ENGLISH LAW IN SEARCH OF A MATRIMONIAL REGIME

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I. THE LEGACY OF THE VICTORIAN STATUTES

The term "matrimonial regime" rings strangely in the ears of an English lawyer, although on the continent of Europe the term has general currency to denote the sum of the rules governing the property rights between spouses, [1] rules which may operate both during the subsistence of the marriage and at its termination by death, divorce or in some other way. Significantly, the only modern monograph in English on this topic, Friedmann's *Matrimonial Property Law*,[2] had to describe its contents by this circumlocution.

The want of a collective noun like "regime" to describe this branch of English law can be attributed to two factors. In the first place, family law itself has been late to acquire practical or pedagogic recognition in English law. [3] Until the early 1950's the English lawyer thought of, and sought, the rules that have now coalesced into "family law" under the disparate rubrics of "divorce," "law of persons," "domestic relations," "parent and child," "husband and wife," "married women's property" and the like. The relative lateness of the synthesis of these constituent parts into the new and distinct subject of family law meant that the legal principles and doctrines of each part were less fully worked out and rationalized than such established disciplines as land law, contract and tort. Much the same thing happened in relation to administrative law; like family law, it had to wait for its treatment in comprehensive textbooks until the 1950's. [4]

Secondly, the absence of the term "matrimonial regime" in English legal language illustrates well the thesis which French writers have ad-

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[1] Thus, 3 G. RIPERT ET J. BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 1 (4th ed. 1951): "Le régime matrimonial est l'ensemble des règles relatives aux intérêts pécuniaires des époux pendant la durée du mariage."

[2] MATRIMONIAL PROPERTY LAW (W. Friedmann ed. 1955).

[3] J. HAMAWI, FAMILY LAW (1953) seems to be the first monograph published in England with this title. It was followed by P. BROMLEY, FAMILY LAW (1st ed. 1957), A CENTURY OF FAMILY LAW (R. Graveson & F. Crane eds. 1957), and E. JOHNSON, FAMILY LAW (1958).

[4] J. GRIFFITH AND H. STREET, PRINCIPLES OF ADMINISTRATIVE LAW (1st ed. 1952); H. WADE, ADMINISTRATIVE LAW (1st ed. 1961); J. GARNER, ADMINISTRATIVE LAW (1st ed. 1963). Precocious forerunners were F. PORT, ADMINISTRATIVE LAW (1929), and C. CARR, CONCERNING ENGLISH ADMINISTRATIVE LAW (1941), but neither covered the whole field.

vanced—that a so-called system of separation of property is in reality no system, hence no regime at all, but rather a non-system.[5] And what does not exist does not need a name. In other words, one should expect a dearth of rules and scant attention in the books respecting "matrimonial property" when one of the fundamental principles of English law is that a spouse owns his or her property just like anyone else. This is the principle which the Victorian reformers adopted in the Married Women's Property Acts 1870-1882 when they sought to remove the legal disabilities which the common law imposed upon the married woman in matters of property. The shortest expression of their solution is to be found in the Law Reform (Married Women and Tortfeasors) Act 1935, section 2:[6] "All property which belongs at the time of the marriage to a woman . . . or is acquired by or devolves upon a married woman shall belong to her in all respects as if she were a feme sole."

By providing that both her pre-marital and post-marital property was to remain the wife's separate property, the statutes put her on an equal footing with her husband. This trend towards legal equality of husband and wife was only one aspect of the more general movement towards social and political equality of the sexes that began to spread through the western world in the 19th century, a movement fostered of course by the growth of industry and of the urban way of life.[7] It was under the twin banners of "emancipation of women" and "equality of the sexes" that the Victorian reformers introduced separation of property as the new norm to oust the traditional hegemony of the husband at common law. But with the science of sociology in its infancy, little thought was given to how the principle of equality, with its emphasis on husband and wife as individuals, was to be reconciled with the essential unity of the family. For all its crudity, the common law did at least uphold this unity by vesting the funds of the family solely in the husband. Thus, at the close of the 19th century a system of "unity of property" was swept away in favour of separation.

"As if she were a feme sole" says the act of 1935. Now, the pretence or legal fiction that a married woman is a spinster may have been an ingenious device to develop the law, but in modern times that law has proved increasingly difficult to reconcile with the realities of married life. Two recent cases serve well to illustrate the problem with which the latter part of this article will be concerned.

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[5] Savatier, among other French writers has asserted that the regime of a complete separation of property is not a regime at all, but rather the absence of a matrimonial regime; for further discussion, see the remarks of M. Oudinot in TRAVAUX DE LA COMMISSION DE REFORME DU CODE CIVIL 374 (1948-49).

[6] 25 & 26 Geo. 5, c. 30, § 2 (1935). This section re-enacted in effect § 2 of the Married Women's Property Act, 45 & 46 Vict., c. 75 (1882), but did away with the obsolete epithet "separate" in relation to the wife's property. Henceforth it became correct to speak of the married woman as owning "property" *simpliciter.*

[7] See *Rheinstein, The Law of Family and Succession, in* CIVIL LAW IN THE MODERN WORLD 27 (A. Yiannopoulos ed. 1965) and *Kahn-Freund, Comparative Law as an Academic Subject,* 82 L.Q.R. 40, at 48 (1966).

II. Two Contemporary Cases in the House of Lords

A. *The Gissing Saga: Episode One* [8]

Orpington is a typical middle-class suburb of London, and Mr. and Mrs. Gissing had spent thirty-three unremarkable years of married life together there at eighteen Tubbenden Drive, before the event occurred which brought them into the English courts: Mr. Gissing tired of his now middle-aged wife and went off with another and younger woman. The wife was left in the matrimonial home, a typical detached villa which had been bought in 1951 for 2,695 pounds. The house had been vested in the husband's name. The husband had found the small deposit and had borrowed the rest of the purchase money by way of mortgage. The husband had always met the mortgage payments of interest and capital, and he continued to do this after he had deserted his wife and gone off with the other woman.

Mrs. Gissing proceeded to obtain a divorce on the ground of her husband's adultery. The divorce judge followed the usual practice and awarded the innocent wife maintenance against the husband. But in this instance, only a nominal sum of one shilling a year was ordered because account was taken of the fact that the wife was still living rent-free in the matrimonial home of the husband who was meeting the mortgage repayments and other expenses.

However, Mr. Gissing was now getting into financial difficulties in his business; he was also discovering the ancient truth that one man's earnings are not sufficient to keep two women. He therefore demanded that Mrs. Gissing should vacate the matrimonial home so that he could sell it, pay off the outstanding mortgage, and pocket a very considerable sum, the value of the matrimonial home having approximately doubled since he bought it.

At this point Mrs. Gissing again sought the help of the High Court. But this time she went not to the Divorce Division but to a judge of the Chancery Division as the appropriate court to adjudicate upon a question of property. She asked the Chancery judge to determine whether in fact the matrimonial home in Orpington was in the sole ownership of the husband, or whether, despite it having been originally vested in the name of the husband, it was nevertheless in the common ownership of the husband and the wife. In support of her claim that the house was in their common ownership, she proved that she had paid thirty pounds to have a lawn laid in the garden, she had paid 190 pounds towards items of furniture, and throughout their married life she had gone out to work, and out of her earnings met a share of the family expenses.

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[8] Gissing v. Gissing, [1969] 1 All E.R. 1043 (C.A.); proceedings in the House of Lords, discussed *infra* are reported in [1970] 2 All E.R. 780 (H.L.).

Her argument failed before the Chancery judge, [9] but on appeal to the Court of Appeal, two of the three judges found in her favour and decreed that the house was owned in equal shares, and that upon its sale Mrs. Gissing would be entitled to half of the proceeds of sale.

