TITLE TO THE MATRIMONIAL HOME

PEYCHERS v. PEYCHERS, [1955] N.Z.L.R. 564.

The matrimonial home has in recent years become the focus of much legal discussion, not only as the subject matter of the "deserted wife's irrevocable license", but as property the title to which is from time to time in question in applications to the Court under s. 19 of the Married Women's Property Act 1952. The term may not be one of legal art, but the concept appears to be finding a special place in judicial decisions. Considerations peculiar to itself have been held to apply where the matrimonial home is the subject of dispute, and the concept of joint matrimonial venture, so decisively rejected by the majority of the Court in Hoddinott v. Hoddinott, [1949] 2 K.B. 406, where the property in dispute was a savings bank account, has been, when applied to the matrimonial home, remarkably fruitful of legal consequences: Nish v. Nish, [1946] G.L.R. 202; Thomson v. Thomson, [1951] N.Z.L.R. 1047; Rimmer v. Rimmer, [1953] 1 Q.B. 63; [1952] 2 All E.R. 863.

The judgment of F.B. Adams J. in the case which is the subject of this note is the most recent judicial pronouncement on a question of title under s. 19 of the Married Women's Property Act 1952. Extraordinarily applicable to the decision, it is submitted, are the words of Kahn-Freund on a recent "irrevocable license" case:

> . . . the decision has a distinctly Praetorian flavour, and may be one of those which are of a creative character for the very reason that their foundations in positive law are not clearly visible. (1)

This is not to say, (again in Kahn-Freund's words) ". . . that the decision was not a wise and just one." (2) It is the purpose of this note to show how the decision was founded on a reconciliation of Barrow v. Barrow, [1946] N.Z.L.R. 438, by which the learned Judge was bound, with Rimmer's case (supra), which he accepted as authoritative; and to suggest, with the greatest diffidence, a possibly less difficult reconciliation

which might provide a safer foundation, and to show why the decision (although, as it stands, precariously based), should be recognized as one of wisdom and justice.

The facts of the case were that the matrimonial property had been provided by the husband out of his savings and earnings. He had paid £200 shortly after the marriage in 1921 for the section, but the building of the home and improvements had been financed by borrowing on mortgages, which were not finally discharged until 1953, four years after the break-up of the marriage. The property had been put into the wife's name, and the mortgages given in her name. There was no evidence, however, that any money had been contributed by the wife to the purchase or to the reduction of the mortgages. The most that could be said was that she had helped for a time in her husband's greengrocery business, and during the depression had assisted the family finances by some outside work. The presumption of advancement which arose on the facts was held to be rebutted, but the learned Judge did not thereupon declare a resulting trust of the whole property for the husband, according to the well-known principle. He declared that the wife held the legal title on trust for them both in equal shares, on the ground that the common intention of the parties had been that the home should be provided for their joint benefit during their lives. As evidence of this intention he took the fact that the husband had put the property into his wife's name, together with all the conditions of their life together.

This decision may appear equitable in the broadest sense, but it is represented as being a decision in accordance with the legal rights of the parties, following the decisions in both Barrow's and Rimmer's cases, the mutual compatibility of which had been doubted by Cooke J. in Masters v. Masters, [1954] N.Z.L.R. 82.

Before examining the above cases, it is proposed to consider the decision of F.B. Adams J. in the light of the strict rights of the parties at law and in equity.

