See Oakley, *op. cit.*, footnote 18, at p. 26.

¹⁴⁹ *Supra*, footnote 133.

¹⁵⁰ In England, see *Cooke v. Head*, *supra*, footnote 144; *Eves v. Eves*, [1975] 3 All E.R. 768 (C.A.). In Canada, see *Pettkus v. Becker*, *supra*, footnote 1, per Dickson J., at p. 850 (S.C.R.), 275 (D.L.R.): "I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period." As to relationships of relatively short duration, where the parties had no intention of assuming the obligations of married partners, see *e.g.*, *Dwyer v. Love* (1975), 58 D.L.R. (3d) 735 (P.E.I.); *Palchinski v. Low* (1979), 12 R.F.L. (2d) 176 (Sask.). In Alberta, there are a number of judicial pronouncements to the effect that where parties live together in a conjugal relationship, though not married to each other, their property disputes fall to be determined in the same manner as the property disputes of married persons: see *Stanley v. Stanley* (1960), 23 D.L.R. (2d) 620 (Alta T.D.), per Milvain J., at p. 625; *Barleben (or Schultz) v. Barleben* (1964), 44 D.L.R. (2d) 332 (Alta A.D.), per Kane J.A., at p. 335; *Ruff v. Strobel* (1978), 86 D.L.R. (3d) 284 (Alta A.D.), per Lieberman J.A., at p. 288; *Coles v. Ferguson* (1980), 13 R.F.L. (2d) 193 (Alta C.A.), per Laycraft J.A., at p. 198. There are two qualifications: (1) The Matrimonial Property Act, S.A. 1978, c. 22, does not apply to unmarried couples, (2) the presumption of advancement, which in the absence of statutory provisions to the contrary, applies to transfers from husband to wife to raise a presumption of gift in the wife's favour, does not apply as between unmarried couples; *Fedorowicz v. Fedorowicz*, [1951] 3 W.W.R. 230, per Duval J., at p. 234 (Man.). It is submitted that *Manley v. Schiller* (1980), 18 R.F.L. (2d) 109 (B.C.) is wrong on this point. (Even as between husband and wife, the importance of the presumption is now greatly diminished: see *Rathwell v. Rathwell*, *supra*, footnote 10, per Dickson J., at p. 452, *cf.* *Robertson v. Robertson*, [1977] 4 W.W.R. 77, at p. 82 (Alta); *Hofmann v. Hofmann* (1979), 101 D.L.R. (3d) 292, at p. 298 (B.C.).

appropriate, the presumptions of resulting trust and advancement.¹⁵¹ In more recent times, however, the adequacy of these rules has come into question. Given modern social conditions, where very often both parties are working in order to improve the economic position of the family unit, it became apparent to the courts that an application of the traditional rules did not necessarily produce a just result between them. So long as the relationship was going well, the parties were not concerned with where legal title lay. Was it appropriate to make this the determining factor when the relationship broke down? In response to the problem, a line of decisions in the English Court of Appeal¹⁵² developed the doctrine of "family assets", which held basically that where both parties were contributing to the general expenses of the family, this was evidence from which the court could infer an implied pooling agreement or joint venture, and accordingly the parties should share the beneficial interest in the "family assets" acquired from the pool irrespective of where the legal interest lay.¹⁵³ Not surprisingly, as the Law Commission¹⁵⁴ has pointed out, some of these decisions were difficult to reconcile with established property law principles; and in *Pettitt v. Pettitt*¹⁵⁵ and *Gissing v. Gissing*¹⁵⁶ the House of Lords put an end to the doctrine of "family assets".¹⁵⁷ The courts, it seems, were not to be concerned with dispensing "justice", but with the consideration of "the cold legal question",¹⁵⁸ of property rights.

¹⁵¹ These rules are conveniently stated in The Law Commission, Published Working Paper No. 42: Family Property Law (October, 1971), pp. 53 *et seq.* See also Bromley, *Family Law* (5th ed., 1976), pp. 447 *et seq.*

¹⁵² See e.g., *Rimmer v. Rimmer*, [1953] 1 Q.B. 63; *Fribance v. Fribance*, [1957] 1 All E.R. 357. The doctrine of "family assets" was never accepted in Canada: see *Thompson v. Thompson*, [1961] S.C.R. 3, per Judson J., at pp. 13-14. *Rathwell v. Rathwell*, *supra*, footnote 10, per Dickson J., at p. 488.

¹⁵³ "It comes to this: where a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is the prima facie inference from their conduct that the house and furniture is a 'family asset' in which each is entitled to an equal share. It matters not in whose name it stands; or who pays for what; or who goes out to work and who stays at home. If they both contribute to it by their joint efforts the prima facie inference is that it belongs to them both equally: at any rate, when each makes a financial contribution which is substantial": *Gissing v. Gissing*, [1969] 2 Ch. 85, per Lord Denning M.R., at p. 93, (overruled *supra*, footnote 133).

¹⁵⁴ *Op. cit.*, footnote 151, p. 60.

¹⁵⁵ [1970] A.C. 777.

¹⁵⁶ *Supra*, footnote 133.

¹⁵⁷ See e.g., *Pettitt v. Pettitt*, *supra*, footnote 155, per Lord Upjohn, at p. 817; see also, The Law Commission, *op. cit.*, footnote 151, p. 14. Cf. Lesser, *op. cit.*, footnote 141, at pp. 177-180, 182-184.

¹⁵⁸ The phrase is used by Lord Denning, M.R., and Edmund Davies L.J. (dissenting) in the Court of Appeal decision in *Gissing v. Gissing*, *supra*, footnote 153, at pp. 93 and 94, respectively.

Unfortunately, the combined effect of the speeches in *Pettitt*¹⁵⁹ and *Gissing*¹⁶⁰ was to leave the law relating to matrimonial property rights in a confused state.¹⁶¹ Without here attempting a detailed analysis of these cases, it may be said as a general proposition that in *Gissing v. Gissing*¹⁶² the House of Lords, in rejecting the "family assets" approach, supplanted it with the "trust approach". However, no general agreement was apparent as to which trust principles were applicable. In consequence, uncertainty has arisen as to the importance or otherwise to be attached to the parties' intentions, or to the absence of same, in deciding whether there should be a sharing of the beneficial interest.