The presiding judge in the Court of Appeal, Lord Denning, took the view that the wife had made a "substantial financial contribution" towards the purchase of the matrimonial home and its contents, and in accordance with the precedents set by the Court of Appeal in its previous decisions of *Rimmer v. Rimmer* [10] and *Fribance v. Fribance*,[11] the matrimonial home should be regarded as a "family asset" which belonged therefore to both the spouses in equal shares. For this was to give effect to the presumed intention of the parties. In his Lordship's words:

> It comes to this: where a couple, by their joint efforts, get a house and furniture, intending it to be a continuing provision for them for their joint lives, it is the prima facie inference from their conduct that the house and furniture is a "family asset" in which each is entitled to an equal share. It matters not in whose name it stands; or who pays for what; or who goes out to work and who stays at home. If they both contribute to it by their joint efforts, the prima facie inference is that it belongs to them both equally; at any rate, when each makes a financial contribution which is substantial. [12]

It is of interest to compare this passage with his Lordship's language twelve years earlier in *Fribance v. Fribance*: [13]

> In many cases . . . the intention of the parties is not clear, for the simple reason that they never formed an intention: so the court has to attribute an intention to them. This is particularly the case with the family assets, by which I mean the things intended to be a continuing provision for them during their joint lives, such as the matrimonial home and the furniture in it. When these are acquired by their joint efforts during the marriage, the parties do not give a thought to future separation. They do not contemplate divorce . . . . They buy the house and furniture out of their available resources without worrying too much as to whom it belongs. The reason is plain. So long as they are living together, it does not matter which of them does the saving and which does the paying, or which of them goes out to work or which looks after the home, so long as the things they buy are used for their joint benefit. In the present case it so happened that the wife went out to work and used her earnings to help run the household and buy the children's clothes, while the husband saved. It might very well have been the other way round. The husband might have allotted to the wife enough money to cover all the housekeeping and the children's clothes, and the wife might have saved her earnings. The title to the family assets does not depend on the mere chance of which way round it was. It does not depend on how they happened to allocate their earnings and their expenditure. The whole of their resources were expended for their joint benefit—either in food and clothes and living expenses for which there was

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[9] The decision of Buckley J. is unreported. See note 60.
[10] Rimmer v. Rimmer, [1953] 1 Q.B. 63 (C.A.).
[11] Fribance v. Fribance, [1957] 1 All E.R. 357 (C.A.).
[12] [1969] 1 All E.R. at 1046.
[13] [1957] 1 All E.R. 357.

> nothing to see or in the house and furniture which are family assets and the product should belong to them jointly. It belongs to them in equal shares. [14]

Lord Denning's doctrine, if one may so call it, of the "substantial financial contribution" producing an equally owned family asset carried the day in the Court of Appeal since Lord Justice Phillimore agreed with him, adding that justice demanded this solution in the particular case before the court. Lord Justice Edmund Davies dissented. For him the question was not one of justice but "a cold legal question." [15] And this question was answered by the fact that the house had originally been placed in the name of the husband alone. In his view of the facts the wife had not made a substantial contribution to the ability of the husband to buy the house. She was not therefore entitled to any beneficial interest in it.

The husband appealed to the House of Lords and was successful. [16] Before examining their Lordship's judgments in *Gissing*, however it is necessary to introduce the case of *Pettitt v. Pettitt*, [17] the second of our illustrations of the inadequacy of the English system of separation of property between spouses. For *Pettitt* reached the House of Lords only a few weeks after the Court of Appeal decided *Gissing* and was a clear pointer as to how the House would receive the appeal in the latter case.

B. *The Pettitts: A Cautionary Tale*

In *Pettitt* the House of Lords unanimously rejected an earlier decision of the Court of Appeal [18] which had found in favour of both spouses having a share (albeit not an equal share) in their matrimonial home, Tinker's Cottage, Bexhill, London. The facts, however, differed significantly from those in *Gissing*.

Tinker's Cottage had been bought by Mrs. Pettitt out of moneys which she derived from an inheritance. During the four years in which she and her husband lived in the house, Mr. Pettitt busied himself with decorations and improvements, buying the materials and carrying out the work himself. He exemplified the current fashion for "do-it-yourself" which is turning the Englishman's home from his castle into his workshop.

After four years Mrs. Pettitt left him, divorced him for cruelty and was about to sell the house. At this juncture Mr. Pettitt brought an action in his local county court to determine what share he could claim in the proceeds of sale of the house, having regard to his estimated expenditure upon it in the form of work and materials. The proceedings were brought under section 17 of the Married Women's Property Act, 1882, a section whose Protean character merits setting out its essential terms: "In any ques-

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[14] *Id.* at 359-60.
[15] [1969] 1 All E.R. at 1047.
[16] [1970] 2 All E.R. 780 (H.L.).
[17] [1969] 2 All E.R. 385 (H.L.).
[18] Pettitt v. Pettitt, [1968] 1 All E.R. 1053 (C.A.).

tion between husband and wife as to the title to or possession of property, either party . . . may apply . . . in a summary way to [the court] and the judge . . . may make such order with respect to the property in dispute . . . as he thinks fit . . . ." [19]

The county court registrar awarded him a share of 300 pounds in the proceeds of sale, and the Court of Appeal upheld this. But in the House of Lords the claim of the husband was rejected, and the matrimonial home was held to belong entirely to the wife. As Lord Hodson put it: "[T]he husband does not become entitled to a share in the wife's property by occupying his leisure hours in the house or garden even though he enhances the value of the property." [20] The House of Lords disapproved of the previous decision of the Court of Appeal in *Appleton v. Appleton* [21] which the latter court had felt bound to follow in the present case, albeit reluctantly. In *Appleton* the matrimonial home was initially purchased by the wife, but the husband, a professional woodcarver, enhanced its value by considerable skilled work upon it in the exercise of his craft. The Court of Appeal decided that the husband was entitled to a proportion of the proceeds of sale equal to the increase in the house's value.

Another member of the House of Lords, Lord Reid, took the view that the improvements effected by Mr. Pettitt were of an ephemeral character; in his opinion, only capital or non-recurring improvements could give rise to any claim to a share in the property. He went on to refer to the fact that there were some 900 similar property disputes between spouses pending before the High Court (and a larger, undetermined number in the county courts), and that there was urgent need for comprehensive legislation. In his view, it was the province of Parliament, not that of the courts, to adapt the nineteenth century law of matrimonial property to the changing social needs of the twentieth century. That plea, as we shall see, has not fallen on deaf ears. Meanwhile, the House of Lords were agreed that section 17 of the 1882 act [22] did not empower the courts to override existing rights in property and to apply a notion of family assets not to be found in English law.

C. *The Gissing Saga: Episode Two*

When the decision of the divided Court of Appeal came before the

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[19] 45 & 46 Vict., c. 75, § 17 (1882). This is a highly condensed version of the section.

[20] [1969] 2 All E.R. at 400.

[21] [1965] 1 All E.R. 44 (C.A. 1964). Jansen v. Jansen, [1965] 3 All E.R. 363 (C.A.), which was decided shortly afterwards, was also concerned with improvements, but of a much more substantial character, and has now been given statutory blessing by § 27 of the Matrimonial Proceedings and Property Act, 1970, c. 45. (For a full discussion of *Jansen* and § 27, see *infra*.) In *Gissing* the House of Lords were divided on whether *Jansen* had been correctly decided; Lords Reid and Diplock approved, while Lords Morris, Hodson and Upjohn disapproved of the decision.

[22] 45 & 46 Vict., c. 75, § 17 (1882).

House of Lords,[23] all five Law Lords agreed with the dissentient in the court below, Lord Justice Edmund Davies, that the wife had established no claim to any share in the house or its proceeds of sale. Their Lordships found that there was never any agreement or common intention that she should share in its ownership. Viscount Dilhorne pointed out that the use of the term "family assets" had been deprecated by the House in *Pettitt*. It was a useful loose expression, but family assets were not a special class of property known to the law. And Lord Pearson thought that cases like the present had been made more difficult to decide by excessive application of the maxim "Equality is equity."[24] On the facts of the present case, his Lordship agreed with the trial judge that the wife had not made, either directly or indirectly, any substantial contribution to the purchase of the house and therefore there was no resulting trust in her favour.

