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HOUSE OF LORDS

PETTITT (A.P.)

v.

PETTITT

Lord Reid
Lord Morris of Borth-y-Gest
Lord Hodson
Lord Upjohn
Lord Diplock

Lord Reid

MY LORDS,

The Appellant was married in 1952. For about nine years she and her husband lived in a house which she had inherited. During that time her husband carried out a number of improvements, largely redecorating, on which he says he spent some £800. In 1961 this house was sold and she acquired another. After this had been paid for there was a surplus of a few hundred pounds and he used this money, apparently with the consent of the Appellant, in paying for his car. The spouses lived for about four years in the new house. Then the Appellant left her husband alleging cruelty and she obtained a divorce in 1967. The husband then left the house and raised the present proceedings. He said that during those four years he carried out a considerable number of improvements to the house and garden and estimated that in doing so he performed work and supplied material to a value of £723. He sought a declaration that he was beneficially interested in the proceeds of sale of the house in the sum of £1,000 and an order on

the Appellant to pay. Then an order was made that she should pay him £300. The Court of Appeal reluctantly dismissed her appeal holding that they were bound by the decision in *Appleton* v. *Appleton* [1965] 1 W.L.R. 25. They gave leave to appeal.

For the last twenty years the law regarding what are sometimes called family assets has been in an unsatisfactory state. There have been many cases shewing acute differences of opinion in the Court of Appeal. Various questions have arisen, generally after the break-up of a marriage. Sometimes both spouses have contributed in money to the purchase of a house: sometimes the contribution of one spouse has been otherwise than in money: sometimes one spouse owned the house and the other spent money or did work in improving it: and there have been a variety of other circumstances. It might be possible to decide this case on somewhat narrow grounds without examining the wider questions, but I do not think that that would be satisfactory. The fact that the Appellant has legal aid has enabled the argument to range widely, and 3 think that it is at least desirable, if not necessary, to deal with the various issues which have emerged.

Many of the cases have been brought by virtue of the provisions of section 17 of the Married Women's Property Act 1882. That is a long and complicated section: the relevant part is as follows:

> " 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 main dispute has been as to the meaning of the latter words authorising the judge (including a County Court judge and now a Registrar) to make such order with respect to the property in dispute as he thinks fit. These are words normally used to confer a discretion on the Court: where the discretion is limited, the limitations are generally expressed: but here no limitation is expressed. So it has been said that here these words confer 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 in the whole circumstances of the case. On the other hand it has been said that these words do not entitle the Court to disregard any existing property right, but merely confer a power to regulate possession or the exercise of property rights, or, more narrowly, merely confer a power to exercise in proceedings under section 17 any discretion with regard to the property in dispute which has already been conferred by some other enactment. And other intermediate views have also been expressed.

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I would approach the question in this way. The meaning of the section cannot have altered since it was passed in 1882. At that time the certainty and security of rights of property were still generally regarded as of paramount importance and I find it incredible that any Parliament of that era could have intended to put husbands' property at the hazard of the unfettered discretion of a judge (including a County Court judge) if the wife raised a dispute about it. Moreover this discretion, if it exists, can only be exercised in proceedings under section 17: the same dispute could arise in other forms of action ; and I find it even more incredible that it could have been intended that such a discretion should be given to a judge in summary proceedings but denied to the judge if the proceedings were of the ordinary character. So are the words so unequivocal that we are forced to give them a meaning which cannot have been intended? I do not think so. It is perfectly possible

to construe the words as having a much more restricted meaning and in my judgment they should be so construed. I do not think that a judge has any more might to disregard property rights in section 17 proceedings than he has in any other form of proceedings.

It was argued that the present case could be decided by applying the presumption regarding advancement. It was said that if a husband spends money on improving his wife's property, then, in the absence of evidence to the contrary, this must be regarded as a gift to the wife. I do not know how this presumption first arose, but it would seem that the judges who first gave effect to it must have thought either that husbands so commonly intended to make gifts in the circumstances in which the presumption arises that it was proper to assume this where there was no evidence, or that wives' economic dependance on their husbands made it necessary as a matter of public policy to give them this advantage. I can see no other reasonable basis for the presumption. These considerations have largely lost their force under present conditions, and, unless the law has lost all flexibility so that the Courts can no longer adapt it to changing conditions, the strength of the presumption must have been much diminished. I do not think that it would be proper to apply it to the circumstances of the present case.

And there is another matter I must deal with before coming to the crucial questions. There are at least suggestions in some cases that property rights may be different before and after the break-up of a marriage. I can see no ground for this. There are other occasions for disputes as to rights of property besides break-up of the marriage, and it appears to me that the property rights of the spouses must be capable of determination immediately after the property has been paid for or the improvements carried out and must in the absence of subsequent agreements or transactions remain the same. There are also suggestions that agreements or arrangements made by the spouses may be rendered inoperative by, or may have a different effect after, the breakdown of the marriage. I suppose that an agreement could take an unusual form, but as a general rule I would think that most improbable. The question does not arise in the present case.

I can now come to the main question of how the law does or should deal with cases where the title to property is in one of the spouses and contributions towards its purchase price have been made or subsequent improvements have been provided by the other. As regards contributions, the traditional view is that, in the absence of evidence to the contrary effect, a contributor to the purchase price will acquire a beneficial interest in the property: but as regards improvements made by a person who is not the legal owner, after the property has been acquired, that person will not, in the absence of agreement, acquire any interest in the property or have any claim against the owner.

Let me suppose that a house which requires extensive renovation or improvement is acquired by one spouse putting down the deposit and taking the title. Instalments of the purchase price and the cost of the improvements will then have to be paid. The other spouse may be willing and able to help and as a pure matter of convenience without any thought of legal consequences and without making any agreement one spouse may

pay the instalments of the purchase price and the other may pay for the improvements. On this view the legal position will be different according as the contributing spouse pays the instalments or the cost of the improvements. Payment of the instalments will obtain for him or her a proprietary interest in the house, but payment of the cost of the improvements will *not* give him or her either an interest in the house or a claim against the other spouse. That seems to me to be entirely unsatisfactory. It is true that the Court will do its best to spell out an agreement to prevent this, but I shall return to that matter.

Then go a step farther. There is no question of making any improvements, but the wife who wants to contribute pays all the household bills thus enabling the husband who holds the title to the house to pay the instalments. That wife will have no claim of any kind. And go a step farther still. The wife may not be able to make any financial contribution but by good management and co-operation she may make it possible for the husband to pay the instalments regularly. Again on this view she will have no claim. Opinions may differ as to whether in one or both of these cases she should have any claim.

Views have been expressed that the law does give a claim to the contributing spouse in the first, or the first and second or in all the three cases which I have outlined. But there has been no unanimity as to the legal basis or the legal nature of such claims. I think that broadly there are two views. One is that you ask what reasonable people in the shoes of the spouses would have agreed if they had directed their minds to the question of what claim the contributing spouse ought to have. The other is that all property used for family purposes must, in the absence of agreement, be regarded as the joint property of the spouses or as belonging to them in equal shares, no matter which spouse bought or inherited it or contributed to its acquisition.

We must first have in mind or decide how far it is proper for the Courts to go in adapting or adding to existing law. Whatever views may have prevailed in the last century, I think that it is now widely recognised that it is proper for the Courts in appropriate cases to develop *or* adapt existing rules of the common law to meet new conditions. I say in appropriate cases because I think we ought to recognise a difference between cases where we are dealing with " lawyer's law " and cases where we are dealing with matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which laymen are as well able to decide as are lawyers. On such matters it is not for the Courts to proceed on their view of public policy for that would be to encroach on the province of Parliament.

I would therefore refuse to consider whether property belonging to either spouse ought to be regarded as family property for that would be introducing a new conception into English law and not merely developing existing principles. There are systems of law which recognise joint family property or *communio bonorum*. I am not sure that those principles are very highly regarded in countries where they are in force, but in any case it would be going far beyond the functions of the Court to attempt to give effect to them here.

But it is, I think, proper to consider whether, without departing from the principles of the common law, we can give effect to the view that, even where there was in fact no agreement, we can 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 spouse who has contributed to the acquisition or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other? I do not think that it is a very convincing argument to say that, if a stranger makes improvements on the property of another without any agreement or any request by that other that he should do so,

he acquires no right. The improvement is made for the common enjoyment of both spouses during the marriage. It would no doubt be different if the one spouse makes the improvement while the other spouse who owns the property is absent and without his or her knowledge or consent. But 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 as acquired such a right.

Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another. And in any case it would only result in a money claim whereas what a spouse who makes an improvement is seeking is generally a beneficial interest in the property which has been improved.

No doubt there would be practical difficulties in determining what the parties, or reasonable people in their shoes, would have agreed. But then there is almost equal difficulty in determining whether the spouses did in fact make an agreement, and, if they did, what are its terms. The first difficulty arises out of the principle approved in *Balfour v. Balfour* [1919] 2 K.B. 571 that arrangements between spouses are not generally intended to be contracts or to have legal consequences. That is obviously right with regard to non-financial arrangements. And if the spouses arrange that one shall pay certain accounts I do not think that that one incurs any legal obligation to pay those accounts. But it does not necessarily follow that, if that spouse does pay those accounts, no legal consequences will follow from such payment. The real difficulty is in inferring from some vague evidence of an arrangement what in fact the arrangement was. There is often difficulty in determining what were the terms of a commercial contract because the parties did not apply their minds to essential matters. It has often been pointed out that spouses living happily together rarely apply their minds to matters which must be determined if their arrangement is to be given contractual force. So it is extremely difficult at a later date to determine what if any contractual effect can be given to some rather indefinite arrangement which preceded the expenditure of money by one of the spouses, and it is hardly possible to apply the ordinary rule that the essential terms of a contract must be sufficiently clearly established before it can be enforced. I do not think that there is much to be said for a rule of law if one finds

that judges are constantly doing their best to circumvent it by spelling out contractual agreements from very dubious material.

in whatever way the general question as to improvements is decided I think that the claim in the present case must fail for two reasons. These improvements are nearly all of an ephemeral character. Redecoration will only last for a few years and it would be unreasonable that a spouse should obtain a permanent interest in the house in return for making improvements of this character. And secondly I agree with the view of Lord Denning M.R. expressed in *Button* v. *Button* [1968] 1 All E. 1064. He said with regard to the husband " he should not be entitled to a share in the house simply by " doing the ' do-it-yourself' jobs which husbands often do ": and with regard to the wife " The wife does not get a share in the house simply because " she cleans the walls or works in the garden or helps her husband with the " painting and decorating. Those are the sort of things which a wife does " for the benefit of the family without altering the title to or interests in " the property." I agree with him that *Jansen's* case [1965] p. 478 was rightly decided. I have more doubt about *Appleton's* case [1965] 1 All E.R. 44: the facts are not very fully stated and it may have been wrongly decided. But if a spouse provides, with the assent of the spouse who owns the house, improvements of a capital or non-recurring nature, I do not think that it is necessary to prove an agreement before that spouse can acquire any right.

