CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE

JUDICIAL CONFERENCE ON FAMILY LAW

VANCOUVER, BRITISH COLUMBIA

An Address by

MR. JUSTICE BRIAN DICKSON

SUPREME COURT OF CANADA

Saturday, August 29, 1981

9:00 a.m.

CANADIAN INSTITUTE FOR THE ADMINISTRATION OF JUSTICE

JUDICIAL CONFERENCE ON FAMILY LAW

MATRIMONIAL PROPERTY

THE PHRASE "MATRIMONIAL PROPERTY" AT FIRST IMPRESSION, IS DECEPTIVELY SIMPLE AND INNOCUOUS. IMBEDDED IN IT HOWEVER ARE SUBTLE, COMPLEX, AND DIFFICULT LEGAL AND NON-LEGAL CONCEPTS AND ATTITUDES. THE SUBJECT OF MATRIMONIAL PROPERTY HAS ENGENDERED LONG AND LEARNED DEBATE AMONG JURISTS AND ACADEMICS RANGING THROUGH SUCH SUBJECTS AS THE LAW OF TRUSTS, THE LAW OF QUASI-CONTRACT, PROPERTY LAW, UNJUST ENRICHMENT. MOST OF THE DEBATE IN ENGLAND HAS CENTRED UPON THE MATRIMONIAL HOME, IN CANADA UPON THE POSITION OF THE FARM WIFE UPON MARRIAGE BREAKDOWN. UNDERLYING IT ALL ARE THE DEEP-SEATED AND CONFLICTING VIEWS LAWYERS MAY HOLD, AND HONOURABLY HOLD, WITH RESPECT TO SUCH FUNDAMENTAL MATTERS AS COMPETING VALUES OF EQUITY AND PROPERTY LAW, THE LIMITS TO BE PUT UPON JUDICIAL CREATIVITY, AND DISCRETION AND, NOT LEAST, THE RELATIONSHIP OF HUSBAND AND WIFE IN SOCIETY. DIFFERENCES OF OPINION ARE CERTAINLY NO NOVELTY

IN THIS BRANCH OF THE LAW. THE SUBJECT OF MATRIMONIAL PROPERTY IS ONE UPON WHICH I EMBARK WITH CONSIDERABLE TREPIDATION AND ONLY IN RESPONSE TO THE BEHEST OF A VERY PERSUASIVE JUDGE ROSIE ABELLA. I NEED HARDLY ADD THAT ANY REMARKS I MAY OFFER THIS MORNING ARE MINE ALONE; MY COLLEAGUES OF THE SUPREME COURT OF CANADA ARE IN NO WAY IMPLICATED.

I WILL BE REFERRING LATER TO THE *MATRIMONIAL PROPERTY ACTS* ENACTED WITHIN THE LAST 2 or 3 YEARS IN THE VARIOUS PROVINCES. TO DATE NONE OF THE CASES INTERPRETING THOSE *ACTS* HAS REACHED THE SUPREME COURT OF CANADA. I WILL THEREFORE REFRAIN FROM COMMENT ON THE CONSTRUCTION OF THE *ACTS*.

IF THE RATIONAL STUDY OF LAW IS STILL TO A LARGE EXTENT THE STUDY OF HISTORY WE WOULD DO WELL, IF WE ARE TO UNDERSTAND THE PRESENT STATE OF THE LAW, TO CAST OUR MINDS BACK TO THE EARLY DEVELOPMENTS IN RESPECT OF MATRIMONIAL PROPERTY AND THE STATUS OF MARRIED WOMEN AT COMMON LAW AND IN EQUITY.

IN FEUDAL TIMES, THE NORMAN KINGS LOOKED TO THE VASSALS FOR PERFORMANCE OF FEUDAL SERVICES. TO THIS END ANY FREEHOLD ESTATE OF WHICH THE WIFE WAS SEIZED AT THE TIME OF MARRIAGE WAS VESTED UPON MARRIAGE IN THE HUSBAND AS WELL AS THE WIFE, AND IT WAS UNDER HIS SOLE MANAGEMENT AND CARE. THE HUSBAND WAS EXPECTED TO PERFORM THE FEUDAL DUES WHICH AROSE

FROM FREEHOLD TENURE. THE WIFE HAD NO POWER TO DISPOSE OF HER REALTY AT ALL DURING COVERTURE. IF THERE WAS ANY ISSUE OF THE MARRIAGE BORN ALIVE, THE HUSBAND WAS ENTITLED BY WHAT WAS QUAINTLY CALLED, THE "COURTESY OF ENGLAND", TO AN ESTATE FOR HIS LIFE IN ALL HER FREEHOLD LANDS. DURING THE MARRIAGE THE HUSBAND WAS ENTITLED TO THE WHOLE OF THE WIFE'S INCOME FROM ANY SOURCE. THE WIFE TOOK NO INTEREST IN THE HUSBAND'S REALTY UNLESS SHE SURVIVED HIM, IN WHICH EVENT SHE BECAME ENTITLED BY VIRTUE OF HER DOWER TO A LIFE ESTATE IN HIS FREE-HOLDS. BLACKSTONE, REFLECTING THE BASIC REASONING OF THE CHURCH AND THE COMMON LAW, WROTE: "THE HUSBAND AND WIFE ARE ONE PERSON IN LAW: THAT IS, THE VERY BEING OR LEGAL EXISTENCE OF THE WOMAN IS SUSPENDED DURING THE MARRIAGE OR AT LEAST IS INCORPORATED AND CONSOLIDATED WITH THE HUSBAND, UNDER WHOSE WING, PROTECTION AND COVER SHE PERFORMS EVERYTHING". IT MUST HAVE BEEN WITH TONGUE IN CHEEK THAT HE ALSO WROTE "EVEN THE DISABILITIES WHICH THE WIFE LIES UNDER ARE FOR THE MOST PART INTENDED FOR HER PROTECTION AND BENEFIT: SO GREAT A FAVOURITE IS THE FEMALE SEX OF THE LAWS OF ENGLAND."

BY THE 17TH CENTURY EQUITY INTERVENED TO AMELIORATE THE STATE OF AFFAIRS UNDER WHICH WIVES SUFFERED. IN THE WORDS OF SIR JOSEYLN SIMON* THE CHANCELLOR DEVISED "A SYSTEM OF EQUITY WHICH WOULD PROVIDE FOR THE DEFICIENCIES OF THE COMMON LAW. HE

* Presidential Address to the Holdsworth Club, 20th March, 1964

COULD NOT - HE DID NOT ATTEMPT TO - TAKE ITS ENTRENCHED POSITIONS BY DIRECT ASSAULT; HE WOULD PIVOT ON THEM AND OUTFLANK THEM. HIS CHERISHED WEAPON WAS THE TRUST". IT WAS ESTABLISHED THAT IF PROPERTY, REALTY OR PERSONALTY, WAS CONVEYED TO TRUSTEES TO THE SEPARATE USE OF A MARRIED WOMAN, SHE RETAINED IN EQUITY THE SAME RIGHT OF HOLDING AND DISPOSING OT IT AS IF SHE WERE A SINGLE WOMAN. SHE COULD SELL IT OR LEAVE IT BY WILL. THE *MATRIMONIAL CAUSES ACT* OF 1857 AND THE SERIES OF *MARRIED WOMEN'S PROPERTY ACTS*, COMMENCING WITH THE *ACT* OF 1870, EXTENDED TO THE WOMEN OF THE MIDDLE AND LOWER MIDDLE CLASS, WITHOUT THE INTERVENTION OF ANY TRUSTEE, WHAT EQUITY HAD PERMITTED TO MARRIED WOMEN OF THE WEALTHIER CLASSES THROUGH THE MEDIUM OF THE TRUST. THUS HUSBANDS AND WIVES WERE ENABLED TO OWN THEIR OWN PROPERTY VIRTUALLY FREE OF ANY CLAIM OF HIS OR HER SPOUSE. A STRICT POLICY OF SEPARATISM HAD, IN EQUITY, REPLACED THE FICTION OF UNITY OF HUSBAND AND WIFE IN MATTERS OF PROPERTY.

