THE EMERGING AUSTRALIAN LAW OF MATRIMONIAL PROPERTY

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I INTRODUCTION

The modern law of matrimonial property has little impact upon the parties to a functioning marriage. Husband and wife can usually be expected to administer their property in the manner that suits their own interests, regardless of legal technicalities, such as title. If the marriage breaks down, however, the law must provide rules for the re-organisation of the relationship between the parties, including, of course, an adjustment of their property rights. The task of developing a satisfactory law of matrimonial property has attracted much attention in recent times, reflecting in part the concern of law reformers to introduce a rational and humane system of divorce.[1] The theme of this paper is that there is a movement in Australia towards an 'indigenous' solution to the problem of adjusting the property rights of husband and wife in the case of breakdown of marriage. While the solution is in many ways radical, it has not been the product of a single legislative reform but has emerged gradually and perhaps is still far from complete. It will be suggested that, in general, the new approach to matrimonial property disputes is flexible and sensible, giving effect to the reality of the situation, which is that the marriage *has* broken down and the rights of the parties need to be adjusted *for the future,* rather than in accordance exclusively with what has happened in the past.

An examination of this development requires some investigation of the scope of the major statutory provisions that deal with matrimonial property disputes and the background to them. The key provision is section 86 of the Matrimonial Causes Act 1959-1966 (Cth) which empowers the court, in proceedings under the Act, to require either or both of the parties to the marriage to make such a settlement of property to which they, or either of them is entitled as the court considers just and equitable in the circumstances of the case. But it is also necessary to consider briefly the Married Women's Property legislation of the States,[2] although special emphasis will be placed on the Victorian provisions[3]

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[1] See particularly, United Kingdom, *Report of the Royal Commission on Marriage and Divorce* (1956) Cmd 9678 (Morton Commission); Kahn-Freund, 'Matrimonial Property—Some Recent Developments' (1959) 22 *Modern Law Review* 241. See generally Friedmann (ed.), *Matrimonial Property Law* (1955).

[2] Married Women's Property Act 1901 (N.S.W.), s. 22; Married Women's Property Acts 1890-1952 (Qld.), s. 21; Law of Property Act 1936-1960 (S.A.), s. 105; Married Women's Property Act 1892 (W.A.), s. 17; Married Women's Property Act 1935 (Tas.), s. 8.

[3] Marriage Act 1958, s. 161 as inserted by the Marriage (Property) Act 1962.

which go further than those of any other state in conferring a broad discretion upon the court to resolve matrimonial property disputes. One significant aspect of the new approach has been the gradual extension of federal jurisdiction, exercised under the Matrimonial Causes Act, into the field of matrimonial property disputes, thus displacing a considerable portion of the state jurisdiction. Consequently, in order to determine the extent to which the scope of the state legislation has been circumscribed, the difficult question of the relationship between the federal and state legislation must be canvassed.

II BACKGROUND TO THE AUSTRALIAN LAW OF MATRIMONIAL PROPERTY

Common law jurisdictions have passed through several broad phases in developing a law of matrimonial property. The basic proposition accepted by the common law was that the wife, during marriage, had no independent legal existence from that of her husband. In the words of Blackstone:

> By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.[4]

As a consequence of this proposition the common law, after initial uncertainty, prevented the wife holding any separate property of her own during the currency of the marriage.[5] The husband became seised of all freehold lands held by his wife at the time of the marriage or acquired by her during the marriage. He had the sole right to dispose of the freehold interest in such lands, although the wife might be able to recover the lands after her husband's death.[6] The husband acquired absolute title to all chattels belonging to the wife at the marriage or acquired by her during the marriage and he could dispose of them during his lifetime or by will at his death.[7] No doubt the reasons for the principle of unity of husband and wife and for the inability of the wife to hold separate property were far more complex than a mere desire to subject the wife to the will of her husband.[8] Nevertheless that was the general effect of the common law as far as matrimonial property was concerned, although it was true that the wife had certain rights of succession to her husband's property.[9] However, these did not affect the wife's position of subservience during the marriage, one that became especially

[4] Blackstone, *Commentaries* (3rd ed. 1768) i, 442.

[5] Holdsworth, *History of English Law* (6th ed. 1934) iii, 520-33.

[6] *Ibid.* 525.

[7] *Ibid.* 526-7. The husband could acquire title to the wife's choses in action by 'reducing them to possession'.

[8] *Ibid.* 524-5; Pollock & Maitland, *The History of English Law* (2nd ed. 1898) ii, 407.

[9] *E.g.* her right to dower, which was at least partially designed to protect the widow in a manner not altogether unlike the modern doctrine of testator's family maintenance. In time it became progressively easier to bar the right. See generally *ibid.* 189-97.

desperate if the marriage had effectively broken down. Judicial divorce was not, of course, available in England until 1857 and even later in the Australian colonies.[10]

The second phase saw the gradual introduction of the principle of separate property, under which the wife was permitted to acquire and retain property for her own benefit, without her husband obtaining any interest in that property. This process, which began in England in 1857,[11] culminated in the Married Women's Property Act 1882, although the final touches were not put to the separate property principle until 1935.[12] The effect of the 1882 Act was that a married woman was capable of acquiring, holding and disposing of any real or personal property in the same manner as if she were a *feme sole*. The acceptance of the separate property principle, which still provides the starting point for the present English and Australian law,[13] was motivated by the changing character of society. Some married women were beginning to earn income from their own efforts as wage earners or even as entrepeneurs. They were much less tolerant of the subservience to which the common law subjected them and the need for change was underlined by the manifest injustices of the common law—for example, it was outrageous that a deserted wife should find her income or personal property liable to seizure by her husband.

Obviously the 1882 legislation improved the lot of the married woman considerably. But the main benefits of the separate property principle were reserved to the wife in the relatively rare position (at that time) of having an income and property of her own. The wife who neither worked nor had property received no real benefit from the separate property regime. While the marriage continued to function she suffered no material prejudice. But if the marriage broke down, she was left to her personal right of maintenance against her husband and was unable to claim any proprietary interest in the assets the family had managed to accumulate. This was true even though her diligence and skill in managing household affairs may have been an indispensable factor in the building up of the family's assets.

The third and current phase in the development of the law of matrimonial property has been prompted by a recognition that to some extent marriage ought to be viewed as an economic partnership between husband and wife, regardless of whether the parties perform exactly the same economic functions. It is true that a greater proportion of married women are able

[10] Toose, Watson & Benjafield, *Australian Divorce Law and Practice* (1968) cviii-c. Of course equity ameliorated the wife's position to some extent, but the concepts of the separate estate and the restraint on anticipation were of assistance only in limited situations, often at the price of considerable inflexibility. Bromley, *Family Law* (3rd ed. 1966) 424-5.

[11] Matrimonial Causes Act 1857, providing, *inter alia*, in s. 25 that, where an order for judicial separation was in force, the wife was deemed to be a *feme sole* for the purposes of acquisition of property.

[12] Law Reform (Married Women and Tortfeasors) Act 1935, ss 1, 2.

[13] See legislation referred to n. 2 *supra*.

to benefit from the separate property regime, since more now participate in the labour force and, what is more important, they have a greater opportunity to save portion of their incomes for investment or 'deferred consumption'.[14] Nevertheless, it is also generally true that in a community such as Australia the separate property regime works to the disadvantage of married women in the event of breakdown of marriage. So long as the family, as understood in Western society, continues to be the unit in which children are reared, women will spend much time, that might otherwise be used to earn income, performing the function of child-rearing (not to mention the valuable time expended in actually producing the children). In addition, the normal division of labour in the Western family requires the wife to manage the household.[15] Many married women, with the concurrence of their husbands, prefer to spend their time at this task, thus allowing the husbands to earn the family income. Moreover, despite the new morality of equality of men and women, Australia has not yet completely adopted the principle of equal pay for equal work.[16] Consequently there is a desire to modify the principle of separate property to permit a measure of equality in the distribution of marital assets if the marriage breaks down. The Royal Commission on Marriage and Divorce for example, accepted that

> [m]arriage should be regarded as a partnership in which husband and wife work together as equals, and that the wife's contribution to the join undertaking, in running the home and looking after the children, is just a valuable as that of the husband in providing the home and supporting th family.[17]

This recognition of marriage as an economic partnership has not led to the wholesale introduction of community property notions into our law Indeed in recent times the Royal Commission,[18] Professor Kahn-Freund[19] and Professor Derham[20] have all rejected the idea of importing unmodified community property notions into English or Australian law, althoug Professor Kahn-Freund was prepared to urge that a 'community of surplus'[21] on the German model should be super-imposed on the separate propert principle.[22] The main arguments against a community property syster

[14] Kahn-Freund, 'Matrimonial Property—Some Recent Developments' (1959) 2: *Modern Law Review* 241, 248-51.

[15] See generally Bell & Vogel (ed.), *A Modern Introduction to the Family* (1960 Ch. 1.

[16] See 54 *Year Book of the Commonwealth of Australia* (1968) 279-84, 306-11.

[17] (1956) Cmd 9678 para. 644.

[18] *Ibid.* para. 651.

[19] Kahn-Freund, 'Matrimonial Property—Some Recent Developments' (1959) 2 *Modern Law Review* 241, 242-8.

[20] In evidence before the Victorian Statute Law Revision Committee see Minute of Evidence, *Report on the Marriage (Property) Bill* (1956) 14-5.

[21] Under a system of community of surplus the property of the spouses remain separate, but on termination of the marriage the difference between what husban and wife owned at the time of the marriage and at its termination is to be divide equally between them. Kahn-Freund, 'Matrimonial Property—Some Recent Develop ments' (1959) 22 *Modern Law Review* 241, 247.

