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The Doctrine of Resulting Trusts in Common Law Canada

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The resulting trust is a term of art which is to be found in court decisions and statutes covering a wide and varying range of subject-matter. It is a term which most common lawyers feel they understand at sight, and it is most commonly used to mean merely that A is under an obligation to return property to B. The similarity of this obligation to the restitution object of the American constructive trust is evident, and partly because Equity lawyers, both in the courts and in the treatises, have not themselves been exact in the use of the term, considerable confusion occurs as between implied trusts, resulting trusts, and constructive trusts.

In the common law jurisdictions of Canada, moreover, the body of English Equity has been received, one sometimes suspects, like some kind of biblical text, about which we all have a notion, but which on demand few of us can quote. And such a reception is understandable. English Equity is like a folklore. It is often couched in quaint judicial language with heavy sentence constructions, and equally often its case authorities seem to involve situations that Trollope would have enjoyed, people with marriage settlement problems who reside in mansion houses at places like Barnby-in-the-Willows. It all has a certain warming charm, yet its very remoteness can lead to a partial understanding in the overseas reader, and a consequent happy laxity in the use of its terms.

Aside from the use of the term, much has been happening in two broad areas covered by the resulting trust. The presumptions of resulting trust and of advancement have come under attack as no longer being an adequate instrument for handling of family property disputes, and the law of joint accounts has possibly been remoulded by several recent decisions. Moreover, it was evident after *Vandervell v. I.R.C.*¹ that the lawyer who cannot recognise a resulting trust when he sees one may land his client with a frightening tax demand.

A student recently commented in a paper he prepared for me that the resulting trust was born of an historical accident, and now represents some unknown quantity vaguely related to the constructive trust, which itself is vaguely related in traditional English and Canadian thinking to the express trust. If he was hoping to provoke me, he has succeeded. This paper has the modest aim of

¹ *Vandervell v. I.R.C.*, [1967] 2 A.C. 291, [1965] 2 All E.R. 37. An option to purchase shares was granted to a trustee company, but the grant did not make it clear whether the option was to be taken beneficially by the company or on trust. As a consequence a resulting trust arose in favour of the grantor (see Lord Upjohn's judgment on this point at [1967] 2 A.C. 291, at pp. 314, 315), and he became subject to surtax on a considerable sum of money arising by way of dividends which in fact he had donated to a charity.

examining the resulting trust in its setting of the law of trusts and in particular against the background of the Canadian authorities.

THE TERM, 'RESULTING TRUST'

Broadly speaking, a resulting trust arises whenever legal or equitable title to property is in one party's name, but that party, because he is a fiduciary or gave no value for the property, is under an obligation to return it to the original title owner, or to the person who *did* give value for it.

The courts and the various legislatures of the common law world have used interchangeably the terms 'implied trust', 'resulting trust' and 'constructive trust', and the terminology is therefore somewhat confusing. But essentially, while express trusts are those which come into existence because settlors have expressed their intention to that effect, constructive trusts arise not because of anyone's expression of trust intent but because B ought to surrender property to A and this is the machinery the court employs in order to get B to do that. In between the express trust, a product of the settlor's intention, and the constructive trust, a machinery imposed by law, are the implied trust and the resulting trust.

The term 'implied trust' is commonly used for two situations. First, where the intention to create a trust is not clearly expressed, but has to be discovered from indirect and ambiguous language. This is all that distinguishes such an implied trust from the express trust. Secondly, where one person has gratuitously transferred his property to another, or paid for property and had the property put into another's name. The intention of the transferor or purchaser is implied to be that the transferee is to hold the property on trust for the transferor or purchaser. The implication arises out of the fact that Equity assumes bargains, not gifts,² and requires the donee to prove gift was intended.

The term 'resulting trust', on the other hand, does not allude in any way to intention; it describes what happens to the property in question. It results or goes back to the person who, for reasons we shall examine, is entitled to call for the property. For example, because Equity does not assume gifts, the transferee holds title for the transferor or purchaser. In other words, in this 'implied trust'

² This old tag probably arose from the desire that the person alleging he took as donee should have to prove that he was not an agent of the transferor or purchaser. However, the tag may have been a seventeenth century rationalisation of the resulting trust that Courts of Equity inferred by analogy with the then well-established doctrine of resulting use. See, *infra*, pp. 199, 200.

situation the property results or goes back to the transferor or purchaser. However, is it correct to describe this resulting trust as one which arises out of implied intent, when it seems more to come about because of the rule of law that Equity does not assume gifts? The view is held that this resulting trust, like all resulting trust situations, arises by operation of law.³ Such an explanation can clearly be given of the resulting trust which arises when for any reason the objects of an express trust fail. Since the trustee cannot take beneficially, the property results to the settlor or his estate. This outcome could also be said to be the implied intention of the settlor, and sometimes the courts have said as much, but commonly this is regarded as a resulting trust by operation of law.⁴ As we shall see,⁵ the *Statute of Frauds* explicitly envisages the resulting trust, like the constructive trust, as one which arises by operation of law.

Distinguishing the resulting trust from the constructive trust is also not easy, because the lines have been blurred. In *Rupar v. Rupar*,⁶ for example, where a mother had assisted her son in the purchase of a house taken in the son's name, the trial judge said that the mother's claim was based "upon implied or constructive trust". The situation clearly gave rise to a resulting trust, but the court saw all trusts arising by operation of law as coming within the ambit of constructive trust.⁷ The distinction between resulting and constructive trusts is perhaps best put in this way that, while constructive trusts have nothing to do with intention, express or implied, resulting trusts can be explained either on the basis of

³ However, since the whole operation of the presumptions of resulting trust and of advancement presumes a search for the intent of the transferor or purchaser, this paper proceeds on the basis that what the courts are concerned with is the intent of the transferor or purchaser. That Equity puts the initial burden of proof on the transferee to prove a gift is undeniable, but it only gives rise to the search for intent.

⁴ In *Goodfellow v. Robertson*, (1871), 18 Gr. 572, A bought land with money of his own, and money received on behalf of R, who was insane. The Court held that because a resulting trust arose by operation of law, no evidence as to any intention of R was necessary.

⁵ *Infra*, p. 193.

⁶ (1964), 49 W.W.R. 226 at p. 233 (B.C.). Implied was taken as synonymous with constructive.

⁷ E.g., *Taylor v. Wallbridge*, [1879] S.C.R. 616 at p. 680, *per* Henry, J. that where A and B purchase in the name of B, a constructive trust arises in favor of A. Cited with approval in *Jones v. Lucas*, [1953] 2 D.L.R. 225 at p. 229 (N.S.). In the latter case Isley, C.J. (at p. 230) would consequently have been prepared to apply *Bannister v. Bannister*, [1948] 2 All E.R. 133, a clear constructive trust authority, had the facts enabled him so to do.

intention or imposition of law. A good example of both a typical constructive trust and a resulting trust occurring on the same set of facts can be seen in *Denny v. Lithgow*.⁸ An infant and his mother claimed that certain land, bought by the defendant in his own name, had in fact been bought on behalf of D, father and husband respectively of the plaintiffs. D had paid part of the price, and for many years prior to his death had had possession of the land. Spragge, V.C. found that the defendant had indeed bought the land on behalf of D. This meant that the defendant had acted in the purchase as an agent, and, as an agent withholding property from his principal, he became a constructive trustee for D's estate. In so far, however, as he took property in his own name which had partly been paid for by another, he was a resulting trustee for D's estate.⁹

THE RESULTING TRUST SITUATIONS

These situations can be divided into two groups. First, if property is purchased by A, and conveyance or transfer is taken in the name of B, or in the names of both A and B, B becomes a resulting trustee of his interest for A. Similarly, if A voluntarily transfers property into the name of B or the names of himself and B, B becomes a resulting trustee of his interest. The second group deals with the situation consequent on the failure of an express trust. If a settlor has failed to dispose of the whole beneficial interest, either because he has created only limited interests in the trust property or the trust objects do not exhaust the trust fund, the trustees — who cannot, of course, take beneficially — hold on resulting trust for the settlor or his estate. Similarly, if an express trust fails for uncertainty or failure of the trust objects, mistake, fraud, duress or undue influence, or contravention of the perpetuity rules, the trustees again hold on resulting trust for the settlor or his estate.¹⁰

The essential characteristic of all resulting trust situations is that the trustee has title to the property in question. The claimant to the property seeks to have that title vested in himself. The claim must fail if title cannot be shown to be in the alleged trustee. In *Wilson v. Owen*,¹¹ the plaintiff bought land from his solicitor, but

⁸ (1869), 16 Gr. 619.

⁹ The plaintiffs were ordered to reimburse the defendant for the moneys he had put into the purchase of the property, and for the taxes on the property which he had paid.

¹⁰ Illegality of trust objects, or a voluntary transfer for illegal purposes, will not prevent a resulting trust arising, but the Courts will not enforce it.

¹¹ (1878), 26 Gr. 27.

later required the solicitor to strike out the plaintiff's name as grantee and enter on the deed the name of the plaintiff's sister. Possession throughout had remained in the solicitor, and the defendant, the sister, then went into possession where she remained. The plaintiff later sought to recover the land, asserting that the defendant was a resulting trustee. During the action it was established that the striking out of the plaintiff's name from the deed, and the insertion of the defendant's name, were insufficient to divest the plaintiff of title. Consequently what should have been brought was not a resulting trust action, but a bill of ejectment. However, the resulting trust does not require the trustee to have a legal estate or title. In the great majority of cases what the trustee has in fact, is the legal title, but the principle of the resulting trust operates even if the title to the property is only equitable.¹² If, for example, A voluntarily assigns his remainder interest under a trust while the life tenant is living, the assignee becomes a resulting trustee of that interest for A.

A second essential characteristic is that the claimant (the would-be resulting trust beneficiary) must have "provided the property or equitable interest vested in the person bound by the trust", as Morrison, J. put it in *Baird v. The Columbia Trust Co.*¹³ This means that either the claimant originally transferred the property in question to the alleged resulting trustee or that the claimant supplied the whole or part of the purchase price when the property was bought from a third party and transferred into the alleged resulting trustee's name. The necessity that this characteristic be present proved fatal to the plaintiff's claim in *Baird v. The Columbia Trust Co.* The plaintiff was claiming from the defendant commission and salary, and by way of making the claim, he asserted that the defendant was a resulting trustee for him of a building, which was owned by the defendant or a third party, but which certainly had never been owned, legally or equitably, by the plaintiff.

Moreover, because a resulting trust arises when A voluntarily transfers to B or requires a vendor to transfer to B, such a trust can arise in a variety of circumstances otherwise having nothing

¹² *Carter v. Carter*, (1969), 70 W.W.R. 237 (B.C.). The defendant may be a purchaser under an unregistered agreement for sale of land. As such he has a mere personal right against the vendor; he has no estate or interest in the land. However, because the purchaser upon payment may convert his "equitable interest" (p. 240) into a legal title, a claimant to a half-share in the land may claim as a beneficiary under a resulting trust for that share.

¹³ (1915), 22 D.L.R. 150 at p. 151 (B.C.).

to do with the law of trusts. In *Ferguson v. Toronto*,¹⁴ a municipal authority under its statutory powers had levied a tax for local highway improvements, assessing the local property owners in question on the basis of their frontages on the highway. After the work was completed, excess moneys remained and these moneys the municipality proposed to use for other purposes, thus reducing taxes to the whole body of municipal tax-payers. The Ontario Court of Appeal held that the excess moneys were held on resulting trust for the payors of the levy, and that those who had paid were entitled to a *pro rata* share in the fund. Indeed, it is this kind of situation which associates the resulting trust with the constructive trust.¹⁵

On the other hand a court may find that a resulting trust arises in what is an express trust situation. The object, or at least the effect, of this may be to avoid the *Statute of Frauds* provisions.¹⁶ Under that *Statute*, it will be recalled, written evidence is required of a trust of land, but resulting trusts which arise by operation of law are excluded from the *Act*.¹⁷ In *Page v. Chambers*,¹⁸ B conveyed land to the defendant in consideration of and as security for the defendant's discharge of one of B's creditors. It was found as a fact that B's other creditors agreed not to press their demands for the three years during which, under the agreement, B had to pay the defendant. The purpose of this agreement between B, the defendant, and the other creditors was in order that B should have more time in which to pay his creditors. This agreement was found by James J. to create a parol trust, under which, if B defaulted, the defendant

¹⁴ [1944] O.R. 385, [1944] 3 D.L.R. 317 (C.A.). See also *Marshall v. Hett & Sibbald Ltd.*, [1932] 1 W.W.R. 520 (Sask. C.A.).

¹⁵ Here the resulting trust merely explains the return of property to the subscribers. The reason for the court order was that the subscribers were entitled to restitution, which is the essence of a constructive trust order.

¹⁶ In *Wilde v. Wilde*, (1873), 20 Gr. 521 (C.A.), a father claimed that a farm was bought by a son in his own name as express trustee for the family. The farm would be worked by all the family, and on the father's death be divided among all his sons. Evidence was inadmissible of any such oral express trust, and a claim to a resulting trust, arising out of the allegation that the son held for the father absolutely, was refused. The terms of the resulting trust were incompatible with the terms of the alleged express trust. Suppose the father had alleged not only that he had provided the purchase money, but that there was an express oral trust that the son would hold for the father absolutely. Could the father avoid the *Statute of Frauds* by pleading a resulting trust?

¹⁷ Each common law province has expressly enacted the *Statute* into its own law, though British Columbia has shortened and modernised the language of the 1677 English original.

¹⁸ (1879), 13 N.S.R. 232 (C.A.) upholding *James, J. at first instance*. Cf. *Briggs v. Newswander*, (1902), 32 S.C.R. 405 (on appeal from B.C.), at p. 411.

would meet his own loan out of the secured land, and then surrender the remainder to the other creditors. B assigned his interest in the land to the plaintiff, who offered the defendant the \$600 owed him by B, and asserted that he was entitled to a conveyance of the land.

The defendant was in fact a trustee under the express parol trust, and it would have been breach of trust for him to act as the plaintiff wished. However, the trust was not in writing signed by the defendant as the declarant of the trust, and therefore was unenforceable.¹⁹ James J. was able to overcome that difficulty by means of the resulting trust. Since in the learned judge's view the defendant and the other creditors had given consideration to B for the conveyance, he was prepared to treat the situation as if the defendant and the other creditors had actually purchased the land for the amount of their respective debts. In this way the defendant, as title holder to the land, became a resulting trustee for the remaining creditors, once his own claim against the debtor was satisfied. That trust being excluded from the *Statute*, parol evidence was admissible, and the plaintiff lost his action.²⁰

**(1) Purchase in the name of another, or in the names
of the purchaser and another**

The principle has been established since the early eighteenth century that if one man buys property, but has it conveyed into another's name, or into the joint names of himself and another, that other becomes a resulting trustee for the purchaser of all the interest taken by that other. The best-known statement of the principle, cited and quoted in many Canadian cases, is that of Chief Baron Eyre in *Dyer v. Dyer*:

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.²¹

¹⁹ The Statute of Frauds, R.S.N.S. 1873, c. 83, s. 6, speaks of "the party entitled to declare or create the trust". Who was the declarant in this case? Was it B as the grantor conveying on trust, or was it the defendant, as the person who agreed to hold on trust for others, after his own interest was satisfied? James, J. assumed it was the latter. This result invalidated the express trust under the Statute because, though there was a trust deed (*ibid.*, at p. 240), it was agreed to by B and the remaining creditors only.

²⁰ This case provides an interesting study in how the courts will refuse evidence of an express oral trust of land at the front door, and let it in as constituting a resulting trust at the back door.

²¹ 2 Cox 92, 30 E.R. 42 at p. 43.

Dyer v. Dyer concerned land, but the principle is clearly applicable to all forms of property, and there has never been any question of its general application.²²

In order to take advantage of the principle, the claimant must first show that it was he who advanced the purchase money. Because the resulting trust is excepted from the *Statute of Frauds*, parol evidence is admissible for this purpose, even if the property purchased is land.²³ Circumstantial evidence is also admissible; in *Vasenelak v. Vaselenak*,²⁴ the impecuniosity of the transferee of title proved the major factor in establishing the claimant's case. This apparent facility to the claimant that he can introduce such informal evidence is not enough, however, to prevent many such claimants from failing at this stage. Where the claimant and the transferee are members of a common household, as is so often the case, the source of the purchase moneys can easily remain in doubt, though it be established that the moneys were handed to the vendor by the claimant.

Though the claimant can establish that he owned and paid over the purchase money, he must also prove that he acted throughout as a purchaser. If in fact he was lending the money to the transferee, then his relationship with the transferee is that of a creditor with a debtor. It is not open to him to argue that he advanced the money which facilitated the purchase of the property, advantageous though such a position might be to the claimant in the event of the transferee's bankruptcy. *Clark v. MacInnis*²⁵ provides the object

²² *Hudson Bay v. Hosie*, [1926] 2 W.W.R. 730, [1926] 4 D.L.R. 489 (Sask. C.A.) (shares). Where A contracts with B to confer a benefit upon C, Professor G. Williams has asserted that no resulting trust should arise in favour of A, the promisee, over any property acquired by C from B. See (1944), 7 M.L.R. 123 at p. 126. He would like to see a legislative change, should there be such a trust arising. The present writer cannot see the force of this argument if it does not attack all resulting trusts, which is a more defensible argument (see p. ?). Surely if a contract intends 'to confer a benefit' upon C, the evidence demonstrating that intent will rebut the presumption of resulting trust.

²³ In *Morris v. Morris*, [1931] 3 W.W.R. 427 (B.C.), a husband bought land with his wife's money, and had it registered in his own name. Fisher, J. held that a creditor of the husband was entitled to rely on the Land Register as to what charges were upon the title, and the resulting trust in the wife's favour, which was not shown on the Register, did not therefore take precedence.

²⁴ [1921] 1 W.W.R. 889, 46 Alta. L.R. 256, 57 D.L.R. 370 (C.A.).

²⁵ [1953] O.W.N. 551. In *Mackenzie v. Ross*, (1900), 33 N.S.R. 252 (C.A.) it was particularly difficult to determine whether the transferee bought in his own name with moneys loaned to him by the claimant (whose trustee in bankruptcy was now suing) or had bought as an agent of the bankrupt. The transferee had entered the bankrupt's business, many years before the bankruptcy, as an employee and son-in-law. As the bankrupt's health deteriorated,

lesson. The claimant merely asserted that he was entitled to a reconveyance of a certain house from the defendant, and was prepared to prove that he had made the down payment. His statement of claim was struck out with costs. He had not shown an express trust, nor any other basis upon which the transferee was to hold the house, and as there was not even a statement that he had made the down payment as a purchaser, there could be no resulting trust. Nor was the court prepared to accept an allegation that because the claimant had agreed to sell the house to the transferee, a resulting trust was established in the claimant's favour. Was the claimant lending the transferee the down payment?

If the claimant is lending money and takes title in the transferee's name, then he is merely acting as an agent for the transferee.²⁶ But a man is also acting as an agent if, on another's behalf, he uses his own money to buy property, and takes title in his own name. In those circumstances the payor has lent the purchase money to another, and holds the property as security. Such a man is a resulting trustee of the property for the other. If, however, the payor had bought the property for himself, and had agreed with another that on the other paying him the price, he would transfer to the other, the payor is not a resulting trustee. The relationship between the payor and the other is purely contractual; the property may have been bought by the payor with the idea of fulfilling the agreement to sell after he himself had bought, but the property was not bought on behalf of the other. This distinction is well brought out in the case of *Brown v. Storoschuk*.²⁷

Again, if A agrees with B to purchase land for B, paying the price with B's money, but enters into a binding contract with a vendor

the transferee came to be the controller of the business. The land purchases were made with moneys coming from the business, but with the bankrupt's consent. Both trial judge and appeal court found that the moneys were in fact loaned to the transferee for him to buy in his own name, though the purchased lands were later mortgaged and the proceeds of the mortgage paid into the business. Consequently no resulting trust arose in favour of the bankrupt's creditors. A crucial point was that the transferee negotiated the purchases, the bankrupt on one occasion even refusing to be a purchaser.

²⁶ It involves a nice point where the claimant alleges that money the transferee acquired from a third party, so that the purchase might be made, was acquired by the transferee as an agent for the claimant. See *Henry v. Yukasha*, (1957), 21 W.W.R. 409 (Sask.).

²⁷ [1946] 3 W.W.R. 641 (B.C.C.A.). That which rests in contract cannot give rise to a resulting trust. If A agrees to sell land to B for a certain sum, and transfers title to B before he has been paid, A retains an equitable lien against the land, but, if B fails to pay, A cannot assert that B is a resulting trustee of the land: *Taylor v. Wallbridge*, [1879] 2 S.C.R. 616 at p. 674.

in his own name, A thereupon becomes a resulting trustee of the chose in action for B. Stuart J. came somewhat reluctantly to this conclusion in *Vaselenak v. Vaselenak*;²⁸ he preferred to see B seek a declaration of agency. In *Boulter-Waugh & Co. v. Phillips*, Lamont, J.A. said:

The same result, in my opinion, follows where a person takes title in his own name to land which he agreed to purchase, but which, prior to obtaining title, he had assigned to another.²⁹

That is to say, the assignor becomes a resulting trustee for the assignee.

