

diction. Helsham, J. doubted that he was entitled to limit the grant in this manner and pointed out that the traditional limitations upon grants of administration had not involved a limitation of this type, but involved limitations as to the nature of the assets which the administrator was entitled to get in or with which he was entitled to deal or the activities he was entitled to undertake.

In view of these factors, Helsham, J. said:

It seems to me that if I am to make an appointment of an administrator in New South Wales for the purpose of enabling the beneficiaries to have the benefit of the assets here to the exclusion of the revenue authorities of a foreign State, then the simplest and most convenient way to do so is to appoint one of them as such administrator.³⁹

Conclusion

Basic to Helsham, J.'s decision in *Bath's Case* is the proposition that an Australian court will not order transmission of the surplus of local assets to the executor of the deceased's domicile if to do so would result in the payment of revenue debts not payable under the *lex fori*. Although technically this point was not raised by the facts in *Finlayson's Case*, Helsham, J. recognised the great emphasis with which the *obiter dictum* had been stated by the High Court. The High Court's insistence that only the debts payable under the *lex fori* can be enforced directly or indirectly out of the assets within the forum is difficult to reconcile with a substantive interpretation of the full faith and credit provisions, since this necessarily would mean that the applicable law would not be the *lex fori* but the law of the most relevant jurisdiction. Nor can the High Court's encouragement of a refusal to order transmission of funds to the New South Wales executor be reconciled with the proposition that the revenue rule has no application between the states and territories of the Commonwealth. It may be surmised therefore that had the deceased in *Bath's Case* been domiciled in Western Australia instead of Singapore, this would not have made any difference to the decision. Whether our law should continue to show such tenderness to those who evade their fiscal obligations in other jurisdictions, whether within Australia or abroad, is obviously a question which the legislature must resolve.

T. M. JUCOVIC, Case Editor — Fourth Year Student.

OWNERSHIP OF MATRIMONIAL PROPERTY

PETTITT v. PETTITT

GISSING v. GISSING

The problem of determining the respective entitlements of husband and wife to matrimonial property acquired during the course of the marriage has received much attention recently from English courts. While the English cases have been primarily concerned with situations where husband and wife approach the court after a breakdown of the marriage for a determination of their property rights, the principles enunciated in the decisions are applicable to any dispute involving the determination of the question of what property a party to a marriage owns.

Claims by spouses to a beneficial interest in property have been based on the following grounds:

³⁹ *Supra* n. 28 at 121.

1. Contributions made by the spouse to the purchase price of the property.
2. Indirect contributions to the purchase price, for example, where one spouse has paid household expenses so as to enable the other to pay the mortgage instalments.
3. Improvements to the property.

Each ground will be examined in this note in the course of discussing *Pettitt v. Pettitt*¹ and *Gissing v. Gissing*² which were decided by the House of Lords against a background of conflicting decisions in the Court of Appeal.

In *Pettitt*, the wife purchased a house with her own money during the marriage and both parties lived in it until the wife left the husband. The husband claimed that he had carried out a considerable number of improvements to the house and garden. These improvements consisted of internal decoration work, building a wardrobe, laying a lawn and constructing an ornamental well and a side wall in the garden. By virtue of these efforts the husband sought a beneficial interest in the proceeds of sale of the property. Title to the house had been in the wife's name.

The husband in *Gissing* purchased the matrimonial home and paid all the mortgage instalments. Title to the home was in his name. The contributions on which the wife based her claim were the provision of some furniture, a cooker and refrigerator for the house and improvement of the lawn to a total value of £220 and payment for the son's clothing and her own. The wife sought an order declaring that she was entitled to a half share in the house.

In neither case was there any express agreement as to the beneficial ownership of the property, nor was there any suggestion that the endeavours of the husband in *Pettitt* or the wife in *Gissing* were made in order to enable the purchasers better to meet their obligations.

Section 17: "Whose is this?"—Not "To whom shall it be given?"

Most of the English cases have arisen in the context of s. 17 of the English Married Women's Property Act 1882 which provides that:

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 High Court of Justice . . . and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit.

The relevant section in New South Wales is s. 22 of the Married Persons (Property and Torts) Act 1901 which substantially copies the English s. 17.