Lord Pearson, for example, suggested that in the absence of an express agreement between the parties as to their property rights the traditional resulting trust principles, as laid down in *Dyer v. Dyer*,¹⁶³ should apply. Following this approach, a *presumption* would arise that the contributing party should have a beneficial interest co-extensive with his or her contribution.¹⁶⁴ Lord Reid, however, suggested that a trust could be *imposed* by the court in the absence of any agreement between the spouses as to the sharing of the beneficial interest wherever the spouse in whose name the legal interest was vested accepted from the claiming spouse contributions "without

¹⁵⁹ *Supra*, footnote 155.

¹⁶⁰ *Supra*, footnote 133.

¹⁶¹ A detailed comparison of *Pettitt* and *Gissing* is undertaken in Lesser, *op. cit.*, footnote 141, at p. 196. See also Cullity, *The Matrimonial Home—A Return to Palm-Tree Justice: Trust Doctrines Based on (a) Intent and (b) Unjust Enrichment* (1978), 4 E.T.Q. 277. It should be noted that in England, as a result of recent legislation, the court now has power, upon the granting of a decree of divorce, nullity or judicial separation, to make a "property adjustment order", whereby either party to the marriage may be ordered to transfer or settle such property as may be specified to or upon the other party or to or for the benefit of a child of the family: (Imp.) Matrimonial Causes Act 1973, c. 18, s. 24. In such circumstances, the common law rules are no longer relevant. They remain relevant, however, where a property dispute occurs during the subsistence of the marriage (or, of course, in the case of unmarried couples and strangers). For recent Canadian matrimonial property legislation, see Bissett-Johnson and Holland (eds), *Matrimonial Property Law in Canada* (1980); McClean, *Matrimonial Property—Canadian Common Law Style* (1981), 4 U. of T.L.J. 363.

¹⁶² *Supra*, footnote 133.

¹⁶³ (1788), 2 Cox Eq. Cas. 92.

¹⁶⁴ "If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by her towards the purchase of the house there was and is a resulting trust in her favour. . . . The starting point, in a case where substantial contributions are proved to have been made, is the presumption of a resulting trust, although it may be replaced by rebutting evidence": *supra*, footnote 133, per Lord Pearson, at p. 902. This also was the approach favoured by Lord Upjohn in *Pettitt v. Pettitt*, *supra*, footnote 155, at p. 813.

which the house would not have been bought".¹⁶⁵ In the view of Viscount Dilhorne, before a trust could be imposed the court must be able to find a *common intention* (whether by words or by conduct) that at the time of the acquisition of the property the beneficial interest in it should be shared. The basis for the imposition of the trust, in his opinion, was that: "[I]t would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest."¹⁶⁶ The importance of a common intention was also emphasised by Lord Diplock, who, however, was prepared to acknowledge the existence of such an intention in circumstances where there had been a "detrimental reliance" by the non-titled spouse on the words or conduct of the other. As we have seen, Lord Diplock stated that the trust arose: "Whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land aquired."¹⁶⁷ He continued.¹⁶⁸

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

... What the court gives effect to is the trust resulting or implied from the common intention expressed in the oral agreement between the spouses that if each acts in the manner provided for in the agreement the beneficial interests in the matrimonial home shall be held as they have agreed.

None of their Lordships stayed to consider whether the trust which he was describing should be regarded as an implied, resulting or constructive trust. Their failure to do so is evidence of the notorious difficulty,¹⁶⁹ if not impossibility,¹⁷⁰ of defining each of these types of

¹⁶⁵ *Supra*, footnote 133, at p. 986. Lord Diplock had expressed similar views in the *Pettitt* case, but in *Gissing v. Gissing* he felt obliged to "accept the majority decision [in *Pettitt*] that, put in this form at any rate, this is not the law."': *ibid.*, at p. 904.

¹⁶⁶ *Ibid.*, at p. 900.

¹⁶⁷ *Ibid.*, at p. 905.

¹⁶⁸ *Ibid.*

¹⁶⁹ See *e.g.*, the discussion by Waters, *op. cit.*, footnote 138, at pp. 189-191.

¹⁷⁰ See *e.g.*, the suggestion by Lord Denning M.R. in *Hussey v. Palmer*, *supra*, footnote 30, at p. 1289, that the difference between a resulting trust and a constructive trust "is more a matter of words than anything else". But see *Rathwell v. Rathwell*, *supra*, footnote 10, per Dickson, J., at pp. 450-455, who emphasises the importance of intention, inferred or presumed by law, in the doctrine of resulting trusts, and on that basis carefully distinguishes resulting trusts from constructive trusts. One would wish that the dividing line were as clear as Dickson J. suggests. However, it is submitted that his analysis over-emphasises the role of intention in the case of resulting trusts, and does not sufficiently acknowledge the role of intention in the case of constructive trusts. As regards resulting trusts, see *e.g.*, the classification of "automatic resulting trusts" and "presumed resulting trusts" suggested by Megarry J. in *In re Vandervell's Trusts (No. 2)*, [1974] Ch. 269, at p. 294, (overruled, with no comment on this classification: [1974] Ch. 308 (C.A.)). Even where the resulting trust is imposed on the basis of a "presumed

trusts so as to exclude the others.¹⁷¹ Thus, on the one hand, it has been suggested that since the trust described by Viscount Dilhorne¹⁷² and Lord Diplock¹⁷³ arises out of, or implements, the expressed or implied intentions of the parties, it therefore falls clearly within the realm of resulting trusts.¹⁷⁴ On the other hand, it has been suggested

intention", is not that a judicially imposed solution: see e.g., *Pettitt v. Pettitt*, *supra*, footnote 155, per Lord Reid, at p. 793E; *McLaren v. McLaren* (1979), 100 D.L.R. (3d) 163 (Ont. C.A.), per Wilson J.A. (dissenting in part) at p. 170. As regards constructive trusts, there are, as we have seen, many examples of such a trust being imposed in order to give effect to the parties' originally expressed intentions: see further, Davies, *op. cit.*, footnote 123, at p. 206, n. 29.

