

CANADA / JUDGMENT

Murdoch v. Murdoch

[1975] 1 SCR 423

COURT

Supreme Court of Canada

DECIDED

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Murdoch v. Murdoch

Collection

Supreme Court Judgments

Date

1973-10-02

Report

[1975] 1 SCR 423

Judges

Martland, Ronald; Judson, Wilfred; Ritchie, Roland Almon; Spence, Wishart Flett; Laskin, Bora

On appeal from

Alberta

Subjects

Family law

Decision Content

Supreme Court of Canada

Murdoch v. Murdoch, [1975] 1 S.C.R. 423

Date: 1973-10-02

Irene Florence Murdoch (Plaintiff) Appellant;

and

James Alexander Murdoch (Defendant) Respondent.

1973: March 22, 23; 1973: October 2.

Present: Martland, Judson, Ritchie, Spence and Laskin JJ.

ON APPEAL FROM THE SUPREME COURT OF ALBERTA, APPELLATE DIVISION

Husband and wife—Work done by wife in connection with husband's ranching activities—Wife's claim to interest in land and other assets owned by husband—Whether a resulting or a constructive trust.

The appellant wife and respondent husband were married in 1943. They worked, as a couple, on several ranches, until 1947, when the respondent and his father-in-law purchased a guest ranch for \$6,000. The respondent paid his portion from his own assets. This property was sold in 1951 and the respondent received \$3,500.

In 1952 the appellant's father died, leaving the proceeds of some life insurance policies to his wife, N. She testified that she gave part of these moneys to the appellant, who deposited them in a bank account in her own name. The respondent's evidence was that the moneys remained, throughout, the property of N.

In that year the respondent had an opportunity to acquire some grazing rights on the lands of S in return for a loan of \$4,000 by the respondent to S. The funds for the loan came out of the appellant's bank account, and she testified that they represented a contribution by her to the venture. According to the respondent, the funds were borrowed by him from N.

S repaid his loan and the respondent purchased land referred to as the Ward property. The price was \$4,500 of which \$2,000 was paid out of the appellant's bank account. The remainder was paid by the respondent out of his receipts from the sale of the guest ranch.

In 1958 the respondent purchased three quarter-sections of land, known as the Brockway property. The purchase price was \$25,000. He also purchased from Brockway some farm machinery for \$3,800. That amount plus the down payment on the land of \$6,200 were paid out of the proceeds of the sale of the Ward property and from repayment of the S loan. Under the agreement, the respondent was obligated to pay instalments, the first for \$2,000 and the remainder at \$1,000 per year, and these payments were made by the respondent.

In 1964 the appellant filed a caveat against one of the quarter-sections, claiming an interest under The Dower Act, R.S.A. 1955, c. 90. In 1968 the respondent asked the appellant to have this caveat released in order to facilitate a sale of the Brockway property. The appellant refused.

The parties later separated and subsequently the appellant brought two actions against the respondent; i.e., a claim for judicial separation whereby she was awarded \$200 per month which was made to her and which judgment was not contested on appeal, and a claim alleging partnership for an undivided one-half interest in three quarter-sections of land and in all other assets of the husband. The second action was dismissed at trial and the appellant's appeal was dismissed by the Appellate Division of the Supreme Court of Alberta. On appeal to this Court, the

appellant asserted an equitable claim, by way of a resulting or a constructive trust, to a one-half interest in the three quarter-sections of land and in the other assets owned by the respondent, by reason of her contribution over many years to the acquisition of those assets.

Held (Laskin J. dissenting): The appeal should be dismissed.

Per Martland, Judson, Ritchie and Spence JJ.: The finding of the trial judge rebutted the appellant's contention that the respondent accepted contributions from her toward the purchase price of the property and there was ample evidence on which that finding could properly be made. If a financial contribution was necessary in order to found the appellant's claim, it had not been established on the facts of this case.

The contention that, in the light of *Trueman v. Trueman*, [1971] 2 W.W.R. 688, a claim could be founded, apart from financial contribution, on the work performed by the appellant in connection with her husband's ranching activities was not accepted. The claim in the *Trueman* case related only to an interest in the family homestead, whereas in the present case the claim was for a half interest in the husband's whole ranching business. In *Trueman*, the trial judge found a substantial contribution by the wife toward the acquisition of the farm home. In the present case, the trial judge made no such finding, but was of the view that what the appellant had done, while living with the respondent, was the work done by any ranch wife.

In the light of the evidence, and the findings of the trial judge thereon, it could not be said that there was any common intention that the beneficial interest in the property in issue was not to belong solely to the respondent, in whom the legal estate was vested. The evidence did not support the existence of a resulting trust.

Per Laskin J., dissenting: In making a substantial contribution of physical labour, as well as a financial contribution, to the acquisition of the successive properties culminating in the acquisition of the Brockway land, the wife had established a right to an interest which it would be inequitable to deny and which, if denied, would result in the unjust enrichment of her husband. Denial would equate her strenuous labours with mere housekeeping chores which, as has been held (see *Kowalczyk v. Kowalczyk*, [1973] 2 All E.R. 1042), will not per se support a constructive trust. Moreover, the evidence in the present case was consistent with a pooling of effort by the spouses to establish themselves in a ranch operation.

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, a declaration should be made 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. Rather than fix the size of her interest arbitrarily, the case should be referred back for inquiry and report for that purpose.

[*Thompson v. Thompson*, [1961] S.C.R. 3; *Trueman v. Trueman*, [1971] 2 W.W.R. 688; *Pettitt v. Pettitt*, [1969] 2 All E.R. 385; *Gissing v. Gissing*, [1970] 2 All E.R. 780, referred to.] APPEAL from a judgment of the Supreme Court of Alberta, Appellate Division, dismissing an appeal from a judgment of MacDonald J. Appeal dismissed, Laskin J. dissenting.