One construction of the section held that the words "may make such order with respect to the property in dispute . . . as he thinks fit . . ." conferred on the Court an unfettered discretion to override existing rights in the property and to dispose of it in whatever manner the judge may think to be just and equitable. This construction was described by Lord Justice Bucknill as the "Palm Tree Justice" principle.³ The most extravagant expression of this view is to be found in the judgment of Lord Denning, M.R. in *Hine v. Hine*:

It seems to me that the jurisdiction of the Court over family assets under s. 17 is entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the Court to make such orders as it thinks fit. This means, as I understand it, that the Court is entitled to make such order as appears to be fair and just in all the circumstances of the case.⁴

¹ (1970) A.C. 777.

² (1971) A.C. 886.

³ *Newgrosh v. Newgrosh* (1950) unreported (cited in *Rimmer v. Rimmer* (1953) 1 Q.B. 63).

⁴ (1962) 1 W.L.R. 1124 at 1127.

This attitude provoked strong criticism from the House of Lords who in *Pettitt v. Pettitt* unanimously decided that the section was purely procedural. Lord Upjohn in *Pettitt* said:

In my view, s. 17 is a purely procedural Section . . . 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, and though the parties are husband and wife these questions of title must be decided by the principles of law applicable to the settlement of claims between those not so related, while making full allowances in view of that relationship.⁵

Lord Diplock in *Pettitt* said that the section "confers . . . no jurisdiction to transfer any proprietary interest in property from one spouse to the other or to create new proprietary rights in either spouse".⁶ According to Lord Morris in *Pettitt* the question was "Whose is this" not "To whom shall it be given".⁷

In *Gissing v. Gissing* Viscount Dilhorne supported this view and said "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".⁸

These views accord with those expressed by Australian Courts⁹ and in particular with that of Dixon, C.J. in *Wirth v. Wirth* "the title to property and proprietary rights in the case of married persons no less than in that of unmarried persons rests upon the law and not upon judicial discretion".¹⁰ *State of the Law Before Pettitt v. Pettitt*

The law before *Pettitt v. Pettitt* with regard to contributions was in a thoroughly confused state. Two competing views were current, the orthodox view and the Lord Denning "family assets" view.

The orthodox view (still current in the High Court of Australia) stated that a resulting trust to the spouse providing the purchase price on acquisition would be presumed where that spouse put the legal title to the property in the name of the other spouse.

The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the name of others without that of the purchaser; whether in one name or several, whether jointly or successive, results to the man who advances the purchase money.¹¹

However, the presumption could be readily rebutted by evidence of an intention to the contrary.

If the property was purchased by the husband and placed in the name of the wife or a child or someone to whom he stood *in loco parentis*, the presumption of advancement applied (in the absence of evidence of a contrary intention) and the beneficial interest remained in the party holding the legal title.

Lord Denning's view was stated in the Court of Appeal in *Gissing v. Gissing* in the following terms:

⁵ *Pettitt* at 813.

⁶ *Id.* at 820.

⁷ *Id.* at 798.

⁸ *Gissing* n. 3 at 899.

⁹ See Bright, J. in *Peck v. Peck* (1965) S.A.S.R. 293; *Macrae v. Macrae* (1902) S.R. (N.S.W.) 142; *Clark v. Clark* (1961) V.R. 151.

¹⁰ (1956) 98 C.L.R. 228, 232.

¹¹ *Dyer v. Dyer* (1788) 2 Cox. 92 at 93 per Eyre, C.B.

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 true *prima facie* inference from the facts that the house and furniture is a "family asset" in which each is entitled to an equal share. It matters not in whose name 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.¹²

The House of Lords rejected the doctrine of family assets and Lord Upjohn said "in my opinion the expression 'family assets' is devoid of legal meaning and its use can define no legal rights of obligations".¹³

While Lord Diplock used the expression in *Pettitt* he made it clear in *Gissing* that he was using it merely in a descriptive sense and "without intending any connotation as to how the beneficial proprietary interest in any particular family asset was held".¹⁴

Before *Pettitt*, orthodox theory held that the improvement by one spouse of property owned by the other spouse gave rise to no claim. However, the decision of the Court of Appeal in *Jansen v. Jansen*¹⁵ where the husband made very substantial improvements on the properties of the wife which greatly increased their value as reflected in their sale price and was awarded a beneficial interest and the decision in *Appleton v. Appleton*¹⁶ threw considerable doubt on the view that improvements did not merit claims.