III. Shortcomings of the Principle of Separation

The cases of *Gissing* and *Pettitt* are significant in providing two of the only three instances in which in the past quarter of a century the House of Lords has had to pass judgment upon issues of matrimonial property. And the third instance, the 1965 case of *National Provincial Bank v. Ainsworth*,[25] is not germane to the discussion at this point since it concerned not the ownership of matrimonial property but rather the right of the deserted wife to remain in possession of what was admittedly the husband's house.

The Victorian scheme of separate property can be criticized on five counts. In the first place, it accords ill with the modern concept of marriage of a partnership This concept seems to have emerged as a consequence of the social upheaval of the 1939-45 war. It was made explicit in the Report of the Royal Commission on Marriage and Divorce in 1956 where it is stated: "[M]arriage 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."[26] That marriage is a partnership in this sense appears to be a generally accepted view in British society in the second half of the twentieth century. While the commercial metaphor must not be pressed too far, one might reasonably expect a partnership to give rise to partnership property, but this runs counter to the system of separate property which, quaintly, regards spouses not as partners but as strangers at arms' length.

Secondly, if separation of property runs counter to people's current attitudes, it also runs counter to the actual behaviour of married couples in

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[23] [1970] 2 All E.R. 780 (H.L.).

[24] *Id.* at 788.

[25] [1965] A.C. 1175.

[26] Report of the Royal Commission on Marriage and Divorce, (England), 1951-55, Cmd. 9678, para. 644 (1956).

family budgeting. The war-time practice of wives going out to work has continued in time of peace. Job opportunities for women have multiplied, as various male bastions of exclusiveness, like the Jockey Club, Lloyds, and the Stock Exchange, have been stormed. The doctrine of equal pay for equal work now holds sway. All these factors encourage women to continue working after marriage, or to resume paid employment at a later stage of married life when the children are reared. And earlier marriage and greater expectation of life together increase the total of working years for married women. In the result the family budget is commonly fed by earned income of both husband and wife. In most households there is no strict accounting of how the combined income is applied to expenditures, although there may be a general understanding or arrangement for some rough and ready attribution of income to expenditure. Thus, if the decided cases are any guide, one couple (*e.g., Allen v. Allen*) [27] may notionally allocate the husband's income to meet the mortgage on the house and the wife's income to housekeeping expenses. Another couple may operate a "common purse" and entrust all disbursement from it either to the husband (*e.g., Sutocka v. Sutocka*) [28] or to the wife (*e.g., Tymoszczuk v. Tymoszczuk*). [29]

Mingling of separate incomes in this fashion makes nonsense of the principle of separate property. For a couple are practising community, whether consciously or unconsciously, whatever the law may say about separation.

A third defect of the present law springs from the fact that more and more families now have sufficient income not to subsist hand to mouth but to be able to amass capital assets such as the home and its furnishings, the family car, and even modest investment portfolios (as the success of the mutual fund movement indicates). Such accumulation of a family patrimony, commonly from mingled funds as in *Gissing*, means difficult problems when the patrimony falls to be distributed upon the marriage coming to an end. Upon death, the law of succession, through its rules for intestate distribution and family provision, has evolved reasonably fair solutions for these problems. But on divorce, with the spouses often at loggerheads, the problems of who owns what have been aggravated by the crude and simplistic principle of separate property, as we saw in *Gissing* and *Pettitt*. No one can blame the judge if, in the midst of this legally uncharted jungle, he looks for the nearest tree beneath which to dispense justice. [30]

A fourth factor which has focussed attention on the inadequacy of the system of separate property is the continuing increase in divorce. The

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[27] [1961] 3 All E.R. 385 (C.A.).
[28] 107 Sol. J. 373 (C.A. 1963).
[29] 108 Sol. J. 676 (Master 1964).
[30] "Palm tree justice" is invoked with approval by Phillimore, L.J. in the Court of Appeal in *Gissing*, [1969] 1 All E.R. at 1055.

liberalizing of English divorce law in 1937 by the A. P. Herbert Act [31] and the many broken marriages of the war years set a trend for divorce in post-war society. After some flattening of the rising graph in the late 1950's, the figures have risen steadily in the 1960's [32] and are likely to lurch upwards again with the coming into effect of the Divorce Reform Act of 1969.[33] This act makes the irretrievable breakdown of the marriage the sole ground for divorce and goes on, logically enough, to permit divorce by consent after two years of living apart and divorce by unilateral repudiation after five years of living apart, even where the repudiated partner is guiltless of any matrimonial offence. The act being retrospective, [34] a large backlog is expected of petitions from spouses who have been unable to remarry because their existing partners have refused to divorce them. Apart from such a backlog, a higher incidence of divorce seems inevitable after 1970 when marriage will become an arrangement for only five years certain. Whether the actual incidence of marriage breakdown will be higher is an interesting question which cries out for proper research. Be this as it may, divorce means more couples beginning to argue over their family property, and the wife discovering, like Mrs. Gissing, how little of it may be hers.

The social trends examined above are common to most countries of the western world and may be prophetic of what will happen elsewhere as western ideas and ideals continue their spread into Africa and Asia. Comparative study of the legal experience of other countries of Europe, both West and East, reveals an almost universal pattern in which husband and wife share in some degree the property accumulated in the course of their marriage. The Code Napoléon did this in 1804 by its community of movables and acquests, and this sharing of gains during marriage was kept in the new system of family property which the French introduced in 1965.[35] The Federal German Republic adopted the like approach in 1957, [36] although with a more sophisticated legal technique adapted from Scandinavia. In all the Nordic countries the final stock-taking and division of the gains

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[31] Matrimonial Causes Act, 1 Edw. 8 & 1 Geo. 6, c. 57 (1937).

[32] Thus, for the years indicated, CIVIL JUDICIAL STATISTICS (ENGLAND AND WALES) give the following petitions filed.

1968	54,036	1952	33,770
1967	49,969	1947	47,041
1965	42,070	1945	24,857
1960	27,870	1938	9,970
1958	25,584		

[33] Divorce Reform Act 1969, c. 55.

[34] The act is retrospective in the sense that, although it does not come into operation until January 1, 1971, a petitioner may avail himself of a basis for divorce already existing at that date, such as a period of living apart for two or five years' duration.

[35] Statute of July 13, 1965, [1965] D.S.L. 233. For a discussion of this legislation, see AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 379-92 (3d ed. F. Lawson *et al.* 1967).

[36] Statute of June 18, 1957. See Leyser, *"Equality of the Spouses" Under the New German Law*, 7 AM. J. COMP. L. 276 (1958), and Muller-Freienfels, *Family Law and the Law of Succession in Germany*, 16 INT'L & COMP. L.Q. 409 (1967).

is deferred until the end of the marriage, but during the marriage each partner is left free to deal with his or her property as under a system of separation.[37] This ingenious notion of "deferred community" is also the basis of the new Dutch law of 1956[38] and has commended itself more recently to the Ontario Law Reform Commission.[39] Gain-sharing between husband and wife is a principle, moveover, that transcends ideological frontiers. It is found in the Soviet Republic and most East European countries.[40] Indeed, the system of separate property is there regarded as incompatible with that complete equality of the sexes posited by Marxist doctrine—a seeming paradox that would certainly have astounded the Victorian legislators of the Married Women's Property Acts.

A fifth and final criticism of English law, therefore, is that it appears to have lagged behind other advanced countries in modernizing the Victorian legacy to serve the new pattern of marital partnership.

IV. Qualifications Upon the Principle of Separation

Pending that comprehensive reform by legislation for which Lord Reid appealed in *Pettitt*,[41] qualifications to the general rule of separate property have multiplied as the shortcomings of the rule have been borne home on legal and lay minds alike. The crying need to modify the strict principle of separation has produced a number of responses. These responses have come from married couples themselves (prompted no doubt by their legal advisers), from the courts (as we have already seen in cases such as *Gissing* and *Pettitt*), from Parliament in a number of fragmentary, unsystematic, minor reforms, and from comparative lawyers *de lege ferenda* in their quest for alternative solutions. Each of these responses deserves examination in turn.

