techniques, casual investigations or reading the literary works of their own partisans.

The highly respected and influential American Bar Association has pronounced itself in favour of the adversary system, but has been unable entirely to stem the no-fault movement in the United States. According to the American Bar Association Journal,[5] Massachusetts has adopted the no-fault concept, the Senate Subcommittee on Anti-trust and Monopoly made a three-year study of the problem, its Chairman has introduced legislation at the last two sessions of Congress that would federalize the automobile insurance system on a no-fault basis, and, the Nixon administration seems committed to the concept. Of course, all of this is a far cry from the radical New Zealand proposal to abolish the entire common law system for compensating personal injury losses.

In Alberta, current indications are that public opinion will continue to view social problems realistically and to favour evolution rather than revolution. Costly experiments in other jurisdictions will be observed and the results assessed. For the present, the amending legislation that resulted from the Report of the Legislative Committee on Automobile Insurance and improved practices by enlightened insurers constitute the type of orderly evolution that is consistent with the character and temper of the people of Alberta.

—J. J. SAUCIER, Q.C.*

[5] (1971) 57 Am. Bar. Assoc. J. 487.

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SOME RECENT DEVELOPMENTS IN THE LAW OF MATRIMONIAL PROPERTY

Two recent House of Lords decisions have drastically changed the approach to be used by the English courts in matrimonial disputes.[1] These decisions have now been applied by the Alberta Appellate Division in the case of *Trueman* v. *Trueman*[2] which resulted in a farm wife receiving a beneficial half interest in the family farm as a result of her substantial, though non-financial, contributions to the acquisition of the property. In this comment, an attempt will first be made to understand the full implications of the *Trueman* decision, an undertaking which will necessitate an examination of the House of Lords decisions in *Pettitt* v. *Pettitt*[3] and *Gissing* v. *Gissing*.[4] The second part of the comment will be an attempt to reconcile the *Trueman* decision with *Thompson* v. *Thompson*,[5] a 1960 Supreme Court of Canada decision, which has been interpreted widely as having put

[1] *Pettitt* v. *Pettitt* [1961] 2 All E.R. 385, [1969] 2 W.L.R. 966; *Gissing* v. *Gissing* [1970] 2 All E.R. 780, [1970] 3 W.L.R. 255.

[2] [1971] 2 W.W.R. 688, (1971) 18 D.L.R. (3d.) 109.

[3] *Supra*, n. 1.

[4] *Id.*

[5] [1961] S.C.R. 3, (1960) 26 D.L.R. 1.

an end to the applicability of the English Court of Appeal developments in matrimonial property disputes, developments popularly termed "palm tree justice".

I. THE LAW OF TRUSTS AND MATRIMONIAL DISPUTES

The *Trueman* case was an appeal from a judgment dismissing a former wife's claim for a declaration that she had an interest in the farm which had been the family home for several years prior to the dissolution of the marriage. The title to the farm stood in her former husband's name, but counsel for the wife in the Appellate Division claimed that the wife was beneficially entitled to a half interest as a result of a constructive, resulting, or implied trust. The argument for the appellant was based upon the recent House of Lords decisions in *Pettitt* v. *Pettitt*[6] and *Gissing* v. *Gissing*,[7] wherein the House of Lords for the first time had considered the "palm tree justice" cases.[8] The success of the appellant's claim depended upon proving to the Court's satisfaction two elements: contribution to the acquisition of the property by the wife and a common intention of the parties that this contribution would entitle her to a beneficial interest.

Contribution: The evidence established that upon marriage the couple had owned very little except some livestock given as wedding presents by their parents. For some time they continued to live and work on the farm of the husband's parents. The land in question was purchased in 1951, several years after the marriage. The purchase was financed by a bank loan which was apparently repaid out of the proceeds of the crops. The wife's efforts in producing these crops were considered by the trial court judge to be substantial. She helped cut the crops, cut, rake and stook hay, disc, harrow, and anything else there was to do. She learned to operate and did operate all the machinery that was on the farm and though her husband was frequently ill and unable to work, no hired man was employed, the extra duties being assumed by the wife. The house on the land was built through their joint efforts; the wife helped "pound nails, paint, paper and with everything there was to do." Johnson J.A. also considered the work performed by the wife was substantial and should be counted as a contribution both to the purchase price of the farm and to the improvements created by the building of the house.