¹⁷¹ Thus, a resulting trust is regarded as sometimes arising by operation of law to give effect to the presumed intentions of the parties, and sometimes arising by operation of law irrespective of the intention of the parties: see e.g., *Vandervell v. Inland Revenue Commissioners*, [1967] 2 A.C. 291, per Lord Upjohn, at pp. 312-314; *In re Vandervell's Trusts (No. 2)*, *supra*, footnote 170, per Megarry J., at pp. 289, 294 (overruled [1974] Ch. 308 (C.A.)). See also, Lesser, *op. cit.*, footnote 141, at p. 176, n. 104. How is this latter type of resulting trust to be distinguished from a constructive trust, which also is said to arise by operation of law irrespective of the intentions of the parties? The circumstances may also make it difficult to distinguish between a constructive trust and an implied trust. In theory, these types of trusts are easily distinguishable: a constructive trust, as we have said, arises by operation of law, whereas an implied trust is classified generically with an express trust: where the parties have not expressed an intention to create a trust, it may be possible for the court to imply one from the circumstances. In practice, however, a court occasionally will give effect to a trust without specifying which type of trust was involved: the reader is left to surmise whether the facts were regarded as sufficient to justify the imposition of a trust, or whether they were regarded as sufficient to create a trust: see e.g., *Re Gillespie*, [1969] 1 O.R. 585 (Ont. C.A.). Even where the type of trust is identified, the analysis of the facts which led the court to impose the trust is often not made clear, which may lead to confusion. Did the pre-existing agreement between the parties (where there was such an agreement) itself create fiduciary obligations, or was it merely one of several factors which enabled the court to conclude that the defendant's conduct was wrongful? See e.g., the following cases concerning the scope of fiduciary obligations: *Stewart v. Molybdenum Mining & Production Co.*, *supra*, footnote 50; *Fraser v. Fraser*, *supra*, footnote 50; *Follis v. Township of Albemarle*, *supra*, footnote 50; *McLeod v. Sweezey*, [1944] 2 D.L.R. 145 (S.C.C.); *Pre-Cam Exploration and Development Ltd v. McTavish* (1966), 57 D.L.R. (2d) 557 (S.C.C.). See also the following cases involving "equitable fraud": *Neale v. Willis*, *supra*, footnote 117; *Binions v. Evans*, *supra*, footnote 125, *Hussey v. Palmer*, *supra*, footnote 30. Moreover, in many cases, the courts have gone beyond merely using the agreement as the basis for the imposition of a trust in order to prevent fraud, and have actually enforced the terms of the agreement. This is most apparent in those cases where a constructive trust was invoked in order to confer a benefit upon a third party: see e.g., *Langille v. Nass*, *supra*, footnote 116; *Neale v. Willis*, *supra*, footnote 117; *Binions v. Evans*, *supra*, footnote 125. These latter decisions, it is submitted, tend to blur the distinction between a legally imposed trust and a trust implied from the circumstances, since they allow the constructive trust to "work forward".

¹⁷² *Supra*, footnote 133, at p. 901.

¹⁷³ *Ibid.*, at p. 905.

¹⁷⁴ *Waters, op. cit.*, footnote 18, p. 314, n. 82. See also *Cowcher v. Cowcher*, *supra*, footnote 7, where "resulting trust" reasoning was applied. It is submitted that the finding of a resulting trust on the basis of an inferred agreement or common intention of the parties represents an extension of traditional resulting trust principles. "Resulting

that: "to some extent, for all three of their lordships¹⁷⁵ the trust arises out of equity's long established jurisdiction to impose constructive trusts in order to prevent one party enjoying the fruits of unconscionable behaviour towards the other."¹⁷⁶

Subsequent decisions of the English Court of Appeal have favoured this second interpretation, and have carried it to the point of imposing a trust, even in the absence of an agreement, wherever necessary to do justice between the parties.¹⁷⁷ In these decisions, therefore, the concept of "unconscionable behaviour" is used, not merely as the basis for imposing a trust once the respective rights of the parties have been established on the basis of an agreement expressed or implied from the surrounding circumstances: it is used as a criterion for determining what the rights of the parties actually are.¹⁷⁸

If this use of the constructive trust is not what was envisaged by a majority of the House of Lords in *Gissing v. Gissing*,¹⁷⁹ nevertheless the development is an understandable one. To begin with, the dividing line between inference and imputation must, as a practical matter,

trust" properly describes a situation where an intention to share the beneficial interest is presumed from the fact that the claimant has made a contribution to the acquisition, or substantial improvement, of the disputed asset: *Dyer v. Dyer*, *supra*, footnote 163. However, if the parties express an intention to create a trust, or such intention is implied from their words or conduct, the court may enforce the express or implied trust in order to prevent fraud: *Rochefoucauld v. Boustead*, *supra*, footnote 109, per Lindley L.J., at pp. 206-208. Alternatively, if the court imposes a trust to implement the terms of a pre-existing arrangement because it would be unconscionable to permit the defendant to deny the plaintiff's beneficial interest, this is a constructive trust: *Bannister v. Bannister*, *supra*, footnote 50; *Re Densham (A Bankrupt)*, [1975] 1 W.L.R. 1519 (Ch.D.). See further, *infra*, footnote 197.

¹⁷⁵ Namely, Lord Reid, Viscount Dilhorne and Lord Diplock.

¹⁷⁶ Lesser, *op. cit.*, footnote 141, at p. 189. See also Cullity, *op. cit.*, footnote 161, at pp. 287 *et seq.*

¹⁷⁷ Thereby, in effect, reviving the doctrine of "family assets": see e.g., *Falconer v. Falconer*, *supra*, footnote 144, per Lord Denning M.R., at p. 452; *Heseltine v. Heseltine*, *supra*, footnote 144, per Lord Denning M.R., at p. 955; *Davis v. Vale*, [1971] 2 All E.R. 1021 (C.A.), per Lord Denning M.R., at p. 1026; *Cooke v. Head*, *supra*, footnote 144, per Lord Denning M.R., at p. 41; *Eves v. Eves*, *supra*, footnote 150, per Lord Denning M.R., at p. 771.

¹⁷⁸ In this context, note the comments of Laskin J. (dissenting) in *Murdoch v. Murdoch*, *supra*, footnote 9, at p. 456: "Although later English cases have continued to speak in terms of the resulting trust both where the financial contribution has been direct (see *Heseltine v. Heseltine*, [1971] 1 All E.R. 952) and where it has been indirect (see *Falconer v. Falconer*, [1970] 3 All E.R. 449), some of them are more easily explicable on the basis of a constructive trust: see *Hargrave v. Newton*, [1971] 3 All E.R. 866; cf. *Hussey v. Palmer*, [1972] 3 All E.R. 744. What has emerged in the recent cases as the law is that if contributions are established, they supply the basis for a beneficial interest without the necessity of proving in addition an agreement (see *Hazell v. Hazell*, [1972] 1 All E.R. 923), and that the contributions may be indirect or take the form of physical labour (see *Re Cummings*, [1971] 3 All E.R. 782)."