A. *The Practical and Practitioners' Response*

Acceptance of the idea of marriage as a partnership leads many English couples to depart today from the principle of separation. Instead they deliberately adopt a system of common ownership or "matrimonial joint stock" (in the language of Lord Evershed[42]) for such assets as the matrimonial home, the furnishings of the home, their bank accounts and their small savings. Moreover the practising lawyer or the banker will often persuade a couple setting up house together to opt for co-ownership of their

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[37] *See* Pedersen, *Matrimonial Property Law in Denmark*, 28 Modern L. Rev. 137 (1965).

[38] Statute of June 14, 1956 (discussed in Pedersen, *id.*).

[39] 3 Ontario Law Reform Commission, Study of the Family Law Project pt. 4, c. 3 (1967 rev. repl. 1969).

[40] *See* Gorecki, *Matrimonial Property in Poland*, 26 Modern L. Rev. 156 (1963), and Lasok, *Matrimonial Property—Polish Style*, 16 Int'l & Comp. L.Q. 230 (1967).

[41] [1969] 2 All E.R. at 391.

[42] Silver v. Silver, [1958] 1 All E.R. 523, at 525 (C.A.).

home. Bankers also commonly counsel the opening of a joint account. In these instances the adoption of common ownership is not only deliberate but also made with a reasonable awareness of the legal consequences. Had the Gissings and the Pettitts plumped for co-ownership of their matrimonial homes, they might never have had any dispute over their property with which to trouble the courts.

As often as not, however, the assets of the family are acquired by each spouse separately and simply used in common. There is then no conscious analysis of what is "his" and what is "hers"; the family property is regarded simply as "ours." In most families at harmony, this creates no legal difficulty. But in that minority of marriages which break down, an almost impossible task may fall to the court to determine the ownership of such assets used in common for the purposes of the family.

B. *The Judicial Response*

The judicial response in such cases has been to presume or infer, whenever possible, an intention on the part of the spouses to adopt ownership in common. This has been done even where the spouses simply had no precise intention how the assets were to be owned because in the rapture of the honeymoon they had not addressed their minds to the possibility of a breakdown of their marriage. Judges have then talked of a "constructive intention" but this is really no intention at all but a mask or fiction. But the use of a legal fiction is a well-known technique for the development of the law, as the Romans taught us.

A good example of this approach is the doctrine of "family assets" as propounded by Lord Denning in *Fribance*[43] and adopted by the majority of the Court of Appeal in *Gissing*.[44] Judicial proponents of this doctrine are prepared to look behind the *ius strictum* of the legal title to the house and to decree that the husband holds his legal estate as trustee for the benefit of himself and his wife in equal shares. The decision of the Court of Appeal in *Gissing* was only the last in a long line of modern cases in favour of community, in this sense, rather than separation of property. *Rimmer v. Rimmer*[45] a decision of the Court of Appeal in 1952, is usually regarded as the parent case of the line. In it Lord Justice Romer stated:

> It seems to me that . . . cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers when each of them contributes to the purchase price of property, and, secondly, that the old-established doctrine that equity leans towards equality is peculiarly applicable to disputes of the character of that before us where the facts, as a whole, permit of its application.[46]

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[43] [1957] 1 All E.R. 357 (C.A.).
[44] [1969] 1 All E.R. 1043 (C.A.).
[45] [1952] 2 All E.R. 863 (C.A.).
[46] *Id.* at 870.

The dispute in *Rimmer* concerned the proceeds of sale of a matrimonial home sold for 2117 pounds in 1952. It had been bought for 460 pounds in 1933 when the Rimmers got married, and had been conveyed to the husband. The wife paid the cash deposit of twenty-nine pounds on the house, the balance being borrowed on a mortgage. Over the years the wife had paid off 280 pounds of the mortgage, and the husband had paid off the rest (151 pounds). Despite the difference in the amount of their contributions, the court held that the husband and wife should be regarded as having equal beneficial interests in the house.

Under the guidance of Lord Denning the maxim that equity leans towards equality had been generally[47] applied whenever each spouse had made a substantial financial contribution towards the acquisition of the particular family asset. The contribution might take the form of a cash payment towards the original purchase; or it might involve meeting subsequent mortgage repayments (as in *Rimmer*)—a recognition that we live today in a "real-property-mortgaged-to-a-building-society-owning democracy," as Lord Diplock has put it in *Pettitt*.[48]

What is not clear is whether the financial contribution can take the form of services in kind, rather than in cash. Services as housekeeper and child-rearer are the common lot of wives, but in no case have such services in themselves been held to give rise to a claim that the wife thereby made a substantial financial contribution to the purchase of the matrimonial home. Yet the husband's ability to buy the home would have been impaired if he had had to pay a charlady or child-minder to do what the wife had done for no payment. In *Nixon v. Nixon*[49] a wife had worked without wages in the husband's business and successfully claimed on this account a share in business assets (including their matrimonial home) purchased by the husband. Lord Denning remarked that "the wife's services are equivalent to a financial contribution"[50] and added that "it has been repeatedly held that when a wife makes a substantial financial contribution, she gets an interest in the asset that is acquired."[51] But would this reasoning be applied to services of a merely domestic, rather than business, character? If it were, it would allow almost every wife in the land to claim a share of family assets. As we shall see later, a recent statute does allow the divorce court to take account of such services when awarding maintenance or when deciding upon any settlements or transfers of property after the marriage has broken down, and the spouses come before the divorce court seeking matrimonial relief.[52]

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[47] Generally, but not invariably. *See, e.g.*, Hine v. Hine, [1962] 3 All E.R. 345 (C.A.). Too ready resort to this equitable maxim has now been discouraged by the House of Lords in *Gissing*. This point is discussed *infra*.

[48] [1969] 2 All E.R. at 414.

[49] [1969] 3 All E.R. 1133 (C.A.).

[50] *Id.* at 1136.

[51] *Id.*

[52] Matrimonial Proceedings and Property Act 1970, c. 45, § 37 (discussed *infra*).

The unanimous decision of the House of Lords in *Gissing* [53] obviously curtails the scope of the doctrine of "family assets." Indeed, the House of Lords deny, as they did in *Pettitt*, [54] that the term describes any legal doctrine as such. Rather, it is a convenient, if loose, expression to denote (as Lord Diplock put it) " 'property, whether real or personal, which has been acquired by either spouse in contemplation of their marriage or during its subsistence and was intended for common use and enjoyment of both spouses or their children, such as the matrimonial home, its furniture and other durable chattels,' [55] *but without intending any connotation as to how the beneficial proprietary interest in any particular family asset was held.*" [56] Their Lordships were at pains to sound two warnings. First, the court cannot ascribe to spouses intentions which they never in fact had, in order by such fictitious intentions to engraft upon the sole legal ownership of one spouse a constructive trust in favour of the other. Secondly, where the court finds there *was* a common intention between the spouses for the sharing of the beneficial ownership of a family asset, the extent of the share of each spouse is a question of fact in each case, and the mere fact that evaluation of the respective shares may be difficult for want of clear evidence does not justify the wholesale application of the maxim "equality is equity." On this second point, the House of Lords seems to be underlining the qualifying words which Lord Justice Romer himself appended to his invocation of this maxim in *Rimmer*; [57] for, as we have seen, in urging the peculiar applicability of the maxim to disputes over family assets, he added the cautionary words "where the facts, as a whole, permit of its application." [58] The House of Lords now reiterates this caution; as Lord Reid says: "There will, of course, be cases where a half share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than a half." [59]