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Even if my views are accepted they only go a short way towards solving the many problems which are coming before the Court in increasing numbers. We were informed that last year there were 900 applications in the High Court besides an unknown number in the County Courts. The whole question can only be resolved by Parliament and in my opinion there is urgent need for comprehensive legislation.

I would allow this appeal.

Lord Morris of Borth-y-Gest

MY LORDS,

The question of wide general importance which is raised in this case is whether section 17 of the Married Women's Property Act, 1882, confers a power enabling the Court in its discretion to grant to a spouse a beneficial interest in property which he or she did not previously have. The words of section 17 must be given the meaning which they had when the Act was passed. They cannot now be given an extended meaning even if it were thought that current social conditions pointed to the desirability of endowing some Court with wider powers than any now existing.

At common law a wife's proprietary capacities were very limited. Although the Court of Chancery protected a wife's equitable separate estate it was by statutory enactment that the rights of a wife concerning property were established. The Matrimonial Causes Act, 1857, provided that in every case of a judicial separation a wife should be considered as a feme sole with respect to property that she might acquire.

By the Married Women's Property Act, 1870, certain property of a married woman (such, for example, as wages and earnings acquired after the passing of the Act in any employment occupation or trade in which she was engaged, or which she carried on separately from her husband, and other money or property referred to in section 1 and deposits in savings banks referred to in section 2, and other property referred to in other sections) was deemed to be her separate property. Section 9 of the Act provided that " in any question between husband and wife as to property " declared by this Act to be the separate property of the wife " either party could by summons or motion apply in a summary way either to the Court of Chancery in England or Ireland or to the judge of the County Court of the district in which either party resided. The judge was empowered to make such order or direct such inquiry or award such costs as he thought lit. There was a right of appeal just as if the order of the same judge had been made in a pending suit or on an equitable plaint. The proceedings could be in the judge's private room. To the extent set out in section 11 a married woman could bring an action in her own name in respect of her separate property.

By the Married Women's Property Act, 1882, married women were given full proprietary rights. In its opening words the Act provided that, in accordance with its provisions, a married woman should " be capable of " acquiring, holding, and disposing by will or otherwise, of any real or " personal property as her separate property in the same manner as if she " were a feme sole without the intervention of any trustee." Also by section 1(2) it was provided that a married woman was to be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole. The date of the commencement of the Act was the 1st January, 1883. A woman who married after that date could hold all her separate property as if she were a feme sole (see section 2). In the case of a woman who was married before that date she could hold as a feme sole all property which she acquired after that date (see section 5). By section 12 remedies were given to married women for the protection and security of their separate property: a married woman could have in her own name " against

" all persons whomsoever including her husband" full remedies for the protection and security of her separate property though except to that extent neither she nor her husband could sue the other for a tort: and there were limitations in regard to criminal proceedings.

In my view, all the indications are that section 17 (following upon section 9 of the Act of 1870) was purely a procedural section. It gave facility for obtaining speedy decision. It related to "any question between husband " and wife as to the title to or possession of property ". In regard to a question as to the title to property the language suggests a situation where an assertion of title by either husband or wife has been met by denial or by counter-assertion on the part of the other. The language is inapt if there was any thought of taking title away from the party who had it. The procedure was devised as a means of resolving a dispute or a question as to title rather than as a means of giving some title not previously existing.

One of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this, in my view, negatives any idea that section 17 was designed for the purpose of enabling the Court to pass property rights from one spouse to another. In a question as to the title to property the question for the Court was—" Whose is this " and not—" To whom shall this be given ".

It is to be noted that the procedure made possible by section 17 was permissive and not obligatory. Under it a question could be submitted for the decision of a judge of the High Court who could sit in private. So also at a time when the ordinary limit of jurisdiction of the County Court in personal actions was £50 (but as to jurisdiction in Equity see section 67 of the County Courts Act, 1888) a question (regardless of the amount involved) could be submitted for the decision of a County Court judge who also could sit in his private room: though the proceedings, if not within the normal jurisdiction of the County Court (or civil bill court in Ireland), could at the option of the defendant or respondent to them be removed as of right into the High Court.

Questions could, however, and can be referred for the decision of the courts in the ordinary way. As to the circumstances under which a husband could sue his wife both before and after the Married Women's Property Act, 1882, see *Butler v. Butler* 16 Q.B.D. 374. Today it is clear that a husband and wife can enter into a contract with each other and can sue each other on such a contract. If, therefore, there were and are alternative ways of resolving a question as to the title to property it could not be that there would be a different legal approach according as to which course was adopted. A decision after an informal private hearing was as much subject to appeal as a decision given after a formal hearing in open court. Each decision had to be made according to law. There was no provision which empowered a judge on the trial of an action between husband and wife concerning a question as to the title to property to give a decision which, however benevolently motivated, was in disregard of the law. There is no provision empowering a judge on the summary adjudication of a question to act any differently. I do not find this in the words (in section 17) " as " he thinks fit". Those are undoubtedly words which give a judicial discretion. Ample reason for their presence in the section is found when it is remembered that the section is found when it is remembered that the section is dealing with question " as to the title to or possession of property ". There may be cases where discretion can properly be exercised in regard to possession and in regard to remedies. I cannot, however, interpret the words " as he thinks fit" as endowing a judge with the power to pass the property of one spouse over to the other or to do so on some vague basis that involves estimating or weighing the good or bad behaviour of the one and the other or assessing the deserts of the one or the other in the light of their work, activities and conduct. If matrimonial troubles bring the spouses to the courts there are various statutory powers relating to property which can be exercised. But if in a " question " between a husband and a wife as to the title to property recourse is had to the special procedure made

possible by section 17, decision must be reached by applying settled law to the facts as they may be established.

It appears to have been generally accepted that if in a question as to the title to some property a judge is able after hearing evidence to come to a conclusion that there was a clear agreement between husband and wife in regard to ownership he must give his adjudication accordingly. He cannot then make an order which withdraws title from the party to whom on his finding it belongs. The same result must, I think, follow if, apart from any agreement between the two of them, the evidence clearly establishes that the property is in one rather than the other. The difficult case is where each party claims ownership and where the evidence is meagre. It cannot, it my view, be that the jurisdiction of the Court is then on a different basis. The search must still be to find an answer to the question as to where ownership lies. The Court has to reach decision in very difficult circumstances but the task, the duty and the objective of the Court does not change. The Court is not suddenly absolved from its duty. The question for decision does not alter merely because evidence is scanty or because the task of reaching decision is perplexing.

In the lengthening line of cases in which questions between spouses have called for adjudication under section 17, the nature of the difficulties which arise is constantly and recurringly made manifest. When two people are about to be married and when they are arranging to have a home in which to live they do not make their arrangements in the contemplation of future discord or separation. As a married couple they do not, when a house is being purchased or when the contents of a house are being acquired, contemplate that a time might come when decision would have to be made as to who owned what. It would be unnatural if at the times of acquisition there was always precise statement or understanding as to where ownership rested. So, if at a later date questions arise as to the ownership of a house or of various things in it though as to some matters no honest difference of view will arise, as to others there can be such honest difference because previously the parties might never really have applied their minds to the question as to where ownership lay.

For the reasons which I have given I consider that the duty of a court when adjudicating under section 17 is no different in a difficult case from what it is in a straightforward case. By the latter I mean a case in which after ascertaining the facts and considering the evidence the Court can without difficulty decide that one party is the owner of certain property. The Court cannot then award it or a share in it to the other party and cannot in section 17 proceedings do so even if the latter was thought to have deserved a different result. In a difficult case the facts will not be ready ascertainable and the evidence will be slender. The Court must, however, do its best. It cannot then abandon its task which continues to be the task of deciding the question submitted to it.

It follows from what I have said that I agree with some statements of principle which have been expressed in decided cases while disagreeing with others. I agree with what was said by Romer L.J. in *Cobb v. Cobb* [1955] 1 W.L.R. 731: at page 736, 737, he said--

> " I know of no power that the Court has under section 17 to vary
> " agreed or established titles to property. It has power to ascertain the
> " respective rights of husband and wife to disputed property, and fre-
> " quently has to do so on very little material; but where, as here, the
> " original rights to property are established by the evidence, and those
> " rights have not been varied by subsequent agreement, the court
> " cannot, in my opinion, under section 17 vary those rights merely
> " because it thinks that in the light of subsequent events the original
> " agreement was unfair."

I think that this was in accord with what had been said by Evershed L.J. in *re Rogers Question* [1948] 1 All E.R. 328 when he pointed out that the task of a judge after seeing and hearing the witnesses was " to try to con-
" elude what at the time was in the parties' minds and then to make an
" order which, in the changed conditions, now fairly gives effect in law to

" what the parties, in the judge's finding, must be taken to have intended at
" the time of the transaction itself ". The emphasis on ascertaining what the parties intended at the time of a transaction shows that the mention of changed conditions did not mean that changed conditions altered property rights: property rights once ascertained, and ascertained by reference to what was the intention of the parties at the time of a transaction, had to be honoured and fairly given effect to even though conditions had changed.

It follows that respectfully I cannot agree with, the statement in *Hine* v. *Hine* [1962] 1 W.L.R. 1124 at page 1127 that " the jurisdiction of the court
" over family assets under section 17 is entirely discretionary. Its discretion
" transcends all rights, legal or equitable, and enables the Court to make
" such order 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." I cannot agree that section 17 empowers a court to take property from one spouse and allocate it to the other. But something may depend upon what is meant by " family assets ". If what is referred to is an asset separately owned by someone who is a member of a family, then once the ownership is ascertained it cannot, under section 17, be changed. If what is referred to is property which, on the evidence, has been decided to be property which belongs beneficially to husband and wife jointly, I do not consider that section 17 enables a Court to vary whatever the beneficial interests were ascertained to be. There would be room for the exercise of discretion in deciding a question as to whether a sale should be ordered at one time or another but there would be no discretion enabling a Court to withdraw an ascertained property right from one spouse and to grant it to the other. Any power to do that must either be found in some existing provision in relation to matrimonial causes or must be given by some future legislation.