¹⁷⁹ *Supra*, footnote 133.

be very difficult to draw. Second, in the light of the cases which were discussed in the immediately preceding part of this article a restrictive interpretation of the speeches in the *Gissing* case would seem to produce the curious result that, within the context of matrimonial property disputes the imposition of a constructive trust will be limited to the carrying out of an express or implied agreement, whereas in other areas the constructive trust will have a much wider sphere of operation.

V. *The Development of the Remedial Trust Based on Unjust Enrichment.*

A. *Introduction.*

The influence of American thought on Canadian trust law has been apparent at least since the last quarter of the nineteenth century,¹⁸⁰ and has manifested itself in a number of cases which have invoked the concept of unjust enrichment. Thus, in *Pahara v. Pahara*,¹⁸¹ Rand J., in permitting a husband to recover property which had been left by his wife to certain parties by a will which she had executed after entering into, and in violation of, a reciprocal wills arrangement with the husband, construed the situation as raising a trust in favour of the husband, the basis of the trust being the prevention of unjust enrichment. In *Schobelt v. Barber*,¹⁸² Moorehouse J. invoked a constructive trust based on unjust enrichment in order to prevent a husband who had murdered his wife from enjoying the benefit of property which thereby accrued to him by right of survivorship. More recently in *Jirna Ltd v. Mister Donut of Canada Ltd*,¹⁸³ where the defendant franchisor had been receiving rebates from suppliers with whom the franchisee in accordance with the terms of the franchise agreement was obliged to deal, Stark J. imposed a constructive trust "in order to prevent [the franchisor's] unjust enrichment".

Encouraged no doubt by such decisions, and by the reception of the common law doctrine of restitution in cases such as *Degelman v. Guaranty Trust Company of Canada*¹⁸⁴ and *County of Carleton v. City of Ottawa*,¹⁸⁵ Canadian academic writers, at least by the late

¹⁸⁰ See e.g., Taylor's Commentaries on Equity Jurisprudence (1876), (Toronto); *Taylor v. Davies* (1918), 41 D.L.R. 510 (Ont.), aff'd (1920), 51 D.L.R. 75 (P.C.).

¹⁸¹ [1946] 1 D.L.R. 433 (S.C.C.), per Rand J., at p. 437.

¹⁸² [1967] 1 O.R. 349 (Ont.), per Moorehouse J., at p. 354. See *supra*, footnote 107.

¹⁸³ [1970] 3 O.R. 629 (Ont.), per Stark J., at p. 641. (Overruled on the ground that no fiduciary relationship existed: (1972), 22 D.L.R. (3d) 639 (Ont. C.A.), aff'd. (1973), 40 D.L.R. (3d) 303 (S.C.C.).)

¹⁸⁴ [1954] S.C.R. 725.

¹⁸⁵ (1966), 62 D.L.R. (2d) 220 (S.C.C.).

1960's, were beginning to classify the constructive trust as an equitable restitutionary remedy based on unjust enrichment.¹⁸⁶ In truth, however, the remedial constructive trust excited little interest in Canada¹⁸⁷ prior to the series of matrimonial property cases of which *Murdoch v. Murdoch*¹⁸⁸ was the earliest, and *Pettkus v. Becker*¹⁸⁹ the most recent.

B. The Matrimonial Property Cases.

(1) Introduction.

The history of the matrimonial property cases has been somewhat different in Canada than in England. Thus, in *Thompson v. Thompson*¹⁹⁰ the Supreme Court of Canada declined to invoke the doctrine of "family assets",¹⁹¹ and from that time until the House of Lords' decision in *Gissing v. Gissing*¹⁹² Canadian courts clearly favoured the strict application of established property law principles in deciding matrimonial property disputes.¹⁹³

However, since *Gissing* a struggle has developed in Canada, as in England, between two schools of judicial thought as to the significance of the parties' intentions in this type of case and, coincidentally, as to the juridical nature of resulting and constructive trusts. The "intent" or resulting trust school holds that where property is acquired in the name of A, B will acquire a beneficial interest in that property only where he has provided consideration, or where he can establish the existence of a trust in his favour. The latter he may do, in the case of a matrimonial or *de facto* relationship, by proving the existence of a common intention of the parties that the beneficial interest should be shared.¹⁹⁴ The "justice and equity" or constructive

¹⁸⁶ See e.g., Crawford, Review, *op. cit.*, footnote 50; Crawford, Cases and Notes on Restitution (U. of T. 1971), p. 57; McClean, Cases and Materials on the Law of Trusts (U.B.C., 3rd ed., 1970), p. 2-1; McClean, Unjust Enrichment—Common Law Wine in Civil Law Bottles (1969), 4 U.B.C.L. Rev. 1; McClean, The Common Law and the Quebec Trusts—Some Comparisons (1967), U.B.C.L. Rev.—C. de D. 333, at p. 348.

¹⁸⁷ See, however, Strathy, *op. cit.*, footnote 136.

¹⁸⁸ *Supra*, footnote 9.

¹⁸⁹ *Supra*, footnote 1.

¹⁹⁰ *Supra*, footnote 152. See also *Rathwell v. Rathwell*, *supra*, footnote 10, per Dickson J., at p. 448.

¹⁹¹ The doctrine did, however, receive some attention from the lower courts: see e.g., *Stanley v. Stanley*, *supra*, footnote 150; *Barleben (or Schulz) v. Barleben*, *supra*, footnote 150.

¹⁹² *Supra*, footnote 133.

¹⁹³ See e.g., the references collected in Cullity, *op. cit.*, footnote 161, at p. 280, n. 18, and accompanying text.

