the Assessment Act.[10] It is, however, clear that such pensions paid during the period 1 July 1976 and 21 April 1977 (for which assessments would not normally be issued until after 30 June 1977) will be treated by the Commissioner as exempt from tax, but that pensions paid after 21 April 1977 will, of course, be taxable in accordance with the amendment made by section 4 of Act No. 57 of 1977.

While, therefore, Fred Goodfellow has been rewarded for his perseverance in pursuing his case to the highest judicial authority in the land by a decision of that authority in his favour, the decision will be of limited benefit to him because of the subsequent amendments of section 23AD, and even more so, it seems, for other recipients of D.F.R.B. and D.F.R.D.B. invalidity pensions, because of the operation of section 170 of the Assessment Act.

K. T. ALLEN*

IN THE MARRIAGE OF McCARNEY AND McCARNEY;[1] IN THE MARRIAGE OF READ AND READ[2]

Family Law Act — Ss. 4(1)(ca), (e); 114(1), (3) — Extent of injunction power — Extent of property power — How to reconcile injunction and property power — No proceedings for principal relief afoot.
Family Law Act — Ss. 113; 118 — Application for declaration of validity — Purpose to confer jurisdiction to make property orders — No doubt as to validity of marriage.

The High Court decision in *Russell* v. *Russell; Farrelly* v. *Farrelly*[3] and the subsequent Family Law Amendment Act 1976 appeared to render unsuccessful the Commonwealth Parliament's attempt to give to courts exercising federal jurisdiction the power to deal with the property rights of the parties to a marriage before the institution of proceedings for principal relief.[4] This power was given to courts administering the Family Law Act 1975 by paragraph (c)(ii) of the definition of "matrimonial cause" in section 4(1); the paragraph which replaced this under the Family Law Amendment Act 1976, paragraph (ca), limits the jurisdiction of the courts to proceedings between the parties to a marriage with respect to the property of either or both of the parties ancillary to concurrent, completed or pending proceedings

[10] Income Tax Assessment Act 1936, s. 170(4), (7).

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[1] (1977) FLC 90-200. Family Court of Australia; Asche, Marshall S.JJ. and Joske J.

[2] (1977) FLC 90-201; (1977) 2 Fam LR 11,596. Family Court of Australia; Watson S.J.

[3] (1976) 9 A.L.R. 103.

[4] Namely, a decree of dissolution or nullity of marriage, or a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage (Family Law Act 1975, s. 4(1)).

for principal relief. It appeared that the effect of this amendment would be generally to preclude a determination of the property rights of the parties according to the tests laid down in sections 78 and 79 of the Family Law Act 1975 until at least twelve months after a marriage had broken down. This could in some cases mean that the provisions of sections 78 and 79 would never be applied to the property of the parties, since the property could be disposed of within that twelve months by the person holding the legal title to it, irrespective of the rights of others which might have been recognised under the Family Law Act 1975.

In recent cases there have been attempts to invoke the jurisdiction of the Family Court with respect to property matters before the parties had been separated for the twelve months required to enable them to file applications for principal relief.

McCarney and McCarney involved an appeal against injunctions granted by Gun J., on the application of a husband, restraining his wife from dealing with her interest in a certain piece of real estate, and from pursuing an action relating to interests in the land in the Supreme Court of South Australia.[5] The Full Court of the Family Court allowed the wife's appeal.

Gun J. had purported to exercise the power to grant injunctions given by section 114(1) of the Family Law Act 1975 in order to preserve for the husband the "right" created by section 79; the "right" protected was the right to have certain specified matters, such as the contributions, both financial and as a homemaker or parent, made by each party to the marriage to the acquisition, conservation or improvement of the property in question, taken into account in the determination of property disputes between the parties to a marriage.[6] The Full Court of the Family Court was therefore required to consider whether the power to grant injunctions extended to such situations.

It may be appropriate at this point to suggest that the wording of the injunctions sought from and granted by Gun J. was perhaps a significant factor in the decision of the Full Court. The second order made by the trial judge restrained the respondent wife from

> continuing with a claim by way of Summons in the Supreme Court of South Australia in its Land and Valuation Division in Action No. L.V.D. 126 of 1976 entitled "Suzanne McCarney, Applicant and Bernard John McCarney, Respondent".

It is submitted that a federal court, whatever the justice of an applicant's cause otherwise, would be properly reluctant to grant or uphold an injunction restraining anyone from proceeding with an action in a State court which had jurisdiction to hear that action. The Full Court, in considering the injunctions granted, said:

> [w]e consider it undesirable that an injunction should ever be framed to restrain a person from proceeding in another court of competent jurisdiction to seek relief to which he is entitled by

[5] (1976) FLC 90-105.
[6] *Id.* (75,492).