It follows further, from my view, as I have expressed it above that with respect I do not agree with the statement in *Appleton v. Appleton* [1965] 1 W.L.R. 25 that if after a separation there is an application under section 17 by a spouse who claims sole ownership of a house the test to be applied by the Court is—" What is reasonable and fair in the circumstances as they have developed seeing that they are circumstances which no one contem-
" plated before? " In such a situation the duty of the Court is to decide whether the house was in the sole ownership of the one spouse who claimed such ownership. " The circumstances as they have developed " may point to the fact that it would only be fair and reasonable, having regard to such
" circumstances ", that some entirely new arrangements should be made. In very many cases that would be so. The parties to a marriage would have ordered their affairs on the basis that the status of marriage possessed by each one was to continue. That very fact would have produced the result that it would happily often have been a matter of indifference and, in very many cases, almost a matter of irrelevance whether ownership was in one spouse or in the other or whether ownership was joint. But if discord leads to separation existing separate ownerships are not thereby extinguished.

I observe that the approach which I have indicated is that which has been followed in New Zealand where questions have arisen in regard to the discretion given to a Court by section 19 of the Married Women's Property Act, 1952, to "make such order with respect to the property in dispute . . . " as it thinks fit" In his interesting judgment in *Hofman* v. *Hofman* [1965] N.Z.L.R. 795 (affirmed on appeal [1967] N.Z.L.R. 9) Woodhouse J. said: " There is a consistent line of authority to the effect that the section " does not permit questions of title to property to be decided except in " accordance with the strict legal or equitable rights of the parties."

After citing the New Zealand authorities to that effect he pointed out that a similar view had been taken of similar legislation in the State of Victoria prior to a recent amendment to the Act there *(Hogben* v. *Hogben* [1964] V.R. 468) and by the High Court of Australia when considering the same legislation in Queensland *(Wirth* v. *Wirth* [1956] 98 C.L.R. 228). In *Hofman* v. *Hofman* the application was made under the new provisions

contained in the Matrimonial Property Act, 1963. In that new legislation a judge is empowered (provided that he does not defeat any common intention which he is satisfied was expressed by the husband and the wife) to make such order as appears just, notwithstanding that the legal or equitable interests of the husband and wife in the property are defined, or notwithstanding that the spouse in whose favour the order is made has no legal or equitable interest in the property. In a section applying to any matrimonial home it is provided that, in considering an application, the Court shall, where the application relates to a matrimonial home, and may in any other case, " have regard to the respective contributions of the husband " and wife to the property in dispute (whether in the form of money " payments, services, prudent management or otherwise howsoever)". In reference to the state of affairs existing before that new legislation was passed Woodhouse J. referred to the unimaginative rule that the property rights of parties to a marriage should be determined on the basis of money alone. In his reasoning, with which I find myself much in sympathy, he spoke of the difficulty of reaching just results by the " application of pre- " sumptions which were developed in a social climate which has little in " common with the widely accepted view that marriage is really a partner- " ship of equals ": he spoke also of the advantage of being able to consider " the true spirit of transactions involving matrimonial property " by giving due emphasis not only to the part played by the husband but " also to the important contributions which a skilful housewife can make " to the general family welfare by the assumption of domestic responsibility, " and by freeing her husband to win the money income they both need " for the furtherance of their joint enterprise."

In *Wirth* v. *Wirth* [1956] 98 C.L.R. 228 in considering the provision in the Queensland Married Women's Property Acts, 1890 to 1952, comparable to section 17, Dixon C.J. said that the discretion enabled a judge "to " take into account considerations which may go beyond the strict enforce- " ment of proprietary or possessory rights but the notion should be wholly " rejected that the discretion affects anything more than the summary " remedy ". Taylor J. agreed with Dixon C.J. that on an application the rights of the parties had to be determined according to ordinary legal

principles. He said:

> " It may well be that in cases between husband and wife, where one
> " does not expect to find formal contracts or solemn declarations of
> " trust, the question of the beneficial ownership of property used by
> " both in the course of the matrimonial relationship, will, almost in-
> " variably, fall to be decided by consideration of casual and informal
> " incidents rather than of studied and deliberate pronouncements. But
> " to say this is to say no more than that the circumstances calling for
> " investigation in such cases are special and require to be considered
> " in the light of that fact. This may mean that in such cases it will
> " frequently be difficult to ascertain the facts but once they are
> " judicially ascertained, either by the acceptance of express evidence,
> " or by inference, or by presumption, the position will be that the rights
> " of the parties must be determined according to ordinary legal
> " principles."

In the absence of some new legislative provisions giving some discretionary powers to a Court to adjust as between husband and wife their legal or equitable interests in property the duty of a court, if disputes arise, must be to reach conclusions as to where those interests belong. The difficulties to be surmounted in doing so are mirrored in the mass of reported cases. In some of these a pattern appears which reflects social conditions which differ from those in earlier decades. After a marriage both husband and wife may for a time be wage earners. They may each make some contributions towards the cost of acquiring a house and of setting up a home. After a time the husband only may be the wage-earner. Their arrangements will often have been made without giving much thought to the question as to where legal and beneficial ownership lies. There will have

been no thought given to the question whether if they later separate some new allocation of ownership would be fair. What is the court to do if asked to decide as to the ownership either of a house or of a chattel or indeed of some chose in action? The answer must be that the Court must do its best to obtain all the relevant evidence and, on an assessment of the evidence, and on an application of any relevant legal principle, it must reach decision. The Court cannot refuse to decide a case on the ground that the path to conclusion is not flood-lit by clear evidence. The duty of the Court in an application under section 17 will not differ from its duty in a situation where a question of title arises not as between husband and wife but by reason of an outside claim. If either husband or wife became bankrupt a court would have to decide what property did and what property did not pass to the trustee in bankruptcy. If there is a judgment against either a husband or a wife a decision may have to be made as to what property could and what property could not be the subject of execution. When acting under section 17 the Court must be guided by the same principles as would apply in any other proceedings where the ownership of property was in question.

The circumstances which have most often created the occasion for an application under section 17 have been *(a)* where husband and wife have both made contributions towards the purchase of a house, and *(b)* where improvements have been made to a house and in either case where a

breakdown of the marriage has later occurred. To begin with I would say that the fact of a breakdown of the marriage is irrelevant in the determination of a question as to where ownership lay before the breakdown: the breakdown will then merely have caused the need for a decision but will not of itself have altered whatever was the pre-existing position as to ownership: it will, however, be relevant in regard to some questions which could be the subject of a section 17 application.

Where questions of ownership have to be decided the judge must weigh every piece of evidence as best he may; the fact that the parties are husband and wife with all that is as a result involved, is in itself a weighty piece of evidence. Sometimes the conclusion will be that ownership was in one party alone; sometimes the conclusion will be that ownership was in both parties. There will be some cases in which a Court is satisfied that both the parties have a beneficial interest, and a substantial beneficial interest but in which it is not possible to be entirely precise in calculating their respective shares. In such circumstances, as Lord Evershed M.R., said (at page 72) in *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63 " equality almost necessarily " follows". There will be some cases in which, as Lord Upjohn said in *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175, 1236m, an equitable knife must be used to sever the Gordian Knot.

The case of *Jones* v. *Maynard* [1951] 1 Ch. 572 (which was an action between former spouses) furnishes an example of a situation in which it was held that it was proper to apply the principle of equality.

Where improvement has been effected to property belonging to one party the evidence when examined might lead to various conclusions. One might be that work was done or expense incurred without any thought that any contractual liability or any ownership disposition would ever result. The spouse who does some work of repair or renovation or decoration in a matrimonial home which in fact belongs to the other spouse would probably do so in circumstances which would create neither a claim nor a right in law. There are so many agreements between spouses which are not contracts for the reason that the parties never intended that the agreements should be attended by legal consequences *(Balfour* v. *Balfour* [1919] 2 K.B. 571). In some set of circumstances the conclusion might be reached that some expense incurred by one spouse was to be the subject of reimbursement by the other. Or it could be that work by one was to be paid for by the other. Another conclusion might be that ownership which had hitherto been separate was thereafter to be a common ownership on some newly agreed basis. But each of these conclusions would have to be the result of some agreement. Sometimes an agreement, though not put into express words, would

be clearly 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 or has a monetary claim against the other.

The mere fact that parties have made arrangements or conducted their affairs without giving thought to questions as to where ownership of property lay does not mean that ownership was in suspense or did not lie anywhere. There will have been ownership somewhere and a Court may have to decide where it lay. In reaching a decision the Court does not find and, indeed,

cannot find that there was some thought in the mind of a person which never was there at all. The Court must find out exactly what was done or what said and must then reach conclusion as to what was the legal result. The Court does not devise or invent a legal result. Nor is the Court influenced by the circumstances that those concerned may never have had occasion to ponder or to decide as to the effect in law of whatever were their deliberate actions. Nor is it material that they might not have been able—even after reflection—to state what was the legal outcome of whatever they may have done or said. The Court may have to tell them. But when an application is made under section 17 there is no power in the Court to make a contract for the parties which they have not themselves made. Nor is there power to decide what the Court thinks that the parties would have agreed had they discussed the possible breakdown or ending of their relationship. Nor is there power to decide on some general principle of what seems fair and reasonable how property rights are to be re-allocated. In my view, these powers are not given by section 17.

If there is a breakdown between spouses there will be a situation for which the parties cannot have provided. There may be a need for new adjustments. At a time when discord has supervened it is not to be expected that the parties concerned will themselves be able to make new dispositions on the basis of what in the circumstances as they have developed would be thought by an independent person to be fair and just. The reported cases and more particularly the pattern of the situations which have given rise to them reflect problems of wide social consequence. Their solution must lie with those who decide policy and enact the law.