The Decision(s) in Pettitt v. Pettitt—Contributions

Although the issue in *Pettitt* strictly speaking was concerned only with the improvements made by the husband, the House of Lords embarked on a wide ranging review of the law concerning the ownership of matrimonial property. The attitude of each judge towards the place of presumptions and the tests to be applied in determining ownership of matrimonial property arising from claims based on contributions by one spouse to the acquisition of property by the other spouse will be dealt with in this section of the note. The court's attitude to improvements is dealt with separately and the decision is silent on the question of indirect contributions.

1. Lord Reid regarded the presumption of advancement as outmoded in present conditions and said that "the strength of the presumption must have been much diminished".¹⁷ The test he proposed was that where there was no express agreement the Court is to ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the contributing spouse.¹⁸ However, where there was no evidence to assist this enquiry, he was prepared to rely on the old presumption "which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse".¹⁹ This, presumably, refers to the presumption of a resulting trust, and, if so, provides a strange blending of contract law and trust law which was to be rejected in *Gissing*.
2. Lord Morris cast doubt on the validity of presumptions of any sort in the matrimonial context.²⁰ He asserted that property rights were to be

¹² *Gissing v. Gissing* (1969) 2 Ch. 85 at 93.

¹³ *Pettitt* at 817.

¹⁴ *Gissing* at 904.

¹⁵ (1965) P. 478.

¹⁶ (1965) 1 W.L.R. 25.

¹⁷ *Pettitt* at 793.

¹⁸ *Id.* at 795.

¹⁹ *Ibid.*

²⁰ *Id.* at 802.

"ascertained by reference to what was the intention of the parties at the time of a transaction. . . ."²¹ He said that the judge must "weigh every piece of evidence as best he may" and "the fact that parties are husband and wife with all that is as a result involved, is in itself a weighty piece of evidence".²² His Lordship rejected the approach taken by Lord Reid, saying, "there is no power in the court to make a contract for the parties which they have not themselves made".²³ Presumably, he considered that there would always be sufficient evidence to infer the intention of the parties from the facts where there is no express agreement.

3. Lord Hodson said that the presumption of advancement would now only apply where there were no living witnesses to a transaction and inferences had to be drawn, but he did not think it would often happen that when evidence had been given the presumption would today have any decisive effect.²⁴ He also rejected the approach of Lord Reid and said: "The conception of a normal married couple spending the long winter evenings hammering out agreements about their possessions appears grotesque, and I certainly cannot take the further step of working out what they would have agreed if they thought of making agreement".²⁵ He considered that where the parties have contributed in equal or unequal proportions to the purchase price of the property "The common intention of the parties is fulfilled without any specific agreement having been made or required".²⁶

4. Lord Upjohn differed from his colleagues on presumptions. These, he said, "have been criticised as being out of touch with the realities of today but when properly understood and properly applied to the circumstances of today I remain of the opinion that they remain as useful as ever in solving questions of title".²⁷ He said that the presumption of advancement was no more than a circumstance of evidence which may rebut the presumption of a resulting trust. These presumptions (or circumstances of evidence) are readily rebutted by comparatively slight evidence. For example, if a wife put property into her husband's name, in the absence of all other evidence, he would be a trustee for her of the land but "in practice there will be in almost every case some explanation (however slight) of this (today) rather unusual course".²⁸

His Lordship focussed attention first on the document of title and stated that if the document declared in whom the beneficial title as well as the legal title was to rest, then the question of title was concluded and the parties could not go behind the document. If the document was silent as to the beneficial ownership, and there was no other express agreement, parol evidence was admissible as to the beneficial ownership intended by the parties at the time of acquisition and "if, as very frequently happens as between husband and wife, such evidence is not forthcoming, the court may be able to draw an inference as to their intentions from their conduct. If there is no such available evidence then what we called the presumptions come into play".²⁹

5. Lord Diplock felt that it would be an abuse of the legal technique for ascertaining or imputing intention to apply presumptions based on "inferences of fact which an earlier generation of judges drew as to the most likely

²¹ *Id.* at 800.

²² *Id.* at 803.