Intention: It is not sufficient, however, merely to prove a contribution to the acquisition of the property; there must be an intention that the contributing spouse share in the ownership of the property. It is at this point that the English decisions were applied. Two alternate approaches have been established: a contract may be found to have existed between the couple that each should share in the ownership; or an implied, resulting or constructive trust may be found.

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[6] *Supra*, n.1.

[7] *Id.*

[8] Most of these property disputes had been brought under s. 17 of the English Married Women's Property Act, 1882 (Alberta does not have an equivalent section so Alberta residents must bring their action as a claim in contract, trust or partnership). At one time s. 17 was thought to enable the court to transcend all property rights, both legal and equitable (*see* Lord Denning in *Hine* v. *Hine* [1962] 3 All E.R. 345 at 347) but in *Pettitt* v. *Pettitt (supra*, n. 1) the House of Lords unanimously held that this section was only procedural, with the court's discretion extending only to remedies. Thus, the substantive law in both England and Alberta as regards the discretion of the court in deciding matrimonial disputes is the same.

A. The Contract Approach

The contract approach was considered by the House of Lords in *Pettitt* v. *Pettitt*.[9] Their Lordships felt that parol evidence of an express agreement was admissible, provided that the spouses intended their agreement to have a legal effect.[10] However, often, as in *Trueman,* such an express agreement will not exist—the controversy then is whether or not the court can infer or impute an intention from the conduct of the parties.[11] Only Lord Hodson felt that a contract could not be inferred where none had been expressly made; the other Law Lords all felt that "sometimes an agreement though not put into express words would clearly be implied from what the parties did."[12]

The state of the law as to the permissibility of imputing an intention where there is insufficient evidence to imply an agreement between the parties, is not clear. Neither Lord Morris nor Lord Hodson in *Pettitt* v. *Pettitt* felt an agreement could be imputed. Lord Upjohn's judgment has been similarly interpreted.[13] Lord Upjohn had stated that in the absence of the evidence necessary to infer a common agreement, the presumptions of advancement and resulting trust should be applied. The operation of the presumptions, which were criticized as out of date by Lords Reid, Hodson and Diplock and which even Lord Upjohn stated were only circumstances of evidence readily rebutted by comparably slight evidence, were confined by Lord Upjohn to situations where only one spouse contributed to the acquisition of the property. Where both spouses contribute to the acquisition, then in the absence of evidence Lord Upjohn felt there was an intention that husband and wife be joint owners, whether the purchase was in their joint names or in the name of only one. This was, he stated, a result of the application of the presumption of the resulting trust and it applied even where the property was put in the wife's name alone, unless the husband's contribution was very small.[14] It is submitted that the application of the presumptions in situations where there is insufficient evidence to infer any intention of the parties, will result in the law imputing an intention based on these presumptions since if there was any evidence to rebut the presumptions, that evidence would have been used to infer a common agreement and the presumptions would never have come into operation.

Lord Reid and Lord Diplock also felt that the court could impute an intention in the absence of evidence. They, however, rejected the old presumptions and stated that the principle to be applied was, in

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[9] *Supra,* n. 1.

[10] *Balfour* v. *Balfour* [1919] 2 K.B. 571 was discussed by all the Law Lords. It was their opinion that the effect of that case was not to prevent an agreement between spouses from having a legal effect. The case stood only for the proposition that courts will be slow to infer legal obligations. [1961] 2 W.L.R. 966 at 973, 981, 983, 992, 997-8.

[11] Many judges have used the terms "infer" and "impute" interchangeably. However, some have made the distinction, which is followed in this article, that one infers an intention by looking to the evidence to see if such an intention, while not expressly made, actually existed. If the evidence does not establish that such an intention existed, then if it is permissible one could impute an intention by using the test of the reasonable man. The controversy concerns the permissibility of imputing an intention.

[12] Lord Morris at 981. The *Trueman* case could have been decided upon this reasoning. The evidence of the husband at trial that they were to go along as a team plus the substantial contribution of Mrs. Trueman would have been sufficient evidence to infer an intention that the parties would share in the beneficial ownership. Johnson J.A., however, did not use this test.