Ernest R. Shymka, for the plaintiff, appellant.

Leslie R. Duncan and James W. Rose, for the defendant, respondent.

The judgment of Martland, Judson, Ritchie and Spence JJ. was delivered by

MARTLAND J.—The appellant is the wife of the respondent and was the plaintiff in two actions against him, which were consolidated for trial. The parties were married in 1943. The appellant left the respondent in 1968. The first of the two actions was commenced on December 4, 1968. The appellant claimed for judicial separation, custody of the infant son, alimony, maintenance for the child and an order giving to her the sole possession of a quarter-section of land referred to as the family home.

The second action was commenced on August 25, 1969, and claimed an undivided one-half interest in the North-East Quarter of Section 14, Township 19, Range 3, West of the 5th Meridian, less mines and minerals, and in the South Half of Section 23, Township 19, Range 3, West of the 5th Meridian, less mines and minerals, and in the cattle brand, cattle and other assets owned by the respondent, on the ground that she and the respondent were equal partners and that the respondent was a trustee for her of such undivided one-half interest.

The respondent did not contest at trial the claim for judicial separation.

The judgment at trial, in the consolidated proceedings, granted a decree of judicial separation and maintenance in the amount of \$200 per month. It gave custody of the infant son to the respondent. The second action was dismissed. The appellant's appeal to the Appellate Division was dismissed for the following reasons:

It was admitted by counsel that the appellant has been accepting payments of alimony as directed in the Judgment.

In our view the Judgment cannot be divided as the adjudication in respect of alimony was inextricably related to and dependent upon the fact that there was to be no division of the property.

The defendant having taken advantage of the Judgment cannot therefore appeal the same. This principle was clearly enunciated by the Ontario Court of Appeal in *Pigott v. Pigott*, [1969] 2 O.R. 427.

The present appeal is from this judgment.

We are concerned in the present appeal only with the issues raised in the second of the appellant's two claims. These were fully argued before this Court on the merits, and I have reached a conclusion with respect thereto which makes it unnecessary to consider the ground relied upon by the Appellate Division for dismissing the appeal to that Court.

The facts which have to be considered are these: At the time of their marriage, in 1943, the appellant owned a couple of horses. The respondent owned some 25 to 30 horses and some eight cows. They worked, as a couple, on several ranches, until 1947, when the respondent and his father-in-law purchased a guest ranch for \$6,000. The respondent paid his portion from his own assets. This property was sold in 1951 and the respondent received \$3,500.

In 1952 the appellant's father died, leaving the proceeds of some life insurance policies to his wife, Mrs. Nash. She testified that she gave part of these moneys to the appellant, who deposited them in a bank account in her own name. The respondent's evidence was that the moneys remained, throughout, the property of Mrs. Nash. In that year the respondent had an opportunity to acquire some grazing rights on the lands of one Sturrock in return for a loan of \$4,000 by the respondent to Sturrock. The funds for the loan came out of the appellant's bank account, and she testified that they represented a contribution by her to the venture. According to the respondent, the funds were borrowed by him from Mrs. Nash.

The appellant and the respondent, together, kept an expense book in which entries were made by both parties. In the page for the year 1955 appears an entry of a payment of \$2,000 to Mrs. Nash "borrowed for land deal". In the page for the year 1956 there is an entry "Payment F. Nash \$1,000.00". In the page for the year 1957 there is an entry "Borrowed from Mrs. Nash for rent on Sturrock place \$750.00".

Sturrock repaid his loan and the respondent purchased land referred to in evidence as the "Ward property". The price was \$4,500, of which \$2,000 was paid out of the appellant's bank account. The remainder was paid by the respondent out of his receipts from the sale of the guest ranch.

In 1958 the respondent purchased three quarter-sections of land, known as the Brockway property. It is these lands which are the subject of the appellant's claims. The purchase price was \$25,000. He also purchased from Brockway some farm machinery for \$3,800. That amount plus the down payment on the land of \$6,200 were paid out of the proceeds of the sale of the Ward property and from repayment of the Sturrock loan. Under the agreement, the respondent was obligated to pay instalments, the first for \$2,000 and the remainder at \$1,000 per year, and these payments were made by the respondent. He also borrowed \$12,240 from a bank to finance the purchase of livestock. In 1964 the appellant filed a caveat against one of the quarter-sections, the North-East Quarter of Section 14, Township 19, Range 3, West of the 5th Meridian, claiming an interest under The Dower Act, R.S.A. 1955, c. 90.

In 1968 the respondent asked the appellant to have this caveat released in order to facilitate a sale of the Brockway property. The appellant refused. Marital difficulties developed in that year, culminating in the two actions brought by the appellant against the respondent.

The appellant's claim, in the second action, was that a partnership existed between herself and the respondent and that, as such, the respondent held the lands and other assets as trustee for the parties equally. Her claim, in this regard, was based mainly on the payments which were made from her bank account, which, she alleged, were contributions to the partnership enterprise. The respondent's position was that there had never been any discussion of

partnership until 1968, when separation was contemplated. He said he did not receive money from his wife, by way of contribution, but that he borrowed the funds from Mrs. Nash.

On this issue, the learned trial judge, having heard the conflicting evidence, made the following important findings of fact:

I accept the defendant's evidence that, in so far as he was concerned, the moneys that he received from time to time to assist in purchasing land or paying rent or purchasing cattle or use for other farm or ranch expenses, he understood to belong to Mrs. Nash, and he understood and treated that money at all times as a loan made to him.

I find no evidence in the holding of any of the properties, nor in the way that cattle were sold or purchased, that would indicate that the parties intended to operate as a partnership, or that anything else by agreement was intended other than what, in fact, did take place. The land was held in the name of Mr. Murdoch at all times. The cattle and the equipment were also held in his name; income tax returns were filed in his name; no declaration of partnership was ever filed under The Partnership Act, that I know of; and I, therefore, do not form the conclusion that the plaintiff and the defendant were partners, or that a relationship existed that would give the plaintiff the right to claim as a joint owner in equity in any of the farm assets.