The wife must have held the property ". . . either as beneficial owner or as a trustee": the words are those of Lord Morton, who continued: ". . . I see no third possibility

which would be recognized by English law." Shephard v. Cartwright, [1954] 3 All E.R. 649, 656. The presumption arises from the putting of the property in the wife's name; the presumption is rebutted: no lesser beneficial interest can then arise, it is submitted, from the same fact as gave rise to the presumption. This is to invent "a third possibility". The wife's legal right, therefore, is an empty one; she holds the property on trust for her husband. She cannot assert any right based on her contribution to the purchase, or on any intention to contribute, for there is no evidence of either. F.B. Adams J. speaks (at 567) of "a legal right arising from the proved or presumed intention of the parties", but, it is submitted, no legal right can arise, as between strangers, from the mere intention that both shall have a beneficial interest, where the property in question is land, unless it can be shown either that both contributed to the purchase price, according to the principle in Dyer v. Dyer (1788), 2 Cox. 92; 30 E.R. 42; or intended so to do; and there is no precedent for the proposition that this rule is modified by the existence of a marriage between the parties: or that appropriate steps were taken by the party who provided all the moneys to create an interest in the property in the other. This could be done either by a declaration of trust, evidenced by writing, as provided by s. 7 of the Statute of Frauds, 1677 (Eng.), or by putting the property into the joint names of the parties, subject to proof of the necessary intention. The second course was not followed, and it is submitted that no declaration of trust can be spelled out of the facts giving rise to the ineffective presumption of advancement: compare Richards v. Delbridge (1874), L.R. 18 Eq. 11: and that there is no other evidence sufficient to support a clear and unequivocal declaration of trust, nor is there any evidence in writing of a trust.

The learned Judge said (at 571) that the Statute did not apply to such a case as this, but this remark was in reply to counsel for the wife, and the reference was necessarily to the resulting trust implied by law on the rebuttal of the presumption of advancement. The Courts do not imply a trust except in accordance with some recognized rule, and there is no precedent, it is submitted, for the implication of a trust for the wife in these circumstances. If the wife had contributed to the purchase, a trust in favour of the wife would be implied; but a trust of land, it is respectfully

submitted, cannot be created by the bare joint intention of A and B that B shall have an interest, where B contributes nothing to the purchase price. Even if an intention is proved, this is so; the difficulty clearly cannot be avoided by presuming such an intention, in default of proof thereof, and calling the trust constructive, and therefore not requiring to be proved in writing, for constructive trust is only found by the Courts where some recognized interest requires to be protected (3). The Statute may not be set up to perpetrate a fraud: Rochefoucauld v. Boustead, [1897] 1 Ch. 196: but unless B has an interest to be denied, there is no fraud.

There is, however, one more possibility. ". . . the home had to be provided", in the learned Judge's words (at 571) ". . . largely by the joint efforts and savings of the spouses in their wedded years." In such a case as this, where the wife's efforts and savings must have been those of any housewife (apart from the outside earnings during the depression, which were not applied specifically to the purchase), the suggestion that such efforts give a wife an interest in rem in the matrimonial home is, it is respectfully submitted, revolutionary. Dealing with an alleged right arising from such a suggested joint venture, Cohen L.J. in Hoddinott's case (supra, at 414) said: ". . . Well, this is a right which to my mind has no foundation in law and is entirely without precedent. Indeed, it seems to me to be inconsistent with the view of the relationship between husband and wife stated by Atkin L.J. in the passages . . . which my Lord has read." (from Balfour v. Balfour, [1919] 2 K.B. 571, 579. This assessment of Atkin L.J.'s view lends particular piquancy to Evershed M.R.'s reliance, in Rimmer's case (supra, at 67), on the same passage for the proposition that precisely because marital arrangements are outside the realm of contract, legal results may flow from presumed intentions which would be insufficient to create rights as between strangers.) The property in dispute in Hoddinott's and Balfour's cases was not, of course, the matrimonial home.

Contrast with the judgment of Cooke J. in Masters's case (supra) highlights the novelty of this proposition. There the family home was in the husband's name; he had paid a small deposit, and undertaken the liability under the mortgages, but his wife by unremitting toil over the years, by taking in

lodgers, charring and so on, had earned enough to make what the learned Judge found (at 84) to be ". . . very substantial contributions towards the outgoings on the property or the household expenses." Counsel for the wife, nevertheless, could suggest no basis in equity upon which a trust of an interest in the property could be declared in her favour. Thus the proposition that there was a joint matrimonial venture with legal consequences affecting family property was not argued before Cooke J., but it is a fair inference, it is suggested, from the judgment as a whole, that, had it been, it would have been received with as little sympathy by that learned Judge as by Cohen L.J.