[13] *See e.g.,* S. Cretney, *No Return from Contract to Status,* (1969) 32 Mod. L.R. 570 at 574.

[14] [1969] 2 W.L.R. 966 at 991.

the words of Lord Reid, to "ask what the spouses, or reasonable persons in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who had contributed to the acquisition or improvement of property already owned by the other spouse."[15] Thus the majority of the House of Lords felt the court could impute an intention to the spouses, with Lords Reid and Diplock agreeing that the "family assets" approach as developed by the Court of Appeal in the series of cases beginning with *Rimmer* v. *Rimmer*[16] was incorrect law but indirectly achieving much the same results.

B. The Trusts Approach

This discussion of the method by which a spouse who makes a contribution to the acquisition of property can acquire an interest in that property was elaborated upon in *Gissing* v. *Gissing.*[17] In *Pettitt* the Law Lords had used the contract approach. In *Gissing,* however, they stated that the better approach was that of trust.[18] This of course was not a new approach for it had long been recognized that where two persons contribute to the purchase of property, but land is conveyed into only one name, the person in whom the legal title is vested holds as a trustee to the extent of the other's beneficial interest.[19] However, prior to *Gissing,* most courts had only focused upon whether or not an agreement between the parties as to their respective interests could be established on the available evidence. Now, in the words of Lord Diplock, "it is desirable to start at the first stage" in the analysis of the legal problem, *viz.* "the role of the agreement itself in the creation of the equitable estate in real property."[20]

The agreement establishing the trust may or may not be express: if it is express it may be a written declaration or may be declared in the instrument by which the legal estate is transferred. If the agreement is not in writing then because of the Statute of Frauds (in England because of s. 53(1) Law of Property Act, 1925) the trust can only take effect as a resulting, implied or constructive trust, the difference among which the Law Lords did not consider important. Lord Diplock defined such a trust as one created:[21]

> ...by a transaction between the trustee and the *cestui que trust* in connection with the acquisition by the trustee of the legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the *cestui que trust* to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

This refusal to differentiate between the different types of trusts, particularly between the constructive trust on the one hand and the

[15] [1969] 2 W.L.R. 973, per Lord Diplock at 999.

[16] [1952] 2 All E.R. 863, [1953] 1 Q.B. 63.

[17] *Supra,* n. 1.

[18] [1969] 2 W.L.R. at 782, 783, 787, 789.

[19] For Canadian matrimonial cases applying this principle, *see Kropielnicki* v. *Kropielnicki* [1935] 1 W.W.R. 249 (Man.); *Gorash* v. *Gorash* [1949] 4 D.L.R. 296 (B.C.); *Henry* v. *Vakusha* (1957) 21 W.W.R. 409 (Sask.); *Nemeth* v. *Nemeth* (1967) 64 D.L.R. (2d) 377 (B.C.).

[20] [1970] 2 All E.R. 780 at 789.

[21] *Id. See also* Waters, *The Doctrine of Resulting Trusts in Common Law Canada,* (1970) 16 McGill L.J. 187 at 189; and *Dyer* v. *Dyer* 2 Cox 92, 30 E.R. 42.

resulting and implied trusts on the other hand has created confusion in the judgments since it is never clear what is the relevance of the actual intentions of the parties to the dispute. Professor Donovan Waters, in a recent article, admitted that the courts have used the terms "implied trust", "resulting trust" and "constructive trust" interchangeably. He, however, differentiated among the three concepts as follows:[22] the constructive trust, which he does not regard as an institution but as a remedy,[23] is a machinery which is imposed by the law to force B to surrender property to A no matter what B's intention was as to the beneficial interest in the property; the implied and resulting trusts, which are not always co-extensive but in the matrimonial property context essentially arise in the same situations, also arise by operation of law but here the actual intent of the parties is relevant and if a contrary intent can be shown the presumption will be rebutted. Following this dichotomy, if a person is subject to a constructive trust, it is unnecessary for the court to attempt to discover the intention of the parties—it is irrelevant. Alternatively, if the facts establish a resulting trust, that trust may be rebutted by the spouse in whom the legal title is vested. On many occasions the difference will be academic because no evidence will be available to rebut the presumption, but in some cases the distinction may be crucial. A close reading of the judgments of Lords Reid and Diplock suggests that they did not consider the presumption of trust rebuttable if the circumstances are such that the *cestui que trust* was reasonably led to believe he or she would obtain a beneficial interest in return for a contribution to the property. This issue, however, remains to be clarified.