Lord Diplock, who delivered much the fullest judgment, provides a valuable analysis of the problems confronting the court when adjudicating upon family assets. In particular, he distinguishes carefully the two stages in resolving the problems. The first stage concerns the finding by the court of that common intention between the spouses out of which alone an equitable interest can be created in favour of the spouse who has no legal estate in the asset in question. The second stage concerns the estimation of the size of that equitable or beneficial interest. At both stages the absence of express agreement will involve the court in drawing inferences from the conduct of the spouses. At both stages Lord Diplock accepts that the relevant conduct may include the wife's contribution towards the purchase

[53] [1970] 2 All E.R. 780 (H.L.).
[54] [1969] 2 All E.R. 385 (H.L.).
[55] *Id.* at 410 (Lord Diplock).
[56] [1970] 2 All E.R. at 789 (emphasis added).
[57] [1952] 2 All E.R. 863 (C.A.).
[58] *Id.* at 870.
[59] [1970] 2 All E.R. at 783.

of the home, where this is the asset in dispute. Following the trend of earlier decisions, his Lordship would attach significance no less to the wife's contribution towards the mortgage instalments as to her contribution towards an outright purchase for cash. And he also accepts that a wife may contribute towards such instalments both directly and indirectly. Indirect contribution would cover situations where the wife undertook to meet from her earnings the household expenses so as to assist the husband to apply his income to the mortgage instalments. Out of domestic arrangements of this nature the court might properly infer a common intention to share beneficial ownership of the home and could then proceed to estimate the respective shares of the spouses.

Like his fellow judges in *Gissing*, Lord Diplock agreed with the trial judge [60] and Lord Justice Edmund Davies in the Court of Appeal that it was not possible on the facts of the case to infer any such common intention. Nevertheless, there is nothing in this latest decision of the House of Lords to prevent in the future, where the facts justify this, a continuing judicial response in favour of the shared, rather than separate, ownership of family assets. But the facts must justify such a finding; the courts cannot construct a system of community of property simply because, unable to ascertain the facts, they believe community to be a more desirable arrangement than separation of property for the present age. This would be to usurp the legislative function. As Lord Morris put it: "Any power in the court to alter ownership must be found in statutory enactment." [61] In *Gissing*, as in *Pettitt*, the House of Lords appear to be inviting legislative intervention, much as their decision in *National Provincial Bank v. Ainsworth* [62] prompted the enactment of the Matrimonial Homes Act 1967. [63]

C. *The Response of the Legislature*

Like the courts, Parliament has become increasingly aware in recent years of the defects of the system of separate property. Statutory reforms of a piecemeal character were made in the years 1964, 1967 and 1970, each of which must now be considered.

(1) *The Married Women's Property Act 1964*

In 1943 in *Blackwell v. Blackwell* [64] the Court of Appeal followed earlier decisions in holding that any savings which a wife made out of the

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[60] Buckley J., whose order in favour of the husband was made on June 12, 1968. Lord Morris, in the House of Lords, pays tribute to his "careful judgment," and one must regret that it has been left unreported.

[61] [1970] 2 All E.R. at 784.

[62] [1965] A.C. 1175.

[63] Matrimonial Homes Act 1967, c. 75. For a discussion of this legislation, *see infra*.

[64] [1943] 2 All E.R. 579 (C.A.). This case was followed in Hoddinott v. Hoddinott, [1949] 2 K.B. 406 (C.A.). Scots law applied the same rule: Logan v. Logan, [1920] Sess. Cas. 537; Smith v. Smith, [1933] Sess. Cas. 701.

housekeeping allowance provided by her husband remained the property of the husband. This conclusion followed from the premise that the wife was to be regarded as the husband's agent for the spending of the allowance, so that by analogy to the commercial agent she must account to him for what was unspent. The rule was of course subject to any agreement to the contrary between the spouses.

The Royal Commission on Marriage and Divorce criticised the rule in their Report in 1956.[65] Their recommendation was that the savings (or any purchases made from such savings) should be deemed to belong to the husband and wife in equal shares unless they agreed otherwise. This reform eventually reached the statute book in the Married Women's Property Act 1964.[66] This short measure introduces in effect community of property for one narrow category of family assets, namely, savings from housekeeping money and any investments or purchases made out of the savings.[67] How narrow is the category was brought home by the decision in *Tymoszczuk v. Tymoszczuk*,[68] where the act was held inapplicable to an allowance given to the wife by the husband to enable her to meet the mortgage instalments on their house.

(2) *The Matrimonial Homes Act, 1967*

As already indicated, the act of 1967 was a direct result of the decision of the House of Lords in *National Provincial Bank v. Ainsworth* in 1965.[69] To understand that decision it is necessary to go back to *Bendall v. McWhirter*,[70] a decision of the Court of Appeal in 1952 which was another judicial response to the inadequacy of the doctrine of separate property between spouses.

The acute housing shortage in the post-war years and the higher incidence of marriage breakdown combined to accentuate the plight of a wife who had been deserted by her husband and left in occupation of the matrimonial home. Where, as was frequently the case, the home was in the separate ownership of the husband, he might seek to exercise his rights as

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[65] REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE, (England), 1951-55, CMD. 9678, para. 699-701 (1956).

[66] Married Women's Property Act, 1964, c. 19. The act also applies to Scotland.

[67] The operative words to be found in § 1 are: "If any question arises as to the right of a husband or wife to money derived from any allowance made by the husband for the expenses of the matrimonial home or for similar purposes, or to any property acquired out of such money, the money or property shall, in the absence of any agreement between them to the contrary, be treated as belonging to the husband and the wife in equal shares."

[68] 108 Sol. J. 676 (1964). The judgment of Master Jacob subjects the wording of the act (*supra* note 67) to minute analysis but is only briefly summarized in the report. The writer, however, has been privileged to read the full transcript. For recent criticism of the decision, *see Re* John's Assignment Trusts, [1970] 2 All E.R. 210 (per Goff, J.).

[69] [1965] A.C. 1175.

[70] [1952) 1 All E.R. 1307 (C.A.).

owner in order to evict the wife and sell the house with vacant possession—and with consequent inflation of price. To the matrimonial wrong of desertion, he proposed to add the indignity of treating the wife as a trespasser in the matrimonial home. The courts were able to foil his designs by refusing him an order for possession unless he made his wife an offer of adequate alternative accommodation or at least allowed her a sufficient time in which to seek such accommodation for herself. [71] Their power to do this rested upon section 17 of the Married Women's Property Act 1882 with its reference to the court making such order "as it things fit."[72] Nor was the husband able to avoid recourse to this section, since the common law barred actions in tort between spouses, including the ordinary action for possession because of its historical origin in tort. [73] Although this doctrine of the common law was abolished by the Law Reform (Husband & Wife) Act 1962, [74] that act still leaves the court with a discretion to stay actions in tort between husband and wife where there is a dispute between them as to property and the court considers the dispute could be better dealt with by proceedings under section 17. [75]

If the wife were protected so far as concerned proceedings for possession brought by the husband, until 1952 she might still have been ousted by a third party to whom the husband transferred the house. In that year, however, the Court of Appeal in *Bendall v. McWhirter* [76] extended her protection to secure her against eviction by third parties, other than a bona fide purchaser for value who acquired an interest in the house without notice of her "equity." Thus, in the instant case, the wife was able to resist a suit for possession brought by the husband's trustee in bankruptcy. On the other hand, in *Westminster Bank v. Lee* [77] an equitable mortgagee whose interest in the house was obtained without notice, actual or constructive, of the wife's rights, was held entitled to possession.

When the doctrine of the deserted wife's equity came for the first time before the House of Lords in 1965, [78] the House rejected it and held that the cases from *Bendall v. McWhirter* onwards had been wrongly decided in so far as they relied upon such a doctrine. Their Lordships decided that the

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[71] *See also* Hutchinson v. Hutchinson, [1947] 2 All E.R. 792 (C.A.); Stewart v. Stewart, [1947] 2 All E.R. 813 (C.A.).

[72] Married Women's Property Act, 45 & 46 Vict., c. 75, § 17 (1882).

