tion of the whole of his property".[8] "By mistake he put his signature in the wrong place and with no intention of giving testamentary effect to the printed words immediately above it".[9] Hence, the Full Court allowed the appeal and granted probate of the first two pages of the will form and of the signature of the testator appearing on the third page.

The real question raised in this case was not that the signature was not at the foot or end of the will, as was argued at first instance, but rather the effect of any writing intervening between what the testator apparently intended as the dispositions in his will and the signature. The Full Court proceeded upon the ground that there must be testamentary intention or approval in relation to the whole of the will and as it did not find that this existed in respect of the printed form on page three, it was prepared to disregard it and to make the grant of probate as set out above.

This case illustrates one of the many pitfalls open to the layman who tries to draw his own will, and this is a continuing problem. As Harvey, J. said in *Will of Moroney*,[10] "the cases in which the use of printed forms of wills have given rise to points of difficulty are numerous and are constantly recurring".

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EQUALITY IS EQUITY

DIWELL v. *FARNES*

The problem of determining the basis of division between two parties of property acquired by them at a time when neither of them could be taken to have contemplated any need for such a division, inevitably presents courts with many difficulties. The problem arises quite frequently where spouses both contribute to the purchase of property, title is taken in the name of one only and the matrimonial union subsequently comes to grief. In one such case[1] Sir Raymond Evershed, M.R. observed[2] "that to fall back on what may be called a Solomonesque judgment" in such cases and order that the property be shared out equally "is perhaps to yield to the obvious temptation to shirk more difficult computations". Nevertheless, the Master of the Rolls proceeded to take that course in the case before him, observing that "where the Court is satisfied that both the parties have a substantial beneficial interest and it is not fairly possible or right to assume some more precise calculation of their shares, I think that equality almost necessarily follows".[3]

However, in *Diwell* v. *Farnes*,[4] the Court of Appeal, when asked to extend the application of this principle to a *de facto* matrimonial relationship, did not yield to the "obvious temptation" and it is submitted that, in failing to yield, the Court illustrated how inequitable Equity can be. It is submitted that, in seeking to uphold conventional morality, the majority of the Court, in fact, came to a decision far less pleasing morally than had they chosen to recognise a sort of quasi-matrimonial home and fallen back on the Solomonesque principle applied by the Master of the Rolls.

Before the decision of *Diwell* v. *Farnes*[5] it had seemed that the position as to the joint property of spouses who had come to live apart was comparatively well settled. In *Jones* v. *Maynard*[6] Vaisey, J. had decided that, in the case of a

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[8] *Ibid.*
[9] *Ibid.*
[10] *Supra* n. 2.
[1] *Rimmer* v. *Rimmer* (1953) 1 Q.B. 63.
[2] *Id.* at 72.
[3] *Ibid.*
[4] (1959) 1 W.L.R. 624.
[5] *Ibid.*
[6] (1951) 1 Ch. 572.

joint bank account used by both spouses over a considerable period, the account should not, after their separation, ". . . be picked apart".[7] In this case Vaisey, J. had said: "I think that the principle which applies here is Plato's definition of equality as a 'sort of justice': if you cannot find any other, equality is the proper basis."[8] Some two years later in *Rimmer* v. *Rimmer*[9] the Court of Appeal also had applied this principle in a case where spouses had each paid sums for the purchase and maintenance of the matrimonial home, and then, subsequently, parted. In arriving at this decision the Court had upset the judgment of the County Court where it had been held that the parties should share in the sum realised by the sale of the house in proportion to their capital contributions, an adjustment being made in relation to sums paid to a building society to clear a mortgage. In the Court of Appeal Evershed, M.R. said:

> I think that in each case the question is, on all the facts of the case, what is the fair and just answer to be given to the questions posed, having regard not merely to what occurred at the time when the property was originally purchased but also having regard to the light which the conduct of the husband and wife throws on their relationship as contributors to the acquisition of the property which was their joint matrimonial home. . . . All this leads to the conclusion that a fair division of the proceeds, consisting so largely as they do in this case of what I have called a windfall, is that they take them equally . . . the husband, although he held the sole legal title, held it on behalf of both of them as a joint home and there being no other evidence which could precisely quantify the shares, held it therefore for them equally.[10]

In *Diwell* v. *Farnes* the widow and administratrix of one Diwell who died in 1957, claimed possession of a house, of which the deceased was the owner in fee simple, from the defendant, who was in occupation; by a counterclaim, the defendant asserted a claim to an equitable interest in the house. The defendant had met the deceased in 1940. In about 1941 they decided to live together and a child was born to the defendant in 1942 as a result of their so living. In May 1945 they went to live at No. 13 Havering Road, the house next door to the one in question. The deceased obtained from the defendant's mother, either as a gift or a loan, the sum of £100 which was required as "key money" and became the tenant of the house.