The biggest problem in the judgments in *Gissing,* however, comes from the refusal to accept the consequences of the trust situation. Both Lord Morris and Viscount Dilhorne recognized that circumstances might give rise to a "resulting, implied, or constructive trust",[24] yet both continued to talk of the impossibility of inferring an agreement between the parties where clearly none had existed. Yet if the evidence established that the spouse who is the legal owner is a trustee for the other spouse, in the case where the court calls him a constructive trustee, any evidence of the actual intent of the parties is irrelevant; and even if there is a resulting or implied trust, the onus is upon the spouse who is the legal owner to rebut that presumption of trust. The court is under no duty to find out if the spouses had made an agreement as to the ownership of the property for the law has imputed one; the question of the permissibility of inferring an intention where none existed is not pertinent. This contradiction in these judgments has unfortunately been repeated in the Alberta Appellate Division by Johnson J.A.

Even Lord Diplock, after stating the above definition of the resulting, implied or constructive trust situation, suggested that the trust would arise only by an agreement between the spouses, though where direct contributions were involved, he thought it was permissible for

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[22] *Supra,* n. 20.

[23] For a cogent argument that the constructive trust is not a substantive institution but a remedy, *see* Waters, *The Constructive Trust* (1964).

[24] [1970] 2 All E.R. 780 at 783, 785.

a court to "infer" an agreement based on the intention which was reasonably understood to be manifested by that party's words or conduct, notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party.[25] (*Quaere* how different is this "inferred" intention from an imputed intention?) Yet if, as Lord Diplock has stated earlier in his judgment, it is the conduct of the trustee *vis à vis* the *cestui que trust* which will give rise to this trust, is not this talk of agreement, even the, in effect, imputed agreement described by Lord Diplock, unnecessary?

Lord Reid, who unlike Lord Diplock, did not feel he was barred from holding the opinion that the law allowed the imputation of intention by means of the reasonable spouses test, stated that he would rather achieve the same result by an alternate approach.[26] This approach, it is submitted, is the trust approach and as Lord Reid stated "the facts may impose on [the person in whom the legal title is vested] an implied, constructive or resulting trust."[27] If the facts are such as to raise such a trust, then unless it is a rebuttable resulting trust, all talk of intention is irrelevant. Thus Lord Pearson, who talked only of the facts raising a resulting trust, discussed how that presumption might be rebutted. His judgment alone is perfectly clear.

As was previously suggested,[28] the *Trueman* case could have been decided upon the basis of an inferred intention to contract, but Johnson J.A., in his decision, felt that the judgments in *Gissing* represented a clarification of the earlier *Pettitt* judgments, and that the trust approach was the superior method of analysis. Of the five judgments in *Gissing,* he chose to apply the judgment of Lord Reid who had stated that either a constructive or resulting trust arises where there is a substantial contribution. However, it is respectfully submitted that having adopted this approach it was unnecessary to embark upon a search for a common intention that Mrs. Trueman should share in the beneficial interest. If, as has been submitted, the approach of the House of Lords in *Gissing* and *Pettitt* are alternate approaches to the problem, then having adopted the trust approach of *Gissing,* evidence of intent of the parties is necessary only if a resulting trust rather than a constructive trust arises. If Mr. Trueman is subject to a constructive rather than a resulting trust, his intention is irrelevant: Equity will cause him to be declared a trustee for his wife. A court need concern itself with the inferring or imputing of a common intention only where it is using the contract approach to the problem.

A court which uses the contract approach to the problem can achieve the same result as a court using the resulting or constructive trust approach. The word "can" is used advisedly, however, for it depends upon whether it is permissible for the court to impute an intention. If the court can only infer an intention, then where it is clear that no agreement was reached by the parties, the contributing spouse will fail. If an intention may be imputed to the parties then a different result will only be achieved where the evidence is evenly balanced;

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[25] [1970] 2 All E.R. 780 at 790.