ALTHOUGH IN TRADITIONAL SEPARATE PROPERTY JURISDICTIONS THERE IS NO SPECIAL PROVISION FOR DETERMINING THE RIGHT OF A SPOUSE TO A SHARE OF THE MATRIMONIAL ASSETS, IT WAS NOT UNTIL AFTER THE SOCIAL UPHEAVAL OF THE SECOND WORLD WAR THAT IT BECAME SO VERY APPARENT THAT A SYSTEM OF SEPARATION OF PROPERTY WAS "SINGULARLY ILL ADAPTED TO DO JUSTICE" TO THE HOUSEHOLD COMMUNITY, TO WIVES WHO CONTRIBUTED FINANCIALLY OR THROUGH DIVISION OF LABOUR TO THE ACQUISITION OF, FOR EXAMPLE, THE

FAMILY HOME, WHICH IS OFTEN THE ONLY SUBSTANTIAL ASSET. WHAT RULES ARE TO GOVERN THE ACQUISITION BY SPOUSES OF *INTER VIVOS* RIGHTS IN MATRIMONIAL PROPERTY, THE LEGAL OWNERSHIP OF WHICH HAS REMAINED VESTED IN ONLY ONE OF THEM DURING THE MARRIAGE? HOW DOES ONE RECONCILE THE PRINCIPLE OF EQUALITY, WITH ITS EMPHASIS ON HUSBAND AND WIFE AS INDIVIDUALS WITH THE ESSENTIAL UNITY OF THE FAMILY AND THE REALITIES OF MARRIED LIFE? AS WAS SAID BY FOSTER AND FREED IN AN ARTICLE ENTITLED *MARITAL PROPERTY REFORM: PARTNERSHIP OF CO-EQUALS?* ((1973) 169 NEW YORK L.J. FOR MARCH 5, 23 and APRIL 270: "... IT IS RELATIVELY MEANINGLESS FOR A WIFE TO ACQUIRE LEGAL CAPACITY TO OWN PROPERTY IF SHE DOES NOT HAVE ANY, OR TO BECOME ENTITLED TO KEEP HER OWN WAGES IF SHE IS FORCED TO STAY AT HOME AND RAISE CHILDREN, ..." WHAT ARE THE LEGITIMATE CLAIMS OF HOUSEWIVES AND MOTHERS TO AN INTEREST IN THE MATRIMONIAL, AND OTHER PROPRIETARY, BENEFITS WHICH THEIR HUSBANDS ENJOYED THROUGH THE ECONOMIC SELF-SACRIFICE OF THE WIVES AND MOTHERS? THESE ARE THE QUESTIONS WHICH AROSE REPEATEDLY IN THE ENGLISH COURTS AND UPON WHICH THE HOUSE OF LORDS AND THE COURT OF APPEAL WERE SHARPLY DIVIDED. THE COURT OF APPEAL, IN BROAD TERMS, WAS OF THE VIEW THAT THE COURTS, IN THE EXERCISE OF A BROAD JUDICIAL DISCRETION, AND IN ORDER TO

DO JUSTICE, COULD HOLD A WIFE ENTITLED TO PROPERTY RIGHTS WHICH WOULD NOT HAVE BEEN ACQUIRED UNDER THE GENERAL PROPERTY LAW. THE COURT OF APPEAL RECOGNIZED THAT WHEN PROPERTY IS ACQUIRED FOR FAMILY USE THERE IS SELDOM ANY THOUGHT OF MARRIAGE BREAKDOWN, OF SEPARATION AND DIVORCE, NOR IS IT OF CONCERN AT THAT TIME AS TO THE NAME IN WHICH LEGAL TITLE IS TAKEN. ATTEMPTS TO SOLVE THESE PROBLEMS IN THE MANNER ADOPTED BY THE COURT OF APPEAL DID NOT MEET WITH GREAT FAVOUR IN THE HOUSE OF LORDS. THE LORDS PREFERRED TO APPLY MORE ORTHODOX PRINCIPLES OF COMMON LAW AND EQUITY TO RESOLVE MARITAL DISPUTES OVER THE OWNERSHIP OF PROPERTY. THE COURTS WERE, HOWEVER, FREQUENTLY LEFT WITH THE UNENVIABLE TASK OF DETERMINING THE INTENTION OF THE SPOUSES AT A TIME MANY YEARS PREVIOUSLY. THE QUESTION IS DIFFICULT BECAUSE, AS PROFESSOR DONOVAN WATERS HAS POINTED OUT,*"IN TRUTH MARRIAGE CANNOT BE ANALOGIZED TO ANY OTHER RELATIONSHIP KNOWN TO THE LAW", ADDING "IN A REAL SENSE WHEN MAN AND WOMAN SHARE LIFE TOGETHER NO EFFORT OF EITHER WHICH CONTRIBUTES TO THE ENHANCEMENT OF THAT LIFE CAN BE SAID TO BE TOTALLY UNCONNECTED WITH THE ASSETS WHICH HAVE BEEN PUT TO THE USE AND ENJOYMENT OF BOTH IN THE LIVING OF THAT LIFE. FOR INSTANCE A WOMAN, WHO HAS BEEN A FAITHFUL HOUSEWIFE AND DEVOTED MOTHER, CAN ONLY BE SAID TO HAVE NO ENTITLEMENT TO A PROPERTY INTEREST IN THE HOUSE PROVIDED BY HER HUSBAND AS THE HOME, IF REDUCED TO ITS

* (1975) 53 Can. Bar Rev. 366, 381.

ESSENTIALS ONE REGARDS MARRIAGE AS SOME FORM OF JOINT BUSINESS VENTURE". CAN ONE REALLY APPLY IN A MARITAL CONTEXT THE SAME PRINCIPLES THAT APPLY BETWEEN STRANGERS? IN THE UNITED KINGDOM, THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE GAVE THIS RESPONSE: "MARRIAGE SHOULD BE REGARDED AS A PARTNERSHIP IN WHICH HUSBAND AND WIFE WORK TOGETHER AS EQUALS, AND ... THE WIFE'S CONTRIBUTION TO THE JOINT UNDERTAKING, IN RUNNING THE HOME AND LOOKING AFTER THE CHILDREN, IS JUST AS VALUABLE AS THAT OF THE HUSBAND IN PROVIDING THE HOME AND SUPPORTING THE FAMILY".

ONE PERCEPTIVE OBSERVER*HAS CRITICIZED THE VICTORIAN SCHEME OF SEPARATE PROPERTY ON FIVE COUNTS: (i) IT ACCORDS ILL WITH THE MODERN CONCEPT OF MARRIAGE AS A PARTNERSHIP; (ii) IT RUNS COUNTER TO THE ACTUAL BEHAVIOUR OF MARRIED COUPLES IN FAMILY BUDGETTING - IN MOST HOUSEHOLDS THERE IS NO STRICT ACCOUNTING OF HOW THE COMBINED INCOME IS APPLIED TO EXPENDITURES; (iii) MORE AND MORE FAMILIES NOW HAVE SUFFICIENT INCOME TO AMASS CAPITAL ASSETS SUCH AS THE HOME, AND MODEST INVESTMENT PORTFOLIOS, COMMONLY FROM MINGLED FUNDS; (iv) A FOURTH FACTOR WHICH HAS FOCUSSED ATTENTION ON THE INADEQUACY OF THE SYSTEM OF SEPARATE

* Professor L. Neville Brown, *ENGLISH LAW IN SEARCH OF A MATRIMONIAL REGIME* (1970-71)

PROPERTY IS THE CONTINUING INCREASE IN DIVORCE; (v) A FIFTH AND FINAL CRITICISM OF ENGLISH LAW IS THAT IT APPEARS TO HAVE LAGGED BEHIND OTHER ADVANCED COUNTRIES IN MODERNIZING THE VICTORIAN LEGACY TO SERVE THE NEW PATTERN OF MARITAL PARTNERSHIP.

WHAT THEN WAS THE JUDICIAL RESPONSE IN ENGLAND? AT FIRST, THERE SEEMED TO BE DEVELOPING A DISCRETIONARY POWER IN THE COURT TO DECLARE WHAT WERE THE PROPER PROPORTIONS IN WHICH THE BENEFICIAL INTEREST SHOULD BE HELD; ON THE LINES OF THE COURT'S DISCRETIONARY POWER UNDER THE *MARRIED WOMAN'S PROPERTY ACT 1882* TO DETERMINE DISPUTES BETWEEN SPOUSES. THE LEADING CASE IN SUPPORT OF THIS WIDE INTERPRETATION IS *RIMMER V RIMMER*, [1953] 1 Q.B. 63, [1952] (C.A.); APPLIED IN *COBB V COBB*, [1955] 2 All E.R. 696 (C.A.); AND *FRIBANCE V FRIBANCE* (NO. 2) [1957] 1 All E.R. 357 (C.A.); BUT DISTINGUISHED IN *SILVER V SILVER*, [1958] 1 All E.R. 523 (C.A.); AND *RICHARDS V RICHARDS*, [1958] 1 All E.R. 513 (C.A.). THIS DEVELOPMENT WAS ENDED BY THE HOUSE OF LORDS IN *PETTIT V PETTIT*, [1969] 2 All E.R. 385 AND *GISSING V GISSING*, [1970] 2 All E.R. 780 WHICH LAY DOWN THAT THE RIGHTS OF THE SPOUSES TO THE MATRIMONIAL HOME MUST BE DETERMINED ACCORDING TO THE RULES OF PROPERTY LAW. WHERE THE LEGAL TITLE IS IN THE NAME OF ONLY ONE SPOUSE, A CLAIM OF THE OTHER TO A SHARE OF THE BENEFICIAL INTEREST WOULD NORMALLY BE UPHELD ONLY IF A TRUST HAD ARISEN FROM