> law. While at all times prepared to assist applicants in proper circumstances and within the scope of the Act, this court should avoid making orders in terms which may give the impression of a jurisdictional conflict between judicial bodies.[7]

The possible effect of the wording of the order sought should be borne in mind in considering the Full Court's reasoning.

The problem facing the members of the Full Court was to reconcile the power of the Family Court to deal with property matters, which, as already mentioned, had been limited by *Russell's* case and the Family Law Amendment Act 1976, with the power to grant injunctions under section 114 of the Family Law Act 1975. An application for an injunction in circumstances arising out of the marital relationship is by section 4(1) of the Act a matrimonial cause in respect of which an application may be brought even where there are no proceedings for principal relief. Section 114(1) refers to various injunctions which may be granted in such proceedings, and specifically authorises the granting of injunctions "in relation to the property of a party to the marriage".

The task of the Full Court was in essence to interpret that phrase. In the course of this they referred to several cases dealing with parts of section 114(1).

The use of the injunctive power to settle disputes over the use and occupancy of the matrimonial home was approved by a Full Court of the Family Court in *Davis and Davis.*[8] The Court allowed an appeal against an order giving a wife exclusive occupancy of the matrimonial home, but it was clear that the trial judge had had power to make the order; here he was found not to have exercised his discretion properly.[9] The Court was at pains to point out that although the existence of the power was unquestionable in those circumstances, "different considerations" might apply where an order relating to the property of a party was sought under section 114(1).[10]

More directly relevant to the point at issue were *Mills and Mills,*[11] *Farr and Farr*[12] and *Mazein and Mazein,*[13] all cases decided by single judges of the Family Court who had to consider the meaning of that part of section 114(1) which allows the granting of injunctions "in relation to the property of a party to a marriage".

Mills and Mills involved an application by a wife for an injunction to restrain her husband from selling soil from the 33 acre block of which they were joint tenants and on which the matrimonial home stood. Demack J. refused the application on the grounds that there was no dispute arising out of the marital relationship, but a dispute solely

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[7] (1977) FLC 90-200 (76,058).
[8] (1976) FLC 90-062 (Evatt C.J., Pawley and Ellis JJ.).
[9] *Id.* (75,309).
[10] *Id.* (75,308).
[11] (1976) FLC 90-079.
[12] (1976) FLC 90-133.
[13] (1976) FLC 90-053.

concerning "the rights of joint tenants to the use and enjoyment of their land".[14]

In *Farr and Farr* an application by a husband for the discharge of an injunction restraining him from dealing with the former matrimonial home was refused by Murray J. Although her decision could perhaps have been based on the jurisdiction under section 114(1) to make orders with respect to the use and occupancy of the matrimonial home, she considered the question of jurisdiction to grant injunctions relating to property.[15] Murray J. found that where an application for an injunction arose "out of the marital relationship", which phrase she read as referring to "marital breakdown or marital difficulties", an injunction could be granted as long as it did not *alter* the property rights of the respondent within the meaning of section 79 of the Family Law Act 1975.[16] Adopting the reasoning of Gun J. in *McCarney and McCarney* at first instance,[17] she drew a distinction between *altering* rights and *affecting* or *suspending* them.[18] Only the latter would occur, for instance, when a person was restrained from dealing with his property pending a full determination of the property rights of both parties to the marriage.

In *Mazein and Mazein* a wife sought to restrain the Government Insurance Office from paying to her husband an amount of money in respect of a third party claim. In refusing this order, Pawley J. asserted:

> Section 114 does not confer jurisdiction upon this Court to make an order by way of injunction . . . *in vacuo,* when such order relates to the property interests of the parties. In such a case any order by way of injunction must be in aid of a substantive application in relation to the property of the parties.[19]

It is submitted, however, that the jurisdiction to make orders by way of injunction in the absence of a substantive application is the very jurisdiction conferred by section 114(1) in conjunction with paragraph (e) of the definition of "matrimonial cause" in section 4(1) of the Act.

Davis and Davis was quoted at length by the Full Court in *McCarney,*[20] but apparently only to emphasise the distinction drawn between the phrase in section 114(1) permitting the granting of injunctions "relating to the use or occupancy of the matrimonial home" and the phrase allowing injunctions "in relation to the property of a party to the marriage". In emphasising this possible difference in interpretation the Full Court tended to deprive *Davis and Davis* of much value in the interpretation of the latter phrase.