[22] *Ibid.* 248-57.

have been its great complexity[23] and the fact that in practice the system is incompatible with equality of the sexes since the almost invariable rule is that the husband administers the community property during the marriage.[24] Although he may be subjected to certain restrictions in the interest of his wife, the ultimate decision on questions of administration rests with him. Undoubtedly the unfamiliarity of a community property system to common law jurisdictions such as England or Australia *should* not prevent its introduction if it is otherwise an appropriate solution.[25] By the same token, the Royal Commission was surely right in contending that the problem of unfamiliarity would prejudice any attempt to introduce a community property regime.[26]

The economic partnership notion has been introduced by modifying the separate property principle at particular points, so that 'what we lose on the swings [in not introducing community property as such] we make up on the roundabouts by tackling particular problems'.[27] This development is seen clearly, in the context of marriages terminated as a result of the death of one spouse, by the introduction of testator's family maintenance legislation restricting the freedom of a married person to dispose of his property by will.[28] The desire to protect the deserted wife without independent resources lay behind the creation by the English courts of the deserted wife's equity. The heretical notion that a proprietary interest in the matrimonial home could spring up in a married woman upon being deserted by her husband was never accepted in Australia[29] and was destroyed by the House of Lords in *National Provincial Bank v. Ainsworth*[30] only to be resurrected by the English Parliament in a somewhat different form by the Matrimonial Homes Act 1967. The New South Wales legislature has intervened in a much more limited form in the situation where the matrimonial home is a leasehold dwelling-house protected under the Landlord and Tenant Act 1899-1964. If the tenant of such a dwelling-house separates from or deserts his wife, leaving her in possession of the house, the provisions of the Act relating to recovery of possessions and the control of rents apply during the period of

[23] *Ibid.* 246; Statute Law Revision Committee, *Report on the Marriage (Property) Bill* (1956) 15; Foote, Levy & Sander, *Cases and Materials on Family Law* (1966) 320-2.

[24] *Ibid.* 242-4; (1956) Cmd 9678 para. 651 (iii).

[25] *Ibid.* 246.

[26] (1956) Cmd 9678 para. 651 (i).

[27] Statute Law Revision Committee, *Report on the Marriage (Property) Bill* (1956) 15 (Professor Derham).

[28] See generally Wright, *Testator's Family Maintenance in Australia and New Zealand* (2nd ed. 1966). In most Australian jurisdictions a divorced person is entitled to claim from his ex-spouse's estate. *Ibid.* 9-13.

[29] *Brennan* v. *Thomas* [1953] V.L.R. 111; *Maio v. Piro* [1956] S.A.S.R. 233; *Dickson v. McWhinnie* (1958) 58 S.R. (N.S.W.) 179.

[30] [1965] A.C. 1175.

separation or desertion as if the wife were the sole tenant of the dwelling-house.[31] Following a recommendation by the Royal Commission[32] the rule in *Hoddinott v. Hoddinott*[33] which holds that any savings from a housekeeping allowance provided by a husband to his wife belong to him even if the savings are the direct result of the wife's thrift and good management, has been abolished in England. Section 1 of the Married Women's Property Act 1964 in effect provides that any surplus from an allowance made by a husband to his wife for the expenses of the matrimonial home and similar purposes shall belong to the spouses equally.[34]

Of course the most significant judicial attempt to modify the rigours of the separate property system has been the approach of the Court of Appeal in England to applications under section 17 of the Married Women's Property Act 1882.[35] Beginning in the early 1950's the Court of Appeal developed a doctrine which allowed the court a discretion to vary existing proprietary rights if that were necessary to do justice between the spouses. The doctrine really commenced with *Jones v. Maynard*[36] which declared that a broad principle of equality was appropriate to marital property disputes, and *Rimmer v. Rimmer*[37] where the Court of Appeal evinced a willingness to reach a fair result by exercising some discretion as to the substance of the claim provided that 'well established principles of law' were not infringed. The highest point of the 'palm-tree justice' line of cases, as they are often called, was the statement of Lord Denning in *Hine v. Hine*[38] where he said

> that the jurisdiction of the court over family assets under s. 17 is entirely discretionary. Its discretion transcends all rights, legal or equitable, and enables the court to make such order as it thinks fit. This means . . that the court is entitled to make such order as appears to be fair and just in all the circumstances of the case.

There is a great deal to be said for the view that in fact the English courts did not depart very far from the more conservative approach taken by the High Court in *Wirth v. Wirth*,[39] where it was emphatically denied that the Queensland equivalent of section 17 conferred any discretion to vary existing proprietary rights.[40] The main impact of the discretionary approach

[31] Landlord and Tenant Act 1899-1964, s. 2B, inserted by the Law Reform (Married Persons) Act 1964. See *Abigail Pty. Ltd. v. Rudder* [1967] 1 N.S.W.R. 671.

[32] (1956) Cmd 9678 para. 701.

[33] [1949] 2 K.B. 406 (C.A.).

[34] For criticisms of the drafting of the legislation see Bromley, *Family Law* (3rd ed. 1966) 435-6. With the exception of Victoria, *Hoddinott* remains good law in Australia. *Hepworth v. Hepworth* (1963) 110 C.L.R. 309, 313.

[35] S. 17 creates a summary jurisdiction in the court to hear any question between husband and wife as to the title or possession of property and allows the judge to make such order with respect to the property in dispute as he thinks fit.

[36] [1951] Ch. 572.

[37] [1953] 1 Q.B. 63 (C.A.).

[38] [1962] 3 All E.R. 345, 347.

[39] (1956) 98 C.L.R. 228.

[40] See Davies, 'Section 17 of the Married Women's Property Act: Law or Palm Tree Justice?' (1967) 8 *University of Western Australia Law Review* 48.

was in the situation where the parties had not expressed any clear intention as to ownership at the time a particular asset was acquired. Furthermore, in most cases the claimant had made some direct contribution to the acquisition of the asset so that the problem in substance was merely to determine the respective shares of the spouses.[41]

The issue of the extent of the court's discretion under section 17 was brought to a head when the Court of Appeal began awarding a share in the proceeds of sale of the matrimonial home to the husband who had undertaken some repairs and improvements to the home, title to which was admittedly in the wife alone.[42] In *Pettitt v. Pettitt*[43] the House of Lords rejected the husband's claim, at least in the case where his work is of an ephemeral nature and perhaps could be expected of a diligent husband in any event. It is ironical to observe that one of the main reasons given for rejecting the idea that there was discretionary power in the court to override existing proprietary interests in order to reach a just result, was the need for maintaining certainty and ensuring security of established proprietary rights.[44] The irony arises from the extraordinary divergence between the various judgments which, despite the unanimity of result, must create considerable uncertainty for the future, at least until new legislation is introduced, as now seems likely.[45] Thus Lords Reid, Hodson and Diplock considered that in modern times the presumptions of advancement and resulting trusts have lost much of their weight and are therefore of little assistance in deciding questions of title between husband and wife.[46] Lord Upjohn, on the other hand, thought the presumption when properly understood and properly applied to the circumstances of today' remains 'as useful as ever in solving questions of title',[47] a view very close to that adopted by the High Court in *Wirth v. Wirth* and adhered to ever since.[48] Again, although it was agreed that the earlier 'handy-husband' case of *Appleton v. Appleton* was to be overruled, three of their Lordships[49] regarded a similar case, *Jansen v. Jansen*,[50] as wrongly decided while two[51] thought it was correct.

[41] *Rimmer v. Rimmer* [1953] 1 Q.B. 63; *Cobb v. Cobb* [1955] 2 All E.R. 696; *Fribance v. Fribance* [1957] 1 All E.R. 357.
[42] See *Appleton v. Appleton* [1965] 1 All E.R. 44; Tiley, 'The More-Than-Handy Husband' (1969) 27 *Cambridge Law Journal* 81.
[43] [1969] 2 W.L.R. 966, 970 (Lord Reid), 984 (Lord Hodson).
[44] [1969] 2 W.L.R. 966, 984-5.
[45] In *Nixon v. Nixon* [1969] 1 W.L.R. 1676, the Court of Appeal applied a joint venture principle to the case of a wife assisting her husband in the family business. It was pointed out that the character of her activities differed from those of the husband in *Pettitt v. Pettitt*. For the likely form of new legislation see *infra* n. 53-5.
[46] [1969] 2 W.L.R. 966, 971, 988, 999.
[47] [1969] 2 W.L.R. 966, 990.
[48] See *Martin v. Martin* (1959) 110 C.L.R. 297; *Hepworth v. Hepworth* (1963) 110 C.L.R. 309.
[49] [1969] 2 W.L.R. 966, 982 (Lord Morris), 986 (Lord Hodson), 994 (Lord Upjohn).
[50] [1965] P. 478.
[51] [1969] 2 W.L.R. 966, 974 (Lord Reid), 1001 (Lord Diplock).

Despite these considerable differences of opinion, one point emerges clearly from *Pettitt v. Pettitt.* Section 17 is to be regarded as a procedural provision only and consequently the court does not have an unfettered discretion to vary established proprietary rights. The precise impact on the decision in England is difficult to assess, but there is no doubt that section 17 has lost much of its potential scope.[52] Certainly, until new legislation is passed the interpretation of section 17 will more closely approximate the construction of the comparable legislation in force in all Australian States except Victoria. However, following the recommendations of the Law Commission's *Report on Financial Provision in Matrimonial Proceedings,*[53] it appears that a new element of flexibility will be introduced in section 17 proceedings, although it may be limited to the case where there is a substantial contribution by the claimant to the acquisition or improvement of the property in dispute.[54] In addition the Report recommends that in proceedings ancillary to divorce, nullity or judicial separation the court should be empowered to order settlements of any property to which either or both spouses are entitled for the benefit of the spouses and the children, or any of them.[55] This power is to be in addition to the existing power of the court to vary any ante or post-nuptial settlement. The result of these reforms, if implemented may well be to produce a system very similar to that already in existence in Australia, with the virtue that existing property rights can be reorganised on the formal dissolution of the marriage.

III STATE MATRIMONIAL PROPERTY LAW—THE VICTORIAN EXPERIMENT

The law of matrimonial property in all Australian States except Victoria is reasonably clear and certainly uninspiring. It is sufficient for present purposes to refer to this law incidentally to tracing the recent attempt by the Victorian legislature to allow some scope for the 'economic partnership' concept of marriage. The attempt, while an improvement on the position in other states is nevertheless imperfect and it has been left to federal law to provide a completely new approach to the problem. It will be convenient to consider the issue by examining the legislative history and subsequent interpretation of section 161 of the Marriage Act 195[illegible] as inserted by the Marriage (Property) Act 1962. Apart from elucidating the purpose of the legislation, the history provides an instructive example of the processes of law reform in Victoria.