What is the position if two persons advance the money for the purchase of certain property, which is taken in the name of one of them? If the amount subscribed by each is determinable, it is clear that the transferee holds on a proportionate resulting trust. But what if it proves impossible to determine how much was subscribed by each? Suppose the parties have kept their savings in a shared strong box, and from those savings a house is bought, in the name, as it happens, of one of the parties. In *Wilde v. Wilde*,³⁰ it was said by Strong, V.C. that in those circumstances no resulting trust could arise. This result seems obviously unsatisfactory, and yet it is clear that the resulting trust can only cause a resulting to the deprived party of what is his own, albeit, in a converted form, as when a house has been purchased. However, there is a further anomaly. In *Eppler v. Szcepkowski*,³¹ it was pointed out that Strong, V.C.'s words could conflict with *Lupton v. White*.³² The latter case established that, if A undertakes to keep the property of B distinct, but mixes it with his own, the whole must be taken to be the property of B. This situation would occur, for example, where B requests A to keep a record of B's savings handed to A, but consents to the savings of both parties being kept in the same strong box. A does not keep a record of B's money. Alternatively, A may have kept the savings distinct, but have drawn indiscriminately and without record from the box when the parties needed money.

Most cases of this kind, where it is impossible to determine how much each party contributed to a purchase taken in the name of one of them, will occur where there has been some pooling of

²⁸ [1921] 1 W.W.R. 889, 16 Alta. L.R. 256, 57 D.L.R. 370 (C.A.).

²⁹ [1918] 3 W.W.R. 27 at p. 38, 11 Sask. L.R. 297, 42 D.L.R. 548, reserved on other grounds [1919] 1 W.W.R. 1046, 58 S.C.R. 385, 46 D.L.R. 41.

³⁰ (1873), 20 Gr. 521 (C.A.). See also *Taylor v. Wallbridge*, [1879] 2 S.C.R. 616 at p. 633, *per* Henry, J.

³¹ [1945] O.R. 149, [1945] 1 D.L.R. 657, aff'd [1946] 3 D.L.R. 641.

³² (1808), 15 Ves. 432.

resources, and in *S. v. S.*³³ in Manitoba, Campbell, J. refused to follow the statement of Strong, V.C. in *Wilde v. Wilde*. He preferred to follow the recent English authority of *Jones v. Maynard*,³⁴ and to hold that the transferee held the property jointly for himself and the other. An equal division is at least more equitable, if arbitrary. *S. v S.* was in fact a case of husband and wife, as was *Jones v. Maynard*, and here the English authorities have found it easier to justify such a division. As we shall see,³⁵ there has been a more recent turning away from the post-World War II English authorities on this point, and *S. v. S.* may not now represent the Canadian solution.

Care should be taken to see what is meant when property is purchased in the "joint names" of two parties, or where, as in *S. v. S.*, property is deemed to be held by the title holder for himself and another "jointly". When property is bought by one person and title taken in joint names, a joint tenancy will arise which confers upon each party an equal share in the property upon partition, and a right of survivorship. This right will cause the whole property to vest in possession in the survivor should the tenancy not be partitioned before the time when only one joint tenant remains alive. If A supplies the purchase money and conveyance is taken in the joint names of A and B, B on a partition will hold his interest for A and also hold his right of survivorship — again by way of a resulting trust — for A's estate. There is then a twofold resulting trust. However, evidence may show that, while A intended B to hold his income rights for A during the joint lives, it was also A's intention that, should he (A) predecease, B should take the right of survivorship as a gift. The resulting trust of the right of survivorship would then be rebutted.

However, A may supply the purchase money and title be taken in the names of A and B as tenants in common. In this case, A and B each has an inheritable undivided half interest, but B will hold his interest on resulting trust for A. All B's interest is then subject to this one resulting trust.³⁶ Where, however, both parties contribute

³³ [1952] 5 W.W.R. 523 (Man.). Campbell, J. said (at p. 527) that *Wilde v. Wilde* had "no application to the instant case", and he refused to follow *Dudgeon v. Dudgeon*, [1907] 6 W.W.R. 346, 13 B.C.R. 179, in which there is a favourable reference to *Wilde v. Wilde*.

³⁴ [1951] Ch. 572, [1951] 1 All E.R. 802. Campbell, J. thought the facts of the instant case more compelling than *Jones v. Maynard, supra*, that a joint interest was intended.

³⁵ *Infra.* pp. 234 s.

³⁶ *Ballard v. Stover*, (1887), 14 O.R. 153 at p. 156 (C.A.), *per* Armour, J.

to the purchase money, and title is taken in the name of one party, the other party is entitled to a resulting trust order in his favour proportionate to the amount he contributed. The result will be secured by declaring that the title holder holds on resulting trust for both parties in proportionate shares as tenants in common.³⁷ This would be an appropriate result where one partner has used partnership moneys and taken title in his own name or in the name of a volunteer third party. A resulting trust in favour of all the partners in equal or proportionate shares as tenants in common would then come into existence.³⁸

**(2) Voluntary transfer into the name of another,
or into the joint names of the transferor and another**

Where a person transfers his property into another's name, or into the names of himself and another, and does so gratuitously, the principle underlying *Dyer v. Dyer*³⁹ would seem logically to apply to this situation also. Since Equity assumes bargains, and not gifts, he who has title gratuitously put into his name must prove that a gift was intended. In the case of purchase by one person taking title in the name of another, the resulting trust produces this effect, namely, of putting the onus of proof of a gift upon the transferee. It is not enough for the transferee to show that the transfer was 'complete and perfect', in the sense that the transferee is fully vested with title to the property, he must also show that a gift was intended.

On occasions, however, the courts have shown themselves not entirely satisfied with this presumption of a resulting trust. They have not said in any case that they will ignore the presumption, and require the claimant to property which he has had put into another's name to prove that he did not intend a gift, but they have been inclined to play down the presumption by saying that they will look at the evidence (with an open mind?) and, weighing everything,

³⁷ *Nasmith v. Nasmith*, (1919), 16 O.W.N. 298, where title to a house was taken in the wife's name, but, since both husband and wife had contributed to the purchase money, and the presumption of advancement was rebutted, the wife held on resulting trust for her husband and herself in equal shares as tenants in common.

³⁸ *Sharp v. McNeil*, (1913), 47 N.S.R. 406, 13 E.L.R. 425, 15 D.L.R. 73, aff'd 62 S.C.R. 504, 70 D.L.R. 740. *McFadden v. Stewart*, (1865), 11 Gr. 239 (C.A.). *Wright v. Kyle*, [1939] O.W.N. 464.

³⁹ 2 Cox 92, 30 E.R. 42.

determine what it was in each case that the parties intended.⁴⁰ As a consequence, it is only in the relatively rare case where all the evidence is completely ambiguous, that the presumption of a resulting trust has real significance.

Something of this desire to let the evidence tell its own tale has undoubtedly affected the courts' handling of the presumption of a resulting trust in cases of voluntary transfer. Due to an accident of history, whether there is a resulting trust in these circumstances, has never been firmly established.

Before the *Statute of Uses*, 1535, if A conveyed the fee simple of land to B without consideration, and B were a stranger in blood, it was held by Chancery that B held on a resulting use for A. It was customary for transferors to convey to others to the use of themselves, and because trusts were difficult to prove, while purchases, being overt, could easily be proved, Chancery put the burden of proof on the transferee to prove that he had given value. If value had been given, the parties clearly did not intend that the transferee should hold to the use of the transferor.⁴¹ However, the *Statute* executed passive uses by putting the legal title in the *cestui que use*, and as a consequence a conveyance by A to B accomplished nothing, for the resulting use was executed and the legal title remained in the grantor. The only way to avoid this result was for B to give consideration, or for the conveyance to declare a use in favour of B. To achieve the latter the conveyance would be worded, 'unto and to the use of B'. Since there was now a specific use in favour of B, there would be no resulting use to A.

In the seventeenth century, however, trusts were introduced and the question then was whether, by analogy to the resulting use, B held his title on behalf of A. In other words, the question became, though A conveyed 'unto and to the use of B', did B nevertheless hold on resulting trust for A.

Curiously enough, this question has never been resolved in the English courts, perhaps because whenever this issue came before the courts there was always evidence of whether or not gift was intended. When it has been discussed, judges are found to be in disagreement,⁴² and treatise writers of the nineteenth century were

⁴⁰ The weakening of the presumption has been more particularly indicated since 1945.

⁴¹ Holdsworth, *History of English Law*, Vol. IV, at pp. 423, 424.

⁴² Lord Hardwicke and James, L.J. thought no resulting trust arose. Lord Nottingham and Somers, L.K. thought to the contrary. See *Neazor v. Hoyle*, (1962), 37 W.W.R. 104 at pp. 112, 113, quoting *Maitland on Equity*, (1932), at p. 413.

also divided.⁴³ Following Maitland, the preponderance of view in 1925, after which time the *Law of Property Act* made the issue largely academic,⁴⁴ was that a resulting trust did arise.

In Canada, where the particular provision of the English *Law of Property Act* has not been introduced, the courts have trodden warily.⁴⁵ In 1933 the Supreme Court had reason to examine the matter, but concluded only that "all the circumstances are to be looked at, and if the conclusion is that, in view of all the circumstances, no resulting trust was intended, then no resulting trust arises."⁴⁶ With this truism the subject rested until in 1947 in *Niles v. Lake*⁴⁷ both Kerwin, J. and Taschereau, J. gave it as their obiter opinion that a resulting trust did arise upon a voluntary transfer, and gave Maitland's reason for this, namely, the close analogy between resulting uses and resulting trusts. Finally, in 1962 in *Neazor v. Hoyle*, the dispute was fully examined by Macdonald, J.A. for the Alberta Court of Appeal, and he concluded:

I think that by reason of the voluntary transfer by the deceased to the appellant [his sister], there could well be a presumption of a resulting trust in favour of the donor and, if so, that the burden is on the appellant to establish as a fact that she received the beneficial interest in the lands so transferred.⁴⁸

⁴³ *Sanders on Trusts* and Williams, *Personal Property*, in its earlier editions, as did Lewin in its early editions, thought no trust arose. Maitland, and the later Williams and Lewin, as well as Underhill, disagreed.

⁴⁴ *Law of Property Act*, 1925, s. 60(3).

⁴⁵ In *Federal Bank of Canada v. Canadian Bank of Commerce*, (1886), 13 S.C.R. 384 at pp. 394, 395, Strong, J. for the Court conceded that the resulting trust arose in common law conveyances, but considered it did not arise in the case of deeds operating under the St. of Uses, or in mere equitable conveyances. This was the minority view of Lord Hardwicke, and of *Sanders on Trusts*.

⁴⁶ *M.D. Donald Ltd. v. Brown*, [1933] S.C.R. 411, [1933] 4 D.L.R. 145 at pp. 146, 147, *per* Duff, C.J.C. Appellant had conveyed land for a nominal consideration to A, B, and C, and these parties had sold the land for \$77,000. Was this income of the appellant, and therefore taxable? S.C.C. said no. The conveyance to A, B, and C was intended to pass the full beneficial or equitable interest, as well as the legal interest. Duff, C.J.C.'s statement was cited in *Kobylanski v. Public Trustee of Alberta*, (1958), 15 D.L.R. (2d) 198 at p. 203 (Alt. C.A.) by Clinton, J. Ford, J.A., but, as Ford, J.A. noted, both in the instant case and the earlier B.C. case of *Clelland v. Clelland*, [1945] 3 D.L.R. 664, 61 B.C.R. 426, where the question of the presumption arose, the evidence clearly showed no intention to make a gift.

⁴⁷ [1947] S.C.R. 291, [1947] 2 D.L.R. 248, at pp. 253 and 256.

⁴⁸ (1962), 37 W.W.R. 104, (1962), 32 D.L.R. (2d) 181 at p. 141. Macdonald, J.A. felt no need to discuss sections from the *Land Titles Act* and the *Transfer and Descent of Land Act* (Alta.), which lay down that a registration or instrument transferring land convey all the rights the grantor had. Does this language really leave room for the resulting trust?

This means that, while the courts lean towards the view that there is a resulting trust on a voluntary transfer, the more modern desire to look at the evidence with an open mind is given greater scope because of the existence of the dispute as to whether there is a presumption at all.

There is surprisingly little authority on whether a resulting trust arises when the property transferred is not land, which we have been discussing, but pure personality. English authority leaves no doubt that such a trust arises,⁴⁹ but in Canada cases of transfer seem only to have occurred between husband and wife, or father and child, where the question was whether the presumption of advancement was rebutted. If that presumption is rebutted, then the wife or child, as the case may be, holds on resulting trust for the husband or father. But whether that means that there is an initial *presumption* of a resulting trust in such cases is a moot point. Certainly one of the English authorities, *Standing v. Bowring*,⁵⁰ has been followed in Canada,⁵¹ so it is likely that Canadian courts would agree that there is a presumption of resulting trust where pure personality is voluntarily transferred.

(a) Rebutting the resulting trust.

Whether the resulting trust, which arises when A purchases in the name of another, or in the names of himself and another, and when A voluntarily transfers *inter vivos* to another or into the names of himself and another, should be described as a trust of presumed intent or a trust arising by operation of law, it is beyond question that that trust may be rebutted by evidence showing that what A had in mind was a gift.

As we saw earlier, any evidence, written or parol, may be adduced to rebut the resulting trust, including circumstantial evidence. The latter might take the form that the transferee on a purchase had at the time such slender means that he could not have supplied the purchase money. But what standard of proof is required to rebut the resulting trust? Quoting *Lewin on Trusts*,⁵² Stuart, J. said in *Vaselenak v. Vaselenak*⁵³ that the evidence must prove the fact of gift "very clearly". However, the very weakness of A's case, the

⁴⁹ *Vandervell v. I.R.C.*, [1967] 2 A.C. 291, [1965] 2 All E.R. 37.

⁵⁰ (1886), 31 Ch. D. 282.

⁵¹ E.g., in *Horne v. Huston and Merchants Bank of Canada*, (1919), 16 O.W.N. 173, aff'd 17 O.W.N. 2 (C.A.).

⁵² 12th ed., at p. 188.

⁵³ [1921] 1 W.W.R. 889 at p. 892, 16 Alta. L.R. 256, 57 D.L.R. 370 (C.A.).

person who claims the benefit of a resulting trust, may result in the rebutting of the trust. In *Hutchison v. Hutchison*,⁵⁴ for example, where A alleged that he paid the purchase price of land, though the deed of conveyance was taken in the joint names of himself and B, not only was A unable to show that he had in fact paid the whole of the purchase price, but he was unable to explain why it was that not only the conveyance, but the mortgage and the receipts for the down payment were in the joint names of himself and B. Unable therefore to see what the parties had had in mind, Spragge, V.C. refused to disturb the title. On the other hand, the claimant to a resulting trust may find that it is his relationship to the transferee which makes it hard for him to prevent the rebuttal. This was the situation in *Street v. Hallett*.⁵⁵ B, who was a married man, went through a ceremony of marriage with A, she being ignorant of his status. House property was bought in B's name, at his insistence, though paid for by A, and on B's death his heirs claimed the property. Blake, V.C. refused to find a resulting trust in A's favour. To the learned judge's mind, it was conclusive, since she had not resisted B's demand that the property should be in his name, and had continued to make payments towards the full price after she knew of his married status,⁵⁶ that A had intended to make a gift to B.

Evidence introduced to support the resulting trust or to rebut it may only concern the intention of the parties at the date of the purchase or transfer.⁵⁷ It is clearly not open to A to support his claim of a resulting trust by showing that at some later date he intended a resulting trust. Even the donor cannot retract from his gift, if he enabled the donee to acquire title and intended at that time to make a gift. As Viscount Simonds put it in *Shephard v. Cartwright*, quoting *Snell's Principles of Equity*,

The acts and declarations of the parties before or at the time of the purchase [or of the voluntary transfer], or so immediately after it as to constitute a part of the transaction, are admissible in evidence either for or against the party who did the act or made the declaration. ... But subsequent decla-

⁵⁴ (1856), 6 Gr. 117 (C.A.).

⁵⁵ (1874), 21 Gr. 255.

⁵⁶ These acts were admissible, though subsequent to the purchase, as acts against interest.

⁵⁷ Though the parties are in no way related by blood or family ties, in determining intent the court may well be swayed by the degree of friendship between the parties and the circumstances surrounding the transaction. See *Thornley v. Royal Trust Co.*, (1932), 41 O.W.N. 470 (doctor and a long-serving, faithful secretary).

rations are admissible as evidence only against the party who made them, and not in favour.⁵⁸

That it is the intention of the parties at the date of the purchase or transfer which is important is well brought out by *Taylor v. Wallbridge*⁵⁹ in the Supreme Court. A was the assignee of an interest arising out of a contract of purchase of certain land. As he was leaving Canada, he assigned his interest to his brother, B, who without authorization paid the remainder of the purchase price, and took a conveyance. Later B reconveyed the interest to A, and A was persuaded to give a power of attorney to B to sell the land. Thereupon B allegedly sold the land to X for a nominal sum, and X reconveyed half the land to B for a much smaller sum. On returning to Canada, A sought to set aside these transactions. B argued that as he had paid part of the purchase price a resulting trust arose in his favour. Henry, J. conceded that in principle a resulting trust did arise, but he pointed out that the claimant to a resulting trust must have paid or come under an obligation to pay at the time of the contract of purchase. The purchase price did not have to be paid at the time of the conveyance, but the resulting trust argument was defeated if it could be shown that the price was paid in pursuance of the contract by which the purchase was made. B could not insert himself by paying the price, or part of it, some ten years after the contract was made.

It is interesting to note that B might have succeeded in this case if he could have shown that A authorized him to pay the remainder of the price, and by that authorization intended to make a gift of his interest in the land to B. But this was the very thing B could not show. The operative time therefore was the date of the contract of purchase, and the obligation to pay under this contract had been assumed by A in the assignment which he had taken. The later assignment to B was only for the purposes of agency.

Can the claimant to a resulting trust bring his claim long after title has become vested in the other? The resulting trust will not be rebutted by the passage of time,⁶⁰ but, as was said in *Taylor v. Wallbridge*,⁶¹ the court will examine the facts very critically in these

⁵⁸ [1955] A.C. 431 at p. 445; [1954] 3 All E.R. 649 at p. 652.

⁵⁹ (1879), 2 S.C.R. 616. See also *McKercher v. Sanderson*, (1889), 15 S.C.R. 296, esp. *per Strong*, J. at pp. 298, 299. The latter authority was followed in *Wood v. Strange*, [1946] O.R. 139, [1946] 2 D.L.R. 76 (the case of the seven spinster sisters), and in *Jones v. Lucas*, [1953] 2 D.L.R. 225, at p. 229 (N.S.). Also see *King v. Thompson*, (1905), 6 Tenn. L.R. 204 (C.A.).

⁶⁰ *Briggs v. Wilson*, (1897), 24 O.A.R. 521 at p. 525, *per Boyd*, C.

⁶¹ [1879] 2 S.C.R. 616 at pp. 656 *et seq.*, 687 *et seq.*

circumstances. Laches will certainly defeat the claimant, as it did in *Fonseca v. Jones*,⁶² and the reason for this is that the claimant by his delay has effectively acquiesced in the defendant's title. Of course, if the claimant has earlier waived his claim, that will also defeat him. In *Hoig v. Gordon*,⁶³ a claim to dower in land subject to a resulting trust was rejected because of waiver by conduct. A married man and a woman were living together as husband and wife, and the woman bought property in the man's name. Later, in a declaration of trust of the property, the parties reserved to themselves powers of sale and appointment. Acting under these powers the property was sold to the plaintiff. After the deaths of the man and the woman, the wife of the man, who had condoned the living together and remained on friendly terms with the two until their deaths, claimed dower in the land. Mowat, V.C. rejected the claim, not only because he was of the view that the man held the property on resulting trust for the woman, but because the wife had allowed her husband and the woman to hold themselves out as man and wife, even receiving support from them, and was thus precluded from setting up her claim against the plaintiff.

(b) The presumption of advancement

If A is able to establish that he purchased property and had it conveyed into B's name, or that he voluntarily transferred property to B, there is commonly said then to be a presumption of a resulting trust in A's favour. But that presumption, which puts the burden of proof on B to prove A intended a gift, will not arise where B is a child or wife of A. In such cases there is a presumption that A intended to make a gift, and it is for A to prove that he had no such intention.⁶⁴ The word 'advancement' is now rather archaic, but it means that the person who stands in the position of a husband or father is assumed to be making over a portion of his assets to one who by marriage or parent-child relationship is in some degree financially dependent upon him and might reasonably

⁶² (1910), 14 W.L.R. 148, 21 Man. R. 168, aff'd 18 W.L.R. 259, 21 Man. R. 168 (C.A.).

⁶³ (1871), 17 Gr. 599.

⁶⁴ "Where a conveyance of land is made by a husband to his wife, the relationship implies a consideration and the law presumes that the conveyance was intended as an advancement by him"; *Hyman v. Hyman*, [1934] 4 D.L.R. 532 at p. 538 (S.C.C.), citing *Johnson v. Johnson*, (1926), 31 O.W.N. 318. The presumption of advancement displaces the presumption of a resulting trust; *Cole v. Cole*, [1943] 3 W.W.R. 532 at p. 551 (B.C.C.A.), *per* Robertson, J.A.

expect to share in the assets of the transferor on his death.⁶⁵ In that sense the transfer of property is an 'advance' of what might be expected on the transferor's death.⁶⁶ As far as children are concerned, an 'advancement' also implies a donation to assist the child in establishing himself in life.

The origin of this presumption is in the eighteenth century, and, prior to the First World War in particular, it reflected very much the course of affairs in the average middle class or aristocratic family. In relation to wives, Lord Reid has recently said :

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 dependence 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.⁶⁷

As for children, the presumption primarily arises between father and child,⁶⁸ but it also arises whenever one person, male or female, places himself *in loco parentis* to another. That is to say, if A acts in relation to B as if he were the parent of B, in some degree financing his needs and showing the love and affection of a parent, A will be presumed to be making a gift of property put in the child's name.⁶⁹ In *Young v. Young*,⁷⁰ the British Columbia Court of Appeal had no difficulty in imposing such a presumption where a man and

⁶⁵ "It is really inaccurate to speak of an advancement of the entire property of a husband to his wife; *an advancement is essentially a share*, and here the transfers were in substance of an entire establishment"; *Pahara v. Pahara*, [1946] S.C.R. 89 at p. 95. (italics supplied).