²³ *Id.* at 804.

²⁴ *Id.* at 811.

²⁵ *Id.* at 810.

²⁶ *Ibid.*

²⁷ *Id.* at 813.

²⁸ *Id.* at 815.

²⁹ *Id.* at 813.

intentions of earlier generations of spouses, belonging to the propertied classes of a different social era".³⁰

Lord Diplock's view was that where acquisition was made as a result of contributions in money or moneys-worth by both spouses "acting in concert", the *common intention* of the parties determined their proprietary rights.³¹

His Lordship stated clearly that although it may be possible to infer from their conduct that they did in fact form an actual common intention, in many cases the "true inference . . . is that . . . the spouses formed no common intention".³² Borrowing from techniques used in contract law, Lord Diplock decided that in cases where it was impossible to infer any actual common intention the court "must impute to them a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses".³³

Summary: Presumptions and Contributions

Presumptions:

1. Lord Upjohn found presumptions useful as circumstances of evidence where there was no evidence.
2. Lord Hodson would only apply the presumption of advancement where there were no living witnesses to a transaction.
3. Lord Reid would, in the absence of any evidence, apply the presumption of a resulting trust and that of advancement but the strength of the latter presumption he found to be much diminished.
4. Lords Diplock and Morris saw no place for presumptions of any sort.

It is clear from the judgments that Lord Upjohn alone considered that there were likely to be many instances where there was insufficient evidence from which intention could be inferred, while the other judges considered that such instances would be very rare or non-existent.

Contributions

1. All the judges agreed that where the parties had agreed on the property rights at the time of acquisition the court would abide by that agreement.
2. In the *absence of express agreement* but *where there was some evidence* the alternative approaches were to:
 - (a) Ask what the spouses or reasonable people in their shoes would have agreed if they had thought about it (Lord Reid).
 - (b) Ascertain from the facts and the conduct of the parties the common intention of the parties at the time of acquisition of the property (Lords Hodson, Morris, Diplock and Upjohn).
3. In the *absence of any evidence* enabling the determination of a common intention (or agreement) or where all the *evidence is neutral* the alternative approaches were:
 - (a) Apply the old presumption of a resulting trust, but probably not that of advancement, but if the latter presumption did apply it was much diminished (Lord Reid).
 - (b) Apply the presumption of advancement, and, *semble*, since there was no other evidence it must govern. It probably only applied where there were no living witnesses (Lord Hodson).
 - (c) There will always be sufficient evidence and the mere fact that the

³⁰ *Id.* at 824.

³¹ *Id.* at 822.

³² *Ibid.*

³³ *Id.* at 823.

parties were husband and wife will be a weighty piece of evidence. The court should then seek the intention of the parties from those facts (Lord Morris).

- (d) Apply the old presumptions, but treating them realistically as circumstances of evidence which are easily rebuttable (Lord Upjohn).
- (e) Infer from the conduct of the parties the actual common intention of the parties, but if the evidence indicates that they did not in fact have a common intention then the court can impute a constructive common intention which is that which the spouses would have formed as reasonable persons if they had actually thought about it at the time (Lord Diplock).

Gissing v. Gissing—Contributions

The House of Lords in *Gissing* considered once again some of the issues raised in *Pettitt* and each judgment is summarized in this section of the note. Indirect contributions are dealt with separately.

1. Lord Reid restated his view in a different way from *Pettitt* saying "If the evidence shows that there was no agreement in fact, then that excludes an inference that there was an agreement".³⁴ However, he said that there was a wide gulf between inferring from the conduct of the parties that there was an agreement and imputing to the parties an intention to agree to share even when the evidence gave no ground for such inference. Thus there may be an imputation of a deemed intention in proper cases, although he "would prefer to reach the same result in a rather different way".³⁵ He rejected the view that it must at least be possible to infer a contemporary agreement in the sense of holding that it was more probable than not there was in fact some such agreement. He said the law would impose a trust where one spouse accepted contributions from the other "without which the house would not have been bought".³⁶

2. Lord Morris said:

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.³⁷

3. Viscount Dilhorne would look for a common intention at the time of acquisition that the beneficial interest should be shared. To determine whether or not there was a common intention regard may be had to the conduct of the parties. To establish this intention there must be some evidence which points to its existence. He said the question was whether it could be "inferred from the evidence that there was such a common intention?"³⁸ He rejected the view of Lord Reid in *Pettitt* saying "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".³⁹ He also rejected Lord Diplock's view in *Pettitt* and that of Lord Reid in *Gissing*, saying "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".⁴⁰

4. Lord Pearson said that if the wife "did make contributions of substantial

³⁴ *Gissing* at 897.