The deceased and the defendant were both working and saving and shared the expenses of the house. The former earned about £10 per week and the latter £6 per week, rising later to £7/10/0, all of which she paid into the establishment in the sense that she paid all the usual outgoings on the property including small repairs, all the food for three persons and the clothing for her daughter and herself. The deceased contributed only about £2/10/0 per week towards the expenses of the establishment, never averaging more than £3 per week. In 1946 the defendant learned for the first time that the deceased was a married man, but she continued to live with him until 1948 when he obtained work elsewhere and proceeded to set up a similar establishment with another woman, while leading the defendant to believe that he was living with his mother. Thenceforward, he visited the defendant every two or three weeks and at holiday time.

In 1954 the deceased obtained the opportunity of buying No. 13 Havering Road and, as sitting tenant, was able to purchase the property for the low price of £900, all of which was obtained by him on a building society mortgage which provided for monthly instalment repayments of £5/1/3. Sixteen of these repayments were made, all of them by the defendant. In 1956 the neighbouring house, No. 15 Havering Road, the property in dispute, was bought by the

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[7] *Id.* at 575.
[8] *Ibid.*
[9] (1953) 1 Q.B. 63.
[10] *Id.* at 71.

deceased for £1250. No. 13 was sold for £2300 and the mortgage over it was discharged out of the proceeds of the sale, leaving after payment of legal expenses little if any balance when No. 15 had been bought. The deceased raised a mortgage of £600 on the security of the house for the purpose of improving the property but spent only £200 of this on this object and appeared to have retained the balance. He subsequently took out a policy of life assurance to ensure that on his death the mortgage would be discharged out of the sum assured. This was done on the death of the deceased.

At the time of the purchase of No. 15 Havering Road and afterwards, the deceased wrote to the defendant letters which referred to the property and the sale of No. 13 Havering Road using the words "our sale", "our expenses" and like expressions showing that he regarded the defendant as interested in the house with him. The deceased paid one of the instalments of the mortgage on No. 15, otherwise the defendant paid all outgoings necessary, apart from mortgage instalments, either out of her own money or out of the contributions which the deceased was continuing to make after his departure in 1948.

The County Court judge was of opinion that the defendant and the deceased by setting up house together were engaged on a "joint venture" or a "joint enterprise",[11] and held that because of the extreme difficulty which would be involved in calculating the exact amount of the respective contributions, the property should be divided between the plaintiff and the defendant equally. The Court of Appeal (Hodson and Ormerod, L.JJ.; Willmer, L.J. dissenting) allowed an appeal by the plaintiff and held that, while the defendant had an equitable interest in No. 15, her share of the beneficial estate was in proportion to her contribution to the purchase of No. 13—that is, the amount of the mortgage instalments paid by her.

Fundamental to the decision of the majority was the fact that the deceased and the defendant were not legally husband and wife. As Hodson, L.J. put it:[12] "This dispute is not concerned with a matrimonial home and is to be treated accordingly as a dispute between strangers." For this reason the majority emphasised that s.17 of the Married Women's Property Act (Eng.), 1882, (45 & 46 Vict. c.75), enabling a judge called upon to adjudicate in property disputes between spouses to make such order "as he thinks fit", was not directly applicable.

It is submitted that what led the majority to this decision was a desire to uphold conventional morality and it is submitted further that, in reaching this decision, the majority, in fact, reached a far less acceptable decision than had they chosen to regard the house as a sort of quasi-matrimonial home and applied the principle stated by Evershed, M.R. in *Rimmer* v. *Rimmer*.[13] For, however much a court might wish to view as strangers in law a man and a woman who had lived together for some twenty years and have a child as a result of their so living, they surely are not strangers in fact. Whatever may have been done by them in respect of their joint home has not been done on the basis that each was making a home for a stranger. Should a court choose to disregard the self-evident fact that this was a joint home simply on the ground that the parties have not been legally married?

Perhaps it was in the minds of the majority that if they were to apply the *Rimmer* v. *Rimmer*[14] principle to an analogous situation arising outside wed-

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[11] This was vigorously attacked by counsel for the plaintiff who argued that a finding of "joint enterprise" as between strangers could only be justified by proof of an express agreement or at least by evidence of facts from which an agreement could properly be implied. No such agreement was, in fact, pleaded by the defendant: obviously, any such agreement could only have been based, in the circumstances of the case, upon an immoral consideration. But see *infra* 583-84.

[12] (1959) 1 W.L.R. 624, 629.

[13] (1953) 1 Q.B. 63.

[14] *Ibid.*

lock, their decision would in some way detract from the privileges accorded by law only to the matrimonial union[15] and, for this reason, be contrary to public policy. If this was, in fact, the feeling behind the majority's reasoning—and it seems quite possible that it may have been—then, with great respect, it is submitted that the majority based their decision on a misconception.