[73] Bramwell v. Bramwell, [1942] 1 K.B. 370 (C.A.) (Goddard, L.J.).

[74] Law Reform (Husband and Wife) Act 1962, c. 48.

[75] *Id.* § 1.

[76] [1952] 1 All E.R. 1307 (C.A.). The Scottish courts subsequently refused to follow this doctrine: Temple v. Mitchell, [1957] Scots L.T.R. 169 (1st Div.).

[77] [1956] Ch. 7 (1955).

[78] National Provincial Bank v. Ainsworth, [1965] A.C. 1175.

wife merely had a personal right of occupation vis-à-vis her husband;[79] because of its personal character the right did not avail against third parties. Where, therefore, the husband had mortgaged the house to a bank, the bank's rights as mortgagee must prevail over the wife's right. Accordingly, an order for possession was made in favour of the bank, and the deserted wife with her four children had to leave their home. It was emphasized that section 17 of the 1882 Act[80] was purely procedural and did not give the courts a free hand to depart from the ordinary norms of the law of property. Their Lordships drew attention to the unsatisfactory state of the law, a state which stemmed from the principle of separate property and the corollary to that principle whereby the separate owner could deal with his property unfettered by his family obligations.

The Matrimonial Homes Act 1967[81] was the legislative response. The act now gives a spouse (whether wife or husband) a right to register his or her right of occupation in the home belonging to the other spouse.[82] By such registration the right becomes effective not only against the owning spouse, but also against all successors in title to the owning spouse. The right subsists until the termination of the marriage (*e.g.*, by divorce) or until such time as the court orders otherwise: the court might end the right where, for instance, the spouse has had a sufficient time to seek other accommodation. Whilst the spouse exercises the right of occupation, the court may impose terms such as an obligation to pay rent to the owning spouse or to repair and maintain.

The act also makes special provision for the situation where the matrimonial home is not owned but rented by one spouse. In effect, where the tenancy falls within the protection of the Rent Acts, the spouse who is not the tenant is put into the shoes of the spouse who is, and so becomes no less protected by the Rent Acts, so far as the landlord is concerned.

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[79] *See* Halden v. Halden, 109 Sol. J. 1028 (Pro. Div. Adm. 1965), decided shortly after *Ainsworth*, where Lloyd-Jones, J. granted an injunction restraining the husband from selling the matrimonial home or in any way interfering with the wife's residence therein, unless and until he provided reasonably suitable alternative accommodation as a home for the wife. In Gurasz v. Gurasz, [1969] 3 All E.R. 822 (C.A.), the Court of Appeal reaffirmed the wife's personal right of occupation against the husband in respect of a matrimonial home outside the protection of the Matrimonial Homes Act 1967, c. 75.

[80] Married Women's Property Act, 45 & 46 Vict., c. 75, § 17 (1882).

[81] Matrimonial Homes Act, 1967 c. 75.

[82] The act has no application where the home is jointly owned by both spouses, as in *Gurasz* (*supra* note 79), or where the one spouse has a merely equitable interest in the home vested in the legal ownership of the other; this latter defect in the act has now been remedied by the Matrimonial Proceedings and Property Act 1970, c. 45, § 38 which expressly allows the protection of the 1967 act to be enjoyed by a spouse, notwithstanding the fact that the spouse is entitled only to an equitable interest in the property. Of course, a spouse with a legal estate or interest needs no protection from the 1967 act.

(3) *The Matrimonial Proceedings and Property Act 1970* [83]

Section 27 of the 1970 act clarifies the law relating to improvements effected by one spouse to the other's property. As we have seen, the House of Lords in *Pettitt* [84] rejected the husband's claim to have acquired any beneficial interest in his wife's house by dint of his improvements as these were of an ephemeral character. In obiter dicta it was accepted that substantial improvements of a capital or non-recurring character might justify such a claim, as the Court of Appeal had so held in *Jansen v. Jansen.* [85]

In that case the couple met in consequence of the husband advertising for a wife who would be in a position to keep him for four years whilst he pursued his studies. The wife, a psychiatric social worker, continued at work after their marriage, and the husband busied himself at home with major improvements to their four-storey house. The house had been bought by the wife and was vested in her name. The husband became a skilful workman and converted the two upper floors into self-contained flats which were sold off for a large profit. After he had started work on the ground floor, the wife parted from him, leaving him residing in the basement. She brought proceedings under section 17 of the 1882 act asking that the house be declared hers and that the husband be declared to have no interest in it. The Court of Appeal agreed with the trial judge that the husband did have a claim to a share of the value of the premises which he had thus improved and assessed the amount of the share as 1,000 pounds.

Section 37 of the 1970 act confirms the decision in *Jansen*, and certain dicta in *Pettitt.* It declares that where a spouse contributes in money or money's worth to the improvement of property in which either or both has or have a beneficial interest, then "[t]he husband or wife so contributing shall, if the contribution is of a substantial nature and subject to any agreement between them to the contrary express or implied, be treated as having then acquired by virtue of his or her contribution a share or an enlarged share, as the case may be, in that beneficial interest . . . ." The section goes on to specify that the extent of the share shall be either what may have been agreed, or in default of agreement, what the court considers just.

In the result, therefore, Parliament has now endorsed the judicial criterion of "substantiality" as determining what contribution by way of improvements may justify a claim on the part of the improver to a share in the separate property of the other spouse. Like the rest of the 1970 act this provision does not come into effect until 1st January 1971. Meanwhile, *Jansen* has been followed in the recent decision of *Smith v. Baker* [86] where the wife gave up well-paid employment in order to assist the husband with the actual building of a bungalow on a plot of land bought by the husband.

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[83] Matrimonial Proceedings and Property Act 1970, c. 45.
[84] [1969] 2 All E.R. 385 (H.L.).
[85] [1965] 3 All E.R. 363 (C.A.).
[86] [1970] 2 All E.R. 826 (C.A.).

She even helped dig the foundations. After the breakdown of the marriage she successfully claimed a share in the beneficial ownership of the bungalow. This share the Court of Appeal assessed at one-half, this being the apportionment which truly reflected the couple's view of the bungalow as "ours." *Smith v. Baker* pre-dates the decision of the House of Lords in *Gissing*, but the award of a half share to the wife would seem in the circumstances to qualify as (in Lord Reid's phrase) "a reasonable estimation." [87]

The bulk of the Matrimonial Proceedings and Property Act 1970 embodies a thorough ouverhaul of the rules governing financial provision for a spouse and the children of the family after a marriage has broken down. [88] Its primary concern, therefore, is with questions of alimony and maintenance, questions very much linked with disputes over matrimonial problems. For such questions and disputes relate to the pecuniary relationship of spouses or ex-spouses, with maintenance affecting, for the most part, income and matrimonial property capital. [89]

The inter-connection of maintenance with property is brought out in the wide powers conferred upon the divorce court to make financial provision, a term coined by the act to embrace both awards of income payments and awards by way of lump sums or grants of property. Thus, sections 2 and 3 empower the court, upon a decree of divorce, nullity or judicial separation,

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[87] Gissing v. Gissing, [1970] 2 All E.R. at 783, where Lord Reid remarks: "I think that the high sounding brocard 'Equality is equity' has been misused. There will of course be cases where a half share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than a half."

[88] Part I of the act (sections 1-29) is headed "Provisions with respect to ancillary and other relief in matrimonial causes and to certain other matrimonial proceedings." The act is based on the LAW COMMISSION (ENGLAND), REPORT ON FINANCIAL PROVISION IN MATRIMONIAL PROCEEDINGS (Law Com. No. 25. 1969) which provides a full and illuminating commentary on the whole act.

