

# A History of Married Women's Real Property Rights<sup>1</sup>

*“ When we see that women are admitted to the capacity of commercial and professional life in most of its branches, that they are received on equal terms with men as voters and legislators; that they act judicially, can hold property, may sue and be sued alone, may and frequently have to provide a home and maintain the family, when too, they are organized in time of national danger as virtual combatants in defense of the country, it is time, I think, to abandon the assertion that in the eye of the law they are merely the adjuncts or property or the servants of their husband, that they have the legal duty of yielding and employing their body to their husband's will and bidding in all his domestic relations... ”*

- Isaacs J in *Wright v Cedzich* (1929) 43 CLR 493, at 505

## Introduction

Oscar Wilde said ‘*the duty we owe to history is to rewrite it*’. Too often our history is ‘his story’. The tale of man-kind is often only a tale of man. If we owe a duty to rewrite this tale, there must first bestow upon us a duty to write a ‘*herstory*’.<sup>2</sup> Herstories help position women's lives within a historical agenda. Feminist herstories explore how women lived in previous times. This is key to the feminist method of consciousness raising.<sup>3</sup> Consciousness raising is a vehicle for creating knowledge by exploring common experiences and patterns that emerge from shared tellings of life events.<sup>4</sup> Within a feminist vein, it focuses on taking women seriously and understanding their lives and experiences from their perspective.<sup>5</sup> Feminist jurisprudence uses the same methodology in its attempts to explain and critique the law's relationship with women and encourage change in support of women's equity.<sup>6</sup>

This paper will examine the application of the Married Women's Property legislation within the Australian context. The Married Women's Property legislation dominated the governance of married women's rights to real property from the 1880s to the 1960s. The allocation of real property rights within a marriage has major social and economic implications on married women given that the matrimonial home represents

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<sup>2</sup> Barns, A, Cowie, A, & Jefferson T, *Women's Property Rights: A herstorical dialogue of economic thought and gender inequality*, (2009), Working Paper Series by Women in Social; and Economic Research (WiSER) Curtin GSB, Perth.

<sup>3</sup> MacKinnon, Catharine A, ‘*Feminism, Marxism, Method and the State: An Agenda for Theory*’ (1982) *Signs* 515 at 535; in Regina Graycar & Jenny Morgan, *The Hidden Gender of Law* (2<sup>nd</sup> ed Sydney, The Federation Press, 2002) at 71.

<sup>4</sup> Leslie Bender, ‘A Lawyer's Primer on Feminist Theory and Tort’, (1988) 38 *Journal of Legal Education* 3, 9 in Jeanne L Schroeder, ‘Abduction from the Seraglio: Feminist methodologies and the Logic of Imagination’, (1991) 70 *Texas Law Review* 109, 153-153.

<sup>5</sup> Christine Littleton, ‘*Book Review; Feminist Jurisprudence: The Difference Method Makes*’ (1989) 41 *Stanford Law Review* 751 at 765.

<sup>6</sup> Christine Littleton, ‘*Book Review; Feminist Jurisprudence: The Difference Method Makes*’ (1989) 41 *Stanford Law Review* 751 at 766.

over half of all household assets for Australian families.<sup>7</sup> Determining real property rights within marriages became particularly important in the 20<sup>th</sup> century with the increasing number of divorces. This paper will analyze the judicial literature surrounding married women's access to real property rights in order to assess effects the law had on married women's public a private persona.<sup>8</sup>

### *My position as researcher*

Before commencing my discussion of this issue a feminist analysis requires that I provide some background about myself as an author/researcher. First, I am a 21-year-old male student studying law and economics. I was first introduced to critical feminist theory whilst studying English literature in high school. The authors I read included Thea Astley, Adrienne Rich, and Sylvia Plath. Feminist literature introduced to me the idea that society is dominated by male discourses. To me, feminism was firstly a compass for women – it located women within a patriarchal context through analyzing the ordinary and extraordinary experience of womankind. Too often women's voices were located in the margins. Secondly, I came to understand feminism as a tool for deconstructing dominant male discourses and critically analyzing their effects on women. Dominant male discourses are pervasive and its presence is explicit within political and legal literature. These domains were built upon patriarchal foundations and, until relatively recently, were the exclusive province of men.