⁶⁶ As such, it may constitute a 'portion', which must be taken into account on the donor's death if the donor makes a class gift including the *inter vivos* donee. See *Miller v. Miller*, (1910), 8 E.L.R. 161 (P.E.I.; Fitzgerald, V.C.).

⁶⁷ *Pettitt v. Pettitt*, [1969] 2 W.L.R. 966 at p. 971, [1969] 2 All E.R. 385 at pp. 388, 389.

⁶⁸ See, e.g., *Eldridge v. Royal Trust Co.*, [1922] 2 W.W.R. 1068; [1923] 2 W.W.R. 67 (S.C.C.), and *Northern Canadian Trust Co. v. Smith*, [1947] 1 W.W.R. 497, aff'd [1947] 1 W.W.R. 765, [1947] 3 D.L.R. 135 (Man. C.A.). This means a father and his legitimate child. Even though such a child does not live with his father, a transfer into the child's name would cause the presumption to arise. Whether this would be so in the case of a natural child is more difficult to say. Yet it seems strange that such a child should have to prove his father stood *in loco parentis* towards his own child.

⁶⁹ *Larondeau v. Laurendeau*, [1954] O.W.N. 722 at p. 724, [1954] 4 D.L.R. 293. See also *O'Brien v. Bean and Bean*, (1957), 7 D.L.R. (2d) 332 (B.C.): brother and sister; brother had a certain fatherly interest in his sister, but he was not *in loco parentis* towards her.

⁷⁰ (1959), 15 D.L.R. (2d) 138.

a woman, the latter of whom had an infant son, had been living as husband and wife. The child lived in the household as if he were the son of the couple, and those living in the area regarded the man as being the stepfather of the boy. The Court therefore held that the man stood *in loco parentis* to the boy, and a presumption of advancement arose when the man bought a farm in the joint names of himself and the boy.

The mother and child relationship is said not to give rise to the presumption.⁷¹ Historically, this was probably the case because the mother in any event did not have the financial resources of her husband, and could not therefore be presumed to be making an 'advance' of future expectations to her child. In *Main v. Main* (No. 2),⁷² however, where Adamson, J. adopted *Lewin*⁷³ to the effect that there is no presumption, he also said that over and above the mother and child relationship little additional motive for the making of a gift would need to be proved.⁷⁴ Yet the burden of proof remains on the child who must show "by clear evidence"⁷⁵ that a gift was intended. On the other hand, in *Rupar v. Rupar*⁷⁶ in the British Columbia Courts, McFarlane, J. seems to have assumed there was a presumption of 'advancement' between mother and son. The son in question was at or near his maturity when a house was bought in the son's name, and at that time he was effective head of the family. Yet the learned judge considered the evidence to be insufficiently cogent "to rebut the presumption".⁷⁷

The presumption that arises when a husband transfers, or has property transferred into his wife's name, or into the joint names of himself and his wife, does not extend to the situation where man and woman are living together as husband and wife. In *Derhak v. Dandenault*,⁷⁸ this proved very important, for the existence of a

⁷¹ *Edwards v. Bradley*, [1957] S.C.R. 599, 9 D.L.R. (2d) 673 at p. 678, *per Cartwright*, J.

⁷² [1939] 1 W.W.R. 7, 47 Man. R. 199, [1939] 1 D.L.R. 723.

⁷³ 13th ed., at p. 190.

⁷⁴ In *Hewitson v. Johnston*, [1954] O.W.N. 795 at p. 796, Barlow, J. said there was no presumption of advancement between mother and daughter, "although such a presumption might be shown by evidence in a case where a daughter was unmarried and dependant upon her mother for support."

⁷⁵ [1939] 1 W.W.R. 7 at p. 10.

⁷⁶ (1964), 49 W.W.R. 226.

⁷⁷ *Ibid.*, at p. 234. On the standard of proof, see also *Re Harvey's Application*, (1969), 66 W.W.R. 254 at p. 256, where a remark of Moss, J. in *McManus v. McManus*, (1876), 24 Gr. 118 at p. 124, is cited, namely, that "clear, distinct, and precise testimony is required."

⁷⁸ (1954), 11 W.W.R. 37, 62 Man. R. 18. See also *Stagg v. Ward*, (1921), 30 B.C.R. 385.

presumption would have put the onus of proof upon the man to the woman's clear advantage. The woman's case had much equity in its favour, and such a situation causes one to reflect on the justification for the denial. Given that there is a presumption of advancement between husband and wife, there is something archaic in withholding the presumption when parties live together without wedlock. The presumption expresses the view that the relationship between husband and wife is so close that it would be incorrect to treat them as if they were strangers vis-à-vis each other. Not to apply this conclusion to man and woman, cohabiting as if man and wife, even where the parties cannot marry because one party is already married, would suggest that the law is not concerned with intention, but with disapproving of what has traditionally been regarded as immoral conduct.⁷⁹

In many of these cases either husband or wife, or both, are dead, and the presumption of advancement has the effect of allowing an assumption as to intention in the absence of evidence in court from the crucial party. Is there a presumption of advancement between husband and wife when both parties are alive and give evidence to the court? In *Ex parte Cooper*, Lindley, L.J. said:

When the parties to such a transaction are alive, and give evidence, there is no occasion to resort to any presumption; the question is one of fact.⁸⁰

And in Ontario in 1891, in the case of *Gibsons v. Tomlinson*,⁸¹ Rose, J. cited and adopted this statement as a rule. More recently, however, in *Walsh v. Walsh*,⁸² Schroeder, J. refused to accept either Lindley, L.J.'s statement or Rose, J.'s adoption of it. The learned judge noted, first, that *Ex parte Cooper* was a decision in the Bankruptcy Court, the report not giving the facts, and that, secondly, the later and higher authority of *Hyman v. Hyman*⁸³ and of *Harrington v. Harrington*⁸⁴ had laid down that in these circumstances

⁷⁹ Counsel argued in *Mason v. Hayes*, (1924), 51 N.B.R. 137, that a presumption of advancement arises whenever the purchaser in another's name or the transferor is under "a legal, moral, or natural obligation" to provide for the transferee. Hazen, C.J. merely found on the facts there was no presumption, and did not take up this argument. It is regrettable that a rationale of the presumption along these lines has not developed.

⁸⁰ [1882] W.N. 96.

⁸¹ (1891), 21 O.R. 489 at p. 493.

⁸² [1948] O.R. 81, [1948] 1 D.L.R. 630, aff'd [1948] O.W.N. 668, [1948] 4 D.L.R. 876 (C.A.).

⁸³ [1934] 4 D.L.R. 532 (S.C.C.).

⁸⁴ 56 O.L.R. 568 at p. 574, [1925] 2 D.L.R. 849 (C.A.). Both this case, and *Hyman v. Hyman*, involved plaintiff and defendant who were husband and wife.

there is a presumption, as a "circumstance in evidence", and that the onus of proof is therefore on the husband.⁸⁵

What evidence rebuts this presumption of advancement? Like the presumption of a resulting trust, it is an evidentiary presumption, and can be rebutted in the same way, that is, by written or parol,⁸⁶ direct or circumstantial evidence, but evidence only which satisfies the rule in *Shephard v. Cartwright*.⁸⁷ And the burden of proof is of the same weight; the person making what is presumed to be an advance must prove his case that there was no gift, "at least within a reasonable probability".⁸⁸ Yet more recently to that expression, Thompson, J. said in *Re Ingersoll v. Nettleton and Fonagy* that,

...Where the written instrument of creation clearly indicates the transfer of an estate which *ipso facto* or as legal incident conveys both the legal and beneficial interest, it would take very clear, cogent and convincing evidence of intention to cut down the interest of apparent, expressed intent.⁸⁹

The question is merely as to whether the person who transferred or caused transfer of the property and who is presumed to have intended a gift, in fact intended not to make the presumed gift. It may have been improvident of the transferor to make the gift, but,

⁸⁵ Logically Lindley, L.J. must have been wrong, because the presumption grows out of the relationship; it is not concerned with the donor's presence in, or absence from, the court. Moreover, facts may leave the court with a genuine indecision as to what were the alleged donor's intentions, whether he is absent from the court or gives evidence. On the other hand, was it traditionalism or an appraisal of the value of the presumptions in these circumstances which led the Supreme Court in these cases to decide there was a presumption?

⁸⁶ *Barr v. Barr*, (1868), 15 Gr. 27 at p. 28; *Owen v. Kennedy*, (1873), 20 Gr. 163 at p. 166 (C.A.). Whether the problem arises over an *inter vivos* dispute, or as to whether property passes under a will, the question is the significance of the purchase in another's name, or voluntary transfer to another, at the time during the lifetime of the purchaser or transferor when that act took place. Was it his intention then to make a gift?

⁸⁷ [1955] A.C. 431, [1954] 3 All E.R. 649. See *Rupar v. Rupar*, (1964), 49 W.W.R. 226; *Larondeau v. Laurendeau*, [1954] O.W.N. 722, [1954] 4 D.L.R. 293; *Owen v. Kennedy*, (1873), 20 Gr. 163 at p. 166; *Gordon v. Warren*, (1897), 24 O.A.R. 44 at p. 51 (C.A.).

⁸⁸ *Walsh v. Walsh*, [1948] 1 D.L.R. 630 at p. 649, *per* Schroeder, J. In *Vaselenak v. Vaselenak*, [1921] 1 W.W.R. 889 at p. 892; 57 D.L.R. 370, Stuart, J. said the evidence to rebut the resulting trust must do so "very clearly". The difficulty of arriving at an agreed word formula to express what standard of evidence is required has always proved considerable, in this field as elsewhere.

⁸⁹ [1956] O.W.N. 738 at p. 741.

if intention to give cannot be disproved, a gift it is. Whether the courts will set aside the gift for improvidence is another and independent issue.⁹⁰ As Riddell, J. put it in *Empey v. Fick*, "the law does not put it upon the child to prove the reasonableness of the gift...".⁹¹

Evidence which rebuts or fails to rebut the presumption of advancement can take many forms, as of course is also the case with the presumption of resulting trust. In many cases the husband fails to satisfy the court that he was the person who advanced the purchase price, a fact which would prevent him from establishing a resulting trust situation. Alternatively, whether husband or father, he fails to show that he had some limited object in mind and not a gift, which means he fails to rebut the presumption of advancement. *Barr v. Barr*⁹² and *Knox v. Traver*⁹³ constitute two useful examples of such cases where presumption of advancement in favour of a son was argued. Evidence introduced to rebut the presumption was successful in the first case, and unsuccessful in the other.

In *Barr v. Barr*, a father who was a mortgagee purchased a prior mortgage, but on the advice of his solicitor had it conveyed into the name of his son. The son, who was 32, was to be a trustee of the mortgage. Upon foreclosure of this mortgage, title was taken in the name of the son, again on the advice of the solicitor, but the deed did not contain any reference to the trust. The deed was retained by the father, who continued to deal with the property as if he were beneficially entitled. With the knowledge of the son, the father had received interest payments from the mortgagor for his own use, but the son only learned through a third party that the deed was in his own name. He thereupon demanded possession from the tenants on the land, and purported to convey the property to another. It was shown, in addition to these facts, that the father had already made some provision for the son. Mowat, V.C. concluded that the clear intention of the father was to use the son's name "as a mere matter of supposed convenience to the father, and for

⁹⁰ As a general rule the courts will not set aside a trust on these grounds.

⁹¹ (1907), 15 O.L.R. 19 at p. 29 (C.A.), cited in *Northern Canadian Trust Co. v. Smith*, [1947] 1 W.W.R. 497 (Man.), *per* Williams, C.J.K.B.

⁹² (1868), 15 Gr. 27.

⁹³ (1877), 24 Gr. 477 (C.A.).

the father's use . . .".⁹⁴ The presumption of advancement was thereby rebutted; the evidence was "quite sufficient to establish the trust".⁹⁵

In *Knox v. Traver*,⁹⁶ the presumption was not rebutted. A son purchased land with money provided by his father, who had borrowed the money for that purpose from third parties. The son had stood surety to the third parties for the repayment of the money, and the father argued that this showed that the son was merely acting to facilitate his father's purchase. The court was agreed that the son was bound by his suretyship, but held that this did not establish his indebtedness to his father, even though the father alleged that his reason for having the land put in the son's name was to qualify the son to vote at elections.

It is well established, on principles common to law and equity, that the transferor may not set up his own illegality or fraud to defeat the presumption of advancement. For example, to take the familiar situation, a husband transfers property into his wife's name with the intention of defeating his creditors' claims against the property. Later, attempting to recover the property from his wife, he seeks to introduce evidence of his intention in order to rebut the presumption of advancement. To defeat one's creditors in this way is illegal, and therefore the husband will be refused the right to introduce evidence of this illegality. However, for this rule to operate, two things must be established. First, the disposition itself must be illegal or fraudulent. In the English case of *Re Emery's Investment Trusts*,⁹⁷ the husband registered certain securities in the name of his wife, intending to retain a one-half beneficial interest for himself. However, the interest was not disclosed to the American federal taxing authorities, the intention of the husband being to avoid American withholding tax. This action was in contravention of American law, and was not permitted to be pleaded. In *Re Harvey's Application*,⁹⁸ on the other hand, the hus-

⁹⁴ (1868), 15 Gr. 27 at p. 28.

⁹⁵ *Ibid.* Could evidence of the express trust be admitted, since it was in parol form? The St. of Frauds excludes such evidence, but, even though that is so, the effect of the successful rebuttal of the presumption of advancement was that the son held on resulting trust for his father. In that way the object of the express trust was secured. However, Mowat, V.C. in this remark must have been referring to the resulting trust, for the Statute permits the admissibility of parol evidence to establish constructive and resulting trusts only.

⁹⁶ *Supra*, n. 93.

⁹⁷ [1959] Ch. 410, [1959] 1 All E.R. 577. Followed most recently in *Tinker v. Tinker*, [1970] 2 W.L.R. 331.

⁹⁸ (1969), 66 W.W.R. 254 (B.C.). *Re Emery's Investment Trusts*, *supra*, was discussed by the learned judge.

band's intention in registering in his wife's name certain land which he had just purchased, and which was adjacent to land already owned by him, was to avoid the adjacent lands having a common owner and thereby attracting higher assessed values for taxation purposes. Seaton, J. held that this scheme was not improper, and could be pleaded in evidence.⁹⁹

Secondly, the evidence of illegality seeking to rebut the presumption must be central to the case of the claimant. If such a person reveals an illegal or fraudulent motive, which a more skilful person could have concealed, he may yet recover if "the untainted part of his story [is] enough to entitle him to succeed without reliance upon that which was either illegal or immoral". This point is made by Idington, J. in *Scheuerman v. Scheuerman*.¹⁰⁰ It is always for the particular court to decide, once evidence of this kind emerges, whether the claimant relies upon the evidence of illegality to establish his claim.¹⁰¹ In *Northern Canadian Trust Co. v. Smith*,¹⁰² for example, Williams, C.J.K.B. found that he did not need to consider the application of Idington, J.'s distinction because the very pleadings in the *Northern* case alleged an intent to achieve what was in fact an illegal object, and actually made that object the only basis of the claim. In *Krys v. Krys*,¹⁰³ on the other hand, the trial judge drew an inference of illegal intent from the evidence, namely, that the claimant assigned to his son in order to avoid his wife's claims to homestead rights. The Supreme Court of Canada refused to draw such an inference. The intent to defraud had neither been pleaded nor proved; indeed, the question was not raised nor suggested at the trial.

The leading case on the effect of illegality or fraud is *Scheuerman v. Scheuerman*,¹⁰⁴ but the difficulty which arises from this case

⁹⁹ The evidence was held to be ambiguous, however, and not enough to rebut the presumption.

¹⁰⁰ (1916), 10 W.W.R. 379 at p. 381; 52 S.C.R. 625 at p. 629; (1915), 21 D.L.R. 593 (Alta.).

¹⁰¹ It may not be the claimant whose evidence is excluded because of this rule. In *Spurgeon v. Aasen*, (1965), 52 W.W.R. 641, a man conveyed property to his mistress, but took from her a promissory note for the value of the property. The man sued to recover the property, the promissory note not having been met, but the woman claimed that the note was intended by both parties as a sham. The man was to forgive \$4,000 each year, and thus the parties would avoid gift tax. It was the woman who relied on this evidence, and the exclusion of the evidence left her liable on the promissory note.

¹⁰² [1947] 1 W.W.R. 497, 55 Man. R. 123.

¹⁰³ [1929] S.C.R. 153.

¹⁰⁴ *Supra*, n. 100.

is whether the *intent* to commit illegality or fraud is enough. Must it also be shown, if the claimant's evidence is to be rejected, that the illegal or fraudulent act was actually carried out to the injury of another? In *Scheuerman v. Scheuerman* the Supreme Court of Canada was divided on this question. Fitzpatrick, C.J., Idington and Brodeur, JJ. considered that intent alone was sufficient, and Duff, J. appears to have shared this view. However, he expressly found that the burden of proof was on the claimant to prove that the intent had not actually achieved its purpose, and he did not consider that that burden had been discharged. Anglin, J. was of the opinion that intent was not enough; the illegal purpose must have been carried out. In light of the facts, as he found them, he therefore dissented. The facts were that a husband bought land and had it conveyed to his wife, and on the land he built the homestead. The wife later sold the house for an enhanced sum, and the husband claimed that sum. The reason for having the land conveyed to the wife, allegedly on trust for the husband, was so that the husband could avoid a claim by a third party who was his judgment creditor. In fact the debt was later paid, and it was long after this payment that the house was sold. Under Alberta law of this time, however, homestead property to the value of \$1500 was exempt from creditors' claims, and the majority Supreme Court judgments do not decide whether the property was ever worth more than this sum before the debt was paid, and whether, if it was, the creditor was actually delayed.¹⁰⁵

On this point of whether intent is enough, *Scheuerman v. Scheuerman* has had an uncertain career. In *Krys v. Krys*, the Supreme Court said of it, "there does not seem to be that unanimity in its reasons handed down by the judges constituting the majority that is necessary for a ruling case".¹⁰⁶ But it has survived as authority for the proposition that intent alone is sufficient. In *Northern Canadian Trust Co. v. Smith* the precedents and the career of *Scheuerman's* case were fully examined, and Williams, C.J.K.B. con-

¹⁰⁵ *Elford v. Elford*, [1922] 3 W.W.R. 339, 64 S.C.R. 125, is often coupled with *Scheuerman v. Scheuerman*, but in *Elford's* case the intent had certainly been carried into fraudulent act (see [1922] 3 W.W.R. 339 at p. 342).

¹⁰⁶ [1929] S.C.R. 153 at p. 164. This is a curious remark. Newcombe, J. for the Court also said the facts of *Scheuerman* were "special", and that the decision depended on its own facts (at p. 164). The reasons for this attack are not given, nor were these criticisms expanded. As the Court found no intention to defeat, hinder or delay creditors, it is also not clear why *Scheuerman* needed to be attacked. The Court did appear to consider that the particular claimant had a strong claim.

cluded that "in a case such as this" *Scheuerman* was still good law.¹⁰⁷ The following year, 1948, Schroeder, J. tried *Walsh v. Walsh*,¹⁰⁸ his judgment being later upheld by the Ontario Court of Appeal. In that case a husband had conveyed his undivided one-fifth interest in certain property into his wife's name, being at that time under pressure from more than one creditor. The debts were subsequently paid off. The husband later alleged that the wife was only to hold the interest for himself, and he sued to recover it. Schroeder, J. first dealt with the argument that it was not the husband, but the wife, who had raised the issue of illegal motive as explanation of the conveyance, an allegation which the husband strenuously resisted. Did the evidence of such motive serve to defeat the husband's attempt to rebut the presumption of advancement? The learned judge held that it did. Following *Toohey v. Toohey*,¹⁰⁹ he held that the essence of the husband's claim was that he had made a conveyance to his wife. If in fact that conveyance was shown by the evidence to have been with the intent to perpetrate an illegality, the court had to take account of the motive when it was brought to the attention of the court. Secondly, Schroeder, J. was firmly of the view that the illegal purpose need not have been carried out; intent was enough. In saying this, he rejected a statement of *Halsbury*¹¹⁰ to the opposite effect, and a decision of the Privy Council in an appeal to the Board from India.¹¹¹ He considered the latter decision to be "out of harmony with the whole trend of English and Canadian cases, . . . particularly the decision of the Supreme Court of Canada in *Scheuerman v. Scheuerman*".¹¹² Here again, however, as in *Scheuerman* itself, the illegal purpose may have been carried out. The learned judge considered that, even had intent not been enough, the husband

¹⁰⁷ [1947] 1 W.W.R. 497 at p. 517. The father was found not to have paid for the property put into the son's name, but to have used the son's assets. As an alternative finding Williams, C.J.K.B. then considered what the position would have been had the father's evidence been correct. In an earlier action by the wife for maintenance, no order had been made when the father pleaded he had no property, but Williams, C.J.K.B. appears to have proceeded on the basis that the intent to avoid his legal liability to support was enough.

¹⁰⁸ [1948] O.R. 81, [1948] 1 D.L.R. 630, aff'd [1948] O.W.N. 668, [1948] 4 D.L.R. 876 (C.A.).

¹⁰⁹ [1941] O.W.N. 119 at p. 122, [1941] 2 D.L.R. 520 at p. 524.

¹¹⁰ 2nd edition, 1939, p. 148, para. 248.

