[HOUSE OF LORDS]

GISSING . . . . . APPELLANT

AND

GISSING . . . . . RESPONDENT

1970 March 16, 17, 18, 19; July 7

Lord Reid, Lord Morris of Borth-y-Gest, Viscount Dilhorne, Lord Pearson and Lord Diplock

Husband and Wife—Matrimonial home—Divorce—Ownership of house—House purchased in husband's name—Interest in house claimed by wife—Whether wife's contribution gave her a beneficial interest or a share therein—Law of Property Act, 1925 (15 & 16 *Geo.* 5, *c.* 20), *s.* 53 (1).[1]

The parties were married in 1935 when both were in their early twenties. The wife worked substantially throughout the marriage, until 1957 as a secretary at a firm of printers. In May, 1946, when the husband was out of work after demobilisation from the army, the wife obtained employment for him at the printers where he did well. In 1951 a house was bought in the name of the husband as the matrimonial home in which the parties lived until November, 1961, when the husband left to live with another woman. The price paid for the house was £2,695 of which £2,150 was raised by the husband on mortgage and £500 was loaned by the printers to the husband who paid the balance and costs. The wife paid £220 out of her savings for furnishings and the laying of a lawn. The husband paid the instalments on the mortgage, gave the wife £8 to £10 a week for housekeeping and paid for holidays and general family expenses. The wife paid for her own clothes and those of their son and for some extras. Both saved. According to the wife, when the husband left in November, 1961, he told her that the house was hers and that he would pay the mortgage instalments and outgoings, which he did. The wife remained in the house and in January, 1966, she was granted a decree absolute of divorce on the ground of the husband's adultery and an order for maintenance which was subsequently reduced to 1s. a year.

On the wife's application by originating summons in the Chancery Division for an order regarding her beneficial interest in the house, Buckley J. held that the husband was sole beneficial owner of the house and was entitled to possession. The Court of Appeal, by a majority, reversed that decision.

On appeal by the husband:—

Held, allowing the appeal, that the wife had made no contribution to the acquisition of title to the matrimonial home from which it could be inferred that the parties intended her to have any beneficial interest in it.

Pettitt v. *Pettitt* [1970] A.C. 777, H.L.(E.) considered.

[1] Law of Property Act, 1925, s. 53 (1): ". . . (*a*) no interest in land can be created or disposed of except by writing . . . or by operation of law; (*b*) a declaration of trust respecting any land or any interest therein must be manifested and proved by some writing signed by some person who is able to declare such trust or by his will; . . . (2) This section does not affect the creation or operation of resulting, implied or constructive trusts."

Per Lord Reid, Viscount Dilhorne and Lord Diplock. Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust (post, pp. 896D–F, 900B, 904H).

Decision of the Court of Appeal [1969] 2 Ch. 85; [1969] 2 W.L.R. 525; [1969] 1 All E.R. 1043, C.A. reversed.

The following cases are referred to in their Lordships' opinions:

Bishop, decd., In re [1965] Ch. 450; [1965] 2 W.L.R. 188; [1965] 1 All E.R. 249.

Chapman v. *Chapman* [1969] 1 W.L.R. 1367; [1969] 3 All E.R. 476, C.A.

Dyer v. *Dyer* (1788) 2 Cox Eq.Cas. 92.

Eykyn's Trusts, In re (1877) 6 Ch.D. 115.

Fowkes v. *Pascoe* (1875) 10 Ch.App. 343.

Fribance v. *Fribance (No. 2)* [1957] 1 W.L.R. 384; [1957] 1 All E.R. 357, C.A.

Gooch, In re (1890) 62 L.T. 384.

Nixon v. *Nixon* [1969] 1 W.L.R. 1676; [1969] 3 All E.R. 1133, C.A.

Pettitt v. *Pettitt* [1970] A.C. 777; [1969] 2 W.L.R. 966; [1969] 2 All E.R. 385, H.L.(E.).

Ulrich v. *Ulrich and Felton* [1968] 1 W.L.R. 180; [1968] 1 All E.R. 67, C.A.

Wray v. *Steele* (1814) 2 V. & B. 388.

Young, In re (1885) 28 Ch.D. 705.

The following additional cases were cited in argument:

Allen v. *Allen* [1961] 1 W.L.R. 1186; [1961] 3 All E.R. 385, C.A.

Bannister v. *Bannister* [1948] 2 All E.R. 133, C.A.

Bedson v. *Bedson* [1965] 2 Q.B. 666; [1965] 3 W.L.R. 891; [1965] 3 All E.R. 307, C.A.

Button v. *Button* [1968] 1 W.L.R. 457; [1968] 1 All E.R. 1064, C.A.

Cobb v. *Cobb* [1955] 1 W.L.R. 731; [1955] 2 All E.R. 696, C.A.

Cook v. *Cook* [1964] P. 220; [1961] 3 W.L.R. 432; [1961] 2 All E.R. 791.

D'Gama v. *D'Gama,* November 24, 1969, C.A.; Bar Library Transcript No. 398A.

Hine v. *Hine* [1962] 1 W.L.R. 1124; [1962] 3 All E.R. 345, C.A.

Jansen v. *Jansen* [1965] P. 478; [1965] 3 W.L.R. 875; [1965] 3 All E.R. 363, C.A.

Keech v. *Sandford* (1726) Sel.Cas.t.King 61.

Llanover Settled Estates, In re [1926] Ch. 626.

MacDonald v. *MacDonald* [1957] 2 All E.R. 690.

Muetzel v. *Muetzel* [1970] 1 W.L.R. 188; [1970] 1 All E.R. 443, C.A.

Newgrosh v. *Newgrosh* (1950) 100 L.J. 525, C.A.

Rimmer v. *Rimmer* [1953] 1 Q.B. 63; [1952] 2 All E.R. 863, C.A.

Rochefoucauld v. *Boustead* [1897] 1 Ch. 196, C.A.

Rogers' Question, In re [1948] 1 All E.R. 328, C.A.

Silver v. *Silver* [1958] 1 W.L.R. 259; [1958] 1 All E.R. 523, C.A.

Tulley v. *Tulley* (1965) 109 Sol.J. 956, C.A.

Vandervell v. *Inland Revenue Commissioners* [1967] 2 A.C. 291; [1967] 2 W.L.R. 87; [1967] 1 All E.R. 1, H.L.(E.).

Wilson v. *Wilson* [1963] 1 W.L.R. 601; [1963] 2 All E.R. 447, C.A.

APPEAL from the Court of Appeal.

This was an appeal by the appellant, Raymond Clifford Gissing ("the husband") from a judgment of the Court of Appeal (Lord Denning M.R. and Phillimore L.J., Edmund Davies L.J. dissenting) dated February 18, 1969, reversing an order dated June 12, 1968, of the Chancery Division of the High Court of Justice (Buckley J.) on an application by originating summons taken out by the respondent, Violet Emily Gissing, feme sole ("the wife") claiming against the husband, inter alia, a declaration as to her interest in No. 28 Tubbenden Drive, Orpington, Kent, the former matrimonial home of the parties.

The following statement of facts is taken substantially from the judgment of Phillimore L.J. in the Court of Appeal:

The parties were married in September, 1935, when he was 22 and she 21 years old. Both were in work, the wife as a secretary in a firm of printers for which she had worked ever since she left school at the age of 14.

They set up house together in a flat and in 1939 they had a son. Then at the outbreak of war the husband was called up for service in the army and so the flat was given up and the wife went back to live with her parents. She continued to go out to work and in addition had the usual allowance from the husband's pay and thus she was able to maintain herself and her child.