[26] *Id.* at 783.

[27] *Id.* at 782.

[28] *Supra,* n. 4.

if a resulting trust approach had been used the onus would be on the spouse in whom the legal title is vested to rebut the presumption of trust, but where the contributing spouse must prove an agreement to share the ownership, the onus of proof is upon the latter.

Because Johnson J.A. considered it necessary to address himself to the problem of finding a common intention of the parties, he has given us some guidance as to the correct approach. In his judgment in *Trueman* he made no reference to the differences of opinion in *Pettitt* v. *Pettitt*.[29] He quoted only from Lord Reid's judgment in that case which contains the test of the reasonable spouses. It is thus submitted that *Trueman* could serve as authority for the proposition that it is permissible for a court to impute an agreement to parties where clearly none existed.[30]

C. Summary

1. The House of Lords and the Alberta Appellate Division have agreed that the preferable approach to matrimonial property disputes is to apply a constructive or resulting trust where one spouse has made substantial contributions to the acquisition of property, the title of which is vested in the other spouse. It remains for a future court to correctly differentiate between the resulting and implied trusts and the constructive trusts, and thus establish the relevance of the actual intention of the parties to the dispute.

2. Alternatively, the court can impute or infer from the parties' conduct a legally binding agreement to share the beneficial interest. Although there is some dissension in England as to whether an agreement can be imputed where clearly no agreement was made, the Alberta Appellate Division has accepted the approach that it is permissible to impute an intention. However, it must be remembered that at least two Law Lords in *Gissing* considered carefully the two approaches and specifically stated that the trust approach was preferable.

II. THE SPECTRE OF THOMPSON V. *THOMPSON*

The reaction of the majority of practitioners to the *Trueman* v. *Trueman* decision has not been concern with the permissibility of imputing an intention as opposed to inferring one, but a lively discussion of whether the *Trueman* decision is consistent with the Supreme Court of Canada decision in *Thompson* v. *Thompson*.[31] Johnson J.A. quoted at some length[32] from the judgment of Judson J. in *Thompson* and concluded that nothing in the English cases was in conflict with the judgment in *Thompson* v. *Thompson* since there had been a majority finding in the latter case that the claimant spouse had made no contribution to the acquisition of the property.[33]

Thompson v. *Thompson* has been interpreted by several courts as having closed the question of the applicability in Canada of the

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[29] *Supra*, n. 1.

[30] But it is only necessary to use the approach of the imputed intention if one is using a contract rather than a resulting trust approach. It should be remembered also that Lord Reid in his judgment was not sure if the imputed intention approach was permissible, and even if it were he stated that he would prefer to reach the same result in a rather different way (at 783).

[31] *Supra*, n. 5.

[32] [1971] 2 W.W.R. 688 at 692-3.

[33] *Id.* at 690, 693.

English Court of Appeal decisions beginning with *Rimmer* v. *Rimmer*,[34] though other courts have recognized, as Johnson J.A. did, that the view that the "palm tree justice" cases were no longer applicable arose not from the actual decision in *Thompson* but from some critical remarks of Judson J. that were actually *obiter dicta*.[35] The criticism centered around the scope of judicial discretion under s. 12 of the Ontario Married Women's Property Act and secondly, the development of a presumption of joint assets which Judson, J. felt entitled a spouse to a half interest no matter how insubstantial the contribution to the acquisition of the property, provided only that there was a contribution.

Having regard to the status of the justice making these criticisms, plus the weight that has been attached to them in subsequent decisions, it is necessary to consider their import today. The recent House of Lords decisions in *National Provincial Bank* v. *Ainsworth*[36] and *Pettitt* v. *Pettitt*[37] have both dealt with the equivalent English section of the Ontario Married Women's Property Act. These cases have resulted in a recognition that the discretion under the Married Women's Property Act is limited to remedies; thus the criticism of Judson, J. on this first point has been considered by no less an authority than the House of Lords and been found valid.