Before this Court the appellant's submission was made, not on the basis of a partnership, but on the existence of a resulting trust, and reliance was placed upon the judgment of the Alberta Appellate Division in *Trueman v. Trueman*[1]. Counsel for the respondent contended that, in the light of the judgment of this Court in *Thompson v. Thompson*[2], the *Trueman* case was wrongly decided, and, in any event, that it was distinguishable.

In the *Thompson* case, which was from Ontario, the husband bought land and took title in his own name. With the assistance of a loan under the Veterans' Land Act, he had a house built on a lot within the parcel. Later he sold all the land except the house and lot. The wife sought a declaration that she was the sole owner of the property and entitled to all the proceeds of the sale. This claim was dismissed by the trial judge on the ground that she had made no financial contribution toward 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, on that basis, held that she was entitled to a one-half interest. Laidlaw J.A., delivering the majority reasons, stated that the rights of the parties rested in equity. He cited s. 12(1) of The Married Women's Property Act, R.S.O. 1950, c. 223, which provided that in any question between husband and wife as to title to or possession of property, either party might apply in a summary way to a judge of the Supreme Court or a judge of a county or district court "and the judge may make such order with respect to the property in dispute ... as he thinks fit". He then cited *Rimmer v. Rimmer*[3]; *Cobb v. Cobb*[4], and *Fribance v. Fribance*[5]. He cited the view expressed by Sir Raymond Evershed M.R. in the *Rimmer* case at p. 866:

On all the facts, what is the fair and just answer to be given to the question posed, having regard not merely to what occurred at the time when the property was originally purchased, but also to the light which the whole conduct of the parties throws on their relationship together as contributors to the property which was their joint matrimonial home?

The husband's appeal to this Court was allowed. Judson J., who delivered the majority reasons, mentioned the above cases, as well as others, and said, at pp. 13 and 14:

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 a 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. However, if one accepts the finding of the learned trial judge, the basis for the application of the rule at its present stage of development in England is not to be found in the present case.

The judicial use of the discretionary power under s. 12 of The Married Women's Property Act, R.S.O. 1950, c. 223, 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. There is no hint of it in this Court in *Minaker v. Minaker*, [1949] S.C.R. 397, and there is an implicit rejection of the existence of any such power in *Carnochan v. Carnochan*, [1955] S.C.R. 669, where Cartwright J. stated that the problem was not one of the exercise of a discretionary power but one of application of the law to ascertained facts. Further, in *Jackman v. Jackman*, [1959] S.C.R. 702, where the Alberta Court of Appeal, in reversing the judgment at trial, had applied the line of decisions above referred to, this Court declined to support the exercise of the discretionary power in the rebuttal of the presumption of advancement in circumstances where the husband's contribution was very large and where it should not have been difficult to draw an inference of a joint interest in the matrimonial home.

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 s. 12 of The Married Women's Property Act.

The proposition that s. 17 of the English Married Women's Property Act, 1882, which is similar to the Ontario provision above mentioned, gave to a Court a discretionary jurisdiction to disregard property rights and to pass proprietary interests from one spouse to another was rejected by the House of Lords in *Pettitt v. Pettitt*[6].

In Alberta, as Johnson J.A. points out in the *Trueman* case, s. 17 of the English Act never became a part of the provincial law. In that province, for a great many years, the position of a wife in relation to the matrimonial home has been protected by The Dower Act, R.S.A. 1970, c. 114. This Act prohibits a disposition of the homestead by a married person without the written consent of the spouse, or a judge's order dispensing with such consent, and also makes any testamentary disposition of the homestead, or its devolution on intestacy, subject to a life estate in the

surviving spouse. Prior to 1948, the benefits of the Act applied only in favour of the wife. A homestead comprises the parcel of land on which the owner's residence is situated. The parcel, in respect of a ranch, as in this case, does not exceed a quarter-section. The appellant in this case enjoys the protection of this Act, and, as previously noted, filed a caveat in respect of that interest.

Reverting to the Thompson case, it was decided that, on the finding of the trial judge that it was the husband who had provided the purchase money, and who took title in his own name, there was no basis for the imposition of a trust. The finding of the trial judge in the present case rebuts the appellant's contention that the respondent accepted contributions from her toward the purchase price of the property. The finding is that the funds received from her bank account were regarded by the respondent as loans from Mrs. Nash, which he recognizes as payable, and there is ample evidence on which that finding could properly be made. If a financial contribution is necessary in order to found the appellant's claim, it has not been established on the facts of this case.

The appellant contends, however, that, in the light of the Trueman decision, a claim can be founded, apart from financial contribution, on the work performed by the appellant in connection with her husband's ranching activities. The circumstances of the Trueman case were these: The husband purchased a quarter-section of land for \$1,760. The down payment of \$435 was financed by a bank loan to the husband. A house was built and moved on to the land. The land was farmed for nine years. The stock and machinery were then sold and the farm rented, the husband receiving the rent. The evidence showed that, in addition to doing the usual work of a farm wife, the wife worked in the fields, operated farm machinery, and contributed to the fund realized from the sale of grain and livestock, which was used to pay for the property. She helped to build the house. Because of her work on the farm, no hired man was employed. The husband was frequently ill, and she performed the extra duties required.

The trial judge had found that there was no doubt as to the wife's substantial contribution toward the acquisition of the property. The husband, on his examination-in-chief, had been asked: "When you went to purchase this property what was your intention with respect to ownership?" The answer was: "Well I thought we was going to go along as a team."