³⁵ *Ibid.*

³⁶ *Id.* at 896.

³⁷ *Id.* at 898.

³⁸ *Id.* at 901.

³⁹ *Id.* at 900.

⁴⁰ *Ibid.*

amount towards the purchase of the house, there would *prima facie* be a resulting trust in her favour".⁴¹ This presumption of intention was rebuttable by evidence showing some other intention. Lord Pearson then said "an intention can be *imputed*; it can be inferred from the evidence of their conduct and the surrounding circumstances".⁴²

Therefore on Lord Pearson's analysis "The starting-point, in a case where substantial contributions are proved to have been made, is the presumption of a resulting trust, although it may be displaced by rebutting evidence".⁴³ Presumably the "imputed intention" test may be used to rebut the presumption of the resulting trust.

5) Lord Diplock said that when the parties make an express agreement what the court gave effect to was the *trust*, resulting or implied from the common intention expressed in the oral agreement between the spouses, and that if each acted in the manner provided for in the agreement the beneficial interests in the house should be held as they have agreed. The agreement disclosed the common intention of the parties.

Where there was no express agreement Lord Diplock said it might be possible to infer a common intention from their conduct. The test used to determine whether a common intention could be inferred was whether a reasonable man would draw such an inference as to the intentions of the parties to the transaction and not whether there was any subjective intention or absence of intention which was not made manifest at the time of the transaction itself. He said it was for the court to determine what those inferences were.

Lord Diplock said that although in the case of contributions the critical time for a court to examine intention was the time the home was acquired, "acquisition" was not restricted to the actual conveyance of the fee simple into the name of one or other spouse, "The conduct of the spouses in relation to the payment of the mortgage instalments may be no less relevant to their common intention . . . than their conduct in relation to the payment of the cash deposit".⁴⁴ Where a home was purchased outright from contributions from both spouses, "if the rest of 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".⁴⁵ This approach is almost identical to the one used in the same example by Lord Upjohn in *Pettitt*.⁴⁶ Lord Diplock then somewhat surprisingly said "This *prima facie* inference is more easily rebutted in favour of a gift where the land is conveyed into the name of the wife".⁴⁷ Lord Diplock, however, said that there would probably always be some evidence.

Summary

1. All judges agreed that where there was an "express agreement" the court would enforce that agreement.
2. In the *absence of such agreement* the alternative approaches are:
 - (a) In "proper cases" the court may impute to the parties an intention to agree to share even when the evidence gives no ground for such inference (Lord Reid).

⁴¹ *Id.* at 902.

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Id.* at 906.

⁴⁵ *Id.* at 907.

⁴⁶ *Pettitt* at 815.

⁴⁷ *Gissing* at 907.

- (b) Infer from the evidence and the conduct of the parties the actual common intention of the parties (Lords Morris, Diplock and Viscount Dilhorne).
 - (c) In cases where both spouses have contributed apply the presumption of a resulting trust, such presumption to be readily rebutted by an imputed intention which can be inferred from evidence of conduct and the surrounding circumstances (Lord Pearson).
3. If there is *insufficient evidence to allow an inference* of any such common intention:
- (a) As in 2(a) above (Lord Reid).
 - (b) Presumably Lord Morris would say, as he did in *Pettitt*, that there would always be evidence.
 - (c) The beneficial ownership must rest in the person who has the legal title (Viscount Dilhorne).
 - (d) The presumption of a resulting trust will presumably apply as there is no evidence from which intention may be imputed (Lord Pearson).
 - (e) Apply a *prima facie* inference that their common intention was to share, such inference to be more easily rebuttable in the case of a wife (Lord Diplock).

Improvements

All the judges in the House of Lords agreed that the improvements made by the husband in *Pettitt* would not give him an interest in the property. The opinions as to the status of improvements varied markedly but even those who decided that there was no difference between improvements and contributions held that those made by the husband were ephemeral and should not give a permanent interest to the improver.

