KENNETH JOHN CLARKE THOMPSON (*Defendant*) ..... APPELLANT;

AND

CONSTANCE NICHOLSON THOMPSON (*Plaintiff*) ..... RESPONDENT.

1960

*June 15, 16

Nov. 21

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Husband and wife—Dispute between spouses as to interest in property—Conveyance taken in name of husband—Matrimonial home—Wife not entitled to proprietary interest in absence of financial contribution.

H bought a parcel of land and took the conveyance in his own name. With the assistance of a loan obtained by him under the *Veterans' Land Act* he had a house built on a lot within the parcel, and later sold all the land with the exception of the house and lot. Subsequently his wife W issued a writ for alimony, support for an infant child and a declaration that she was the sole owner of the property and entitled to all the proceeds of the sale. The trial judge dismissed her claim to the property on the ground that she had made no financial contribution to its purchase. The Court of Appeal held that W was entitled to a one-half interest in the property and the proceeds of the sale. The husband then appealed to this Court.

Held (Kerwin C.J. and Cartwright J. dissenting): The appeal should be allowed.

Per Martland and Ritchie JJ.: No question of a matrimonial home arose until two years after the purchase of the land, which was a business venture by H for speculative purposes, with the added advantage that the land was suitable for the building of a house on part of it. Therefore no principle applicable to a matrimonial home which may be derived from cases such as *Rimmer v. Rimmer,* [1953] 1 Q.B. 63, would properly be applicable to the circumstances of this case.

Per Martland, Judson and Ritchie JJ.: The trial judge concluded that the financial dealings between the spouses indicated no proprietary interest in the property on the part of the wife. This was not a case where the findings of fact of the trial judge should have been reversed.

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. Here, however, on the finding of the trial judge, the basis for the application of the rule as at present developed by the English decisions is not to be found. *Rimmer v. Rimmer, supra*; *Hodinott v. Hodinott,* [1949] 2 K.B. 406;

*PRESENT: Kerwin C.J., Cartwright, Martland, Judson and Ritchie JJ.

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Cobb v. Cobb, [1955] 2 All E.R. 696; *Silver v. Silver*, [1958] 1 All E.R. 523; *Richards v. Richards*, [1958] 3 All E.R. 513; *Fribance v. Fribance*, [1957] 1 All E.R. 357, referred to.

The judicial use of the discretionary power under s. 12 of *The Married Women's Property Act*, R.S.O. 1950, c. 233, in property disputes between husband and wife has not developed in the same way in the common law provinces of Canada as it has in England. *Minaker v. Minaker*, [1949] S.C.R. 397; *Carnochan v. Carnochan*, [1955] S.C.R. 669; *Jackman v. Jackman*, [1959] S.C.R. 702, referred to.

Per Kerwin C.J. and Cartwright J., *dissenting*: The actions of counsel for the defendant in moving at the commencement of the trial for a mental examination of the wife and the many interventions of the trial judge had a direct influence on the latter's finding in connection with the property and mortgage.

Bearing in mind the principles to be applied by a Court of Appeal in considering the judgment of a trial judge, it is impossible to say that the trial judge made full judicial use of the opportunity given him by hearing the *viva voce* evidence. *Hontestroom (Owners) v. Sagaporack (Owners)*, [1927] A.C. 37, applied; *Powell v. Streatham Manor Nursing Home*, [1935] A.C. 243; *Calderia v. Gray*, [1936] 1 All E.R. 540; *Lawrence v. Tew*, [1939] 3 D.L.R. 273, referred to.

The evidence justified the conclusion that the parties considered that each was entitled to a one-half interest in the land.

Cases where a husband supplies most, if not all of the money required for the purchase of a property, and puts it in his wife's name with the result that there is a presumption of advancement, such as in *Jackman v. Jackman, supra,* have no application in the circumstances of this case.

Per Cartwright J., *dissenting*: When the husband used moneys of which the wife was joint owner with him to purchase the property and took the deed thereof in his own name there arose a rebuttable presumption that he held as trustee for himself and his wife jointly. The evidence taken as a whole far from rebutting that presumption supports it.

APPEAL from a judgment of the Court of Appeal for Ontario[1], reversing in part a judgment of Kelly J. Appeal allowed, Kerwin C.J. and Cartwright J. dissenting.