Having stated my view as to the powers of a court when acting under section 17, I do not propose to endeavour to review the numerous decisions which were examined during the hearing. In cases which arise conclusion should, in my view, depart upon an analysis of particular facts and detailed evidence and upon an application of recognised legal principles. As to general principle I consider that guidance is to be found in the speeches in *National Provincial Bank Ltd. v. Ainsworth* (supra) (see the speeches of my noble and learned friends. Lord Hodson, pages 1220-1, Lord Upjohn, pages 1235-6 and Lord Wilberforce, pages 1245-6). It follows from all that I have said that I am in agreement with the approach of Russell L.J. expressed (at pages 497 and 498) in his judgment in *Jansen* v. *Jansen* [1965] P.478 and at page 691 in his judgment in *Bedson* v. *Bedson* [1965] 2 Q.B. 666. It further follows that I cannot with respect agree with the approach that led to the decision in *Appleton* v. *Appleton* [1965] 1 W.L.R. 25. I do not think that the mere circumstance taken by itself that one spouse does work of renovation to a house belonging to the other spouse has the result that some beneficial interest in the house is acquired by the former.

The facts in the case now under consideration bear a remarkable similarity to those in *Appleton* v. *Appleton* and I can fully appreciate how it was that the Court of Appeal with manifest reluctance and regret felt compelled to decide as they did. The facts are clearly recorded in the careful judgment of Willmer L.J. The events in relation to the first house need not now be examined. The second house, the bungalow which was built and was called Tinker's Cottage clearly belonged to the wife. The husband claimed that he had " undertaken work thereon" which had enhanced its value. He said that he had performed work and supplied material to a value of £723 and that the value of the bungalow had as a result been increased by

£1,000. He had done work of internal decoration and had built a wardrobe : he had done much work in the garden including the building of an ornamental well and a brick side wall. That was in the period after 1961. The parties lived together in the house until February, 1965 (when the wife left) and the husband continued to live there until March, 1967. By his Summons (in May, 1966) the husband claimed that it should be declared that he was " beneficially interested in the proceeds of sale " of the house in the sum of £1,000: he asked that his wife should be ordered to make payment to him of any sum found due to him; that, presumably, meant such sum as should be held to represent the increase in value of the house which resulted from the work that he had done. The conclusion of the learned Registrar was that the husband had a beneficial interest in the proceeds of sale of the house in the sum of £300 and he ordered the wife to pay that sum to him. My Lords, I do not think that this result can be upheld. The wife undoubtedly owned Tinker's Cottage when the parties went to live in it. The husband had no sort of title to it and never thought that he had. As Willmer L.J. pointed out, it had never been suggested that there was any subsequent agreement varying the rights of the parties and the assertion of the husband that he had acquired some beneficial interest could only be accepted if the Court could impute to the parties some common intention that the husband was to acquire an interest in the property commensurate with the value of the work which he did. I can see no justification for any such imputation. I agree with Willmer L.J. that in any event the work done by the husband (who without finding money to pay rent for a house was able to live in a house owned by his wife) did not go beyond what a reasonable husband might be expected to do. As Russell L.J. pointed out, the husband did not assert that there was any kind of bargain or understanding between him and his wife that he should ever be to any extent reimbursed or rewarded. It was solely because they felt bound by *Appleton* v. *Appleton* that the Court of Appeal upheld the order of the Registrar. As, for the reasons I have expressed, I disapprove of the approach in *Appleton* v. *Appleton* I am free to come to a different conclusion. I think that the husband had no claim.

I would, therefore, allow the appeal.

Lord Hodson

MY LORDS,

During the last year, so your Lordships were informed, 900 applications were made to the High Court, besides an unknown number in the County Courts, in connection with disputes between husbands and wives as to the ownership of property. That these disputes are difficult to resolve is plain enough, if only because of the special relationship between husband and wife. They do not as a rule enter into contracts with one another so long as they are living together on good terms. It would be very odd if they did.

An illustration, perhaps an extreme one, is provided by the case of *Balfour* v. *Balfour* [1919] 2 K.B. 571. There Sargant J. held that the parties who

were husband and wife had entered into a contract fixing the husband's obligation to maintain his wife during a temporary separation at £30 a month. Apart from the husband and wife relationship the judge's decision could hardly have been questioned, but the Court of Appeal used strong words in support of the proposition that mutual provisions made in the ordinary domestic relationship of husband and wife do not of necessity give cause for action on a contract. Atkin L.J. pointed out that these arrangements are not sued upon because the parties in the inception of the arrangement never intended that they should be sued upon. The *Balfour* decision has no direct bearing on the kind of situation which has arisen here but I think it rightly indicates that the Court will be slow to infer legal obligations from transactions between husband and wife in the ordinary course of their domestic life.

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The dispute concerns a house belonging to the Appellant who was the wife of the Respondent, and a claim by him that he should receive part of the proceeds of sale of the house on the ground that he has undertaken work on the house and garden which enhanced its value.

The Registrar made an order in favour of the Respondent that he had a beneficial interest in the proceeds of sale of the house in the sum of £300 and the Petitioner was ordered to pay this sum to him.

I agree with your Lordships that this case can be disposed of on the short ground that the husband does not become entitled to a share in the wife's property by occupying his leisure hours in the house or garden even though he enhances the value of the property. I, like my noble and learned friend, Lord Reid, agree with the view expressed by Lord Denning M.R. in the recent case of *Button* v. *Button* [1968] 1 All E.R. 1064 where he said with regard to a husband that he should not " be entitled to a share in the " house simply by doing the ' do-it-yourself ' jobs which husbands often do ". This is not only good law but good sense which, in my opinion, should normally be applied to this kind of situation.

In view of the wide issues canvassed it is, I think, insufficient to confine oneself to the facts of this case.

The proceedings were instituted under section 17 of the Married women's Property Act, 1882, which is the successor to section 9 of the Married Women's Property Act, 1870. The section of the earlier of these Acts provided, so far as is material:

> " In any question between husband and wife as to property declared
> " by this Act to be the separate property of the wife, either party may
> " apply ... to the Court of Chancery ... in England (irrespective
> " of the value of the property) the judge of the County Court . . . and
> " thereupon the judge may make such order ... as he shall think
> " fit ... and the judge may, if either party so require, hear the
> " application in his private room."

The section of the later Act which now prescribes the method of deciding questions between husband and wife in a summary way is much longer but, so far as material, is to the same effect and likewise enjoins the judge to hear the application in private if either party so requires.

The discretionary words " as he shall think fit" appear in both sections and were discussed at length in this House in *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. page 1175. That case was concerned with consideration of what was called " the deserted wife's equity" and is not,

therefore, a decision of this House on the extent of the discretion to be exercised under section 17.

The matter has now been again fully argued and the same authorities, with some additional ones, have been considered, together with the relevant statutes which preceded the Act of 1882, and I would only say that I adhere to the opinions expressed in the *National Provincial Bank* case, in effect reaffirming the language of Romer L.J. in *Cobb* v. *Cobb* [1955] 1 W.L.R. 731 when he said:

> " I know of no power that the Court has under section 17 to vary
> " agreed or established titles to property. It has power to ascertain
> " the respective rights of husband and wife to disputed property, and
> " frequently has to do so on very little material; but where, as here, the
> " original rights to property are established by the evidence, and those
> " rights have not been varied by subsequent agreement, the court cannot,
> " in my opinion, under section 17 vary those rights merely because it
> " thinks that in the light of subsequent events the original agreement
> " was unfair."

This view has not been universally held and the difficult cases alluded to by Romer L.J. may have had some influence in bringing Lord Denning M.R. to the view that the discretionary language of the section could be used to override the rights of the parties where family assets were concerned. In *Hine* v. *Hine* [1962] 1 W.L.R. 1124 at page 1127 he said:

> " It seems to me that the jurisdiction of the Court over family assets
> " under section 17 is entirely discretionary. Its discretion transcends

> " all rights, legal or equitable, and enables the Court to make such order
> " 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."

To use the language of Coke, this would be to substitute the uncertain and crooked cord of discretion for the golden and straight metwand of the law (Fourth Institute, page 41). This interpretation, moreover, would, if correct, lead to the anomalous result that the jurisdiction of the Court would vary according to the forum chosen by the litigant. It is not suggested that there is a general discretion in this respect in all proceedings between husband and wife wherever taken, although it is true that their special relationship has always to be taken into account. An illustration is to be found in the case of *Shipman* v. *Shipman* [1924] 2 Ch. 140. There a wife obtained an injunction restraining her husband from living in her house which had formed the matrimonial home. It was argued that this was tantamount to pronouncing a judicial separation but the decision was upheld in the Court of Appeal in the special circumstances. The section 17 discretion is valuable in protecting the matrimonial relationship in appropriate cases by summary procedure. A wife's occupation of the home may need protection until her husband provides her with another. (See *Lee* v. *Lee* [1952] 2 Q.B. 489.) As Russell L.J. pointed out in *Wilson* v. *Wilson* [1963] 1 W.L.R. 601 at page 611:

> " It seems to me that the legal and equitable title of a husband
> " is not absolute but is, vis-à-vis his wife, limited in that in general
> " law he has not an absolute right to eject the wife. The refusal to
> " order possession under section 17 is, therefore, not the overriding
> " of an unassailable title but the recognition of a defect in the title."

After the opinions expressed in the *National Bank* case the absence of an unfettered discretion was accepted (see *Bedson* v. *Bedson* [1965] 2 Q.B. 666 per Denning M.R. at page 677) but a different approach was made which appears to me to lead to the same result as that reached by the discretionary road. This leads me to consider the problem which arises in many of these cases and in particular to the case of *Appleton* v. *Appleton* [1965] 1 W.L.R. 25 followed reluctantly by the Court of Appeal in the present case.

Appleton's case was one in which the husband had voluntarily improved his wife's property and it was held by the Registrar that such action, in the absence of bargain or expressed intention to the contrary, gave him no interest in either the property or the proceeds of sale. I should interpolate by stating that these matters are now dealt with by the Registrar and not by the judge in chambers (Matrimonial Causes Rules 1959, rule 77). On appeal to the Court of Appeal Lord Denning M.R. said that the work was done in the matrimonial home for the sake of the family as a whole. He went on to say:

" In these circumstances, it is not correct to look and see whether
" there was any bargain in the past, or any expressed intention. A
" judge can only do what is fair and reasonable in the circumstances.
" Sometimes this test has been put in the cases: What term is to be
" implied? What would the parties have stipulated had they thought
" about it? That is one way of putting it. But, as they never did
" think about it at all, I prefer to take the simple test: What is reason-
" able and fair in the circumstances as they have developed, seeing
" that they are circumstances which no one contemplated before? "

The learned Master of the Rolls went on to award to the husband a percentage of the proceeds of sale of the house commensurate with the enhancement due to his work on improvement.

This case preceded the decision in the *National Provincial Bank* case and has been followed in the present case as not having been formally over-ruled.