Of the remaining authorities, *Mills and Mills* is not particularly helpful. The decision on the facts does not impose a significant limit

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[14] (1976) FLC 90-079 (75,381).
[15] (1976) FLC 90-133 (75,634-636).
[16] *Id.* (75,635).
[17] (1976) FLC 90-105 (75,493).
[18] (1976) FLC 90-133 (75,635).
[19] (1976) FLC 90-053 (75,219).
[20] (1977) FLC 90-200 (76,055).

on the application of the phrase in question, while the two situations in which Demack J. suggested that he would consider granting injunctions do not in fact relate to the phrase in question at all; he refers to applications for principal relief, in relation to which injunctions may be granted under section 114(3), and applications relating to the use and occupancy of the matrimonial home, which are available under another clause of section 114(1).[21]

Although the Full Court devoted more of their attention to *Davis* (a decision of a Full Court) and *Mills,* it appears that *Mazein* and *Farr* were more relevant cases, but both received scant attention. The Court disapproved the attempt of Pawley J. to limit section 114(1) by applying to it the principles governing the construction of section 124 of the Matrimonial Causes Act 1959,[22] and reference was made to the distinction of Murray J. between altering and affecting proprietary rights,[23] but the Full Court did not appear to regard the decisions as either helpful or authoritative.

In effect, then, the Full Court had no guidance as to the scope and application of the phrase "in relation to the property of a party to the marriage" in section 114(1). Rather than attempting to explain the operation of the phrase by a close analysis of the words, it looked elsewhere for assistance. It decided that:

> The ambit of the power is not restricted by its own definition but by external limitations arising out of the fact that until proceedings for dissolution, declaration or nullity are issued no orders pursuant to sec. 78 or 79 can be made.[24]

This reasoning acquired validity in this case from the way in which Mr McCarney's action was argued. The Court pointed out that the respondent had based his application for injunctions on "his claim *in futuro* under sec. 79". That is, he had asked the Court to grant an injunction to preserve property in which he might, at some time in the future, be found to have rights under the provisions of section 79 of the Family Law Act 1975.[25]

There is no basis for suggesting that the Full Court was wrong in deciding that rights under sections 78 and 79 do not come into existence until a claim for principal relief is made, and that until in existence no steps can be taken to preserve property which might later be subject to those rights. However it is submitted that neither are there any compelling reasons, to be found in the words of the Act or as a matter of logic, for accepting that the Full Court was right and that Gun J., in reaching the opposite conclusion, was interpreting the Act incorrectly. The most that can be said is that, bearing in mind the many contingencies surrounding the existence of these rights, a factor which the Court emphasised, the decision of the Full Court to this point was perhaps the most sensible one.

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[21] (1976) FLC 90-079 (75,381).
[22] (1977) FLC 90-200 (76,056).
[23] *Id.* (76,055).
[24] *Id.* (76,057).
[25] (1976) FLC 90-105 (75,489).

The Court's decision was based on a narrow view of the application of the phrase "in relation to the property of a party to the marriage". A desultory attempt was made later to widen the scope of the phrase; the Court conceded that if

> a claim can be shown to arise out of the marital relationship and yet not depend upon prospective rights under sec. 79

an injunction might be available under section 114(1).[26] However, no hint was given of the sort of circumstances in which such a claim might arise. The further qualification that an injunction would not be granted where

> the real or substantial purpose [of the application] is to delay proceedings until the applicant can issue an application for dissolution and thereby make claims under sec. 79

creates other difficulties;[27] it is easy to imagine that a particular fact situation might induce one judge to find an intention to delay and another judge to find instead a desire to preserve property which might otherwise be lost to the "rightful owner". In many cases the choice between the various possible findings would depend not on any of the evidence but solely on the attitude taken by the judge.

Faced with a basically narrow view of the relevant phrase in section 114(1), and with the rather unhelpful attempt to widen the scope of the phrase, it is likely that Family Court judges sitting alone will hesitate to grant injunctions under section 114(1) "in relation to the property of a party to the marriage".

It is possible that the Full Court interpreted the phrase "in relation to the property of a party to the marriage" narrowly with questions of the constitutional validity of the provisions in mind. However it is submitted that the phrase could have been interpreted quite liberally without threatening its validity as an exercise of the power of the Commonwealth Parliament.

The original paragraph (e) of the definition of "matrimonial cause" in section 4(1) of the Family Law Act 1975 read: "proceedings for an order or injunction in circumstances arising out of a marital relationship". After *Russell's* case[28] this was amended to read: "proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship". This was in line with the definitive judgment of Mason J. in *Russell's* case; he said that the paragraph was valid as far as it applied to proceedings between the parties to a marriage.[29]

In considering the constitutional power of the federal Parliament to provide for the resolution of disputes over the property of parties to a marriage, Mason J. felt constrained to limit this power to situations where there were proceedings for principal relief, not because property disputes were in any way inherently outside the power of the federal

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[26] (1977) FLC 90-200 (76,057).
[27] *Ibid.*
[28] (1976) 9 A.L.R. 103.
[29] *Id.* 140.

