Supreme Court of Canada
Pettkus v. Becker, [1980] 2 S.C.R. 834
Date: 1980-12-18

Lothar Pettkus *(Defendant) Appellant;*

and

Rosa Becker *(Plaintiff) Respondent.*

1980: June 23; 1980: December 18.

Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Trusts and trustees—Constructive trust or resulting trust—Long standing common law relationship—"Wife" first supported "husband" while he accumulated capital and later helped in construction of home and development of business—Whether or not women entitled to portion of property and assets held exclusively in man's name—Applicability of constructive and resulting trusts to common law relationship.

Appellant, through toil and thrift, developed over the years a successful beekeeping business. He owned two rural Ontario properties, where the business was conducted, and had the proceeds from the sale in 1974 of a third property located in Quebec. Respondent through her labour and earnings, too, contributed substantially to the good fortune of the common enterprise. Although unmarried, appellant and respondent lived as husband and wife from 1955 to 1974, save for a three-month separation in 1972. When the relationship terminated in late 1974, respondent commenced this action seeking a declaration of entitlement to one-half interest in the lands and a share in the beekeeping business.

The trial judge awarded respondent forty beehives without bees, together with $1,500 representing earnings from those hives for 1973 and 1974. The Ontario Court of Appeal varied the judgment at trial by awarding respondent one-half interest in the lands owned by appellant and in the beekeeping business.

Held: The appeal should be dismissed.

Per Laskin C.J. and Dickson, Estey, McIntyre, Chouinard and Lamer JJ.: In the absence of an express or implicit intention to create it, a resulting trust could not be found. Mr. Pettkus and Miss Becker had no express arrangement for sharing economic gain. An intention that a wife should have an interest cannot be implied if her conduct before or after the acquisition of the property is "wholly ambiguous", or its association with the agreement "altogether tenuous". Uncommitted

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to marriage or to a permanent relationship, it would be difficult to ascribe to Mr. Pettkus an intention, express or implied, to share his savings. While Miss Becker said they were to "save together", the truth was that Mr. Pettkus saved at her expense. In the face of the trial judge's explicit finding that common intention was not present and the appellate court's decision not to disturb that finding, this Court would not infer or presume otherwise.

The constructive trust could be applied in this case. The requirements needed to establish unjust enrichment, the principle lying at the heart of the constructive trust, were: an enrichment, a corresponding deprivation and the absence of any juristic reason for the enrichment. It was necessary

not only to determine that one spouse had benefited at the expense of the other and order restitution but also to consider the retention of the benefit to be unjust in the circumstances of the case. The compelling inference from the facts was that Miss Becker believed she had some interest in the farm and that the expectation was reasonable in the circumstances. The first two requirements underlying unjust enrichment were satisfied: Mr. Pettkus had the benefit of 19 years, unpaid labour, while Miss Becker received little or nothing in return. As for the third requirement, where one person in a relationship tantamount to spousal, prejudiced herself in reasonable expectation of receiving an interest in property and the other in the relationship freely accepted benefits conferred by the first person in circumstances he knew or ought to have known of that expectation, it would be unjust to allow the recipient of the benefit to retain it.

The causal connection between the acquisition of the property and corresponding enrichment, necessary for the application of the principle of unjust enrichment, was met in this case. The question of causal connection was really one of fact: was her contribution sufficiently substantial and direct as to entitle her to a portion of the profits realized?

There was not basis for any distinction, in dividing property and assets, between marital relationships and those informal relationships which subsist for a lengthy period. The Court did not create a presumption of equal shares. There was a great difference between directing that there be equal shares for common law spouses, and awarding Miss Becker a share equivalent to the money or money's worth that she contributed over nineteen years. The fact that there was no statutory scheme directing equal division of assets acquired by common

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law spouses was no bar to the availability of an equitable remedy. The extent of interest was to be proportionate to the claimant's contribution, direct or indirect. Where the contributions were unequal, the shares would be unequal.

While the question of conflict of laws was not pleaded, addressed by the Court or counsel or alluded to in argument, it lurked in the background of the case. As the parties were domiciled in Quebec from 1955 until at least August 1971, it was arguable that the laws of Quebec, not Ontario, should govern the rights of the parties. While the Court takes judicial notice of the statutory or other laws prevailing in every province and territory in Canada, even in cases where such statutes or laws may not have been proved in evidence in courts below, the Court does not take judicial notice of the law of another province unless that law has been pleaded in the first instance.

Per Martland and Beetz JJ.: The case was not concerned with the rights of a wife and so was not concerned with matrimonial property. Any recognition by this Court of the right of a court to impose on one party the obligations of a trustee in respect of his property for the benefit of another founded on unjust enrichment would have very wide implications and would involve judicial legislation that would extend substantially the existing law.

The scope of the doctrine of unjust enrichment in English law was somewhat nebulous. It was recognized in claims for the return of money—usually in areas where a fiduciary relationship existed—or in situations where a person, having knowledge of an existing trust acquired the legal title to the trust property.

The adoption of the concept of constructive trust involved an undesirable extension of the law, as so far determined in this Court, for it would clothe judges with a very wide power to apply "palm tree

justice" without the benefit of any guidelines. The only test of what constituted unjust enrichment would be the judge's individual perception of what he considered to be unjust.

The determination of this appeal in respondent's favour could be made in accordance with existing authority and without recourse to the concepts of unjust enrichment and constructive trust.

Per Ritchie J.: The advances made by the plaintiff throughout the period of the relationship between the parties supported the existence of a resulting trust which

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was governed by the legal principles in *Murdoch v. Murdoch* and *Rathwell v. Rathwell.*

Contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household gave rise to a rebuttable presumption that, at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust in favour of the donor to be measured in terms of the value of the contributions so made. When there was a conjugal relationship between the parties the presumption of a resulting trust arose for the benefit of the donor whenever there was evidence of a contribution of money or money's worth having been made by one spouse towards the acquisition of property by the other, and this presumption persisted until the relationship was dissolved unless it was rebutted by "evidence showing some other intention".