Respecting, as I do, the feeling of the learned Master of the Rolls that this legal fiction that a contract is to be implied which contained a term

covering an unpremeditated situation is not attractive, I am left with a decision which rests on the phrase noted by the Registrar and taken from *Appleton's* case " A judge can only do what is fair and reasonable in the " circumstances ". This is surely unfettered discretion.

In *Jansen's* case [1965] P.478 on somewhat similar facts the learned Master of the Rolls took the view, which I accept, that *Appleton's* case had not been expressly overruled. I do not however think that the special facts of *Jansens* case justify the decision. No agreement was reached between the husband and the wife as to any payment to be made to the former by the latter for improvements made upon the wife's property. The husband had no interest in the property and the result was reached by the majority of the Court of Appeal by exercising an unfettered decision.

I must refer to the expression " family assets " used by the learned Master of the Rolls in *Hine's* case (supra) and in a previous case of *Fribance* v.

Fribance [1957] 1 W.L.R. 387 and subsequently by my noble and learned friend, Lord Diplock, (then Diplock L.J.) in *Ulrich* v. *Ulrich* [1968] 1 AH E.R. page 68, a case of variation of marriage settlement under the Matrimonial Causes Act, 1965, section 17, approved by the learned Master of the Rolls in another unreported case of *Gissing* v. *Gissing* dated 18th February, 1969. I cite a passage from my noble and learned friend's judgment at page 72, making general observations on married women's property:

> " When these young people pool their savings to buy and equip a
> " home or to acquire any other family asset, they do not think of this
> " an an ' anti-nuptial' or ' post-nuptial' settlement, or give their minds
> " to legalistic technicalities of ' advancement' and ' resulting trusts.'
> " Nor do they normally agree explicitly what their equitable interests
> " in the family asset shall be if death, divorce or separation parts
> " them. Where there is no explicit agreement, the Court's first task
> " is to infer from their conduct in relation to the property what their
> " common intention would have been had they put it into words before
> " matrimonial differences arose between them. In the common case
> " today, of which the present is a typical example, neither party to
> " marriage has inherited capital, both are earning their living before
> " marriage, the wife intends to continue to do so until they start having
> " children. They pool their savings to buy a house on mortgage in the
> " husband's name or in joint names and to furnish and equip it as the
> " family home. They meet the expenses of its upkeep and improve-
> " ment and the payments of instalments on the mortgage out of the
> " family income, to which the wife contributes so long as she is earning.
> " In such a case, the *prima facie* inference from their conduct is that
> " their common intention is that the house, furniture and equipment
> " should be family assets ..."

This solution has the attraction that it appears to narrow the field so as to avoid giving the judge an uncontrolled discretion simply indicating that he may deal with property rights of either spouse by calling specific property family assets and that he may then exercise his discretion in the light of that decision. It is open to the objection, to which the Master of the Rolls adverted in *Hine's* case (supra), in so far as it rests on a fictional intention or agreement which the parties might have adopted if they had thought of a breakdown of their marriage. Apart from the difficulty of inferring a contract where none has been made, no agreement between husband and wife for future separation can be recognised and the breakdown of a marriage has no automatic effect on existing rights. 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 had thought of making an agreement.

The notion of family assets itself opens a new field involving change in the law of property whereby community of ownership between husband

and wife would be assumed unless otherwise excluded. This is a matter of policy for Parliament and I agree is outside the field of judicial inter-

pretation of property law. I do not think the decision in *Appleton's* case can be supported on this basis or indeed on any other.

Cases in which the parties have made purchases of property by contributing in equal or unequal proportions have not caused difficulty. The common intention of the parties is fulfilled without any specific agreement having been made or required. An illustration is provided by the case of *Rimmer* v. *Rimmer* [1953] 1 K.B. 63 where the contributions were uncertain and resort was had to the maxim " equality is equity " and thus a decision was reached. The decision depends in no way on an agreement, expressed or implied.

It is, of course, true that following the strict rights of the parties to ownership of property may have unhappy results but the traffic is not all one way. If a wife is left by her husband she may not establish any claim on his property by calling it a family asset but as the law stands at present she will have a right to apply for a maintenance order against him for herself and any children who are in her care. I agree that the case put by Lord Diplock is common and typical to-day. There is also, of course, the common case where the parties work together in harmony to build up their home. The wife who had earned a substantial income before marriage gives up her work and devotes herself to the management of the house, her husband and children to the exclusion of all else. The husband prospers and buys a house, car and various household goods such as machinery of a labour-saving character. They do not, in my opinion, *ipso facto* become family assets of which the wife is part owner. If this seems hard it is in part compensated by the liability to maintain his wife which the law imposes on a husband. This common situation was illustrated recently in a picturesque manner by the learned President of the Probate Divorce and Admiralty Division, in an extra-judicial address. He said:

> " The cock can feather the nest because he does not have to spend " most of his time sitting on it."

I do not myself see how one can correct the imbalance which may be found to exist in property rights as between husband and wife without legislation.

This particular case is not concerned with contributions as such, it is concerned with improvements, and although I recognise, as my learned and noble friend, Lord Reid, points out, there is but a fine distinction between contributions to the purchase of property and improvements subsequently made thereto which increase its value, 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.

No doubt there are many scores of cases where married persons acquire a house and do all the necessary work by way of decoration and improvement themselves. It could hardly be otherwise, as none but the wealthy can to-day afford the cost of employing independent contractors on their private affairs.

Reference has been made to the " presumption of advancement" in favour of a wife in receipt of a benefit from her husband. In old days when a

wife's right to property was limited, the presumption no doubt had great importance and today, when there are no living witnesses to a transaction and inferences have to be drawn, there may be no other guide to a decision as to property rights than by resort to the presumption of advancement. I do not think it would often happen that when evidence had been given, the presumption would today have any decisive effect.

I agree that this appeal be allowed.

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Lord Upjohn

MY LORDS,

The first and most fundamental question in this appeal depends upon the true scope of section 17 of the Married women's Property Act, 1882, that is whether that section gives to the court exercising the jurisdiction of that section a discretion in relation to the property of husband and wife to do what is fair between them notwithstanding their proprietary interests, or whether the section is only a procedural section, intended merely to provide for a cheap, private and speedy forum for the solution of difficulties between husband and wife as to their respective proprietary interests. This House has already considered the question, though not as a matter of decision, in the case of *National Provincial Bank Limited* v. *Ainsworth* [1965] A.C. 1175 where we considered, I think, all or nearly all the earlier authorities. I there expressed myself (at pages 1235C-1236C) in favour of the view that the section was no more than a procedural section which gave courts, including the then fairly new county courts, a discretion to decide on these matters but did not give the court a discretion to do what was merely fair and just between the spouses. I stated my views at some length and I do not propose to repeat them: but we have now had a more detailed examination of those authorities than was necessary in that case, and of course we have been referred to the numerous cases that have since been decided. We have also been referred to the Married Women's Property Act, 1870, where a section similar to section 17 first appeared. That reference, to my mind, has been helpful. That Act, in sections 2 to 7 inclusive, declared that certain types of property, deposits in banks, investments in the funds in joint stock companies, in industrial and provident societies and after acquired property (subject to certain limitations) acquired by a married woman should be deemed to be her separate property, but each section contained a proviso that if the married woman had obtained the property by means of her husband's money without his consent then the Court, on an application under section 9 of the Act, might order a transfer of such property to the husband. Section 9, which was plainly the forerunner of section 17, then provided that in any question between husband and wife as to the separate property of the wife, either spouse might apply to the court and the judge " may make such order direct such inquiry and award such " costs as he shall think fit". Plainly the words " as he shall think fit" were not intended to give him a general discretion merely to do what he on general grounds thought fair and just but to give him a discretion to decide what might be very difficult questions between husband and wife as to what was her separate property and whether such property had been obtained by her husband's monies without his consent.

That language was substantially repeated in section 17, and the draftsmen of that Act again appreciated that some discretion must be conferred upon the court to determine the very difficult questions of title that might arise between husband and wife, but in my opinion that language did no more than confer a discretion to determine the title. It was also necessary to confer upon the court a discretion to determine questions of possession of the matrimonial home because apart altogether from questions of title to the home the duty of the spouses to live together must be an important element. This, in my opinion, is the explanation of the words giving the court jurisdiction " to make such order with respect to the property in " dispute ... as he thinks fit ".

It is in any event, in my opinion, inconceivable in a Statute in the eighteen seventies or eighties to suppose that Parliament intended to give a general discretion to the judge (including a County Court judge) to determine questions with regard to the respective properties of husband and wife otherwise than in accordance with their respective proprietary titles ascertain upon well established principles of law and equity.

Nor can the meaning of the Statute have changed merely by reason of a change in social outlook since the date of its enactment; it must continue to

bear the meaning which upon its true construction in the light of the relevant surrounding circumstances it bore at that time.

These considerations reinforce the observations in relation to the true purpose of section 17 that I made in the *Ainsworth* case (supra). Nothing in the cases that have been decided since causes me to alter the views I there expressed.

In my view, section 17 is a purely procedural section which confers upon the judge in relation to questions of title no greater discretion than he would have in proceedings begun in any Division of the High Court or in the County Court in relation to the property in dispute, for it must be remembered that apart altogether from section 17, husband and wife could sue one another even before the 1882 Act over questions of property ; so that, in my opinion, section 17 now disappears from the scheme and 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.

In the first place, the beneficial ownership of the property in question must depend upon the agreement of the parties determined at the time of its acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest that necessarily concludes the question of title as between the spouses for all time, and in the absence of fraud or mistake at the time of the transaction the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage.

The observations of Davies L.J. in *Bedson* v. *Bedson* [1965] 2 Q.B. 665 at page 685 were plainly made only upon the footing that section 17 had

the wider construction.

But the document may be silent as to the beneficial title. The property may be conveyed into the name of one or other or into the names of both spouses jointly in which case parol evidence is admissible as to the beneficial ownership that was intended by them 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 are called the presumptions come into play. They 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 opinion that they remain as useful as ever in solving questions of title.

First, then, in the absence of all other evidence, if the property is conveyed into the name of one spouse at law that will operate to convey also the beneficial interest and if conveyed to the spouses jointly that operates to convey the beneficial interest to the spouses jointly, i.e. with benefit of survivorship, but it is seldom that this will be determinative. It is far more likely to be solved by the doctrine of resulting trust, namely, that in the absence of evidence to the contrary if the property be conveyed into the name of a stranger he will hold it as trustee for the person putting up the purchase money and if the purchase money has been provided by two or more persons the property is held for those persons in proportion to the purchase money that they have provided.