When the husband was demobilised he was for a time out of work, living with his wife in her parents' house; the only money coming in was the money she earned. However, in May, 1946, the wife persuaded Mr. Clarke, the managing director of the printers, to give her husband employment and he did very well indeed in their service. By 1951 they decided to buy a house, in place of the flat in Tulse Hill where they were then living. By now the husband was earning £1,000 per annum and the wife £500 per annum.

The wife found 28 Tubbenden Drive and the husband then proceeded to carry out all the negotiations and formal matters connected with the purchase. The price was £2,695. Mr. Clarke, the managing director of the printing firm, agreed to lend him £500 and a mortgage of £2,150 was arranged: he found the balance of £45 and the costs out of his own savings. They agreed some work must be done on the lawn and also that they must buy some more furniture, and these expenses were met by the wife, who spent about £220 out of her savings. The conveyance was to the husband and he alone was liable on the mortgage and the loan.

Thereafter the wife continued to work at the printers and from her earnings she paid for her own clothes and her son's, and also added to the amount of the housekeeping allowance made her by the husband, so as to buy certain extras. His income rose until he became a director earning at first £2,000 and later £3,000 per annum. In 1957 the wife left the printers to have an operation and later obtained other comparable employment.

The husband paid the wife a housekeeping allowance and also paid instalments on the loan and the mortgage as well as other outgoings on the house, also the cost of holidays. She, of course, did all the household work of cleaning and cooking. Each was thrifty and they had separate savings accounts.

In 1960, after 25 years of married life, the husband met another and younger woman with whom he committed adultery, and in November, 1961, he left the matrimonial home and set up house with this other woman, using £2,000 out of his savings of £3,500. They had two children.

According to the wife when he left he said: "Don't worry about the house: it's yours"; and indeed he continued to pay all the outgoings and the mortgage instalments. He had by then cleared off the loan. He continued to pay the outgoings on the house until September 1965. By then the wife had agreed to divorce him and had filed a petition and obtained an order for maintenance. The decree was made absolute on January 14, 1966.

About this time the husband began to find himself in difficulties. The firm of printers of which he was a director was taken over and he lost his employment and was unable to find other employment. He began suggesting that the wife should move out so that he could sell the matrimonial home.

He then obtained a variation of the order for maintenance. The award was reduced to 1s. a year. No doubt the basis of this order was that the husband was out of work and the wife was still living in the house and he was paying the mortgage instalments. However, by 1967 he was falling into arrears with the mortgage instalments. Meanwhile the wife had issued her summons asking the court to declare her interest in the house. It appeared, however, that the husband had now caught up with the mortgage instalments, having obtained work once more, and that if he continued to pay regularly the mortgage would be cleared by 1971, and that if the house was sold it should fetch about double what was paid for it in 1951.

On June 12, 1968, Buckley J. held that the house belonged to the husband, that the wife had no interest in it and that as the sole beneficial owner of the house the husband was entitled to possession within 28 days.

On appeal by the wife, the Court of Appeal held, by a majority, that the wife was entitled to a half-share in the house.

The Court of Appeal granted the husband leave to appeal to the House of Lords subject to conditions which were unacceptable to the husband ([1969] Ch. 85, 105). The Appeal Committee of the House of Lords subsequently granted the husband leave to appeal subject only to the condition that, if his appeal were to fail, he would not seek to disturb the order for costs made against him by the Court of Appeal.

J. R. Cherryman for the husband. The question for determination is whether the wife acquired any beneficial interest in the house, that is, is there any share in the house which is held in trust for the wife?

The question of the title to the matrimonial home must be decided on the same principle as a dispute between strangers concerning title to a house save for two qualifications:

(i) In cases of the present type the court often has to come to a conclusion on very little material before it. But this fact does not absolve the court from coming to a decision.

(ii) The court leans in favour of equality in such disputes between husband and wife, and where both parties have made substantial contributions to its purchase or paying off the mortgage may declare that the beneficial

interest in the house belongs to them jointly: see *per* Evershed M.R. and Romer L.J. in *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63. A

The function of the court is to ascertain in whom the beneficial title is vested; it is not the court's function either to vary existing rights, or to create or invent new rights.

It is pertinent to consider the operation of section 53 (1) of the Law of Property Act, 1925, which must be complied with in cases of this kind. Section 53 (1) (*b*) is the relevant provision. It has not been complied with B for the alleged parting words of the husband even if spoken and intended to create a trust cannot do so here because they were not in writing.

As to section 53 (2), its meaning has to be ascertained as at the date of the passing of the Act. This is important, for if a new type of trust is seen to have arisen in 1970 it does not follow that it comes within section 53 (2). As to the view taken of an implied trust in 1926 see *In re Llanover Settled Estates* [1926] Ch. 626. C

Here, the wife can only establish the existence of a trust in her favour in so far as she can prove either an oral declaration of trust evidenced in writing pursuant to section 53 (1) (*b*) or some arrangement or common intention between the parties that she should have a share in the beneficial interest in the house on which she relies.

It is emphasised that section 53 (2) does not apply unless the element D of conscience enters into the transaction. [Reference was made to *Keech* v. *Sandford* (1726) Sel.Cas.t.King 61; *Bannister* v. *Bannister* [1948] 2 All E.R. 133.]

The test to be applied in determining whether indirect contributions entitle the wife to a share in the beneficial interest in the matrimonial home is to ascertain whether the payments substantially contribute to the husband's ability to purchase the house or pay off the mortgage and whether E there is an arrangement or agreement between the spouses to pool their earnings and expenses.

No arrangement was found by Buckley J. of any kind concerning the pooling of expenses or earnings: the parties had separate bank accounts. Further, such payments as the wife did make had no reference to the house; she was not buying fixtures, or paying for central heating, or paying the F gas or electricity bills or the rates. The present proceedings are for the determining of rights of property. The Divorce Division is the appropriate forum for the dispensation of what has been termed " Palm Tree Justice."

In *Pettitt* v. *Pettitt* [1970] A.C. 777 this House had to consider for the first time questions concerning the ownership of the matrimonial home. A number of general conclusions are to be drawn from that decision: (i) It was unanimously held that the jurisdiction conferred by section 17 of the G Married Women's Property Act, 1882, is not discretionary in that the court cannot alter existing proprietary rights or decide matters on the basis of what is fair and just in the circumstances. (ii) There is no doctrine of English law that property acquired for family purposes is prima facie owned in common by the spouses. That doctrine is to be distinguished from the doctrine of " family assets " which was adumbrated by Diplock H L.J. in *Ulrich* v. *Ulrich and Felton* [1968] 1 W.L.R. 180 and explained by his Lordship in *Pettitt* v. *Pettitt* [1970] A.C. 777, 819A. (iii) There is a majority view against the process of imputing to parties any general

intention of what reasonable persons would have thought at the time (see in particular the observations of Lord Morris of Borth-y-Gest in *Pettitt* [1970] A.C. 777, 804F–G). An agreement will not be imputed nor an intention either. The court must ascertain from all the evidence whether the parties in fact reached an agreement or had a common intention. The court will not determine whether reasonable persons in the circumstances would have reached an agreement or formed a common intention.

A distinction is to be drawn between inferring from all the evidence what the parties intended and imputing an intention to the parties from what reasonable persons would have intended in the circumstances. The duty of the court is *not* to create rights for the parties but to declare their *existing rights*. The above submission is supported by the disapproval of *Jansen* v. *Jansen* [1965] P. 478 by a majority of their Lordships in *Pettitt* v. *Pettitt* [1970] A.C. 777.