In 1955 the relevant legislation in Victoria was contained in section 20(1) of the Married Women's Property Act 1928, which reproduced in substance the provisions of section 17 of the English Married Women's Property Act 1882. All other states had then, as they have now,

[52] See Samuels, 'What Did Pettitt Decide?' (1969) 119 *New Law Journal* 78[illegible] 799; Note (1969) 32 *Modern Law Review* 570.
[53] (1969) Law Commission No. 25, H.C. Paper No. 448.
[54] Para. 115 (4).
[55] Para. 115 (5).
[56] See *supra* n. 2.

comparable legislation. In that year a distinguished sub-committee of the Chief Justice's Law Reform Committee was appointed[57] to consider the law relating to married women, with terms of reference that included problems of matrimonial property as well as matters such as the inter-spousal tort immunity. The sub-committee reported on a draft Bill submitted to them and recommended a number of relatively minor changes in section 20(1), all of which have found their way into the present Act. For example, it was suggested that if a question arose in proceedings between husband and wife otherwise than under section 20(1), the court, if the proceedings could have been taken under section 20(1), should have the powers it possessed under that section.[58] This recommendation was implemented in what now appears as section 161(10) and is a useful device[59] that could well be followed by other states to avoid doubts in cases where actions are brought otherwise than in the summary jurisdiction provided for marital property disputes.[60] The sub-committee also suggested several other minor amendments to the legislation.[61]

The sub-committee considered, but rejected a suggestion that section 20(1) be amended to make it clear that the court had a discretion in allocating property rights between spouses and thus was not bound to adhere strictly to the presumption of advancement and similar equitable rules. The report argued that the question could be safely left to the courts which, as the then recently decided case of *Rimmer v. Rimmer*[62] showed, were developing flexible rules especially adapted to marital property disputes. These rules had departed from the rigid equitable

[57] The sub-committee comprised Smith J. of the Supreme Court, Mr. R. A. Smithers (as he then was), Miss M. Kingston, and Professor David Derham.

[58] *Report of sub-committee of Chief Justice's Law Reform Committee on the Law Relation to Married Women* paras. 20, 27 (f).

[59] Applied in *Kluska v. Kluska* [1965] V.R. 457.

[60] In *Peck v. Peck* [1965] S.A.S.R. 293 the husband brought partition proceedings in respect of the jointly owned matrimonial home. The court was prepared to assume that the wife could obtain such assistance as s. 105 Law of Property Act 1935-1960 gave her despite her failure to take out a s. 105 summons herself. However, the husband had a legal right to partition or sale as an incident of the joint tenancy, although the court could in its discretion postpone the sale for good reason. In *Macrae v. Macrae* (1962) 62 S.R. (N.S.W.) 142 the court refused the wife's claim, made in a summons under s. 22 Married Women's Property Act 1901, to an injunction restraining the husband from proceeding under s. 66G Conveyancing Act 1919 for appointment of trustees of sale of the jointly owned matrimonial home. It was held that there was an absolute right in each joint tenant to avail himself of the procedures in s. 66G. But it was said that a court of equity hearing the s. 66G application might have the same discretionary power as to remedy as existed under s. 22. Thus it might be possible to stay the order for appointment of trustees of sale to allow the wife to apply for maintenance in view of her changed situation. See also *Smith v. Smith* (No. 2) [1962] Qd. R. 132; *Nilan v. Nilan* (1951) 68 W.N. (N.S.W.) 271 (action of ejectment by wife); *Walkenden v. Walkenden* [1965] Tas. S.R. 101 (ejectment).

[61] *E.g.* a provision specifically authorising an order for the sale of property and division of proceeds: paras 12, 27 (c), (see now s. 161(3) Marriage Act 1958). The sub-committee also recommended an amendment to ensure that the only third parties entitled to apply under s. 20 (1) were those upon whom conflicting claims were made by husband and wife (see now s. 161 (1)). The draft bill had proposed that applications could be made by 'any person interested' but this was thought to be too wide: paras 13, 27 (d).

[62] [1953] 1 Q.B. 63.

presumptions applied to property disputes between strangers and allowed the court a considerable discretion, yet still respected the parties' intentions.[63] Therefore intervention by the legislature was neither necessary nor desirable. As if to reinforce this conclusion, Smith J., a member of the sub-committee, took the opportunity in *Wood v. Wood*[64] decided shortly after the report was presented, to hold that *Rimmer v. Rimmer* should be followed in Victoria and consequently that the court had a discretion, within limits, to resolve the substance of the property dispute between husband and wife. The end result of the sub-committee's report on this point was that the Marriage (Property) Act 1956 did not amend the provisions of section 20(1) of the 1928 Act.

Rarely have the expectations of the framers of legislation been frustrated so swiftly. In the words of Mr. Rylah[65] 'the ink was hardly dry upon the 1956 Act' when the High Court in *Wirth v. Wirth*[66] authoritatively decided that the Queensland equivalent of section 20(1) conferred a discretion only as to the remedy, not with respect to the actual determination of the proprietary rights of the spouses. A key passage from the judgment of Dixon C.J. emphasised that these rights were to be ascertained in accordance with strict rules of property.

> The discretion conferred on the Judge by the last words doubtless enable him, in granting withholding or moulding an order, to take into account considerations which may go beyond the strict enforcement of proprietary or possessory rights, but the notion should be wholly rejected that the discretion affects anything more than the summary remedy. The law of property governs the ascertainment of the proprietary rights and interests of those who marry and those who do not. It has in the past contained special rules governing the title to property in the case of a husband and wife and the relation is such that it has not been found possible to discard all rules of the law of property which are founded upon its existence. But the title to property and proprietary rights in the case of married persons no less than that in unmarried persons rests upon the law and not upon judicial discretion.[67]

This legalistic approach has been reaffirmed on several occasions by the High Court[68] and accepted by the state Supreme Courts,[69] although there

[63] Paras 15-9.

[64] [1956] V.L.R. 478. See also *Blair v. Blair* [1956] Tas. S.R. 146.

[65] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 1962, 116

[66] (1956) 98 C.L.R. 228.

[67] *Ibid.* 231-2. See also *ibid.* 247 *per* Taylor J.

[68] *Martin v. Martin* (1959) 110 C.L.R. 297; *Hepworth v. Hepworth* (1963) 110 C.L.R. 309. In *Martin* a husband was held to have discharged the onus of rebutting the presumption of advancement by showing an intention that his wife was to be a trustee for him of the land in respect of which she was registered as proprietor. The primary motive for placing the title in the wife's name was to avoid federal land tax. In *Hepworth*, although the matrimonial home was registered in the wife's name, it was held that the presumption of advancement did not apply since the evidence was consistent with the conclusion that the husband had not consented to the purchase in his wife's name. The High Court affirmed an order declaring that the wife held the land in trust for herself and her husband as tenants in common in equal shares (subject to a charge in favour of the wife for £400 being half of her contribution to the cost of the property in excess of the husband's contribution).

[69] See *Buchanan v. Buchanan* [1954] St. R. Qd. 246; *Robinson v. Robinson* [1961] W.A.R. 56; *Macrae v. Macrae* (1962) 62 S.R. (N.S.W.) 142.

ıay still be room for a joint venture principle, not as an instance of ›alm-tree justice, but as a well-defined rule appropriate to marital property lisputes.[70]

A stringent, but not atypical application of the legalistic approach was nade by the Full Court of the Supreme Court of Victoria in *Pearson v. 'earson*.[71] By a summons issued in 1958 the wife claimed a declaration hat she was entitled to a beneficial half interest in the matrimonial home ›urchased in the husband's name in 1939 from the War Service Homes Commission. The cost of the home was £800 of which the deposit was 25 and the balance was payable by monthly instalments. The wife's ase was that both had worked after the marriage in 1934, except when he was pregnant and that their earnings had been pooled. She claimed ıat the deposit came from their joint savings and also that the instalments ad been paid until 1950 out of joint funds, instalments thereafter being aid by the husband alone. The husband maintained that he had paid ll moneys required in respect of the house, other than a sum of £45 rovided by the wife towards the cost of a sleep-out added to the house. 'he trial judge found that very little of the deposit came from the wife's arnings, that the parties had not formed any real intention as to wnership of the house when it was acquired and that, although the wife ıade some small contribution to the instalments paid, the husband never ad an intention that she should contribute regularly. However the 'ife had materially assisted the family by her contributions to general ousehold expenses, particularly at times when her husband was unem- loyed, although she ceased working regularly in 1938. The judgment rgued that, while it perhaps might be desirable to move towards a ɔmmunity property regime as Professor Kahn-Freund had suggested,[72] was impracticable 'for the courts to attempt to amend the law to ccord with changes, real or supposed, in the attitude of society to such roblems' and in fact it was much more 'preferable for them to administer ıe law as it is, and to leave its amendment to Parliament'.[73] The Court ıen gave an orthodox exposition of the law as approved in *Wirth v. Wirth*, ɔncentrating upon the application of the presumptions of advancement ıd resulting trusts. The orthodox theory required effect to be given an express agreement between the parties and this could be extended an agreement that could be inferred from the parties' conduct. But the ourt was not prepared to accept the development in England where

[70] *Hocking v. Hocking* [1959] S.A.S.R. 1. See also *Travica v. Travica* [1955] L.R. 261. There is also no doubt that the court retains a discretion as to the nedy to be awarded in a particular case even to the extent of awarding possession the matrimonial home in a manner inconsistent with the parties' proprietary hts. See *Public Trustee v. Kirkham* [1956] V.L.R. 64, where a deserted wife was rmitted to stay in the matrimonial home owned by the husband for a further months rent free. The husband was restrained from disposing of his interest ring that period.

[71] [1961] V.R. 693.

[72] *Supra* nn. 19, 21.

[73] [1961] V.R. 693, 697.

equality of ownership between husband and wife apparently had bee elevated to a rebuttable presumption of law. As with disputes betwee strangers, the proprietary rights of husband and wife could not b determined independently of settled principles of contract, gift or trust at least until legislation directed otherwise. Thus the wife in this case ha to fail since she could not show any agreement whereby she was to obtai a beneficial interest in the home. The ordinary principles of trusts di not assist her since the property was in her husband's name and therefor the presumption of advancement was inapplicable. Nor could she rel upon the equitable rule that where two persons contribute to the acquisitio of property they hold in equity in proportion to their respective contribu tions, for the trial judge had found that her monetary contributions wei not significant.