A. Maloney, Q.C., and *P. Hess*, for the defendant, appellant.

R. N. Starr, Q.C., and *J. M. Weekes*, for the plaintiff, respondent.

THE CHIEF JUSTICE (*dissenting*):—This is an appeal by the husband from a judgment of the Court of Appeal for Ontario[1] in an action brought against him by his wife in which she claimed alimony and custody of an infant child of the marriage together with maintenance for his support.

[1] (1960), 22 D.L.R. (2d) 504.

She also claimed a declaration that certain lands were held by the husband in trust for her; an order requiring him to pay her the monies received by him for the sale of certain parts thereof; a declaration that a mortgage given to the husband was held in trust by him for the plaintiff; an accounting of all monies paid under that mortgage; and an order declaring that part of the lands,—a two-acre lot on which was situate the matrimonial home,—and which was to be conveyed under a certain contract to the defendant, be conveyed to the plaintiff. The claim for alimony was dismissed at the trial and in the Court of Appeal and there is no cross-appeal, and all disputes as to the custody and support of the child have been settled between the parties.

This leaves for determination only the questions of ownership of the land and the mortgage money. As to these there was a difference of opinion in the Court of Appeal. Laidlaw J.A. and McGillivray J.A. decided that the property described in the statement of claim was owned by the parties in equal shares at and subsequent to the date of purchase thereof; that the wife was entitled to an equal share with the husband of the proceeds of the sale of part of the property sold by him including the proceeds of the mortgage given by the purchaser to him; and that the land and premises reserved by the husband from the sale, (the two-acre lot), belong to each of the parties to this litigation in equal shares. MacKay J.A. would have dismissed all the wife's claims in connection with the property and mortgage.

The three members of the Court of Appeal agreed that counsel who had formerly appeared for the husband acted improperly in moving at the commencement of the trial for a mental examination of the wife, which, he stated, was made for two purposes,—to attack the credibility of the wife and also to show that the action had not been commenced "on properly given instructions". The trial judge permitted counsel to call Dr. Crisp although at the conclusion of the doctor's testimony the motion was dismissed. I agree with all that has been said by all the members of the Court of Appeal with reference to those actions of the husband's former counsel.

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The majority of the Court of Appeal considered that the trial judge, with the best intentions in the world, intervened unduly during the course of the trial. Laidlaw J.A. points out in his reasons that in the memorandum filed in the Court of Appeal counsel for the wife stated that the examination-in-chief of the plaintiff occupied 147 pages and that on 134 of them the trial judge intervened. Without attempting to assess the accuracy of these figures it is clear to me from a reading of the record that the interventions occurred on a great many occasions and I cannot but come to the conclusion that they, as well as the unwarranted proceedings by the husband's counsel, affected the conclusions of the trial judge. At p. 473 of vol. 2 of the Appeal Case in this Court, he is reported as follows:

> As I said during the trial, I have to deal with this case on the premise that the wife was normal mentally. She refused to submit to a further physical examination to have her mental condition ascertained, so that I have to deal with her as being normal. However, there is evidence before me and I cannot say that it did not, to some extent, influence me at least in coming to a conclusion as to why the plaintiff acted as she did. I feel that paranoia has influenced the plaintiff in her dealings and relationship with her husband. She was taking psychiatric treatments for some time before November 12th, 1956. In fact, she went to see her doctor the very next day, on November the 13th, I think it was, according to the evidence, or within a few days anyway, and she saw Dr. Crisp on the 20th of November, which would only be a week later. I am of the opinion that what was in her mind was the root of all the trouble.

The underlining has been added but I cannot read the above extract in conjunction with the rest of the trial judge's remarks as referring only to the claims for alimony and custody and support of the infant.

MacKay J.A. concluded that much of the blame for the trial judge's intervention should be attributed to the plaintiff's evasiveness and failure to make direct answers to questions put to her by counsel. In view of the statements made by the husband's counsel at the commencement of the trial and of the calling by him of Dr. Crisp as a witness on the motion, it is not surprising that the wife was disconcerted. In my view the actions of counsel for the defendant at the trial and the intervention of the trial judge had a direct influence on the latter's finding in connection with the property and mortgage.

Soon after the commencement of the argument on behalf of the appellant in this Court, it was announced that we were of opinion that the evidence of Dr. Crisp was not

admissible and when Mr. Maloney was replying it was made clear that that ruling applied to all of the doctor's evidence, whether given on the motion at the commencement of the trial or whether (and assuming it was not necessary for him to be re-sworn) when he was called as a witness on behalf of the defendant after the evidence on behalf of the plaintiff was completed.