It is a rule of law that in the absence of evidence to the contrary the beneficial interest in the matrimonial home follows the legal title: see *per* Lord Upjohn in *Pettitt's* case. *Allen* v. *Allen* [1961] 1 W.L.R. 1186 is relied upon as illustrative of the court's approach in determining the rights of the spouses where one spouse is paying off the mortgage and the other is paying the other expenses. The present case is a stronger one than *Allen* for here the wife's contribution to the expenses was very little.

If the above argument be rejected and it is held that the wife is entitled to a half-share in the beneficial interest in the house then the husband should be credited with half the mortgage moneys payable since 1961, that is, after the breakdown of the marriage: see *Wilson* v. *Wilson* [1963] 1 W.L.R. 601.

As to the reported decisions subsequent to the decision in *Pettitt* v. *Pettitt* [1970] A.C. 777, the first was *Chapman* v. *Chapman* [1969] 1 W.L.R. 1367. But Lord Denning M.R.'s formulation of the test at p. 1369 is too wide. The decision, however, is supportable on its facts for the trial judge found that there was an arrangement between the parties to pool expenses. In *Nixon* v. *Nixon* [1969] 1 W.L.R. 1676 the principle adumbrated by the Master of the Rolls at p. 1679F is not rightly stated. The "joint effort" principle was the view adopted by the minority of their Lordships in *Pettitt* [1970] A.C. 777 and cannot be supported. The decision could be supported on the grounds that there was an arrangement that husband and wife should be equal partners in the business and that, therefore, the wife was entitled to a half-share in the business assets. Unless it can be shown that in that case there was a partnership of some kind it was wrongly decided.

The most recent of the decisions, *Muetzel* v. *Muetzel* [1970] 1 W.L.R. 188, was wrongly decided for there the court did not look for an agreement at all but merely at any contributions, direct and indirect, that had been made. It was decided on an even wider basis than *Nixon* v. *Nixon* [1969] 1 W.L.R. 1676.

As to the earlier authorities, *In re Rogers' Question* [1948] 1 All E.R. 328 was rightly decided. *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63 was rightly decided on its facts but the statement of Evershed M.R. at p. 74 is wrong —there is no presumption but an intention has to be shown. Furthermore, the principle that equality is equity should not be carried too far. *Cobb* v.

Cobb [1955] 1 W.L.R. 731 was right on its facts but the statement of principle by Denning L.J. at p. 733 cannot be supported. It is difficult to understand why the maxim " equality is equity " applies where it is not apparent to whom the property belongs. In *Fribance* v. *Fribance* (*No.* 2) [1957] 1 W.L.R. 384, Morris L.J.'s judgment sets out the correct principle applicable to the present type of case. In *Ulrich* v. *Ulrich and Felton* [1968] 1 W.L.R. 180 the opening words of Lord Denning M.R. on the law are wrong; it depends upon the contributions made by the parties. Further, Diplock L.J., at p. 188, is incorrect in stating that there exists a prima facie inference that there was an agreement to pool expenses. The decision, however, can be supported on the ground that there was conduct from which an agreement could be inferred.

In general, most of the reported decisions anterior to *Pettitt* v. *Pettitt* [1970] A.C. 777 can be supported on their facts although they contain dicta which are contrary to the majority opinion in *Pettitt*.

Evidence of subsequent conduct may not of itself be sufficient to support the inference that there was an antecedent agreement to share the cost of paying for the matrimonial home. It is emphasised that in circumstances like the present for a wife to succeed the court must find evidence from which it can be deduced that the wife was intended to have a beneficial interest in the house.

If a wife wishes to rely on the ancient presumption that where a contribution is made to the cost of purchase of a house the contributor thereby has an interest she must show that there *was a contribution* and *not* that by reason of her conduct another person indirectly was enabled to make a contribution. Thus, the wife cannot rely on the mere fact that she bought, and paid the expenses of running, the family car thereby enabling her husband the more easily to pay for the matrimonial home as a circumstance entitling her to a share in the house. She must show that there was a common intention for her and her husband to pool their expenses in paying for the house.

Further, if a wife pays the mortgage instalments, that only amounts to a payment of the purchase-moneys if she can show a common intention that she was to have a beneficial interest in the house. It is conceded that where the wife pays the deposit on the purchase price of a house that there is a presumption that she has an interest therein.

The decision of the Court of Appeal here cannot stand. On the facts it is plain that the wife had no interest in this house. Buckley J. applied the right principle in holding that there was no agreement for the wife to have such an interest. Further, on the evidence there were no facts from which to draw the inference that there was an agreement: see *per* Edmund Davies L.J. [1969] 2 Ch. 85, 99.

The wife did not appear and was not represented.

Michael Fox Q.C. and *Ian McCulloch* for the Official Solicitor as amicus curiae. On the facts here, the purchase of the house and of the furniture and the payment for the laying of the lawn should be considered as a single combined enterprise to which the wife directly contributed. The purchase of the furniture and the laying of the lawn were an integral part of that enterprise. The husband and the wife were pooling their ready money to purchase a new home. It would be wrong to view these three factors as

A separate transactions to be considered in isolation. Between spouses who are pooling their available resources it is an unnatural way of looking at the situation.

MacDonald v. *MacDonald* [1957] 2 All E.R. 690 supports the proposition that the purchase of the furniture and of the house formed part of a joint enterprise but it must be conceded that that case is a much stronger one on its facts than the present.

B In terms of actual ready money the wife provided £220 and the husband £145. If it be held that there was here a joint enterprise the wife made a direct contribution to it of £220. *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63 establishes that where husband and wife have both a substantial beneficial interest in property and it is not possible to make a precise quantification of their shares then the maxim "equality is equity" applies. But the difficult question arises to what extent can the court take into account the C wife's indirect contributions towards the purchase of the matrimonial home?

Suppose it can be established that the wife took an interest in the house because there was a joint enterprise from which it can be inferred that there was an understanding or agreement, there is nothing inconsistent with the decision in *Pettitt* v. *Pettitt* [1970] A.C. 777 in holding, as a matter of evidence, that the purchase of such a family asset was acquired for the D spouses in equal shares.

There are two examples to be considered. First, both spouses contribute to the deposit. The mortgage and the conveyance are in the husband's name. The wife goes out to work and thereby makes an indirect contribution in that thereby the husband is able to pay the mortgage moneys. In these circumstances it is reasonable to hold that spouses take in equal shares for it would be most difficult to work out the fractions in which they held E the property.

Another case is where the wife contributes to the deposit and subsequently she makes substantial contributions to the general running expenses of the house. Here, there is no valid reason why the wife should not have an equal share in the property. There is nothing in *Pettitt* v. *Pettitt* [1970] A.C. 777 which runs counter to the above proposition for that was a case F of a claim to a share in *another person's* property and to substantiate that claim it was necessary to prove an agreement: see *per* Lord Upjohn, at p. 818A–D.

The question arises as to what point of time the court chooses in order to resolve the problem, for at the time of purchase, of course, there has usually been no contribution by the wife. On the other hand at the time of purchase the husband has made no contribution apart from pay- G ment of the deposit. The relevant time to review the situation is plainly the date of the break-up of the marriage.

It has been said that assuming that there is a presumption that where spouses enter into a joint enterprise to buy property and that thereafter the wife makes substantial indirect contributions they take in equal shares, this would involve importing into English law the doctrine of community of H goods. But this is nowhere near such a concept since a *joint* enterprise has to be *proved* before the presumption even arises.

If it be said that to give the wife a beneficial interest in circumstances such as those pertaining here would place difficulties in the way of a pur-

chaser of the matrimonial home, the difficulties could be circumvented by the purchaser obtaining the wife's signature to the conveyance. If she refused her signature she could not thereafter upset a subsequent sale: she would be estopped from denying the position, although she could trace her interest in the purchase-money. Alternatively, it may be said that the property is held on trust for sale and the husband has merely to appoint a second trustee to effect a sale.