The trial judge felt obliged to dismiss the wife's claim for a declaration that she had an interest in the family home, in view of the Thompson case. The Appellate Division allowed her appeal, relying upon two judgments of the House of Lords, subsequent to the Thompson case, in *Pettitt v. Pettitt*, *supra*, and *Gissing v. Gissing*[7]. The following passages from Lord Reid's judgment in the latter case, at p. 782, were quoted:

I take a common case where husband and wife agreed when acquiring the family home that the wife should make a financial contribution and the title to the house was taken in the husband's name. That contribution could take one or other of two forms: the wife might pay part of the deposit and instalments or she might relieve the husband of some of his obligations, eg by paying household bills, so as to enable him to pay for the house. The latter is often the more convenient way. . . .

If there has been no discussion and no agreement or understanding as to sharing in the ownership of the house and the husband has never evinced an intention that his wife should have a share, then the crucial question is whether the law will give a share to the wife who has made those contributions without which the house would not have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is under what circumstances does the husband become a trustee for his wife in the absence of any declaration of trust or agreement on his part. It is not disputed that a man can become a trustee without making a declaration of trust or evincing any intention to become a trustee. The facts may impose on him an implied, constructive or resulting trust. Why does the fact that he has agreed to accept these contributions from his wife not impose such a trust on him?

The Court was of the opinion that these propositions were consistent with the views expressed by Judson J. in the first paragraph of the portion of his reasons previously quoted. The Court's conclusion was as follows:

In most of the English cases, the contribution is made by cash contributed by the spouse. It is evident from the passage from the judgment of Judson J. in the Thompson case which I have quoted that this principle should logically extend beyond financial contributions. Surely if services which the appellant rendered relieved the respondent from employing extra help to do the work which the appellant did, the value of such work should be counted as a contribution both to the purchase price of the farm and to the improvement created by the building of the house.

Leaving aside consideration of her work as a farm wife and mother, the share of the work usually done by the husband and his hired hands that was assumed and done by the appellant, has, I think, earned her an equal share in the ownership of the property and there will be a declaration accordingly. Assuming that the conclusion reached in the Trueman case was, on its facts, correct, it does not follow that the appellant should succeed in the present appeal. The English decisions in Pettitt and Gissing, as well as those to which reference was made in the Thompson case, were all concerned with the determination of interests in what has been called the matrimonial home. The Trueman case dealt with a claim for an interest in the family "homestead". The present case involves a claim to an interest in three quarter-sections of land and in all the other assets of the respondent. It is, in substance, a claim to a one-half interest in the respondent's ranching business and it is probably for that reason that the action, as formulated, sought a declaration of a partnership interest.

In both Pettitt and Gissing, the claims for an interest, in the one case by the husband, and in the other by the wife, were rejected. In Pettitt, the husband had done interior decorating in the house and had laid a lawn, constructed an ornamental well and had built a side wall. In Gissing, the wife had provided furniture and equipment for the house and had paid for improving the lawn.

In Trueman, the trial judge found a substantial contribution by the wife toward the acquisition of the farm home. In the present case, the trial judge has made no such finding, but was of the view that what the appellant had done, while living with the respondent, was the work done by any ranch wife.

It has already been noted that the Pettitt decision disposed of the idea that s. 17 of the Married Women's Property Act, 1882 gave a discretionary jurisdiction to pass proprietary interests from one spouse to the other. It has also been noted that in both Pettitt and Gissing the claims were refused. The effect of the reasons in these decisions is that, apart from an application under s. 17, it may be possible, on the evidence, to establish the existence of a resulting trust in favour of one spouse as against the other, who has the legal title to the matrimonial home. However, in each of these cases, all five of the members of the Court who sat wrote separate reasons, which were, in light of the judgment rendered, obiter dicta. It is difficult to state the ultimate result of the reasons rendered. I will, however, accept the headnote in the Gissing case, in the All England Reports, as correctly summarizing the view of the Court:

- (i) Where (a) both spouses contributed towards the purchase of the matrimonial home which was conveyed into the name of one spouse only, (b) there was no discussion, agreement or understanding between the spouses as to sharing the beneficial interest in the matrimonial home, and (c) the spouse in whose name the matrimonial home was purchased evinced no intention that the contributing spouse should have a beneficial interest therein, the question whether the contributing spouse is entitled to a beneficial interest in the matrimonial home is a matter dependent on the law of trust.

If this be accepted as an accurate summary of the decision, I would point out that there is no evidence, on the findings of fact made by the trial judge in this case, that the appellant did contribute toward the purchase of the property in issue, and, further, that the property in which she claims an interest is not restricted to the matrimonial home.

I am in agreement with the view expressed by Lord Diplock, at pp. 789 and 793, as to what is necessary to be established in order to prove the existence of a resulting trust:

Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of "resulting, implied or constructive trusts". Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give

effect to it. But to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by s 53(1) of the Law of Property Act 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application.

A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.

...

Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other. In my opinion, in the light of the evidence in this case, and the findings of the trial judge thereon, it cannot be said that there was any common intention that the beneficial interest in the property in issue was not to belong solely to the respondent, in whom the legal estate was vested.

I would dismiss this appeal with costs.

LASKIN J. (dissenting)—The substantive issue in this appeal is whether the appellant wife is entitled to an interest in certain assets, including land, standing in the name of her husband from whom she is separated. She asserts an equitable claim, by way of a resulting or a constructive trust, to a one-half interest, by reason of her contribution of money and labour over many years to the acquisition of those assets.