¹⁹⁴ See e.g., *Murdoch v. Murdoch*, *supra*, footnote 9, per Martland J., at pp. 434 *et seq.*; *Rathwell v. Rathwell*, *supra*, footnote 10, per Martland J. (dissenting in part), at pp. 466 *et seq.*; *Pettkus v. Becker*, *supra*, footnote 1 per Martland J.

trust school is prepared, in the absence of evidence of intention, to impose a trust in favour of the non-titled party "in order to achieve a result consonant with good conscience".¹⁹⁵

It was earlier suggested that a considerable extension of traditional resulting trust principles has taken place in order that they might play a useful role in this area.¹⁹⁶ Thus, judges have indicated a willingness to give effect by way of a resulting trust to an agreement (express or implied) between the parties as to a sharing of the beneficial interest;¹⁹⁷ or to a presumed intention to share, arising from the fact of a contribution in money or money's worth¹⁹⁸ to the disputed asset; or, possibly, to an imputed intention to share, being the court's view of what the parties, as reasonable people, would have agreed, had they considered the matter.¹⁹⁹ The insistence upon some form of an intention to share as a pre-requisite to a successful claim has brought to the resulting trust school the criticism of "meaningless ritual in search for a phantom intent".²⁰⁰ Is it likely that a young married couple will come to some agreement as to the division of their assets in anticipation of a possible future breakdown of the marriage?²⁰¹ If they do not, what facts and circumstances will suffice

¹⁹⁵ *Rathwell v. Rathwell*, *supra*, footnote 10, per Dickson J., at p. 455. See also *Murdoch v. Murdoch*, *supra*, footnote 9, per Laskin J. (dissenting), at p. 454; *Pettkus v. Becker*, *supra*, footnote 1, per Dickson J., at pp. 844 (S.C.R.), 270 (D.L.R.).

¹⁹⁶ *Supra*, footnote 174. See also Cullity, *op. cit.*, footnote 161, at p. 286; McCamus and Taman, *Rathwell v. Rathwell: Matrimonial Property Resulting and Constructive Trusts* (1978), 16 O.H.L.J. 741, at pp. 744-747.

¹⁹⁷ The speech of Lord Diplock in *Gissing v. Gissing*, *supra*, footnote 133, is usually cited as authority for the suggestion that a resulting trust can arise from an inferred agreement or common intention of the parties. This represents an extension of traditional resulting trust principles. What is being recognised here is an express or implied trust or agreement which, if it concerns land, would otherwise be required to be evidenced in writing in order to be enforceable; except in the case of fraudulent, unconscionable or inequitable conduct, when parole evidence would be admissible on the basis of decisions such as *Rocheffoucauld v. Boustead*, *supra*, footnote 109; *Bannister v. Bannister*, *supra*, footnote 50.

¹⁹⁸ The Supreme Court in *Pettkus v. Becker*, *supra*, footnote 1, unanimously agreed that a contribution in money's worth might entitle the claimant to a beneficial interest. There had been suggestions to the contrary in the preceding case law: see e.g., *Thompson v. Thompson*, *supra*, footnote 190; *Murdoch v. Murdoch*, *supra*, footnote 9, per Martland J., at p. 433. Recognition that indirect or non-financial contributions might give rise to a presumption of resulting trust represents an extension of traditional resulting trust principles: see *Murdoch v. Murdoch*, *supra*, footnote 9, per Laskin J. (dissenting), at p. 454.

¹⁹⁹ See e.g., *Pettitt v. Pettitt*, *supra*, footnote 155, per Lord Reid, at p. 794; *Trueman v. Trueman* (1971), 18 D.L.R. (3d) 109 (Alta A.D.); *Rathwell v. Rathwell*, *supra*, footnote 10, per Dickson J., at p. 452; *Giles v. Giles*, [1979] 1 W.W.R. 392 (Alta T.D.); *Coles v. Ferguson*, *supra*, footnote 150, per Laycraft J.A., at p. 200; *Pettkus v. Becker*, *supra*, footnote 1, per Ritchie J., at pp. 862 (S.C.R.), 264 (D.L.R.).

²⁰⁰ *Rathwell v. Rathwell*, *supra*, footnote 10, per Dickson J., at p. 443.

²⁰¹ *Ibid.*, at pp. 447-448.

to found the required intention? Professor Waters has suggested bluntly that in many cases the "discovery" of an implied common intention to share is "a mere vehicle or formula for giving the wife a just and equitable share in the disputed asset. It is in fact a constructive trust approach masquerading as a resulting trust approach".²⁰²

In relation to the constructive trust school, it has been suggested that the availability of unjust enrichment to extend the scope of the constructive trust is not yet established in Canadian law, and that such a development would not be desirable. Criticism has centred on the undesirability of clothing judges with a wide power to alter property interests guided only by their individual perceptions of what is "just", and the cry of "palm tree justice" has been raised.²⁰³ In assessing the strength of these criticisms, several factors should be considered. First, as we have seen, there already exist situations in which the courts will compel the legal owner of property to transfer it to another, having regard to the former's unjust, unconscionable or merely inequitable conduct,²⁰⁴ so that the criticism of "altering ownership" without legislative sanction is not so compelling as might initially appear. Second, one might question whether the scope of the discretion available under the unjust enrichment constructive trust approach is significantly greater than that available under the resulting trust approach, modified as above described. Third, it is submitted that there is no legal obstacle to extending the scope of the constructive trust by invoking the concept of unjust enrichment—there are, as we have seen, Canadian precedents for so doing—and furthermore, the use of this concept to circumscribe general notions of "justice and equity", accompanied by a gradual working out of its scope, is likely to prove a more satisfactory method of resolving these cases than, for example, resort to an almost unfettered judicial discretion as exemplified in the post-*Gissing*²⁰⁵ decisions of the English Court of Appeal.²⁰⁶

(2) *The Murdoch, Rathwell and Pettkus Cases.*

The availability of a constructive trust based on unjust enrichment to assist in the resolution of matrimonial property disputes was

²⁰² Waters, Comment (1975), 53 Can. Bar Rev. 366, at p. 368.

²⁰³ *Pettkus v. Becker*, *supra*, footnote 1, per Martland J., at pp. 855 *et seq.* (S.C.R.), 260 *et seq.* (D.L.R.). See also *Rathwell v. Rathwell*, *supra*, footnote 10, per Martland J. (dissenting in part), at p. 473.

²⁰⁴ See e.g., *Rocheffoucauld v. Boustead*, *supra*, footnote 109; *Bannister v. Bannister*, *supra*, footnote 50; *Hussey v. Palmer*, *supra*, footnote 30. See also the "proprietary estoppel" cases such as *Pascoe v. Turner*, [1979] 1 W.L.R. 431 (C.A.).

²⁰⁵ *Supra*, footnote 133.