As to the authorities, it is significant that the decisions in which it has been held that the spouses take in equal shares are all cases where either the wife made a direct contribution to the purchase price or the property was conveyed into the joint names of the parties as joint tenants on trust for sale with an express declaration of their beneficial interests as joint tenants: see *Rimmer* v *Rimmer* [1953] 1 Q.B. 63; *Cobb* v. *Cobb* [1955] 1 W.L.R. 731; *Fribance* v. *Fribance* (*No.* 2) [1957] 1 W.L.R. 384; *Wilson* v. *Wilson* [1963] 1 W.L.R. 601; *Bedson* v. *Bedson* [1965] 2 Q.B. 666; *Ulrich* v. *Ulrich and Felton* [1968] 1 W.L.R. 180; *Chapman* v. *Chapman* [1969] 1 W.L.R. 1367 and *Muetzel* v. *Muetzel* [1970] 1 W.L.R. 188.

Nixon v. *Nixon* [1969] 1 W.L.R. 1676; *In re Rogers' Question* [1948] 1 All E.R. 328; *Allen* v. *Allen* [1961] 1 W.L.R. 1186; *Hine* v. *Hine* [1962] 1 W.L.R. 1124; *Silver* v. *Silver* [1958] 1 W.L.R. 259; *Tulley* v. *Tulley* (1965) 109 Sol.J. 956 and *Button* v. *Button* [1968] 1 W.L.R. 457 are all distinguishable on their facts.

On a perusal of the above authorities it will be seen that there are three cases which were decided before *Pettitt* v. *Pettitt* [1970] A.C. 777 in which it was held that the doctrine of equality applied where there had been indirect contributions. The three cases are: *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63; *Fribance* v. *Fribance* (*No.* 2) [1957] 1 W.L.R. 384; *Ulrich* v. *Ulrich and Felton* [1968] 1 W.L.R. 180 and in each of them the wife had made a *direct contribution* to the payment of the deposit. Both *Rimmer* and *Ulrich* were expressly approved of by Lord Upjohn in *Pettitt* v. *Pettitt* [1970] A.C. 777, 815H–816A.

It is to be remembered that a matrimonial dispute is not a prerequisite for the emergence of the present question. It may well arise on a bankruptcy. If the husband goes bankrupt there is no valid reason why his creditors should obtain the whole interest in the matrimonial home towards the purchase of which the wife has made direct and indirect contributions. Even if there be a divorce, section 17 of the Married Women's Property Act, 1882, only applies to an ante-nuptial or post-nuptial settlement. If the house belongs absolutely to the husband there is no settlement but if it can be shown that both spouses had a share, equal or unequal, in it then section 17 comes into operation: *Cook* v. *Cook* [1964] P. 220.

As to section 53 of the Law of Property Act, 1925, either there was here a trust to be implied from all the circumstances that the husband held the property for the wife and himself in equal shares or there was an agreement between the spouses, express or implied, that the wife should have a half-share in the beneficial interest in the property. In these circumstances it would be a fraud on the wife if the husband were to deny the wife's interest. Section 53 cannot be set up to defeat her interest.

In ascertaining the interests of persons in property held on trust the

A subsequent conduct of the parties can be considered in determining their intentions at the time of acquisition.

As to Lord Denning M.R.'s observations on the husband's parting words ([1969] 2 Ch. 85, 93F), it is difficult to maintain that those words were a recognition of a pre-existing interest in the house, They appear rather to be looking to the future. Further, there is no evidence that the wife acted on those words to her own detriment and therefore no question of B estoppel arises in respect of them.

As to *Wilson* v. *Wilson* [1963] 1 W.L.R. 601, it is conceded that after the date of the breakdown of the marriage the husband cannot be expected to pay the wife's proportion of the mortgage instalments. The difficult question is the precise determination of what constitutes the breakdown of the marriage.

C Finally, if it be held that the appellant has an absolute interest in the house it would be right in the circumstances to give the wife an opportunity to make an application in the Divorce Division for maintenance before the house is sold.

[Reference was also made to *Snell's Equity*, 26th ed. (1966), p. 109; *Rochefoucauld* v. *Boustead* [1897] 1 Ch. 196; *Vandervell* v. *Inland Revenue Commissioners* [1967] 2 A.C. 291.]

D *McCulloch* following: In *Button* v. *Button* [1968] 1 W.L.R. 457 the observations of Lord Denning M.R. at p. 416G would appear to be too wide in view of his reference to indirect contributions and should therefore be overruled. Danckwerts L.J., at p. 462G, formulates the correct principle to be applied in these cases.

Cherryman in reply. It is not in dispute that where a wife makes only E indirect contributions and there is no agreement concerning the destiny of the beneficial interest in the matrimonial home that such circumstances can never create a trust in favour of the wife. But here it has been suggested that the wife might be able to contend that she made a direct contribution and that there was a single combined enterprise or effort to buy the house. But this is a very shadowy concept unknown to the law. It was further F suggested that in the case where the wife makes a direct contribution to the purchase of the house, which is conveyed into the husband's name, and thereafter she makes indirect contributions it is easier for her to prove that she has a beneficial interest up to a half-share in the house. But this is not so. The maxim " equality is equity " cannot be used as a means to increase the extent of her interest.

G Finally, there is no finding by Buckley J. that the alleged parting words of the husband were ever uttered.

Their Lordships took time for consideration.

July 7, 1970. LORD REID. My Lords, I agree with your Lordships that H this appeal must be allowed. But, as in *Pettitt's* case [1970] A.C. 777, much wider questions have been raised than are necessary for the decision of the case. I adhere to the views which I expressed in *Pettitt's* case and I do not think that I am precluded from maintaining them by the decision in that

case. But if I am, then in my view the law is left in a very unsatisfactory position. A

I take a common case where husband and wife agreed when acquiring the family home that the wife should make a financial contribution and the title to the house was taken in the husband's name. That contribution could take one or other of two forms: the wife might pay part of the deposit and instalments or she might relieve the husband of some of his obligations, e.g. by paying household bills, so as to enable him to pay for the house. The B latter is often the more convenient way.

It must often happen that in coming to and carrying out such an agreement or understanding neither spouse gives a thought to the legal position or the legal consequences. The law is terra incognita and rather frightening to many people. Spouses generally expect that, on the decease of one of them, his property will go to the other, and I strongly suspect that in a C great many cases they do not think about what the position of the wife would be if there were a divorce or the husband became bankrupt, or at least they do not discuss those possibilities. So they do not discuss the question whether carrying out such an understanding will give the wife a share or beneficial interest in the house. If either of them gives a thought to the matter he or she may well think that the law will produce a just result without their assistance. Of course many people are more business-like D but many are not.

If there has been no discussion and no agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. E

I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions F from his wife not impose such a trust on him?

As I understand it, the competing view is that, when the wife makes direct contributions to the purchase by paying something either to the vendor or to the building society which is financing the purchase, she gets a beneficial interest in the house although nothing was ever said or agreed about this at the time: but that, when her contributions are only indirect by way of G paying sums which the husband would otherwise have had to pay, she gets nothing unless at the time of the acquisition there was some agreement that she should get a share. I can see no good reason for this distinction and I think that in many cases it would be unworkable. Suppose the spouses have a joint bank account. In accordance with their arrangement she pays in enough money to meet the household bills and so there is enough to pay H the purchase price instalments and their bills as well as their personal expenses. They never discuss whose money is to go to pay for the house and whose is to go to pay for other things. How can anyone tell whether

she has made a direct or only an indirect contribution to paying for the house? It cannot surely depend on who signs which cheques. Is she to be deprived of a share if she says "I can pay in enough to pay for the household bills," but given a share if she says "I can pay in £10 per week regularly."