[89] Thus, in the Court of Appeal in *Gissing*, [1969] 1 All E.R. at 1045, Lord Denning said:

> As I said in Button v. Button, [[1968] 1 All E.R. 1064, at 1067], maintenance is linked with property. If the wife stays in the house, her maintenance may be reduced on that account. If she goes out, and the husband sells the house and takes the purchase money, she may get more maintenance: and he may be ordered to put part of the money aside so as to be a secured provision for her. She would be well advised, therefore, to take out proceedings in the Divorce Division so as to determine to whom the house belongs (s. 17 of the Married Women's Property Act, 1882), before decree absolute, or to enquire whether it was a post-nuptial settlement (s. 17 of the Matrimonial Causes Act, 1965), before or after decree absolute, and to ask for maintenance and a secured provision (s. 16 of the Act of 1965). All these proceedings can be heard at one and the same time. The Divorce Division has ample power to do what is fair and reasonable, having regard to the conduct of the parties: whereas, the Chancery Division is asked only to answer the cold legal question: what interest has the wife in the house? without regard to the conduct of the parties.

Likewise, per Phillimore, L.J., at 1055: "I would desire to emphasize that questions of maintenance and property ought to be dealt with together."

to order the making of periodical payments or the payment of lump sums to the other party to the marriage, or for the benefit of the children. Section 4 allows the court, upon such a decree, to order (a) transfers of property by one spouse to the other (or to the children), (b) settlements of property for the benefit of the other spouse or the children, and (c) variations of ante-nuptial or post-nuptial settlements made on the parties to the marriage. [90]

It is now expressly provided that in making these property adjustments or awarding maintenance the court shall have regard to all the circumstances, including "the contributions made by each of the parties to the welfare of the family, including any contribution made by looking after the home or caring for the family." [91]

In this new provision, English law is acknowledging the part played in the marriage partnership by the woman as housewife and mother.[92] Her contribution in these respects is to be taken into account in the final balance-sheet when the partnership is being dissolved in the divorce court. This provision, like the act as a whole, does not take effect until 1st January 1971. Meanwhile, under the present law we have seen in *Gissing* how difficult it may be for a wife to have her contributions to the "welfare of the family" taken into proper account when she becomes involved in a dispute over matrimonial property, even though the dispute was bound up with divorce proceedings. In *Gissing* her claim was, of course, proprietary rather than alimentary. After the new act becomes operative, a future Mrs. Gissing might fare no worse if she abandoned any proprietary claim to an interest in the matrimonial home but asked instead for part of the husband's separate property (including the home or some interest in it) to be transferred to her under section 4(a) by way of financial provision in divorce. By switching to an alimentary claim she could invoke not only her various contributions to the family budget but also to its welfare generally under the new provision. Admittedly, an alimentary claim depends upon the discretion of the court, and it remains to be seen how bold the courts will be in the exercise of their extended powers under the 1970 act.

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[90] This power to vary nuptial settlements is at present contained in § 16 of the Matrimonial Causes Act, 1965, c. 72 (referred to by Lord Denning in the passage cited *supra* note 89). Nuptial settlement has been widely construed so as to permit the divorce court to vary, as a nuptial settlement, the situation where the husband is deemed to hold a family asset on constructive trust for himself and his wife by virtue of her contribution towards the purchase or improvement of the asset originally acquired in his name. *See* Cook v. Cook, [1962] 2 All E.R. 811 (C.A.) extending Brown v. Brown, [1959] 2 All E.R. 266 (C.A.): Ulrich v. Ulrich, [1968] 1 All E.R. 67 (C.A.). In *Gissing* the wife's counsel did not pursue the claim that there was a post-nuptial settlement of the home, although Lord Justice Phillimore and Lord Denning (*supra* note 89) were of opinion that such a settlement could have been established on the facts.

[91] Matrimonial Proceedings and Property Act 1970, c. 45, § 5(1)(f).

[92] *Compare* C. Civ. art. 214 (65e Petits Codes Dalloz 1966) which refers to the wife's contribution to the "charges du mariage" as including "son activité au foyer"; this explicit recognition of the economic contribution of the housewife was introduced by the Statute of July 13, 1965, [1965] D.S.L. 233.

V. Reform of the Principle of Separation: the Contribution of Comparative Law

The Matrimonial Proceedings and Property Act will go some considerable way to alleviate the inadequacy of the system of separate property by enabling the courts upon divorce to do the best they can for the wife and children by way of financial provision. Nevertheless, everything is left to the discretion of the judge; neither the wife nor the children are entitled *as of right* to a single penny of the family fund if this fund be vested in strict law in the husband as his separate property.

It is this placing of the wife at the mercy, however tender, of the judge that led Baroness Summerskill to describe the act as a confidence trick,[93] inasmuch as it did not, in her view, honour the government's promise to reform matrimonial property law before the new Divorce Reform Act 1969 comes into operation on 1st January 1971. As we have already discussed, an increase in divorce can be expected after that date, so that the injustice of the system of separate property will touch more couples. Moreover, the substitution of breakdown for the present matrimonial offences as the basis for divorce will mean wives finding themselves being divorced and left property-less who in their own eyes at least have committed no matrimonial wrong to justify this fate.

The contribution which comparative law can make to the reform of English law in this field was not fully realized until the publication in 1955 in Canada of Friedmann's *Matrimonial Property Law*, to which reference was made at the beginning of this article.[94] Only six years before, Gutteridge had taken the view that family law (including matrimonial property) was so largely moulded by racial or religious or even political considerations that comparison in this field was both fraught with difficulty and of doubtful value.[95] To correct this misapprehension it has needed the sociological insight of comparative lawyers such as Professor Friedmann and Professor Kahn-Freund, both of whom came to the common law from a continental background. It was Professor Kahn-Freund whose chapter on English law in the Friedmann volume first drew attention to the elements of community of property already present in a system ostensibly based upon separation of property.[96] And the volume as a whole enabled English law to be compared with other contemporary systems of matrimonial property.[97]

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[93] "A confidence trick had been played on women: they had been betrayed." From a report on the debate over the act in the House of Lords. The Times (London), November 7, 1969, at 15, col. 1.

[94] Matrimonial Property Law (W. Friedmann ed. 1955).

[95] H. Gutteridge, Comparative Law 32 (2d ed. 1949).

[96] Kahn-Freund, *Matrimonial Property Law in England, in* Matrimonial Property Law 267 (W. Friedmann ed. 1955); *see also* Kahn-Freund, *Matrimonial Property—Some Recent Developments*, 22 Modern L. Rev. 241 (1959).

[97] *See especially* Friedmann, *A Comparative Analysis in* Matrimonial Property Law 433-55, *supra* note 94.

A few months after this work was published, the Royal Commission on Marriage and Divorce included some comparative discussion in that part of its Report which concerned matrimonial property.[98] In the event, twelve members of the Commission were opposed to any introduction of community of property as against seven who supported its introduction either as a general principle to replace separation or in relation to the matrimonial home and its contents.

It was no doubt the setting up of the two permanent Law Commissions for England and Scotland in 1965 which prompted the renewal of ideas for reform both north and south of the border.[99] The English Law Commission included the whole of family law in its initial programme, and pursuant to this it convened a seminar at All Souls College, Oxford, in July 1966, where both divorce reform and matrimonial property were studied. In an unpublished paper submitted to that seminar, the writer spelled out the following *desiderata* in a matrimonial regime.

VI. Desiderata in a Matrimonial Regime

Although the law must regulate the economic consequences of marriage, this does not mean that marriage is being regarded, primarily, as a financial arrrangement. The object of any system of matrimonial property must be to promote harmony between the spouses and stability in their union. To this end the matrimonial regime provided by the law should provide a fair solution of the problems concerning property which arise either during marriage or when it ends, and whether it be ended naturally by death or prematurely by divorce. The regime should also be based on principles which are sufficiently simple to be understood by married couples without a lawyer at their elbow. Again, the regime should be sufficiently flexible to be adaptable to marriages which depart from the traditional pattern of the husband-breadwinner and the housewife-mother. It should also leave each spouse with reasonable and equal freedom to manage his or her own affairs; too restrictive or protective a regime will inhibit third parties in their dealings with the spouses and may also leave the widow or divorcee ill-prepared to cope anew with her own or the family's finances. In short, the regime should embody the four qualities of fairness, simplicity, flexibility and freedom.