THEIR ACTUAL OR PRESUMED INTENTION. THERE MAY BE EVIDENCE OF AN AGREEMENT, OR OF A DECLARATION, WHICH, IF IT IS AN AGREEMENT OR DECLARATION CONCERNING AN INTEREST IN LAND MUST BE IN WRITING TO COMPLY WITH THE STATUTE OF FRAUDS. WHERE THERE IS NO SUCH EVIDENCE, INFERENCES AND PRESUMPTIONS MUST BE RELIED ON. INFERENCES AS TO AN AGREEMENT MAY BE OBVIOUS FROM THE CONTRIBUTIONS WHICH THE PARTIES HAVE MADE TO THE PURCHASE PRICE OF THE HOME, OR IN MAKING SUBSTANTIAL IMPROVEMENTS TO IT. AND THE PRESUMPTION OF A RESULTING TRUST WILL ARISE IN FAVOUR OF THE DIVISION OF THE BENEFICIAL INTEREST IN THE PROPORTIONS IN WHICH THE PARTIES CONTRIBUTED TO THE PURCHASE MONEY, OR TO THE REGULAR PAYMENT OF MORTGAGE INSTALMENTS. EVEN IN THOSE SITUATIONS THE "INTENTION" OF THE PARTIES IS NORMALLY A PURE FICTION. IN ANY EVENT, ACCORDING TO THE HOUSE OF LORDS A COURT HAS NO POWER TO IMPUTE AN INTENTION WHICH REASONABLE SPOUSES WOULD HAVE FORMED IF THEY HAD TURNED THEIR MINDS TO THE QUESTION.

NOTWITHSTANDING *GISSING* THE SUBSEQUENT CASES IN ENGLAND, AS PROFESSOR MAURICE C. CULLITY HAS NOTED, ((1977-78) 4 *ESTATES AND TRUSTS QUARTERLY* 277) REVEAL A DEVELOPING TREND TOWARDS THE POSITION WHICH THE ENGLISH COURTS HAD PREVIOUSLY ATTEMPTED TO REACH UNDER S.17 OF THE *MARRIED WOMAN'S PROPERTY ACT*

AND WHICH HAS BEEN STIGMATIZED BY SOME COMMENTATORS AND JUDGES AS AN APPLICATION OF 'PALM TREE' JUSTICE. AT PRESENT THE DEVELOPMENT, PROFESSOR CULLITY SUGGESTS, APPEARS TO BE PROCEEDING ALONG TWO LINES. THE FIRST IS AN EXTENSION OF TRADITIONAL RULES OF PROPERTY LAW WHICH IMPOSE TRUSTS IN ACCORDANCE WITH AN ACTUAL OR PRESUMED INTENTION. THE SECOND INVOLVES A CONSTRUCTIVE TRUST WHICH IS BASED ON THE NOTION OF UNJUST ENRICHMENT AND TO WHICH INTENTION IS SAID TO BE IRRELEVANT. PROFESSOR CULLITY HAS IDENTIFIED, AS FAR AS CANADIAN LAW IS CONCERNED, THREE MAIN FEATURES OF THE ENGLISH CASES AFTER *PETTIT V PETTIT* WHICH HAVE PROVED TO BE SIGNIFICANT: (i) THE FAILURE TO DISTINGUISH BETWEEN RESULTING, IMPLIED AND CONSTRUCTIVE TRUSTS; (ii) THE INTRODUCTION OF THE CONSTRUCTIVE TRUST TERMINOLOGY IN CASES OF DISPUTES OVER MATRIMONIAL PROPERTY; (iii) AND THE EXTENSION OF THE BASIS OF THE CONSTRUCTIVE TRUST BEYOND THE PRINCIPLE OF DETRIMENTAL RELIANCE MENTIONED BY LORD DIPLOCK.

ONE OF THE FUNDAMENTAL PROPOSITIONS LAID DOWN BY THE HOUSE OF LORDS IN *GISSING* AND IN THE EARLIER DECISION IN *PETTIT* WAS THAT RIGHTS OF PROPERTY ARE NOT TO BE DETERMINED ACCORDING TO WHAT IS REASONABLE AND FAIR OR JUST IN ALL THE CIRCUMSTANCES. THEIR LORDSHIPS RECOGNIZED THE NEED FOR REFORM BUT LEFT IT TO THE LEGISLATURE OF THE UNITED KINGDOM TO INITIATE

THAT REFORM. THIS LED TO SOME LEGISLATIVE ACTION BY THE U.K. PARLIAMENT. THE PROGRESSION OF EVENTS IN ENGLAND, MIRRORED TO SOME EXTENT IN CANADA, BRINGS TO MIND THE CELEBRATED PASSAGE SIR HENRY MAINE WROTE:"WITH RESPECT TO THEM (i.e. PROGRESSIVE SOCIETIES) ... SOCIAL NECESSITIES AND SOCIAL OPINION ARE ALWAYS IN ADVANCE OF THE LAW. WE MAY COME INFINITELY NEAR TO CLOSING THE GAP BETWEEN THEM, BUT IT HAS A PERPETUAL TENDENCY TO REOPEN. LAW IS STABLE: THE SOCIETIES WE ARE SPEAKING OF ARE PROGRESSIVE. THE GREATER OR LESS HAPPINESS OF THE PEOPLE DEPENDS ON THE DEGREE OF PROMPTITUDE WITH WHICH THE GULF IS NARROWED". MAINE WENT ON TO DESCRIBE THE INSTRUMENTALITIES, THREE IN NUMBER, BY WHICH THE LAW IS BROUGHT INTO HARMONY WITH SOCIETY. THESE ARE LEGAL FICTIONS, EQUITY AND LEGISLATION.

I WISH TO TURN NOW TO THE CANADIAN SCENE AND REVIEW BRIEFLY, FOUR CASES WHICH CAME BEFORE THE SUPREME COURT OF CANADA: *THOMPSON V THOMPSON*, [1961] S.C.R. 3; *MURDOCH V MURDOCH*, [1975] 1 S.C.R. 423; *RATHWELL V RATHWELL*, [1978] 2 S.C.R. 436; *PETTKUS V BECKER* 19 R.F.L. (2d) 165.

THE FACTS IN *THOMPSON* WERE BRIEFLY THESE: THE HUSBAND BOUGHT A PARCEL OF LAND IN 1945 FOR $1940 AND TOOK THE CONVEYANCE IN HIS OWN NAME. WITH THE ASSISTANCE OF A LOAN OBTAINED BY HIM UNDER THE *VETERANS LAND ACT* HE HAD A HOUSE BUILT ON A TWO-ACRE

LOT WITHIN THE PARCEL. THREE YEARS LATER HE SOLD ALL THE LAND, FOR $40,000. UPON FAILURE OF THE MARRIAGE THE WIFE ISSUED A WRIT FOR A DECLARATION THAT SHE WAS SOLE OWNER OF THE PROPERTY AND ENTITLED TO ALL THE PROCEEDS OF THE SALE. THE TRIAL JUDGE DISMISSED HER ACTION ON THE GROUND THAT SHE HAD MADE NO FINANCIAL CONTRIBUTION TO ITS PURCHASE. THE COURT OF APPEAL MADE ITS OWN INDEPENDENT FINDING OF FACT THAT SOME CONTRIBUTION HAD BEEN MADE BY THE WIFE TO THE MATRIMONIAL HOME AND HELD THAT SHE WAS ENTITLED TO A ONE-HALF INTEREST IN THE PROPERTY AND THE PROCEEDS OF THE SALE. THE SUPREME COURT OF CANADA, SPEAKING THROUGH MR. JUSTICE JUDSON REVERSED (MARTLAND AND RITCHIE JJ. CONCURRING, KERWIN C.J.C. AND CARTWRIGHT J. DISSENTING). AFTER RE-INSTATING THE FINDING OF THE TRIAL JUDGE THAT THE WIFE HAD MADE NO FINANCIAL CONTRIBUTION MR. JUSTICE JUDSON SAID: "BUT NO CASE HAS YET HELD THAT, IN THE ABSENCE OF SOME FINANCIAL CONTRIBUTION, THE WIFE IS ENTITLED TO A PROPRIETARY INTEREST FROM THE MERE FACT OF MARRIAGE AND COHABITATION AND THE FACT THE PROPERTY IN QUESTION IS THE MATRIMONIAL HOME. YET, IF THE PRINCIPLE IS SOUND WHEN IT IS BASED ON FINANCIAL CONTRIBUTION, NO MATTER HOW MODEST, THERE SEEMS TO BE NO LOGICAL OBJECTION TO ITS APPLICATION AND THE EXERCISE OF THE SAME DISCRETION WHEN THERE IS NO FINANCIAL CONTRIBUTION WHEN THE OTHER ATTRIBUTES OF THE MATRIMONIAL PARTNERSHIP ARE PRESENT." THIS SOMEWHAT OPAQUE PASSAGE