It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half-share. I think that the high-sounding brocard "equality is equity" has been misused. There will of course be cases where a half-share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than a half.

But then it is said that there will be few deserving cases where the court cannot find enough in the evidence to justify a finding that there was at the time of acquisition some kind of agreement or understanding or intention that the wife should have a share. I do not agree. In evidence the husband will say truthfully that the matter was never discussed and that he never considered the question of her having a share. Even if in cross-examination he were to say that if he had been asked he might have been willing to make some arrangement, that would be quite irrelevant if the law requires a contemporary agreement. And a candid and honest wife would agree that the matter was never discussed, that her husband never indicated any intention to give her a share, and that she never thought about it. On such evidence no judge could possibly infer that on a balance of probability there was an agreement. On the other hand a more sophisticated wife who had been told what the law was would probably be able to produce some vague evidence which would enable a sympathetic judge to do justice by finding in her favour. That would not be a very creditable state in which to leave the law.

Returning to the crucial question there is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference. If the evidence shows that there was no agreement in fact then that excludes any inference that there was an agreement. But it does not exclude an imputation of a deemed intention if the law permits such an imputation. If the law is to be that the court has power to impute such an intention in proper cases then I am content, although I would prefer to reach the same result in a rather different way. But if it were to be held to be the law that it must at least be possible to infer a contemporary agreement in the sense of holding that it is more probable than not there was in fact some such agreement then I could not contemplate the future results of such a decision with equanimity.

LORD MORRIS OF BORTH-Y-GEST. My Lords, on the facts as found by Buckley J. in his careful judgment I have no doubt that he came to the correct conclusion. As on the general questions which have been discussed I set out my views in *Pettitt* v. *Pettitt* [1970] A.C. 777—there is little that I wish to add. When questions arise between spouses or between

former spouses or in relation to the affairs of one or another of them concerning the beneficial ownership of property the task of a court will often be one of much difficulty. But this should not be because the principles of law are in any way obscure or in doubt. It will be because in the nature of things the evidence will often not be specific and precise. The court must do its best to ascertain all the facts and then reach a conclusion.

In the infinite variety of circumstances that may arise there will be cases where there is separate ownership of property in a husband and cases where there is separate ownership in a wife and cases where there is joint ownership: there may be a payment which gives rise to a resulting implied or constructive trust: there may be a gift of money by one to the other: there may be a loan from one to another: there may be services rendered in respect of which some reward was expressly or impliedly promised: there may be services rendered without any contemplation of any such result: there may be services rendered or payments made without any thought that any property rights could be or would be in any way affected. When the full facts are discovered the court must say what is their effect in law. The court does not decide how the parties might have ordered their affairs: it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had. Nor can ownership of property be affected by the mere circumstance that harmony has been replaced by discord. Any power in the court to alter ownership must be found in statutory enactment.

Being in agreement with the conclusion reached by Edmund Davies L.J. I would allow the appeal.

VISCOUNT DILHORNE. My Lords, in this case the respondent claims to be entitled to a share in the beneficial interest in a house bought in 1951 and conveyed to the appellant, her former husband. They married in 1935 and were divorced on the respondent's petition in January 1966. In February of that year the respondent commenced these proceedings by originating summons. She claimed the entire beneficial interest in the house but, at the commencement of the hearing, she reduced her claim to a one-half undivided share in the house.

Its price was £2,695 of which £2,150 was raised on mortgage, and £500 by a loan made to the husband. The balance of £45 and the legal charges were paid by the appellant from his own money.

The appellant and his wife were employed by the same company. The respondent gave up her employment in 1957.

Buckley J. held that the loan of £500 was made to the appellant alone and that the repayment of the loan and the mortgage payments were made by him out of his own moneys: that he gave the respondent house-keeping money out of which she paid the house-keeping expenses: and that she paid out of her own money for her clothes and for those of their son and for various extras for the family's benefit. The respondent provided some furniture and equipment for the house and paid £30 for having the lawn made. In all she spent about £220 on this. Husband and wife had separate accounts, one at the post office and the other at a bank, and each made savings.

Buckley J. held that the conduct of the respondent was

> "quite insufficient to support the contention that this is a case in which some constructive trust should be erected on the circumstances attending the purchase of the house as a result of which she would have some equitable interest in the property."

The Court of Appeal by a majority (Lord Denning M.R. and Phillimore L.J., Edmund Davies L.J. dissenting) held that the respondent was entitled to a half-share in the house.

Lord Denning based his conclusion on the house being a "family asset." After referring to *Fribance* v. *Fribance (No. 2)* [1957] 1 W.L.R. 384 and my noble and learned friend Lord Diplock's judgment in *Ulrich* v. *Ulrich and Felton* [1968] 1 W.L.R. 180, 189 he said ([1969] 2 Ch. 85, 93):

> "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 a 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."

Judgment in this case in the Court of Appeal was delivered before the opinions of your Lordships in *Pettitt* v. *Pettitt* [1970] A.C. 777 were given.

In the light of the views expressed in *Pettitt* v. *Pettitt* the passage cited above cannot in my opinion be regarded as good law.

My Lords, in my opinion the decision in *Pettitt* v. *Pettitt* has established that there is not one law of property applicable where a dispute as to property is between spouses or former spouses and another law of property where the dispute is between others. In that case my noble and learned friend Lord Morris of Borth-y-Gest said, at p. 803D:

> "The duty of the court in an application under section 17 will not differ from its duty in a situation where a question of title arises not as between husband and wife but by reason of an outside claim."

and my noble and learned friend Lord Upjohn said, at p. 813C–D:

> "... the rights of the parties must be judged on the general principles applicable in any court of law when considering questions of title to property ..."

Use of the expression "family assets" was deprecated by my noble and learned friends Lord Hodson and Lord Upjohn in *Pettitt* v. *Pettitt* as devoid of legal meaning and conducive to the error of supposing that the legal principles applicable to the determination of the interests of spouses in property are different from those of general application in determining claims by one person to a beneficial interest in property in which the legal estate is vested in another. Despite this criticism it has been used in later cases, *Chapman* v. *Chapman* [1969] 1 W.L.R. 1367 and *Nixon* v. *Nixon* [1969] 1 W.L.R. 1676. It is, no doubt, a useful loose expression to refer

to the possessions of a family, but family assets are not a special class of property known to the law. The motor car owned by a member of the family, the wife's money and the husband's, the television set and many other things are aptly covered by the expression but the application of this expression does not resolve the question to whom does a particular " family asset " belong. Is it to the husband or the wife or to both jointly?

I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on establishing that it is held on a trust to give effect to the beneficial interest of the claimant as a cestui que trust.

Where there was a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it 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.

The difficulty where the dispute is between former spouses arises with regard to proof of the existence of any such common intention. It may be, as in this case, that the claim to a share in the beneficial interest is not made until years after the acquisition of the property. It is most likely that there will be no documentary evidence pointing to the existence of any such intention.

In a great many cases, perhaps in the vast majority, no consideration will have been given by the parties to the marriage to the question of beneficial ownership of the matrimonial home at the time that it is being acquired. If, on the evidence, that appears to have been the case, then a claim based upon the existence of such an intention at the time must fail.