The trial judge's opinion was that whatever respondent's motives may have been, her intention in making the contributions was to benefit the appellant and that those contributions were acquiesced in and freely accepted by him to be applied for and towards the maintenance and operation of a joint household. There was, accordingly, support for the existence of a common intention giving rise to a presumption of a resulting trust and certain pejorative remarks made by the trial judge could not be considered as evidence rebutting the presumption to which the contributions made by the respondent gave rise. Several facts recognized by the Court of Appeal—that the parties had lived together as husband and wife, although unmarried, for twenty years, during which time the respondent made possible the appellant's acquisition of the first property by exclusively supporting the household and by working with the appellant to build up the beekeeping business—constituted evidence that the properties and the beekeeping operation were subject to a resulting trust in favour of the respondent.

Rathwell v. Rathwell, [1978] 2 S.C.R. 436; *Murdoch v. Murdoch,* [1975] 1 S.C.R. 423; *Pettitt v. Pettitt,* [1970] A.C. 777; *Gissing v. Gissing,* [1971] A.C. 886; *Fribance v. Fribance,* [1957] 1 All E.R. 357; *Moses v. Macferlan* (1760), 2 Burr. 1005; *The Ruabon Steamship Company, Limited v. The London Assurance,* [1900] A.C. 6; *Cooper v. Cooper* (1888), 13 A.C. 88; *Canadian National Steamship Co. Ltd. v. Watson,* [1939] S.C.R. 11; *Reading v. Attorney General,* [1951] A.C. 507; *Cooke v. Head,* [1972] 2 All E.R. 38, referred to.

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APPEAL from a judgment of the Court of Appeal for Ontario[1], varying a judgment of Chartrand J. Appeal dismissed.

Barry B. Swadron, Q.C., and Susan G. Himel, for the defendant, appellant.

Sidney N. Lederman and G.E. Langlois, for the plaintiff, respondent.

The judgment of Laskin C.J. and Dickson, Estey, McIntyre, Chouinard and Lamer JJ. was delivered by

DICKSON J.—The appellant, Lothar Pettkus, through toil and thrift, developed over the years a successful beekeeping business. He now owns two rural Ontario properties, where the business is conducted, and he has the proceeds from the sale, in 1974, of a third property, located in the Province of Quebec. It is not to his efforts alone, however, that success can be attributed. The respondent, Rosa Becker, through her labour and earnings, contributed substantially to the good fortune of the common enterprise. She lived with Mr. Pettkus from 1955 to 1974, save for a separation in 1972. They were never married. When the relationship sundered in late 1974, Miss Becker commenced this action, in which she sought a declaration of entitlement to a one-half interest in the lands and a share in the beekeeping business.

I

The Facts

Mr. Pettkus and Miss Becker came to Canada from central Europe, separately, as immigrants, in 1954. He had $17 upon arrival. They met in Montreal in 1955. Shortly thereafter, Mr. Pettkus moved in with Miss Becker, on her invitation. She was thirty years old and he was twenty-five. He was earning $75 per week; she was earning $25 to $28 per week, later increased to $67 per week.

A short time after they began living together, Miss Becker expressed the desire that they be married. Mr. Pettkus replied that he might consider marriage after they knew each other better. Thereafter, the question of marriage was not

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raised, though within a few years Mr. Pettkus began to introduce Miss Becker as his wife and to claim her as such for income tax purposes.

From 1955 to 1960 both parties worked for others. Mr. Pettkus supplemented his income by repairing and restoring motor vehicles. Throughout the period Miss Becker paid the rent. She bought the food and clothing and looked after other living expenses. This enabled Mr. Pettkus to save his entire income, which he regularly deposited in a bank account in his name. There was no agreement at any time to share either monies or property placed in his name. The parties lived frugally. Due to their husbandry and parsimonious lifestyle, $12,000 had been saved by 1960 and deposited in Mr. Pettkus' bank account.

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[1] (1978), 87 D.L.R. (3d) 101, (1978), 20 O.R. (2d) 105.

The two travelled to Western Canada in June 1960. Expenses were shared. One of the reasons for the trip was to locate a suitable farm at which to start a beekeeping business. They spent some time working at a beekeeper's farm.

They returned to Montreal, however, in the early autumn of 1960. Miss Becker continued to pay the apartment rent out of her income until October 1960. From then until May 1961, Mr. Pettkus paid rent and household expenses, Miss Becker being jobless. In April 1961, she fell sick and required hospitalization.

In April 1961, they decided to buy a farm at Franklin Centre, Quebec, for $5,000. The purchase money came out of the bank account of Mr. Pettkus. Title was taken in his name. The floor and roof of the farmhouse were in need of repair. Miss Becker used her money to purchase flooring materials and she assisted in laying the floor and installing a bathroom.

For about six months during 1961 Miss Becker received unemployment insurance cheques, the proceeds of which were used to defray household expenses. Through two successive winters she lived in Montreal and earned approximately $100 per

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month as a babysitter. These earnings also went toward household expenses.

After purchasing the farm at Franklin Centre the parties established a beekeeping business. Both worked in the business, making frames for the hives, moving the bees to the orchards of neighbouring farmers in the spring, checking the hives during the summer, bringing in the frames for honey extraction during July and August, and the bees for winter storage in autumn. Receipts from sales of honey were handled by Mr. Pettkus; payments for purchases of bee hives and equipment were made from his bank account.

The physical participation by Miss Becker in the bee operation continued over a period of about fourteen years. She ran the extracting process. She also, for a time, raised a few chickens, pheasants and geese. In 1968, and later, the parties hired others to assist in moving the bees and bringing in the honey. Most of the honey was sold to wholesalers, though Miss Becker sold some from door to door.