²⁰⁶ See e.g., *Rathwell v. Rathwell*, *supra*, footnote 10, per Dickson J., at p. 455; *Pettkus v. Becker*, *supra*, footnote 1, per Dickson J., at pp. 848 (S.C.R.), 273 (D.L.R.). See further, McCamus and Taman, *op. cit.*, footnote 196, at p. 756.

first suggested by Laskin J. (as he then was), dissenting, in *Murdoch v. Murdoch*.²⁰⁷ The wife there claimed to be entitled to a beneficial interest in certain property standing in her husband's name, basing her claim before the Supreme Court on a resulting trust arising from her contributions of money and labour. A majority of the court²⁰⁸ denied the claim: first, accepting the trial judge's finding, on the basis that she had made no substantial contribution to the acquisition or improvement of the property; and second, (though this reasoning was strictly *obiter*), on the basis that there was no evidence of a common intention to share, and hence no trust could arise.²⁰⁹ However, Laskin J., dissenting, found that the wife had made a substantial contribution to the property. Furthermore, he held that the absence of evidence of an agreement or common intention to share did not preclude her claim.²¹⁰

The appropriate mechanism to give relief to a wife who cannot prove a common intention or to a wife whose contribution to the acquisition of property is physical labour rather than purchase money is the constructive trust which does not depend on evidence of intention. Perhaps the resulting trust should be as readily available in the case of a contribution of physical labour as in the case of a financial contribution, but the historical roots of the inference that is raised in the latter case do not exist in the former. It is unnecessary to bend or adapt them to the desired end because the constructive trust more easily serves the purpose. As is pointed out by Scott:²¹¹

"... a constructive trust is imposed where a person holding title to property is subject to an equitable duty to convey it to another on the ground that he would be unjustly enriched if he were permitted to retain it. . . . The basis of the constructive trust is the unjust enrichment which would result if the person having the property were permitted to retain it. Ordinarily, a constructive trust arises without regard to the intention of the person who transferred the property. . . ."

Following the majority reasoning in *Murdoch*, lower courts confronted with a matrimonial property dispute were obliged to find evidence of a common intention to share, either in the form of a presumed intention arising from the plaintiff's contributions, or otherwise derived from the parties' words or conduct, before they could grant the plaintiff an interest. It is apparent that, in the absence of a broad discretionary remedy enabling them to do "justice and equity" between the parties, they became adept at manipulating the "intent" criteria in order to produce the desired result.²¹² Thus, on the question of substantial contribution, *Murdoch* was frequently distinguished on its facts, notwithstanding the apparently close factual similarities

²⁰⁷ *Supra*, footnote 9.

²⁰⁸ Martland J., Judson, Ritchie and Spence JJ. concurring.

²⁰⁹ Citing *Gissing v. Gissing*, *supra*, footnote 133, per Lord Diplock, at pp. 789, 793.

²¹⁰ *Supra*, footnote 9, at pp. 454-455.

²¹¹ Scott, *op. cit.*, footnote 62, p. 3215.

²¹² See *e.g.*, Waters, *op. cit.*, footnote 202, at p. 377.

which sometimes existed between it and the particular case under consideration.²¹³ On the question of common intention, as one Alberta judge remarked:²¹⁴

It seems an interesting coincidence that there does not appear to be a reported decision in Canada in which the court found facts that made it appear equitable that the wife should share in the ownership of the property, but in which she was denied an interest because a common intention could not be found from the evidence.²¹⁵ Is this not reminiscent of Lord Denning's statement in *Cooke v. Head*²¹⁶. . . : "So the courts . . . said that shares in a home depended on the common intention of the parties; and they used considerable freedom to ascertain that common intention."

Further evidence of dissatisfaction with the "intent" criteria was apparent in the occasional use of constructive trust or unjust enrichment reasoning as the primary²¹⁷ or an alternative²¹⁸ basis for decisions and in dissenting reasons for judgment.²¹⁹

Then came the decision in *Rathwell v. Rathwell*.²²⁰ Here again, the wife claimed to be beneficially entitled to an interest in property standing in her husband's name based on her contributions in money and money's worth, and in this case she was substantially successful. All members of the Supreme Court agreed that the claim could be resolved by the application of resulting trust principles.²²¹ In addition, three judges upheld the claim on the basis of a remedial constructive trust imposed to prevent unjust enrichment. On this point, Dickson J., speaking for himself, Laskin C.J.C. and Spence J., said:²²²

The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties;

²¹³ See e.g., the references collected in Pollock, *Matrimonial Property and Trusts: The Situation from Murdoch to Rathwell* (1978), 16 *Alta L. Rev.* 357.

²¹⁴ *Sikora v. Sikora*, [1977] 6 W.W.R. 580 (Alta T.D.), per Manning J., at p. 594, (substantially aff'd. (1980), 20 A.R. 447 (Alta C.A.)).

²¹⁵ But cf. *Fiedler v. Fiedler* (1975), 55 D.L.R. (3d) 397 (Alta A.D.).

²¹⁶ [1972] 1 W.L.R. 518 (C.A.), at p. 520.

²¹⁷ *Re Spears and Levy* (1974), 52 D.L.R. (3d) 146 (N.S.C.A.).

²¹⁸ *Sikora v. Sikora*, *supra*, footnote 214; *Rathwell v. Rathwell* (1976), 71 D.L.R. (3d) 509 (Sask. C.A.), per Brownridge J.A., at p. 520, (judgment of Woods and Hall J.J.A. aff'd., [1978] 2 S.C.R. 436).

²¹⁹ *Fiedler v. Fiedler*, *supra*, footnote 215, per McDermid J.A. (dissenting), at pp. 398 *et seq.*

²²⁰ *Supra*, footnote 10.

²²¹ Though Ritchie and Pigeon JJ. preferred to emphasise the wife's direct financial contributions rather than her contributions in the form of labour: *ibid.*, at pp. 474-475; and Martland, Judson, Beetz and de Grandpré JJ. dissented as to her entitlement to an interest in one particular parcel of land: *ibid.*, at pp. 470-471.

²²² *Ibid.*, at p. 455.

but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment . . .

He held further that in cases of this type the plaintiff must demonstrate a "causal connection" between her contributions and the acquisition of the disputed assets, and noted that in the present case the requirement had been satisfied:²²³

Analyzing the facts from the remedial perspective of constructive trust, it is clear that only through the efforts of Mrs. Rathwell was Mr. Rathwell able to acquire the lands in question. Assuming, *arguendo*, that Mrs. Rathwell had made no capital contribution to the acquisitions, it would be unjust, in all of the circumstances, to allow Mr. Rathwell to retain the benefits of his wife's labours. His acquisition of legal title was made possible only through "joint effort" and "team work" as he himself testified: he cannot now deny his wife's beneficial entitlement.