F.B. Adams J. in the instant case did not speak in terms of a partnership, but he called in support the decision of Fell J. in Thomson v. Thomson (supra), in which he had found a partnership between a husband and wife who ran a butchery business together, and, although the property was in the name of the wife, he found a one-third interest in the proceeds of the business in the husband, in recognition of the work contributed by him to the business. These facts may justify the decision in Thomson's case (supra) as a decision according to law and the rights of the parties, but they go far beyond the facts in Peycher's case.

It is submitted, therefore, with deep respect, that a decision in accord with the strict rights of the parties must have awarded the whole interest in the property to the husband. Such a result, however, would only serve to underline the inadequacy of a strict view of the law in a case where the parties are not strangers, and where a modification of the law to suit the special relationship has not yet been hallowed by judicial acceptance into a respectable rule of law. If the law may properly modify by the use of the judicial discretion allowed by s. 19, and if Barrow's case (supra) does not bar the way, a remedy is at hand. The jurisdiction given by s. 19 is in these terms:

> In any question between husband and wife as to the title to or possession of property, either party . . . may apply by summons or otherwise in a summary way to any Judge of the Supreme Court . . . and the Judge . . . hearing any such application may make such order with respect

to the property in dispute . . . as he . . . thinks fit. . . .

In questions of possessions, it is well established that the Judge may at his discretion make an order without regard to the strict rights of the parties. In Masters's case (supra) for example, although the wife was held to have no interest in the property, she was given exclusive possession of the house; in such questions a prime consideration is the behaviour of the spouses: Thomson's case, [1944] N.Z.L.R. 469; Nish's case, [1946] G.L.R. 202; Hutchinson's case, [1947] 2 All E.R. 792; Lee's case, [1952] 2 Q.B. 489; [1952] 1 All E.R. 1299; Simpson's case, [1952] N.Z.L.R. 278. It does not follow, of course, that questions of title should be decided according to the behaviour of the parties, but neither does it necessarily follow, that the Judge can entertain only such considerations as apply between strangers or such (for example, the presumption of advancement) as are already established as arising between man and wife. The English Court of Appeal has found such limits too restrictive: Rimmer's case (supra). Courts in New Zealand, however, must come to terms with the decision in Barrow's case (supra) by which they are bound; and it is by reason of his view of this decision that the findings of F.B. Adams J. had to be forced into the strait-jacket which appears to fit them so ill.

The house, in Barrow's case (supra) had been bought by the husband and put into the joint names of himself and his wife. While he was serving overseas the wife with his consent sold the house. On his return, she told him that she had committed adultery and would not live with him again. She did not pay him any part of the proceeds of the sale. He applied for and was granted an order declaring him entitled to the whole net proceeds. The wife appealed. Johnston J., delivering the judgment of the Court, said (at 445):

> . . . counsel for respondent relied solely on the power given to the Judge on an application under s. 23 of the Married Women's Property Act 1908, to make such order as he thinks fit. If a question of title had been in dispute and the effect of joint tenancy brought to the notice of the Chief Justice, we think it unlikely the Chief Justice would have made an order in favour of respondent

> beyond the return to respondent of one half-share of the sum . . . . But the real question of title was not, we think, brought to the mind of the Chief Justice, and counsel for appellant (sic) really relies on a construction of s. 23 that would sanction a Judge . . . to dispose of property irrespective of title.
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> The section, however, relates to disputed questions of ownership. Since there can be no such question in this case, we think the order should be . . . for the return to respondent of his half of the sum claimed.