My Lords, all this is trite law but I make no apology for citing the judgment of Eyre C.B. in 1788 in the leading case of *Dyer v. Dyer 2* Cox 92 set out in full in White and Tudor's Leading Cases in Equity 9th edition Vol. II page 749—

> ' 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 names 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.* This is a general proposition,
> " supported by all the cases, and there is nothing to contradict it; and
> " it goes on a strict analogy to the rule of the common law, that where
> " a feoffment is made without consideration, the use results to the
> " feoffor. It is the established doctrine of a Court of equity, that this
> " resulting trust *may be rebutted* by circumstances in evidence.
>
> " The cases go one step further, and prove that *the circumstance of*
> " *one or more of the nominees being a child or children of the pur-*
> " *chaser, is to operate by rebutting the resulting trust;* and it has been
> " determined in so many cases that the nominee being a child shall
> " have such operation as a circumstance of evidence, that we should
> " be disturbing land-marks if we suffered either of these propositions
> " to be called in question, namely, that such circumstance shall rebut
> " the resulting trust, and that it shall do so as a circumstance of
> " evidence."

The remarks of Eyre C.B. in relation to a child being a nominee are

equally applicable to the case where a wife is the nominee. Though normally referred to as a presumption of advancement it is no more than a circumstance of evidence which may rebut the presumption of resulting trust. And the learned editors of White and Tudor were careful to remind their readers, that (at page 763) "all resulting trusts which arise simply from " equitable presumptions may be rebutted by parol evidence . . .". This doctrine applies equally to personalty.

These presumptions or circumstances of evidence are readily rebutted by comparatively slight evidence ; let me give one or two examples.

In *Gooch v. Gooch* 62 L.T. 384 a father, purchased in his son's name stock in a certain company more than sufficient to qualify the son to be a director of the company but the father kept the relative certificates in an envelope on which he had written " belonging to me " ; held presumption of gift rebutted.

In *Fowkes* v. *Pascoe* L.R. 10 Ch. A. 343 a rich lady, having some stocks in her own name, put some more of the same stock into the name of one who was in law a stranger but in fact the son by a subsequent marriage of the lady's former daughter-in-law. Held that as in the circumstances there can have been no conceivable reason for putting the stock in his name as nominee, the presumption of resulting trust was rebutted and the stocks were a gift to him. Then, as between husband and wife, the law is clearly settled and was well stated by Malms V.C. in *Re Eykyns Trust* 6Ch. D. 115 at page 118:-

> " The law of this Court is perfectly settled that when a husband
> " transfers money or other property into the name of his wife only,
> " then the presumption is, that it is intended as a gift or advancement
> " to the wife absolutely at once, subject to such marital control *as*
> " he may exercise. And if a husband invests money, stock, or other-
> " wise, in the names of himself and his wife, then also it is an
> " advancement for the benefit of the wife absolutely if she survives
> " her husband, but if he survives her, then it reverts to him as joint
> " tenant with his wife."

So in such a case as a practical matter where the property is in joint names the presumption is in effect no more than a joint beneficial tenancy.

Then in *Re Young* 28 Ch. D. 705 the spouses, who died within five days of one another, had opened a joint account mainly contributed to by the wife, principally, but not only, for housekeeping expenses, but with the consent of the wife (as Pearson J. held) the husband drew on the joint account to make substantial investments in his own name alone. Held that the joint account belonged beneficially to the spouses jointly and so passed to the survivor by survivorship but that the investments purchased by the husband in his own name (there being no evidence that he was thereby acting as a trustee) belonged to his estate. This sound principle has recently been followed in *Re Bishop* [1965] Ch. 450.

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So that, in the absence of all evidence, if a husband puts property into his wife's name he intends it to be a gift to her but if he puts it into joint names then (in the absence of all other evidence) the presumption is the same as a joint beneficial tenancy. If a wife puts property into her husband's name it may be that in the absence of all other evidence he is a trustee for her but in practice there will in almost every case be some

explanation (however slight) of this (today) rather unusual course. If a wife puts property into their joint names I would myself think that a joint beneficial tenancy was intended, for I can see no other reason for it.

But where both spouses contribute to the acquisition of a property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners and this is so whether the purchase be in the joint names or in the name of one. This is the result of an application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of evidence enabling the wife to claim an advancement to her, for it is against all the probabilities of the case unless the husband's contribution is very small.

Whether the spouses contributing to the purchase should be considered to be equal owners or in some other proportions must depend on the circumstances of each case. See *Rimmer* v. *Rimmer* [1953] 1 Q.B. 63 and many other cases, but for very good reasons for treating the spouses on an equality when one puts up the deposit and the other assumes liability for the Building Society mortgage. See *Ulrich* v. *Ulrich* [1968] I A.E.R. 67, per Lord Denning at page 70 and Diplock L.J. (as he then was) at page 72.

But if a spouse purchases property out of his or her own money and puts it into his or her own name then (in the absence of evidence) I can see absolutely no reason for drawing any inference save that it was to be the property of that spouse : bought of course for the common use or common occupation during the marriage, but if sold during the marriage the proceeds belong to the purchasing spouse as does the property upon termination of the marriage whether brought about by death or divorce.

My Lords, during argument there was much reference to the well-known case of *Balfour v. Balfour* [1919] 2 K.B. 571. That case illustrates the well-known doctrine that in their ordinary day-to-day life spouses do not intend to contract in a legally binding sense with one another, though I am bound to confess that in my opinion the facts of that case stretched that doctrine to its limits. The doctrine has, in my opinion, little if any application to questions of title to the property of the spouses, at all events to property of the magnitude we are now considering.

Then in some of the recent cases, before the true scope of section 17 was resolved, a number of judicial observations have been made to the effect that when a marriage is broken it is the function of the court to fill in the gap by doing what the parties as reasonable spouses would have agreed was to happen on the break-up had they thought about it. This cannot be right; apart from the fact that an agreement as to the results of a future separation or divorce is void as being contrary to public policy it is clear that the court can only ascertain the title to property by considering the circumstances at the time of acquisition and in the absence of positive evidence by applying the presumptions I have discussed above. This decides the question of title for all times and in all circumstances and there is no gap to be filled. Nor can this matter be affected by the fact that looking backwards after many years it may seem to have been unfair *(Cobb* v. *Cobb* [1955] 1 W.L.R. 731). Evidence of facts and circumstances subsequent to the acquisition is relevant only where—(1) it is desired to prove title by reason of the subsequent conduct of the parties or (2) it is alleged there has been some subsequent agreement affecting title

to the property.

My Lords, in some recent cases the expression " family assets " has been used. It has been said that young people today do not give their minds

to legalistic technicalities of advancements and resulting trusts; neither did they in 1788 and it is only because they did not do so then that these presumptions were invented because that represented the common sense of the matter and what the panties, had they thought about it, would have intended. In my opinion, today it still represents the common sense of the matter and what the parties would have agreed had they thought about it.

But these recent cases seek to impose upon the courts the idea that in the case of " family assets ", where both parties are earning and their joint earnings purchase property, there is a special principle leading to a different conclusion.

This does not depend upon the existence of a common banking account. In the very recent case in the Court of Appeal of *Re Gissing* heard on 18th February, 1969, of which your Lordships have been supplied with a transcript, Lord Denning M.R. stated it thus in his judgment: —

> " This depends on whether it is a family asset. This principle has
> " been frequently stated. I tried to do it myself in *Fribance v. Fribance*
> " [1957] 1 W.L.R. at page 387, but it has been much better done by
> " Lord Justice Diplock (as he then was) in *Ulrich* v. *Ulrich* [1968]
> " 1 W.L.R. at page 189. It comes to this: where a couple, by their
> " joint efforts, get a house and furniture, intending it to be a continuing
> " provision for them for their joint lives, it is the *prima facie* inference
> " from their conduct that the house and furniture is a ' family asset'
> " in which each is entitled to an equal share. It matters not in whose
> " name it stands: or who pays for what: or who goes out to work and
> " who says 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."

My Lords, we have in this country no doctrine of community of goods between spouses and yet by judicial decision were this doctrine of family assets to be accepted some such a doctrine would become part of the law of the land. I do not myself believe it accords with what the parties intended even if *sub silentio* or would regard as common sense. Let us suppose the wife buys a motor-car for the family use out of her earnings ; according to the doctrine it belongs to the spouses jointly. Then the husband goes bankrupt (the astonishing number of 8,510 in 1967 did) and she finds the trustee in bankruptcy claiming an interest in the car. Or the husband, out of a substantial bonus received from his employers, buys in his name as a family asset a little holiday home for the family in the country. On the unexpected death of his wife he pays estate duty on a moiety, and of course that moiety may pass away possibly to her side of the family under some residuary gift in her Will. My Lords, in my opinion the expression " family " assets " is devoid of legal meaning and its use can define no legal rights or obligations. Of course, if it appears from the evidence that the parties in fact did agree to pool their assets into one jointly owned fund, that is a

different matter, but that must be a question of fact in each case. In the absence of such agreement I would prefer to rely upon the well established principles which will give rise to no such absurd results and which principles, I repeat, represent the commonsense of the matter and what the average couple intend had they expressed their intentions. If there is to be a change that must be done by Parliament.

Furthermore, on the making of a decree of divorce the court has ample statutory power to do what is fair in the way of varying the marriage settlement and settling the guilty wife's property, e.g. see section 17 of the Matrimonial Causes Act, 1965, which makes this alleged doctrine of family assets quite out of place.

My Lords, the facts of this case depend not upon the acquisition of property but upon the expenditure of money and labour by the husband in the way of improvement upon the property of the wife which admittedly is her own beneficial property. Upon this it is quite clearly established that by the law of England the expenditure of money by A upon the property

of B stands in quite a different category from the acquisition of property by A and B.

It has been well settled in your Lordships' House *(Ramsden v. Dyson* L.R.1 H.L. 129) that if A expends money on the property of B, *prima facie* he has no claim on such property. And this, as Sir William Grant held as long ago as 1803 in *Campion* v. *Cotton* 17 Ves. 263, is equally applicable as between husband and wife. If by reason of estoppel or because the expenditure was incurred by the encouragement of the owner that such expenditure would be rewarded, the person expending the money may have some claim for monetary reimbursement in a purely monetary sense from the owner or even, if explicitly promised to him by the owner, an interest in the land (see *Plimmer* v. *Mayor of Wellington* 9 A.C. 699). But the Respondent's claim here is to a share of the property and his money claim in his plaint is only a qualification of that. Plainly, in the absence of agreement with his wife (and none is suggested) he could have no monetary claim against her and no estoppel or mistake is suggested so, in my opinion, he can have no charge upon or interest in the wife's property.