In August 1971, with a view to expanding the business a vacant property was purchased in East Hawkesbury, Ontario, at a price of $1,300. The purchase monies were derived from the Franklin Centre

honey operation. Funds to complete the purchase were withdrawn from the bank account of Mr. Pettkus. Title to the newly acquired property was taken in his name.

In 1973 a further property was purchased, in West Hawkesbury, Ontario, in the name of Mr. Pettkus. The price was $5,500. The purchase monies came from the Franklin Centre operation, together with a $1,900 contribution made by Miss Becker, to which I will again later refer. Nineteen seventy-three was a prosperous year, yielding some 65,000 pounds of honey, producing net revenue in excess of $30,000.

In the early 1970's the relationship between the parties began to deteriorate. In 1972 Miss Becker left Mr. Pettkus, allegedly because of mistreatment. She was away for three months. At her departure, Mr. Pettkus threw $3,000 on the floor.

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He told her to take the money, a 1966 Volkswagon, forty beehives containing bees, and "get lost". The beehives represented less than ten percent of the total number of hives then in the business.

Soon thereafter, Mr. Pettkus asked Miss Becker to return. In January, 1973, she agreed, on condition he see a marriage counselor, make a will in her favor and provide her with $500 per year so long as she stayed with him. It was also agreed that Mr. Pettkus would establish a joint bank account for household expenses, in which receipts from retail sales of honey would be deposited. Miss Becker returned; she brought back the car and $1,900 remaining out of the $3,000 she had earlier received. The $1,900 was deposited in Mr. Pettkus' account. She also brought the forty bee hives but the bees had died in the interim.

In February 1974 the parties moved into a house on the West Hawkesbury property, built in part by them and in part by contractors. The money needed for construction came from the honey business, with minimal purchases of materials by Miss Becker.

The relationship continued to deteriorate and on October 4, 1974 Miss Becker againt left, this time permanently, after an incident in which she alleged that she had been beaten and otherwise abused. She took the car and approximately $2,600 in cash, from honey sales. Shortly thereafter the present action was launched.

At trial, Miss Becker was awarded forty beehives, without bees, together with $1,500, representing earnings from those hives for 1973 and 1974.

The Ontario Court of Appeal varied the judgment at trial by awarding Miss Becker a one-half interest in the lands owned by Mr. Pettkus and in the beekeeping business.

II

Resulting Trust

This appeal affords the Court an opportunity to clarify the equivocal state in which the law of

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matrimonial property was left, following *Rathwell v. Rathwell*[2].

Broadly speaking, it may be said that the principles which have guided development of recent Canadian case law are to be found in two decisions of the House of Lords: *Pettitt v. Pettitt*[3] and *Gissing v. Gissing*[4]. In neither judgment does a majority opinion emerge. Though it is not necessary to embark upon a detailed analysis of the two cases, the legacy of *Pettitt* and *Gissing* should be noted. First, the decisions upheld the judicial quest for that fugitive common intention which must be proved in order to establish beneficial entitlement to matrimonial property. Second, the Law Lords did not feel free to ascribe or impute an intention to the parties, not supported by evidence, in order to achieve "equity" in the division of assets of partners to a marriage. Third, in *Gissing* four of the Law Lords spoke of "implied, constructive or resulting trust" without distinction.

A majority of the Court in *Murdoch v. Murdoch*[5] adopted the "common intention" concept of Lord Diplock in *Gissing:*

> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cakes where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other. [p. 438]

In *Murdock,* it was held that there was no evidence of common intention. In *Rathwell, supra* common intention was held to exist. Although the notion of common intention was endorsed in *Murdoch* and in *Rathwell,* many difficulties, chronicled in the cases and in the legal literature on the

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[2] [1978] 2 S.C.R. 436.
[3] [1970] A.C. 777.
[4] [1971] A.C. 886.
[5] [1975] 1 S.C.R. 423.

subject, inhered in the application of the doctrine in matrimonial property disputes. The sought-for "common intention" is rarely, if ever, express; the courts must glean 'phantom intent' from the conduct of the parties. The most relevant conduct is that pertaining to the financial arrangements in the acquisition of property. Failing evidence of direct contribution by a spouse, there may be evidence of indirect benefits conferred: where, for example, one partner pays for the necessaries while the other retires the mortgage loan over a period of years, *Fribance v. Fribance*[6].

The artificiality of the common intention approach has been stressed. Professor Donovan Waters in a comment in (1975), 53 Can. Bar Rev. 366 stated:

> In other words, this "discovery" of an implied common intention prior to the acquisition is in many cases a mere vehicle or formula for giving the wife a just and equitable share in the disputed asset. It is in fact a constructive trust approach masquerading as a resulting trust approach, [at p. 368]

Professor Waters also observed, in a discussion of the resulting trust and constructive trust doctrines:

> After all, in few cases will the inferring of an agreement be impossible or unreasonable, and, where it is so, justice and equity may well come to the same conclusion as that produced by the law of resulting trusts. But too often the resulting trust theory produces a result at odds with what would seem the more desirable outcome, or there is a fight through the appeal courts, and then what may well be difference of judicial opinion on the factual merits becomes a difference on the subtleties of the law of trusts, [at p. 377]

In *Murdoch v. Murdoch,* Laskin J., as he was then, introduced in a matrimonial property dispute the concept of constructive trust to prevent unjust enrichment. It is imposed without reference to intention to create a trust, and its purpose is to remedy a result otherwise unjust. It is a broad and flexible equitable tool which permits courts to gauge all the circumstances of the case, including

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the respective contributions of the parties, and to determine beneficial entitlement. It was described this way in *Rathwell,* at p. 455:

> The constructive trust, as so envisaged, comprehends the imposition of trust machinery by the court in order to achieve a result consonant with good conscience. As a matter of principle, the court will not allow any man unjustly to appropriate to himself the value earned by the labours of another. That principle is not defeated by the existence of a matrimonial relationship between the parties; but, for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment.

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[6] [1957] 1 All E.R. 357.