Following the defeat of their expectations by the High Court, th same sub-committee of the Chief Justice's Law Reform Committee pr sented a second report on 13 November 1957.[74] The sub-committe favoured what was in substance a very limited community property regim Specifically, they recommended a general rule that the court should hav no discretion to depart from the strict rules of law and equity whe deciding where title resides—the 'Dixon Construction'.[75] However, i the case of savings accumulated or property acquired during the marria or in contemplation of it the general rule was not to apply. In th case, provided that each spouse made a 'material contribution in mone or effort', the court was to have a discretion to exercise its powers sale or division in such manner as might be just in the special circumstance of the case.[76] This was subject to a proviso that the court was t have regard to any actual common intention of the spouses as to th ownership or enjoyment of property. Having suggested this measure community property, the sub-committee went on to consider certa particular recommendations of the Royal Commission on Marriage ar Divorce (Morton Commission). They accepted the Morton Commissio recommendation that the presumption of advancement should opera in favour of husbands as well as wives[77] and also agreed that the cou should have express power to restrain either spouse from disposing any interest in property which is the subject of the proceedings.[78] B curiously enough the sub-committee rejected the Morton Commissio

[74] *Second Report of the sub-committee appointed to consider the Law Relati to Married Women.* The sub-committee did point out that there were certa drafting differences between the 1956 Act and the comparable English and Queensla provisions and that these differences may have made *Wirth v. Wirth* inapplicable Victoria. But they nevertheless agreed that the doubts as to interpretation had be resolved. In any event, as *Pearson v. Pearson* shows, the drafting differen were not regarded as material in later cases; paras 7-10.

[75] Para. 12.

[76] *Ibid.*

[77] Para. 15, Morton Commission, Recommendation 83.

[78] Para. 17, Morton Commission, Recommendation 78. See now s. 161(2) Marria Act 1958.

ecommendation that the court should have power to make an order for ›ayment of money in respect of property dissipated or destroyed before the ummons was issued, on the unconvincing ground that money claims would ›e brought within the summary procedure that would be more suited to rial in an ordinary action.[79] The failure to grant such a power is one of ıe weaknesses of the present Victorian legislation[80] and, for that matter, ıe legislation of other states,[81] reflecting the defects of the backward-ɔoking approach of the state provisions. Finally the sub-committee eclined to accept the Morton Commission's recommendation concerning avings from housekeeping allowances,[82] preferring to apply the presump-on of advancement to savings accumulated by one spouse out of a ousekeeping allowance provided by the other.[83]

In due course the sub-committee's recommendations were passed on to ıe Attorney-General. In October 1960 the Attorney-General requested ıe Statute Law Revision Committee to examine Part VIII of the Marriage ıct 1958 (which now included the marital property provisions of the 956 Act), in light of the recommendations of the Chief Justice's Law ꞉eform Committee and of the Morton Commission. After hearing a ariety of witnesses the Committee issued a short report[84] which rejected ıe limited approach of the sub-committee for several reasons, in particular ıe difficulty of assessing the contributions of spouses to the acquisition f any given asset and the arbitrariness of discriminating against the pouse whose earnings happened to be used for home management rather ıan for the purchase of specific property. The Committee put forward vo alternative suggestions to replace the rejected recommendations. The rst was a proposal to grant the court an unfettered discretion to determine ıe disposition of property between the spouses. This proposal received ıpport from changing community attitudes towards marriage and specially the notion that marriage should be regarded as an economic artnership. The Committee were also impressed by the broad discretionary owers to resolve property disputes conferred on courts invested with ederal jurisdiction under the Commonwealth Matrimonial Causes Act 959. If there were such wide powers on the formal dissolution of ıarriage the Committee thought that similar powers should exist in ıe case of a marriage which had broken down but had not yet been

[79] Para. 18, Morton Commission, Recommendation 85. The Commission's recom-endation was designed to overcome the decision in *Tunstall v. Tunstall* [1953] All E.R. 310 and it has been implemented in England by s. 7 Matrimonial auses (Property and Maintenance Act) 1958. See Note, (1959) 22 *Modern Law eview* 50, 55-6.

[80] *Gallo v. Gallo* [1967] V.R. 190, 191; *Pate v. Pate* [1968] V.R. 404, 406-7.

[81] See *Tinson v. Tinson* [1967] 2 N.S.W.R. 462 (husband's claim to half the nount in a savings account rejected as the wife had closed the account before sue of the summons).

[82] *Supra* nn. 32-4.

[83] Para. 16.

[84] Victoria, *Report of the Statute Law Revision Committee upon Part VIII of the arriage Act* 1958 (1961).

dissolved. On the other hand an unfettered discretion carried with i real dangers. Legal practitioners would have difficulty in advising thei clients because of uncertainty as to the outcome of marital propert disputes. There was the risk that different judges would reach differen decisions in identical circumstances. And it had to be remembered tha a discretionary approach would mean that 'the well-tried and tested laws o presumptions could be upset'. The second alternative proposed by th Committee was the introduction of a presumption that the matrimoni home, 'the most valuable single item subject to litigation', was owne jointly by the spouses. This presumption could also be justified by th economic partnership concept of marriage as well as the growing tren for wives to contribute money to the purchase of the matrimonial hom

The Committee found themselves unable to distinguish between th merits of the alternative suggestions and thus refrained from making recommendation as to which was preferable. The Committee's repo was presented in April 1961. The Government upon consideratio regarded the suggestions of the Committee as not necessarily alternativ but rather as complementary and accordingly referred the matter back t the Committee.[85] On 12th December, 1961 the Committee reported f a second time[86] and on this occasion recommended the adoption both the alternatives suggested previously, their intention apparentl being that the presumption of joint tenancy should merely be a guide assist the Court in exercising its discretion. The Bill introduced i Parliament by the Government embodied both alternatives and in th form the Marriage (Property) Act was passed in October 1962, mo than six years after the High Court decision in *Wirth v. Wirth*.

IV SECTION 161 MARRIAGE ACT (VIC.)

1. *The Scope of the Court's Discretion*

It is hardly surprising, in view of its prolonged and tortured birt that the 1962 Act reflects a curious amalgamation of principles. Tl objective of granting the court a discretion to vary existing proprieta rights is achieved by the introductory words of the new section 161(3 inserted into the 1958 Act by the 1962 legislation. Section 161(provides:

> Subject to the next succeeding sub-section but *notwithstanding any oth Act or law to the contrary* the Judge may make such order with respect the title to or possession or disposition of the property in dispute (includi any order for the sale of the property and the division of the proceeds sale, or for the partition or division of the property) and as to the co of and consequent on the application as he thinks fit . . . [Italics supplie

[85] Victoria, *Parliamentary Debates,* Legislative Assembly, 12 September 196 116-7.

[86] Victoria, *Further Report of the Statute Law Revision Committee upon P VIII of the Marriage Act* 1958 (1961).

.s Mr. Rylah commented in introducing the Bill,[87] these introductory ,ords are 'expressly intended to negative the restrictive judgment of the Iigh Court in *Wirth v. Wirth*'.

At first glance the broad discretionary jurisdiction of section 161(3) eems to confer power upon the court to readjust the parties' proprietary ghts on the breakdown of marriage in a manner that takes account of ie economic partnership view of marriage, without regard to the monetary ontributions of the spouses or formal questions of title. However, ection 161(3) is subject to section 161(4)(a) which emphasises the nctity of agreements, even between husband and wife, to a point where n agreement between the spouses, no matter how unfair or unsatisfactory s a basis for reorganising the parties' property rights, must be respected y the court. Section 161(4)(a) achieves this result by providing that ie Judge shall not exercise the power conferred upon him by section 51(3) 'so as to defeat any common intention which he is satisfied was xpressed by the husband and the wife'.[88] The effect of the sub-section is ell illustrated by *Gallo v. Gallo*.[89] In that case the husband and wife parated and shortly thereafter executed an agreement under seal proding, *inter alia*, for custody of the children and maintenance of the wife. he agreement also contained a clause whereby the husband acknowledged s indebtedness to the wife in the sum of £250, which sum the wife agreed accept in full satisfaction of any claim by her to the matrimonial home, s contents or any other property. In fact but for this agreement the wife most certainly would have had a claim to property worth considerably ore than £250. Moreover, there was evidence that the wife, who could not ad English, did not understand the effect of the clause. Nevertheless owans J. ruled that he was bound by the expression of common intention the deed, regardless of whether the wife realised she was forfeiting luable rights. The 'common intention' by which the court was bound was t confined to an intention expressed at the time the property was quired but included a subsequent expression of intention. Thus the fe who makes a bad bargain, or who, during the marriage acknowlges the title of her husband to assets she may have assisted in quiring, is debarred from resorting to the court's discretion under ction 161(3).

None of this is to suggest that section 161(3) is of minimal significance. e discretion it confers is a very real one, at least in the case where the ouses express no common intention with respect to the disputed operty. There is surprisingly little actually decided in the reported cases ost of which concentrate upon the relationship between section 161(3)

[7] Victoria, *Parliamentary Debates*, Legislative Assembly, 12 September 1962, 117.
[8] The remainder of s. 161(4)(b) directs the court to ignore any conduct of band and wife which is not directly related to the acquisition of the property or ts extent or value.
[9] [1967] V.R. 190.

and the presumption of a joint tenancy in the matriminial home create by section 161(4)(b)) to indicate the extent of the court's power However, in *Hogben v. Hogben*,[90] the leading case to date, Herring C. placed a broad construction on the effect of the introductory words t section 161(3):

> In my opinion, [these words] make and were intended to make a revol tionary change in the law in Victoria. The words "notwithstanding any othe Act or law to the contrary" relieve a judge dealing with a case under th section from being any longer bound to decide it according to the stri legal or equitable rights of the parties. He can now go behind those righ in much the same way that judges in England have been held entitled to c under s. 17 of the Married Women's Property Act 1882;[91] and havir done so he has the widest powers. He may *think it just merely to decla* where the title presently resides, according to the strict rules of law ar equity (or those rules as modified by s. 163(4)(b)[91A]), and to leave th matter there. He may declare where the title shall thenceforth reside, givi effect or not, as he thinks just, to those rules and the existing tit situation. He may direct a disposition of the property as between tl spouses or otherwise, and once again he may, in so doing, give effect not, as he thinks just, to the said rules and the existing title situation. H may also, if he thinks it just, confine his order to directions as to futu possession.[92]

The analysis of Herring C.J. was accepted in *Pate v. Pate*[93] whe it was decided that an order requiring a husband to hold certain land trust for himself and his wife had prospective effect only, if that ord were made in the discretionary jurisdiction created by section 161(3 Thus the wife's claim for an alleged breach of trust committed by tl husband *before* the date of the order necessarily failed.[94] Lush J. his judgment recognised that the court's powers extend far beyo declaring the respective rights of the parties as they were at the date the hearing.