At the beginning of 2009 my job gave me the opportunity to do some assisted research with two feminist economists at Curtin Graduate School of Business; Dr. Angela Barns and Dr. Therese Jefferson. The topic was 'Women's Property Rights'. I was heavily influenced by the works of Dr. Jocelyne A. Scutt, Regina Graycar, Jenny Morgan, and Mary Lyndon. My work required me to carry out an extensive search of the relevant judicial literature. I was inspired by the work of Isaacs J, Kirby J, and Lord Denning. They have influenced my opinion of the correct role of a judge in applying the law and guaranteeing equilibrium between social expectations and the preservation of our legal traditions. The research I did for that project was the catalyst for writing this paper.

In undertaking this research I have had to address my own biases and agenda given that I am a male writing from a critical feminist position. Men who speak out against sexism often face criticism. Some feminists argue that all male praise of feminism is merely a façade; it is a cloak used to disguise men's efforts to usurp power from women.<sup>9</sup> Hearn says that 'men's practice against patriarchy will always be problematic, as men do not occupy the same position in relation to the dominant power structure as women'.<sup>10</sup> I agree with Hearn's statement. For this reason I do not

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<sup>7</sup> Kohler, M & Rossiter, A, 'Property Owners in Australia: A Snapshot' (May, 2005) *Economic Research Department*, Reserve Bank of Australia.

<sup>8</sup>In this setting *public* means a realm of state-intervention. The opposite of *public* is *private*, which Katherine Donovan associates with the realm of the family – a place where the state can not intervene and legislate: see Katherine Donovan, *Sexual Divisions in Law: Divisions and dichotomies* (London, Weidenfeld & Nicholas, 1985) see [2]-[15] found in Regina Graycar & Jenny Morgan, *The Hidden Gender of Law* (2<sup>nd</sup> ed Sydney, The Federation Press, 2002) at 10.

<sup>9</sup> See Moi, T. (1989) *Men Against Patriarchy*, in L Kauffman (ed.) *Gender and Theory: Dialogue on Feminist Criticism*, Basil Blackwell, Oxford at page 184.

<sup>10</sup> Hearn, J. (1992) *Men in the Public Eye*, Routledge, London at page 230.

see myself as a feminist. I see myself as a supporter of the feminist ideology which makes me, as Bob Pease suggests, a profeminist. Profeminism offers men an avenue for educating themselves about the impact of patriarchy on women's lives and is one of the major forms of resistance to dominant masculinity.<sup>11</sup> To fulfill this premise, profeminists can employ the same 'consciousness raising' methodology used by feminists.

## 1. Real Property Law: Britain's Legacy to Australian Women

The Australian colonies already had established legal regimes which governed a married women's right to real property prior to Australia federated in 1901. These regimes were imported from England as imperial laws. A married woman's real property rights derived from two main sources. The first was English common law. The doctrine of unity of spouses controlled a married woman's rights to real property during her marriage. This doctrine was a rule of law associated with the common law doctrine of coverture. The second source of law was statutory law. The *Married Women's Property Act 1882* (the Act) was the first major statute to amend the rights of married women property rights.<sup>12</sup> The assent and operation of the Act caused much controversy in both England and Australia.

### *Coverture and the unity of spouses*

Coverture is 'the state of being under the protection of one's husband.'<sup>13</sup> The term can also be used to mean marriage. Marriage can then be categorized as a contract between a wife and husband where the wife gives up certain legal powers to the husband in return for being under his protection. Until the late 19<sup>th</sup> century, the marriage contract was the last contract a woman would ever enter. The common law of England used marriage to create a legal fiction whereby a husband and wife were seen as one person.<sup>14</sup> Sir William Blackstone famously observed that 'the very being or legal existence of the women is suspended during the marriage and...consolidated into that of the husband.'<sup>15</sup> The legal disabilities that governed a woman's rights during marriage were collectively called the laws of coverture. It was thought that where two persons were destined to pass their live together one should be dominant

<sup>11</sup> Pease, B. Kook, J. (1999) *Transforming Social Work Practice: postmodern critical perspectives*, St Leonards, N.S.W: Allen & Unwin at page 108.

<sup>12</sup> *Married Women's Property Act 1882* (UK).

<sup>13</sup> *Butterworths Concise Australian Legal Dictionary*, (3<sup>rd</sup> ed., Australia, LexisNexis: Butterworths, 2006), 104.