In her pleadings, by an amendment allowed at trial, the appellant also alleged a partnership, and the reasons of the trial judge dismissing her claim focus mainly on that allegation. The only sentence in his brief reasons that could conceivably relate to the issue as argued in this Court was one coupling his rejection of the allegation of partnership with a refusal to find that (in his words) “a relationship existed which would give the plaintiff the right to claim as a joint owner in equity in any of the farm assets”. Although I do not regard this as meeting the case advanced on behalf of the appellant, it appears to be founded on the trial judge’s view that there was “a normal husband and wife relationship until the parties separated”. On the evidence, to which I will refer, I cannot share the trial judge’s appreciation of normalcy. The wife’s contribution, in physical labour at least, to the assets amassed in the name of the husband can only be characterized as extraordinary. In so far as the trial judge’s holding against the appellant rests on his view that she discharged a role that was not beyond what is normally expected of a wife, I disagree with it and

approach her claim on a different footing. I am the less reluctant to do so because the Alberta Appellate Division did not deal with the merits and hence this Court is, in fact, the first appellate Court in respect to them. The Alberta Appellate Division held that the wife was precluded from pursuing her appeal on her claim for a division of property because she had accepted payments of alimony under a judgment of the trial judge in a separate action for judicial separation and alimony which was consolidated for trial with the claim now in appeal. It relied upon *Pigott v. Pigott*[8], which, in my view, is inapplicable. In the *Pigott* case, interim alimony was fixed by taking into account what the husband had been directed to pay under a previous partition order. The husband did not appeal the interim alimony order but sought to appeal the partition order which he had invoked in having the amount of interim alimony reduced. The Ontario Court of Appeal quashed the appeal because he had acted upon the partition order to his advantage. No such situation is present here. There has been no appeal by the husband from the order for alimony, and the wife was certainly entitled to take the fruits of the judgment as it stood and to ask for more. She was not in the position of approbating and reprobating at the same time, as was the husband in the *Pigott* case. I have had the advantage in preparing these reasons of reading those written by my brother Martland. Since the conclusions which I draw from the facts lead me to a different result in law from that which he has reached, it is best that I make my own summary to indicate how and why my view differs from his.

Central to my assessment is the uncontradicted evidence of the physical labour which the wife contributed to the spouses' well-being and evidence of what she otherwise put into the matrimonial stock. First, as to the physical labour. For some four years after the marriage in November 1943, the spouses worked on various ranches, hiring themselves out as a couple. The husband broke horses and looked after cattle and the wife did the cooking for the work crews and assisted her husband in some of his work. They were paid \$100 per month, which was received by the husband, and got their board and lodging. In 1947, the husband and the wife's father bought a piece of ranch property jointly, each putting up \$3,000. Some of this—the parties do not agree in their evidence as to how much—came from their earnings as a hired couple. This property, the Bragg Creek property, was operated as a dude ranch until it was sold in 1951 and the husband realized \$3,500 as his share of the proceeds.

During most of the period of ownership of the Bragg Creek property the husband was an employee of a stock association, working for it during the day away from home for some five months of the year. He remained so employed up to the time the spouses separated in October 1968 and was still so employed at the time of the trial. In the result, it was the wife who, during her husband's absence for the five months of the year, performed the work which was involved in operating the dude ranch as a joint venture with the wife's father. Thus, she accompanied guests on pack trips, on fishing and hunting hikes and did other necessary chores around the ranch.

Her contribution of physical labour beyond ordinary housekeeping duties continued during the some four years that the spouses rented a property known as the Sturrock farm in which they had grazing rights and the right to mow and dispose of the hay on the property. One of the factual issues in this case concerned the source of the money, about \$5,000 used to prepay the rent on the Sturrock farm, and I will return to this later in these reasons.

In 1956, the spouses bought the 160-acre Ward property, on which they had been living as tenants, for \$4,500, making a down payment of \$3,000. Again, there was a difference of view by the parties as to the source of this money. Undeniably, however, the wife again did a husband's work, during his periods of absence, in operating this ranch property. The Ward property was sold in late 1958 for \$8,000 and the Brockway property consisting of 480 acres, three quarter-sections, was bought for \$25,000. A down payment was made of \$10,000 but of this sum \$3,800 represented the purchase price of farm machinery which was part of the deal. The balance of the purchase price was payable in annual instalments of \$2,000 for the first year and \$1,000 per year thereafter. Again, the wife did her husband's work on this property during the periods he was away on his stock association work.

The wife filed a caveat in 1964 against one of the Brockway quarter-sections as an assertion of an interest under The Dower Act, R.S.A. 1955, c. 90. Relations between the spouses had deteriorated by that time, and they were severed completely in 1968 after the wife refused her husband's request to release the caveat to enable him to sell the Brockway property. Subsequently there was a physical clash which resulted in the hospitalization of the wife. The parties separated, with the husband remaining in possession of the Brockway property and everything in and on it. The wife was left with nothing, and her two actions followed.

The wife's contribution of physical labour to the various ranching operations on the properties successively occupied by the spouses is detailed in her evidence in chief as follows:

Q. Now, you said earlier that you did certain kinds of work on ranches. We haven't dealt with the Ward property, the Sturrock property and the Brockway property. Did you do any work on those properties?

A. Yes, I worked on all of them.

Q. Could you tell the court, as briefly as you can, the nature of the work you did?

A. Haying, raking, swathing, moving, driving trucks and tractors and teams, quietening horses, taking cattle back and forth to the reserve, dehorning, vaccinating, branding, anything that was to be done. I worked outside with him, just as a man would, anything that was to be done.

Q. Was your husband away from these properties?

A. Yes, for five months every year.

Q. Five months of every year?

A. Yes. He worked for the Stock Association in the Forestry Service.

Q. So that you would do the chores and other work around the farm?

A. I did until our son was old enough, then he helped, but until we had him I did it on my own, except for the few, you know, two or three weeks in the summer time when we would hire extra help then for stacking, but I was always still out there helping to rake and take lunches and gas out into the field.