The obvious objections to such an attitude are twofold. Firstly, as a matter of authority, the application of the maxim has never been confined only to the case of husband and wife.[16] Secondly, looking at the matter as one of commonsense, could it possibly be said that parties contemplating living in sin would be even remotely concerned as to what would happen to property acquired by them jointly during their union should they ultimately separate? If they were, then surely it would not be very difficult for them to have an appropriate deed drawn up and executed without having to look for, and rely on, a Court of Appeal decision. Even if they should choose to rely on a convenient Court of Appeal decision, if it were available, their decision to live in sin would in no way be influenced anyway. It is submitted that it would be quite absurd to suggest that parties who have never contemplated such behaviour would be encouraged to indulge it simply by virtue of the assurance that, all other factors being equal, they would be entitled to the same treatment as Mr. and Mrs. Rimmer, should something ultimately end the union.

The effect of the Court's decision is, of course, that it gives to the deceased's legal wife who, *semble*, was in fact, more of a stranger to the deceased than the defendant, nine-tenths of the proceeds of the sale of the quasi-matrimonial home to which the deceased had contributed hardly a penny. The defendant, on the other hand, had contributed a great deal and the balance, which was quite substantial, was the result of a windfall.

Further, it is submitted that Hodson, L.J. while noting the fact that as the plaintiff sued as the deceased's legal representative she could do nothing which he could not have done in his lifetime, did not attach due significance to it. Would the deceased have been permitted during his life to contend that the defendant was a "stranger in law" to him? Would the Court have chosen to disregard the correspondence between the deceased and the defendant which was tendered by the defendant? Letters, dated and belonging to the period when No. 13 was being sold and No. 15 purchased, were referred to by Willmer, L.J.[17] In one letter the deceased wrote — "If our sale goes through I will make it up to you and in 15 our expenses won't be so high." In another — "He (the solicitor) has the contract for me to sign for the buying of next door but I am signing it when we get the contract for our own place. When the man comes from the council get Mrs. Sibthorp to explain we intend to spend some of the borrowed money on improving the place." Later he wrote — "I realise you have a lot to do but the sooner you can get 13 sold the better. If I were you I would make a list of what you are going to do in 15, get the materials yourself and get someone you know local *(sic)* to do the work." Finally — "As you know I paid this month's mortgage and fire insurance and now I have just signed the papers for my insurance policy on the mortgage so if anything happens to me from now on the mortgage is completely covered." Such correspondence caused Willmer, L.J. to remark, quite soundly, it is conceived: "Such words could hardly have been written to the defendant unless the deceased contemplated and intended that the house being purchased was to be the joint concern of himself and the defendant."[18] The evidence of intention disclosed by this

[15] Hodson, L.J. certainly hinted at this when he said: "Husband and wife cases are in a class by themselves, for the reasons given by Atkin, L.J. in *Balfour* v. *Balfour* (1919) 2 K.B. 571, 578, where he pointed out that the ordinary incidents of commerce have no application to the ordinary relations between husband and wife."

[16] See, for example, *In re Dickens* (1935) Ch. 267 and *infra* 583.

[17] (1959) 1 W.L.R. 624, 640.

[18] *Id.* at 641.

correspondence is surely of great significance and, with due respect to the learned Lords Justices, it is submitted that due weight was not given to the correspondence.

Distinguishing the husband and wife cases[19] from the instant case Hodson, L.J. said that "the court in husband and wife cases resorts more readily to the equitable maxim because of the very nature of the relationship between spouses and the absence in most cases of any attempt by either of them to regulate their business relationships, if any, with one another in any formal manner".[20] But surely here the judge has chosen to overlook the fact that, in the case before him, the very characteristics, which he states as being the reason for the application of the maxim as between spouses, were present.

One might not be so inclined to take this attitude had the maxim been previously applied only in the case of husband and wife. But this is not so. In *In re Dickens*,[21] for example, the maxim was applied to apportion a sum of money between the owners of the manuscript of a work of Charles Dickens and the owners of the copyright of that work, each party clearly being entitled to a share of the royalties — indeed, a substantial share, but a share which it was impossible to quantify. In the words of Ormerod, L.J. in the instant case it ". . . is a rule or device to which resort should be had in every case in which precise quantification is impossible or difficult or irrelevant".[22]

In *Diwell* v. *Farnes* was precise quantification "impossible or difficult or irrelevant"? The majority held, of course, that it was not. Essential to this part of their decision was their holding that the tenancy of No. 13 was not a factor to be considered. Indeed, Ormerod, L.J. went so far as to say that — "If the tenancy of No. 13 should have been taken into account it would, I think, have been impossible to have arrived at any other apportionment than that the parties should share equally."[23]