In taking this course Dickson J. did not feel constrained by *Murdoch v. Murdoch*.²²⁴ He observed that there "[t]he issue of constructive trust never had a thorough airing",²²⁵ and to that extent "*Murdoch* did not deny the possibility of an action in constructive trust",²²⁶ Furthermore, he continued:²²⁷

. . . having recognized that the *Murdoch* decision is distinguishable in various ways, I wish also to say this: to the extent that *Murdoch* stands for the proposition that a wife's labour cannot constitute a contribution in money's worth and to the extent that *Murdoch* stands in the way of recognition of constructive trust as a powerful remedial instrument for redress of injustice, I would not, with utmost respect, follow *Murdoch*.

The other members of the court did not, however, support this approach. Two judges²²⁸ found it unnecessary to consider the matter, while four judges,²²⁹ citing *Thompson v. Thompson*²³⁰ and *Murdoch v. Murdoch*,²³¹ specifically did "not accept the application, in cases of this kind,²³² of a doctrine of constructive trust as a means of preventing unjust enrichment".²³³

²²³ *Ibid.*, at pp. 454, 461. This requirement would seem to make it difficult to establish a claim to a beneficial interest in property based solely on contributions as a home-maker or parent. Cf. Oosterhoff, *Comment* (1979), 57 *Can. Bar Rev.* 356, at pp. 369-370. See the further discussion of "causal relationship" in McCamus and Taman, *op. cit.*, footnote 196, at p. 757.

²²⁴ *Supra*, footnote 9.

²²⁵ *Supra*, footnote 10, at p. 465.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

²²⁸ Ritchie and Pigeon JJ.

²²⁹ Martland, Judson, Beetz and de Grandpré JJ.

²³⁰ *Supra*, footnote 152.

²³¹ *Supra*, footnote 9.

²³² The qualifying phrase is ambiguous. Is Martland J. suggesting that there are some kinds of matrimonial property disputes in which a constructive trust based on unjust enrichment might be invoked; or rather, that there is no role for the remedial constructive trust in the context of matrimonial property disputes?

²³³ *Supra*, footnote 10, at p. 471.

In the result, the decision in *Rathwell* did nothing to clarify the equivocal state of the law relating to matrimonial property disputes. While the judgment of Dickson J. indicated increasing support for, and expanded upon the concept of, the unjust enrichment constructive trust, the dissension apparent at the highest judicial level, as to the availability of this concept as a means of awarding an interest in property in the absence of a common intention to share, left lower courts without clear guidance on the issue. Thus, at least one court declined to invoke the constructive trust on the basis that a majority in *Rathwell* had rejected its use in the context of matrimonial property disputes.²³⁴ Others preferred to await a clearer pronouncement by the Supreme Court.²³⁵ In the vast majority of cases, however, the availability of the doctrine was either affirmed or assumed with little or no hesitation.²³⁶

Finally, the concept of the unjust enrichment constructive trust, and its applicability to matrimonial property disputes, was authoritatively approved in *Pettkus v. Becker*.²³⁷ As was earlier mentioned, this case concerned an unmarried couple who had lived together for some nineteen years. On the breakdown of the relationship Miss Becker claimed to be beneficially entitled to an interest in the lands and in the bee-keeping business which had been acquired and built up through the parties' joint efforts. At first instance,²³⁸ her claim was rejected. On appeal to the Ontario Court of Appeal,²³⁹ she was successful in obtaining a one-half interest in the disputed assets, Wilson J.A., on behalf of the court, invoking the constructive trust approach as expounded by Laskin J., dissenting, and by Dickson J.,

²³⁴ *Keddy v. Keddy* (1978), 1 R.F.L. (2d) 312 (N.S.), per Hart J., at p. 317.

²³⁵ See e.g., *Armstrong v. Armstrong* (1978), 93 D.L.R. (3d) 128 (Ont.), per Labrosse J., at p. 138; *Fedon v. Fedon*, [1978] 2 W.W.R. 723 (Man. C.A.), per O'Sullivan J.A. at p. 739; *King v. King* (1980), 16 R.F.L. (2d) 117 (Nfld), per Mahoney J., at pp. 127-128.

²³⁶ See e.g., *Becker v. Pettkus* (1978), 87 D.L.R. (3d) 101 (Ont. C.A.), per Wilson J.A., at pp. 107-108 (aff'd *sub nom Pettkus v. Becker*, *supra*, footnote 1); *Ruff v. Strobel* (1978), 86 D.L.R. (3d) 284 (Alta A.D.), per Lieberman J.A., at p. 291; *Douglas v. Guaranty Trust Company of Canada* (1978), 8 R.F.L. (2d) 98 (Ont.), per Keith J., at p. 115; *Boogerman v. Boogerman* (1978), 19 O.R. (2d) 188 (Ont. Co. Ct.), per Carter Co. Ct J., at p. 201; *Palchinski v. Low* (1979), 12 R.F.L. (3d) 176 (Sask.), per MacPherson J., at p. 180; *Machuk v. Machuk* (1979), 10 R.F.L. (2d) 224 (Ont. Co. Ct), per Killeen Co. Ct J., at p. 235; *Daly v. Daly*, [1980] 6 W.W.R. 680 (Man. C.A.), per Huband J.A., at p. 687; *Nuti v. Nuti* (1980), 28 O.R. (2d) 102 (Ont.), per Holland J., at pp. 110 *et seq*; *Cook v. Cook* (1980), 26 Nfld & P.E.I.R. 433 (Nfld C.A.), per Gushue J.A., at p. 441; *Young v. Lim*, CCH Canadian Family Law Guide No. 25,423 (Ont. Nov. 17th, 1980).

²³⁷ *Supra*, footnote 1.

²³⁸ (1974), 14 R.F.L. 297 (Ont.)

²³⁹ (1978), 87 D.L.R. (3d) 101.

in the *Murdoch*²⁴⁰ and *Rathwell*²⁴¹ cases, respectively. Mr. Pettkus' appeal from this judgment was unanimously dismissed by the Supreme Court of Canada. A majority of the court,²⁴² noting the finding at first instance against the existence of a common intention, based its decision exclusively on constructive trust. The three remaining members²⁴³ decided the case on the basis of resulting trust principles and denied the applicability of the constructive trust.