Despite the relative dearth of authority, there is no doubt that the cour discretion is most important in practice. The dearth of authority is larg explained by the fact that individual cases simply will represent, to b judge and reporter, a particular exercise of judicial discretion that w not be binding in later cases. The impact of federal jurisdiction, as shall see,[95] must also play some role in limiting the effect of the Victori legislation. Nevertheless it is quite clear, for example, that the rule *Hoddinott v. Hoddinott*[96] is no longer in force in Victoria and that a co

[90] [1964] V.R. 468.

[91] Herring C.J. was of course speaking before *Pettitt v. Pettitt* and earlier in judgment had quoted from *Hine* v. *Hine* [1962] 3 All E.R. 345, 347. See *su* n. 38.

[91A] The report refers to s. 163(4)(b) but plainly Herring C.J. means s. 161(4)(

[92] [1964] V.R. 468, 471.

[93] [1968] V.R. 404.

[94] The wife alleged that the husband had sold the land subject to the or before the date of the order at less than its true value.

[95] *Infra* nn. 45-60.

[96] *Supra* nn. 32-4.

may in its discretion, allocate savings from a house-keeping allowance provided by the husband otherwise than to him. Again it is at least arguable (although no reported case has decided the point) that a court could award the wife property owned and paid for by the husband, even though she has not directly contributed to the acquisition of the property in any way. Such an order presumably could be made as a means of reorganising the parties' property rights for the future in view of the irretrievable breakdown of the marriage.[97] To this extent the powers under section 161(3) resemble very closely the broad jurisdiction to make a settlement of property under the Commonwealth Matrimonial Causes Act.

Watts v. Watts,[98] the latest reported case interpreting section 161(3) does, however, suggest that the courts will be cautious in defining their powers under the section. Newton J. paid lip service to the notion that a judge has the widest discretion to decide any question between husband and wife 'in the way which he considers just and equitable and without regard to the ordinary law of property'.[99] But, perhaps in an attempt to find workable standards readily available, he then stated that the principles to be applied in the exercise of the court's discretion were those laid down by Smith J. in *Wood v. Wood*[1] in 1956. In *Wood v. Wood* Smith J. applied the 'palm-tree justice' approach of *Rimmer v. Rimmer*[2] but was at pains to point out that the court's discretion was not unlimited. Thus he considered that any actual intention as to ownership was to be respected. In the absence of any actual intention the judge was free to make an order that was 'fair and just in the special circumstances of the case', leaning towards equality, particularly in cases where both spouses had used the property in common or had contributed to its acquisition.[3]

Applying these somewhat restrictive principles in *Watts v. Watts*, Newton J. refused to declare that the wife held certain shares in the family company on trust for her husband. He was satisfied that the legal and beneficial ownership of the shares was in the wife and, moreover, that the husband intended, mainly for taxation reasons, that she should acquire beneficial ownership. Regardless of whether or not there was a 'common intention' within section 161(4)(a), Newton J. considered the husband's intention as to ownership an important factor influencing the exercise of his discretion. He was also impressed by the fact that the wife held one half of the shares in the family company, so that the effect of his decision was to allow husband and wife to remain equal owners of the company. This approach suggests a reluctance to indulge in the task of reorganising the parties' proprietary rights for the future, in favour of a more limited role for the court. Indeed, Newton J. specifically states that a federal

[97] But *cf. Moore v. Moore* [1965] V.R. 61, *infra* nn. 8, 14-5.
[98] [1969] V.R. 767.
[99] [1969] V.R. 767, 771.
[1] [1956] V.L.R. 478. See *supra* n. 64.
[2] [1953] 1 Q.B. 53.
[3] [1956] V.L.R. 478, 488.

court would have a more extensive jurisdiction under the settlement powers contained in section 86 of the Commonwealth Matrimonial Causes Act. There seems to be no warrant in the wording of section 161(3) to confine the court's powers merely to the limits to which they were advanced by the English Court of Appeal in the 1950's. Whether *Watts v. Watts* is the forerunner if another judicial attempt (conscious or not) to frustrate the legislative intent remains to be seen.

2. *The Presumption of Joint Tenancy in the Matrimonial Home—Section 161(4)(b)*

A complete analysis of the scope of section 161(3) requires reference to section 161(4)(b), to which the first section is subject. It is curious that a provision designed to implement an economic partnership view of marriage has had the effect in some cases of circumscribing the discretion conferred by section 161(3). Section 161(4)(b) provides as follows:

> Upon the hearing of any application between husband and wife under this section . . . (b) husband and wife shall, to the exclusion of any presumption of advancement or other presumption of law or equity, be presumed, in the absence of sufficient evidence of intention to the contrary and in the absence of any special circumstances which appear to the Judge to render it unjust so to do, to hold or to have held as joint tenants so much of any real property in question as consists of a dwelling and its curtilage (if any) which the Judge is satisfied was acquired by them or either of them at any time during or in contemplation of the marriage wholly or principally for occupation as their matrimonial home.[4]

The limiting effect of the sub-section lies in the exceptions to the presumption of a joint tenancy. The presumption does not apply if there is sufficient evidence of an intention to the contrary or there are special circumstances rendering it unjust to do so.[5] It is well settled that there is sufficient evidence of a contrary intention if the husband (assuming he has provided the purchase price of the matrimonial home) is able to prove that at the time he acquired the home he intended to exclude his wife from any beneficial interest therein.[6] In short, a husband's unilateral

[4] The drafting of s. 161(4)(b) has been severely criticised in that it creates a presumption applicable to a broken down marriage, but not to the more usual case of a functioning marriage, terminated by the death of one party. Liddell 'Ownership of the Matrimonial Home in Victoria' (1967) 6 *M.U.L.R.* 82. Liddell convincingly argues that the philosophy behind the section is equally applicable to the functioning marriage and that testator's family maintenance is not an adequate substitute for a presumption of joint tenancy arising automatically on acquisition of the matrimonial home.

[5] It is clear that *either* a contrary intention *or* special circumstances will suffice to rebut the presumption. *Haskin v. Haskin* [1964] V.R. 37, 39-40; *Moore v. Moore* [1965] V.R. 61.

[6] *Haskin v. Haskin* [1964] V.R. 37, 40; *Moore v. Moore* [1965] V.R. 61. If both husband and wife contributed to the purchase of the house, the relevant contrary intention is that of both spouses; *Boykett v. Boykett* [1965] V.R. 422, 425. It is not clear whose intention is relevant if the husband provided all the purchase money but the house was in joint names, rather than in the name of the husband himself. *Haskin* would suggest that only the husband's intention is relevant since he would be the 'sole actor' in the purchase.

subjective intention to retain sole entitlement to the matrimonial home is enough to rebut the statutory presumption of a joint tenancy, although that might be the very case where the wife should be granted a share in the home. The husband's self-serving evidence is admissible to prove the necessary intention, but is to be received with considerable caution.[7]

In *Moore v. Moore*[8] the husband purchased the matrimonial home with his own money in 1959. Smith J. found no 'special circumstances' to rebut the presumption of a joint tenancy, but did accept the husband's evidence that he intended to exclude his wife from any interest in the home at the time of purchase. In the absence of evidence that she had contributed o the purchase price or enhanced its value in some way, Smith J. considered that since the wife was unable to avail herself of the statutory resumption there was no basis for a judicial exercise of the discretion nder section 161(3) in her favour.[9] The case may be interpreted in one of two ways. Smith J. may have been applying a general rule that the iscretion under section 161(3) should never be exercised in favour of spouse who cannot establish a claim to the particular asset on orthodox rinciples or by way of direct assistance in the acquisition of the asset. This would be a restrictive approach, limiting the court to a consideration f events that have occurred in the past and excluding a reorganisation f their property rights with a view to the future. Such a narrow approach s certainly not compelled by the wording of section 161(3) and would un counter to the expectations of the Statute Law Revision Committee, whose report was framed in terms of an unfettered discretion. The second nd more likely interpretation is that Smith J. was merely arguing that here would be little point in specifically presuming a joint tenancy in the natrimonial home if the court were free to create a joint tenancy even the statutory presumption were rebutted. This analysis acknowledges e breadth of the discretion conferred by section 161(3) but contends that the husband succeeds in rebutting the presumption of joint tenancy the ourt has no residual discretion to dispose of the matrimonial home nless the wife has made a tangible contribution to its acquisition.[10] Even is view severely restricts the court's discretion and allows an astute (or erely selfish) spouse to exclude unilaterally the court's power to nplement the economic partnership principle in relation to the matrimonial ome. In the result *Moore v. Moore* suggests that the draftsman and e courts together have thwarted the expectations of the Statute Law

[7] *Hogben v. Hogben* [1964] V.R. 468, 473, 474.
[8] [1965] V.R. 61.
[9] The same conclusion was reached by Little J. in *Haskin v. Haskin* [1964] .R. 37, 42.
[10] This qualification seems to be a concession to the judgment of Herring C.J. in *ogben v. Hogben* [1964] V.R. 468, 475. In that case the Chief Justice stated, way of *dicta*, that if the presumption under s. 161(4)(b) had been rebutted, he ill would have felt free to make any order for a joint tenancy in recognition of e wife's contribution to the acquisition of the matrimonial home by working the parties' poultry farm.

Revision Committee, for there is little doubt that that body envisage the presumption of a joint tenancy to be merely a guide to the court i exercising its discretion and did not contemplate that a rebuttal of th presumption would fetter the court's residual discretion.[11]

The presumption of joint tenancy may also be rebutted by proof c special circumstances rendering it unjust to apply the presumption. A first it appeared that special circumstances would be relatively easy t establish. Thus in *Haskin v. Haskin*[12] it was held that a number o factors combined to render it unjust to apply the presumption in favou of the wife. These factors were: (i) the wife had paid nothing an incurred no pecuniary liability in respect of the matrimonial home; (ii) th husband had paid the purchase moneys himself; (iii) the husband did no acquire the house solely as a residence but also as a workshop; (iv) bot parties realized at the time the house was acquired that there was a rea risk of the marriage breaking down; (v) the husband intended that th wife should have no interest in the house; (vi) the wife was merel claiming an interest in order to have the house sold and proceeds of sal divided. Later cases have in substance departed from *Haskin v. Haski* on the sensible ground that to permit each of these factors to amou to a 'special circumstances' would negate the operation of the statuto presumption and re-introduce the old equitable rules. In *Hogben v Hogben*[13] Herring C.J. held that the first and second factors could not, themselves, constitute special circumstances since the very point of th presumption was to apply where the husband had paid the purcha price. In *Moore v. Moore*[14] the intention of the husband at the time acquisition of the house was disregarded, as his intention was specificall covered by the other exception to the presumption.[15] In both cases t fact that the wife intended only to sell the matrimonial home, or to obta a share of the proceeds, was not regarded as relevant.