<sup>14</sup> *The Registrar-General of New South Wales v Wood* (1926) 39 CLR 46 at 48. The union of matrimony created the metaphysical union of flesh. The husband was responsible for keeping the public persona of the marriage. As Sir Thomas Smith wrote in *Commonwealth of England* Book i, page 11, 'the man...get[s], to travel abroad, and to defend.' The wife, however, was the 'angle' of the private world; 'the wife[']s purpose is] to save, to stay at home, and to distribute that which is gotten, for the nurture of the children and family'. The idea of *angel* was taken from a poem by Coventry Patmore, 'Angels of the House', which celebrated domestic bliss in 19<sup>th</sup> century England.

<sup>15</sup> Sir William Blackstone, *Commentaries on Laws of England: Of Husband a Wife* (Chapter 15), (1765-1769), Co Lit 112; also see *Murray v Barlee* (1834) My. & K 209 at 220 per Lord Bougham: '[a wife's] separate existence is not contemplated; it is merged by the coverture in that of her husband.'

and other should be subordinate.<sup>16</sup> It was also assumed that the man should be the dominant party because his superior physical strength. Dominance was a man's natural right; '[g]od hath given the man greater wit, better strength, better courage, to compel the women to obey, by reason or force; and to woman, beauty, fair countenance, and sweet words, to make the man obey her again for love.'<sup>17</sup>

The husband represented the wife's civil/public persona. She was 'covered' or 'veiled' by her husband. Having no separate legal existence meant that a married woman could not enter into her own contracts.<sup>18</sup> Similarly, the disability meant a married woman could not sue or be sued.<sup>19</sup> The coverture meant a married woman was effectively 'civilly dead'.<sup>20</sup> The laws of coverture affected all public facets of a married women's life.

A husband and wife's real property rights were governed by a special type of ownership known as a tenancy by entirety. Blackstone once again provides the classic statement on this area of the law; '...if an estate in fee be given to a man and his wife, they are neither properly joint-tenants, nor tenants in common; for husband and wife are considered one person in law, they cannot take the estate by moieties, but both are seized of the entirety...; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.'<sup>21</sup> A tenancy by entirety was a species of joint tenancy, with the distinguishing characteristic that a husband or wife had no power of severance without the others bona fide concurrence or upon one spouse surviving the other.<sup>22</sup> The formation of a tenancy by entirety derived from the classical theory that a husband and wife constituted an indivisible unit. Only together could they alienate real property.

A husband was entitled to all the rents and profits which derived from a freehold estate during marriage. This applied to not only property that was bought during a marriage, but also to freehold that a wife brought to a marriage.<sup>23</sup> When applying this rule of coverture the courts predominantly spoke of the husband's gain rather than the wife's loss.<sup>24</sup> The loss a wife suffered during marriage is more readily identifiable

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<sup>16</sup> Peregrine Bingham, *The Laws of Infancy and Coverture*, (Burlington, Chauncey Goodrich, 1849) reprinted by E H Bennet (Littleton, Colorado, Red B. Rothman & Co, 1980), 182.

<sup>17</sup> Sir Thomas Smith, *Commonwealth of England*, Book i, p 11.

<sup>18</sup> *McCormick v Allen* 39 CLR 22 per *Knox C. J.* at p. 28. In fact, a married woman in England was at a greater disability than an infant. The contracts of an infant were generally voidable at law, whereas the contracts of a married woman, with few exceptions, absolutely void (see note 32).

<sup>19</sup> Lord Brougham stated in *Murray v Barlee* (1834) 3. My. & K 209 at 220 that 'this is her position of disability, or immunity at law.' The doctrine of coverture effectively protected married women from personal liability. The husband was liable if a married woman committed a tort or civil misdemeanour.

<sup>20</sup> 1848 Seneca Falls Declaration of Sentiments; in Claudia Zaher, 'When a Woman's Marital Status Determined her Legal Status: A Research Guide on the Common Law Doctrine of Coverture' (2002) 94 *Law Library Journal* 459 at 460.

<sup>21</sup> Sir William Blackstone, *Commentaries on the Laws of England* 182 (9<sup>th</sup> ed. 1783), in Fred Franke, Asset Protection and Tenancy by the Entirety, (2009) 34 *ACTEC Journal* 210, 210.

<sup>22</sup> Citing *Coke*, in *Challis on Real Property* (2<sup>nd</sup> ed), in *Registrar-General v Wood* (1926) 39 CLR 46 at 54 per *Isaac's J.*

<sup>23</sup> *Robinson v Norris* (1848) 11 QB 916, 116 ER 716.