It is perhaps not surprising that this judgment was passed over with a mere reference by F.B. Adams J.; but by implication he accepts it as a decision that questions of title must be decided strictly. Fell J. in Thomson's case (supra, at 1050) held that, as no dispute was found, it was no authority on the exercise of the discretion allowed by the section. Cooke J. in Masters's case (supra) held himself bound by it to decide the question of title before him according to the strict rights of the parties; the result has been seen.

In the absence of any judicial explanation (apart from construction) of the decision in Barrow's case, what is a patent contradiction in terms can be rationalized only, it is submitted, in either of two ways: either the Court meant that where there was a dispute in fact between the parties, the Court could make an order, but that where on the facts there was no room for a dispute in law, the order made must be in accordance with the rights of the parties at law, in contradistinction to the kind of order which might be made in a question of possession: or that where the facts disclosed no room for a dispute in law, the Court should refuse jurisdiction. This would appear to be the correct inference from the words of Johnston J. (p. 24 ante): "The section . . . relates to disputed questions of ownership. Since there can be no such question in this case . . . .", but as the Court did not refuse jurisdiction and went on to make an order, it is preferable, it is submitted, to adopt the first construction. On the other construction, the husband would, contrary to the intention of the Legislature, be left without redress, for, since actions in tort against his wife are prohibited by s. 9 of the same Act, if he has no remedy under this section he has none at all. The husband in Barrow's case, for example,

precisely because his rights were so clear, would have been unable to recover his half share. The Court of Appeal clearly did not intend to be the instrument of such a calamity. In order, therefore, it is submitted, to give proper effect to the decision in Barrow's case, the judge must first not refuse jurisdiction although the facts do not support a dispute in law, and further must give effect to the legal rights of the parties. (Legal rights must not be understood so as to exclude equitable rights: Masters's case (supra) per Cooke J.)

It is significant that in Barrow's case the rights of the parties were beyond dispute. The husband did not seek to rebut the presumption of advancement by which his wife took her beneficial interest. There was no circumstance except the wife's adultery which could have been taken into account to alter the result, and it is not of course suggested that title should follow morality. There could be no doubt where the title lay, and the Court's curt dismissal of a suggested discretion capricious enough to override so clear a title is not surprising. The decision is on the facts of the case: it is submitted, therefore, that it may reasonably be regarded as a decision that title, once determined, will not be overridden. Whether there are special considerations applicable to the determination of title as between man and wife did not fall to be decided.

Such a question came before the English Court of Appeal in Rimmer's case, [1953] 1 Q.B. 63. The task of reconciling these cases had previously been undertaken by F.B. Adams J., as he explains in the course of his judgment, in the unreported case of Talbot v. Talbot (Auckland, Dec. 3, 1953, No. M/193/52); and it needs to be remarked that the failure to report what was clearly a full and considered judgment on a difficult and important question seems beyond explanation or excuse.

The facts in Rimmer's case (supra) were these: in 1935 a house was bought for £460 in the name of the husband. The deposit of £29 was paid by the wife, and the rest of the price was borrowed on the security of a mortgage under which the husband alone was liable. £151 was repaid by the wife out of money given her for housekeeping by the husband, and a further £280 out of her own money earned while the husband was

on war service. In 1951 the husband left the wife, but later returned and ejected her, after which he sold the house for £2,117. The question on a summons brought by the wife under s. 17 of the Married Women's Property Act, 1882 (U.K.), was to determine how the proceeds of sale should be divided; and the decision was that the division should be equal.

". . . What the Court did", said F.B. Adams J., speaking of the above decision (at 567), "was to ascertain and give effect to the legal rights of the parties in circumstances where it was difficult to ascertain those rights. The underlying proposition was that "the wife possessed a beneficial interest, but it was difficult in the circumstances to determine the nature and extent of her right." There appear to be two essential elements in the learned Judge's view of this decision: first, that it is only after a beneficial interest has been established that the Court's discretion comes into play, and secondly, that a beneficial interest may be established as arising from the proved or presumed intention of the parties. To this it may be objected, with great respect, that the first proposition is meaningful only if the interest must first be established according to strict law; and that if this is so, the beneficial interest established in the manner contemplated in the second proposition does not satisfy the requirement of the first, for the reasons given earlier. Either, therefore, the discretion may be applied to the establishment of the interest, or a person in the position of the wife in Peycher's case can acquire no interest in the matrimonial property: and if Rimmer's case is authority for the proposition that the initial interest must be ascertained according to strict law, the second alternative would follow.