As to the criticism of the presumption of joint assets, the Law Lords sitting in the *Pettitt* case all stated that there is no such presumption. *Rimmer* v. *Rimmer*[38] was approved only for those cases where there are substantial joint contributions and difficulty in determining respective joint shares; if the proportionate contributions are ascertainable, then, in the absence of an agreement that the parties share equally, the interest obtained is proportionate to the contribution made. The problem of course is how such an intention to share equally can be determined—can it be imputed or must it be inferred? On the basis of *Trueman* v. *Trueman* it is certainly arguable that such an intention can be imputed which would in essence produce the same results as a presumption of joint assets. However, it is respectfully submitted that the basis of this criticism was a misinterpretation of such a presumption. Judson J. had spoken of *any* contribution resulting in a half interest, while even in *Rimmer* v. *Rimmer*, Sir Evershed M.R. had spoken of "substantial contribution." And while an agreement to share equally may be imputed, there must be evidence upon which to base such an imputation—the reasonable spouse cannot expect to share equally merely on the basis of the marriage relationship.

Even if Judson, J.'s criticisms are based on a correct reading of the law it must be remembered that these were isolated *dicta* from only

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[34] [1952] 2 All E.R. 863, [1953] 1 Q.B. 63. *See Lawson* v. *Lawson* (1966) 56 W.W.R. 576, *affirming* (1965) 54 W.W.R. 466 (B.C.C.A.); *Re Married Women's Property Act; Re Stajcer and Stajcer* (1961) 34 W.W.R. 424 (B.C.); *Tschcheidse* v. *Tschcheidse* (1963) 41 D.L.R. (2d) 138 (Sask.); and especially *Weisgerber* v. *Weisgerber* (1969) 71 W.W.R. 461; and *Rooney* v. *Rooney* (1969) 68 W.W.R. 641. The last two cases have almost the same factual situations as *Trueman* v. *Trueman* but opposite results.

[35] The following cases apply the reasoning of *Rimmer* v. *Rimmer: Barleben* v. *Barleben* (1964) 46 W.W.R. 683; *Grunert* v. *Grunert* (1960) 32 W.W.R. 509; *Stanley* v. *Stanley* (1960) 30 W.W.R. 686; *Morasch* v. *Morasch* (1962) 40 W.W.R. 50; *Germain* v. *Germain* (1969) 70 W.W.R. 120. Some courts have avoided the dilemma of which line of authority to apply by applying neither—*see, e.g.*, the partnership cases: *Thomas* v. *Thomas* (1961) 36 W.W.R. 23, D.L.R. (2d) 576; *Marx* v. *Marx* [1964] S.C.R. 653.

[36] [1965] A.C. 1175, 3 W.L.R. 1, 2 All E.R. 472.

[37] *Supra*, n. 1.

[38] *Supra*, n. 15.

one of the five judges who handed down written decisions. The two dissenting justices, Kerwin C.J.C. and Cartwright J., who dissented only on the facts, both applied the rationale of the "palm tree justice" cases without relying on them *per se,* actions which are at least equivocal as to support or non-support of Judson J. Martland J. held that since this was not a dispute over a matrimonial home but a business venture, the "palm tree justice" cases were not applicable. The remaining judge agreed with both Judson and Martland JJ., so it is difficult to know if he supported the critical *dicta* of Judson J. or not.

Moreover, Judson J., criticizing the English cases, stated that Canadian jurisprudence had not developed in the same manner as had the English. Judson J., in making this statement, ignored the many provincial court judgments which had applied the *Rimmer* line of cases,[39] and relied upon three Supreme Court decisions which, it is respectfully submitted, do not support such a sweeping contention. One, *Minaker* v. *Minaker*[40] was decided several years prior to the decision in *Rimmer;* another, *Jackman* v. *Jackman,*[41] is taken as a rejection because the presumption of advancement was held applicable, yet on the peculiar fact situation of that case it is submitted this was a correct decision. Moreover, the English Court of Appeal had not found that the presumption did not apply but only that it was weakened, so that that Court applied the presumption in *Silver* v. *Silver.*[42] Finally, *Carnochan* v. *Carnochan,*[43] in so far as it was relevant to the "palm tree justice" cases, is consistent with Romer L.J.'s statement in *Cobb* v. *Cobb*[44] that the discretion under s. 17 is not to vary existing titles but to decide in accordance with whatever the existing legal and equitable rights are.