Dickson J., speaking for the majority, discussed the nature of the constructive trust and its applicability to matrimonial property disputes in the following terms:²⁴⁴

The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. . . . It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. . . . The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury. . . .

How then does one approach the question of unjust enrichment in matrimonial causes? In *Rathwell* I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. . . .

On these facts, the first two requirements laid down in *Rathwell* have clearly been satisfied: Mr. Pettkus has had the benefit of 19 years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

I conclude, consonant with the judgment of the Court of Appeal, that this is a case for the application of constructive trust.

He also adverted to the requirement of "causal connection" and found on the facts that the requirement had been satisfied, Miss Becker's contributions being "sufficiently substantial and direct" to entitle her to a one-half share in the disputed assets.²⁴⁵

In concluding this section it remains to be observed, that, with the belated passage in most Canadian provinces of matrimonial prop-

²⁴⁰ *Supra*, footnote 9.

²⁴¹ *Supra*, footnote 10.

²⁴² Dickson J., Laskin C.J.C., Estey, McIntyre, Chouinard and Lamer JJ., concurring.

²⁴³ Martland, Beetz JJ., concurring, and Ritchie J.

²⁴⁴ *Supra*, footnote 1, per Dickson J., at pp. 847-849 (S.C.R.), 273-275 (D.L.R.).

²⁴⁵ *Ibid.*, at pp. 852 (S.C.R.), 277 (D.L.R.).

erty law reform legislation,²⁴⁶ the importance of the *Rathwell* and *Pettkus* cases in this particular context has been somewhat diminished. However, in the wider context of Canadian trust law their importance will endure: they have enshrined in our law the remedial constructive trust based on unjust enrichment.²⁴⁷

VI. Summary and Conclusions.

Recent developments in English law suggest that the remedial role of the constructive trust is there undergoing a tremendous expansion. The foremost proponent of change has been Lord Denning M.R. Essentially, his approach has been to push to the limits the equitable notion of unconscionability, while all but ignoring the requirement of a fiduciary relationship. Using as a springboard the decision in *Bannister v. Bannister*,²⁴⁸ Lord Denning M.R. has managed to invoke a constructive trust to achieve the following ends: to effect specific performance of a contract at the suit of the third party beneficiary;²⁴⁹ to protect a contractual licensee against a purchaser with notice;²⁵⁰ and to perpetuate the doctrine of "family assets"²⁵¹ in the face of two House of Lords' decisions²⁵² to the contrary. Finally, with a string of his own previous decisions to support him, Lord Denning has suggested that the constructive trust should be viewed as "an equitable remedy by which the court can enable an aggrieved party to obtain restitution",²⁵³ and has invoked the American restitutionary concept of the proportionate share constructive trust.²⁵⁴

The developments in Canadian law, while perhaps less dramatic, would appear to rest on a firmer foundation. We may set to one side these decisions which seem to illustrate merely a propensity for *post facto* judicial rationalisation.²⁵⁵ Quite independently of those cases, there now exists a substantial body of authority which acknowledges the unjust enrichment principle as underlying both the common law²⁵⁶

²⁴⁶ See *passim*, Bissett-Johnson and Holland, *op. cit.*, footnote 161, McClean, *op. cit.*, footnote 161.

²⁴⁷ See e.g., *Lake Manitoba Estates Ltd and Dumont v. Communities Economic Development Fund* (1980), 2 Man. R. (2d) 295 (Man. C.A.).

²⁴⁸ *Supra*, footnote 50.

²⁴⁹ *Neale v. Willis*, *supra*, footnote 117.

²⁵⁰ *Binions v. Evans*, *supra*, footnote 125.

²⁵¹ See e.g., *Falconer v. Falconer*, *supra*, footnote 144.

²⁵² *Pettitt v. Pettitt*, *supra*, footnote 155; *Gissing v. Gissing*, *supra*, footnote 133.

²⁵³ *Hussey v. Palmer*, *supra*, footnote 30, at p. 1290.

²⁵⁴ *Ibid.*

²⁵⁵ *Supra*, text at footnote 92.

²⁵⁶ See e.g., *Degelman v. Guaranty Trust Company of Canada*, *supra*, footnote 184; *County of Carleton v. City of Ottawa*, *supra*, footnote 185.

and the equitable²⁵⁷ streams of restitutionary law.

It is submitted that recognition of the unjust enrichment principle as underlying the constructive trust concept will prove to be an extremely beneficial development:

- (a) The remedial nature of the constructive trust—its historical origins notwithstanding—becomes immediately apparent; and the difficulties which have plagued the institutional-remedial classification in English law²⁵⁸ disappear.
- (b) The fiduciary relationship will appear in its proper perspective, as merely one basis for the imposition of a constructive trust, and not as the starting point in every case for determining whether a constructive trust should be imposed.
- (c) The policy choices which until now have been obscured behind a finding of, or a refusal to find, a fiduciary relationship, or behind the language of unconscionability, should now be clearly identified; and, as a result, more clearly examined.
- (d) We can begin to develop a systematic approach to the restitutionary remedies, including:
 - (i) exploring the scope of these remedies, whether common law or equitable, with a view to determining the most appropriate mode, in any given circumstances, of granting relief;²⁵⁹
 - (ii) re-examining and rationalising the legal and equitable rules for following property.²⁶⁰

²⁵⁷ See *e.g.*, *Rathwell v. Rathwell*, *supra*, footnote 10, per Dickson J., at p. 455; *Pettus v. Becker*, *supra*, footnote 1, per Dickson J., at pp. 847 *et seq.* (S.C.R.), 273 *et seq.* (D.L.R.).

²⁵⁸ *Supra*.

²⁵⁹ See *e.g.*, Strathy, *op. cit.*, footnote 136, at p. 90. An important question to be addressed here is whether the imposition of a constructive trust necessarily entails the granting of a proprietary remedy, or whether the court should be free to do the minimum equity necessary to do justice between the parties: *cf.* J.D. Davies, *op. cit.*, footnote 123, at pp. 211 *et seq.*; J.D. Davies, *Informal Arrangements Affecting Land* (1979), 8 Syd. L. Rev. 578, but *cf.* Maudsley, *op. cit.*, footnote 6, at p. 124.

²⁶⁰ *Supra*, footnote 53.