The principles to be applied by a Court of Appeal in considering the judgment of a trial judge are set forth in the decision of the House of Lords in *Hontestroom (Owners) v. Sagaporack (Owners)*[1] and mentioned in *Powell v. Streatham Manor Nursing Home*[2], both of which cases together with the decision of the Privy Council in *Calderia v. Gray*[3] are referred in the decision of this Court in *Lawrence v. Tew*[4]. Bearing in mind these principles I find it impossible to say, in view of what is set out above, that the trial judge made full judicial use of the opportunity given him by hearing the *viva voce* evidence. A careful reading of the record satisfies me that the evidence detailed in the reasons of Laidlaw J.A. and in the additional reasons of McGillivray J.A. justify the following conclusions:

(1) the wife worked and earned a considerable sum throughout the years and her cash in the bank was nearly exhausted in 1954;

(2) while the husband was in the Air Force the wife worked and paid for help in the apartment and for the education of the daughter;

(3) while sums of money were paid by the husband to his wife and, as he alleged, in repayment of what he considered had been loans, she had made substantial contributions to the purchase of the land and paid out of her own monies various sums for household articles and expenses;

(4) each of the parties expended physical labour in building the house and in working the land in conjunction with others;

[1] [1927] A.C. 37 at 40, 95 L.J.P. 153.
[2] [1935] A.C. 243 at 264, 104 L.J.K.B. 304.
[3] [1936] 1 All E.R. 540, 80 Sol. Jo. 243.
[4] [1939] 3 D.L.R. 273.

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(5) it was recognized by the husband that his wife was entitled to a one-half interest in the land when he gave her a cheque for one-half ($6,403.65) of a payment made to him and that he intended, as a result of certain misinformation given him, that $4,000 of the cheque should be free from what he thought would be subject to a gift tax.

I am not suggesting that there is community of property in Ontario as between husband and wife and I do not rely upon the "palm tree" justice referred to in some of the decisions in England mentioned in the reasons for judgment of the Court of Appeal; I place my conclusion upon the ground that there is evidence in this record that the parties considered that each was entitled to a one-half interest in the land.

Cases where a husband supplies most, if not all of the money required for the purchase of a property, and puts it in his wife's name with the result that there is a presumption of advancement, such as in *Jackman v. Jackman*[1], have no application to the circumstances before us.

The appeal should be dismissed with costs.

CARTWRIGHT J. (*dissenting*):—The differences of judicial opinion to which this case has given rise appear to me to result from the difficulty in ascertaining the facts rather than from any question as to the applicable law.

The primary question is as to the intention of the parties at the time when the conveyance of the twenty-acre parcel of land was taken in the name of the husband. The analysis of the evidence made in the reasons of Laidlaw J.A. brings me to the conclusion that the down payment on the purchase of this property was made from moneys jointly owned by the appellant and the respondent. If the respondent had paid his own money into a joint account standing in the names of himself and his wife there would have been a rebuttable presumption that he was giving her a half interest in the moneys in the account. In fact more than half of the money standing in that account at the time that the down payment was paid out of it had been furnished by the wife.

[1] [1959] S.C.R. 702, 19 D.L.R. (2d) 317.

When the husband used moneys of which the wife was joint owner with him to purchase a property and took the deed thereof in his own name there arose a rebuttable presumption that he held as trustee for himself and his wife jointly. In my opinion the evidence taken as a whole far from rebutting that presumption supports it.

For the reasons given by the Chief Justice and those briefly stated above I would dispose of the appeal as proposed by the Chief Justice.

The judgment of Martland and Ritchie JJ. was delivered by

MARTLAND J:—I agree with the reasons given by my brother Judson and with his proposed disposition of this appeal.

There is also a further point which I consider to be important. The property in question here was a substantial area of suburban land, with possibilities for a considerable appreciation in value, but suitable, at the time of purchase, for operation as a small farm or market garden. At that time there was no house on the property. The appellant rented the land to a tenant for five years and later operated the farm, as such, in his spare time. No question of a matrimonial home arose until two years after the purchase of the land, when the appellant decided to build a house with the assistance available to him under the *Veterans' Land Act*. I regard this, as did the dissenting judgment in the Court of Appeal, as a business venture by the appellant for speculative purposes, with the added advantage that it was suitable for the building of a house on part of it.