The respondent husband admitted on discovery that his wife did the necessary chores while he was away on his other work, and his evidence in chief on this matter was as follows:

Q. Over the years what were your wife's activities around the ranch?

A. Oh, just about what the ordinary rancher's wife does. Most of them can do most anything.

This answer appears to be the basis of the trial judge's conclusion that the wife made only a normal contribution as wife to the matrimonial regime, a conclusion carrying the legal signification that it gave her no foundation, upon the breakdown of the marriage, to claim an outright interest in the assets, standing in her husband's name, which were accumulated during the cohabitation of the spouses.

The evidence as to the wife's financial contribution falls into several categories. It is clear that the remuneration paid to the husband for the period that the spouses were engaged as a couple was in part earnings of the wife, and the husband used some of the money in making the down payment on the Bragg Creek property. The proceeds of the sale of that property were in part at least used for the purchase of the Ward property, and the proceeds of the sale of that property were used in part for the down payment on the Brockway property. It is undeniable, therefore, that the appellant wife made a financial contribution, that was more than nominal, to the various purchases of property taken in the husband's name. The trial judge, unfortunately, failed to deal with this although it was plain enough on the record.

A second type of financial contribution made by the wife was in the purchase of all household furniture and appliances, save a stove which the husband bought. The wife was not allowed to take any of those articles with her when she and her husband separated. There is no contradiction of her evidence that it was her money that purchased the household effects. The trial judge made no reference to this matter in his reasons but it is a factor in the case which operates in the wife's favour.

A third situation involving an alleged financial contribution by the wife relates to the prepayment of rent on the Sturrock farm and to the down payment on the Ward property. The mother of the appellant wife had come into some insurance money on the death of her husband and she gave the money to her daughter who banked it in her name. The daughter drew on this account to provide \$4,000 for the rent on the Sturrock farm and \$2,000 as a down payment on the Ward property. The husband's position was that these outlays were by way of a loan to him from his mother-in-law and that, as indicated by his records, he so treated them and had made repayments accordingly. The trial judge dealt with the conflicting evidence on this matter as follows:

The money that Mrs. Nash received by way of insurance policies on her husband's life I find was turned over by her to the plaintiff and was banked by the plaintiff in her name. I find no quarrel with the suggestion of Mrs. Nash that this money was considered to be her daughter's money to use as her daughter saw fit. However, this relationship between the mother and daughter was a relationship between them, and was not a relationship which involved the defendant. I accept the defendant's evidence that, in so far as he was concerned, the moneys that he received from time to time to assist in purchasing land or paying rent or purchasing cattle or use for other farm or ranch expenses, he understood to belong to Mrs. Nash, and he understood and treated that money at all times as a loan made to him. Although clarity could have been better served if this is intended as a finding that the money was a loan from the wife's mother, I need not quarrel with it in the view that I take of this case.

The position as between the parties at the time of their separation was, therefore, that the wife had contributed considerable physical labour to the building up of the assets claimed by the husband as his own and had also made a modest financial contribution to their acquisition. The legal question is whether she can now claim a one-half or any interest in them when the husband has legal title and possession, denies any arrangement for the sharing of the assets and the wife is unable to produce any effective writing to support a division in her favour.

The legal proposition upon which the respondent husband rests is that his wife's work earned her nothing in a share of the assets in his name when it had not been recognized by him in a way that would demand an apportionment, that is by proof of an agreement or at least of a common intention that she should share in the acquisitions. In my view, this is to state too narrowly the law that should apply to the present case.

The case is one where the spouses over a period of some fifteen years improved their lot in life through progressively larger acquisitions of ranch property to which the wife contributed necessary labour in seeing that the ranches were productive. There is no reason to treat this contribution as any less significant than a direct financial contribution, which to a much lesser degree she also made. The relations of husband and wife in such circumstances should not be allowed to rest on the mere obligation of support and shelter which arises from the fact of marriage, where the husband is able so to provide for an impecunious wife, nor on her statutory dower rights under the law of Alberta. They represent a minimum, and reflect the law's protection for a dependent wife. I do not regard them as exhausting a wife's claim upon her husband where she has, as here, been anything but dependent.

The most relevant decision in this country to date on the point in issue here has been the judgment of the Alberta Appellate Division in *Trueman v. Trueman*[9]. Counsel for the respondent husband invited this Court to say that the case was wrongly decided or, if not, that it was distinguishable on its facts so as to exclude in the present case the application of the legal principles upon which it proceeded. The findings of fact in the *Trueman* case were that the husband had provided the down payment for the purchase of the farm on which the spouses built the matrimonial home but that the wife assisted materially in the building of the house, and worked in the field operating the farm machinery thus helping in the realization of the revenue

which was used to pay the purchase price of the farm. No hired man was employed and in working as she did (her husband was frequently ill and unable to work) she assumed duties beyond what a farm wife was expected to do. I point to this view of the Alberta Appellate Division in contrast to the assessment of the wife's work in the present case by the trial judge, an assessment which, I have already indicated, is unacceptable.

In holding that the wife (who sued for a declaration after dissolution of her marriage) was entitled to a one-half interest in the farm property, Johnson J.A. speaking for the Court founded himself on principles stated by Lord Reid in *Pettitt v. Pettitt*[10], as expanded in *Gissing v. Gissing*[11], at p. 896. He also concluded that a declaration in favour of the appellant wife on the facts in the case was quite consistent with what was said by Judson J. for the majority of this Court in *Thompson v. Thompson*[12]. I wish to examine the foregoing three cases and other authorities, including recent English cases on the subject under review.