Although the resulting trust approach will often afford a wife the relief she seeks, the resulting trust is not available, as Professor Waters points out, (at p. 374): "where the imputation of intention is impossible or unreasonable". One cannot imply an intention that the wife should have an interest if her conduct before or after the acquisition of the property is "wholly ambiguous", or its association with the alleged agreement "altogether tenuous". Where evidence is inconsistent with resulting trust, the court has the choice of denying a remedy or accepting the constructive trust.

Turning then to the present case and common intention, the evidence is clear that Mr. Pettkus and Miss Becker had no express arrangement for sharing economic gain. She conceded there was no specific arrangement with respect to the use of her money. She said "No, we just saved together. It was meant to be together, it was ours". The arrangement "was without saying anything… there was nothing talked over…". She testified she was not interested in the amount Mr. Pettkus had in the bank. In response to the question "but he never told that what he was saving was yours?" she replied: "I never asked".

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It is apparent Mr. Pettkus took a negative view of Miss Becker's entitlement. His testimony makes it clear that he never regarded her as his wife. The finances of each were completely separate, except for the joint account opened for the retail sales of honey. Mr. Pettkus was asked in cross-examination: "you both saved together?", and replied: "I saved, she didn't". Uncommitted to marriage or to a permanent relationship it would be difficult to ascribe to Mr. Pettkus an intention, express or implied, to share his savings. Miss Becker said they were to "save together" but the truth is that Mr. Pettkus saved at the expense of Miss Becker.

With respect to the period from 1955 until the spring of 1961, the trial judge found:

> Now the Plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the Plaintiff paying the living expenses and the Defendant doing the saving. I am sure that the Plaintiff wouldn't have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger Defendant into marriage.
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> Moreover, the evidence does not clearly show that from 1955 to May, 1961, the Plaintiff contributed more than the Defendant to the overall expenses of the household, so that I find that the $12,000 accumulated by the Defendant was due to his superior salary, his frugal living and his off job gains from repairs. It is to be noted that the Plaintiff made also some savings. [Emphasis added.]

Whatever the passage may lack in point of gallantry, the words underlined represent findings of fact by the trial judge, negating common intention.

As to the contribution by Miss Becker to the beekeeping business, the trial judge found:

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> As the honey business is a seasonal one, the Defendant continued his side line, repairs of German cars but both businesses were not enough sometimes to keep the household solvent so that the Plaintiff had to work outside a few times. I also find that during that period the Plaintiff helped the Defendant to a certain degree in the operation of the honey business, especially during the extracting period but such help was seasonal and marginal as the Defendant employed outside help in the peak periods.

The trial judge dealt with Miss Becker's claim to a part interest in the Ontario properties, for the 1971 to 1974 period, in the following manner:

> The Plaintiff alleges that those sums came from the Franklin Centre honey operation and claims a part interest in those Ontario properties on account of her active participation in the honey business. Once again, it would never have occurred to the Plaintiff to make such a claim explicitly at the time because such a trust wasn't in the contemplation of either party, even implicitly. [Emphasis added.]

Again there is a rejection of the notion of implied intention and resulting trust. At trial, Mr. Pettkus testified:

> Q. All right. Now did you ever have any discussions with her as to whether or not she had an interest in either your garage business or your bee business?
>
> A. It was all mine. She had no interest in the business, no.
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> Q. Did she ever suggest that she did?
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> A. No.

With regard to the arrangement under which Miss Becker was to receive $500 per year, Mr. Pettkus testified:

> A. Well, I knew the whole business is in my name and she has nothing so I figured it's only fair to give her a little bit of money and Î figured the five hundred dollars, pay for all the expenses and she would have five hundred dollars every year as long as she stayed with me and if there's a good crop if there's no crop well of course I can't pay.

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In the view of the Ontario Court of Appeal, speaking through Madam Justice Wilson, the trial judge vastly underrated the contribution made by Miss Becker over the years. She had made possible the acquisition of the Franklin Centre property and she had worked side by side with him for fourteen years building up the beekeeping operation.

The trial judge held there was no common intention, either express or implied. It is important to note that the Ontario Court of Appeal did not overrule that finding.

I am not prepared to infer, or presume, common intention when the trial judge has made an explicit finding to the contrary and the appellate court has not disturbed the finding. Accordingly, I am of the view that Miss Becker's claim grounded upon resulting trust must fail. If she is to succeed at all, constructive trust emerges as the sole juridical foundation for her claim.

III

Constructive Trust

The principle of unjust enrichment lies at the heart of the constructive trust. "Unjust enrichment" has played a role in Anglo-American legal writing for centuries. Lord Mansfield, in the case of *Moses v. Macferlan*[7] put the matter in these words: "…the gist of this kind of action is, that the defendant, upon the circumstances of the case, is *obliged by the ties of natural justice and equity to refund* the money". It would be undesirable, and indeed impossible, to attempt to define all the circumstances in which an unjust enrichment might arise. (See A.W. Scott, "Constructive Trusts", (1955), 71 L.Q.R. 39; Leonard Pollock, "Matrimonial Property and Trusts: The Situation from Murdoch to Rathwell", (1978), 16 Alberta Law Review 357). The great advantage of ancient principles of equity is their flexibility: the judiciary is thus able to shape these malleable principles so

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as to accommodate the changing needs and mores of society, in order to achieve justice. The constructive trust has proven to be a useful tool in the judicial armoury. See *Babrociak v. Babrociak*[8]*; Re Spears and Levy et al.*[9]*; Douglas v. Guaranty Trust Company of Canada*[10]*; Armstrong v. Armstrong*[11].

How then does one approach the question of unjust enrichment in matrimonial causes? In *Rathwell* I ventured to suggest there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and absence of any juristic reason for the enrichment. This approach, it seems to me, is supported by general principles of equity that have been

[7] (1760), 2 Burr. 1005.
[8] (1978), 1 R.F.L. (2d) 95 (Ont. C.A.).
[9] (1975), 52 D.L.R. (3d) 146 (N.S.C.A.).
[10] (1978), 8 R.F.L. (2d) 98 (Ont. H.C.).
[11] (1978), 93 D.L.R. (3d) 128 (Ont. H.C.).

fashioned by the courts for centuries, though, admittedly, not in the context of matrimonial property controversies.