The trend of the case law thus supports a narrow interpretation 'special circumstances rendering it unjust' to apply the presumption of joint tenancy in the matrimonial home. Consequently the presumption quite likely to operate. If it does, the court is to approach the exerci of its discretion on the footing that the parties are joint tenants. Neve theless the court may make an order departing from the existing positi if the circumstances warrant a displacement of the presumption.[16] ((course if there are no 'special circumstances' within section 161(4)(t

[11] Victoria, *Further Report of the Statute Law Revision Committee on Part Vi of the Marriage Act* 1958 (1961) para. 5.

[12] [1964] V.R. 37.

[13] [1964] V.R. 468, 474-5; see also *Boykett v. Boykett* [1965] V.R. 422, 425.

[14] [1965] V.R. 61.

[15] Smith J. disregarded also the fact that the husband had acquired the prope without consulting his wife at a time when the marriage was strained. This mere supported the husband's claim relating to his intention. [1968] V.R. 61, 62.

[16] *Hogben v. Hogben* [1968] V.R. 468, 475; *Boykett v. Boykett* [1965] V.R. 4: 425.

it is difficult to envisage a situation in which the statutory presumption would not be applied.) It is unfortunate that Victorian courts have not been prepared to accept a similarly broad residual discretion even if the statutory presumption is not brought into play in the first place.

The net effect of the 1962 legislation and its subsequent interpretation is that Victorian courts possess a useful discretionary jurisdiction to resolve marital property disputes, liberated from some of the out-moded shackles that bind courts in other States. Yet both in the drafting and interpretation of the legislation there has not been a complete break with traditional concepts. Too much attention is paid to the intention of one or both of the parties at the time of the acquisition of the asset and too little to the situation the parties will be facing in the future. The legislation would be more effective in complementing the laudable goals of the framers if it openly empowered them to readjust the parties' proprietary rights for the future in light of the breakdown of their marriage. This could be achieved by repeal of the 'common intention' restriction upon the court's discretion and by an amendment ensuring that rebuttal of the statutory presumption of joint tenancy does not deprive the court of its residual discretion to re-organise the parties' proprietary rights. Moreover the statutory presumption should not be prevented from coming into effect merely by reason of the subjective intention of the spouse acquiring the property in dispute.

V THE FEDERAL SOLUTION—SECTION 86 MATRIMONIAL CAUSES ACT

Section 86(1) of the Matrimonial Causes Act 1959-1966 (Cth) is rapidly becoming the key section in the Australian law governing matrimonial property disputes, since it allows a substantial readjustment of the proprietary rights of husband and wife when the marriage has broken down. The section provides that

> [t]he court may, in proceedings under this Act, by order require the parties to the marriage, or either of them, to make, for the benefit of all or any of the parties to, and the children of, the marriage, such a settlement of property to which the parties are, or either of them is, entitled (whether in possession or reversion) as the court considers just and equitable in the circumstances of the case.

The powers in this section are, on any analysis, far wider than any power conferred by the state Acts governing matrimonial causes before the Commonwealth entered the field. The nearest equivalent under state law was the power entrusted to the court to vary an existing ante-nuptial or post-nuptial settlement, now found in section 86(2).[17] While the inter-

[17] See *e.g.* Matrimonial Causes Act 1899-1958 (N.S.W.), s. 56; Matrimonial Causes Act 1875 (Qld), s. 9. This legislation was derived from Matrimonial Causes Act 1859 (Eng.), s. 5. In addition some States conferred power on the court to settle the property of a guilty wife. See *Smee v. Smee* (1965) 7 F.L.R. 321, 335 (N.S.W.).

pretation of an ante- or post-nuptial settlement was surprisingly liberal,[18] the power of variation fell far short of the jurisdiction conferred b section 86(1), which extends to any property to which either spouse i entitled. Of course the one overriding limit on the scope of section 86(1 is the requirement that the settlement order be made in the course of matrimonial cause instituted under the Act.

The philosophy behind section 86(1), as Kitto J. pointed out i *Lansell v. Lansell*[19] in upholding the constitutional validity of the section,[20] is to permit a complete readjustment of property rights between husban and wife at the time of the formal re-organisation of their marital relation ship. Kitto J. was prepared to concede that the section would have bee unconstitutional had it created a jurisdiction quite independent of an matrimonial cause—such a law would be "with respect to" property rathe than matrimonial causes.[21] However, by its terms section 86 create a remedy incidental to a claim for principal relief and thus was valid Nevertheless the section has a broad scope, since it permits a court fo example, to order a husband to settle property on his wife many year after the decree absolute. Indeed in *Lansell v. Lansell* itself the wife's[22] claim was made 14 years after the decree absolute in respect of propert acquired by her husband after the decree.

Some of the earlier authorities concerning section 86 suggested tha the courts were moving towards a generous view of the scope of th section. Thus in *Horne v. Horne*[23] a broad interpretation was afforde to the term 'settlement', including not merely a transfer of specifi property, but also a charge over assets. The judgments in *Horn* suggested a close relationship between the maintenance provisions (section 84 and 87) of the Matrimonial Causes Act and section 86. But a chang appeared to have occurred with the decision of the New South Wale Court of Appeal in *Smee v. Smee*[24] which imposed comparatively stringen limits upon the discretion conferred by section 86. In that case th court considered that the power to order a settlement of property wa quite distinct from the court's power to make awards of periodic o lump sums, secured or otherwise, for the maintenance of either part to the marriage. Section 86 was not to be used as a device for awardin maintenance to a party and in fact an adjustment of existing propert rights by way of a settlement order was, in general, justified only wher the claimant could demonstrate some contribution to the acquisition o

[18] See *Dewar v. Dewar* (1960) 106 C.L.R. 170 (transfer of land to joint name of husband and wife shortly after marriage *held* to be a post-nuptial settlement).
[19] (1964) 110 C.L.R. 353, 361.
[20] As a law with respect to divorce and matrimonial causes within Constitutio s. 51 (xxii).
[21] (1964) 110 C.L.R. 353, 359.
[22] Actually the ex-wife.
[23] (1962) 3 F.L.R. 381, 393-4 (N.S.W.).
[24] (1965) 7 F.L.R. 321.

the particular asset in dispute. Whereas a court was obliged to consider the means, earning capacity and conduct of the parties in assessing the appropriate maintenance award,[25] these factors were not necessarily relevant to a determination of whether a settlement order should be made. The one qualification to the dichotomy between the maintenance and settlement provisions was a concession that section 86 authorised a settlement of the matrimonial home if, for example, that was the best way of discharging the husband's obligation to provide satisfactory accommodation for his wife. Otherwise it was necessary to show a material contribution to the acquisition of the asset, although this might include an indirect contribution, insufficient to give rise to a proprietary interest on orthodox principles.[26]

It was soon apparent that even the New South Wales courts were concerned to avoid the restrictive approach of *Smee v. Smee* in the interests of achieving a complete adjustment of the parties' financial relations at the time of divorce.[27] In *Smith v. Smith*[28] a petitioning wife was ordered to transfer her interest in the matrimonial home of which she was joint tenant, to the 'guilty' husband, on condition that he paid her $6,000, that sum to be secured by a mortgage over the property. Toose A.J. was partly influenced by the wife's reduced circumstances as a result of her husband's conduct. But the most significant fact to be considered was that the husband, the child of the marriage, the co-respondent and her children were living in the matrimonial home. In those circumstances some order 'obviously' had to be made and the most sensible solution was to allow them to remain in the home, while giving the wife a lump sum in return for her interest, taking into account her husband's exclusive use of the premises for some time and his payment of all outgoings. In short, section 86 permitted the judge to distribute the matrimonial assets between the parties in a manner that conserved the assets, yet took account of the parties' needs for the future, given that they were to be divorced. In *Treweeke v. Treweeke*[29] Begg J. was moved by the profligate habits of the husband to ensure that the wife would have security for the future without the risk of the husband dissipating his capital. This was done by ordering the husband to settle his interest in a substantial trust upon his wife for life or until remarriage, with remainder to the children. A trustee was appointed to manage the fund

[25] S. 84(1).

[26] *E.g.* efficiency in the conduct of household affairs. (1965) 7 F.L.R. 321, 334. The actual decision in *Smee v. Smee* was that an order requiring a husband to pay a specified sum to his wife for the purchase of the matrimonial home could not be supported by s. 86 since a settlement must operate upon specified or specifiable property to which either party is entitled. On this point the case remains good law, although as the judgments recognised, the same order, in substance, could be made under ss 84 and 87, or under s. 86 by creating a charge over certain of the husband's assets as suggested in *Horne v. Horne* (1962) 3 F.L.R. 381, 386.

[27] *Eagle v. Eagle* [1966] 2 N.S.W.R. 440, 441.

[28] (1967) 10 F.L.R. 57 (N.S.W.), *cf. Van Lifj v. Van Lifj* [1967] 1 N.S.W.R. 102.

[29] [1967] 1 N.S.W.R. 284.

and was granted power to purchase a home for the wife. Begg J. made it plain that, despite *Smee v. Smee,* he regarded the powers under Part VIII of the Matrimonial Causes Act as very wide and closely related to each other.[30] In *Dempsey v. Dempsey*[31] the Queensland Full Court refused to follow *Smee v. Smee*, holding that sections 84 and 87 were merely different aspects of the court's responsibility to reach an equitable financial solution on the dissolution of the marriage.

It was therefore not surprising that the High Court in *Sanders* v *Sanders*[32] rejected the narrow approach of *Smee* v. *Smee*. In *Sanders* the Supreme Court of Norfolk Island had dissolved a marriage and ordered the husband to settle the matrimonial home upon his wife. Shortly thereafter, the home was destroyed by fire and the wife obtained an order which, *inter alia,* compelled the husband to pay all amounts due under the policy to her and also required him to transfer the policy. On appeal to the High Court, the husband argued that the Supreme Court lacked jurisdiction to make the order since the wife had not specifically applied for a settlement of particular property under section 86.

Barwick C.J., with whom McTiernan J. agreed, said the objection misconceived the place of section 86 and its relationship with other section in Part VIII. The section conferred a broad flexible power to provide fo the maintenance of the parties and the children of the marriage. It wa complementary to section 84 and was not confined to cases where th claimant had directly contributed to the acquisition of the property. B the same token, section 86 covered situations other than the provision c maintenance.