WAS LATER USED IN AN ALBERTA CASE, *TRUEMAN V TRUEMAN* (1971), 18 D.L.R. (3d) 109 AS AUTHORITY FOR THE CONCEPT OF INDIRECT CONTRIBUTION. IN *TRUEMAN* THE ALBERTA SUPREME COURT, APPELLATE DIVISION, HELD THAT THE RIGHT OF A WIFE TO A DECLARATION THAT SHE IS ENTITLED TO AN INTEREST IN THE MATRIMONIAL HOME, TITLE TO WHICH STANDS IN THE NAME OF THE HUSBAND ALONE, IS NOT LIMITED TO THOSE CASES IN WHICH SHE HAS MADE A DIRECT FINANCIAL CONTRIBUTION TO THE PURCHASE OR IMPROVEMENT OF IT. BY THE APPLICATION OF THE LAW OF TRUSTS SUCH A DECLARATION MAY BE MADE THE COURT HELD WHERE IT IS SHOWN THAT THE WIFE'S CONTRIBUTION IS INDIRECT, WHERE A WIFE ACTUALLY WORKED WITH HER HUSBAND ON THE CONSTRUCTION OF A FARM HOUSE AND THEREAFTER, IN ADDITION TO DISCHARGING HER ORDINARY WIFELY DUTIES, WORKED IN THE FIELDS CULTIVATING AND HARVESTING THE CROPS AND OPERATING FARM MACHINERY SO THAT A HIRED MAN DID NOT HAVE TO BE EMPLOYED.

THE FACTS IN *MURDOCH* ARE WELL-KNOWN. WHAT IS NOT SO WELL-KNOWN IS THAT MRS. MURDOCH WAS THE PLAINTIFF IN TWO ACTIONS AGAINST HER HUSBAND. IN THE FIRST ACTION SHE CLAIMED, AMONGST OTHER THINGS, AN ORDER GIVING TO HER THE SOLE POSSESSION OF A QUARTER SECTION OF LAND REFERRED TO AS THE FAMILY HOME. THE SECOND ACTION CLAIMED AN UNDIVIDED ONE-HALF INTEREST IN THREE QUARTER SECTIONS OF LAND AND IN THE CATTLE AND OTHER ASSETS OWNED BY THE HUSBAND, ON THE GROUND THAT SHE AND THE HUSBAND

WERE EQUAL PARTNERS AND THE HUSBAND WAS A TRUSTEE FOR HER FOR AN UNDIVIDED ONE-HALF INTEREST. AT TRIAL, THE WIFE IN THE FIRST ACTION WAS AWARDED MAINTENANCE OF $200 PER MONTH. HER CLAIM TO SOLE POSSESSION OF THE QUARTER SECTION REFERRED TO AS THE FAMILY HOME WAS DENIED AND SHE DID NOT APPEAL THIS DECISION. WHAT WAS AT STAKE WHEN THE MATTER REACHED THE SUPREME COURT WAS THEREFORE NOT THE FAMILY HOME BUT THE RANCHING BUSINESS IN RESPECT OF WHICH THE WIFE CLAIMED TO BE AN EQUAL PARTNER. ALTHOUGH THE DECISION RECEIVED MUCH PUBLIC ATTENTION IT WAS IN LINE WITH THOSE REACHED IN EARLIER CASES, HERE AND IN ENGLAND. THE MAJORITY OF THE COURT ACCEPTED THE FINDING OF THE TRIAL JUDGE THAT THE WIFE HAD NOT CONTRIBUTED TOWARD THE PURCHASE PRICE OF THE RANCHING PROPERTIES. IF A FINANCIAL CONTRIBUTION WERE NECESSARY IN ORDER TO FOUND THE WIFE'S CLAIM IT HAD NOT BEEN ESTABLISHED ON THE FACTS OF THE CASE. WITH RESPECT TO THE CONTENTION THAT A CLAIM COULD BE FOUNDED, APART FROM FINANCIAL CONTRIBUTION, IN THE WORK PERFORMED BY THE WIFE IN CONNECTION WITH HER HUSBAND'S RANCHING ACTIVITIES THE MAJORITY JUDGMENT RELIED UPON THE DECISION IN *THOMPSON* AND UPON THE JUDGMENTS OF LORD REID AND LORD DIPLOCK IN *GISSING*. THE *TRUEMAN* CASE WAS DISTINGUISHED ON THE GROUNDS THAT (i) *TRUEMAN* DEALT WITH A CLAIM FOR AN INTEREST IN THE FAMILY "HOMESTEAD";

MURDOCH INVOLVED A CLAIM TO AN INTEREST IN THE HUSBAND'S RANCHING BUSINESS AND IN ALL HIS OTHER ASSETS; (ii) IN *TRUEMAN* THE TRIAL JUDGE FOUND A SUBSTANTIAL CONTRIBUTION BY THE WIFE TOWARD THE ACQUISITION OF THE FARM HOUSE; IN *MURDOCH* THE TRIAL JUDGE HAD MADE NO SUCH FINDING. THE COURT DISMISSED THE WIFE'S CLAIM.

A DISSENT IN THE COURT OF LAST RESORT, CHIEF JUSTICE HUGHES ONCE WROTE, IS "AN APPEAL TO THE BROODING SPIRIT OF THE LAW". THE PRESENT CHIEF JUSTICE, THEN MR. JUSTICE LASKIN, MADE SUCH AN APPEAL IN *MURDOCH*. THE DISSENTING JUDGMENT WAS LENGTHY. THE FOLLOWING PASSAGE IS CRITICAL:

> THE APPROPRIATE MECHANISM TO GIVE RELIEF TO A WIFE WHO CANNOT PROVE A COMMON INTENTION OR TO A WIFE WHOSE CONTRIBUTION TO THE ACQUISITION OF PROPERTY IS PHYSICAL LABOUR RATHER THAN PURCHASE MONEY IS THE CONSTRUCTIVE TRUST WHICH DOES NOT DEPEND ON EVIDENCE OF INTENTION. PERHAPS THE RESULTING TRUST SHOULD BE AS READILY AVAIL-ABLE IN THE CASE OF A CONTRIBUTION OF PHYSICAL

LABOUR AS IN THE CASE OF A FINANCIAL CONTRIBUTION, BUT THE HISTORICAL ROOTS OF THE INFERENCE THAT IS RAISED IN THE LATTER CASE DO NOT EXIST IN THE FORMER. IT IS UNNECESSARY TO BEND OR ADAPT THEM TO THE DESIRED END BECAUSE THE CONSTRUCTIVE TRUST MORE EASILY SERVES THE PURPOSE. AS IS POINTED OUT BY SCOTT, *LAW OF TRUSTS*, 3RD ED., 1967, VOL. 5 AT P.3215, "A CONSTRUCTIVE TRUST IS IMPOSED WHERE A PERSON HOLDING TITLE TO PROPERTY IS SUBJECT TO AN EQUITABLE DUTY TO CONVEY IT TO ANOTHER ON THE GROUND THAT HE WOULD BE UNJUSTLY ENRICHED IF HE WERE PERMITTED TO RETAIN IT ... THE BASIS OF THE CONSTRUCTIVE TRUST IS THE UNJUST ENRICHMENT WHICH WOULD RESULT IF THE PERSON HAVING THE PROPERTY WERE PERMITTED TO RETAIN IT. ORDINARILY, A CONSTRUCTIVE TRUST ARISES WITHOUT REGARD TO THE INTENTION OF THE PERSON WHO TRANSFERRED THE PROPERTY"; AND, AGAIN, AT P.3413, QUOTING JUDGE CARDOZO "A CONSTRUCTIVE TRUST IS THE FORMULA THROUGH WHICH THE CONSCIENCE OF EQUITY FINDS EXPRESSION. WHEN PROPERTY HAS BEEN ACQUIRED IN SUCH CIRCUMSTANCES THAT THE HOLDER OF THE LEGAL TITLE MAY NOT IN GOOD

> CONSCIENCE RETAIN THE BENEFICIAL INTEREST, EQUITY CONVERTS HIM INTO A TRUSTEE."

ONE OTHER BRIEF EXCERPT MIGHT ALSO BE QUOTED:

> IT IS THE FACT THAT THE GREAT MAJORITY OF THE DECIDED CASES CONCERN MATRIMONIAL HOME, BUT THE APPLICABLE LAW IS NOT LIMITED TO THAT KIND OF PROPERTY.

THE JUDGMENT CONCLUDES:

> HAVING REGARD TO WHAT EACH PUT INTO THE VARIOUS VENTURES IN LABOUR AND MONEY, BEGINNING WITH THEIR HIRING OUT AS A COUPLE WORKING FOR WAGES, I WOULD DECLARE THAT THE WIFE IS BENEFICIALLY ENTITLED TO AN INTEREST IN THE BROCKWAY PROPERTY AND THAT THE HUSBAND IS UNDER AN OBLIGATION AS A CONSTRUCTIVE TRUSTEE TO CONVEY THAT INTEREST TO HER.