Hodson, L.J. reaches his conclusion that the tenancy of No. 13 was not a factor to be considered because "the rent was not paid to acquire the property".[24] Ormerod, L.J. expresses a similar reason for his so holding. Again with respect, it is submitted that such an approach to the question is hardly a realistic one. For, after all, the hard fact of the matter is that in 1954 the deceased was able to purchase the freehold of No. 13 for £900 and in July 1956 to sell it for £2300. Surely there was some other element of consideration advanced by the deceased as well as the £900? Was it not that as rent had been paid and the other conditions of the tenancy fulfilled up to the date of the purchase, the deceased was, at the time of the purchase, the sitting tenant? As Willmer, L.J. puts it:[25]

> What may be called the windfall element in the value of No. 13 — that is, the amount by which its value exceeded the purchase price was in effect purchased by the regular payments of rent during the nine years preceding the purchase of the freehold. In my judgment, the defendant, by contributing a preponderating share of the rent paid from 1945 to 1954 and of the mortgage instalments paid thereafter must be held to have made a substantial contribution to the purchase of No. 13 and consequently of No. 15 also, seeing that the latter was purchased out of the proceeds of the sale of the former.

The criticism levelled by the majority of the Court at the County Court judge's decision that this was a case of a "joint enterprise" is somewhat difficult to follow. They say that the defendant cannot claim that there was such a

[19] Such as *Rimmer* v. *Rimmer, supra* and *Newgrosh* v. *Newgrosh* (unreported).
[20] (1959) 1 W.L.R. 644.
[21] (1935) Ch. 267.
[22] (1959) 1 W.L.R. 624, 633.
[23] *Ibid.*
[24] *Id.* at 630.
[25] *Id.* at 638.

relationship between herself and the deceased because in order to establish such a claim she would have to rely on an agreement, express or implied, between herself and the deceased, and this she could not do, because to establish such an agreement she would have to rely on an immoral consideration. Two criticisms can be made of this approach. Firstly, assuming that it falls upon the defendant to establish such an agreement, in what way can it be said that she is trying to enforce an illegal contract? The possibility of her continuing to live in sin with the deceased has now been irrevocably removed. The court was concerned, or at least should have been, only with the present effect of a contribution made by the defendant in the past to the establishment of what in fact constituted a joint home. The question of an immoral consideration would no doubt be a bar to a woman attempting to enforce a man's promise to give her a house if she would, in the future, live in sin with him, but this was not the point involved in *Diwell* v. *Farnes*.

Secondly, and more importantly, Willmer, L.J., arrives at the crux of the matter, it is thought, when he points out[26] that, in so far as any question of an immoral consideration is involved in the case, the burden is on the plaintiff, who has instituted an action for recovery of possession, to establish her case and, furthermore, she can only assert such rights as the deceased could have asserted. "Could he (the deceased) have been heard to deny that . . . he and the defendant were engaging in a joint enterprise similar to that of a legally married husband and wife?"[27] He goes on to refer to the conduct of the parties during the twenty years of their acquaintance referring in particular to the letters tendered by the defendant, and concludes that "it seems to me that, had the deceased himself sued the defendant in his lifetime, he would have been estopped from denying that the houses . . . were intended to be purchased and . . . be run by the defendant, as a joint enterprise for the benefit of both of them".[28]

Thus, in conclusion, it is submitted that in reaching the decision which they did the majority in this case were excessively concerned with the dictates of what they believed to be public morality. It is submitted that the approach taken by Willmer, L.J. was the correct approach and that the case was a proper one for the application of the maxim, "Equality is equity". *Jones* v. *Maynard*, *Rimmer* v. *Rimmer* and *In re Dickens* had all shown the utility of this approach. It is true that in *Jones* v. *Maynard* and *Rimmer* v. *Rimmer* the rights of a legally married husband and wife were considered, and while the Court in this case may not have wished to give legal privileges to a mere *de facto* matrimonial relationship, the maxim as applied in *Rimmer* v. *Rimmer* is not confined to the husband and wife relationship, as its application by the Court of Appeal in *In re Dickens* clearly shows. Its application in the instant case would have achieved substantial justice.

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PERPETUAL CHARITABLE ENDOWMENTS
RE LEVY (DEC'D.)

The interpretation of a testator's intention is the precise object of a court of construction. In this difficult task recourse may be had to the words of the instrument, the surrounding circumstances and rules of construction, in an attempt to give effect to the intention of the testator as this appears from the will. The court faces complex problems where the beneficiary is an individual, but when a charity is a beneficiary the obscure rules applying to charitable trusts[1] and the conflicting interests moving the court on the one hand to effectuate

[26] *Id.* at 640. [27] *Ibid.* [28] *Id.* at 641.

[1] See, *e.g.*, the discussion of House of Lords on the Committee for the reform of the Law of Charitable Trusts, London *Times*, 14th May, 1959.