The common law has never been willing to compensate a plaintiff on the sole basis that his actions have benefited another. Lord Halsbury scotched this heresy in the case of *The Ruabon Steamship Company, Limited v. London Assurance*[12] with these words: "…I cannot understand how it can be asserted that it is part of the common law that where one person gets some advantage from the act of another a right of contribution towards the expense from that act arises on behalf of the person who has done it." (p. 10) Lord Macnaghten, in the same case, put it this way: "there is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it", (p. 15) It is not enough for the court simply to determine that one spouse has benefited at the hands of another and then to require restitution. It must, in addition, be evident that the retention of the benefit would be "unjust" in the circumstances of the case.

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Miss Becker supported Mr. Pettkus for 5 years. She then worked on the farm for about 14 years. The compelling inference from the facts is that she believed she had some interest in the farm and that that expectation was reasonable in the circumstances. Mr. Pettkus would seem to have recognized in Miss Becker some property interest, through the payment to her of compensation, however modest. There is no evidence to indicate that he ever informed her that all her work performed over the nineteen years was being performed on a gratuitous basis. He freely accepted the benefits conferred upon him through her financial support and her labour.

On these facts, the first two requirements laid down in *Rathwell* have clearly been satisfied: Mr. Pettkus has had the benefit of nineteen years of unpaid labour, while Miss Becker has received little or nothing in return. As for the third requirement, I hold that where one person in a relationship tantamount to spousal prejudices herself in the reasonable expectation of receiving an interest in property and the other person in the relationship freely accepts benefits conferred by the first person in circumstances where he knows or ought to have known of that reasonable expectation, it would be unjust to allow the recipient of the benefit to retain it.

I conclude, consonant with the judgment of the Court of Appeal, that this is a case for the application of constructive trust. As Madam Justice Wilson noted, "the parties lived together as husband and wife, although unmarried for almost twenty years during which period she not only made possible the

acquisition of their first property in Franklin Centre during the lean years, but worked side by side with him for fourteen years building up the beekeeping operation which was their main source of livelihood".

Madam Justice Wilson had no difficulty in finding that a constructive trust arose in favour of the respondent by virtue of "joint effort" and "teamwork", as a result of which Mr. Pettkus was able to acquire the Franklin Centre property, and subsequently the East Hawkesbury and West Hawkesbury properties. The Ontario Court of

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Appeal imposed the constructive trust in the interests of justice and, with respect, I would do the same.

IV

The "Common Law" Relationship

One question which must be addressed is whether a constructive trust can be established having regard to what is frequently, and euphemistically, referred to as a "common law" relationship. The purpose of constructive trust is to redress situations which would otherwise denote unjust enrichment. In principle, there is no reason not to apply the doctrine to common law relationships. It is worth noting that counsel for Mr. Pettkus, and I think correctly, did not, in this Court, raise the common law relationship in defence of the claim of Miss Becker, otherwise than by reference to *The Family Law Reform Act, 1978,* 1978 (Ont.) c. 2.

Courts in other jurisdictions have not regarded the absence of a marital bond as any problem. See *Cooke v. Head*[13]*; Eves v. Eves*[14]*; Spears v. Levy, supra;* and in the United States, *Marvin v. Marvin*[15] and a comment thereon (1977), 90 Harv. L.R. 1708. In *Marvin* the Supreme Court of California stated that constructive trust was available to give effect to the reasonable expectations of the parties, and to the notion that unmarried co-habitants intend to deal fairly with each other.

I see no basis for any distinction, in dividing property and assets, between marital relationships and those more informal relationships which subsist for a lengthy period. This was not an economic partnership nor a mere business relationship, nor a casual encounter. Mr. Pettkus and Miss Becker lived

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[12] [1900] A.C. 6.
[13] [1972] 2 All E.R. 38.
[14] [1975] 3 All E.R. 768.
[15] (1976), 557 P. 2d 106.

as man and wife for almost twenty years. Their lives and their economic well-being were fully integrated. The equitable principle on which the remedy of constructive trust rests is broad and

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general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs.

In recent years, there has been much statutory reform in the area of family law and matrimonial property. Counsel for Mr. Pettkus correctly points out that *The Family Law Reform Act, 1978,* of Ontario, enacted after the present litigation was initiated, does not extend the presumption of equal sharing, which now applies between married persons, to common law spouses. The argument is made that the courts should not develop equitable remedies that are 'contrary to current legislative intent'. The rejoinder is that legislation was unnecessary to cover these facts, for a remedy was always available in equity for property division between unmarried individuals contributing to the acquisition of assets. The effect of the legislation is to divide 'family assets' equally, regardless of contribution, as a matter of course. The Court is not here creating a presumption of equal shares. There is a great difference between directing that there be equal shares for common law spouses, and awarding Miss Becker a share equivalent to the money or money's worth she contributed over some nineteen years. The fact there is no statutory regime directing equal division of assets acquired by common law spouses is no bar to the availability of an equitable remedy in the present circumstances.

V

Settlement or Estoppel

Another question argued is whether acceptance by Miss Becker of $3,000, forty beehives and a car, upon temporary separation, and the imposition of terms on her return, estopped further claim. The trial judge answered this question in the affirmative. With respect, I think that he was wrong in so holding. A person is not estopped by accepting a sum of money, the amount of which is not negotiated, thrown at one's feet. There was no agreement by Miss Becker as to her interest in what I would regard as joint assets, nor can the conditions exacted by Miss Becker upon resumption of

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cohabitation be any bar to her claim. The filing by Mrs. Rathwell in *Rathwell, supra,* of a caveat claiming a one-tenth interest was held to be no basis for rejecting her claim to share equally in assets accumulated by her and her husband.