It may be that one spouse will say that if he or she had thought about it, he or she would have agreed to sharing the beneficial interest with the other, but that in my view will not justify or entitle the court to hold that they share the beneficial interest. As I read the opinions of the majority in *Pettitt* v. *Pettitt* [1970] A.C. 777 that was their conclusion. One cannot counteract the absence of any common intention at the time of acquisition by conclusions as to what the parties would have done if they had thought about the matter. If such a common intention is absent, in my opinion the law does not permit the courts to ascribe to the parties an intention they never had and to hold that property is subject to a trust on the ground that that would be fair in all the circumstances.

My Lords, in determining whether or not there was such a common intention, regard can of course be had to the conduct of the parties. If the wife provided part of the purchase price of the house, either initially or subsequently by paying or sharing in the mortgage payments, the inference may well arise that it was the common intention that she should have an interest in the house.

To establish this intention there must be some evidence which points to its existence. It would not, for instance, suffice if the wife just made a mortgage payment while her husband was abroad. Payment for a lawn and provision of some furniture and equipment for the house does not of itself point to the conclusion that there was such an intention.

I appreciate that there may be very great difficulty in establishing such an intention where the dispute is between former spouses but that does not alter the question to be decided. In every case it has to be established that the circumstances are such that there is a resulting, implied or constructive trust in favour of the claimant to a beneficial interest or a share in it. In the case of former spouses that will ordinarily depend on whether it can be inferred from the evidence that there was such a common intention.

My Lords, I do not think that any useful purpose will be served by my expressing any views on what will suffice to justify the drawing of such an inference. In one case the evidence may just fall short of doing so; in another it may just suffice. But what is important is that it should be borne in mind that proof of expenditure for the benefit of the family by one spouse will not of itself suffice to show any such common intention as to the ownership of the matrimonial home.

It may be regarded as unsatisfactory that one claim will fail for lack of evidence from which such an intention can be inferred and another similar claim where there is slightly more evidence succeed. But that can happen in all kinds of cases and the fact that it can happen in this class of case does not lead me to the conclusion that the state of the law with regard to the determination of rights to property is unsatisfactory.

It may be that it is alleged that some time after the acquisition of the matrimonial home the spouses formed the intention of sharing the beneficial interest. It may well be difficult to establish this but if it was, for instance, proved that up to the time when such an intention is alleged to have been formed, the mortgage payments were made by one spouse and thereafter by the other, then proof of that would tend to support the allegation.

In the course of this case it has been said that it is with regret that the conclusion has been reached that the respondent's claim fails. I do not share that regret. In my opinion the evidence adduced by her utterly fails to show the existence of any common intention that she should share in the ownership of the house.

As Lord Denning said in this case [1969] 2 Ch. 85, 93:

> "The Divorce Division has ample power to do what is fair and reasonable, having regard to the conduct of the parties: whereas, the Chancery Division is asked only to answer the cold legal question: what interest has the wife in the house? without regard to the conduct of the parties."

If the Divorce Division is not armed with adequate powers to make provision for the wife on the breakdown of the marriage, that is a matter for the legislature. Determination of the cold legal question is not in my opinion to be affected by the conduct of the parties during the marriage save and in so far as that may indicate an intention as to ownership.

I would for these reasons allow the appeal.

LORD PEARSON. My Lords, the respondent to this appeal, having been deserted by the appellant, and having divorced him, obtained an order for maintenance and can apply in the appropriate Division of the High Court for an order for security or a lump sum payment. But this appeal

is not concerned with any such application. It is concerned solely with a property claim arising in the sphere of property law as distinct from matrimonial law and contract law.

The appellant is the owner of the legal estate in the house and prima facie the legal estate carries with it the whole beneficial interest. The respondent however claims that she has a partial beneficial interest to the extent of one-half or some lesser proportion.

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. If she did make contributions of substantial amount towards the purchase of the house, there would prima facie be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption: it can be rebutted by evidence showing some other intention. The question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the judge acting as a jury.

That is what appears, in my opinion, from the cases cited by my noble and learned friend Lord Upjohn in *Pettitt* v. *Pettitt* [1970] A.C. 777, 814–815, namely, *Dyer* v. *Dyer* (1788) 2 Cox Eq.Cas. 92, *per* Eyre C.B. at pp. 93–94; *In re Gooch* (1890) 62 L.T. 384, *per* Kay J. at p. 387; *Fowkes* v. *Pascoe* (1875) 10 Ch.App. 343, *per* James L.J. at p. 349 and *per* Mellish L.J. at pp. 352–353; *In re Eykyn's Trusts* (1877) 6 Ch.D. 115, *per* Malins V.-C. at p. 118; *In re Young* (1885) 28 Ch.D. 705, 708; *In re Bishop, decd.* [1965] Ch. 450. There is also in *Snell on Equity* 26th ed., by Megarry and Baker (1966), at p. 192 a statement referring to the doctrine of resulting trust, that

> "It also applies where two or more persons advance money jointly and the purchase is taken in the name of one only, in which case there is a resulting trust in favour of the other or others as to so much of the money as he or she advanced."

This statement is borne out by the case cited in support of it, which is *Wray* v. *Steele* (1814) 2 V. & B. 388, 390.

I think it must often be artificial to search for an agreement made between husband and wife as to their respective ownership rights in property used by both of them while they are living together. In most cases they are unlikely to enter into negotiations or conclude contracts or even make agreements. The arrangements which they make are likely to be lacking in the precision and finality which an agreement would be expected to have. On the other hand, an intention can be imputed: it can be inferred from the evidence of their conduct and the surrounding circumstances. The starting-point, in a case where substantial contributions are proved to have been made, is the presumption of a resulting trust, though it may be displaced by rebutting evidence. It may be said that the imputed intent does not differ very much from an implied agreement. Accepting that, I still think it is better to approach the question through the doctrine of resulting trusts rather than through contract law. Of course, if an agreement can be proved it is the best evidence of intention.

I think also that the decision of cases of this kind has been made more difficult by excessive application of the maxim "equality is equity." No doubt it is reasonable to apply the maxim in a case where there have been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the proportion borne by the contributions to the total price or cost is difficult to fix. But if it is plain that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing.

Contributions are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name of one of the spouses. For instance there can be a contribution if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments.

On the facts of the present case the learned judge, Buckley J., decided in effect that the respondent had not made, either directly or indirectly, any substantial contribution to the purchase of the house, and therefore there was no resulting trust in her favour. I agree with him and would therefore allow the appeal.

LORD DIPLOCK. My Lords, the judgments of the Court of Appeal in the instant case were delivered while *Pettitt* v. *Pettitt* [1970] A.C. 777 was still pending in your Lordships' House. It concerns a claim by a former wife to a proprietary interest in real property of which the legal estate in fee simple is vested in her former husband subject to a mortgage to a building society which has not yet been fully paid off. Her claim was not brought in the matrimonial proceedings for dissolution of the marriage nor was it instituted under section 17 of the Married Women's Property Act, 1882. It was made by an ordinary originating summons in the Chancery Division for a declaration that she was entitled to a beneficial interest in the house which had been the matrimonial home for some 10 years before her husband deserted her. Her original claim was to the whole beneficial interest, but at the hearing before Buckley J. this was reduced to a claim to a one-half undivided share and her case has since proceeded on this basis. She founds her claim upon the contention that she contributed substantially, though indirectly, to the payment by her husband of the original deposit and the subsequent instalments payable under the mortgage which enabled him to acquire the fee simple in the house.