CONSTRUCTIVE TRUST HAD NEITHER BEEN PLEADED NOR ARGUED IN *MURDOCH*. FIVE YEARS AFTER *MURDOCH V MURDOCH* THE SUPREME COURT OF CANADA WAS AGAIN CALLED UPON TO CONSIDER THE WIFE'S RIGHT TO MATRIMONIAL PROPERTY ON THE DISSOLUTION OF MARRIAGE, IN THE CASE OF *RATHWELL V. RATHWELL*. THE COURT WAS ABLE TO PREMISE PROPRIETARY RELIEF ON THE THEORY OF THE RESULTING TRUST. THE PRESUMPTION AROSE FROM THE WIFE'S CONTRI-

BUTION OF FUNDS AND THE PURCHASE OF PROPERTY PARTLY WITH THOSE FUNDS. IN A JUDGMENT IN WHICH CHIEF JUSTICE LASKIN AND MR. JUSTICE SPENCE CONCURRED, I WENT ON TO CONSIDER THE POSSIBLE APPLICATION OF THE REMEDY OF CONSTRUCTIVE TRUST TO THE FACTS AND IN THE COURSE OF THE JUDGMENT STATED:

> THE CONSTRUCTIVE TRUST, AS SO ENVISAGED, COMPREHENDS THE IMPOSITION OF TRUST MACHINERY BY THE COURT IN ORDER TO ACHIEVE A RESULT CONSONANT WITH GOOD CONSCIENCE. AS A MATTER OF PRINCIPLE, THE COURT WILL NOT ALLOW ANY MAN UNJUSTLY TO APPROPRIATE TO HIMSELF THE VALUE EARNED BY THE LABOURS OF ANOTHER. THAT PRINCIPLE IS NOT DEFEATED BY THE EXISTENCE OF A MATRIMONIAL RELATIONSHIP BETWEEN THE PARTIES; BUT, FOR THE PRINCIPLE TO SUCCEED, THE FACTS MUST DISPLAY AN ENRICHMENT, A CORRESPONDING DEPRIVATION, AND THE ABSENCE OF ANY JURISTIC REASON - SUCH AS A CONTRACT OR DISPOSITION OF LAW - FOR THE ENRICHMENT. THUS, IF THE PARTIES HAVE AGREED THAT THE ONE HOLDING LEGAL TITLE IS TO TAKE BENEFICIALLY AN ACTION IN RESTITUTION CANNOT SUCCEED.

MR. JUSTICE MARTLAND WITH WHOM JUSTICES JUDSON, BEETZ AND DEGRANDPRE AGREED WAS OF THE OPINION, AS APPEARS IN THE HEADNOTE:

> THERE SHOULD BE NO APPLICATION, IN CASES OF THIS KIND, OF A DOCTRINE OF CONSTRUCTIVE TRUST AS A MEANS OF PREVENTING UNJUST ENRICHMENT. THE AREAS TO WHICH THE DOCTRINE OF CONSTRUCTIVE TRUST HAVE BEEN APPLIED HERETOFORE ARE THOSE IN WHICH A TRUSTEE OR A FIDUCIARY TAKES ADVANTAGE OF HIS POSITION TO MAKE A PROFIT FOR HIMSELF CONTRARY TO HIS DUTY AS A TRUSTEE OR FIDUCIARY. IT HAS ALSO BEEN APPLIED IN CASES WHERE A PERSON, HAVING KNOWLEDGE OF AN EXISTING TRUST, ACQUIRES LEGAL TITLE TO THE TRUST PROPERTY. IT HAS NOT BEEN EXTENDED TO ENABLE A COURT TO ALLOCATE PROPERTY BETWEEN A HUSBAND AND A WIFE ON THE BASIS OF A BROAD DISCRETION AS TO WHAT THE COURT CONSIDERS WOULD BE JUST AND EQUITABLE. THE CIRCUMSTANCES IN WHICH SUCH AN ALLOCATION COULD BE MADE, IF THEY ARE TO BE EXTENDED BEYOND THE SCOPE OF EXISTING LAW, SHOULD BE DETERMINED, AS A MATTER OF PUBLIC POLICY, BY LEGISLATION.

MR. JUSTICE RITCHIE AND MR. JUSTICE PIGEON CONSIDERED THAT THE QUESTIONS RAISED IN THE APPEAL WERE CONTROLLED BY THE FACT OF THE WIFE'S FINANCIAL CONTRIBUTION AND THEY DID NOT FIND ANY DETERMINATION AS TO THE APPLICATION OF THE DOCTRINE OF CONSTRUCTIVE TRUST OR UNJUST ENRICHMENT TO BE NECESSARY.

ALTHOUGH THE NEXT CASE, THAT OF *PETTKUS V BECKER*, WAS NOT CONCERNED WITH THE RIGHTS OF THE WIFE AND THEREFORE, PROPERLY SPEAKING, NOT ONE AS TO MATRIMONIAL PROPERTY, SOME REFERENCE SHOULD BE MADE TO IT. IT CONCERNED TWO PERSONS, MR. PETTKUS AND MISS BECKER WHO LIVED TOGETHER WITHOUT BENEFIT OF CLERGY OVER A PERIOD OF ALMOST TWENTY YEARS, DURING WHICH TIME THEY DEVELOPED A SUCCESSFUL BEEKEEPING BUSINESS. DURING THE EARLY YEARS MISS BECKER PAID THE LIVING EXPENSES FOR BOTH. MR. PETTKUS SAVED MONIES WHICH HE PLACED IN AN ACCOUNT IN HIS NAME. A FARM WAS BOUGHT AND PLACED IN HIS NAME. LATER TWO OTHER PROPERTIES WERE ACQUIRED AND ALSO PLACED IN HIS NAME. THE MAJORITY JUDGMENT OF THE COURT QUOTED WITH APPROVAL TWO PASSAGES FROM THE ARTICLE WRITTEN BY PROFESSOR WATERS TO WHICH I HAVE EARLIER REFERRED. THE FIRST IS THIS:

> ...IN OTHER WORDS, THIS "DISCOVERY" OF AN IMPLIED COMMON INTENTION PRIOR TO THE ACQUISITION IS IN MANY CASES A MERE VEHICLE OR FORMULA FOR GIVING THE WIFE A JUST AND EQUITABLE SHARE IN THE DISPUTED ASSET. IT IS IN FACT A CONSTRUCTIVE TRUST APPROACH MASQUERADING AS A RESULTING TRUST APPROACH.

THE SECOND IS THIS:

> AFTER ALL, IN FEW CASES WILL THE INFERRING OF AN AGREEMENT BE IMPOSSIBLE OR UNREASONABLE, AND, WHERE IT IS SO, JUSTICE AND EQUITY MAY WELL COME TO THE SAME CONCLUSION AS THAT PRODUCED BY THE LAW OF RESULTING TRUSTS. BUT TOO OFTEN THE RESULTING TRUST THEORY PRODUCES A RESULT AT ODDS WITH WHAT WOULD SEEM THE MORE DESIRABLE OUTCOME, OR THERE IS A FIGHT THROUGH THE APPEAL COURTS, AND THEN WHAT MAY WELL BE DIFFERENCE OF JUDICIAL OPINION ON THE FACTUAL MERITS BECOMES A DIFFERENCE ON THE SUBTLETIES OF THE LAW OF TRUSTS.

THE TRIAL JUDGE IN *PETTKUS* HAD HELD THERE WAS NO COMMON INTENTION, EXPRESS OR IMPLIED, AND THE ONTARIO COURT OF

OF APPEAL DID NOT DISTURB THAT FINDING. THE LATTER COURT HELD IN FAVOUR OF MISS BECKER ON THE BASIS OF CONSTRUCTIVE TRUST.

THE MAJORITY OF OUR COURT HELD THAT MISS BECKER HAD INCURRED EXPENDITURE OR OTHERWISE PREJUDICED HERSELF RESULTING IN THE ENRICHMENT OF MR. PETTKUS AT HER EXPENSE. THE MAJORITY CONSIDERED THAT SHE HAD PREJUDICED HERSELF IN THE EXPECTATION OF RECEIVING SOME INTEREST IN THE PROPERTY, THAT MR. PETTKUS HAD FREELY ACCEPTED THE BENEFITS CONFERRED BY HER AND THERE WAS NO OVERRIDING PUBLIC POLICY OR EQUITY THAT WOULD OPERATE TO DEFEAT HER CLAIM. A CONSTRUCTIVE TRUST AROSE BY VIRTUE OF A "JOINT EFFORT" OR "TEAMWORK" IN RESPECT OF THE PROPERTY ACQUIRED THROUGH THE JOINT EFFORTS.