¹¹¹ *Petherpermal Chetty v. Muniandy Servai*, (1908), 24 T.L.R. 462. In *Cole v. Cole*, [1943] 3 W.W.R. 532, McDonald, C.J.B. found it unnecessary to decide whether this decision could be reconciled with *Scheuerman v. Scheuerman* and *Elford v. Elford*, [1922] 3 W.W.R. 339, 64 S.C.R. 125.

¹¹² [1948] 1 D.L.R. 630 at p. 647.

had not discharged the onus of proof upon him to show that no creditors had actually been prejudiced.¹¹³

One has in fact to go back to the case of *Harrington v. Harrington*,¹¹⁴ heard in the Appeal Court of Ontario in 1925, to find a situation where *Scheuerman* was regarded as good authority, but no illegal purpose was actually carried out. The claimant, a husband who had had land transferred into his wife's name, was denied the right to a resulting trust because "he was endeavouring to protect this property from claims which he seemed to anticipate". The intent seems barely to have been proved, let alone any act in furtherance of that intent.¹¹⁵ There was no evidence of creditors, and the husband said merely that the property was the only substantial asset he had at the time of transfer.

It has sometimes been said that, if the courts exclude evidence of illegality or fraud, thus giving no assistance to the claimant and allowing the property to remain where it lies, the most equitable result is not produced where the parties, normally husband and wife, colluded in the scheme to defraud. The object of the rule is to prevent the courts from being asked to further the aims of a person, whose intent was to carry out an illegal act, but, as we have seen, the rule takes the form that it denies the assistance of the court to any person who must rely on his illegal purpose to substantiate his claim to property. This judicial approach works well when only one party acted wrongfully, but it is at least questionable whether that approach is appropriate when there existed a collusive scheme. The typical situation is when husband and wife

¹¹³ In *Coplan v. Coplan*, (1958), 12 D.L.R. (2d) 460 (Ont.) the fraudulent intent was to deceive the M.N.R. as to the extent of liability of the parties for income tax. However, the parties had been wrongly advised as to their liability, and therefore the M.N.R. had not been defrauded of tax. McLennan, J. held nevertheless that the making of false representations to the M.N.R. was an illegal act. *Scheuerman v. Scheuerman*, as an authority where there exists fraudulent intent alone, did not therefore have to be relied upon. See also *Jackson v. Jackson*, (1961), 34 W.W.R. 431, 26 D.L.R. (2d) 686 (B.C.) and *Spurgeon v. Aasen*, (1965), 52 W.W.R. 641 (B.C.), in both of which cases *Scheuerman* was followed where the Revenue authorities had been defrauded by schemes which were designed to avoid gift tax, and, apparently, in each case had succeeded.

¹¹⁴ (1925), 56 O.L.R. 568 at p. 575; [1925] 2 D.L.R. 849 at p. 855.

¹¹⁵ In *Cole v. Cole*, [1943] 3 W.W.R. 532 (B.C.C.A.) aff'd [1944] S.C.R. 166, McDonald, C.J.B.C. (at p. 535) refused to accept that because a husband was under heavy liabilities and "fighting off bankruptcy", the mere suspicion, at most, which attached to the transfer to his wife, attracted the rule concerning evidence of illegality.

arrange their affairs with the object of defrauding the Revenue authorities or the husband's creditors.

Such a situation led to the dissent of Idington and Brodeur, JJ. in *Elford v. Elford*.¹¹⁶ Husband and wife agreed that, in order for the husband to defeat his creditors' claims, certain land should be transferred into the wife's name. This done, the wife gave a power of attorney to the husband so that he could deal with the land. The one thing the power did not allow him to do, for obvious reasons, was to execute a conveyance in his own favour. Subsequently relations between the parties deteriorated, and without the wife's consent the husband did have the land re-conveyed and registered in his own name. Creditors had already been defeated by the first conveyance, and later creditors had registered claims against the land since it was registered in the husband's name. The wife now claimed that the husband held the property on a resulting trust for herself. In order to succeed the wife had only to establish the original conveyance, and the terms of the power of attorney; the husband for his part had to show the *object* of that original conveyance, which would in turn explain the object of the power of attorney, namely, to enable him to continue dealing with the property. The majority in the Supreme Court held in favour of the wife; it was a straightforward case where the husband could not plead the illegal object, and he had acted in fraud of the power. The dissenting judges were concerned by the wife's connivance in the scheme, and, ironically enough, they would have done exactly what the conception of the rule envisaged, that is, keep the court out of the whole thing, and allow the property to remain where it lay — in the husband's name!

In an era when collusive schemes to defraud the Revenue authorities are not uncommon, an increase fostered by the public reaction to high taxes, the approach of the majority in *Elford v. Elford*, when the rule resulted in the court actively assisting a person who was a party to a fraudulent scheme, may need re-examination.¹¹⁷ The result in *Spurgeon and Public Trustee v. Aasen*,¹¹⁸ also, has little to commend it, and that case, contrasted with

¹¹⁶ [1922] 3 W.W.R. 389, 64 S.C.R. 125.

¹¹⁷ In *Doty v. Marks*, 55 O.L.R. 147, [1924] 3 D.L.R. 687 (C.A.), where the husband took title in his wife's name, the court found that the wife knew at that time that the husband owed money to creditors. She therefore was compelled to hold the legal estate subject to the claims of the creditors. Of course, this result where neither colluding party wins can only occur when there is a third party claim.

¹¹⁸ (1965), 52 W.W.R. 641 (B.C.).

Re Harvey's Application,¹¹⁹ also demonstrates the nice distinction, which may prove all important, between tax avoidance, which is not illegal, and tax evasion, which is.

(i) *Joint bank accounts.*

Since the Second World War in particular, the resulting trust and the presumption of advancement have arisen most often in the context of matrimonial property disputes, and in connection with joint accounts. To the latter of these topics we now turn.

A joint account comes into being when an account at a bank is opened in the names of two or more persons. The legal effect of this action, as commonly understood, is that, while the bank and the account holders stand respectively in the position of debtor and creditor, each of the account holders has a legal title to the monies in the account. If the holders are joint tenants, as is most often the case with current and savings accounts, each holder has a legal title to the whole sum at the bank at any one time, and each has a right of survivorship. That is, since each owns the whole, none has any inheritable interest, and on his death his interest is extinguished, leaving title in the survivors. When the penultimate life fails, the final survivor then takes the fund absolutely. If the holders are tenants in common, as is most often the case when they lease from the bank a safety deposit box, each is entitled to an undivided equal share. But such tenants do not hold "jointly". In this case the share is inheritable, and therefore there is no right of survivorship.

When two persons open a joint account, and each pays in an ascertainable share, there is no difficulty in determining how much each is entitled to while the parties are alive. Their respective legal titles imply that each is entitled to a proportionate share on a winding up of the account. But should one party die, the other will take the whole fund by right of survivorship, and then the question will arise as to whether it was the intention of the deceased to make such a gift of his interest to the other. In other words, is the survivor a resulting trustee of one half of the fund for the deceased's estate? In such a case, then, it is clear that the parties are entitled to share the income arising from the fund during their joint lives, and the presumption of resulting trust concerns only the capital rights upon the death of the first to die. If the survivor is the widow of the deceased, there will be a rebuttable presumption that the widow was intended to take all the capital rights by way of advancement.

¹¹⁹ (1969), 66 W.W.R. 254 (B.C.).

However, when one party opens a joint account in the name of himself and another, and his money alone is paid into the account during the joint lives, there arises a question of resulting trust not only in relation to the capital monies, should the payor die first, but also in relation to the income paid to the volunteer during the joint lives. A presumption of advancement may now arise in connection with the income received, as well as with the capital rights. The question before the court will be whether he who alone paid into the joint account intended to make a gift of any monies withdrawn by the volunteer during the joint lives, and another gift of the entire monies in the account, should the sole payor die before the volunteer.

Before we examine how the presumptions operate, however, it is important to observe how the volunteer acquires rights to withdraw monies from a joint account, and to take by survivorship. If A hands the bank clerk \$1,000, and asks for an account to be opened in the joint names of himself and B, what rights does B acquire? As between A and the bank a chose in action comes into existence to the value of \$1,000, and the contract which exists between A and the bank permits A to demand the \$1,000 at any time. What is B's position? First, by instructing the bank to make payments to himself or B, A thereby gives a discharge to the bank for any sums paid out of the account to B. A and the bank are in a creditor-debtor relationship, and, as creditor, A has instructed the bank to discharge the debt either to himself or B. Difficulty arises, however, as to the rights which B has as against the bank. Can B demand payment from the bank? As a stranger to the contract between A and the bank, the rule in *Tweddle v. Atkinson*¹²⁰ would seem to deny B any action on that contract, though B is named as a beneficiary to that contract. As between A and B, joint ownership means that A and B each has a legal right of ownership over all the sums in the account at any one time, and that the survivor takes the balance absolutely. But how do these rights pass to B when A opens an account in his own and B's name?

Various theories have been put forward to explain how these rights pass to B. Lord Atkin in *McEvoy v. The Belfast Banking Co. Ltd.*,¹²¹ said that when A opens such an account with the bank he acts as an agent for B, an agency which B as principal can ratify. On this approach B would ratify the agency when he presents a cheque to the bank demanding payment on the account. Another

¹²⁰ (1861), 1 B. & S. 393, 30 L.J.Q.B. 265 (C.A.).

¹²¹ [1935] A.C. 24.

view is that when A makes the deposit he is constituting the bank a trustee for himself and B as beneficiaries of the trust. B would then present his cheque as a trust beneficiary. The chose in action would be the trust property. Yet a third view is that a joint account takes effect as a transfer of stock into the joint names of A and B. All these theories have been variously criticized, and Professor Wilks has put forward the view that, if A gives written instructions to the bank to open the joint account, all the elements of a statutory assignment are present.¹²² In other words, A has assigned his contractual rights to the chose in action to himself and B jointly. Recently, however, this last rationale came under severe attack, and indeed rejection, in the Australian High Court case of *Coulls v. Bagot's Executor and Trustee Co. Ltd.*,¹²³ a decision which may prove of far-reaching importance for the law of joint accounts. A agreed with X Co. that the latter should have the right to quarry on A's land. A and the company then entered into a contract to that effect under which royalties and agreed compensation for stone excavated were to be paid by the company to A and B (his wife) as joint tenants, and to the survivor on A or B's death. The contract was signed by an officer of the company for the company, and by A. B's signature also was appended. On A's death the question arose as to B's rights to the payments. Was X Co. entitled to make future payments to B alone; could she demand payments from the company? Was B an assignee of A's rights to receive payment and royalties? If payment had to be made to A's executors, on behalf of whom did they hold the money?

The members of the High Court agreed that on a true construction the contract was neither expressed as a transaction between A and his wife, nor did it take effect as an assignment to her and A jointly of A's rights under the contract. There was no evidence of intention that the contract should constitute an assignment. Moreover, as a statutory assignment it also failed in McTiernan, J.'s view because it was not an absolute transfer of the chose in action. The immediate transfer to B was not of A's entire interest; the transfer of the entire interest was contingent on the wife surviving

¹²² (1936), 14 C.B.R. 457.

¹²³ (1966-67), 40 A.L.J.R. 471.

her husband.¹²⁴ As an equitable assignment of a legal chose, it failed because of the nature of the chose. And this factor would also have prevented the transaction from being a statutory assignment. In McTiernan, J.'s judgment the chose in question was not legal, not "specific debts", but a "part interest in future debts."¹²⁵ At this point, therefore, if the wife could not establish that she herself had a right of action against the company on the contract, she failed to establish any claim to payments after A's death. In the view of the majority she did indeed fail.¹²⁶

McTiernan, J. took the view that the contract between A and the company merely gave rise to a revocable mandate by A, requiring the company to pay himself and his wife, and he also considered that in respect of any future payment that mandate was terminated by the death of the creditor, A. Owen and Taylor, JJ. in a joint judgment held with McTiernan, J. that on a true construction of the contract the wife was not a party to the contract, and so had no right to sue on it.¹²⁷ They did go on to say, however, that had they been able to find that the wife was a party to the contract, she would have been able to sue on it. In their view if A and B contract with X that X shall perform certain acts of benefit for A and B, but consideration moves only from A, that is enough to permit B to sue on the contract. It is not necessary that consideration shall move from both parties to the contract (A and B); as long as consideration moves from one of them, that is enough.

¹²⁴ Professor Willis, *supra*, n. 122, had addressed his mind to a joint account where the volunteer (B) is given immediate right of withdrawal. Willis saw opening of a joint account as transferring a joint creditorship to A and B. McTiernan, J. seems to be rejecting this view. However, there is the added difficulty with Willis' theory that the joint creditorship may only exist over the moneys in the account when it is opened. Future deposits would constitute future property. Or is there a continuing joint creditorship?

¹²⁵ 40 A.L.J.R. 471 at p. 479.

¹²⁶ Lord Atkin's principal and agency theory was not discussed, and A and the company had clearly not intended to create a trust of the payments and royalties. McTiernan, J. drew attention to the fact that the issue concerned payments in the future by the company, and in his views any trust was therefore incompletely constituted. But if there were a trust, A's executors, as trustees of the chose in action, would have an action on the contract, and McTiernan, J. is only right thereafter if *Fletcher v. Fletcher*, (1844), 4 Hare 67; 14 L.J. Ch. 6 is wrongly decided. Nor was the analogy of transfer of stock into joint names discussed.

¹²⁷ McTiernan, J. does not consider this point, but, since he makes his decision (that the wife was not a party to the contract) by construing the particular contract, the inference at least is that he would not have disagreed with this view of Owen and Taylor, JJ.

Barwick, C.J. and Windeyer, J. dissented, and would have found in favour of the wife. Barwick, C.J. agreed with Owen and Taylor, JJ. that provided consideration is supplied, it need not have come from both co-promisees. But he also found that on a proper construction of the contract B was privy to that contract.¹²⁸ He avoids mention of whether she was a party to it, though the effect may be the same. Windeyer, J. agreed with the three of his brother judges that consideration need only move from one of the co-promisees, and he found that the wife was a party to the contract. Pausing here, it is interesting to note that both Barwick, C.J. and Windeyer, J. prefer to look at the contract more from the company's position. The company had promised to make payments to A and B jointly, and A would need to join B in order to sue the company for performance or damages. In Barwick, C.J.'s view, A could not unilaterally revoke his instructions to the company, nor could A's executors demand payment to themselves. In their shared view the company was obligated to pay the survivor, and the widow could bring an action on that contract to compel the company to do so.¹²⁹

No Canadian court has had reason in any reported case to examine the validity of these arguments and the outcome of this particular case, but the decision and the disagreement of judicial opinion, both in the High Court and in the courts below, must throw into doubt much of the common law position as to joint accounts. Does the case turn on general principles governing every situation where A for value joined by B, contracts with X to the effect that X will make payments to A and B jointly, or is it in fact a decision on the language of the particular contract between the company on the one side and Coulls and his wife on the other? It is probably a decision on general principles, determining that a volunteer's right to sue on the contract is a matter of construction of the contract. If this is so, McTiernan, J.'s judgment leaves one with the impression that he would find a volunteer joint account holder has no action against the bank, certainly after the payor's

¹²⁸ Windeyer, J. (at p. 482) considered the signature by B a significant factor in showing that X promised payment to A and B jointly and to the survivor, but Taylor and Owen, JJ. did not consider (at p. 481) that this made B a party to the contract.

¹²⁹ Approaching the problem from the angle that the wife was a stranger to the contract, and therefore brought within the rule in *Tweddle v. Atkinson*, (1861), 1 B. & S. 393, Windeyer, J. is not prepared to say that that rule is not binding law. However, with the aid of *Beswick v. Beswick*, [1966] Ch. 538 (C.A.) — the House of Lords' hearing had not taken place at the time — he is able to say the wife can derive benefits from the contract. He is noticeably hesitant about the widow's right to sue, however.

death.¹³⁰ But for the remaining judges two would say that everything hangs upon whether the volunteer is a party to the contract, and two others would agree but with a seemingly greater willingness to find that the volunteer is a party, or privy, as Barwick, C.J. prefers to put it.¹³¹ For the majority in the Australian court, therefore, the crucial matter to a greater or lesser degree would probably be the language of the contract between the bank and the joint account holders. Even if the volunteer signs a document to which the party making the deposit and the bank are party, this may not be enough to make the volunteer party or privy to the contract. And if he signs nothing, the depositor making an oral contract with the bank, the volunteer's chances of being able to sue the bank, certainly after the depositor's death, must be small.

As to the law in Canada, therefore, the primary question must be, what view have Canadian courts taken as to the ability of the volunteer joint account holder to sue the bank? In other words, does the agreement with the bank confer a joint legal ownership upon the volunteer, and ownership of the entire legal interest should he survive the other joint tenant? Thereafter, assuming that the volunteer does acquire rights, we turn to the principal question with which the Canadian courts have been concerned, namely, when does the volunteer hold his legal joint interest on resulting trust as to the beneficial interest for the other party to the joint account, who alone paid into the account, and, if a gift was intended, at what moment of time does a gift of the right of survivorship arise?

It is customary banking practice to require a depositor, when he seeks to open an account in his own and another's name, to require both would-be parties to the joint account to enter into a written agreement with the bank. This document, signed by both account holders, may take slightly varying forms according to the bank, or district of the banking operation in question, but its terms always authorize the bank to make payments out of the account, from whichever party the deposits came, to either of the account holders, and to the survivor. All cheques on the account, receipts or other vouchers may be signed by either party, or by

¹³⁰ It is true that McTiernan, J. said of the contract in *Coull's case* (at p. 479), "It is not stated expressly with whom the agreement is made or to whom the company agrees to pay the royalties." But the present writer feels that his Lordship's view on the requirements for a valid statutory or equitable assignment leaves little room for the validity of the typical joint account agreement.

¹³¹ Can a party to a contract acquire only rights and no liabilities? In the case of a joint account, the bank can surely sue both account holders for recovery if it has allowed the account to accumulate a considerable overdraft.

the survivor, the agreement will recite, and the bank be given a full discharge thereby. If the volunteer is not a party or privy to this agreement, *Coulls v. Bagot's Executor and Trustee Co. Ltd.* would suggest that all the joint account creates is an incompletely constituted gift, while the volunteer has no equity to compel completion. Who then is a party to a contract? Who is privy to it? If the answer is not, 'He who has supplied consideration', and four out of five of the High Court said this was indeed not the answer, it must be a matter of evidence. Was the particular volunteer so closely associated in the agreement with the person who supplied the consideration that it could be said that both of them, acting as if they were one, entered into the contract with the party on the other side? On that test Mrs. Coulls lost her action. What would be the outcome on that test of bankers' joint deposit account agreements? The shortcoming of *Coulls'* case is that it makes this important issue of the volunteer's rights a matter of construction, so that only a conjecture can be made of how the courts will react to joint account agreements. It seems to the writer that the language of the documents of agreement that have come before the Canadian courts, and at least five cases have been concerned with these documents,¹³² justifies the conclusion that the volunteer does satisfy the test. Each document before the courts has spoken throughout of "we" in relation to the account holders, and in particular it is "we" who give a discharge to the bank for actions done both during the joint lives and during survivorship. If this view is correct, the volunteer under a joint account agreement can enforce his rights against the bank, joining his joint tenant during joint lives but suing in his own name only should he (the volunteer) survive.

One must mention, however, two decisions of the Supreme Court of Canada which for a time left in doubt whether any rights of legal ownership arose out of the creation of a joint account, A depositing and joining B's name. In *Re Mailman*¹³³ in 1941 the Supreme Court was asked to decide whether A intended to confer a gift of the survivorship upon B, and, unhappily, the question

¹³² *Niles v. Lake*, [1947] S.C.R. 291, [1947] 2 D.L.R. 248 (Royal Bank of Canada); *Re Mailman*, [1941] S.C.R. 368, [1941] 3 D.L.R. 449 (Bank of Nova Scotia); *French v. French*, [1952] O.R. 889 (Bank of Montreal); *Re Kettle*, (1965) 51 M.P.R. 1 (Nfld.) (Bank of Nova Scotia); *Edwards v. Bradley*, [1956] O.R. 225, [1956] 2 D.L.R. (2d) 382 (Ont. C.A.), reversed on another point [1957] S.C.R. 599, (1957) 9 D.L.R. (2d) 673 (Royal Bank of Canada); *Benjamins v. Chartered Trust Co.*, [1965] S.C.R. 251, (1965), 49 D.L.R. (2d) 1 (Swiss Bank Corp., Zurich).

¹³³ [1941] S.C.R. 368.

of the *legal* rights created by the opening of a joint account was confused with the question of the *beneficial or equitable* rights, which is a matter of the intention of A. The question posed should have been: (1) what legal rights were created by the mere fact of A's opening an account in his own and B's name, and what, if any, additional legal rights were created between A and B by the joint account agreement with the bank. If B acquired legal joint ownership by one or both of those occurrences, the next question should have been: (2) did B hold his legal title on trust as to the beneficial interest for A.

The majority judgment was given by Crocket, J. He took the view that a joint tenancy or ownership could only come into existence if B was to retain for himself a share of the beneficial interest. This fusion of the two principal questions suggested that, as far as B was concerned, he was made a gift or took no title at all. The question of A's intention was dominant, and excluded all meaningful discussion of the first question. It follows that the effect of an account in joint names and the effect of the agreement with the bank were not properly distinguished. The learned judge merely let drop these words: "No doubt had the letter of instructions to the bank not contained this provision [that the survivor could withdraw the balance], [B's] right to withdraw any money from the deposit account would have ended with [A's] death."¹³⁴ Since A's mandate to the bank must lapse with A's death, does this mean that it is the agreement with the bank that creates an assignment and confers rights upon B? If an assignment is created, what rights does this confer upon B? If it is not an assignment, upon what basis is it that B can withdraw any money after A's death?