<sup>24</sup> *Robinson v Norris* (1848) 11 QB 916, 116 ER 716, at 920 per Lord Denman C.J., *Johnson v Johnson* (1887) LR 35 Ch. D. 345, at 348 per Stirling J, *Tennett v Welch* (1888) LR 37 Ch. D. 622, at 633 per

when framed in terms of disability. A married woman lost all rights to rents and profits which might be realized from a freehold estate as a consequence of coverture. The wife's disability lasted for the life of the marriage. A wife was entitled to the rents and profits on the death of her husband, and if the husband survived the wife, he would have a life interest in the estate – on his death the freehold would revert to the wife's rightful heirs.<sup>25</sup> This disability kept a wife's persona in the private or domestic realm. This hindered a married women's ability to accumulate wealth. The result of this disability was that the wealth of a family was a measure of the husband's property and not the wife's.

The Court of Chancery created an exception to the doctrine of unity of spouses. The equitable doctrine of separate estate was developed throughout the 18<sup>th</sup> century which allowed property to be settled upon a married woman for her own separate use.<sup>26</sup> A settlement was an expressed agreement which stated that certain property should become the separate property of the wife and be for her own separate use. The wife could then deal with the property as if she were femme sole (unmarried).<sup>27</sup> A wife did not need the consent of her husband to alienate her separate estate.<sup>28</sup> A wife's separate property was beyond the reach of her husband.<sup>29</sup> He could not alienate his wife's property. In reality, only wealthy women could take advantage of the equitable doctrine of separate property. Often the separate property doctrine was used by fathers to ensure that property and wealth stayed within the family and was not alienated by a reckless husband.

### *An Act to amend the laws relating to married women*

The 19<sup>th</sup> century was the scene of a multifaceted movement to emancipate married women from the patriarchal confines of English society. The industrial revolution led to a world of greater wealth and higher living standards. It followed that women saw their position in society as undervalued and indeed constrained by archaic values from a bygone era.<sup>30</sup> Women's groups moved to have the marital boundaries redrawn to include the independent rights of married women. Essential to this movement was the need to redefine the property rights of men and women within a marital relationship. The pursuit for equal property rights was one of many goals that women's political groups pursued during this era. The campaign for married women's property rights ultimately intersected with women's campaigns for suffrage, education, and equal wages for equal work. The 'feminist' movement had a snowballing effect in many

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Kay J, *Jupp v Buckwell* (1888) LR 39 Ch. D. 148, *Registrar-General v Wood* (1926) 39 CLR 46, at 51 per Knox C.J.

<sup>25</sup> *Robinson v Norris* (1848) 11 QB 916, 116 ER 716.

<sup>26</sup> I.J Hardingham and M.A Neave, '*Australian Family Property Law*', (Sydney, Lawbook Company Ltd., 1984) at [110] page 11.

<sup>27</sup> The legal rights of a femme sole were succinctly described by Barbara Leigh Smith Bodichon in the following passage: 'A woman of twenty-one becomes an independent human creature, capable of holding and administering property to any amount; or, if she can earn money, she may appropriate her earnings freely to any purpose she thinks good.' See Barbara Leigh Smith Bodichon, '*A Brief Summary in Plain Language of the Most Important Laws Concerning Women; Together with a Few Observations Thereon*' (London, John Chapman, 1854) at 13.

<sup>28</sup> *Willock v Noble* (1875) L.R. 7 H.L. 580.

<sup>29</sup> *Newlands v Paynter* (1840) 4 My. & Cr. 408; 41 E.R. 158.

<sup>30</sup> See Isaac's J in *Wright v Cedzich* (1929) 43 CLR 493, 500-502.

facets of English society. The ultimate goal was greater equality between men and women.<sup>31</sup> However, when these ideas arrived on the steps of parliament their intent was distorted and reframed. The notion of equality of marital rights was suppressed and the need for married women's protection was emphasized.<sup>32</sup>