What is most striking, however, about Rimmer's case is that although on the facts, since the wife paid the deposit, the finding that her interest amounted to a half share could have been made dependent on the finding of a prior legal interest, none of the three judgments delivered (by Evershed M.R., Denning and Romer L.JJ.) proceeded on this basis. Romer L.J., for instance (at 75; 869), although he regarded the case as one where both parties contributed to the purchase, made no distinction between the wife's payment of the deposit and her payments, begun ten years later, in reduction of the mortgage, and indeed treated the payment of deposit

rather as evidence of a common intention that the wife should have ". . . some beneficial interest in the home . . . ." If this is so, however, it is submitted with great respect that the exercise of the Court's discretion has not been made conditional on the determination, according to strict law, of a beneficial interest, but has been applied to the determination of the interest.

The intention of the parties, on the other hand, is treated by the Court as conclusive of the extent of their beneficial interest, and so far provides a basis for the learned Judge's second proposition: but the case is essentially one where the parties contribute to the purchase price. The intention had to be presumed, but the evidence by which it was established was that of the various payments for the benefit of the property. It is submitted, therefore, that the case is not authority for the proposition that an interest may arise from bare intention.

In a later case, Romer L.J. has spoken of ". . . agreed or established titles to property", saying that the Court has no power, under s. 17, to vary them; and certainly not ". . . where, as here, the original rights to property are established by the evidence . . . merely because it thinks that in the light of subsequent events the original agreement was unfair." Cobb v. Cobb, [1955] 1 W.L.R. 731, 736, 737. It might be suggested that the learned Lord Justice contemplated a situation where the agreement is that the parties shall have equal rights, although one is to contribute nothing. These words, however, have a different appearance in the light of the facts. Husband and wife were joint tenants, had contributed equal amounts towards the purchase price, and were both liable under the mortgage. Both were employed, and the agreement was that the husband should make the payments on the mortgage, while the wife should be largely responsible for the housekeeping expenses. The county court judge, misconstrueing Rimmer's case, had, because the husband alone had made payments on the mortgage, treated the wife merely as a secured creditor.

Since this is the context within which Romer L.J.'s words must be read, it is building too much on them, it is submitted, to treat them as authority for the establishment of a

beneficial interest from intention alone. On the other hand, the statement that the Court has no power to vary agreed or established titles, taken with the learned Lord Justice's following remark, that the Court ". . . has power to ascertain the respective rights of husband and wife to disputed property, and frequently has to do so on very little material . . ." lends strong support, it is submitted, to the view that it is the establishment of title which gives scope for the exercise of the Court's discretion.

Such a view is consistent also with the assessment of the Court's decision in Rimmer's case by Romer L.J. in that case. In formulating (at 76; 870) the first general principle to emerge from the decision (the second was the principle of equality) he said: ". . . cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property . . . ." The true significance of the decision, it is submitted, is that, where the parties are husband and wife, contributions need not be limited to such as would give an interest in the property as between strangers. The fundamental question, it is suggested, is whether such a contribution as that made by the wife in Peycher's case is sufficient to make the case one where both spouses contribute to the purchase.

With the greatest diffidence and respect, it is submitted that there is less difficulty in reconciling Barrow's case with Rimmer's on the view of s. 19 suggested herein (namely, that while the Court has no power to override established titles, it has a discretion to apply other considerations than those applicable between strangers in determining title as between husband and wife) than there is on the view that both questions of title can be decided only ". . . in accordance with law and the rights of the parties . . ." as F.B. Adams J. put it in the instant case (at 567). If the decisions are to be justified according to law, it is necessary to recognize, it is submitted, that there has been a new development of the law relating to husband and wife.