VII. Proposals for Reform

To achieve these qualities, the writer went on to argue in favour of English law adopting some form of deferred community of gains on the

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[98] Report of the Royal Commission on Marriage and Divorce, (England), 1951-55, Cmd. 9678 (1956), pt. IX "Property Rights Between Husband and Wife," and app. III(2) "Matrimonial Property Systems in Other Countries."

[99] Law Commissions Act 1965, c. 22. For an authoritative critique of this new machinery for law reform see Chorley & Dworkin, *The Law Commissions Act 1965*, 28 Modern L. Rev. 679 (1965).

model of matrimonial regimes of Federal Germany and Scandinavia [100] or of the optional regime of participation in acquests which French couples may choose by marriage contract. [101] The regime of deferred community would keep the simplicity of the present law in leaving each spouse free to administer his or her own assets during the subsistence of the marriage. For the community does not attach to any specific assets but rather to the "added value" of the respective patrimonies of the spouses. Generally the dissolution of the community would be deferred until death or divorce. Among the questions to be resolved prior to the drafting of such legislation would be whether a spouse should be able to apply for earlier dissolution in the event of permanent separation or the other spouse's insanity, insolvency, prodigality or other abusive exercise of the power of administration.

This proposal for reform won a measure of cautious support from the Chairman of the Law Commission, Sir Leslie Scarman. Broadcasting in his personal capacity on the B.B.C. Third Programme in November 1966, he concluded that "the system of 'deferred community' is something we ought to look at with great care to see if it can be adapted for our purposes in this country." [102]

An encouraging sign of the readiness of Parliament to shift English law towards a regime of this kind was the surprising if short-lived success of the Matrimonial Property Bill which Mr. Edward Bishop, M.P., introduced as a Private Member's Bill in the House of Commons in November 1968. The bill, which sought to introduce a deferred community of gains, was given a second reading by eighty-six votes to thirty-two on 24th January 1969. But it was hastily prepared and ill-drafted, and after attracting considerable adverse comment in the legal press it was withdrawn before the committee stage. [103] As a measure of the bill's complexity and vagueness, it is worth setting out its principal clause:

> 1. On the application at any time of either spouse the court may, and, whenever a petition for nullity of marriage, divorce or juricial separation is presented, the court shall, make a division of property between the spouses on the following principles:
>
> > (a) all property, or the replacement thereof beneficially owned by either spouse at the time of the marriage or acquired by either spouse during the marriage by gift, devise, bequest or descent remains the separate property of that spouse, but all increase in the real value of such property during the subsistence of the marriage shall be matrimonial property and shall be equally divided between the spouses; and

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[100] See statutes and commentaries in notes 36, 37 *supra*.

[101] For an account of this regime (introduced by the Statute of July 13, 1965, [1965] D.S.L. 233), *see* AMOS AND WALTON'S INTRODUCTION TO FRENCH LAW 379-92 (3d ed. F. Lawson *et al.* 1967).

[102] Sir L. Scarman, *Law Reform and Family Property*, 76 THE LISTENER 683, at 684 (1966) (a talk broadcast on the B.B.C. Third Programme).

[103] *See, e.g.*, the editorial strictures in the influential NEW L.J., January 30, 1969, at 93-94.

> (b) subject to the provisions of section 6 below, all property, other than separate property, the beneficial interest in which has been acquired by either spouse during the subsistence of the marriage, shall be matrimonial property and shall be equally divisible between the spouses.

It may be unfair, however, to criticise a bill of this kind on the score of complexity. A Danish comparative lawyer, who is also a judge, has commented: "[t]he questions that have to be solved in matrimonial property law *are* complicated, and any system that wants to solve them cannot avoid a certain degree of complexity. Simplicity, on the other hand, may well have to be bought at the expense of the spouses, especially that of the wife." [104]

Meanwhile, reform of matrimonial property remains on the programme of the English Law Commission. In its Report which introduced the Matrimonial Proceedings and Property Bill and was published in July 1969, the Commission emphasized that "this Report does not attempt a root-and-branch reform of family property, a far more intractable problem on which we hope, within the next few months, to publish a preliminary study in a further Working Paper." [105] And in November 1969 the Lord Chancellor in defending himself in the House of Lords against Baroness Summerskill's charge that the bill was a confidence trick, pointed out that the Law Commission was still considering the question of community of property. [106]

There may indeed have been a moment when the government honestly believed that the basic system of separation of property could be reformed root and branch in time to accompany the implementation of the new Divorce Reform Act. [107] But that moment is clearly past, as the Law Commission continue to wrestle with the intractable problem posed by the reform of matrimonial property.

The writer believes that English law will not now go over to a regime of community but retain for all its defects the system of separation of property as the basic regime. For where death ends a marriage, the English law of succession already achieves a fair solution for the claims of the surviving spouse, especially after the recent improvements to that law by the Family Provision Act 1966. [108] Where divorce ends the marriage, a vigorous and

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[104] Pedersen, *Matrimonial Property Law in Denmark*, 28 MODERN L. REV. 137, at 140 (1965).

[105] LAW COMMISSION (ENGLAND), REPORT ON FINANCIAL PROVISION IN MATRIMONIAL PROCEEDINGS para. 2 (Law Com. No. 25, 1969).

[106] The Times (London), November 7, 1969, at 15, col. 1.

[107] Divorce Reform Act 1969, c. 55.

[108] Family Provision Act 1966, c. 35. An elementary lesson which comparative law teaches is the danger of considering parts of a legal system in isolation. Thus, in English law the matrimonial property system of separation is counterbalanced to some extent by the law of intestacy and family provision. Under the Family Provision Act 1966 the surviving spouse receives, even where there are children, the first 8,750 pounds out of the deceased's estate on intestacy, and if there are no children, this sum rises to 30,000 pounds. To this extent, therefore, English law admits a "posthumous" com-

bold exercise of the statutory powers conferred under the Matrimonial Proceedings and Property Act 1970 could solve with no less fairness the financial claims of the divorced spouse and children of the family, at least for households where a sufficiency of income and capital exists to provide both for the family which is breaking up and for the new family which is likely to be formed in many instances by way of a second marriage.

Of course, where there is simply not sufficient money for two families, one family must go without support, save for the ultimate paterfamilias, the welfare state. [109] A system of separation of property tends to sacrifice the old family; a system of community, to sacrifice the new.

There may well be some limited introduction of community in relation to the matrimonial home and, perhaps, its contents. [110] This would be a natural progression from the so-called doctrine of family assets and the common rights of possession guaranteed by the Matrimonial Homes Act, 1967. But if we are left simply with the Act of 1970, then, in the event of marriage breakdown, couples will find that there is no "regime" at all governing their matrimonial property in the sense of hard and fast legal rules as to who owns what. Instead, all their rights of property will become subject to the risk of variation, transfer or even extinction by the divorce judge. During marriage they will have lived under a regime of separation of property; upon breakdown of marriage all their property rights become terminable at judicial discretion—a situation of "communism," rather than community, of goods. And this may be the best way to achieve justice in the family. [111]

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munity of property between husband and wife, in the sense that their two separate estates come together on the death of whichever dies first intestate. And four out of ten people die intestate (see Simon, "With All My Wordly Goods . . ." 30 (address to the Holdsworth Club, 1964). In praise of the English law of family provision, see the comparative study of W. MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960).

[109] The law relating to "supplementary benefits" (formerly "national assistance" and before that "poor relief") is now to be found in the Ministry of Social Security Act 1966, c. 20.

[110] Seven of the nineteen members of the Royal Commission supported some such limited introduction of community of property. See REPORT OF THE ROYAL COMMISSION ON MARRIAGE AND DIVORCE, (England), 1951-55, CMD. 9678, para. 652 (1956).

[111] For a Scottish view of some of the above problems in that legal system, see Meston, *Justice in the Family*, 43 ABERDEEN U. REV. 95 (1969).