VI

Causal Connection

The matter of "causal connection" was also raised in defence of Miss Becker's claim, but does not present any great difficulty. There is a clear link between the contribution and the disputed assets. The contribution of Miss Becker was such as enabled, or assisted in enabling, Mr. Pettkus to acquire the assets in contention. For the unjust enrichment principle to apply it is obvious that some connection must be shown between the acquisition of property and corresponding deprivation. On the facts of this case, that test was met. The indirect contribution of money and the direct contribution of labour is clearly linked to the acquisition of property, the beneficial ownership of which is in dispute. Miss Becker indirectly contributed to the acquisition of the Franklin Centre farm by making possible an accelerated rate of saving by Mr. Pettkus. The question is really an issue of fact: was her contribution sufficiently substantial and direct as to entitle her to a portion of the profits realized upon sale of the Franklin Centre property and to an interest in the Hawkesbury properties, and the beekeeping business? The Ontario Court of Appeal answered this question in the affirmative, and I would agree.

VII

Respective Proportions

Although equity is said to favour equality, as stated in *Rathwell* it is not every contribution which will entitle a spouse to a one-half interest in the property. The extent of the interest must be proportionate to the contribution, direct or indi-

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rect, of the claimant. Where the contributions are unequal, the shares will be unequal.

It could be argued that Mr. Pettkus contributed somewhat more to the material fortunes of the joint enterprise than Miss Becker but it must be recognized that each started with nothing; each worked continuously, unremittingly and sedulously in the joint effort. Physically, Miss Becker pulled her fair share of the load; weighing only 87 pounds, she assisted in moving hives weighing 80 pounds. Any difference in quality or quantum of contribution was small. The Ontario Court of Appeal in its discretion favoured an even division and I would not alter that disposition, other than to note that in any accounting regard should be had to the $2,600, and the car, which Miss Becker received on separation in 1974.

VIII

I would not wish to conclude without reference to the conflict of laws question lurking in the background in this case. The evidence discloses that the parties were domiciled in the Province of Quebec from 1955 until at least August 1971, when vacant property was purchased in East Hawkesbury, Ontario. It is arguable that the laws of the Province of Quebec, and not those of Ontario, should govern the rights of the parties. This point was not pleaded, nor was it addressed by court or counsel in any of the earlier proceedings. It was not alluded to during argument in this Court.

The position in law would seem to me to be as stated by Professor Jean Castel, in *Droit international privé québécois* (Butterworths, 1980, pp. 803-4). Although, before an inferior court, the law of another province in Canada has to be proven in the same manner as the law of a foreign country, that rule does not have application in an appeal to this Court. This Court follows the rule drawn by the House of Lords in the case of Cooper *v.* Cooper[16] and takes judicial notice of the statutory

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or other laws prevailing in every province and territory in Canada even in cases where such statutes or laws may not have been proved in evidence in the courts below. This Court however, does not take judicial notice of the law of another province unless that law has been pleaded in the first instance. As Cannon J. held in *Canadian National Steamship Co. Ltd. v. Watson*[17] at p. 18 it would be unfair for this Court to take, *suo motu*, judicial notice of the statutory laws of another province, ignored in the pleadings.

I would dismiss the appeal with costs to the respondent.

The following are the reasons delivered by

MARTLAND J.—I am in agreement with the reasons of Mr. Justice Ritchie. I would like to outline my reasons for my concurrence with his opinion as to the application of the theory of a constructive trust in the circumstances of this case.

This is the third case to come before this Court in which a claim has been made for the recognition of an interest in what is claimed to be “family property”. In the first two cases, the claim was made by a wife as against her husband. In the present case the claimant is not the wife of the defendant.

[16] (1888), 13 A.C. 88 (H.L.).
[17] [1939] S.C.R. 11.

In *Murdoch v. Murdoch*[18] the wife claimed a partnership interest in three quarters sections of land and in all the other assets of her husband. The trial judge held that the parties were not partners and also held that no relationship existed which would give the plaintiff the right to claim as a joint owner in equity any of the farm assets. Before this Court, the wife's claim was placed, not on the basis of partnership, but on the existence of a resulting trust. In rejecting the wife's claim, the majority of the Court referred to the two leading English authorities, *Pettitt v. Pettitt*[19] and *Gissing v. Gissing*[20], and also pointed out that in those

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cases the wife's claim related only to the matrimonial home. The following passages were cited with approval from the judgment of Lord Diplock in the latter case at pp. 905 and 909:

> A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land.
>
> …
>
> Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other.

The conclusion reached was that in the light of the evidence in the case and the findings of the trial judge it could not be said that there was any intention that the beneficial interest in the property in issue did not belong solely to the husband.

The majority of the Court did not adopt the opinion expressed in the dissenting judgment that the court could find a constructive trust, not dependent upon evidence of intention.

In *Rathwell v. Rathwell*[21], this Court was again concerned with a claim by a wife to a beneficial

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[18] [1975] 1 S.C.R. 423.
[19] [1970] A.C. 777.
[20] [1971] A.C. 886.
[21] [1978] 2 S.C.R. 436.

interest in land, the legal ownership of which was in the husband and such interest was found, on the evidence, to exist. Three members of the Court were of the view that the claim could be supported on the basis of either a resulting trust, founded upon common intention, or a constructive trust, founded upon unjust enrichment. Two members of the Court decided that a resulting trust had been established and that a decision as to the application of the principles of unjust enrichment and constructive trust was unnecessary. Four members of the Court rejected the application, in cases of this kind, of the doctrine of a constructive trust as a means of preventing unjust enrichment. The reasons for so deciding are to be found at pages 471 to 474 of the report, and it is unnecessary to repeat them here.

As pointed out earlier, the present case is not concerned with the rights of a wife and so is not concerned with matrimonial property. Any recognition by this Court of the right of a court to impose on one party the obligations of a trustee in respect of his property for the benefit of another founded on unjust enrichment has very wide implications and involves judicial legislation in that it extends substantially the existing law.