I begin with *Thompson v. Thompson* where there was a division of opinion in the provincial Court of Appeal and in this Court on whether on the evidence the wife had made a financial contribution to the purchase of the property on which the matrimonial home was built. The trial judge had found that the husband had purchased the land with his own money, and this view was sustained by a majority of this Court speaking through Judson J. The majority reasons did not advert to a point taken by Kerwin C.J.C. in dissent that the spouses had each expended physical labour in building the house and in working the land in conjunction with others. Three points emerge from the reasons of Judson J. First, he rejects the view that any financial contribution by the wife entitles her to a one-half interest. I agree that there can be no such arbitrary division, and recent English cases indicate that the extent of a wife's interest must depend on the extent of her contribution: see, for example, *Gissing v. Gissing*, at p. 897; *Falconer v. Falconer*[13], at p. 452 where Lord Denning, after adverting to *Gissing v. Gissing*, said: "It is not in every case that the parties hold in equal shares. Regard must be had to their respective contributions. This confirms the practice of this Court. In quite a few cases we have not given half-and-half but something different."

I agree as well with the second point that emerges from the reasons of Judson J. in the *Thompson* case, and that is that a joint assets doctrine cannot be founded on the discretionary power given by s. 12 of the Ontario Married Women's Property Act, now R.S.O. 1970, c. 262, for the adjudication on summary application of disputes between husband and wife as to title to or possession of property. This same view was taken some years later by the House of Lords in *Pettitt v. Pettitt*[14], in respect of the prototype provision in the similarly named English Act. We are not concerned with such a provision here not only because it is not invoked in this case but because no such provision exists in any relevant Alberta legislation.

The third point in the Thompson case is that to which Johnson J.A. in the Alberta Appellate Division referred and which, he found, did not inhibit his freedom to make an order in favour of the wife on a trust basis. After dealing with and rejecting the proposition that any contribution, however modest, entitled the wife to a one-half interest Judson J. went on as follows (at p. 13 of [1961] S.C.R.):

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 a 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. However, if one accepts the finding of the learned trial judge, the basis for the application of the rule at its present stage of development in England is not to be found in the present case.

I read this passage as emphasizing the illogic of an arbitrary half-interest division in favour of a wife who has made little or no financial contribution. It does not relate to the equity considerations that may warrant a Court in declaring some entitlement in a wife who has contributed substantially in money or in labour to the acquisition of property taken in the husband's name.

Certainly, to say that a wife has no invariable right to a half-interest by reason of a financial contribution however modest is not to say that she must be denied any interest, where her contribution in money or in money's worth has been substantial, merely because legal title is in the husband. We are nearing a century (and it is more than that as to some States of the United States: see Schouler, *Marriage, Divorce, Separation and Domestic Relations*, vol. 1, 6th ed., 1921, at pp. 311 ff.) since married women's property legislation was enacted in England and in Canada. It offered merely mute testimony to the independent legal personality and capacity of the wife. As was said in a recent piece of periodical literature on the subject (see Foster and Freed, *Marital Property Reform: Partnership of Co Equals?*, in (1973) 169 *New York L.J.* for March 5, 23 and April 27) "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, or employment opportunities are limited"

No doubt, legislative action may be the better way to lay down policies and prescribe conditions under which and the extent to which spouses should share in property acquired by either or both during marriage. But the better way is not the only way; and if the exercise of a traditional jurisdiction by the Courts can conduce to equitable sharing, it should not be withheld merely because difficulties in particular cases and the making of distinctions may result in a slower and perhaps more painful evolution of principle.

A Court with equitable jurisdiction is on solid ground in translating into money's worth a contribution of labour by one spouse to the acquisition of property taken in the name of the other, especially when such labour is not simply housekeeping, which might be said to be merely

a reflection of the marriage bond. It is unnecessary in such a situation to invoke present-day thinking as to the co-equality of the spouses to support an apportionment in favour of the wife., It can be grounded on known principles whose adaptability has, in other situations, been certified by this Court: cf. *Deglman v. Guaranty Trust Co. of Canada and Constantineau*[15]. The Court is not being asked in this case to declare an interest in the appellant merely because she is a wife and a mother; nor is there here an implicit plea for a community property regime to be introduced by judicial fiat. Common law jurisdictions in the United States, which also has community property States, have recognized that it is within a court's equity powers to adjudicate property rights between husband and wife: see *Clark, Law of Domestic Relations in the United States*, 1968, at pp. 449 ff. In *Garver v. Garver*[16], the Supreme Court of Kansas in drawing a distinction between alimony (as based on the husband's common law obligation to support his wife) and division of property said (at p. 410), "division of property ... has for its basis the wife's right to a just and equitable share of that property which has been accumulated by the parties as a result of their joint efforts during the years of the marriage to serve their mutual needs"; and see also *Engelbrechtsen v. Engelbrechtsen*[17], which is factually similar to the present case. Since, in my view, the wife has clearly established here a factual basis for a share in the Brockway property, the only remaining question is whether there are any obstacles in legal principle against a declaration in her favour.

The House of Lords canvassed this and other matters in the *Pettitt* and *Gissing* cases. As Lord Reid pointed out in the latter case, much wider questions were raised in the two cases than were necessary for the decisions in them, but this was because of the unsatisfactory state of the law as it had been developing in the English courts. The *Pettitt* case, on its facts, involved a claim by a husband to a beneficial interest in land purchased by his wife by reason of improvements made to a house thereon. His claim was disallowed, however, because there was no evidence of an agreement or of any common intention that the husband should have an interest by reason of the work he did on the house which the wife alone had purchased; such an agreement or common intention was held to be necessary where improvements, at least if not substantial, were concerned. Subsequent legislation, s. 37 of the *Matrimonial Proceedings and Property Act*, 1970 (U.K.), c. 45, has outflanked the *Pettitt* case by providing that subject to any agreement to the contrary a spouse who has contributed substantially in money or money's worth to the improvement of real or personal property in which either or both has or have a beneficial interest is entitled to a share or enlarged share, as the case may be, in the beneficial interest. In the *Gissing* case, the House of Lords agreed with the finding of the trial judge that the claiming divorced wife had not made, either directly or indirectly, any substantial contribution to the purchase of the house standing in her former husband's name and hence it rejected her contention that she was entitled to a beneficial interest. The facts in the present case distinguish it markedly from the *Pettitt* and *Gissing* cases.