MR. JUSTICE RITCHIE REACHED THE CONCLUSION AT WHICH THE MAJORITY ARRIVED BUT BY A DIFFERENT ROUTE. HE FOUND THE ADVANCES MADE BY MISS BECKER TO BE SUCH AS TO SUPPORT THE EXISTENCE OF A RESULTING TRUST. JUSTICE RITCHIE WAS OF OPINION THAT CONTRIBUTIONS MADE BY ONE SPOUSE, AND FREELY ACCEPTED BY THE OTHER, FOR USE IN THE ACQUISITION AND OPERATION OF A COMMON HOUSEHOLD GIVE RISE TO A REBUTTABLE PRESUMPTION THAT, AT THE TIME WHEN THE CONTRIBUTIONS WERE MADE AND ACCEPTED, THE PARTIES BOTH INTENDED THAT THERE WOULD BE A RESULTING TRUST IN FAVOUR OF THE DONOR TO BE MEASURED IN TERMS OF THE VALUE OF THE CONTRIBUTIONS SO MADE.

MR. JUSTICE MARTLAND, IN SEPARATE REASONS, EXPRESSED HIMSELF AS BEING IN AGREEMENT WITH THE REASONS OF MR. JUSTICE RITCHIE. HE CAREFULLY REVIEWED THE ENGLISH AUTHORITIES AND CONCLUDED THAT IN ENGLISH LAW THE EXISTENCE OF AN UNJUST ENRICHMENT HAD BEEN RECOGNIZED IN CLAIMS FOR THE RETURN OF MONEY, AND THE AREAS IN WHICH A CONSTRUCTIVE TRUST HAD BEEN FOUND TO EXIST HAD USUALLY BEEN IN CASES WHERE A FIDUCIARY RELATIONSHIP EXISTED, e.g. A TRUSTEE OR FIDUCIARY TAKING ADVANTAGE OF HIS POSITION TO MAKE A PROFIT FOR HIMSELF. JUSTICE MARTLAND CONCLUDED HIS REASONS WITH THE OPINION THAT THE ADOPTION OF THE CONCEPT OF CONSTRUCTIVE TRUST INVOLVED AN EXTENSION OF THE LAW AS SO FAR DETERMINED IN THE SUPREME COURT OF CANADA AND SUCH AN EXTENSION WAS, IN HIS VIEW, UNDESIRABLE, AS IT WOULD CLOTHE JUDGES WITH A VERY WIDE POWER TO APPLY WHAT HAS BEEN DESCRIBED AS "PALM TREE JUSTICE", WITHOUT THE BENEFIT OF ANY GUIDELINES.

I SHOULD LIKE NOW, FOR A MOMENT, TO DISCUSS IN GENERAL TERMS THE CONCEPT OF RESULTING TRUST AND CONSTRUCTIVE TRUST. IN THE INTERESTING ARTICLE IN THE *ESTATES AND TRUSTS QUARTERLY*, TO WHICH I HAVE EARLIER REFERRED, PROFESSOR CULLITY NOTES THAT THE PRESUMPTION OF RESULTING TRUST HAS BEEN APPLIED IN NUMEROUS CANADIAN CASES IN WHICH ONE SPOUSE HAS CONTRIBUTED FINANCIALLY TO THE ACQUISITION OF A HOME TO WHICH THE OTHER SPOUSE HAS THE LEGAL TITLE. PROFESSOR CULLITY EMPHASIZES

THE FOLLOWING POINTS: (i) THE PRESUMPTION WILL ONLY ARISE IF THE ALLEGED *CESTUI QUE TRUST* HAS MADE SOME FINANCIAL CONTRIBUTION TO THE PURCHASE. HE NOTES THAT, IN MAKING THE DISTINCTION BETWEEN "DIRECT" AND "INDIRECT" CONTRIBUTIONS, IT IS UNDERSTANDABLE THAT THE NOTION OF A CONTRIBUTION WHICH WAS SUFFICIENTLY DIRECT TO RAISE THE PRESUMPTION WAS PUSHED A LONG WAY; (ii) AN ORTHODOX APPLICATION OF THE PRESUMPTION CAN ONLY CREATE A TRUST UNDER WHICH THE BENEFICIAL INTERESTS ARE PROPORTIONATE TO THE FINANCIAL CONTRIBUTIONS OF THE PARTIES; (iii) IF TRADITIONAL AND WELL-ESTABLISHED PRINCIPLES OF EQUITY ARE TO BE ADHERED TO IT IS MISLEADING TO SPEAK OF A RESULTING TRUST ARISING FROM A COMMON INTENTION TO CREATE THE TRUST. THE RESULTING TRUST ARISES FROM AN INTENTION TO CREATE A TRUST WHICH PRESUMES TO EXIST IN CERTAIN LIMITED CIRCUMSTANCES AND NOT FROM AN INTENTION WHICH THE PARTIES HAVE EXPRESSED OR WHICH THE COURT CAN INFER FROM THEIR ACTS OR THEIR WORDS; IT IS THE INTENTION OF THE CONTRIBUTION WHICH IS PRESUMED AND WHICH WHEN PRESUMED FORMS THE BASIS OF THE TRUST.

PROFESSOR CULLITY ADDS, HOWEVER, IN THE FOLLOWING PARAGRAPH:

> RECENT CASES CONTAIN MANY STATEMENTS ABOUT RESULTING TRUSTS WHICH DO NOT SEEM TO BE

CONSISTENT WITH THESE PRINCIPLES. IN PARTICULAR, IT HAS BECOME QUITE COMMON FOR JUDGES TO SPEAK OF RESULTING TRUSTS AS ARISING FROM AN INFERRED AGREEMENT OR COMMON INTENTION OF THE SPOUSES TO SHARE THE BENEFICIAL INTEREST. ALTHOUGH THIS IS CLEARLY A DEPARTURE FROM THE ORTHODOX CONCEPT OF SUCH TRUSTS AND AMOUNTS TO A RECOGNITION OF AN EXPRESS TRUST WHICH WILL BE ENFORCED IN CONTRAVENTION OF THE STATUTE OF FRAUDS, IT IS NOT DIFFICULT TO SEE HOW AND WHY THIS EMPHASIS ON THE ACTUAL INTENTION OF THE PARTIES RATHER THAN THE INTENTION WHICH IS PRESUMED FROM THE FACT OF A CONTRIBUTION DEVELOPED.

THERE FOLLOWS A LEARNED DISCUSSION WHICH INCLUDES THE FOLLOWING PASSAGE WHICH I WOULD LIKE TO QUOTE:

IT SEEMS BEYOND DISPUTE THAT THE TRADITIONAL PRINCIPLES OF RESULTING TRUSTS ARE INADEQUATE TO DEAL WITH PROBLEMS CONCERNING THE OWNERSHIP OF MATRIMONIAL PROPERTY. IF THEY ARE APPLIED STRICTLY, THE CONSEQUENCES MAY BE QUITE FORTUITOUS AND MANIFESTLY UNJUST. IF AN ATTEMPT IS MADE TO EXTEND THE PRINCIPLES TO INDIRECT

> CONTRIBUTIONS, THE INQUIRY QUICKLY CEASES TO HAVE MUCH CONTACT WITH REALITY AND THE PRINCIPLES THEMSELVES BECOME DISTORTED. THE TRUTH OF THESE PROPOSITIONS IS AMPLY DEMONSTRATED BY THE REASONING OF THE ENGLISH AND CANADIAN CASES, BOTH BEFORE AND AFTER *GISSING V GISSING*. THE GRADUAL EMERGENCE OF THE CONSTRUCTIVE TRUST AS AN ALTERNATIVE REMEDY DATES FROM THAT DECISION.

THE CONSTRUCTIVE TRUST ON THE OTHER HAND HAS NOTHING TO DO WITH INTENT. AS PROFESSOR WATERS HAS WRITTEN, THE COURT MERELY UTILIZES THE MACHINERY OF THE TRUST TO EXPRESS THE JUDICIALLY IMPOSED OBLIGATION UPON "A" TO RESTORE OR HAND OVER PROPERTY TO "B". "A'S" OBLIGATION ARISES OUT OF THE FACT THAT IN JUSTICE AND EQUITY THAT IS PRECISELY WHAT "A" OUGHT TO DO AND, "B" HAVING NO OTHER REMEDY, WILL BE COMPELLED TO DO.