Parliament but because he felt that paragraph (c)(ii) of the definition of "matrimonial cause" was too widely expressed to allow him to treat it as a purported exercise of the marriage power; he therefore read this paragraph down by reference to the divorce and matrimonial causes power.[30]

This problem did not exist with respect to paragraph (e) of the definition; Mason J. was able to read it down by reference to the marriage power.[31] In doing so he impliedly upheld section 114(1) as it would operate with the amended paragraph (e).

In *Davis and Davis* the Full Court of the Family Court considered the constitutional status of section 114(1) and concluded:

> There is nothing in the majority decision in *Russell* v. *Russell* to suggest that sec. 114(1) should be given a restricted meaning. On the contrary, Mason J.'s judgment implies that the marriage power may support wider powers than those now conferred by sec. 78 and 79 to deal with the property of the parties to a marriage, provided that the property is clearly defined as matrimonial property. . . .[32]

The Court then restricted its decision to the question of its power to make orders relating to the use and occupancy of the matrimonial home, but it is submitted that the inconclusive warning:

> Different considerations may apply to that part of sec. 114(1) which gives the court power to make orders in relation to the property of a party to the marriage[33]

need not be treated as effectively limiting that part of section 114(1).

The High Court has upheld the right of the Commonwealth to give to courts exercising federal jurisdiction the power to grant to a party to a marriage an injunction or order in circumstances arising out of the marital relationship. There is no convincing reason to be found in the judgment in *Davis*,[34] or elsewhere, why the effect of this decision should be narrowed by a contemporaneous decision that legislation purporting to give courts exercising federal jurisdiction power to deal with all property disputes involving the property of a party to a marriage was expressed so widely as to be unable to be related to any particular head of Commonwealth power. This is especially the case since the decision to remove from the Family Courts jurisdiction over property matters except as ancillary to proceedings for principal relief was that of those responsible for amending the Act, rather than the decision of the High Court, whose view was only that the Family Law Act 1975 *in its original form* exceeded the marriage power in as far as it related to the property of parties to a marriage. If it had been the intention of the Parliament to remove from the courts all jurisdiction over property disputes except where they were ancillary to proceedings for principal relief, this could and should have been done

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[30] *Ibid.*
[31] *Ibid.*
[32] (1976) FLC 90-062 (75,308).
[33] *Ibid.*
[34] (1976) FLC 90-062.

by direct amendments to section 114(1), but in fact no such amendment was made.

It appears, then, that the Family Court was not induced by considerations of constitutional validity to interpret the phrase in section 114(1) so as to deprive it of substantial application; its reasons for so holding must remain a mystery, the more surprising in view of the early emphasis on the duty of a court to interpret a statute so as to render it effective rather than futile.[35]

This case, however, need not mark the end of attempts to invoke the jurisdiction of the Family Court over the property of parties to a marriage before proceedings can be instituted for principal relief.

In *Read and Read* a wife seeking to have property matters decided by the Family Court within the twelve months separation period applied for orders as to property ancillary to a determination of the validity of her marriage.[36] An application for such a determination is included in the definition of "proceedings for principal relief" in section 4(1) of the Family Law Act 1975. There was no dispute about the validity of the applicant's marriage—the evidence in support of her application consisted of a copy of her marriage certificate—and Watson S.J. was called upon to decide, as a preliminary point, whether the proceedings were frivolous, vexatious or an abuse of the process of the court. He held that they were not, saying:

> The mere fact that a legitimate device is used to attract jurisdiction not otherwise available is not in my view an abuse of process per se.[37]

Further, Watson S.J. indicated that even had he decided that the applicant was attempting to abuse the process of the court, he would have exercised his discretion to allow the proceedings to continue, because he found that there was a real question to be decided between the parties in relation to property.[38]

Practitioners wishing to bring property disputes before the Family Court before the parties have been separated for twelve months may be more inclined to adopt this method of proceeding than to attempt to persuade the Family Court to grant injunctive relief in pursuance of a sub-section which has been judicially considered and so far interpreted very narrowly. Furthermore, although any injunctive relief which might be granted in proceedings under section 114(1) would only be to prevent dealings with the property in dispute until proceedings for principal relief are instituted, the method adopted in *Read* will presumably allow a final determination of property interests in conjunction with the declaration of validity of the marriage.

HILARY PENFOLD*

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[35] (1977) FLC 90-200 (76,054-055).
[36] (1977) FLC 90-201.
[37] *Id.* (76,063).
[38] *Ibid.*

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