> As is rightly pointed out in *Horne* v. *Horne* . . . disputes between the partie to the matrimonial cause as to the beneficial ownership of property veste in one or both of them . . . can be, and indeed can only be, determined i the matrimonial cause. Further, in my opinion, in an appropriate case although one of the parties has no legal or equitable right to property veste in the other . . . the Court hearing the matrimonial cause may make order settling that property on that one. . . No doubt cogent considerations c justice founded on the conduct and circumstances of the parties would nee to be present if such orders were to be made. But if those consideration are present, settlements beyond the provision of mere maintenance, c the determination or enforcement of rights, legal or equitable, in my opinio can be made.[33]

Since section 86 could be used as a maintenance device it followe that a general claim for maintenance was sufficient to include a claim fo settlement of property. It also followed that the Chief Justice could n agree 'with much that was said in *Smee* v. *Smee*'. The court could mak

[30] *Ibid.* 287.
[31] (1967) 11 F.L.R. 61.
[32] (1967) 116 C.L.R. 366. Barwick C.J., McTiernan and Windeyer JJ.
[33] *Ibid.* 375-6. See also Windeyer J. *ibid.* 381.

any order that it considered 'just and equitable' subject only to the requirement that the discretion was exercised judicially—for example, it would be improper to exercise the power to punish a guilty spouse for reprehensible conduct,[34] or to afford *solatium* to the innocent spouse.[35] In this case the Chief Justice had no difficulty in deciding that the circumstances justified the order although, by consent, the order was modified to compel the wife to apply the insurance moneys towards the rebuilding of the matrimonial home.

The major effect of *Sanders v. Sanders* is that section 86 is now interpreted to confer the broadest powers on a court in adjusting the property rights of the parties to a divorce, or other matrimonial cause. Sections 86 and 84 clearly overlap and, as Windeyer J. pointed out,[36] they are in essence different means of attaining the same end. The basic distinction between the two is that an order under section 86 must relate to specific property, whereas a maintenance order under section 84 does not do so, although it may be secured on certain property.

The full impact of *Sanders v. Sanders* has yet to be felt. Nevertheless it seems clear that the High Court's analysis of section 86 is both important and sensible as it permits the court to vary existing property rights having regard to the breakdown of the marriage and the need to reorganise the parties' relationship for the future. This approach has a great advantage over the limited powers conferred by the Married Women's Property Legislation of the States (and for that matter over community property regimes) in that the court's attention is not directed exclusively to events occurring in the past. The same point is true even in relation to the Victorian provisions which, as we have seen, do not completely depart from the traditional respect for established property rights. Under section 86, while past history is of course relevant, the court is not confined to the circumstances in which the parties happened to acquire their assets. Rather, it is entitled to look to the future, in the light of the new situation in which the parties find themselves. Therefore the court may take account of events likely to occur in the future, such as the remarriage of either party and may distribute the matrimonial assets in a manner calculated to conserve them.[37] This interpretation means that the rigidities of the separate and community property regimes may be avoided, yet effect may be given to the economic partnership view of marriage.

[34] *Ibid.* 375, 380. See *Rogers v. Rogers* (1962) 3 F.L.R. 398; *Smee v. Smee* (1965) 7 F.L.R. 321, 327.

[35] *Smee v. Smee* (1965) 7 F.L.R. 321, 327, 335.

[36] (1967) 116 C.L.R. 366, 380.

[37] In *Atkinson v. Atkinson* [1969] V.R. 278, 282 Barry J. pointed out that one important factor justifying the common, but by no means automatic order that the husband transfer his interest in the matrimonial home to his wife, is the necessity to conserve the parties' assets. If the home is sold and the wife purchases a new one from the proceeds, the net resources available to both parties will be diminished. Expenses will include agent's commission on sale of the matrimonial home, legal costs on the sale and purchase, stamp duty payable in respect of the purchase, in all perhaps $1,000.

One other important advantage of the *Sanders v. Sanders* approach i that, being flexible, it is capable of operating independently of the notio of matrimonial fault. It has been held that the party guilty of a matrimonia offence may receive the benefit of a settlement order. In *Griffith v Griffith*[38] the husband succeeded in a cross-petition in obtaining a decre of dissolution against his wife on the ground of her cruelty. The wif had an epileptic illness and a mild form of paranoia, but was foun 'guilty' of cruelty on the principles of *Gollins v. Gollins*.[39] Although Allen J decided to make no settlement order, he specifically rejected an argumen that a settlement order could not be made in favour of the guilty party. He considered that section 86 allowed a settlement regardless of matrimoni fault provided it was 'just and equitable' that the order should be made It is true that in *Griffith v. Griffith* the wife was only technically guilty, but there can be no doubt that the same principle applies in favour of spouse more obviously 'guilty' of causing marital disharmony.[40] As wit maintenance,[41] the court is entitled to take matrimonial fault into accoun to some extent in determining whether to order a settlement of property.[4 But, in line with recognition that the grounds of divorce are merel symptoms of breakdown, rather than causes,[43] the current trend is t underplay the relevance of fault. The one qualification to this developmen derives from the wording of section 89 Matrimonial Causes Act. Thi section, *inter alia,* bars a settlement order being made in favour of a unsuccessful petitioner unless (so it was held in *Griffith v. Griffith*) th petitioner was also a respondent, successful or not, to a counter-petition

Perhaps the main significance of permitting a 'guilty' party to receiv a settlement, beyond the manifest good sense of such a development, is tha the settlement device will remain an effective method of resolving matri monial property disputes when the fault concept of divorce is abandoned No doubt the replacement of the doctrine of the matrimonial offence by system of divorce on proof of breakdown or by consent will take time Nevertheless, the replacement will be made. The flexible adjustment o property disputes through a discretionary power to order settlement o particular property together with a broad power to award periodic o lump sums as maintenance, is readily assimilated to a non-fault syste of divorce. It is quite clear even now that the trial judge exercises th broadest discretion under section 86. An appellate tribunal will no interfere unless there has been a clear error of law or a manifestl improper exercise of the discretion. The mere fact that the appellat

[38] (1968) 11 F.L.R. 296 (N.S.W.).

[39] [1964] A.C. 644.

[40] *Cf. Smith v. Smith* (1967) 10 F.L.R. 57 (N.S.W.) *supra* n. 28.

[41] *Lumsden v. Lumsden* [1964] V.R. 210; *Rodgers v. Rodgers* (1965) 114 C.L.R 608.

[42] *Atkinson v. Atkinson* [1969] V.R. 278, 288.

[43] See generally Law Commission, *Field of Choice* (1966) Cmd 3123.

.ribunal would not have made the order is insufficient to justify inter-
vention.[44] Such a broad discretion is admirably suited to an enlightened
system of divorce seeking to achieve a rational and humane accommodation
of the interests of the parties and the community.

VI THE RELATIONSHIP BETWEEN SECTION 86 AND STATE MATRIMONIAL PROPERTY LEGISLATION

Apart from the generous interpretation of the scope of section 86 the most notable feature of the emerging Australian law of matrimonial property is the gradual extension of federal jurisdiction over the field of matrimonial property disputes. The trend is towards a displacement of state jurisdiction by the federal jurisdiction arising on the hearing of a matrimonial cause under the federal act.

The leading case is *Horne v. Horne*.[45] The wife commenced proceedings before the Prothonotary under section 22 of the Married Women's Property Act 1901 (N.S.W.), claiming an order for sale of the matrimonial home and division of the proceeds between herself and her husband. The husband had previously filed a petition for dissolution of the marriage and in due course obtained a decree *nisi*.

The petition made no claim to a settlement of any property and the wife sought no order relating to property in the federal proceedings. The husband sought an injunction under section 124 of the Commonwealth Matrimonial Causes Act[46] to restrain his wife proceeding further with her application. The matter was referred to the Court of Appeal which granted the injunction on the ground that the state court lacked jurisdiction to entertain the wife's application. The Court of Appeal relied upon section 8(2) of the Matrimonial Causes Act which states that

> where . . . a matrimonial cause has been instituted, then, whether or not that matrimonial cause has been completed, proceedings for any relief or order of a kind that could be sought under this Act in proceedings in relation to that matrimonial cause shall not be instituted after the commencement of this Act except under this Act.

It is important to note that on the hearing of the husband's application for an injunction (which was after the decree of dissolution had become absolute) he was given leave to amend his petition to claim a settlement of the wife's property.

Wallace J., with whom Dovey and McClemens JJ. agreed, said the question involved determining whether the claim of the wife was 'of a kind that could be sought' in federal jurisdiction. He thought the answer to this was clear, since any order the Prothonotary could make might also

[44] *Atkinson v. Atkinson* [1969] V.R. 278, 288.
[45] (1962) 3 F.L.R. 381. See Note, (1963) 37 *Australian Law Journal* 258.
[46] S. 124 empowers the court to issue an injunction in any case where it is just convenient to do so.

be made by the federal court under section 86. This was true even assum ing that the powers of the Prothonotary were confined to declarin· existing property rights. The power under section 86 to order one spous· to transfer property to the other required for its exercise the exclusiv right to determine existing property rights. Otherwise the court woul not know on what property its order could operate. Thus the state cou in this case was being asked for relief of a kind that could be sough in federal proceedings. In sum:

> even purely declaratory relief under s. 22 is out of order at any tim after the institution of a matrimonial cause whenever an application fc maintenance or for a settlement is current or contemplated because th exclusive right to determine the respective assets of the parties is veste in the court exercising this federal jurisdiction.[47]

Wallace J. rejected the argument that the federal court would n have jurisdiction to make a settlement order if no property relief we sought in the petition. The Act[48] permitted relief to be sought after th decree absolute, although the leave of the court was required.[49] He di not however, specifically rule as to whether state jurisdiction would b displaced if no property application at all had been made in the feder proceedings. But it would be strange indeed if the displacement of sta jurisdiction were to depend on whether a formal (but not serious application for a settlement had been made in the matrimonial cause.