This thoroughly unsatisfactory judgment was re-echoed in Rand, J.'s judgment in *Niles v. Lake*.¹³⁵ He, too, considered that a joint tenancy was "a title characterized by an immediate beneficial interest of a moiety of ownership",¹³⁶ but he added that, if the evidence showed B was not made a gift of the beneficial interest, no one had yet suggested what "category of ownership"¹³⁷ was set up when rights were conferred upon B by the agreement with the bank.

In this same case, however, Taschereau, Kellock, and Kerwin, JJ. each said that B acquired a legal interest, and the true question was whether he held that legal interest on resulting trust for A.

¹³⁴ *Ibid.*, at p. 456.

¹³⁵ [1947] S.C.R. 291, [1947] 2 D.L.R. 248.

¹³⁶ [1947] 2 D.L.R. 248 at p. 261.

¹³⁷ *Ibid.*

So the situation was at least initially clarified, and this distinction between the legal and the beneficial interest has been firmly established ever since. However, it is largely because of that early confusion that Canadian courts have never come to grips with the questions posed in *Coulls'* case. If a joint account were to be opened without an agreement of the familiar kind with the bank, what legal rights of ownership (if any) would B, the volunteer, acquire? Canadian courts have been content to assume the banking practice of requiring the completion by A and B of a standard agreement form. Typical is this statement of F.G. MacKay, J.A. in *Edwards v. Bradley*:

The right of the depositor is the right to withdraw or demand payment of the money from the bank. It is a chose in action that may be assigned and by the terms of the joint deposit agreement with the bank, signed by both A and B, A assigns the legal right to withdraw the money to himself and B jointly, with the right to the survivor to withdraw the balance in the event of the death of A or B. . . . The title to the chose in action being vested in A and B jointly on the execution of the agreement with the bank, each, under the terms of the agreement, has a legal right [to withdraw during the joint lives and as survivor].¹³⁸

The Ontario Court of Appeal, upon which F.G. MacKay, J.A. sat, was reversed by the Supreme Court, but on another point, and Cowan, C.J.T.D. was right, one would respectfully suggest, in deciding in *Re Cameron*¹³⁹ that MacKay, J.A.'s statement survived the reversal.¹⁴⁰ Whether the fact of A opening a joint account confers rights of withdrawal during joint lives and of survivorship upon B, and whether all standard joint account agreements would constitute an assignment of those rights to B, are questions which Canadian courts have not yet considered.¹⁴¹

¹³⁸ [1956] 2 D.L.R. (2d) 382 at p. 387.

¹³⁹ (1967), 53 M.P.R. 214, (1967), 62 D.L.R. (2d) 389.

¹⁴⁰ In *Re Kong Chee Ming Estate*, (1969), 69 W.W.R. 759 (B.C.) Macdonald, J. agreed with Cowan, C.J.T.D., and adopted MacKay, J.A.'s words, set out here.

¹⁴¹ The fullest standard joint account agreement form which has yet come before the courts was that of the Royal Bank of Canada in *Niles v. Lake*. This included the sentence, "the undersigned [A] in order effectually to constitute the said joint deposit account hereby assigns or transfers to all of the undersigned [A and B] jointly and to the survivor or survivor of them any and all moneys which may have been heretofore or may now or hereafter be deposited to the credit of the said account together with all interest...". Those representing A did not challenge that this constituted an effective assignment to B of the survivor's rights. Later cases, with different agreement forms from other banks, have accepted *Niles v. Lake* as the authority, together with *Re Mailman*, on this point. In *Conway Estate v. M.N.R.*, (1965), 65 D.T.C. 5169 at p. 5173, Thurlow, J. took certain remarks of Kellock, J. in *Niles v. Lake*, and of Crocket,

But, if the fact of an account in joint names or the assignment said to be embodied in agreements establishes rights in B, this gets the volunteer (B) only half the way home. Though he can enforce his rights against the bank, he now becomes subject to the rule that if A transfers his property into the joint names of A and B, B holds on resulting trust for A.

In other words, the rights over the chose in action between the joint account holders themselves must now be established. These rights can be divided; the right of drawing moneys and signing on behalf of the account holders during the joint lives, and, secondly, the right of survivorship. *Prima facie*, as we have seen, the volunteer holds his share of the beneficial rights on resulting trust for the actual depositor, unless a presumption of advancement arises in the volunteer's favour. Any moneys drawn from the account by the volunteer during the joint lives, and the right of the survivor to take the balance, are subject to a resulting trust. Because the rights are divisible into joint lives and survivorship, there will be a *prima facie* resulting trust as to the right of survivorship when two persons pay equally into their joint account.¹⁴² Were it otherwise, said Schroeder, J.A. in *Frosch v. Dadd*, a joint tenancy of the beneficial interest could be created by inadvertance.¹⁴³ The opening of a joint account gives each account holder a legal interest in the moneys credited to the account at any one time, and the right of survivorship arises by operation of law as part of the legal concept of joint tenancy. But whether the survivor may take the balance depends upon whether the deceased intended to make such a gift of his share. The *prima facie* resulting trust therefore compels the survivor, who has contributed equally to the moneys in the account, to hold the deceased's share on trust for his estate. In equity, that is, the survivor is a tenant in common. The only time when the survivor would not hold the deceased's share on a resulting trust would be when the moneys in the account were a gift to the two joint tenants by a third person. Between husband and wife as joint account holders there is often no reliable evidence as to the source of the moneys in the account, moneys of both parties having been paid into the account without record kept of the source. In these circumstances the moneys are *prima facie* taken to belong to both account holders

J. in *Re Mailman* to mean that as soon as joint ownership is created over personal property full rights of withdrawal and of survivorship arise in each party. But, as we have seen, standard joint account agreements were involved in both those cases.

¹⁴² *Frosch v. Dadd*, [1960] O.R. 435 (C.A.).

¹⁴³ *Ibid.*, at p. 452.

equally,¹⁴⁴ and the presumptions will come into operation, as in *Frosch v. Dadd*, to aid in determining whether the survivor takes the balance beneficially.

Before evidence is introduced as to the intention of the originating account holder either as to rights between the account holders during the joint lives, or as to the survivorship, it must be determined what was to be the subject-matter of the alleged gift. In *O'Brien v. Bean and Bean*,¹⁴⁵ this question proved the undoing of the claiming joint account holder. A, the sole depositor, had opened a joint account in the names of himself and B, his sister. During their joint lives B claimed that a half share in the moneys deposited were a gift to herself. A alleged that the purpose of the joint account was merely to permit B in the interests of family concord to oversee the handling of these finances, but this led him to admit that the moneys in the account were to be used for the purchase of a house in which he had promised B an interest. Ruttan, J. concluded that the gift was not to be of money, but of an interest in a house, and this effectively decided the case because, since no house had yet been bought with the moneys, the gift was incomplete. B as a volunteer had no means of securing completion.

Whether A intended to make a gift to B when the joint account was opened by him in the names of A and B is dealt with, of course, by the presumptions of resulting trust and of advancement. As to whether A intended to make a gift to B, much attention was given in the earlier cases to the terms of the agreement with the bank. In *Re Mailman*,¹⁴⁶ where an agreement form of the Bank of Nova Scotia was under consideration, the Supreme Court divided as to whether the agreement revealed any intention on the part of A. The majority considered the document as concerned only to establish the relation of the joint account holders with the bank,¹⁴⁷ while the minority found in it a desire to create a joint tenancy of the beneficial interest. In the later case of *Niles v. Lake*,¹⁴⁸ however, all but one member of the Supreme Court was prepared to agree that B acquired a joint legal interest on the opening of the account,

¹⁴⁴ *Benjamins v. Chartered Trust Co.*, (1965), 49 D.L.R. (2d) 1 (S.C.C.); *Re Cameron*, (1967), 53 M.P.R. 214, (1967), 62 D.L.R. (2d) 389 (bearer bonds and debentures in two safe deposit boxes).

¹⁴⁵ (1957), 7 D.L.R. (2d) 332 (B.C.).

¹⁴⁶ [1941] S.C.R. 368, [1941] 3 D.L.R. 449.

¹⁴⁷ Crocket, J. for the majority said ([1941] 3 D.L.R. 449 at p. 456) the agreement made no reference to ownership between the account holders, and contained no evidence of a previous agreement.

¹⁴⁸ [1947] S.C.R. 291, [1947] 2 D.L.R. 248.

and so the real question of A's intent became much more clear. Did B hold his legal interest in trust for A? In other words, did a resulting trust arise in favour of A? If it did, then A retained the equitable or beneficial interest in all the moneys in the account at any one time. To the question of whether the agreement contained any evidence of A's intent, each member of the Court had no doubt. It contained none. As Kedwin, J. put it, the standard form agreement was "prepared by a bank for its own protection". As to evidence of intent, "the language is no more absolute or unequivocal than in a deed of land or a transfer of shares or stock by the owner to the joint names of the transferor and transferee".¹⁴⁹ The agreement form in that case, used by the Royal Bank of Canada, was particularly comprehensive in the relation which it spelled out between the account holders and the bank, and this decision seems to have concluded the issue as to whether such documents as a class contain any evidence as to intention of the parties *inter se*. Indeed, in *Edwards v. Bradley* in 1957 Kerwin, C.J.C. said, "It has been pointed out in *Re Mailman* and *Niles v. Lake* that documents of this nature are drawn by the bank and cannot affect the resulting trust."¹⁵⁰

However, assuming that other available and admissible evidence either rebuts the presumption of resulting trust or proves insufficient to rebut the presumption of advancement, so that in both situations A is found to have been making a gift to B, B may yet fail. This happens because a joint account involves the two sets of rights; the right to withdraw moneys during the joint lives, and the right to take the balance on survivorship. What moneys B, the volunteer, draws during the joint lives he will take as a gift (he has a joint legal interest, and he has been able to show that A intended him to have a joint beneficial interest as well), but it is debatable at what time the right of survivorship passes to B. When A opens the joint account, the bank agreement form is jointly signed, and B acquires a joint legal interest, including a legal interest in the right of survivorship, does the beneficial or equitable interest in that right pass to B at the same time? If so, there is a gift *inter vivos*

¹⁴⁹ [1947] 2 D.L.R. 248 at p. 253.

¹⁵⁰ [1957] S.C.R. 599 at p. 600 in *Re Cameron*, (1967), 53 M.P.R. 214, (1967) 62 D.L.R. (2d) 389 (N.S.), Cowan, C.J.T.D. seems to leave the matter open. The Bank of Nova Scotia agreement before him, he said ((1967), 62 D.L.R. (2d) 389, at p. 399) was "in a form substantially the same" as that before the court in *Niles v. Lake*. He was therefore prepared to follow *Niles'* conclusion. In the most recent case, *Re Armstrong*, (1970), 7 D.L.R. (3d) 36 at p. 59, Cowan, C.J.T.D. again followed *Niles v. Lake*.

of both legal and equitable interest in the right of survivorship. A second argument is that, even though the legal and equitable interests pass at the time of the account being opened, the ability of A to exhaust the account in his lifetime is tantamount to a power of revocation. If he does not exercise that power, B will take over the moneys remaining in the account. This acquisition seems to have more of the character of the *donatio mortis causa*.¹⁵¹ A third argument is that, insofar as the beneficial or equitable interest seems contingent on survivorship, the volunteer survivor acquires his beneficial interest only at the moment of the decease of A. If A is in fact the first to die, then A has made a testamentary gift to B which must be in proper testamentary form in order to be valid.

The issue has been before the Canadian courts over a number of decades, and only fairly recently has judicial opinion settled in favour of the first alternative, namely, that rights of survivorship, both legal and equitable, vest when the joint account is opened, so that the gift of those rights is *inter vivos*. The Supreme Court has still to give a judgment on the matter, however, and much may turn upon whether B has the right to make withdrawals on the fund during the joint lives.

In *Hill v. Hill*,¹⁵² for example, a father had \$400 in a bank account, and he procured a deposit receipt for this sum "payable to himself [A] and [B], his son, or either, or the survivor." His proved intention was that, while he would retain complete control over the sum during his lifetime, whatever was left should belong to B. And he retained the receipt in his papers. Anglin, J. had little doubt as to whether this gift was valid.

The father retaining exclusive control and disposing power over the \$400 during his lifetime, the rights of the son were intended to arise only upon and after his father's death. This is, in substance and in fact, a testamentary disposition of the money, and, as such, ineffectual.¹⁵³

¹⁵¹ For this doctrine to operate A would have to be *in extremis* at the time of opening the joint account. The likelihood of this doctrine arising on the facts must be small.

¹⁵² (1904), 8 O.L.R. 710.

¹⁵³ *Ibid.*, at p. 711. Anglin, J. also said, but gave no reason, that he could not regard this as a voluntary settlement, reserving to the settlor a life interest with a power of revocation. Because he could find no evidence of an intention to create a trust? Such a solution, of course, would have changed the result of the case. The son would have acquired a vested interest when the deposit receipt was taken from the bank. Was this a case of mandate? See *Coulls v. Bagot's Executor*, (1966-67), 40 A.L.J.R. 471.

Danis, J. followed that decision on very similar facts in *Larondeau v. Laurendeau*.¹⁵⁴

One of the earlier cases in which A and B had agreed that A alone should exercise drawing rights during A's lifetime was *Re Reid*,¹⁵⁵ heard in the Ontario Court of Appeal. A son, A, had opened a joint account with his own moneys in the names of himself and B, his father. Did B take the balance for himself on A's death, or did his interest in that prospective balance arise when the joint account was opened? Meredith, C.J.O. thought the answer was the latter. In the earlier words of Boyd, C. in *Weese v. Weese*,¹⁵⁶ Meredith, C.J.O. seems to be saying that the opening of the joint account was "a voluntary bestowment in joint tenancy", and, though B's legal title to the fund became vested in possession on A's death, it vested in interest at the time of the joint tenancy creation. But it is a confusing judgment, and it is not clear whether the learned judge was thinking in terms of a gift *inter vivos* or a *donatio mortis causa*.¹⁵⁷ There is no doubt in Ferguson, J.A.'s mind. At the moment the joint account was opened, there was a complete and perfect gift of a joint title in the money which, by operation of law as well as by expressed intention and agreement, carried with it a right to title by survivorship. In his view the agreement between A and B did not act so as to prevent dominion and control from passing from A to B, nor did it act as a power of revocation. All it did was give A a right and power to defeat in whole or in part (by withdrawals from the account) the *purpose* of the gift. Because A could withdraw the total funds in his lifetime, Ferguson, J.A. thought it might have been possible to describe this as a *donatio mortis causa*, but he preferred to see this situation as a "gift *inter vivos* of a joint interest".¹⁵⁸ Hodgins, J.A. dissented because he felt that A's ability to withdraw what he wanted during his own lifetime must mean that B took ownership of nothing till A's death. Since no dominion or control of the moneys passed to B in A's lifetime, there could be no *donatio mortis causa*, and the consequence was that this was a gift on death not in proper testamentary form which therefore failed.

¹⁵⁴ [1954] O.W.N. 722. In this case the child was to have the balance left at the father's death, after the child, now an adult, had paid off the father's debts.

¹⁵⁵ (1921), 50 O.L.R. 595, (1922), 64 D.L.R. 598.

¹⁵⁶ (1916), 37 O.L.R. 649 at p. 651.

¹⁵⁷ Or why, indeed, the gift was not testamentary. He clearly had decided it was not testamentary; that is all that emerges with clarity.

¹⁵⁸ *Ibid.*, at p. 608.

The majority view of *Re Reid*, effectively expressed in Ferguson, J.'s judgment, was adopted by Romer, J. in the English case of *Young v. Sealy*,¹⁵⁹ and the able arguments of the members of the High Court of Australia in *Russell v. Scott*¹⁶⁰ in 1936 gave considerable support to the gift *inter vivos* view. Both these cases enhance the judgment which was given by MacKay, J.A. in *Edwards v. Bradley* in the Ontario Court of Appeal. He drew attention to the fact that *Hill v. Hill* and *Larondeau v. Laurendeau* were decisions of the trial court, and expressed the relevant principles of law in this way:

The legal right to take the balance in the account if A predeceases him being vested in B on the opening of the account, it cannot be the subject of a testamentary disposition. If A's intention was that B should also have the beneficial interest, B already has the legal title and there is nothing further to be done to complete the gift of the beneficial interest. If A's intention was that B should not take the beneficial interest, it belongs to A or his estate and he is not attempting to dispose of it by means of the joint account. In either event B has the legal title and the only question that can arise on A's death is whether B is entitled to keep any money that may be in the account on A's death or whether he holds it as a trustee under a resulting trust for A's estate.¹⁶¹

It made no difference in MacKay, J.A.'s view whether A could defeat B's interest by drawing all the money out of the account; A could not divest B of his legal title without B's consent. Only B's predecease brought his legal title to a close. It was an obiter comment to the facts of *Edwards v. Bradley* but the learned judge considered that his statement of the law was not affected whether A intended to make a gift both of withdrawal rights during joint lives and of survivorship, or of either alone.

However, in the Supreme Court this question of whether the gift was testamentary did not need to be decided, since the Court found no evidence of an intent to make a gift, and, aside from noting the decisions in various jurisdictions on the question, Cartwright, J. left the matter there.

It is unfortunate that the Court did not give an opinion on this point, because it is of some importance in practice, as a twist on the facts of *Conway Estate v. M.N.R.*¹⁶² will show. The Minister was there claiming estate tax not over half, but over the whole of the balance left in a joint account on the death of Mr. Conway.

¹⁵⁹ [1949] Ch. 278, [1949] 1 All E.R. 92.

¹⁶⁰ (1936), 55 C.L.R. 440.

¹⁶¹ (1956), 2 D.L.R. (2d) 382 at pp. 387, 388.

¹⁶² (1965), 65 D.T.C. 5169. Followed in *Goeglin v. M.N.R.*, (1968), 68 D.T.C. 5271.

Mrs. Conway argued that, unless the presumption of advancement was rebutted, immediately upon the opening of the account she acquired as a gift *inter vivos* a half interest in both income and capital balance.¹⁶³ Thurlow, J. commenced his judgment by asking what rights are acquired in the capital balance when a joint ownership is created, and he held that the wife was entitled to an undivided interest in the balance as soon as the account was opened. In other words, the joint tenant has a legal interest in the property during the joint lives. As to the capital, therefore, that interest took effect as from the opening of the account, and on this point the learned judge saw no reason for distinguishing between capital and income. The next question was whether the equitable or beneficial interest followed the wife's legal interest; that is, whether the presumption of advancement was rebutted "that an immediate gift of an undivided interest in the balance in the account was intended."¹⁶⁴ As a finding of fact, Thurlow, J. concluded that at the time the account was opened the wife was intended to have "a present gift"¹⁶⁵ of a joint interest in the income and the capital balance. The wife had not made any withdrawals during the joint lives, but from the moment the account was opened the pass books were always kept in a place to which she had access, and she had not been excluded by prohibition of her husband, or an agreement between them from making withdrawals during the joint lives. This finding, the learning judge said, and the reader should note this, made *Larondeau v. Laurendeau* and *Hill v. Hill* irrelevant. He concluded:

The case is thus in my opinion not one of an intended testamentary disposition which is ineffective because of failure to comply with the formalities involved in making such a disposition and I am further of the opinion that there is nothing in the material before me which rebuts the presumption insofar as the capital is concerned.¹⁶⁶

Thurlow, J.'s conclusion as to the presumption of advancement is clearly justifiable on the facts of the case, but let us change the

¹⁶³ Under the *Estate Tax Act*, S.C. 1958, c. 29, s. 3(1) (f) [still in force] taxable property includes "property held jointly by the deceased and one or more other persons, to the extent of the beneficial interest therein arising or accruing by survivorship or otherwise on the death of the deceased." Presumably this paragraph was thought to close off the possibility of arguing in the *Conway Estate* case the *Russell v. Scott, Edwards v. Bradley* conclusion that survivorship rights over the whole of any future balance vest legally and equitably when the account is opened; that at that moment the gift is completed, if there is of no evidence of a contrary intent in the donor.

¹⁶⁴ *Ibid.*, at p. 5174.

¹⁶⁵ *Ibid.*, at p. 5175.

¹⁶⁶ *Ibid.*

facts a little. Suppose the presumption of advancement was rebutted that the wife was to have a beneficial interest during joint lives. Suppose, that is to say, that Mr. Conway had made it clear to his wife that she was not to touch the account while he was alive, but that he wanted to make a gift to her of the balance remaining at his death.¹⁶⁷ Could it then have been decided that, though the legal balance passed to the wife on the opening of the account, the denial of withdrawal rights while her husband was alive, meant that the beneficial interest in the capital balance passed only on his death?¹⁶⁸ In other words, in Canadian courts how far does the issue dealt with by MacKay, J.A. remain open?¹⁶⁹

The joint bank account is a popular device, particularly among married people, and it has long been recognised by banking practice. That doubts should still exist as the rights of the volunteer against the bank, and to the rights *inter se* of the joint account holders, is really indefensible. Messrs. Sheard and Hull feel compelled to warn practitioners in their *Canadian Forms of Wills*¹⁷⁰ that "such accounts are a prolific source of litigation", and that "with the passing of years the difficulties... have certainly not decreased." We have the 30-years-old merry-go-round of stock transfer, agency, express trust, and assignment as possible rationalisations of the judicially assumed rights of the volunteer against the bank. Federal legislation should be introduced to clarify the obligations of the bank. And then there is the need to clarify the law governing the rights of the joint account holders *inter se*. Assuming that it is appropriate to question whether the volunteer is to take his joint ownership as a gift or on behalf of the payor,

¹⁶⁷ This is a common occurrence. The husband is using the account in connection with his business, but he wants his widow to have money available immediately upon his sudden incapacity or his death, both for her needs and, possibly, to meet any emergency call of the business. Alternatively, the husband has always managed the couple's financial affairs, but his aim is to make provision so that his wife has drawing rights in the event of his incapacity or death. In either case it is very likely he has not taken legal advice.