ENGLISH LAW REQUIRES THAT, BEFORE THE CONSTRUCTIVE TRUST IS IMPOSED, THE DEFENDANT MUST HAVE COMMITTED SOME LEGAL WRONG. AMERICAN LAW ON THE OTHER HAND REGARDS THE CONSTRUCTIVE TRUST AS A REMEDIAL INSTITUTION, FOR IT IS IMPOSED BY THE COURT IN ORDER TO ENABLE A PARTY TO RECOVER "THAT WHICH IS UNFAIRLY WITHHELD FROM HIM TO THE BENEFIT OF THE WITHHOLDER". A PLAINTIFF

NEED SHOW ONLY THAT THE DEFENDANT HAS BEEN UNJUSTLY ENRICHED AT HIS EXPENSE. THE LATE CHIEF JUSTICE CHALLIES PREFERRED THE WORD "UNJUSTIFIABLY" AS IT DIRECTS ATTENTION TO JUSTIFICATION RATHER THAN JUSTICE IN THE ABSTRACT. IT IS PERHAPS OF INTEREST TO NOTE THAT IN THE UNITED STATES CONSTRUCTIVE TRUSTS ARE DEALT WITH IN THE *RESTATEMENT OF RESTITUTION*, RATHER THAN IN THE *RESTATEMENT OF TRUSTS*, EXCEPT INSOFAR AS THEY ARISE OUT OF EXPRESS TRUSTS. THE *RESTATEMENT* HAS NOT REGARDED A FIDUCIARY RELATIONSHIP AS NECESSARY IN ALL CASES TO RECOGNITION OF A CONSTRUCTIVE TRUST: "A CONSTRUCTIVE TRUST, UNLIKE AN EXPRESS TRUST, IS NOT A FIDUCIARY RELATION, ALTHOUGH THE CIRCUMSTANCES WHICH GIVE RISE TO A CONSTRUCTIVE TRUST MAY OR MAY NOT INVOLVE A FIDUCIARY RELATION."

WRITING IN A RECENT ISSUE OF THE UNIVERSITY OF TORONTO LAW JOURNAL IN AN ARTICLE ENTITLED *"THE JURIDICAL NATURE OF UNJUST ENRICHMENT"* ((1980) 30 U. of T.J.L. 356, 373) PROFESSOR GEORGE B. KLIPPERT HAS SAID:

> IN MY VIEW, THE DEVELOPING CANADIAN PRINCIPLE OF UNJUST ENRICHMENT PRESUPPOSES: (i) THAT THE DEFENDANT RECEIVED A BENEFIT AT THE PLAINTIFF'S EXPENSE, (ii) EVIDENCE OF VOLITION IN THE RECEIPT OR RETENTION OF THE BENEFIT;

(iii) THAT THE BENEFIT WAS NOT VOLUNTARILY CONFERRED AND (iv) THAT THE BENEFIT IS UNJUSTLY RETAINED BY THE DEFENDANT.

THE CONSTRUCTIVE TRUST, AS I UNDERSTAND IT, IS NOT BASED ON ANY NOTION OF PATERNALISM OR UNLIMITED JUDICIAL DISCRETION BUT RATHER ON THE SIMPLE EQUITABLE PRINCIPLE THAT IF TWO PEOPLE JOINTLY CONTRIBUTE TO THE ACQUISITION OF PROPERTY AND THE TITLE IS ONLY IN THE NAME OF ONE OF THEM, IT IS INEQUITABLE NOT TO DECLARE THAT THE OTHER HAS A BENEFICIAL INTEREST IN THE PROPERTY. IT IS QUESTIONABLE WHETHER THE CONSTRUCTIVE TRUST DOES IN FACT CONFER A WIDER DISCRETION ON THE COURT THAN DOES THE RESULTING TRUST.

THE PHRASE "PALM TREE JUSTICE" IS A CATCHY PHRASE, SUGGESTIVE OF THE POSSIBILITY THAT CASES WILL BE DECIDED, IN A HAPHAZARD OR ARBITRARY WAY, ACCORDING TO THE CONSCIENCE (OR LENGTH OF FOOT) OF THE PARTICULAR JUDGE. IT IS BY NO MEANS CLEAR THAT THE DEPRECATORY EPITHET SHOULD BE DIRECTED AT THE CONCEPT OF CONSTRUCTIVE TRUST IN THE CONTEXT OF A MATRIMONIAL PROPERTY DISPUTE. AS PROFESSOR CULLITY HAS NOTED: "IT IS CERTAINLY NOT CLEAR THAT THE APPLICATION OF A CONCEPT OF A CONSTRUCTIVE TRUST BASED ON UNJUST ENRICHMENT IN THE CONTEXT OF MATRIMONIAL DISPUTES AND SIMILAR SITUATIONS IS LIKELY TO CAUSE CHAOS OR LESSEN PREDICTABILITY. IN THE ABSENCE OF PROOF OF INTENTION

OR OF DETRIMENTAL RELIANCE, THE FUNCTION OF THE COURT WILL BE PRIMARILY TO ASSESS THE VALUE OF THE RESPECTIVE CONTRIBUTIONS OF THE SPOUSES AND TO AWARD A BENEFICIAL INTEREST PROPORTIONATE TO THE VALUE OF THE CONTRIBUTIONS MADE BY THE SPOUSE WHO DOES NOT HOLD THE LEGAL TITLE".

SUBSTANTIAL DISCRETIONS ARE CONFERRED ON THE JUDICIARY IN OTHER BRANCHES OF THE LAW, INCLUDING PARTS OF FAMILY LAW. I THINK IT IS ALSO FAIR TO SAY THAT THE COURTS HAVE EXERCISED DISCRETION WIDELY IN RE-ORDERING THE PROPERTY INTERESTS OF MARRIED PERSONS BY MEANS OF THE RESULTING TRUST.

THE DETERMINATION OF WHETHER THERE HAS BEEN AN UNJUST ENRICHMENT MUST BE MADE IN THE SAME MANNER AS ANY OTHER EXERCISE OF JUDICIAL DISCRETION, NAMELY, ON THE BASIS OF PRECEDENT AND PRINCIPLE.

IN THE LAW OF TORT,THE PRINCIPLE OF NEGLIGENCE ENUNCIATED BY LORD ATKINS IN *DONOGHUE V STEVENSON*, [1932] A.C. 562, WAS EXPRESSED IN BROAD TERMS. LITIGATION ON A CASE BY CASE BASIS WAS REQUIRED IN ORDER TO DETERMINE SOME OF THE DIFFICULT ISSUES. SO, I EXPECT, WILL IT BE IN THE WORKING OUT OF THE CONCEPT OF CONSTRUCTIVE TRUST.

I HAVE THUS FAR SOUGHT TO SUMMARIZE THE JUDICIAL RESPONSE, IN THE SUPREME COURT OF CANADA, TO SOME OF THE QUESTIONS WHICH HAVE ARISEN IN RESPECT OF WHAT MIGHT, BROADLY SPEAKING, BE

CALLED MATRIMONIAL PROPERTY. I WOULD VERY MUCH WISH TO CANVAS THE MANY EXCELLENT JUDGMENTS WHICH HAVE BEEN RENDERED ON THIS SUBJECT IN THE COURTS OF APPEAL AND AT THE TRIAL LEVEL, BUT TIME AND SPACE DO NOT PERMIT. I TURN INSTEAD TO THE LEGISLATIVE RESPONSE IN CANADA TO THE PROBLEMS PRESENTED IN THE DISTRIBUTION, UPON MARRIAGE BREAKDOWN, OF PROPERTY ACQUIRED DURING COVERTURE. THE RESPONSES OF THE VARIOUS PROVINCES WILL BE FOUND, CONVENIENTLY SET OUT IN A VOLUME PUBLISHED LAST YEAR ENTITLED *MATRIMONIAL PROPERTY LAW IN CANADA* EDITED BY PROFESSORS BISSETT-JOHNSON AND HOLLAND. IN ALPHABETICAL ORDER OF PROVINCES ONE FINDS THAT THE PROVINCIAL LEGISLATURES HAVE PASSED, IN THE YEARS MENTIONED, THE FOLLOWING ACTS - ALBERTA, 1978, *THE MATRIMONIAL PROPERTY ACT;* BRITISH COLUMBIA, 1978, *THE FAMILY RELATIONS ACT;* MANITOBA, 1978, *THE MARITAL PROPERTY ACT;* NEW BRUNSWICK, 1980, *THE MARITAL PROPERTY ACT;* NEWFOUNDLAND, 1979, *THE MATRIMONIAL PROPERTY ACT;* NOVA SCOTIA, 1980 *THE MATRIMONIAL PROPERTY ACT;* ONTARIO, 1978, *THE FAMILY LAW REFORM ACT;* PRINCE EDWARD ISLAND, 1978, *THE FAMILY LAW REFORM ACT;* SASKATCHEWAN, 1979, *THE MATRIMONIAL PROPERTY ACT.*

THE OBSERVATION WHICH I MADE IN THE *RATHWELL* CASE "CANADIAN LEGISLATURES GENERALLY HAVE GIVEN LITTLE OR NO GUIDANCE FOR THE RESOLUTION OF MATRIMONIAL PROPERTY DISPUTES" CAN NO LONGER BE REGARDED AS VALID. THE JUDGMENT IN *RATHWELL*

WAS DELIVERED IN 1978. WITHIN TWO YEARS ALL NINE COMMON LAW PROVINCES HAD LEGISLATION IN PLACE FOR THE RESOLUTION OF MATRIMONIAL PROPERTY DISPUTES.