Recently the New South Wales Court of Appeal in *Re Gilmore an the Conveyancing Act*[50] has imposed a limit upon the application *Horne v. Horne.* The husband had obtained a decree of dissolution again the wife in 1962. Neither party sought ancillary relief in those proceeding The husband continued to reside in the matrimonial home of which th husband and wife were concededly joint tenants. In 1967 the wife applie to the Equity court for appointment of trustees for sale of the land pursua to section 66G of the Conveyancing Act 1919. The husband argue that this application was in substance one for a settlement within t Matrimonial Causes Act and therefore, on the authority of *Horne v. Horn* the state court lacked jurisdiction to proceed further. The Court Appeal rejected the argument, although conceding that a federal court und section 86 could make an order for the realisation of assets even whe there was no dispute as to the parties' respective interests.[51] Such an ord could be made if it were somehow necessary to meet the circumstanc created by the breakdown of the marriage, as where the wife required h share of the matrimonial home in cash in order to purchase a ne smaller home for herself. But in this particular case the order cou

[47] (1962) 3 F.L.R. 381, 395.
[48] S. 87(1)(n).
[49] S. 68(3).
[50] [1968] 3 N.S.W.R. 675. This was a two-one decision, the dissent being on unrelated point.
[51] *Ibid.* 680.

not be made, as there was insufficient connection between the wife's application and the matrimonial proceedings. The court was not prepared to hold that state jurisdiction in disputes between a man and his ex-wife was forever displaced simply because a decree of dissolution had once been pronounced between them. Federal jurisdiction arose only where the application bore an appropriate relationship to substantive proceedings constituting a matrimonial cause—to be within federal power the application had to be incidental to relief obtained in the principal proceedings. In this case the order sought by the wife served no purpose related to maintenance or to the readjustment of the parties' relationship consequent upon divorce and thus could not have been made by a federal court.

The assumption underlying the reasoning in *Re Gilmore* is that the Commonwealth lacks constitutional power to authorise a settlement order after decree absolute, unless the order is related to the dissolution of the marriage and consequent adjustment of rights. This is no doubt impeccable constitutional theory, but the application of the theory in *Re Gilmore* does not sit well with the actual facts of *Lansell v. Lansell*.[52] As noted above[53] a settlement was sought in *Lansell v. Lansell* some fourteen years after decree absolute and the High Court cast no doubt on the competence of the federal court to determine the claim. Be that as it may, the result of *Horne v. Horne* and *Re Gilmore* seems to be that the institution of a matrimonial cause ousts state jurisdiction to resolve property disputes between the spouses, at least where some form of property relief is claimed in the federal proceedings. However, there comes a point after the decree absolute when the state jurisdiction revives. This point is apparently reached when the property claim loses the character of a matrimonial squabble and takes on the appearance of an orthodox dispute between strangers.

In the only reported Victorian decision on the issue, Adam J. in *McIntosh v. McIntosh*[54] declined to follow *Horne v. Horne*. He relied mainly on the argument that the state proceedings[55] were concerned only with delineation of existing title between husband and wife, whereas section 86 was concerned with resettlement of existing proprietary interests. Thus, he argued, the *kind of relief* available in state proceedings was quite different from that available in a federal court, even though the latter might have had to canvass some of the same issues as the state court in order to determine what property was eligible for a settlement order. Adam J. also expressed concern that, if *Horne v. Horne* were followed, state courts would find themselves displaced from much of the field of matrimonial property disputes.

[52] (1964) 110 C.L.R. 353.
[53] *Supra* nn. 19-21.
[54] (1963) 7 F.L.R. 42.
[55] In this case, a contest between divorced persons by way of writ, Adam J. stated that the same principles would apply to proceedings between husband and wife under s. 161 Marriage Act 1958. (1963) 7 F.L.R. 42, 44.

Three points need to be made concerning *McIntosh v. McIntosh*. First, the basic difficulty with the judgment is that it underestimates th scope and flexibility of section 86. The section does permit, it is submitted the same kind of order as may be made in state proceedings. In *Re Gilmore,* a case largely unsympathetic to the philosophy of *Horne v. Horne* it was agreed that a federal court could order the sale of a asset, title to which was not disputed and direct division of the proceed according to the respective interests of the parties.[56] There appears to b no reason preventing a federal court delineating authoritatively the parties existing interests and then deciding not to vary those interests.[57] Secondly, if *McIntosh v. McIntosh* were correct in relation to a state jurisdiction t declare, but not vary existing rights, it is no longer applicable in Victoria This follows the 1962 legislation which clearly permits some variation c established proprietary interests. Thirdly, the displacement of stat jurisdiction, it is suggested, far from being alarming, is a desirable tren It encourages the resolution of marital property disputes by the cou handling the reorganisation of the entire marital relationship. Apart from avoiding duplication of effort, this development ensures that the partie property rights will not be adjusted in isolation from all other problem associated with the breakdown of the family unit.

It will have been noticed that *Horne v. Horne* applies to the case c state proceedings instituted after the commencement of a matrimoni cause. The other and perhaps more usual case is that of the state cou dealing with the property dispute before the matrimonial proceedings ar commenced. In this case section 8(2) of the Matrimonial Causes Ac probably does not apply since it merely forbids the institution of pro ceedings for relief of a kind that could be obtained from a federal cour not the continuation of proceedings already instituted.[58] Neverthele much the same result has been reached in New South Wales as in th *Horne v. Horne* situation. This has not been done on the basis that th state court lacks jurisdiction to proceed with the matter, but in th exercise of the federal court's power to issue an injunction when it 'just and equitable' to do so. Thus in *Shepherd v. Shepherd*[59] the feder court issued an injunction to restrain the wife proceeding with an applicatio under section 22 of the Married Women's Property Act 1901 for declaration that certain furniture was her sole property and that certai other assets were held by her husband and herself as tenants in commo Begg J. issued the injunction simply in the interests of avoiding duplicatio He considered it just and convenient that the entire dispute should b resolved in federal jurisdiction particularly as the husband had claime a settlement of property in the divorce proceedings and his claim require

[56] *Supra* n. 51.
[57] *Horne v. Horne* (1962) 3 F.L.R. 381, 394-5.
[58] *Jones v. Jones* [1968] Argus L.R. 381.
[59] [1968] 1 N.S.W.R. 64.

ı delineation of the parties' property rights. In *Jones v. Jones*[60] the wife ·ommenced proceedings in Equity for dissolution of the partnership busiɩess conducted with her husband and for appointment of a receiver under he terms of the Partnership Act 1892 (N.S.W.). The husband filed a ·etition for dissolution of marriage and specifically sought an order settling he wife's interest in the partnership upon him. The husband succeeded ı obtaining an injunction from the federal court under section 124 of the 'ommonwealth Matrimonial Causes Act, restraining continuation of the roceedings in Equity. Jenkyn J. held that, even assuming there was oncurrent state and federal jurisdiction, it was convenient to resolve the roperty dispute at the same time as all other disputes between the parties.

Shepherd v. Shepherd and *Jones v. Jones* reinforce the suggestion that ıe extension of federal jurisdiction must inevitably reduce the significance f the principles of state law regulating matrimonial property disputes. The ›rmal legal position now appears to be that state proceedings not oncluded at the time of institution of the divorce proceedings very robably will be stayed to enable the federal court to exercise its exible powers of adjusting the parties' property rights. The inevitable onsequence must be that the legal advisers to warring spouses will be ss willing to commence state proceedings since there is a grave risk of ıose proceedings being terminated abruptly without concluding the matter. ven if the state court makes an order there is always power in the ederal court to overturn that order, although it may be predicated that the state court has a broad discretion (as in Victoria) the federal court ill be more reluctant to intervene.

It is not suggested that the number of matrimonial property disputes eard before state courts will drop dramatically in a short space of time. ıere must be, for example, considerable scope for an interim solution a dispute where there is a relatively long delay between the effective eakdown of the marriage and its formal dissolution. This delay is still ıe of many broken marriages and not only those ultimately dissolved ı the ground of five years' separation. On the other hand, one suspects at the tendency would be for marriages in which the partners have cumulated property to reach the divorce court with a minimum of delay ter breakdown. Partners to such a marriage are better able to appreciate e need for legal adjustment of their affairs and to afford that adjustment, well as being more responsive to community demands to regularize cit unions. Since these are the marriages that generate property disputes, would seem that many such disputes will fall to federal courts for justment, simply because it will not be worth commencing state oceedings. Again, it must be remembered that future reform of the law divorce is likely in many cases to lessen the delay between breakdown d formal dissolution of marriage. This, too, would increase the likelihood

[60] [1968] Argus L.R. 381.

of the discretionary federal approach gradually displacing the mor restrictive state rules. For reasons given earlier, this characteristic o the emerging Australian law of matrimonial property is to be welcomed

VII CONCLUSION

The major development in Australian matrimonial property law ha been the emergence of an approach which permits alteration of existin property rights on breakdown of marriage. This has occurred mainl by reason of a broad interpretation of the powers in section 86 of th Commonwealth Matrimonial Causes Act and a correspondingly generou view of the extent of federal jurisdiction. State law, with the exceptio of Victorian law, has adhered to the traditional view that the court's rol should be limited to the ascertainment of the parties' property rights i accordance with settled principles. Victoria has departed from th traditional view to some extent, but the 1962 legislation, as interpreted, st suffers from the defect of being tied to events occurring in the past. Th the Victorian courts are not entirely free to re-adjust the property righ of the parties *for the future,* in the light of the breakdown of their marriag

The trend to a discretionary, forward-looking approach is most desirab and any reform should be directed towards permitting a discretiona adjustment of matrimonial property rights as soon as possible after brea down of marriage. This could (and ideally should) be done by feder legislation extending powers similar to those in section 86 into the ar now occupied by state Married Women's Property legislation. The are grave practical difficulties with this solution, in particular the co stitutional problems posed and the reluctance of the Commonwealth 'intrude' further into the state sphere. Nevertheless, it is suggested th this approach warrants closer examination. Of course if divorce la is reformed to make access to the divorce court easier following effecti breakdown of marriage, a similar result will be reached in most cas without the necessity for the Commonwealth to enter areas hither reserved to the States. The alternative is for the States to reform th Married Women's Property legislation to authorise a re-adjustment property rights and not merely a declaration of established interests. T would allow a forward-looking adjustment of property rights, although t formal reorganisation of the matrimonial relationship might be delay or never take place. Moreover, since state Supreme Courts are invest with federal jurisdiction to hear matrimonial proceedings, there is lit doubt that the discretionary state solution to the matrimonial prope dispute would be respected when the matrimonial proceedings w determined.

Whatever direction the reforms ultimately take, it is fair to say that emerging law of matrimonial property represents a step towards a ratio and realistic system, designed specifically to deal with marriages that h broken down.