¹⁶⁸ It is possible that the very fact of a husband opening a joint account means that he intends to make a present gift to his wife of the balance remaining at his death. But control passes on his death, and the contingency of her survival must be satisfied and that can only occur on his death. Is it enough to say that at his death the husband needed to do no more to convey legal and beneficial interest to his wife? How far does a husband make a gift *inter vivos* when for tax purposes he puts his business bank account into joint names?

¹⁶⁹ For a valuable analytical study of the problems associated with joint accounts, see Cullity, M.C., "Joint Bank Accounts with Volunteers", (1969), 85 L.Q.R. 530.

¹⁷⁰ 3rd ed., 1970 at p. 310.

and that the presumptions assist in the handling of this question,¹⁷¹ there could be doctrinal clarification. In view of the trend of the cases, the expense to the parties of construction actions could be avoided by laying down that documents signed with banks can have no effect or be construed as containing any evidence on the rights *inter se* of the account holders. Such documents are not originated for that purpose, and insofar as one party to the "agreement", the bank, is not interested in the matter, they are not an appropriate vehicle for such evidence. Moreover, it should be laid down when a survivorship interest vests legally and beneficially.¹⁷² If MacKay, J.A. is right in *Edwards v. Bradley* or his solution is preferable, it should not need another appeal to the Supreme Court to establish the point. The problem is already too hoary, and the solution by statute too obviously needed.

The Uniformity Commissioners might draft a bill which would clarify the position as to *inter se* rights. Failing the Commissioners, the provincial law reform agencies should take up the matter. Hopefully, liaison between these agencies would result in uniform legislation, which by its uniformity would commend itself to the remaining common law provinces.

(ii) *The presumption of advancement and matrimonial disputes.*

In recent years in Canada, as we noted earlier, there has been evidence of some judicial desire to approach the facts of each case with an open mind and to weigh the evidence before the court as the preferable means of deciding what was the intention of the parties. In cases concerning matrimonial disputes over property the disinclination in some English quarters to accept the value of the presumptions of resulting trust and of advancement is marked, and this concern was given forcible expression at the highest appellate level in *Pettitt v. Pettitt*,¹⁷³ where the House of Lords examined the presumptions closely. Such a development is significant, for Canadian courts have traditionally relied upon English authority.

¹⁷¹ See *Re Figgis*, [1969] Ch. 123 at p. 149, for the difficulty of applying the presumption of advancement to a joint account.

¹⁷² Megarry, J. (*ibid.*) suggested the interest is "an immediate gift of a fluctuating and defeasible asset consisting of the chose in action for the time being constituting the balance in the bank account". He thought this a subject "worthy of academic disputation", and was happy it was not a problem he needed to solve for the purpose of the case. He concluded, however, that payments by the particular husband into the joint account were not "gifts made by me during my lifetime", as the will required.

¹⁷³ [1969] 2 W.L.R. 966, [1969] 2 All E.R. 385. See for a note, (1969), 32 M.L.R. 570 (S. Cretney).

The issue in *Pettitt's* case arose because the wife had bought a house with her own resources, and the husband had done work both outside and inside the house. On the breakdown of the marriage the husband claimed that he was entitled to a share in the proceeds of sale of the property because of the work he had done. Lord Reid, like other members of the Court, thought it first necessary to examine the ways in which many a modern family acquires property. The probabilities are these. Each party enters the marriage with little property, the wife works and thus helps finance the needs of them both, and when children come along the husband earns the salary which keeps the family while the wife maintains the house and tends to the children. If she has money of her own, or earns anything during the marriage, it is probable that that money will be spent in a number of ways. She may contribute towards the house-keeping, or clothing the family; she may help in meeting mortgage repayments on the house, or in buying furnishings or labour-saving equipment. Lord Reid thought that the presumptions of resulting trust and of advancement, if they were still applicable at all to such situations as these, were surely much diminished today. Lord Diplock agreed with this view. He felt that the presumptions were fashioned by the judges of the nineteenth century and reflected an era when the propertied middle class made marriage settlements, the husband's income and capital would otherwise finance the family, and it was unusual for the wife to earn an income which was used to assist that financing. The social and economic change since the Second World War had brought new situations before the courts, and Lord Diplock felt that it was better today, in the absence of an agreement between them, to impute to the modern couple a constructive common intention that would have been formed by reasonable spouses. Most spouses would have agreed to share their assets. Indeed, he pointed out that whether the matrimonial house was in the name of the husband, or the wife, or both jointly, was often influenced not by their intentions so much as by the requirements of the mortgage corporation. Lord Morris saw the problem created by the outdated character of the presumptions, but thought that legislation was needed to make any change of substance in the legal approach to property disputes. Lord Hodson was of the opinion that, if evidence were adduced, the presumptions today would seldom have decisive effect.

Only Lord Upjohn went so far as to say that the presumptions remain as valid today as they have ever been. They were designed, he said, to deal with situations where there was no available evidence as to the intention of the parties, and that task the presumptions

still perform. "They have been criticized as being out of touch with the realities of today but when properly understood and properly applied to the circumstances of today I remain of the opinion that they remain as useful as ever in solving questions of title."¹⁷⁴ It is noticeable, however, that his Lordship did not go through with all that that statement implied. With reference to the presumption of a resulting trust and assuming the absence of any evidence as to the parties' intent, he said: "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."¹⁷⁵ Formerly, it has been thought that evidence as to intention cannot be construed from the fact that ownership of the property is in one name as opposed to another, or in joint names. All that could be said in the case of the transfer into joint names, the transferor being one, is that the presumption of resulting trust might be somewhat easier to rebut.¹⁷⁶

Pettitt v. Pettitt is the latest and the most authoritative statement of the judicial approach in England to matrimonial property problems.¹⁷⁷ If the parties have agreed as to the ownership of their assets, then the courts will enforce that agreement. But, if there is no evidence of an agreement, it is a question of deducing their intentions from what evidence there is available. There is, as we have seen, some difference of opinion as to the weight that should today be given to the presumptions. Some would say they are of little or no value. Lord Denning, M.R., and Lord Diplock, who are of this view, think it more realistic to say that when the parties have entered their marriage with little property, and have laboured together to build up their home and its chattel assets without taking account

¹⁷⁴ [1969] 2 W.L.R. 966 at p. 990.

¹⁷⁵ *Ibid.*, at p. 991.

¹⁷⁶ However, there has been a marked trend in England during the last ten years for the lower courts to accept a conveyance by either husband or wife into their joint names as conclusive evidence of an intention that they should have equal beneficial shares. To the present writer's mind this is part of the move, noted by Lord Diplock, for the lower courts to recognize increasingly an equal sharing of assets between husband and wife. In Canada there is evidence that, while the courts have been more conservative, they are prepared to regard joint tenancies as strong evidence of an intention to share equally. See *Re Osachuk and Osachuk*, (1970), 10 D.L.R. (3d) 81 (Man.), and *Kearney v. Kearney*, (1970), 10 D.L.R. (3d) 138 (Ont. C.A.). In the *Kearney* case the court cited Lord Upjohn's words with approval.

¹⁷⁷ For the English Court of Appeal's interpretation of this case, see *Chapman v. Chapman*, [1969] 1 W.L.R. 1376, [1969] 3 All E.R. 476, and *Nixon v. Nixon*, [1969] 1 W.L.R. 1676, [1969] 3 All E.R. 1133.

of whose earnings went where, they should be assumed to have pooled their resources in the acquisition of 'family assets', the ownership of which they share equally. Lord Diplock said in *Pettitt's* case that in his view this approach had represented the broad consensus of judicial opinion in the lower courts since the Second World War. Others would prefer to say merely that the presumptions are more easily rebutted than they would have been twenty-five years ago. In the view of this school, and Lords Morris, Hodson, and Upjohn each supported it in *Pettitt's* case, if there is no evidence of an agreement between the parties, the courts start from where they find title to be. There the presumptions come in. Only if the parties each contributed to the purchase of a disputed asset, normally the matrimonial home, may the court properly find, regardless of in whose name or names the property stood, that the common intention or the most reasonable outcome is equal beneficial ownership. And in such cases the contribution of each party must probably be substantial. In this sense Lord Upjohn, for example, interpreted and agreed with *Rimmer v. Rimmer*.¹⁷⁸

Only in *Appleton v. Appleton*¹⁷⁹ and *Gissing v. Gissing*¹⁸⁰ has a court presumed a joint tenancy interest in house or chattels where one of the married parties contributed nothing in nonetary terms towards the purchase or cost of that asset. Work done by the husband on a house in the wife's name may constitute an advancement, but certainly if it is the kind of reasonable upkeep that might be expected of a husband living in a shared home, the House of Lords has now decided that it does not entitle the husband to a share in the proceeds of sale.¹⁸¹ *Appleton v. Appleton* has therefore been held by the House to have been wrongly decided. It now also seems likely that the same fate awaits *Gissing v. Gissing*.^{181a} There the wife's earnings had been used not to make any down payment

¹⁷⁸ [1953] 1 Q.B. 63, [1952] 2 All E.R. 863. His Lordship's remarks on this point are reported, *supra*, at pp. 991, 992. He also approved of *Ulrich v. Ulrich and Fenton*, [1968] 1 W.L.R. 180, [1968] 1 All E.R. 67 (C.A.), where the wife contributed £500 as the down payment, and the husband undertook to pay mortgagees the balance of £2,000, which balance (because the mortgage was later increased) remained when the action was before the Court.

¹⁷⁹ [1965] 1 W.L.R. 25, [1965] 1 All E.R. 44 (C.A.).

¹⁸⁰ [1969] 2 W.L.R. 525, [1969] 1 All E.R. 1043 (C.A.). A husband and wife partnership clearly constitutes a situation where each spouse has contributed in terms of value to an asset which is in one spouse's name. See *Nixon v. Nixon*, [1969] 1 W.L.R. 1676 (C.A.), and *Muetzel v. Muetzel*, [1970] 1 W.L.R. 188 (C.A.).

¹⁸¹ *Pettitt v. Pettitt*, where the husband's claim accordingly failed.

^{181a} The fact situation seems to be outside the recently enacted *Matrimonial Proceedings and Property Act*, 1970, s. 37. See *infra*, n. 183.

or mortgage repayment on the matrimonial home, the property in dispute, but to lay out a lawn, buy furniture, and purchase clothes for herself and the child of the family. On this basis the Court of Appeal decided that the purchase of the house was a joint enterprise intended to create a 'family asset'.

As some members of the House of Lords have themselves pointed out, the rule that a wife shall only share in the matrimonial home if she has herself contributed to meeting the cost of that home is not satisfactory. Such a rule appears to recognize the need for equity, but restricts the situations in which equity can be done. The Lords in *Pettitt's* case were divided merely as to whether, when the husband and wife have pooled their resources and effort and there is no evidence as to their intentions, the *courts* can bring about a change to a presumption of common ownership, or whether any such property allocation should be left to the *legislature*. Lord Morris warmly endorsed recent legislation in New Zealand,¹⁸² which empowers the trial judge in the absence of a common intention between the married pair to make such order as appears just, notwithstanding that the property in question is in one name or the other or both.¹⁸³ However, he, like others of the Court, found the notion of 'family assets' resulting from joint venture, incorrect. It was the task of the court to determine where ownership lay as to disputed assets; it was not its role to distribute those assets in a

¹⁸² *Matrimonial Property Act*, 1963, c. 72, ss. 5, 6. As Lord Morris also points out, s. 6(1) lays down that the court "shall, where the application [for an order] relates to a matrimonial home or to the division of the proceeds of the sale of 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)." The Act is concerned with a situation where the marriage is still in being (s. 5(1)).

¹⁸³ Under the *Matrimonial Proceedings and Property Act*, 1970, c. 45, (England), Section 37 enables the court, in default of agreement between the parties, to determine the existence or extent of the beneficial interest of each party "as may seem in all the circumstances just". However, the section is specifically concerned only with cases "where a husband or wife contributes *in money or money's worth* to the improvement of real or personal property in which or in the proceeds of sale of which either or both of them has or have a beneficial interest" (Italics supplied). The Act adopts the recommendations of the English Law Commission (LAW COM. No. 25), and the above section is intended to apply only in actions to determine title to proprietary interests while the marriage subsists and there has been no order of judicial separation. The section came into force on August 1, 1970 (s. 43(2)). Section 4 of the act (see footnote 208, *post*) extends the existing powers of English courts to distribute the property equitably once divorce, nullity, or judicial separation is being granted.

manner which to the court seemed equitable having regard to the mode of living of the married pair. Only legislation could empower the courts to do that.

In Canada the view has not taken root that, where the married pair have pooled their resources in financing their matrimonial needs and there is no evidence of an agreement between them, a common intention should be inferred to share ownership in the disputed asset. This is largely due to the decision of the Supreme Court in *Thompson v. Thompson*.¹⁸⁴ Prior to that decision the lower courts were undoubtedly accepting the authority of *Rimmer v. Rimmer*.¹⁸⁵ In *Mitchelson v. Mitchelson*,¹⁸⁶ the house was in the husband's name, but DuVal, J. was able to infer that the wife's "time, labour and earnings" put into the home constituted evidence in itself that she did not intend to make a gift, but rather to provide a common home. What earnings there were in that case is not clear, and the inference is that DuVal, J. was more impressed by the fact that the marriage was a joint venture than that, by reason of the earnings, *Rimmer v. Rimmer* became relevant. In *Sopow v. Sopow*,¹⁸⁷ however, Lord, J. specifically followed *Rimmer v. Rimmer* and *Fibrance v. Fibrance*.¹⁸⁸ The house was in the wife's name, but in his view the combined efforts and resources rebutted the presumption of advancement and revealed an intention of joint ownership.

If the 'family assets'¹⁸⁹ idea was going to catch on in Canada, it was first essential that Canadian courts accept the *Rimmer v. Rimmer* notion that where both parties have contributed to the

¹⁸⁴ [1961] S.C.R. 3, (1961), 26 D.L.R. (2d) 1, reversing (1959), 22 D.L.R. (2d) 504 (Ont.).

¹⁸⁵ [1953] 1 Q.B. 63, [1952] 2 All E.R. 863.

¹⁸⁶ (1953), 9 W.W.R. 316 (Man.).

¹⁸⁷ (1959), 15 D.L.R. (2d) 57 (B.C.).

¹⁸⁸ [1957] 1 W.L.R. 384, [1957] 1 All E.R. 357.

¹⁸⁹ That is to say, property, like a house, furnishings, and a car, which is to be commonly enjoyed by the husband and wife. The majority of the Lords in *Pettitt v. Pettitt* disapproved of the phrase, "family assets". Lord Upjohn said, ([1969] 2 W.L.R. 966, at p. 993), "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". His Lordship was unwilling to imply such an agreement. Lord Reid (at p. 972), Lord Morris (at p. 978), and Lord Hodson (at pp. 986, 987) spoke to the same effect. It has been argued that the doctrine of "family assets" is no more than an inference as to intention, as the nineteenth century presumptions of resulting trust and of advancement were judicial inferences against the background of the then marriage relationships. See (1970), 86 L.Q.R. 98 (J.G. Miller).

purchase of the matrimonial home, whether in ascertainable or unascertainable amounts, and there is no evidence of agreement, it is reasonable to infer a common intention to share ownership or to follow the maxim that equity is equality. This notion was approved in *Pettitt v. Pettitt*. But in 1961 in *Thompson v. Thompson* the members of the Supreme Court felt that where the amounts were ascertainable those amounts should determine the proportions of joint ownership. The principle judgment on this matter came from Judson, J., and, starting from the proposition which was later to commend itself to Lord Upjohn in *Pettitt's* case that one first looks to see in whose name or names title stands and then applies the presumptions of resulting trust and advancement, he came to the view that *Rimmer v. Rimmer* was an English development which should not be followed in Canada, and indeed had not been followed in the Supreme Court. He pointed to the earlier decision of *Jackman v. Jackman*¹⁹⁰ where the home was taken in the name of the wife, and the husband had made the substantial contribution of \$10,000 towards the purchase price. The Court had been unable to find that the presumption of advancement was rebutted, he said, though in view of the substantial contribution "it should not have been difficult to draw an inference of a joint interest in the matrimonial home".¹⁹¹ Supposedly, the Supreme Court would also have held that the presumptions determined the outcome of the case, if there had been a substantial, but in terms of amount, an *unascertainable* contribution.

The unsatisfactory aspect of this decision stems from Judson, J.'s view that it is the English judicial assumption of a discretionary power which makes *Rimmer v. Rimmer* unacceptable in Canada. In his own words, "The judicial use of the discretionary power under section 12 of *The Married Women's Property Act*, R.S.O. 1950, c. 233, in property disputes between husband and wife has not developed in the same way in the common law provinces of Canada as it has in England".¹⁹² In *Pettitt v. Pettitt*, however, the House of Lords has now agreed that section 17 of the *Married Women's Property Act, 1882*,¹⁹³ does not confer a discretionary power upon the court to allocate property between the spouses as seems to the court desirable. Yet the House upheld *Rimmer v. Rimmer*. And it did so, surely, because in the circumstances of the case the very

¹⁹⁰ [1959] S.C.R. 702, (1959), 19 D.L.R. 317.

¹⁹¹ [1961] S.C.R. 3 at p. 14.

¹⁹² *Ibid.*

¹⁹³ The English counterpart of the Ontario Legislation.

fact of substantial contribution by one party made it reasonable to infer a common intention to share ownership. That inference, the House pointed out, *also* did equity as between the parties.¹⁹⁴ It seems to follow from *Thompson's* case, however, that a Canadian court should draw no such inference. Yet a Canadian court may now take the view in the light of *Pettitt v. Pettitt* that Judson, J. drew wrong conclusions from his determination that there is no judicial discretion under the equivalent Ontario section.¹⁹⁵ A future Canadian court may find, that is, that a substantial contribution leads to the inference of a common intention to share ownership; a result which *also* does equity as between the parties.

The other objection which Judson, J. had to *Rimmer v. Rimmer* was the powerful one that, if a financial contribution is enough to justify an equal division between husband and wife, why should financial contribution be the only factor which brings about this result. If such a contribution is absent or minuscule, and the "other attributes of matrimonial partnership"¹⁹⁶ are present, such as contributing in other ways to household needs and by labour within or upon the home, why should those factors not also justify an equal division? For him therefore both *Rimmer v. Rimmer* and the doctrine of 'family assets' led to this conclusion:

If a presumption of joint assets is to be built up in these matrimonial cases, it seems to me that the better course would be to attain this object by legislation rather than by the exercise of an immeasurable judicial discretion under section 12 of the *Married Women's Property Act*.¹⁹⁷

Subsequent Canadian decisions have reflected *Thompson's* disapproval of the *Rimmer v. Rimmer* development,¹⁹⁸ and indeed have

¹⁹⁴ Lord Morris ([1969] 2 W.L.R. 966, at p. 980) put it this way: "There will be 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 in *Rimmer v. Rimmer*..., 'equality, I think, almost necessarily follows.' See the post—*Pettitt* case of *Chapman v. Chapman*, [1969] 1 W.L.R. 1367, [1969] 3 All E.R. 476 (C.A.).

¹⁹⁵ Judson, J.'s words concerning *Rimmer v. Rimmer* were *obiter*, because the wife was repaying the husband money borrowed, not making a contribution.

¹⁹⁶ [1961] S.C.R. 3 at p. 14.

¹⁹⁷ *Ibid.*

¹⁹⁸ In *Re Stajcer*, (1961), 34 W.W.R. 424 (B.C.) Wilson, J. followed *Thompson v. Thompson*, and held that contribution during coverture by a wife from her wages toward housekeeping money used for food and clothing for herself and her children was no basis for a claim upon the matrimonial home. In *Spurgeon and Public Trustee v. Aasen*, (1965), 52 W.W.R. 641 (B.C.) Verchere, J. also followed *Thompson's* case, where a wife claimed a share in furniture and fur-

often adopted the sentiments of Judson, J. Moreover, the similar words of MacKay, J.A.,¹⁹⁹ who dissented in the Ontario Court of Appeal hearing of *Thompson v. Thompson*, have also found support.²⁰⁰ MacKay, J.A. considered that *Rimmer v. Rimmer* would lead to uncertainties of title to property, and he pointed out, in attempting to restrict the scope of that case, that it did not apply to chattels nor to real property in general, but only to the matrimonial home. This excites the comment that, if *Rimmer v. Rimmer* is valid at all, such a restriction upon the principle which it contains is completely illogical.

Nevertheless, the outcome of cases in Canada may still be along the lines of *Rimmer v. Rimmer*, curious as that may seem. In *Nemeth v. Nemeth*,²⁰¹ husband and wife were engaged in a vineyard business. The husband, who had bought in his own name the two vineyards which they worked, had put considerable effort into building up the business, and the wife had helped from time to time when she was not engaged in the home with young children. She had also earned occasional sums which were paid into the husband's bank account. On the breakdown of the marriage she claimed a half share in both vineyards. Macdonald, J. drew attention to the fact that the *Rimmer v. Rimmer* cases, particularly "the wide discretionary power exercised under [that] line of cases", seemed to have been extinguished almost totally by *Thompson's* case.²⁰² Therefore, as to the land upon which the matrimonial home stood, since the wife had made no contribution towards its purchase (as was the case), she clearly had no claim to a share in the proceeds of its sale. The position concerning the other area of land, however, was different. There her contribution had gone towards purchase, and Macdonald, J. decided the wife was entitled to an equal share. But, one would ask, if *Rimmer v. Rimmer* is rejected, why should it have been an equal share? Though the sums the wife had earned were ascertained, the amount used in the purchase was not ascer-

nishings. See also Dubinsky, J. in *Stevens v. Brown*, (1969), 2 D.L.R. (3d) 687 (N.S.), though the wife in that case was found to have made no financial contribution.