The scope of the doctrine of unjust enrichment in English law is somewhat nebulous. The broad statement of Lord Mansfield in the case of *Moses v. Macferlan*[22] was made in relation to an action for money had and received to the plaintiff's use. It was in this context that he said: "The gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by ties of natural justice and equity to refund the money".

Later decisions did not support the generality of this statement but held that the action for money had and received had to be placed on a contractual basis founded upon an implied promise to pay. Scrutton L.J. in *Holt v. Markham*[23] at p. 513, referred to the "now discarded doctrine of Lord

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Mansfield". Lord Greene in *Morgan v. Ashcroft*[24], at p. 62, said that: "Lord Mansfield's view upon those matters, attractive though they be, cannot now be accepted as laying the true foundation of the claim".

Although Lord Wright in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ld.*[25] at p. 62 expressed sympathy with Lord Mansfield's view, it may be noted that some years later in *Reading v. Attorney-General*[26] at pp. 513-14, Lord Porter said:

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[22] (1760), 2 Burr. 1005.
[23] [1923] 1 K.B. 504.
[24] [1938] 1 K.B. 49.

> It was suggested in argument that the learned judge founded his decision solely upon the doctrine of unjust enrichment and that that doctrine was not recognized by the law of England. My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated.

In the *Pettitt (supra)* case, at p. 795, Lord Reid dealt with the theory of unjust enrichment as follows:

> Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to be any English case of the doctrine being applied where one person has improved the property of another. And in any case it would only result in a money claim whereas what a spouse who makes an improvement is seeking is generally a beneficial interest in the property which has been improved.

He did not suggest that in that case recognition of the beneficial interest could be effected by means of a constructive trust.

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It would appear that in English law the existence of an unjust enrichment has been recognized in claims for the return of money, which was the case in *Moses v. Macferlan (supra)* in which Lord Mansfield's statement was made.

I turn now to the nature of a constructive trust as so far recognized. The areas in which a constructive trust has been found to exist have usually been in cases where a fiduciary relationship exists, *e.g.* a trustee or fiduciary taking advantage of his position to make a profit for himself. Such a trust has also been found to exist where a person having knowledge of an existing trust acquires the legal title to the trust property. In relation to the matter of unjust enrichment, the following passage appears in Snell's *Principles of Equity,* 27th ed., at p. 186:

> In some jurisdictions the constructive trust has come to be treated as a remedy for many cases of unjust enrichment; whenever the court considers that the property in question ought to be restored, it simply imposes a constructive trust on the recipient. In England, however, the constructive trust has in general remained essentially a substantive institution; ownership must not be confused with obligation, nor must the relationship of debtor and creditor be converted into one of trustee and *cestui que trust.* Yet the attitude of the courts may be changing; and although the constructive trust is probably not confined to cases arising out of a fiduciary relationship, it is far from clear what other circumstances suffice to raise it or how far it can be employed as a species of equitable remedy to enforce legal rights.

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[25] [1943] A.C. 32.
[26] [1951] A.C. 507.

The authority for the statement "the attitude of the courts may be changing" is given in the case of *Hussey v. Palmer*[27]. In that case, the plaintiff went to live with her daughter and son-in-law and paid the cost of adding an extra bedroom to their house. The arrangement did not work and the plaintiff left. She sued to recover the money she had expended. In the Court of Appeal, Lord Denning found there was a constructive trust. Phillimore L.J. regarded the matter as a resulting trust and

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Cairns L.J. dissented.

The validity of the judgment is questionable as indicated in the discussion of it in (1973), 89 L.Q.R. 2. Lord Denning, at p. 1290, referred to a constructive trust as a "trust imposed by law whenever justice and good conscience require it". Commenting on this generalization, the note in the *Law Quarterly Review* says, at p. 4:

> These large generalisations will be more familiar to American than English lawyers. This applies especially to the notion that resulting and constructive trusts run together and the amalgam is an equitable remedy: see *e.g.* A.W. Scott (1955) 71 L.Q.R. 39. Indeed, even those writers who have some sympathy with the notion do not suggest that it is already part of English law: see Hanbury's *Modern Equity* (9th ed. 1969) at pp. 222, 223; Goff & Jones, *Restitution* (1966) at p. 37.

In my opinion, the adoption of this concept involves an extension of the law as so far determined in this Court. Such an extension is, in my view, undesirable. It would clothe judges with a very wide power to apply what has been described as "palm tree justice" without the benefit of any guidelines. By what test is a judge to determine what constitutes unjust enrichment? The only test would be his individual perception of what he considered to be unjust.

As stated in the reasons of my brother Ritchie, the determination of this appeal in the respondent's favour can be made in accordance with existing authority and without recourse to the concepts of unjust enrichment and constructive trust.

The following are the reasons delivered by

RITCHIE J.—I have had the benefit of reading the reasons for judgment prepared for delivery by my brother Dickson which contain an accurate account of the facts giving rise to this appeal.

I agree with the conclusion reached by Mr. Justice Dickson, but as my reasons for doing so are

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[27] [1972] 1 W.L.R. 1286.

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substantially different from those adopted by him, I find it necessary to express myself separately.

The difference between us stems from the fact that I find that the advances made by the plaintiff throughout the period of the relationship between the parties to be such as to support the existence of a resulting trust which is governed by the legal principles adopted by the majority of this Court in *Murdoch v. Murdoch*[28] and *Rathwell v. Rathwell*[29], whereas Mr. Justice Dickson, in applying the reasoning contained in the dissenting opinions in those cases to the evidence as he interpreted it, concluded that the circumstances disclosed the existence of a constructive trust arising out of and dependant upon the applicability of the doctrine of "unjust enrichment".