Lord Reid said that any distinction between contributions and improvements was entirely unsatisfactory and he would apply the same test as for contributions to the purchase price and:

If the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position, I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.⁴⁸

However, the position would be different if the improvements were made without the other spouse's knowledge or consent. Moreover, the improvements must be of more than an ephemeral character and should be of a "capital or non-recurring nature".⁴⁹

Lord Diplock made no distinction between contributions and improvements and applied the common intention test to each equally.

However, Lord Morris stated that for an improvement to result in a beneficial interest, it would have to be the result of some agreement:

Sometimes an agreement though not put into express words, would clearly be implied from what the parties did. But there must be evidence which establishes an agreement before it can be held that one spouse has acquired a beneficial interest in property which previously belonged to the other.⁵⁰

Lord Upjohn was quite explicit in saying "It is quite clearly established that by the law of England the expenditure of money by A. on the property of B. stands in quite a different category from the acquisition of property

⁴⁸ *Pettitt* at 795.

⁴⁹ *Id.* at 796.

⁵⁰ *Id.* at 804.

by A. and B.”⁵¹ However, if there was some agreement between the parties the improver may have some monetary claim. He said that other exceptions were estoppel, mistake and situations where expenditure was incurred as a result of the encouragement of the owner in anticipation such expenditure would be rewarded and each of these exceptions would give rise to a monetary claim.

Lord Hodson said:

I cannot find any basis for the proposition that the making of improvements by one spouse on the property of the other gives a claim to the structure any more than if the same improvements had been made as between strangers.⁵²

Gissing v. Gissing is silent on the question of improvements.

The conclusion of the majority in *Pettitt* that an interest could not generally be acquired by improvements made by one spouse on the property of another, except by agreement, was overturned by s. 37 of the English Matrimonial Proceedings and Property Act 1970 which provides that a spouse who makes a substantial contribution to the improvement of property will acquire a beneficial interest in it, subject to any agreement between the parties.

The problem of improvements becomes more acute when examined in the context of “continuing acquisition” where for example major improvements are carried out by one spouse while the other spouse continues to pay the mortgage instalments. It is clear that legislation is needed to clarify the area.

Indirect Contributions

Lord Reid in *Gissing* said that “contributions without which the house would not have been bought”,⁵³ whether they be direct or indirect in the sense of payment for household expenses, will give the other spouse an interest.

Lord Pearson in *Gissing* would allow a contribution to be claimed “if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments”.⁵⁴

Lord Diplock considered that where a wife had made an adjustment to her contribution to the expenses of the household which it can be inferred was referable to the acquisition of the house then she is entitled to some beneficial interest as she was paying expenses which would otherwise have to be met by the husband and thus he was better able to purchase the house.⁵⁵

Method of Calculation of Spouse's Interest—Equality is Equity?

Once a court has concluded that one spouse is entitled to a beneficial interest in property which is in the name of the other it must then determine the proportions in which the parties are to be taken as having provided the purchase moneys. In both *Pettitt* and *Gissing* it was agreed that if both parties contributed substantial sums then the property would be divided in proportion to the amounts contributed (unless the common intention found by the court indicated a contrary conclusion).

If the amounts contributed were substantial, but could not be precisely quantified, then the maxim “Equality is Equity” may be applied and the property should then be divided into two equal shares.⁵⁶ However, the maxim can never displace a proper evaluation where the contributions can be quantified, no matter how hard the evaluation might prove to be.⁵⁷

⁵¹ *Id.* at 818.

⁵² *Id.* at 811.

⁵³ *Gissing* at 896.

⁵⁴ *Id.* at 903.

⁵⁵ *Id.* at 908.

⁵⁶ *Id.* at 897.

⁵⁷ *Id.* at 903.