¹⁹⁹ (1960), 22 D.L.R. (2d) 504 at p. 525.

²⁰⁰ *Spurgeon v. Aasen*, (1965), 52 W.W.R. 641 at p. 646.

²⁰¹ (1967), 64 D.L.R. (2d) 377 (B.C.), following *Kropielnicki v. Kropielnicki*, [1935] 1 W.W.R. 249, [1935] 2 D.L.R. 100 (Man. C.A.) where a wife regularly handed over her earnings to her husband, and was held to have an undivided half interest in property which he bought out of moneys of the wife and of himself, but in his own name.

²⁰² *Ibid.*, at p. 381.

tainable, and presumably it was this latter fact which led the judge to find that that land was owned in equal shares. Yet, if this is not the result which the Court of Appeal thought appropriate in *Rimmer v. Rimmer*, and the House of Lords approved in *Pettitt v. Pettitt*, the writer for one cannot see the distinction.²⁰³ *Nemeth v. Nemeth* surely establishes that *Rimmer v. Rimmer* itself was a result which could be reached either on the basis of an assumed common intention or that equity is equality.²⁰⁴ The discretionary power is a separable issue. Indeed, one is led to think that had the lower English courts framed the proposition that an equal division is often appropriate not in terms of a discretion, but in terms of the evidence rebutting the appropriate presumption (when it is shown the parties pooled their resources), it is possible that neither the House of Lords nor the Supreme Court in Canada would have got themselves into such a fine drawing of lines as to when the courts have, and when they have not statutory power under the *Married Women's Property Acts*. They would merely have been deciding, as in every case, where the equitable title to property lay.

The solution to the problem of *Thompson v. Thompson* originally proposed by the Baxter Committee to the Ontario Law Reform Commission was that there be a statutory introduction of a presumption that husband and wife own the matrimonial home jointly in all questions of title or possession.²⁰⁵ But, according to one's conception of the role of the *Married Women's Property Act* power, this may indeed not be the answer. In *Nemeth v. Nemeth*, for example, Mac-

²⁰³ In *Stevens v. Brown*, (1969), 2 D.L.R. (3d) 687 at p. 696, Dubinsky, J. quoted *Thompson v. Thompson* extensively, but also quoted with approval the headnote of *Nemeth v. Nemeth* where the decision as to equal shares is specifically spelled out.

²⁰⁴ See *Germain v. Germain*, (1969), 70 W.W.R. 120 (Man.) where *Rimmer v. Rimmer* was followed for reasons that can be rationalized in either of these ways. In *Klutz v. Klutz*, (1969), 2 D.L.R. (3d) 332 (Sask.) MacDonald, J. suggests that where "any [financial] contribution" (p. 337) has been made by the wife she would be entitled to a 50% share. He thinks this result is possible after the *Thompson* decision, and he quotes favourably both *Rimmer v. Rimmer* and Lord J.'s adoption of *Rimmer's* reasoning in *Sopow v. Sopow*, (1959), 15 D.L.R. (2d) 57 (B.C.).

²⁰⁵ Vol. I, p. 104. The Committee now proposes (Vol. III, Pt. IV, ch. 3 (revised)) a Legal Regime under which in outline all assets acquired during marriage, except gifts by third parties to either the husband or wife as an individual, be equally divided between the parties at the end of the marriage. However, parties might opt out of the Legal Regime, by a Contractual Regime which in its simplest form would constitute in effect the present law as to separation of property. The Legal Regime would do away with the presumptions of resulting trust, and of advancement.

donald, J. said in reference to the vineyard upon which the matrimonial home stood, but to the purchase of which land the wife had made no financial contribution, that even if he had had wide power to do that which was fair and just, and "if the *Rimmer v. Rimmer* line of authorities remains applicable in Canada",²⁰⁶ he would have given the wife in that case no interest. In his view the wife had been less than faithful to her husband, given only occasional help in the business, and latterly spent relatively long periods away from the home without justifiable cause. To come to a just solution in these circumstances would have involved overcoming the *difficulty* of a presumed joint ownership. In any case what circumstances would be necessary in order to give rise to the statutory presumption of joint ownership? The fact of marriage, and the acquisition of a matrimonial home after the marriage? Is this enough?²⁰⁷

The urgent need for legislation throughout common law Canada is widely recognised, and with the Supreme Court having taken such a conservative line as it did in *Thompson v. Thompson* the need is even greater in Canada than in England. Unfortunately, it is clearly beyond the scope of this paper to assess the various possible solutions to the problem of matrimonial property, but one or two thoughts may be in order.

The division of opinion in the House of Lords in *Pettitt v. Pettitt* as to the value of the existing presumptions reflects the desire of the courts to do two things. First, the courts wish it to be understood that under the *Married Women's Property Acts* they are merely

²⁰⁶ (1967), 64 D.L.R. (2d) 377 at p. 386. Of course, those authorities would not have applied in any case since no contribution had been made by the wife. For the same reason Judson, J.'s comments in *Thompson v. Thompson* on *Rimmer v. Rimmer* were *obiter*. The wife in that case, as we have seen, was found to be repaying a debt to her husband, not making a contribution towards house purchase from her own resources.

²⁰⁷ It is disturbing to find a court avoiding joint ownership on technical grounds. In *Re Bishop*, [1965] Ch. 450, [1965] 1 All E.R. 249, Stamp, J. considered that when a joint account holder bought investments in his own name with moneys from the account, no presumption of resulting trust as to one moiety arose in favour of the other joint account holder. The learned judge considered the latter had no equity to displace the legal ownership in the purchaser; each joint tenant has given the other authority to draw on the account. The reconciliation of this case with *Jones v. Maynard*, [1951] Ch. 572, [1951] 1 All E.R. 802, is not altogether convincing, and Macdonald, J. refused to accept *Re Bishop* in *Warm v. Warm*, (1969), 70 W.W.R. 207 (B.C.). Cartwright, J.'s reasoning in *Thompson v. Thompson* was preferred; purchase with joint account moneys gives rise in the normal way to the presumptions of resulting trust and of advancement.

deciding who owns what prior to the marriage being ended or the parties judicially separated. Secondly, they want to look at the *modus vivendi* of modern married couples when, as is normally the case, the particular couple had no clear intentions as to ownership when assets were acquired. One wonders, however, how many marriages are not on the verge of breakdown when such an order is sought. In other words, in view of the somewhat arbitrary decisions the courts have to make in determining intent in such cases, should the parties be able to secure such an order prior to the courts making a suitable property order when the marriage is subsequently ended or the parties judicially separated? It seems a cumbersome and undesirable operation. Yet on the other hand no one wants to rush the parties into the divorce court over property disputes, if the marriage can be saved. Given adequate homestead and dependants' relief legislation, it may be that conferring upon the courts the discretion, which appears in the English *Matrimonial Proceedings and Property Act*, 1970,²⁰⁸ or, better, the New Zealand *Matrimonial Property Act*, 1963, is about the best that can be done. Given the traditionally pragmatic approach of the common law, there is much good sense in this, and the courts have handled this kind of discretion well.

Community of property legislation, as proposed by the Baxter Committee, is more of a final solution, but even in Quebec where the population has always been accustomed to such a doctrine it is noteworthy that the great majority of middle income group married couples have traditionally contracted out of the legal regime into separation of property. Indeed, between 1963 and 1968, 70% of persons marrying in Quebec contracted out.²⁰⁹ This may be a reflection of the unpopularity of the former legal regime, which was abolished as of July 1, 1970, but the causes of unpopularity may go deeper. The *Act* making the change²¹⁰ introduced a new legal regime which deliberately seeks to meet the objections to the former

²⁰⁸ For section 37 (extending the Court's power under the *Married Women's Property Act* and to all other actions, whether or not involving third parties, see n. 183, *supra*. Section 4(a) enables the court on granting a decree of divorce, of nullity, or of judicial separation, to make "an order that a party to the marriage shall transfer to the other party, to any child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned party is entitled, either in possession or reversion." The court may order the settlement of property, vary existing settlements, and reduce or extinguish the interest of either party to the marriage under such settlements.

²⁰⁹ Civil Code Revision Office: Report on Matrimonial Regimes, 1968, at p. 7.

²¹⁰ Statutes of Quebec, 1969, c. 77.

legal regime, but in the writer's experience on the island of Montreal many practitioners are hesitant to say that they are recommending it to their clients. They welcome the fact that spouses are now free to change their regime, that gifts between husband and wife are possible, and that the wife is able to borrow money on property in her name and with those monies make loans to her husband. But, they say, there are all the book-keeping requirements associated with the new legal regime of partnership of acquests, and other technical requirements that those separate as to property will avoid. Certainly, few practitioners foresee themselves advising couples to take the new legal regime if either has, or both have, property on entering marriage. Time alone will tell how much real difference in practice is produced by the new *Act*.

In common law provinces where community of property is unfamiliar, and in the eyes of many judges and practitioners a 'foreign' concept, contracting out of a legal regime in favour of the known and tried separation of property system might become as familiar as has been the case in Quebec. In any event there is bound to be a transitional period of hesitancy and of settling for the old order of things. In these circumstances provision along the lines of the New Zealand legislation may commend itself to the common law provinces. If such a provision were tied in as a legal consequence of contracting out of the legal regime, it would ease the introduction of community of property, and also provide more adequately for that inevitable transition period.

(3) Exhaustion or failure of express trust objects.

We come now to the second group of resulting trust situations. A resulting trust will arise when for some reason an express trust fails, and the trustees are left holding the trust property. Clearly the trustees cannot as trustees take the property beneficially, and the question is what they are to do with it. In these circumstances the property could either pass to the Crown as escheat or *bona vacantia*, or be returned to the settlor. Equity decided in the seventeenth century, and the rule has prevailed unchallenged, that the property should be returned, or in technical language result, to the settlor. As with the resulting trusts we have been discussing, this outcome could have been said and has been said to be the implied intention of the settlor on the failure of his express trust, but it is now generally accepted that this resulting trust arises by operation of law. That is to say, the law decrees that the property shall be returned to the settlor, or, if he is dead when his trust fails, to his estate.

From one point of view this resulting to the settlor may seem curious. The trust, we have said, is a mode of alienating property, of transferring it from the settlor to others. But it will be asked, if it is alienated, how can it return to the alienor? The explanation is really quite simple. If I contract to sell you my house, and the house is conveyed to you on your paying the purchase price, I am in no way entitled to call for the house on your dying intestate without heirs. The property is yours, and, as there is no one to whom it can pass, it falls to the Crown as escheat or *bona vacantia*. Similarly, if I decide to make a gift to you of my shares in the XYZ Co., and I do so by having the shares transferred into your name in the company's books, I have no claim to them if you die intestate without heirs. Moreover, if I decide to make my gift by way of trust, and transfer the shares to A and B in trust for you, I also have no claim on your dying intestate without heirs. The full beneficial interest is vested in you, and on your death your administrator is entitled to call upon the trustees for the property, which will then pass to the Crown as escheat or *bona vacantia*. The reason why a resulting trust sometimes occurs is because the settlor has either failed to dispose of the whole beneficial interest, or because his express trust fails to take effect. The first situation would occur, for example, when the settlor by will transfers property to trustees for A for life, and does not say who is to have the property on A's death. The settlor has therefore disposed of only a part beneficial interest in the property. The second situation would occur, for example, where the settlor sets up an *inter vivos* trust of property and requires the trustees to further by appropriate methods good journalism and the continued independence of the press. The objects of the trust will fail because they are not charitable, and not within the limited number of recognized non charitable purposes.²¹¹ The settlor's trust device has therefore failed, as the gift by way of direct transfer fails when the donor does not effectively deliver the property to the donee. In each case the mode of transfer having failed, the donor retains his property. The difference between the two situations is that, though the trust has failed, the trustees have title to the property. In the case of a straight transfer to the intended donee, the failure of the transfer simply leaves the property in the donor's name. In the case of gift by way of transfer to trustees equity brings about the same result by decreeing that the trustees hold the property of the failed trust on resulting trust for the settlor.

²¹¹ *Re Astor's Settlement Trusts*, [1952] Ch. 534; [1952] 1 All E.R. 1067.

(a) Failure of settlor of express trust to dispose of the whole equitable interest.

Such a failure may occur in a number of ways, but the common theme is that the limited interests which the settlor has created do not exhaust the extent of beneficial ownership in the property which the settlor has transferred to the trustees. The primary task of the court, therefore, is to examine as a matter of construction in each case whether the settlor has in fact not disposed of the whole equitable or beneficial interest. A proper construction may show that the settlor intended the trustees to take the absolute interest for themselves after the prior limited interests had run their course. The character of the trustees themselves may assist in this construction problem. If there is a bequest of property to a wife, for example, requiring her to employ the property for certain purposes, and property remains after the completion of those purposes, it may be apparent that what the testator had in mind was not a trust, but a conditional gift.²¹²

This construction problem, classically stated by Lord Eldon in *King v. Denison*,²¹³ is one which can arise from a deed as well as a will,²¹⁴ and in either kind of document it can lead to some very fine distinctions in the interpretation of meaning which should be put upon language. It is worth recalling at this point that, though the entire document can be looked at in construing meaning, extrinsic evidence is only admissible to clarify a patent ambiguity. If the document, once construed, reveals that a person takes as a trustee, and only as a trustee, doubts may not be created by any extrinsic evidence, which is therefore inadmissible.²¹⁵ Tied to the documentary language, the courts have attached different significance to the slightest factors. In *Re Barrett*,²¹⁶ for example, Middleton, J. and the Ontario Court of Appeal disagreed on the significance to be attached to the size of the legacy in question. A testator gave to his daughter whatever sums might at his death be credited to any

²¹² E.g., "I leave the balance in my bank savings deposit account to my wife, Georgina, so that she can maintain my father for the rest of his days." Moral obligation, or conditional gift, or trust?

²¹³ (1813), 1 Ves. & Bea 260 at p. 272.

²¹⁴ *Moffit v. Moffit*, (1954), 13 W.W.R. 145, [1954] 2 D.L.R. 841 (B.C.).

²¹⁵ Similarly, if a proper construction shows that a resulting trust was intended, extrinsic evidence may not be admitted to disprove that resulting trust: *Ballard v. Stover*, (1887), 14 O.R. 153 (C.A.), *per* Wilson, C.J., at p. 166, quoting *Langham v. Sandford*, 17 Ves. 443, 19 Ves. 641.

²¹⁶ (1914), 5 O.W.N. 805, (1914), 6 O.W.N. 267 (C.A.).

bank account of his, be on his person, or belong to him within his domicile, "for the purpose of enabling my said daughter to meet the immediate current expenses in connection with housekeeping". The total bequest turned out to be \$17,200. Middleton, J. took the view that, the daughter having lived with the testator, it was his wish that she should keep the family together after his death until new arrangements could be made. This was not therefore a case of an absolute gift, he thought. What was intended was a trust for the specific purpose, the moneys remaining to result to the testator's estate. The Court of Appeal considered that it was an absolute gift. Two English courts had similarly construed the meaning of language such as this, and the Court of Appeal considered it was concerned in this case with the meaning of language. Whether the sum in question was \$17,200 or a mere \$500 did not alter the construction.

In view of the fact that decisions on construction are not binding on later courts, and that no canons of construction were breached by Middleton, J., it is instructive to see that the Court of Appeal thought fit nevertheless to reverse the trial judge. Meredith, C.J.O. thought that "very probably"²¹⁷ the testator would have made a different disposition of the property had he realised how large a sum would be available, but that that was no reason for putting a different construction on the language. Was it a different approach to this factor by the Court of Appeal which tipped the scales the other way?

What kind of factors affect the courts' interpretation was well brought out in the earlier decision of the Ontario Court of Appeal in *Ballard v. Stover*.²¹⁸ A testator had left an estate consisting chiefly of mortgages, which amounted to at least \$40,000, producing a yearly revenue of some \$2,400, to four nephews and a grand-nephew, their survivors, heirs and assigns, share and share alike, on trust to keep his widow in the condition in which she had been kept by the testator during his lifetime. The widow in fact predeceased the testator, and the question was whether the estate passed beneficially to the five legatees, or as on intestacy. Armour, J. attached importance to the fact that the words suggesting beneficial interest, "share and share alike", were followed by the words "on trust for", and he also noted that skilled counsel had drafted this will incorporating trust language. He therefore concluded in favour of a resulting trust to the testator's estate. Wilson, C.J. for the majority disagreed. The widow had been old and senile, and maintained very frugally at

²¹⁷ (1914), 6 O.W.N. 267 at p. 268.

²¹⁸ (1887), 14 O.R. 153 (C.A.).

a yearly cost not exceeding \$100.²¹⁹ Secondly, the inclusion of "assigns" was significant because trustees may not alienate the trust property. The fact that words of trust followed words of apparent beneficial interest was of great force,²²⁰ but this was the only factor pointing to a resulting trust. The relationship between the testator and the legatee or devisee might show that the testator meant the property to be taken beneficially. The same was true when the testator had taken a special interest in the legatee or devisee. Lastly, it was important to note that, if one or more of the tenants in common here had died in the widow's lifetime and after the testator's death, his or their shares of the capital would have been taken out of the trust fund, thereby possibly defeating the trust.²²¹ In sum, Wilson, C.J. was led to the conclusion that a beneficial interest was indeed intended, but on the lines that the five persons should take a joint estate during the trust period, and afterwards an estate in severalty, share and share alike.

Once it has been decided that the deed or will does not dispose of the whole beneficial interest either in favour of third parties or the legatee or devisee himself, the property results to the settlor. It is commonly said that when the whole beneficial interest has not been transferred away by the settlor, the undisposed of interest remains in him. In other words, when the trust confers a life interest upon A, a remainder life interest upon B, and leaves the capital of the gift to return to the settlor, there is a reverter in the settlor.²²² But this resulting trust may occur in other ways. If a testator bequeaths \$10,000 on trust for A at 21, he has not disposed of the income which will arise and accumulate during the minority. If the settlor confers a life interest upon W while she is

²¹⁹ Would evidence of actual housekeeping costs in the testator's lifetime have assisted the court in *Re Barrett*? Did the testator realize in *Ballard v. Stover* how large his estate was? — there was no evidence of this; it was the Court which did the calculation. Yet in making the point about the cost of maintaining the wife, Wilson, C.J. assumes that he realized the situation.

²²⁰ These words were entirely absent from *Re Barrett*.

²²¹ Would not the survivor have taken as a trustee? If so, did the observation point in any direction as to the testator's intent?

²²² In *Krisman v. Montreal Trust Co.*, (1959), 29 W.W.R. 299 (B.C.) it was held possible for a life insured under *Insurance Act*, R.S.B.C. 1948, c. 164, s. 110, to direct the trustees to make annual payments to the beneficiary until the capital and accumulated interest were exhausted. Consequently, when the beneficiary died after receiving only one annual payment, the remainder of the fund fell into the insured's estate. Brown, J. noted that the resulting trust was not a matter of intent; the purposes did not exhaust the fund, an outcome which was probably not foreseen.

living with H, remainder *on her death* to her children, and W leaves H, the income of the trust fund will be payable to the settlor between the time that W leaves and her death.

A more common situation where the settlor fails to dispose of the whole beneficial interest is when he has set up a trust for the accomplishment of certain purposes, and the carrying out of those purposes does not exhaust the fund. In the case of charitable purposes the courts have the power to apply the residual sum *cy-prés*, but where the purpose is non-charitable, that sum must revert to the settlor. This situation occurred in *Boyd v. McLaurin*.²²³ The plaintiff mortgagee was persuaded by the defendant solicitor to assist the mortgagor after the plaintiff had foreclosed on the mortgagor's property. It was arranged that the plaintiff would settle part of the sale value of the property upon the defendant, as trustee, for the mortgagor's maintenance. Payments were to be made to her from time to time, as the defendant thought fit. The trust document took care to provide that title in the trust fund should not become part of the mortgagor's assets, and neither she nor her creditors could claim the trust fund. However, no provision was made for any moneys that might remain after the mortgagor's death. Consequently, since the mortgagor was never told of the trust nor were any payments made to her, the plaintiff succeeded in his claim that there was a resulting trust to him of the whole trust fund. He would also have succeeded if payments had been made, but the fund was not exhausted. The excess would have been his by resulting trust.

In the well-known case of *Re Gillingham Bus Disaster Fund*,²²⁴ where the mayors of three English towns had opened a fund to defray the funeral expenses of certain boy cadets killed in a road accident, to assist the injured boys, and to subscribe to worthy causes connected with boy cadets, the gift was non-charitable. As a consequence, when a large sum remained after all possible assistance to the boys and their parents had been given, the money had to revert to the people who had responded to the appeal. Many were of course untraceable, because their offerings had been made anonymously, and

²²³ (1926), 30 O.W.N. 247.

²²⁴ [1958] Ch. 300, [1958] 1 All E.R. 37, aff'd [1959] Ch. 62, [1958] 2 All E.R. 749 (C.A.).

the outcome was that those moneys remained in court, where they still are today.²²⁵

(b) **The express trust fails totally or partially to take effect.**

An express trust may fail because the settlor was fundamentally mistaken as to what objects he was thereby benefiting, or because fraud, duress, or undue influence was practiced upon him. In certain situations the court may set aside the trust because it is improvident. The trust may also fail because there is uncertainty as to what are the trust objects. The objects may also be illegal or contrary to public policy, or a limitation to a beneficiary of an interest in ascertained property may fail because the limitation contravenes the perpetuity rule. As we have seen, the *Statute of Frauds* lays down that no trust shall be enforceable if the property is land and the trust is not evidenced in writing.