THE POSITION OF QUEBEC, WHERE THE CIVIL LAW PREVAILS, DIFFERS MARKEDLY, OF COURSE, FROM THE COMMON LAW PROVINCES. COMMUNITY OF PROPERTY PREVAILED IN QUEBEC FROM THE TIME WHEN THE PROVINCE OF QUEBEC, THEN A FRENCH COLONY, WAS SUBJECT TO FRENCH LAW UNTIL THE YEAR 1970 WHEN COMMUNITY OF PROPERTY WAS LARGELY REPLACED BY A NEW LEGAL REGIME, REFERRED TO AS PARTNERSHIP OF ACQUESTS. IN BROAD TERMS THE STRUCTURE OF THE NEW REGIME IS THIS.

DURING THE MARRIAGE, EACH CONSORT RETAINS THE ENTIRE CONTROL OF HIS PATRIMONY AND REMAINS FULLY RESPONSIBLE FOR HIS DEBTS. IT IS ONLY ON THE DISSOLUTION OF THE REGIME (BY DEATH OR SEPARATION) THAT A PART OF THE PATRIMONY OF EACH CONSORT WILL BECOME SUBJECT TO PARTITION: THAT PART WHICH WILL HAVE BEEN MADE UP OF THE GAINS REALIZED DURING THE COURSE OF THE REGIME. PROPERTY POSSESSED BEFORE MARRIAGE OR ACQUIRED SUBSEQUENTLY BY GRATUITOUS TITLE REMAINS PRIVATE PROPERTY AND NOT SUBJECT TO PARTITION.

IT IS INTERESTING THAT, IN SEEKING TO ACHIEVE EQUALITY BETWEEN THE SEXES, THE COMMON LAW COUNTRIES, AND THE CANADIAN COMMON LAW PROVINCES, ARE MOVING AWAY FROM THE PRINCIPLE

OF STRICT SEPARATION AT A TIME WHEN THE CIVIL LAW COUNTRIES ARE TRENDING AWAY FROM THE TRADITIONAL RIGID PRINCIPLES OF COMMUNITY PROPERTY.

I WOULD LIKE NOW TO REFER TO THE *ONTARIO FAMILY LAW REFORM ACT 1978* AS AN EXAMPLE OF THE LEGISLATION WHICH HAS BEEN ENACTED IN THE NINE COMMON LAW PROVINCES. THE *ACT* CONTEMPLATES RETENTION OF SEPARATE PROPERTY DURING THE CURRENCY OF THE MARRIAGE, TOGETHER WITH PROVISION FOR A DIVISION OF WHAT ARE TERMED "FAMILY ASSETS" AND, IN CERTAIN CIRCUMSTANCES, NON-FAMILY ASSETS. "FAMILY ASSETS" ARE GENERALLY DEFINED AS MEANING A MATRIMONIAL HOME AND PROPERTY OWNED BY ONE SPOUSE OR BOTH SPOUSES AND ORDINARILY USED OR ENJOYED BY BOTH SPOUSES OR ONE OR MORE OF THEIR CHILDREN WHILE THE SPOUSES ARE RESIDING TOGETHER FOR SHELTER OR TRANSPORTATION OR FOR HOUSEHOLD, EDUCATIONAL, RECREATIONAL, SOCIAL OR AESTHETIC PURPOSES.

WHERE A DECREE *NISI* OF DIVORCE IS PRONOUNCED OR A MARRIAGE IS DECLARED A NULLITY OR WHERE THE SPOUSES ARE SEPARATED AND THERE IS NO REASONABLE PROSPECT OF THE RESUMPTION OF COHABITATION, EACH SPOUSE IS ENTITLED TO HAVE THE FAMILY ASSETS DIVIDED IN EQUAL SHARES. THERE IS PROVISION FOR THE COURT MAKING A DIVISION OF FAMILY ASSETS RESULTING IN SHARES THAT ARE NOT EQUAL WHERE THE COURT IS OF THE OPINION THAT A DIVISION OF THE FAMILY ASSETS IN EQUAL SHARES WOULD BE INEQUITABLE. THE

COURT MAY ALSO MAKE A DIVISION OF ANY PROPERTY THAT IS NOT A FAMILY ASSET WHERE A SPOUSE HAS UNREASONABLY IMPOVERISHED THE FAMILY ASSETS OR THE RESULT OF A DIVISION OF THE FAMILY ASSETS WOULD BE INEQUITABLE IN ALL THE CIRCUMSTANCES.

SECTION 8 PROVIDES THAT WHERE ONE SPOUSE OR FORMER SPOUSE HAS CONTRIBUTED WORK, MONEY OR MONEY'S WORTH IN RESPECT OF THE ACQUISITION, MANAGEMENT, MAINTENANCE, OPERATION OR IMPROVEMENT OF PROPERTY, OTHER THAN FAMILY ASSETS, IN WHICH THE OTHER HAS OR HAD AN INTEREST, UPON APPLICATION, THE COURT MAY BY ORDER (A) DIRECT THE PAYMENT OF AN AMOUNT IN COMPENSATION THEREFOR; OR (B) AWARD A SHARE OF THE INTEREST OF THE OTHER SPOUSE OR FORMER SPOUSE IN THE PROPERTY APPROPRIATE TO THE CONTRIBUTION. THE COURT IS REQUIRED TO DETERMINE AND ASSESS THE CONTRIBUTION WITHOUT REGARD TO THE RELATIONSHIP OF HUSBAND AND WIFE OR THE FACT THAT THE ACTS CONSTITUTING THE CONTRIBUTION ARE THOSE OF A REASONABLE SPOUSE OF THAT SEX IN THE CIRCUMSTANCES. UNLIKE THE SITUATION WITH FAMILY ASSETS, THERE ARE NO GUIDELINES IN THE *ACT* AS TO THE MANNER OF ASSESSING THE RESPECTIVE CONTRIBUTIONS TO NON-FAMILY ASSETS. IT SEEMS TO ME, UPON BROWSING THROUGH THE *ONTARIO FAMILY LAW REFORM ACT* AND OTHER PROVINCIAL LEGISLATION, THAT THE LEGISLATIVE RESPONSE HAS BEEN TO VEST VERY WIDE DISCRETIONARY POWERS IN THE JUDICIARY, NOT

NOTICEABLY DIFFERENT FROM THOSE ENVISAGED IN THE APPLICATION OF THE LAW OF CONSTRUCTIVE TRUST. AND ONE MIGHT WELL ASK - HOW COULD IT BE OTHERWISE? MATRIMONIAL DISPUTES DO NOT READILY LEND THEMSELVES TO RESOLUTION BY A DETAILED AND RIGID FORMULARY. A WIDE DISCRETION IS INESCAPABLE IN THE COMPLEXITY AND SUBTLETY OF THE MYRIAD MARRIAGE RELATIONSHIP. THE MEDIEVAL RULE HAD CERTAINTY - THE MAN WAS ENTITLED TO VIRTUALLY EVERYTHING - BUT THERE WAS LITTLE JUSTICE FOR WOMEN. THE MODERN LEGISLATIVE AND JUDICIAL RESPONSE HAS BEEN TO DO JUSTICE THROUGH THE INTRODUCTION OF A WIDE MEASURE OF JUDICIAL DISCRETION.

IT IS MUCH TO BE HOPED THAT THE DEVELOPMENTS, LEGISLATIVE AND JUDICIAL, DURING THE PAST FEW YEARS, IN RESPECT OF MATRIMONIAL PROPERTY WILL ACHIEVE AN ORDERLY AND EQUITABLE SETTLEMENT OF AFFAIRS OF HUSBANDS AND WIVES UPON THE BREAKUP OF MARRIAGE PARTNERSHIPS.

MAY I CONCLUDE WITH A PASSAGE FROM THE JUDGMENT OF MY BROTHER ESTEY IN THE CASE OF *HARPER V HARPER** EXPRESSING VIEWS WITH WHICH I AM IN FULL AGREEMENT:

> THE REALITIES OF LIFE TODAY REQUIRE A RECOGNITION IN THE COURTS THAT THE PARTIES ENTER INTO NOT THE MARITAL CONTRACT BUT THE

*[1980] 1 S.C.R. 2

ENSUING SOCIAL JOINT VENTURE ON THE BASIS THAT EACH SPOUSE WILL PLAY HIS OR HER ASSIGNED ROLE WITHOUT DELIBERATE AND FINITE AGREEMENT, AND CERTAINLY WITHOUT DAILY OR PERIODIC ACCOUNTING. THE COMMON AND BASIC INTENT IS CLEARLY A SHARING OF THE GOOD WITH THE BAD, THE DEBTS AND THE ASSETS.