It may be that as counsel for the Queen's Proctor quite rightly pointed out this case could be decided somewhat on the *Balfour* v. *Balfour (supra)* principle, that the nature of the work done was of the type done by husband and wife upon the matrimonial home without giving the worker a legal interest in it. See *Button* v. *Button* [1968] 1 A.E.R. 1064. But I prefer to decide this appeal upon the wider ground that in the absence of agreement, and there being no question of any estoppel, one spouse who does work or expends money upon the property of the other has no claim whatever upon the property of the other. *Jansen* v. *Jansen* [1965] P. 478 was a very good example of that type of case. The husband, putting it briefly, spent his life making very substantial improvements upon the properties of the wife which greatly increased their value as reflected in their sale price. The wife recognised that as between husband and wife he should receive some benefit and instructed her solicitor to draw up an agreement whereby he was to receive monetary recompense from the proceeds of sale of one of the properties he had improved when such sale was effected. The husband refused to accept this so the parties in fact and in law never did agree. In those circumstances it seems to me clear that the husband had no claim

against the wife even personally and certainly no claim against the property itself either by way of charge or by way of a share in the property. In my opinion *Jansen* v. *Jansen* was wrongly decided.

My Lords, for these reasons I would allow this appeal.

Lord Diplock

MY LORDS,

I agree with all your Lordships that this appeal should be allowed, but in expressing my reasons for doing so I find it necessary to examine the legal principles applicable to the determination of questions between husband and wife as to the title to what in recent decisions of the Court of AppeaJ have been described as " family assets ". This expression I understand to mean property, whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for the common use and enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels. It does not include property acquired by either spouse before the marriage but not in contemplation of it.

Questions between husband and wife as to the title to or possession of property can be dealt with under the summary procedure provided for by section 17 of the Married Women's Property Act, 1882. They generally are, and such was the procedure adopted in the present case. But they may also arise in ordinary actions between spouses or former spouses for a declaration of rights, for possession of a former matrimonial home or, since

the Married Women's Property Act, 1964, for detinue or for conversion of chattels.

In numerous judgments of the Court of Appeal during the last twenty years this branch of the law of property has undergone considerable development. The cases start with *In re Rogers' Question* (1948) 1 AH E.R. 328 and end with *Gissing v. Gissing,* an unreported judgment of the Court of Appeal delivered while the present appeal was being heard by your Lordships' House. They manifest a divergence of views among the members of the Court of Appeal as to the origin and extent of the Court's powers in dealing with questions of title to property between spouses and as to the principles on which such powers should be exercised ; but although some of these cases were commented upon by members of your Lordships' House in *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175, the present appeal is the first in which your Lordships have had the opportunity and duty of examining and, if necessary, correcting the recent developments by the Court of Appeal of this branch of the law. And a very important branch it is. It affects every married couple. We are informed that in the High Court alone there are some 900 applications a year under section 17 of the Married Women's Property Act, 1882, and this figure takes no account of applications in the County Court which also has jurisdiction under the section. On a matter of such general social importance the principles applied by the Courts in exercising their jurisdiction ought to be clear.

In some of the judgments of the Court of Appeal it is stated that section 17 itself gives to the Court a free hand to do whatever it thinks just as respects the title to family assets. This view reaches its high-water mark in the judgment of Lord Denning in *Hine* v. *Mine* [1962] 1 W.L.R. 1124 where he said (at pp. 1127/8) "It seems to me that the jurisdiction of the court " over family assets under section 17 is entirely discretionary. Its discretion " transcends all rights, legal or equitable, and enables the court to make such " order as it thinks fit". Since your Lordships' decision in *National Provincial Bank Ltd.* v. *Ainsworth* (ubi. sup.), the tide has receded. It is no longer claimed that where the proprietary rights of spouses in any property which is a family asset can be clearly ascertained the court has any jurisdiction to vary agreed or established titles. See *Jansen* v. *Jansen,* [1965] p. 478 at p. 488, where Lord Denning M.R. accepted this limitation on the powers of the court under section 17, which had previously been laid down by Romer L.J. in *Cobb v. Cobb* [1955] 1 W.L.R. 731 at p. 736. But since husband and wife while still happily married seldom make and record any express agreement as to the title of family assets which are acquired as a result of their concerted action this still leaves a wide area in which the court could exercise an unfettered discretion to deal with the title in whatever way it thinks just in the circumstances as they exist at the time of the court's determination, which is generally after the break up of the marriage. "I prefer", said Lord Denning M.R. in *Appleton* v. *Appleton* [1965] 1 W.L.R. 25 " to take " the simple test: What is fair and reasonable in the circumstances as they " have developed seeing that they are circumstances which no-one " contemplated before ".

The first question, therefore, is whether section 17 of the Married Women's Property Act, 1882, does give to the court any power to create or vary the proprietary rights of husband or wife in family assets as distinct from ascertaining and declaring their respective proprietary rights which already exist at the time of the court's determination.

I agree with your Lordships that the section confers no such power upon the Court. It is, in my view, a procedural section. It provides a summary and relatively informal forum which can sit in private for the resolution of disputes between husband and wife as to the title to or possession of any property—not limited to " family assets " as I have defined them. It is available while husband and wife are living together as well as when the marriage has broken up. The power conferred upon the judge " to make such order with respect to the property in dispute ... as he " shall think fit", gives him a wide discretion as to the enforcement of

the proprietary or possessory rights of one spouse in any property against the other but confers upon him no jurisdiction to transfer any proprietary interest in property from one spouse to the other or to create new proprietary rights in either spouse.

The proposition that the section confers upon the court a discretion wider than that which I have indicated could, it seems to me, only be tenable if it were under this section alone that the title of spouses to property could have been determined after the passing of the Act in 1882. But this is not the case. Even before the first Married Women's Property Act of 1870 questions of title to property of spouses could arise in claims by

execution creditors, trustees in bankruptcy and mortgagees (see *Hewison* v. *Negus* (1863) 16 Beav. 594), or in proceedings in Chancery between the spouses themselves. Although neither spouse could bring an action against the other at common law upon a contract made between them, such contracts, if relating to the wife's estate settled to her separate use, could be enforced by equitable remedies in the Court of Chancery (see *Woodward* v. *Woodward* (1863) 3 De G.J. & S. 672). This jurisdiction, transferred to the High Court of Justice by the Judicature Act, 1873, was not abolished by the Married Women's Property Acts of 1870 or 1882 and it can hardly be supposed that Parliament intended that the title of spouses to property should be different if one procedure for determining it were adopted instead of another.

The history of the legislation, too, supports this. The predecessor of section 17 of the Act of 1882 is section 9 of the Act of 1870. That Act declared that the earnings of a married woman, and various bank deposits, shares and other kinds of personal property should be the separate property of a wife. The summary procedure under section 9 was available " In any " question between husband and wife as to any property *declared by this* " *Act* to be the separate property of the wife", and the discretion conferred upon the judge was in the same terms as in section 17 of the Act of 1882, viz., to " make such order ... as he shall think fit". It would be quite impossible to construe these words as conferring upon the judge a jurisdiction to make an order declaring the title to any property which was in conflict with what the Act itself declared. Furthermore, even in the Act of 1870 the wife was given by section 11 an alternative remedy by way of action " for the recovery of any wages, earnings, money and property " by this Act declared to be her separate property ", and this new remedy in the ordinary courts of common law was additional to her previously existing remedy in the Court of Chancery.

The Act of 1882 made a wife capable of acquiring, holding and disposing of any real or persona1 property as her separate properly and to enter into contracts with respect to and binding her separate property. The summary procedure, first introduced by section 9 of the Act of 1870, was extended by section 17 to "any question between husband and wife as to " the title to or possession of property ", and the right to sue for the protection and security of her own separate property was similarly extended by section 12. Under this latter section a wife could sue her husband upon a contract relating to her separate property. She was not confined to her remedy under section 17. (See *Butler* v. *Butler* (1884) 14 Q.B.D. 831.)

I conclude, therefore, that in determining a question of title to property in proceedings between husband and wife under section 17 the Court has no power to apply any different principles from those which it applies to the same question in any other proceedings. It must decide them according to law.

What, then, is the law? Ever since 1882 husband and wife have had the legal capacity to enter into transactions with one another, such as contracts, conveyances and declarations of trust so as to create legally enforceable rights and obligations, provided that these do not offend against the settled rules of public policy about matrimonial relations. Where spouses have done so, the Court has no power to ignore or alter the rights and obligations so created, though the court in the exercise of the discretion which it always has in respect of its own procedure may in an appropriate case

where a matrimonial suit between the spouses is pending or contemplated adjourn the hearing or defer making an order for the enforcement of the right until the spouses have had an opportunity of applying for ancillary relief in that suit under the provisions of Part III of the Matrimonial Causes Act, 1965, which do confer power upon the Court to vary proprietary rights, upon granting a decree of divorce.

But it is comparatively rarely that husband and wife enter into any express agreement as to the proprietary rights which are to subsist in " family " assets" acquired or improved while they are living or contemplating living happily together. Yet any such acquisition or improvement must have some legal consequences. Family assets are not *res nullius*. When a " family asset" is first acquired from a third party the title to it must vest in one or other of the spouses, or be shared between them, and where an existing family asset is improved this, too, must have some legal consequence even if it is only that the improvement is an accretion to the property of the spouse who was entitled to the asset before it was improved. Where the acquisition or improvement is made as a result of contributions in money or money's worth by both spouses acting in concert the proprietary interests in the family asset resulting from their respective contributions depend upon their common intention as to what those interests should be.

I have used the neutral expression " acting in concert" because many of the ordinary domestic arrangements between man and wife do not possess the legal characteristics of a contract. So long as they are executory they do not give rise to any chose in action for neither party intended that non-performance of their mutual promises should be the subject of sanctions in any court (see *Balfour v. Balfour* [1919] 2 K.B. 571). But this is relevant to non-performance only. If spouses do perform their mutual promises (he fact that they could not have been compelled to do so while the promises were executory cannot deprive the acts done by them of all legal consequences upon proprietary rights; for these are within the field of the law of property rather than of the law of contract. It would, in my view, be erroneous to extend the presumption accepted in *Balfour* v. *Balfour* that mutual promises between man and wife in relation to their domestic arrangements are *prima facie* not intended by either to be legally enforceable to a presumption of a common intention of both spouses that *no* legal consequences should flow from acts done by them in performance of mutual promises with respect to the acquisition, improvement or addition to real or personal property—for this would be to intend what is impossible in law.