The passage of the Married Women's Property Bill (the Bill) through English parliament began in 1865 and was not fully realized until 1882. The leading advocates for married women's property rights included Barbara Leigh Smith Bodichon, the Honourable Mrs. Caroline Norton, Harriet Taylor Mills, John Stuart Mills, and numerous women's rights groups.<sup>33</sup> These groups and individuals advocated the elimination of the doctrine of unity of spouses and emphasized the need for married women to control their own property regardless of marital status.<sup>34</sup> The old laws were seen as out of date, as Barbara Bodichon claimed... [t]he abolition of the laws which give husbands this unjust power is most urgently needed.<sup>35</sup>

John Stuart Mills was the first politician to table and present a bill on married women's property to the House of Commons. His ambitions were defeated in 1856. In 1868 the Bill was once again tabled and put to parliamentary debate. The Parliament feared that the Bill would disrupt the peaceful foundation of domestic life.<sup>36</sup> Philip Muntz MP stated that the Bill 'would cause great difficulties in all the domestic arrangements of life. It would cause antagonism between those who we were taught to believe were one.'<sup>37</sup> Mr. Lopes MP, a staunch opponent of the Bill, was convinced that the Bill would materially alter the 'existing relations between husband and wife, and introduce discomfort, ill-feeling, and distrust where hitherto harmony and concord had prevailed.'<sup>38</sup> The Conservatives forced a compromise which resulted in the 1870 *Married Women's Property Act*. This Act fell well short of the expectations of the women's groups as it did not create a system of separate property within marital relationships.

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<sup>31</sup> See John Stuart Mills, *Subjection of Women*, (E-book, Raleigh, N.C. Alex Catalogue, accessed Curtin University Library, 1869).

<sup>32</sup> See Mary Lyndon, *Feminism, Marriage, and the Law in Victorian England, 1850-1895*. (London, I.B. Tauris & Co Ltd Publishers, 1989).

<sup>33</sup> E.g. the Society for Promoting the Employment of Women, The Female Middle-class Emigration Society Workhouse Visiting Society, and The Ladies Sanitary Association.

<sup>34</sup> Mary Lyndon, *Feminism, Marriage, and the Law in Victorian England, 1850-1895*. (London, I.B. Tauris & Co Ltd Publishers, 1989).

<sup>35</sup> Barbara LS Bodichon, 'A Brief Summary in Plain Language of the Most Important Laws Concerning Women; Together with a Few Observations Thereon' (London, John Chapman, 1854) at 14.

<sup>36</sup> Edward Karslake's stated that [t]he law ... was founded upon the assumption that the husband and wife were one person - that position was denoted by the word 'coverture' - that there should be but one head of the family, and that the husband should be that head ... The result of only one person being the head of the family involved, according to text writers on law, 'supremacy' on the one hand, and 'subjection' on the other, or, as he would say in modern language, authority on the one hand and obedience on the other. But the hon. gentleman desired to alter the law ... and to make two heads of the family, instead of one, which could have no other effect than that of introducing discord and confusion into family life': *Times*, 1 June 1868, p. 6, col. b. Karslake was the Conservative MP for Colchester, 1867-8, in Ben Griffith, *Class, Gender, and Liberalism in Parliament, 1868-1882: The Case of the Married Women's Property Acts*, (2003) 46 *The Historical Journal* 59, at 64.

<sup>37</sup> *Times*, 20 Feb. 1873, p. 6, col. c; *Daily News*, 20 Feb. 1873, p. 2, col. b; *Morning Post*, 20 Feb. 1873, p. 2, col. c. Muntz was the Radical MP for Birmingham, 1868-85.

<sup>38</sup> Lopez MP, House of Commons, (3 *Hansard* 192 [10 June 1868], 1352).

Women's groups wanted the Act to afford all married women the separate estate doctrine that had developed in the Court of Equity. This was finally realized in 1882 after the 1870 Act had been significantly amended. The Act was the codification of the equitable doctrine of separate property which effectively made the equitable doctrine of separate property obsolete. It also meant that all women, and not just wealthy women, had access to separate property law regime. It was unclear whether the statutory doctrine of separate property was intended to coexist with the common law doctrine of coverture (as the equitable doctrine had done) or whether it was implicitly intended to superseding it. The remainder of this paper will discuss how the Australian and English judiciary answered this question.

## **2. The Reception of the Married Women's Property Act in Australia**<sup>39</sup>

The laws of coverture prevented a married woman from having her own separate property during marriage. This applied both between herself and her husband and herself and the outside world. The Act<sup>40</sup> gave a married woman the right to acquire, hold, and dispose of any real or personal property as her separate property as if she were a *femme sole*.<sup>41</sup> For the first time married women had separate rights to her property within a marriage. This marked a new era in married women's property rights. It was the beginning of a long struggle to create a system of equal property rights between not only a husband and a wife, but between a men and women. Correcting the proprietary imbalance between a husband and wife was dependent on how Australian society received the new laws.