In each of these cases, except possibly in all cases of illegal objects, the property returns to the settlor by way of a resulting trust. Where the settlor knew that his purposes were illegal when he set up the trust, or learned of the illegality before it took effect, the court may take the view that the loss should lie where it falls. In England, it seems, the settlor is only *in pari delicto* if some part of the illegality has actually been carried out, but in Canada as a result of *Scheuerman v. Scheuerman*²²⁶ as we have seen, it appears the mere intent to commit illegality is enough.

A trust is void if the settlor was fundamentally mistaken as to what he was doing, but if the trust is attacked by the settlor on the grounds of misrepresentation, fraud, duress, undue influence, or improvidence, it is voidable. The distinction is important as to benefits acquired by others after the trust nominally takes effect. If the trust is void, no proprietary benefits can be retained against the settlor. No property passed. But if it is voidable, title to such benefits may pass provided the trust has not yet been set aside. If A is fraudulently induced by B to settle property on trust for B for life, remainder to B's son, C, absolutely, and C, innocent of the fraud, assigns his interest to D for value, D will take a good title. If A, on discovering the fraud, sues to have the trust set aside, a problem arises. It is clearly wrong for B to resist the setting aside,

²²⁵ Similarly if express trustees purchase land with moneys supplied for that purpose by members of the public, and the purpose of the trust fails or cannot take further effect, the land or the sale monies will be held by the express trustees on resulting trust for the contributing members of the public: *Re St. John's Church*, (1927), 60 O.L.R. 491, [1927] 3 D.L.R. 535.

²²⁶ (1915), 10 W.W.R. 379, 52 S.C.R. 625, 28 D.L.R. 223.

but what of C's and D's positions? C is innocent, but a volunteer; D is innocent, but gave value. Clearly A ought to have the trust set aside, but this will not assist him as against D who is a *bona fide* purchaser for value, and therefore beyond the limit to which A can trace his property. A may well be able to trace against the sale price in C's hands, on the principles set out in *Re Diplock*.²²⁷ However, this would be a fairly unusual situation. In most cases it is the beneficiary of the trust who has employed the misrepresentation, fraud, or undue influence which brought the trust about and he is still in possession of his interest. The setting aside of the trust will then have the same effect as if the trust had been declared void. If as between parties to the action there cannot be a *restitutio in integrum*, then the court may still refuse to set aside the trust, but make damages satisfy the plaintiff.

If a trust fails for uncertainty, a resulting trust can only occur if the uncertainty concerns the objects or purposes of the trust. If there is uncertainty of intention, then no trust comes into existence, and if there is uncertainty of subject-matter the trust cannot come into existence because it is not possible to determine what the trustees are to hold as the trust property. And, if it is not possible to determine what is to be held on trust, it follows that there cannot be a resulting trust. When there is uncertainty of objects or purposes, however, the trustees are left holding property with no use to which it can be put. This is when the resulting trust arises. In *Roberts v. Roberts*,²²⁸ for example, a son transferred his mining claim to his father on the latter promising to secure a Crown grant, and, if the claim proved valuable, to give his son a share. The father secured a grant, and the claim was proved to be worth a large sum. Murphy, J. decided that an express trust had been created, and that it seemed the father had undertaken as a trustee to secure a grant and hold the property until a sale could be affected. However, he said, if the trust was so indefinite that its terms could not be determined, there was a resulting trust to the creator of the trust.

The objects or purposes may be certain, but events turn out in such a way that objects cease to exist or purposes become impossible. An obvious example of objects ceasing to exist is when a testator dies leaving a will trust in favour of persons who have predeceased him. And a purpose is impossible when, for example, a father makes an ante-nuptial settlement upon his son, the future wife, and the

²²⁷ [1948] Ch. 465, [1948] 2 All E.R. 318, aff'd *sub nom. Ministry of Health v. Simpson*, [1951] A.C. 251, [1950] 2 All E.R. 1137.

²²⁸ [1923] 2 W.W.R. 137 (B.C.).

issue of the marriage, only to find that the marriage plans are later cancelled.

There are a number of ways in which objects may cease to exist or purposes become impossible, and the problem then takes the form of discovering when such a situation has occurred. If it has occurred, and there is no gift over, there must be a resulting trust. The following four cases show how the problem can arise. In *Gamble v. Lee*,²²⁹ the further carrying out of the express trust had reached a stalemate. A cheque had been drawn on the trust by the trustees' agent in favour of the beneficiary, but when the beneficiary presented the cheque to the bank there were no funds to meet it. Consequently, the plaintiff paid \$1500 into the trust account towards meeting the cheque. However, as the cheque was never again presented, and the trustees had no authority to use the sum for any other purpose, the question was what to do now. Spragge, C. decided that the plaintiff's purpose in settling the money had failed, and that therefore the trustees "became dry trustees of the money"²³⁰ for him.

The second case, *Poirier v. Brûlé*,²³¹ demonstrates that a trust limitation may fail because it is subject to a condition precedent which is not satisfied, as the trust terms require, during the subsistence of the precedent estate. In such circumstances it is known during the time of the precedent estate that the limitation over can never take effect. Elderly A conveyed his land to trustees on the terms that should he survive B the land should be reconveyed to himself, but that if B survived A and A's wife and shall have supported and provided for the elderly couple during their lives, the land plus certain chattels and stock should be conveyed to B. A asked the court to set aside the trust or rectify the deed, because no provision had been made as to what should happen should B fail to support or provide for the elderly couple, as had in fact happened. The Supreme Court refused rectification because of the lapse of time since A, the settlor, first had grounds for complaint, but awarded setting aside of the trust. "By reason of [B's] failure and neglect to perform his covenants the contingent trust limited in his favour in the event of his surviving [A] has failed and cannot possibly arise."²³² These were the words of Strong, J., who noted that "the only remaining trusts are in favour of [A] himself, and these he is at liberty to put an end to at his option and to call on the trustee

²²⁹ (1878), 25 Gr. 326.

²³⁰ *Ibid.*, at p. 327.

²³¹ (1891), 20 S.C.R. 97.

²³² *Ibid.*, at p. 102.

to convey."²³³ Here was a situation, then, where the settlor retained a life interest for himself, but gave a remainder interest to another contingent on the occurrence of a condition precedent. The remainder having failed, the settlor's underlying ownership prevailed; if the donee does not qualify for receipt, the donor retains his title.

Poirier v. Brûlé, however, arose out of an agreement, and B failed to supply the consideration which was outlined in the condition precedent. The trust deed was in furtherance of the agreement. The third case shows that, before the settlor can argue that a resulting trust arises in his favour, he must prove that, if there was an agreement, the consideration coming from the other party has in fact not been supplied. This he failed to do in *Powell v. City of Vancouver*.²³⁴ The plaintiff conveyed land to the city in consideration that the corporation would build a town hall on the site. The city did in fact build a town hall, which was used as such for a number of years. However, when the city decided to build a new town hall elsewhere, and to use the existent building for other purposes, the plaintiff sought return of the land by way of resulting trust. His difficulty was that the deed did not contain a condition subsequent nor was the fee simple made determinable. As Irving, J.A. said²³⁵ for the British Columbia Court of Appeal, if a resulting trust was desired, the words 'for all time' should have been added in the deed. As the agreement and the deed stood, the consideration had been performed by the city.

The final case shows that an express trust may be construed from the duty of the recipient of property to sell and hand over the proceeds, and a resulting trust rationale be given to the obligation of the recipient to hand over those proceeds. In other words, the express trust and the resulting trust concepts may be employed in circumstances where a decision on the grounds of simple contractual obligations would have sufficed. In *Anderson, Greene & Co. v. Kickley*²³⁶ the respondent, president of G. Co., handed shares to the appellants for sale, the proceeds of sale to be paid to the respondent. The appellants claimed that the respondent was acting on behalf of his company, and they consequently asserted a right as a creditor of the company to retain these proceeds of sale in satisfaction of the debt. It was the respondent's intention, however,

²³³ *Ibid.*

²³⁴ (1912), 3 W.W.R. 108, (1912), 8 D.L.R. 24 (B.C.C.A.).

²³⁵ (1912), 3 W.W.R. 108 at p. 109.

²³⁶ [1934] S.C.R. 388, [1934] 3 D.L.R. 787.

²³⁷ [1934] S.C.R. 388 at p. 402.

known to the appellants, to purchase shares in G. Co. with the proceeds of the sale, and, due to the retention by the appellants of those moneys, this intention could not be fulfilled because in the interim, before the respondent brought action, G. Co. went into liquidation. The Supreme Court handled this action in what was a surely over-complex manner by holding that the sale moneys in the appellants' hands "were impressed with a trust, which, in that sense, was a trust in favour of the respondent."²³⁷ Duff, C.J. for the Court went on :

The legal result is beyond controversy. The object of the original trust has failed in consequence of repudiation by the trustee, and present impossibility of performance; a resulting trust, therefore, attaches to the proceeds of the sale of the respondent's property, in favour of the respondent.²³⁸

Improvidence is a rare ground upon which the courts will set aside a trust, thereby causing a resulting trust to the settlor. The Courts will not intervene merely because a person was foolish to settle property as he did, and, provided the donor understands the nature and effect of the trust deed and acted as a free agent, the courts see no justification for interference. An allegation of improvidence will cause the court to examine closely the circumstances prevailing when the trust was made. In *Fonseca v. Jones*,²³⁹ for example, where these points were reiterated, the trust deed taken on its own was improvident, but against the background of circumstances prevailing when the deed was executed, it was not. A husband had built up a successful business, but was faced with the forbidding prospect of distributing his assets after his death among a large family and a wife who was over-indulgent to her children. Four of the sons were wasters, and, though of age, their constant aim was to obtain all the property from their parents that could be got. The *inter vivos* trust, executed by the husband and wife, therefore tied up the capital in such a way that the mother could not touch it, and no power of revocation was reserved. After the husband's death the sons sought to get at the capital by an action, undertaken by the mother, to set the trust aside. As nominal co-settlor the wife had participated in the creation of a trust which as to its terms was clearly improvident, but against the background of the needs and personalities equally clearly was not.

If trust limitations fail because of rules of law, the property must result to the settlor. This will always be so when a trust of

²³⁸ *Ibid.*, at p. 403.

²³⁹ (1910), 14 W.L.R. 148, 21 Man. R. 168, aff'd 18 W.L.R. 259, 21 Man. R. 193 (C.A.).

land is orally created and not evidenced in writing, or where the grant or assignment of an equitable interest arising under a trust is not in writing.²⁴⁰ For such reason a declaration of trust enumerating the objects of an express trust of land could not take effect in *Fleming v. Royal Trust Co.*²⁴¹ On the other hand, however, the court may refuse to strike down the oral evidence of it believes the Statute was being used an instrument of fraud. In *Roberts v. Roberts*,²⁴² for example, the father was not permitted to plead the Statute against his son, and therefore the express trust with indefinite objects was free to take effect. Since the objects were indefinite, seemingly a resulting trust to the son arose, but Murphy, J. decided that the objects were not so indefinite that he could not see that both father and son were to take some share in the mining grant. In these circumstances he followed *Briggs v. Newswander*²⁴³ and *Wells v. Petty*,²⁴⁴ and on the basis that equity is equality divided the property equally between father and son.

Another familiar rule of law which may invalidate trust terms is the rule against perpetuities and accumulations. If a remainder absolute is struck out by this rule, the property 'results back' to the settlor.

The notion of resulting trust is used liberally by the courts, not only to describe any liability to restore property to the person from whom title passed,²⁴⁵ but even to describe the obligations upon an express trustee successfully sued for breach of trust. This unnecessary and inexact usage is not a happy development. Moreover, this liberal usage is not a fault of which only trial courts are guilty. *Briggs v. Newswander*²⁴⁵ was decided in the Supreme Court of Canada. The plaintiff had agreed with the defendant to sell certain mining claims to him for a consideration of \$500 on the terms that the defendant form a company to own and work the claims and that he allot the plaintiff a "reasonable" amount of stock in the company. The plaintiff

²⁴⁰ Statute of Frauds.

²⁴¹ (1920), 18 O.W.N. 386.

²⁴² [1923] 2 W.W.R. 137 (B.C.). See also *Sutherland v. McKay* (1898), 40 N.S.R. 223.

²⁴³ (1902), 32 S.C.R. 405.

²⁴⁴ (1897), 5 B.C.R. 353, 1 M.M.C. 147 (C.A.).

²⁴⁵ E.g., *Ferguson v. Toronto*, [1944] O.R. 385, [1944] 3 D.L.R. 317, where no express trust already existed, and *Powell v. City of Vancouver*, (1912), 3 W.W.R. 108, (1912), 8 D.L.R. 24, where such a trust did exist. It will be observed that in the latter case the resulting trust would have existed over the specific property originally conveyed. *Ferguson v. Toronto* was a money claim.

sued for specific performance when the defendant did not form a company, and in the two lower courts the defendant won on the ground that the agreement was too vague to enforce. The Supreme Court, however, was of the view that this agreement gave rise to an express trust,²⁴⁶ and that any vagueness of purposes redounded not to the defendant's, but to the plaintiff settlor's, benefit; the trust would fail, if at all, for uncertainty. However, the Court did not find such uncertainty. The trust was effective, and the defendant was in breach of trust for not forming the company. Sedgewick, J. for the Court went on,²⁴⁸ "The first effect of that breach of trust was that a resulting trust in favour of the Plaintiff . . . was at once created," and the breach was aggravated by the defendant taking the properties into his own name.

The questions that arise are several. Given that property passed from plaintiff to defendant, what evidence was there that the parties intended a trust? Why did breach of trust lead to restitution of the property to the plaintiff? Was not restitution secured by a constructive trust order? If it was indeed a resulting trust, which of the resulting trust situations existed on these facts? — failure of the trust purposes?

In the outcome the Court did not order a reconveyance of the properties with a refunding of the defendant's expenses, but in the pursuit of equity adopted partnership principles and awarded the plaintiff a quarter share in the properties. As we saw with *Roberts v. Roberts*, the resulting trust is a right in the settlor or conveyor attendant upon a trust purpose which fails, but that right is subject to the discretion of the court to do equity as between the parties affected.

(c) The Rule in *Hancock v. Watson*²⁴⁹

What is the position if A makes a testamentary bequest in favour of B, but imposes upon that property a number of obligations which B is to carry out, and those obligations fail for uncertainty, illegality, lapse, or any such reason? Does the property released from the obligations result back to the testator's estate, or does B take absolutely and free from the obligations? The rule has been estab-

²⁴⁶ (1902), 32 S.C.R. 405.

²⁴⁷ The Court considered the \$500 a mere nominal consideration. The formation of the company, and the allocation of a share of stock to the plaintiff, were the real items of consideration.

²⁴⁸ *Ibid.*, at p. 411.

²⁴⁹ [1902] A.C. 14.

²⁵⁰ (1820), 2 Jac. & W. 279.

lished for over 150 years that, provided the gift to B is absolute, the failure of the trust engrafted or imposed on that absolute interest will cause the absolute gift to be free of the trust. The testator's residuary legatee or next-of-kin will take nothing, since no resulting trust arises. The absolute gift is interposed between the testator's estate and the failed trust, and it is the grafting of the trust on the absolute gift itself which prevents the property freed from the trust from falling back into the estate.

The rule was being applied as early as 1820 in the case of *Whittell v. Dudin*,²⁵⁰ and in Lord Cottenham's judgment in *Lassence v. Tierney*²⁵¹ it was elaborated and clarified, to be restated and affirmed by Lord Davey in the House of Lords in *Hancock v. Watson*. The rule has also been applied and discussed in Canada in two cases which afford us an opportunity of seeing the rule in operation.

As Masten, J. pointed out in *Re Goodhue Trusts*,²⁵² the problem in these cases is to discover what interests the testator has given. He may have made an absolute gift upon which a trust has been imposed, or the apparent absolute gift on a proper construction may turn out to be a limited gift, and the subsequent apparent trust terms to be part of, or successive to, that limited gift. Only in the latter case can there be a resulting trust. In *Re Goodhue Trusts*²⁵³ the testatrix had a life interest in \$30,000 arising out of a marriage settlement, and a power of appointment over that sum as to the remainder interest in favour of and among her issue. Five children were born to her of the marriage, one of whom was dead when she made her will. In her will the testatrix purported to make the \$30,000 subject to the terms of her will disposing of her residuary estate. Secondly, she divided the residue²⁵³ including the \$30,000 among her four living children, but she also gave survivorship interests in the property to the spouses of those children, and expressly conferred upon the children permission to donate a specific proportion of their shares to charity. Finally she empowered her children to determine by their respective last wills the amounts which the children of each such child should take in the parent's share of the testatrix's residuary estate. These three provisions in the will suggested that the 'division' of the \$30,000 was not a division of the capital so as to create four absolute interests, but rather to create four life interests, survivorship interests for life in spouses,

²⁵¹ (1849), 1 Mac. & G. 551.

²⁵² (1920), 47 O.L.R. 178 at p. 186.

²⁵³ With the exception of certain life insurance monies, which were divided among the four living children and the children of a deceased fifth child.

and a power of appointment in each case among grandchildren. The testatrix's gift to the spouses and the grandchildren failed; an appointment to non-objects of the power is invalid, and the power given to children to appoint among their children was void as in breach of the perpetuity rule. These failings gave an opening to the children of the deceased child, who were able to argue that the clause in the testatrix's marriage settlement, giving an equal interest to all the testatrix's children in default of appointment, had thereby come into effect. In this way the grandchildren excluded by the testatrix would take a share in her estate. To succeed they had to argue that the testatrix had only given *life* interests to the four living children, and that all the subsequent limitations were remainder interests. Since these limitations failed, it was said, a quarter share of the estate became divisible into five parts on the dropping of each tenant in common's life. The four surviving children argued *per contra* that the testatrix had given them each *absolute* interests, and then had gone on in such a way as to attempt to limit in each case the extent of enjoyment.

This was a classic *Hancock v. Watson* situation, and the occasion was taken by Masten, J. to discuss fully the meaning and authority of the rule. On a construction of the testatrix's will the court decided in this case that the argument of the living children was correct, and that they took absolute interests, now free of the limitations on the extent of enjoyment. There was therefore nothing of the residue, including the \$30,000, to pass on a resulting trust to the testatrix's estate.

In *Ankcorn v. Stewart*²⁵⁴ the rule became relevant because a will was ambiguous as to whether a certain legatee had a vested or contingent interest. The testator bequeathed two tenths of his residue to each of his three daughters, and required that payment should be made to each when the youngest daughter attained her majority. But the testator also added that, if any of his daughters should be married at that time, his executors should have the power not to pay any share in full if in their opinion the daughter in question was at that time in comfortable circumstances. One daughter married just before the testator's death, and died shortly afterwards before the youngest had attained her majority. When that majority occurred, therefore, the executors considered that the deceased daughter had failed to qualify for a share of the estate, and proceeded accordingly. The deceased daughter's child later contested this interpretation.

²⁵⁴ (1920), 47 O.L.R. 478.

The issue in this case, then, was whether the testator had given an interest which vested on the testator's death, subject to the right of the executors to reduce the actual payment at the later date, or whether the share was contingent on the daughter living till the majority attainment took place when the executors had to exercise their discretion. The Court of Appeal overruled Kelly, J.,²⁵⁵ and held that the share did indeed vest on the testator's death, and, since he had made no provision for a daughter dying before the youngest attained majority, the deceased daughter took her share free of any reduction which the executors might have made at the later date. The rule in *Hancock v. Watson* therefore applied in this sense that the testator had made an absolute gift upon which he had grafted the executors' discretion later to reduce the amount to be paid. The failure of that grafted discretion meant that the absolute gift remained irreducible in size.²⁵⁶

CONCLUSION

The resulting trust touches such a variety of areas of substantive law that it readily appears to be no more than a device for the restoring of property to the person with the best claim. In this popular sense it comes very close to the restitutive character of the constructive trust which itself in its turn has historically been presented as something other than a restitutive remedy. Perhaps the law is moving towards the time when the two types of trust will coincide, but this can only occur when Restitution is commonly recognized as less a description of assorted existing obligations and more a head of obligation. 'Reversion' or 'resulting' will then be a description of what happens when those restitution obligations occur. In the meantime a resulting trust is a distinct term of art, applicable in specific situations when property remains in, or reverts to, the original transferor.

The distinction between the two types of trust is emphasised in the recent decision of the Ontario Court of Appeal in *Re Bank of Western Canada*.²⁵⁷ The appellants could only succeed under a resulting trust if they could show that the respondent company held certain assets, Bank of Western Canada shares, on express trust for

²⁵⁵ *Ibid.*, at p. 479.

²⁵⁶ In this case, however, there could not have been a resulting trust to the testator's estate because the testator had provided that any sums withheld from a daughter should be added to the shares to be divided among the remaining daughters.

²⁵⁷ (1970), 8 D.L.R. (3d) 593.

the appellants, and that that trust had failed. If no express trust existed, the claim of the appellants, if any, was personal only, and they could not circumvent the difficulty by the argument that "a resulting trust may be founded on a frustrated contract".²⁵⁸ Nor could the personal claim be avoided by the argument that the respondent had been unjustly enriched when the Bank declared a dividend on its shares and payment was made to the respondent. The respondent could not be held liable as a constructive trustee to remedy that alleged unjust enrichment because on the facts the appellants had obtained other agreed consideration for the money they had paid over, the value of which was in the respondent's name.

Resulting trust and constructive trust are both proprietary remedies, but at the moment the rationale of each trust is still quite distinct from the other. How long this will remain so, and how they will ultimately be joined in a common rationale, are nice matters for seminar discussion. The key may lie in the significance the courts continue to give to intent in the law of resulting trusts.

²⁵⁸ *Ibid.*, at p. 605.