The wider questions raised in those cases included, first, the effect of s. 17 of the Married Women's Property Act (similar to s. 12 of the Ontario Act referred to in the Thompson case), a matter irrelevant to the present appeal, and, second, the circumstances under which trust doctrines could be invoked to support claims by one spouse or former spouse to an interest in property formally held as to legal title by the other. It is this second matter that controls the disposition of the present appeal.

On one point, a starting point, there can be no dispute. The fact that legal title is vested in a person does not necessarily exclude beneficial interests in others. Evidence of a common intention before or at the time of acquisition, qualifying the formal legal title, is generally admissible. A long-established presumption of a resulting trust operates in equity in favour of a purchaser who takes title in another's name, and this presumption, a rebuttable one, is equally operable in favour of one who contributes some but not all of the purchase money. This is as true in the relations of husband and wife as it is in the relations of strangers. (For present purposes, it is unnecessary to consider the effect of the presumption of advancement on an alleged resulting trust in favour of a husband, it is the wife who is claiming here.)

What complicates the application of a presumption of a resulting trust, in its ordinary signification arising from a contribution of purchase money to the acquisition of property, is that in the case of husband and wife the contribution may relate only to a deposit on property which has to be carried on mortgage or instalment payments for many years; that where the spouses have lived together for some years after the acquisition, without any thought having been given to formalizing a division of interests claimed upon the breakdown or dissolution of the marriage, the presumption (as a mere inference from the fact of payment of money) is considerably weakened if not entirely dissipated; and that there is no historical anchorage for it where the contribution of money is indirect or the contribution consists of physical labour. Attribution of a common intention to the spouses in such circumstances (where evidence of the existence of such an intention at the material time is lacking) and resort to the resulting trust to give it sanction seem to me to be quite artificial.

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 available 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.”

Why the device of the constructive trust is more appropriate in a case like the present one is pointed up by what Lord Reid said in the Gissing case, at p. 896 of [1971] A.C., as follows:

As I understand it, the competing view is that, when the wife makes direct contributions to the purchase by paying something either to the vendor or to the building society which is financing the purchase, she gets a beneficial interest in the house although nothing was ever said or agreed about this at the time: but that, when her contributions are only indirect by way of paying sums which the husband would otherwise have had to pay, she gets nothing unless at the time of the acquisition there was some agreement that she should get a share. I can see no good reason for this distinction and I think that in many cases it would be unworkable.

It appears to me that Lord Diplock in the Pettitt case viewed the matter in the same way in speaking as he did (although this view did not attract majority support) at p. 823 of [1970] A.C.:

Unless it is possible to infer from the conduct of the spouses at the time of their concerted action in relation to acquisition or improvement of the family asset that they did form an actual common intention as to the legal consequences of their acts upon the proprietary rights in the asset the court must impute to them a constructive common intention which is that which in the court’s opinion would have been formed by reasonable spouses.

Although later English cases have continued to speak in terms of the resulting trust both where the financial contribution has been direct (see *Heseltine v. Heseltine*[18]), and where it has been indirect (see *Falconer v. Falconer*[19]), some of them are more easily explicable on the basis of a constructive trust: see *Hargrave v. Newton*[20]; cf. *Hussey v. Palmer*[21]. What has emerged in the recent cases as the law is that if contributions are established, they supply the basis for a beneficial interest without the necessity of proving in addition an agreement (see *Hazell v. Hazell*[22]), and that the contributions may be indirect or take the form of physical labour (see *In re Cummins*[23]).

It is the fact that the great majority of the decided cases concern the matrimonial home, but the applicable law is not limited to that kind of property: see *In re Cummins*, *supra*. In making the substantial contribution of physical labour, as well as a financial contribution, to the acquisition of successive properties culminating in the acquisition of the Brockway land, the wife has, in my view, established a right to an interest which it would be inequitable to deny and which, if denied, would result in the unjust enrichment of her husband. Denial would equate her strenuous labours with mere housekeeping chores which, an English Court has held, will not per se support a constructive trust: see *Kowalczyk v. Kowalczyk*[24]. Moreover, the evidence in the present case is consistent with a pooling of effort by the spouses to establish themselves in a ranch operation.

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. Rather than fix the size of her interest arbitrarily, I would refer the case back for inquiry and report for that purpose. I am not called upon in this appeal to determine the effect of this declaration upon the award of alimony in her favour or its relation to her statutory dower rights.

I would allow this appeal with costs to the wife throughout.

Appeal dismissed with costs, LASKIN J. dissenting.

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[1] [1971] 2 W.W.R. 688, 18 D.L.R. (3d) 109.

[2] [1961] S.C.R. 3.

[3] [1952] 2 All E.R. 863.

[4] [1955] 2 All E.R. 696.

[5] [1957] 1 All E.R. 357.

[6] [1969] 2 All E.R. 385, [1970] A.C. 777.

[7] [1970] 2 All E.R. 780.

[8] [1969] 2 O.R. 427.

[9] [1971] 2 W.W.R. 688, 18 D.L.R. (3d) 109.

[10] [1970] A.C. 777.

[11] [1971] A.C. 886.

[12] [1961] S.C.R. 3.

[13] [1970] 3 All E.R. 449.

[14] [1970] A.C. 777.

[15] [1954] S.C.R. 725.

[16] (1959), 334 P. 2d 408.

[17] (1942), 11 So. 2d 322 (Fla).

[18] [1971] 1 All E.R. 952.

[19] [1970] 3 All E.R. 449.

[20] [1971] 3 All E.R. 866.

[21] [1972] 3 All E.R. 744.

[22] [1972] 1 All E.R. 923.

[23] [1971] 3 All E.R. 782.

[24] [1973] 2 All E.R. 1042.

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