Lord Reid in *Gissing* rejected the maxim and called for a "more rough and ready evaluation"⁵⁸ in cases where it was impossible to determine the exact amount contributed. Lord Diplock in the same case said that if no inference as to the respective shares intended can be derived from the conduct of the spouses, "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".⁵⁹

Conclusion

If faced with a case of this nature it is submitted that the analysis that should be adopted by a court is:

- (a) Look to the title document to determine whether it declares in whom the beneficial title should rest. If it does, that concludes the question.⁶⁰
- (b) Determine whether there was an express agreement between the parties.
- (c) If there is no such agreement determine whether there can be inferred from the facts any actual common intention as to the proportions in which the parties are to be treated as providing the purchase money.
- (d) If there are insufficient facts to enable such an inference to be drawn, or where the evidence is neutral, each of the following interpretations is open:
 - (i) Regard the beneficial title as remaining in the same place as the legal title (*Viscount Dilhorne*).
 - (ii) Apply the presumption of a resulting trust (*Lord Pearson in Gissing* and also perhaps apply a much diminished presumption of advancement (*Lord Reid in Pettitt*).
 - (iii) Apply the presumption of advancement, but only where there are no living witnesses (*Lord Hodson*).
 - (iv) Apply the presumptions of resulting trust and advancement, but only treating them as circumstances of evidence which are easily rebuttable (*Lord Upjohn in Pettitt*).
 - (v) Impute an intention to the parties to share in "proper cases" (*Lord Reid in Gissing*).
 - (vi) Impute a constructive common intention which would have been formed by reasonable spouses (*Lord Diplock in Pettitt*).
 - (vii) Apply a *prima facie* inference that their common intention was to share, such inference to be more easily rebuttable in the case of a wife (*Lord Diplock in Gissing*).
 - (viii) Reject the above and hold that there will always be facts, the mere fact that the parties are husband and wife with all that entails will be a weighty piece of evidence (*Lord Morris in Pettitt*).
- (e) Determine whether the initial beneficial proportions have been altered by a subsequent agreement and then determine the respective beneficial interests of the parties by determining the proportions contributed by each. However, it seems doubtful whether cases will ever arise where no evidence can be found in view of the readiness with which certain of the Lords were willing to infer intentions from very scanty material.

⁵⁸ *Id.* at 897.

⁶⁰ *Id.* at 908.

⁶⁰ But *cf.* *The Commissioner of Stamp Duties (Qld.) v. Jolliffe* (1920) 23 C.L.R. 178 where the High Court reached a different conclusion.

It is submitted that in its approach to the problem the High Court is now out of step with current English judicial thinking on the method of determining the ownership of matrimonial property. In England the presumptions of resulting trust and advancement now have no place where there is evidence as to the inferred common intention of the parties.

The attitude of the courts towards the principles in *Pettitt* and *Gissing* is well characterised by Mr. Justice Bagnall in *Cowcher v. Cowcher*:

In any individual case the application of these propositions may produce a result which appears unfair. So be it; in my view that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate—by precedent out of principle. It is well that this should be so; otherwise no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.⁶¹

J. A. DUNSTAN, Case Editor—Fourth Year Student.

WHEN AND HOW SHOULD THE INCOME OF A SOLICITOR BE BROUGHT TO ACCOUNT FOR TAXATION PURPOSES?

HENDERSON v. COMMISSIONER OF TAXATION OF THE COMMONWEALTH¹

The problem of what is the correct or appropriate mode of accounting in any fact situation is one which has recently exercised the minds of Canadian as well as Australian lawyers. The Canadian Royal Commission on Taxation,^{1a} recently reported that professional persons should *all* be assessed on the accrual basis of tax accounting unless their gross revenue is less than \$10,000 per annum.² Strenuous opposition was expressed to such a compulsory application of the accrual basis to lawyers. The Canadian Bar Association Brief on the Report of the Royal Commission criticized the accrual basis as too complicated, and argued that it raised problems of getting in accounts and of the valuations of work in progress. Nevertheless in the White Paper proposals on tax reform the Minister of Finance declared that "professional persons should be required to use the accrual method".³ This was done without accepting or answering the arguments put forward by the Bar Association. A rather similar declaration has come in Australia from the Federal Commissioner of Taxation though it does not purport to extend to *all* professionals.

In his Press Release of 16th June, 1970, the Federal Commissioner of

⁶¹ (1972) 1 All E.R. at 948.

¹ (1970) 44 A.L.J.R. 115.

^{1a} Report, Vol. IV, 250.

² Which is said to be an "insignificant" exception. E. C. Harris, XIX *Canadian Tax Journal* No. 1 Jan.-Feb. 1971 at 65.

³ *Id.* at 57.