The actual decision of your Lordships' House in *Pettitt* v. *Pettitt* is thus not directly in point. That case was concerned with a claim made in proceedings brought under section 17 of the Married Women's Property Act, 1882, by a former husband who claimed that he was entitled to a beneficial interest in a house which had been the former matrimonial home. It was not disputed that at the time of the acquisition of the house, which was not purchased on mortgage, the sole beneficial interest in it as well as the legal estate was vested in the wife. The husband's claim to a beneficial interest was based upon the allegation that he had made considerable improvements to the house and garden which had enhanced its value. Your Lord-

ships decided unanimously, first, that section 17 of the Married Women's Property Act, 1882, was procedural only and did not entitle the court to vary the existing proprietary rights of the parties; and, secondly, that upon the facts disclosed by the evidence it was not possible to infer any common intention of the parties that the husband by doing work and expending money on materials for the improvement of the house should acquire any beneficial proprietary interest in real property in which the whole legal and beneficial interest had previously been vested in the wife.

But although, as a matter of decision, *Pettitt* v. *Pettitt* does not govern the instant appeal, it entailed for the first time a survey by your Lordships of numerous decisions of the Court of Appeal during the past 20 years in which the beneficial interests of spouses in a former matrimonial home had been the subject of consideration not only in applications under section 17 of the Married Women's Property Act, 1882, but also in other kinds of proceedings. In the cases examined the practice had developed of using the expression " family asset " to describe the kind of property about which disputes arose between spouses as to their respective beneficial interests in it. I myself [1970] A.C. 777, 819A, adopted the expression as a convenient one to denote

> " property, whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use or enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels "

but without intending any connotation as to how the beneficial proprietary interest in any particular family asset was held. I did, however, differ from the majority of the members of your Lordships' House who were parties to the decision in *Pettitt* v. *Pettitt* in that I saw no reason in law why the fact that the spouses had not applied their minds at all to the question of how the beneficial interest in a family asset should be held at the time when it was acquired should prevent the court from giving effect to a common intention on this matter which it was satisfied that they would have formed as reasonable persons if they had actually thought about it at that time. I must now accept the majority decision that, put in this form at any rate, this is not the law.

In all the previous cases about the beneficial interests of spouses in the matrimonial home the arguments and judgments have been directed to the question whether or not an agreement between the parties as to their respective interests can be established on the available evidence. This approach to the legal problem involved is in most cases adequate, but it passes over the first stage in the analysis of the problem, viz., the role of the agreement itself in the creation of an equitable estate in real property. In the instant appeal, I think it is desirable to start at the first stage.

Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute

between spouses that comes before the courts, the law relating to the creation and operation of "resulting, implied or constructive trusts." Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it. But to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by section 53 (1) of the Law of Property Act, 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application.

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. 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.

This is why it has been repeatedly said in the context of disputes between spouses as to their respective beneficial interests in the matrimonial home, that if at the time of its acquisition and transfer of the legal estate into the name of one or other of them an express agreement has been made between them as to the way in which the beneficial interest shall be held, the court will give effect to it—notwithstanding the absence of any written declaration of trust. Strictly speaking this states the principle too widely, for if the agreement did not provide for anything to be done by the spouse in whom the legal estate was not to be vested, it would be a merely voluntary declaration of trust and unenforceable for want of writing. But in the express oral agreements contemplated by these dicta it has been assumed sub silentio that they provide for the spouse in whom the legal estate in the matrimonial home is not vested to do something to facilitate its acquisition, by contributing to the purchase price or to the deposit or the mortgage instalments when it is purchased upon mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure. 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.

An express agreement between spouses as to their respective beneficial interests in land conveyed into the name of one of them obviates the need for showing that the conduct of the spouse into whose name the land was conveyed was intended to induce the other spouse to act to his or her detriment upon the faith of the promise of a specified beneficial interest in the land and that the other spouse so acted with the intention of acquiring that beneficial interest. The agreement itself discloses the common intention required to create a resulting, implied or constructive trust.

But parties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate this intention to one another; or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case—a common one where the parties are spouses whose marriage has broken down—it may be possible to infer their common intention from their conduct.

As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. It is for the court to determine what those inferences are.

In drawing such an inference, what spouses said and did which led up to the acquisition of a matrimonial home and what they said and did while the acquisition was being carried through is on a different footing from what they said and did after the acquisition was completed. Unless it is alleged that there was some subsequent fresh agreement, acted upon by the parties, to vary the original beneficial interests created when the matrimonial home was acquired, what they said and did after the acquisition was completed is relevant if it is explicable only upon the basis of their having manifested to one another at the time of the acquisition some particular common intention as to how the beneficial interests should be held. But it would in my view be unreasonably legalistic to treat the relevant transaction involved in the acquisition of a matrimonial home as restricted to the actual conveyance of the fee simple into the name of one or other spouse. Their common intention is more likely to have been concerned with the economic realities of the transaction than with the unfamiliar technicalities of the English law of legal and equitable interests in land. The economic reality which lies behind the conveyance of the fee simple to a purchaser in return for a purchase price the greater part of which is advanced to the purchaser upon a mortgage repayable by instalments over a number of years, is that the new freeholder is purchasing the matrimonial home upon credit and that the purchase price is represented by the instalments by which the mortgage is repaid in addition to the initial payment in cash. The conduct of the spouses in relation to the payment of the mortgage instalments may be no less relevant to their common intention as to the beneficial interests in a matrimonial home acquired in this way than their conduct in relation to the payment of the cash deposit.

It is this feature of the transaction by means of which most matrimonial

homes have been acquired in recent years that makes difficult the task of the court in inferring from the conduct of the spouses a common intention as to how the beneficial interest in it should be held. Each case must depend upon its own facts but there are a number of factual situations which often recur in the cases.

Where a matrimonial home has been purchased outright without the aid of an advance on mortgage it is not difficult to ascertain what part, if any, of the purchase price has been provided by each spouse. If the land is conveyed into the name of a spouse who has not provided the whole of the purchase price, the sum contributed by the other spouse may be explicable as having been intended by both of them either as a gift or as a loan of money to the spouse to whom the land is conveyed or as consideration for a share in the beneficial interest in the land. In a dispute between living spouses the evidence will probably point to one of these explanations as being more probable than the others, but if the rest of the evidence is neutral the prima facie inference is that their common intention was that the contributing spouse should acquire a share in the beneficial interest in the land in the same proportion as the sum contributed bore to the total purchase price. This prima facie inference is more easily rebutted in favour of a gift where the land is conveyed into the name of the wife: but as I understand the speeches in *Pettitt* v. *Pettitt* four of the members of your Lordships' House who were parties to that decision took the view that even if the "presumption of advancement" as between husband and wife still survived today, it could seldom have any decisive part to play in disputes between living spouses in which some evidence would be available in addition to the mere fact that the husband had provided part of the purchase price of property conveyed into the name of the wife.

Similarly when a matrimonial home is not purchased outright but partly out of moneys advanced on mortgage repayable by instalments, and the land is conveyed into the name of the husband alone, the fact that the wife made a cash contribution to the deposit and legal charges not borrowed on mortgage gives rise, in the absence of evidence which makes some other explanation more probable, to the inference that their common intention was that she should share in the beneficial interest in the land conveyed. But it would not be reasonable to infer a common intention as to what her share should be without taking account also of the sources from which the mortgage instalments were provided. If the wife also makes a substantial direct contribution to the mortgage instalments out of her own earnings or unearned income this would be prima facie inconsistent with a common intention that her share in the beneficial interest should be determined by the proportion which her original cash contribution bore either to the total amount of the deposit and legal charges or to the full purchase price. The more likely inference is that her contributions to the mortgage instalments were intended by the spouses to have some effect upon her share.