That such a development was needed is shown by the judgment of the county court judge in Rimmer's case (which also shows

that there was no particular difficulty in ascertaining the parties' rights on a strict view of the law.) He determined the beneficial interests of the spouses in the proportions of 29 : 431, subject to the repayment of £280 to the wife. This decision can only, from the point of view of strict law, be criticised as too generous, for according to the old cases concerning payments made to recover encumbrances off a spouse's property, for example, Gooch v. Gooch (1851), 15 Jur. 1166, and Outram v. Hyde (1875), 24 W.R. 268, if the intention proved was not subrogation to the rights of the mortgagee but to benefit the property, there was no right of reimbursement; so that unless the wife proved an intention to subrogate herself to the rights of the mortgagee, and Romer L.J. regarded this as ridiculous, she would have no right to repayment of the money. There would be no presumption of gift - there was none even when it was the husband who paid off the encumbrance on the wife's property - but the intention, as proved, would determine the result. The wife would even less acquire any beneficial interest by her payment for the benefit of the property. The County Court Judge, therefore, might well have found that the £280 was a gift to the husband.

Whether such a result would have corresponded any more nearly to the wife's intention is perhaps doubtful. Her true intention must have been, it is submitted, what it was found to be by Romer L.J. (at 76; 870): ". . . The obvious answer is that she made this contribution to the purchase of what was and what she hoped would continue to be the home of herself and her husband . . . ." That is, she intended it to give her a beneficial interest. This intention, however, unaided by the Court's exercise of its discretion, would have been inoperative. Compare, The Venture, [1908] P. 218: there an uncle and a nephew put up money for the purchase of a yacht; later the nephew made a payment towards the mortgage. The Court of Appeal decided that his interest in the yacht was proportionate to the amount he provided towards the purchase, and took no account, indeed did not even mention, his payment towards the mortgage. This view is borne out, it is submitted, by Romer L.J.'s explanation of the county court judge's finding. He said (at 75; 869):

> . . . the county court judge . . . applied legal principles which, although perfectly right and accurate in

> a dispute between strangers, require modification as between a husband and wife when the subject of dispute is the ownership of what was the matrimonial home. In effect he held, as would certainly follow had this been a case as between strangers, that the wife's contribution to the building society's mortgage resulted in her being subrogated pro tanto to the society's rights . . . .

The Court of Appeal thus firmly grasped the fact that marriage does make a difference. What is really surprising is that rules of law applicable as between strangers should ever have been thought to be appropriate to married persons. All the judgments in Rimmer's case (supra) take into account the sharing of fortunes and pooling of resources which are characteristic of marriage, if not of all marriages: perception of this is most explicit in the judgment of Denning L.J. (at 74; 869):

> . . . when the parties, by their joint efforts, save money to buy a house which is intended as a continuing provision for them both, then the proper presumption is that the beneficial interest belongs to them both jointly. The property may be bought in the name of the husband alone, or in the name of the wife alone, but nevertheless if it is bought with money saved by their joint efforts, and it is impossible fairly to distinguish between the efforts of the one and the other, then the beneficial interest should be presumed to belong to them both jointly.

F.B. Adams J. commented on this view in Peycher's case (supra, at 569):

> . . . It accords with common sense and justice, and represents the intention which normal husbands and wives would, in fact, have entertained in the period that is relevant in this case. If a different intention might have been inferred at earlier periods - as to which I express no opinion - changing legal and social conditions have to be taken into account.

The Married Women's Property Act, 1882 (U.K.) itself decisively changed legal relations between man and wife. By s. 1 a married woman was made

> . . . capable of acquiring, holding and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee.