The leading cases of *Pettitt v. Pettitt*[30] and *Gissing v. Gissing*[31] afford a comprehensive though not entirely consistent review of the law respecting the disposition to be made of matrimonial property in the event of a marital break-up and it is made plain from the judgment of Lord Denning in *Cooke v. Head*[32] at p. 40 that the same considerations apply in the case of a man and his mistress who had been living in what is now frequently referred to as a "common law" relationship.

I should make it plain at the outset that in my opinion contributions made by one spouse and freely accepted by the other for use in the acquisition and operation of a common household give rise to a rebuttable presumption that, at the time when the contributions were made and accepted, the parties both intended that there would be a resulting trust in favour of the donor to be measured in terms of the value of the contributions so made. This opinion appears to me to be borne out in the following passage taken from the reasons for judgment of Lord Pearson in *Gissing v. Gissing*, *supra*, at p. 902 where he said:

> If the respondent's claim is to be valid, I think it must be on the basis that by virtue of contributions made by

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> her towards the purchase of the house there was and is a resulting trust in her favour. If she did make contributions of substantial amount towards the purchase of the house, there would prima facie be a resulting trust in her favour. That would be the presumption as to the intention of the parties at the time or times when she made and he accepted the contributions. The presumption is a rebuttable presumption: it can be rebutted by evidence showing some other intention. The

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[28] [1975] 1 S.C.R. 423.
[29] [1978] 2 S.C.R. 436.
[30] [1970] A.C. 777.
[31] [1971] A.C. 886.
[32] [1972] 2 All E.R. 38.

> question as to what was the intention is a question of fact to be decided by the jury if there is one or, if not, by the judge acting as a jury.

The same proposition is elaborated in the reasons for judgment of Lord Reid, speaking for himself, in the case of *Pettitt v. Pettitt, supra,* where he said at p. 795:

> But it is, I think, proper to consider whether, without departing from the principles of the common law, we can give effect to the view that, even where there was in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one spouse towards the acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other? I do not think that it is a very convincing argument to say that, if a stranger makes improvements on the property of another without any agreement or any request by that other that he should do so, he acquires no right. The improvement is made for the common enjoyment of both spouses during the marriage. It would no doubt be different if the one spouse makes the improvement while the other spouse who owns the property is absent and without his knowledge or consent. But if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position, I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right.
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> Some reference was made to the doctrine of unjust enrichment. I do not think that that helps. The term has been applied to cases where a person who has paid money sues for its return. But there does not appear to

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> be any English case of the doctrine being applied where one person has improved the property of another.

It will be seen that in the case of *Gissing v. Gissing, supra,* four of the law Lords spoke of "implied constructive or resulting trusts" without any apparent distinction and this is to be found in other English authorities, but it is nevertheless noteworthy that when there is a conjugal relationship between the parties the presumption of a resulting trust arises for the benefit of the donor wherever there is evidence of a contribution of money or money's worth having been made by one spouse towards the acquisition of property by the other, and this presumption persists until the relationship is dissolved unless it is rebutted by "evidence showing some other intention".

It is contended on behalf of the appellant that the five-year difference in age between the parties constituted evidence justifying the learned trial judge in making the following finding:

> Now, the Plaintiff claims a share in the said farm on the ground that at the beginning of their relationship they had implicitly agreed to carry on a common enterprise, the Plaintiff paying the

> living expenses and the Defendant doing the saving. I am sure that the Plaintiff wouldn't have voiced such a proposition explicitly at the time, bent as she was on marriage, for fear of scaring away a prospective husband. I find that her contribution to the household expenses during the first few years of their relationship was in the nature of risk capital invested in the hope of seducing a younger Defendant into marriage.

With the greatest respect for those who take a different view, I cannot but find that this gratuitously insulting conclusion is based upon the trial judge's opinion that, whatever her motives may have been, the respondent's intention in making the contributions was to benefit the appellant and it is clear that they were acquiesced in and indeed freely accepted by him to be applied for and towards the maintenance and operation of a joint household. Accordingly, the last quoted comments of the trial judge in my view support the existence of a common intention giving rise to a presumption of a resulting trust and nothing said by him in this

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paragraph can be considered as evidence rebutting the presumption to which the contributions made by the respondent give rise.

In the latter part of his reasons for judgment the learned trial judge made a further finding to the effect that a trust entitling the respondent to a part interest in the Ontario farm properties "was not in the contemplation of either party even implicitly".

My brother Dickson has made a finding that "The trial judge held there was no common intention, either expressed or implied. It is important to note that the Ontario Court of Appeal did not overrule that finding".

For my part, however, I would adopt the following paragraph from the judgment of Wilson J.A. in the Court of Appeal:

> With all due respect to the learned trial judge I think he vastly underrated the contribution the appellant made to the acquisition of the assets held in the respondent's name. The parties lived together as husband and wife, although unmarried, for almost twenty years during which period she not only made possible the acquisition of their first property in Franklin Centre by supporting them both exclusively from her income during 'the lean years', but worked side by side with him for fourteen years building up the bee-keeping operation which was their main source of livelihood. The respondent did not deny that she supported him for the first five or six years of their lives together while he put away all his earnings in the bank.

In my view these findings constitute evidence that the Hawkesbury properties and the beekeeping operation were subject to a resulting trust in favour of the respondent and I do not find it necessary to

import the doctrine of “unjust enrichment” from the law of quasi contract in order to dispose of this appeal.

As to the share to which the respondent is entitled upon the dissolution of the relationship, I am, like my brother Dickson, in accord with the disposition made of the matter by the Court of Appeal.

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As I reach the same conclusion as my brother Dickson, it may be thought that these reasons are somewhat superfluous but I find myself unable to subscribe to the application of the doctrine of constructive trusts under the circumstances here disclosed and I wish to disassociate myself with any suggestion in conformity with the trial judge’s bitter criticism of the respondent.

In view of all the above, I would dismiss this appeal with costs to the respondent.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Barry B. Swadron and Susan G. Himel, Toronto.

Solicitors for the plaintiff respondent: Langlois & Wilkins, Hawkesbury.