How, then, does the Court ascertain the " common intention " of spouses as to their respective proprietary interests in a family asset when at the time that it was acquired or improved as a result of contributions in money or money's worth by each of them they failed to formulate it themselves? It may be possible to infer from their conduct that they did in fact form an actual common intention as to their respective proprietary interests and where this is possible the Courts should give effect to it. But in the case of transactions between husband and wife relating to family assets their actual common contemplation at 'the time of its acquisition or improvement probably goes no further than its common use and enjoyment by themselves and their children, and while that use continues their respective proprietary interests in it are of no practical importance to them. They only become

of importance if the asset ceases to be used and enjoyed by them in common and they do not think of the possibility of this happening. In many cases, and most of those which come before the courts, the true inference from the evidence is that at the time of its acquisition or improvement the spouses formed no common intention as to their proprietary rights in the family asset. They gave no thought to the subject of proprietary rights at all.

But this does not raise a problem which is peculiar to transactions between husband and wife. It is one with which the courts are familiar in connection with ordinary contracts and to its solution they apply a familiar legal technique. The common situation in which a court has to decide whether or not a term is to be implied in a contract is when some event has happened for which the parties have made no provision in the contract because at the

time it was made neither party foresaw the possibility of that event happening and so never in fact agreed as to what its legal consequences would be upon their respective contractual rights and obligations. Nevertheless the court imputes to the parties a common intention which in fact they never formed and it does so by forming its own opinion as to what would have been the common intention of reasonable men as to the effect of that event upon their contractual rights and obligations if the possibility of the event happening had been present to their minds at the time of entering into the contract. In *Davis Contractors Ltd.* v. *Fareham U.D.C.* [1956] A.C. 696 Viscount Radcliffe analyses this technique as applied to cases of frustration. See also Professor Glanville Williams's analysis of the legal doctrine of implied terms in "Language and the Law" (61 L.Q.R. p. 401).

In applying the technique to contracts the court starts with the assumption that *prima facie* the parties intended that whatever may happen their legal rights and obligations under their contract should be confined to those which they have expressed. Consequently the court will not imply a term unless it is of opinion that no reasonable men could have failed to form the common intention to which effect will be given by the term which it implies. But such an assumption, viz., that *prima facie* the parties intended at the time of the transaction to express all the legal consequences as to proprietary rights which would flow from it, whatever might happen in the future, is, for the reasons already indicated, inappropriate to transactions between husband and wife in relation to family assets. In most cases they express none and form no actual common intention about proprietary rights in the family asset because neither spouse gave any thought to an event happening, viz., the cesser of their common use and enjoyment of the asset, which alone would give any practical importance to their respective proprietary interests in the asset. Unless it is possible to infer from the conduct of the spouses at the time of their concerted action in relation to acquisition or improvement of the family asset that they did form an actual common intention as to the legal consequences of their acts upon the proprietary rights in the asset 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.

A similar technique is applied in imputing an intention to a person wherever the intention with which an act is done affects its legal consequences and the evidence does not disclose what was the actual intention with which he did it.

This situation commonly occurs when the actor is deceased. When the act is ofl a kind to which this technique has frequently to be applied by the courts the imputed intention may acquire the description of a " presumption " —but presumptions of this type are not immutable. A presumption of fact is no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of any evidence to the contrary—for example, presumptions of legitimacy, of death, of survival and the like. But the most likely inference as to a person's intention in the transactions of his everyday life depends upon the social environment in which he lives and the common habits of thought of those who live in it. The concensus of judicial opinion which gave rise to the presumptions of " advancement" and " resulting trust" in transactions between husband and wife is to be found in cases relating to the propertied classes of the nineteenth century and the first quarter of the twentieth century among whom marriage settlements were common, and it was unusual for the wife to contribute by her earnings to the family income. It was not until after World War II that the courts were required to consider the proprietary rights in family assets of a different social class. The advent of legal aid, the wider employment of married women in industry, commerce and the professions and the emergence of a property-owning, particularly a real-property-mortgaged-to-a-building-society-owning. democracy has compelled the courts to direct their attention to this during the last twenty years. It would, in my view, be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples " presumptions " which are based upon inferences of

fact which an earlier generation of judges drew as to the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era.

I do not propose to examine in detail the numerous cases decided in the last 20 years and cited in the argument before your Lordships' House in which in the absence of evidence that spouses formed any actual intention as to their respective proprietary rights in a family asset, generally the matrimonial home acquired as a result of their concerted action, the courts have imputed an intention to them. I adhere to the view which I expressed in *Ulrich v. Ulrich* [1968] 1 W.L.R. 180 at pp. 188-190, in the passage which my noble and learned friend Lord Hodson has already cited at length. I think it fairly summarises the broad consensus of judicial opinion disclosed by the post-war cases (none of which has reached your Lordships' House), as to the common intentions which, in the absence of evidence of an actual intention to the contrary, are to be imputed to spouses when matrimonial homes are acquired on mortgage as a result of their concerted acts of a kind which are typical of transactions between husband and wife to-day. And I firmly think that broad consensus of judicial opinion is right. The old presumptions of advancement and resulting trust are inappropriate to these kinds of transactions and the fact that the legal estate is conveyed to the wife or to the husband or to both jointly though it may be significant in indicating their actual common intention is not necessarily decisive since it is often influenced by the requirements of the building society which provides the mortgage.

In imputing to them a common intention as to their respective proprietary rights which as fair and reasonable men and women they presumably would have formed had they given their minds to it at the time of the relevant acquisition or improvement of a family asset, the court, it has been suggested, is exercising in another guise a jurisdiction to do what it considers itself to be fair and reasonable in all the circumstances and this does not differ in result from the jurisdiction which Lord Denning in *Appleton* v. *Appleton* (ubi. sup.) considered was expressly conferred on the Court by section 17 of the Married Women's Property Act, 1882.

It is true, as Viscount Radcliffe pointed out in *Davis Contractors Ltd.* v. *Hareham U.D.C.* (ubi. sup. at p. 728), that when the court imputes to parties an intention upon a matter to which they in fact gave no thought " In their (sc. the parties) place there rises the figure of the fair and reason- " able man. And the spokesman of the fair and reasonable man, who " represents after all no more than the anthropomorphic conception of justice, " is and must be the Court itself". The officious bystander of MacKinnon L.J. (see: *Shirlaw.* v. *Southern Foundries Ltd.* [1939] 2 K.B. 206 at p. 227) may pose the question, but the court, not the parties, gives the answer. Nevertheless, there is a significant difference between applying to transactions between husband and wife the general legal technique for imputing intention to the parties and exercising a discretion such as that which Lord Denning suggested was conferred on the court by section 17 of the Married Women's Property Act, 1882. In applying the general technique the court is directing its attention to what would have been the common intention of the spouses as fair and reasonable husband and wife at the time of the relevant transaction while they were still happily married and not contemplating its breakdown. The family asset might cease to be needed for the common use and enjoyment of themselves and their children without the marriage breaking down at all. The circumstances of the subsequent breakdown and the conduct of the spouses which contributed to it are irrelevant to this inquiry. If these circumstances are such as to call for an adjustment of the spouses' respective proprietary rights which resulted from their previous transactions the Court has jurisdiction to make such adjustments under the Matrimonial Causes Act, 1965, (see: *Ulrich v. Ulrich* ubi. sup.). It has no such jurisdiction under section 17 of the Married Women's Property Act, 1882.

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In the present case we are concerned not with the acquisition of a matrimonial home on mortgage but with improvements to a previously acquired matrimonial home. There is no question that at the time that it was acquired the matrimonial home was the wife's property. It was bought not with the help of a mortgage but with the proceeds of sale of the previous matrimonial home which the wife had inherited from her grand- mother. The husband made no contribution to its purchase and the conveyance of it was to the wife alone. The conduct of the parties is consistent only with the sole proprietary interest in it being that of the wife. During the four years that the spouses lived together in their new home the husband in his spare time occupied himself, as many husbands do, in laying out the garden with a lawn and patio, putting up a side wall with a gate and in various jobs of redecoration and the like in the house itself. He claimed that these leisure activities had enhanced the value of the

property by £1,000 and that he was entitled to a beneficial interest in it of that amount. The learned Registrar declared that the husband had a beneficial interest in the proceeds of sale of the property in the sum of £300. How that sum was arrived at is not wholly clear. It would seem to be the Registrar's estimate of the increase in value of the property due to the husband's work. The Court of Appeal with expressed reluctance felt themselves bound by *Appleton v. Appleton* (ubi. sup.) to dismiss the wife's appeal from the Registrar's order.

It is common enough nowadays for husbands and wives to decorate and to make improvements in the family home themselves with no other intention than to indulge in what is now a popular hobby and to make the home pleasanter for their common use and enjoyment. If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted wardrobe in the bedroom while the wife does the shopping, cooks the family dinner or baths the children, I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that these domestic activities or any of them are to have any effect upon the existing proprietary rights in the family home on which they are undertaken. It is only in the bitterness engendered by the break-up of the marriage that so bizarre a notion would enter their heads.

I agree with the Court of Appeal that the present case cannot be distinguished from that of *Appleton* v. *Appleton* (ubi. sup.), but in my view *Appleton* v. *Appleton* (ubi. sup.) was wrongly decided, perhaps because the Court applied the wrong test laid down in the passage from Lord Denning's judgment which I have already cited and took into account the circumstances in which the marriage in that case in fact broke up. *Button v. Button* [1968] 1 All E.R. 1064, was, in my view, clearly right. *Jansen* v. *Jansen* (ubi. sup.) falls into a different category. There it was not a case of leisure activities of the spouses. The husband in agreement with his wife had abandoned his prospects of paid employment in order to work upon her property which although the family lived in part of it had been acquired as a commercial venture to which both were contributing. There were circumstances in that case which, in my view, justified the court in imputing to the spouses a common intention that his work should entitle him to a proprietary interest in the property whose value was enhanced by his full time labours directed to that end.

The present case, however, in my view clearly falls in the same category as *Button* v. *Button* and *Appleton* v. *Appleton.* I would allow this appeal.

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