Where there has been an initial contribution by the wife to the cash deposit and legal charges which points to a common intention at the time of the conveyance that she should have a beneficial interest in the land conveyed to her husband, it would be unrealistic to regard the wife's subsequent contributions to the mortgage instalments as without significance unless she pays them directly herself. It may be no more than a

matter of convenience which spouse pays particular household accounts, particularly when both are earning, and if the wife goes out to work and devotes part of her earnings or uses her private income to meet joint expenses of the household which would otherwise be met by the husband, so as to enable him to pay the mortgage instalments out of his moneys this would be consistent with and might be corroborative of an original common intention that she should share in the beneficial interest in the matrimonial home and that her payments of other household expenses were intended by both spouses to be treated as including a contribution by the wife to the purchase price of the matrimonial home.

Even where there has been no initial contribution by the wife to the cash deposit and legal charges but she makes a regular and substantial direct contribution to the mortgage instalments it may be reasonable to infer a common intention of the spouses from the outset that she should share in the beneficial interest or to infer a fresh agreement reached after the original conveyance that she should acquire a share. But it is unlikely that the mere fact that the wife made direct contributions to the mortgage instalments would be the only evidence available to assist the court in ascertaining the common intention of the spouses.

Where in any of the circumstances described above contributions, direct or indirect, have been made to the mortgage instalments by the spouse into whose name the matrimonial home has not been conveyed, and the court can infer from their conduct a common intention that the contributing spouse should be entitled to *some* beneficial interest in the matrimonial home, what effect is to be given to that intention if there is no evidence that they in fact reached any express agreement as to what the respective share of each spouse should be?

I take it to be clear that if the court is satisfied that it was the common intention of both spouses that the contributing wife should have a share in the beneficial interest and that her contributions were made upon this understanding, the court in the exercise of its equitable jurisdiction would not permit the husband in whom the legal estate was vested and who had accepted the benefit of the contributions to take the whole beneficial interest merely because at the time the wife made her contributions there had been no express agreement as to how her share in it was to be quantified.

In such a case the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse upon which each must have acted in doing what each did, even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently. It is only if no such inference can be drawn that the court is driven to apply as a rule of law, and not as an inference of fact, the maxim "equality is equity," and to hold that the beneficial interest belongs to the spouses in equal shares.

The same result however may often be reached as an inference of fact. The instalments of a mortgage to a building society are generally repayable over a period of many years. During that period, as both must be aware, the ability of each spouse to contribute to the instalments out of their separate earnings is likely to alter, particularly in the case of the wife

if any children are born of the marriage. If the contribution of the wife in the early part of the period of repayment is substantial but is not an identifiable and uniform proportion of each instalment, because her contributions are indirect or, if direct, are made irregularly, it may well be a reasonable inference that their common intention at the time of acquisition of the matrimonial home was that the beneficial interest should be held by them in equal shares and that each should contribute to the cost of its acquisition whatever amounts each could afford in the varying exigencies of family life to be expected during the period of repayment. In the social conditions of today this would be a natural enough common intention of a young couple who were both earning when the house was acquired but who contemplated having children whose birth and rearing in their infancy would necessarily affect the future earning capacity of the wife.

The relative size of their respective contributions to the instalments in the early part of the period of repayment, or later if a subsequent reduction in the wife's contribution is not to be accounted for by a reduction in her earnings due to motherhood or some other cause from which the husband benefits as well, may make it a more probable inference that the wife's share in the beneficial interest was intended to be in some proportion other than one-half. And there is nothing inherently improbable in their acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately upon the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date. Where this was the most likely inference from their conduct it would be for the court to give effect to that common intention of the parties by determining what in all the circumstances was a fair share.

Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.

Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift. There is nothing

here to rebut the prima facie inference that a purchaser of land who pays the purchase price and takes a conveyance and grants a mortgage in his own name intends to acquire the sole beneficial interest as well as the legal estate: and the difficult question of the quantum of the wife's share does not arise.

In the instant appeal the matrimonial home was purchased in 1951 for £2,695 and conveyed into the sole name of the husband. The parties had by then been married for some 16 years and both were in employment with the same firm, the husband earning £1,000 and the wife £500 per annum. The purchase price was raised as to £2,150 on mortgage repayable by instalments, as to £500 by a loan to the husband from his employers, and as to the balance of £45 and the legal charges was paid by the husband out of his own moneys. The wife made no direct contribution to the initial deposit or legal charges, nor to the repayment of the loan of £500 nor to the mortgage instalments. She continued earning at the rate of £500 per annum until the marriage broke down in 1961. During this period the husband's salary increased to £3,000 per annum. The husband repaid the loan of £500, and paid the mortgage instalments. He also paid the outgoings on the house, gave to his wife a housekeeping allowance of £8 to £10 a week out of which she paid the running expenses of the household and he paid for holidays. The only contribution which the wife made out of her earnings to the household expenses was that she paid for her own clothes and those of the son of the marriage and for some extras. No change in this arrangement was made when the house was acquired. Each spouse had a separate banking account, the wife's in the Post Office Savings Bank, and each made savings out of their respective earnings. There was no joint bank account and there were no joint savings. There was no express agreement at the time of the purchase or thereafter as to how the beneficial interest in the house should be held. The learned judge was prepared to accept that after the marriage had broken down the husband said to the wife: "Don't worry about the house—it's yours"; but this has not been relied upon, at any rate in your Lordships' House, as an acknowledgment of a pre-existing agreement on which the wife had acted to her detriment so as to give rise to a resulting, implied or constructive trust, nor can it be relied upon as an express declaration of trust as it was oral only.

On what then is the wife's claim based? In 1951 when the house was purchased she spent about £190 on buying furniture and a cooker and refrigerator for it. She also paid about £30 for improving the lawn. As furniture and household durables are depreciating assets whereas houses have turned out to be appreciating assets it may be that she would have been wise to have devoted her savings to acquiring an interest in the freehold; but this may not have been so apparent in 1951 as it has now become. The court is not entitled to infer a common intention to this effect from the mere fact that she provided chattels for joint use in the new matrimonial home; and there is nothing else in the conduct of the parties at the time of the purchase or thereafter which supports such an inference. There is no suggestion that the wife's efforts or her earnings made it

possible for the husband to raise the initial loan or the mortgage or that her relieving her husband from the expense of buying clothing for herself and for their son was undertaken in order to enable him the better to meet the mortgage instalments or to repay the loan. The picture presented by the evidence is one of husband and wife retaining their separate proprietary interests in property whether real or personal purchased with their separate savings and is inconsistent with any common intention at the time of the purchase of the matrimonial home that the wife, who neither then nor thereafter contributed anything to its purchase price or assumed any liability for it, should nevertheless be entitled to a beneficial interest in it.

Both Buckley J. and Edmund Davies L.J. in his dissenting judgment in the Court of Appeal felt unable on this evidence to draw an inference that there was any common intention that the wife should have any beneficial interest in the house. I think that they were right. Like them I, too, come to this conclusion with regret, because it may well be that had husband and wife discussed the matter in 1951 when the house was bought he would have been willing for her to have a share in it if she wanted to. But this is speculation, and if such an arrangement had been made between them there might well have also been a different allocation of the household expenses between them in the ensuing years. If, as I hold, she has no interest in the matrimonial home in which she is still living, this will no doubt affect her claim for maintenance under the Matrimonial Causes Act, 1965.

I would allow the appeal and declare that the sole beneficial interest in the house is vested in the husband, but would impose a stay upon the sale of the house for three months to give the wife an opportunity of applying in the matrimonial proceedings for appropriate relief. The husband should have his costs before Buckley J. and in the Court of Appeal.

Appeal allowed.

Solicitors: *Breeze, Benton & Co., Lovell, White & King.*

J. A. G.