III. SOME QUESTIONS

These cases by no means settle the law. It is the opinion of this author that many important questions remain to be answered, by either the courts or the legislature. Many questions were raised; briefly, here are a few:

1. Is acquisition of an asset to be recognized as a continuing process, as in reality with thirty-five year mortgages it really is?
2. What constitutes an indirect contribution?

(a) Improvements?

As a result of the *Pettitt* v. *Pettitt* case, in England the Matrimonial Proceedings and Property Act, 1970 contained a provision that improvements in money or moneys worth of a substantial nature, in the absence of an express agreement to the contrary, would result in the spouse receiving such interest as had been agreed upon or in default of such an agreement, such interest as the court in the circumstances

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[39] *See e.g., Sopow* v. *Sopow* (1958) 24 W.W.R. 625; *Mitchelson* v. *Mitchelson* [1953] 9 W.W.R. 316; *Kropielnicki* v. *Kropielnicki* [1953] 1 W.W.R. 249; *Atamanchuk* v. *Atamanchuk* (1955) 15 W.W.R. 301; *Sywack* v. *Sywack* (1943) 51 Man. R. 108.

[40] [1949] 1 D.L.R. 801, S.C.R. 397.

[41] (1959) 19 D.L.R. 317 (S.C.).

[42] (1958) 1 All E.R. 523.

[43] [1955] 4 D.L.R. 81, S.C.R. 699.

[44] [1955] 2 All E.R. 696, [1955] 1 W.L.R. 731 (Eng. C.A.).

deems just. Will Alberta courts apply *Pettitt* v. *Pettitt* or follow *Stanley* v. *Stanley*[45] which granted a spouse a beneficial half interest for making improvements? If *Stanley* is not followed then will Lord Reid's approach in *Gissing* be followed wherein no distinction is made between direct and indirect contributions, or will Lord Diplock's approach be followed? Perhaps the correct approach should be that of equitable estoppel?[46]

(b) Contributions to the houskeeping fund, payments of clothes, etc.?

In England, the Court of Appeal has granted a spouse an interest for such contributions[47] but in a later case it was made clear that for such contributions to result in a beneficial interest there must be a pooling of their resources.[48] In Canada, three cases have denied an interest to a spouse based on such contributions.[49] Is the crucial factor in Canada the nature of the contribution or the inability of courts before *Trueman* to discover the intention of the parties?

(c) Contributions of a spouse who does the housekeeping and looks after the children?

No case has ever granted a spouse an interest based on this type of contribution and many courts have commented that to do so would be to introduce a community of property regime via the courts rather than the legislature. Johnson J.A. was careful to point out that Mrs. Trueman achieved her beneficial interest not through her contribution as a farm wife and mother but through the share of the work performed by her that would ordinarily be assumed by a hired man. This is consistent with comments from the bench during the hearing of the *Trueman* appeal where the learned justices of appeal mentioned several times the need to change the law in the legislature.

—JEAN McBEAN WORTON*

[45] (1960) 30 W.W.R. 625.

[46] *See Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129 at 170; *Jacques* v. *Hopkins* (1931) 25 Alta. L.R. 372, [1931] 2 W.W.R. 277, [1931] 3 D.L.R. 410 (C.A.); *Kelly* v. *Watson* (1921) 61 S.C.R., [1921] 1 W.W.R. 958, especially the decision of Duff J.; *Rex* v. *C.P.R.* [1931] 1 W.W.R. 673 (P.C.); *Ariff* v. *Rai Jadunath Majumdan Buhadur* (1931) 47 T.L.R. 238 (P.C.).

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

[48] *Allen* v. *Allen* [1961] 3 All E.R. 385 (C.A.).

[49] *Minaker* v. *Minaker* [1949] 1 D.L.R. 801, S.C.R. 397. *Re Married Women's Property Act; Re Stajcer and Stajcer* (1961) 34 W.W.R. 424; *Lawson* v. *Lawson* (1966) 56 W.W.R. 576 (B.C.C.A.).

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