On this ground alone it does not appear to me that any principle applicable to a matrimonial home which may be derived from cases such as *Rimmer v. Rimmer*[1], would properly be applicable to the circumstances of this case.

The judgment of Judson and Ritchie JJ. was delivered by

JUDSON J.:—The only remaining issue in this litigation between husband and wife relates to the ownership of a twenty-acre parcel of land in the Township of Scarborough. The husband bought this property as vacant land in 1945, for $1,940 and took the conveyance in his own name. With

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

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the assistance of a loan obtained by him under the *Veterans' Land Act* he had a house built on a two-acre lot within the parcel. The house was completed in 1951. In 1954 he sold all the land, with the exception of the house and two-acre lot, for $40,000. In 1957 the wife issued a writ for alimony, support for an infant child and a declaration that she was the sole owner of the property and entitled to all the proceeds of the sale. The learned trial judge dismissed her claim to the property on the ground that she had made no financial contribution to its purchase. The Court of Appeal held that she was entitled to a one-half interest in the property and the proceeds of the sale. The husband now appeals. The claim for alimony was dismissed both at trial and on appeal. The matter of custody and support of the child was settled.

There is a full analysis of the evidence in the reasons of the learned trial judge and in the reasons delivered in the Court of Appeal. The evidence satisfies me, as it did the learned trial judge and MacKay J.A. (dissenting in the Court of Appeal) that it was the husband who purchased this property with his own money and that there was no intention between the parties either expressed or to be inferred from their conduct and dealings that this property was to be owned jointly.

The wife's claim to a proprietary interest in this property is based first upon what she says was her contribution to the down payment. The total purchase price of $1,940 was to be paid as follows: $100 as a deposit; $1,440 to be secured by a mortgage given back by the purchaser; and the balance of $400, subject to adjustments, to be paid on closing. The husband paid the $100. The wife put $300 into a joint account, which the evidence indicates to have been the husband's account. This is the only deposit which the wife ever made in this account. The wife says that this $300 was her contribution to the purchase of the farm. The husband says that this money was given to him by his wife to reimburse him for moneys that she had taken from this account while he was overseas. This account had originally been in his name but when he went overseas, he put it in their joint names. The wife had the usual allowance for herself and the children and the husband made her, in addition, an assignment from his pay. He says that

while he was overseas he sent certain sums of money for deposit in this joint account with the intention that he should have an emergency fund when he returned. These sums, he said, amounted to $379.74 and particulars are given in the evidence. When he returned from overseas in January 1944, because of domestic trouble, there was only $1.15 in this account. The trial judge accepted the husband's evidence and found that this $300 was not a contribution to the purchase price but was a reimbursement by the wife of these moneys. During the husband's absence overseas, the wife had been working and had kept her savings in her own account. There was ample evidence on which the learned trial judge could find as he did and I do not think that his finding constitutes reversible error.

The husband alone was liable on the mortgage and he paid it off out of his own monies on August 1, 1947. Until 1950 he received all the rents from the land, which was leased to neighbouring farmers. The wife never made any claim to share these rents.

In 1947 the husband applied under the *Veterans' Land Act* for assistance in the construction of a house. As required by the Act, he conveyed to the Director under the Act a parcel containing over two acres on which the house was to be built. The loan was for $6,000, of which $5,400 was for the house and $600 for equipment and stock. Nine progress payments in all were made during the course of building, the first on August 10, 1949, the last on July 17, 1952. Construction of the house began in 1948. The husband's evidence was that in 1949, the progress payments being slow and since he needed money to continue building, he borrowed sums from his wife on the understanding that they would be repaid as soon as possible out of the progress payments. In July and August 1949 the husband received from his wife two cheques, one for $400 and one for $1,000. She says that these cheques were for the purpose of paying off the National Trust mortgage on the purchase price of the farm. This cannot be so because this mortgage had been paid off by the husband two years before. The husband claims that he repaid these cheques by endorsing his progress payments under the *Veterans' Land Act*. He produced cheques totalling $1,545 endorsed by him to his wife and deposited by the wife in her own

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bank account. So far the only possible financial contribution of the wife to the purchase price appears to be the $300, on which the learned trial judge made a finding adverse to the wife.

After 1950 the wife operated the vacant land as a market garden. She got the profits from this operation and also the cheques representing the proceeds of the grain crop for the years 1951 to 1954.