By s. 12, proceedings in tort were banned as between spouses, with the noteable exception that a wife could sue even her husband ". . . for the protection and security of her own . . . property . . . ." The form of these sections shows clearly how the course taken by the Legislature was predetermined by the fact that the first step towards the goal now reached had been the recognition by Equity of the trust of property for the separate use of a wife. What may have been appropriate, however, between people of comparable economic independence, the sons and daughters of men of property, does not, it is submitted, meet the common situation today. Even where both spouses earn money by their work, the concept of two separate persons separately amassing their separate Savings Bank accounts is unreal; how much less adequate is the separate property concept when the husband by his earnings and the wife by her household arts and management both contribute to the family prosperity. There is a marriage; there is, normally, a joint venture: where there is, responsibility and rights alike should be shared.

The presumption of advancement, the husband's sole responsibility for providing the family home and income, the non-earning wife's complete dependence upon a personal right to be maintained, all these are anachronisms; by these the wife's economic helplessness was protected before she was capable of holding property, and by these the special relationship between man and wife was recognized both at law and in equity as being different from property relationships between strangers: and because there is still a special relationship, one incident of which is the economic dependence of the married woman, qua married woman, these provisions of the law have survived the married woman's acquisition of the power to hold property. To do away with them, however, without providing a means of determining property relations between spouses in any other way than is available between strangers would be to produce a state of even greater unreality than exists at present.

Such a means is provided by the English Act itself, in s. 17, the precursor of s. 19 of the New Zealand Act of 1952,

and how it has been used has been demonstrated in Rimmer's case (supra), and in the result, in the instant case. Section 17 is a re-enactment, in an amended form, of s. 9 of the Act of 1870, by which Parliament first gave a married woman a right, albeit limited, to hold property to her separate use apart from any trust. What is interesting is that when the law as to married women's property was consolidated and extended by the Act of 1882, and a married woman was given the right to sue her husband in tort in respect of her separate property, this provision was in substance retained and redrawn to suit the new enactment. There is a presumption, therefore, it is submitted, that as s. 17, it was not a mere survival, but was expected to fill a place in the new scheme. Without it, no doubt, the husband would have had no remedy, but his need could easily have been met by extending to him the benefit of the exception allowed to the wife. Possibly the intention of the legislators in 1870 was simply to provide a more seemly form of proceeding than an action; but the retention of the special jurisdiction in 1882 when an action was allowed to the wife points to the existence of some further purpose. What is certain is that the legislators had opened up an uncharted area of property relationships and quite new opportunities for dispute; this being so, they may have wished to provide an instrument for the use of the Courts flexible enough to meet the eventualities they could not foresee.

Such an instrument, apt for the purpose of keeping the law in touch with changing conditions, it has proved to be. It would be wrong to regard it as an instrument by which the bread-winner may be robbed to enrich the housewife. ". . . There is not one measure of justice for the husband and another for the wife." per F.B. Adams J. (at 570). It is not always the wife who would suffer were the parties treated as strangers. Nor will the spouses' rights or intentions, where they are clear, be overridden: Rimmer's case (73; 868) per Denning L.J.: Cobb's case (supra). The Courts, however, will use their discretion, in determining title, to take into account considerations which would not apply as between strangers. As these largely, if not exclusively, arise from the fact of the marriage, and the joint venture it may well imply (the existence of which is a question of fact), it appears not unreasonable that the law as between strangers should by them be modifiable. The most useful result is, it is submitted, the filling

of the gap in matrimonial property law by the modification of Dyer's case (supra) so that "contributions to the purchase price" may be found outside the strict limits that hold between strangers, and therefore that a beneficial interest in the matrimonial property may, in appropriate circumstances, be acquired as the wife in Peycher's case acquired hers, by virtue of her "efforts and savings" as a housewife.

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(1) Kahn-Freund, "Once Again: The Matrimonial Home" (1955), 18 M.L.R. 412.

(2) Idem, 415.

(3) Underhill (ed. White and Wells), Law Relating to Trusts and Trustees (19th ed., 1950), p. 204, Art. 32.