In June 1954 the husband accepted an offer to purchase the farm lands for $40,000, payable $2,000 as a deposit, $20,000 to be secured by a mortgage and the balance in cash on closing. The sale was completed on August 1, 1954; the mortgage in favour of the Director of the *Veterans' Land Act* was paid off, and the husband received a net amount of $12,807.30 on closing. A week after the closing he gave his wife exactly one-half of this sum, namely, $6,403.65. The husband says that this was a gift to the wife because family troubles were beginning and he was anxious to keep the household together. After this, the husband, as sole mortgagee, received and retained all monies payable under the mortgage for a period of two years and, until the institution of the action, the wife never made any claim.

There is also a great mass of evidence about other financial dealings between husband and wife—who purchased certain articles; who provided the money for these purchases; who provided the money for a vacation in Western Canada; how the market garden was operated, and who got the money from this source. It seems to be impossible to expect any married couple to testify with certainty about these matters and the understandings behind them. During the period 1945 to 1955 the marital life of this couple seems to have been free of discord but on a consideration of the whole evidence, the learned trial judge concluded that the financial dealings between the two indicated no proprietary interest in the property on the part of the wife. There was ample evidence on which he could make this finding. The majority judgment of the Court of Appeal does, however, analyse the evidence and come to different conclusions of fact. MacKay J.A., dissenting, also on a detailed analysis of the evidence, came to

the same conclusion as the learned trial judge. In my opinion, this is not a case where the findings of fact of the learned trial judge should have been reversed.

The learned trial judge based his judgment on the obvious principle that where a husband provides the purchase money and takes the conveyance in his own name, he will be the beneficial owner unless the wife can prove that he holds on an express trust for her, either as to the whole or part. Such proof, of course, involves compliance with the Statute of Frauds. He found as a fact that the husband did provide the purchase money and if this finding is supportable, as I think it is, there was no basis for the imposition of a trust.

The Court of Appeal, on the contrary, founded its judgment on its own independent finding that the wife in this case had made some financial contribution as a purchaser to the acquisition of the property and was, in consequence, entitled to a one-half interest in what, in these cases, is commonly referred to as the matrimonial home. The Court, on the basis of its own finding of fact that there was some financial contribution to the purchase price, is really doing what, according to Romer L.J., should be done when he said in *Rimmer v. Rimmer*[1], 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 strangers." This, it seems to me, is a fundamental departure in dealing with disputes between husband and wife about ownership of property and is traceable to its beginning in the dissenting judgment in *Hodinott v. Hodinott*[2]. The dissent was adopted in *Rimmer v. Rimmer, supra; Cobb v. Cobb*[3]; *Silver v. Silver*[4]; *Richards v. Richards*[5] and *Fribance v. Fribance*[6], with the result that, if it is found that the wife makes any contribution to the purchase of the matrimonial home, she is the owner of a one-half interest and not merely of an interest proportionate to her contribution as in *Re Rogers*[7].

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

[1] [1952] 2 All E.R. 863, [1953] 1 Q.B. 63.
[2] [1949] 2 K.B. 406 at 414.
[3] [1955] 2 All E.R. 696.
[4] [1958] 1 All E.R. 523.
[5] [1958] 3 All E.R. 513.
[6] [1957] 1 All E.R. 357.
[7] [1948] 1 All E.R. 328.

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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. 233, in property disputes between husband and wife has not developed in the same way in the common law provinces of Canada as it has in England. There is no hint of it in this Court in *Minaker v. Minaker*[1], and there is an implicit rejection of the existence of any such power in *Carnochan v. Carnochan*[2], 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*[3], 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.*

I would allow the appeal with costs and restore the judgment at trial. The order of the learned trial judge as to costs pursuant to Rule 388 should stand. In the Court of Appeal the order that the husband do pay to the wife

[1] [1949] S.C.R. 397, 1 D.L.R. 801. [2] [1955] S.C.R. 669, 4 D.L.R. 81.
[3] [1959] S.C.R. 702, 19 D.L.R. (2d) 317.

her cash disbursements actually and properly made by her solicitor and attributable to her claim for alimony should stand but beyond this there should be no order as to costs.

Appeal allowed with costs, Kerwin C.J. *and* Cartwright J. *dissenting.*

Solicitors for the defendant, appellant: Whiteacre & Creighton, Toronto.

Solicitor for the plaintiff, respondent: John M. Weekes, Toronto.

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*PRESENT: Locke, Cartwright, Abbott, Martland and Judson JJ.