What did it mean to be regarded as a *femme sole* in Australian society?

The Act gave married women the freedom to deal with her property as if she were a single woman. It was not the Parliament's intent to give married women the same public rights as married men or any men for that matter. The Act was not a tool of equality between men and women. It was simply a means of protecting a married women's property from her husband as quite often it allowed inheritance to be passed through the matrilineal line.<sup>42</sup>

The Act removed a married woman's private disability but it did not completely remove a married woman's public disability. The separate spheres remained intact. The majority of married women in Australia were financially dependent on their

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<sup>39</sup> The Married Women's Property legislation was initially received in Australia colonies as imperial law. The new legislation altered many of the common law rules of coverture which had applied in the Australian colonies. It is important to note that the English common law was officially implanted into the legal systems of the Australian colonies following the enactment of the *Australian Courts Act* in 1828 (UK). Section 24 provided ...that all Laws and Statutes in force within the Realm of England at the time of the passing of this Act shall be applied in the Administration of Justice in the courts of New South Wales and Van Diemen's Land respectively, so far as the same can be applied within the said colonies'. The Act became operation in Western Australia in 1829: see *Western Australia v Commonwealth* (the *Native Title Act* case) (1995) 183 CLR 373 at 425.

<sup>40</sup> See *Married Women's Property Act* 1983 (NSW), *Married Women's Property Act* 1890 (Qld), *Married Women's Property Act* 1893 (SA), *Married Women's Property Act* 1893 (TAS), *Married Women's Property Act* 1884 (Vic), *Married Women's Property Act* 1892 (WA).

<sup>41</sup> *Married Women's Property Act* 1892 (WA), s 1(a).

<sup>42</sup> Jocelynne A. Scutt, *For Richer, For Poorer: Money, marriage, and property rights* (Victoria, Penguin Books, 1984).

husband. In Australian society the husband was commonly the financially productive partner (the breadwinner) and the wife was the non-financial productive partner who assumed the stereotypical role of caregiver, housekeeper and child bearer.<sup>43</sup> A married woman, by reason of her status, was effectively the working property of her husband.<sup>44</sup> As a result married women were located in the margins of Australia's public realm. These roles were the product of dominant patriarchal traditions which developed from male power structures, such as the laws of coverture. This is one of the reasons why married women were and often still remain a non-entity in the public realm.

The Act, theoretically, gave married women a legal right to enter the public realm for the first time. However, the Act did not compel the greater Australian society to afford married women equality within the public realm. Married women remained disadvantaged in public society.<sup>45</sup> They were often mistrusted and avoided by financial institutions.<sup>46</sup> The same dominant male values denied women pay parity in the workplace.<sup>47</sup> A married women's place was in the private sphere and this left them disabled in the public sphere.

### *An Act to abolish the doctrine of unity of spouses?*

A married woman's right to the use, possession, and enjoyment of her property was transferred during the coverture to her husband.<sup>48</sup> The Act was a public law which dealt with the private<sup>49</sup> property rights of spouses.<sup>50</sup> As such, the Act did not expressly abolish the common law doctrine of spousal unity but it did create a married woman's separate legal personality. The early English courts accepted that the Act altered the proprietary relations between married couples. However, they were not willing to accept that the Act altered the proprietary interest between a husband and wife with a third party.

*Jupp v Buckwell*<sup>51</sup> was an English case concerning the property rights of a married couple. Stephen Jupp died in 1887 and in his will he left a share of his real property

<sup>43</sup> The work of men became increasingly identified with 'the economy' and the work of women's remained confined to 'the household' which played a supportive or auxiliary role: see Desley Deacon, 'Political Arithmetic: The nineteenth century Australian consensus and the construction of the dependent woman' (1985) 11(1) *Journal of Women in Culture and Society* 27, 32.

<sup>44</sup> *Wright v Cedzich* (1930) 43 CLR 493, per Isaacs J at 501.

<sup>45</sup> Adrian J Bradbrook, Susan V MacCallum, Anthony P Moore, *Australian Real Property Law* (4<sup>th</sup> ed. Sydney, Lawbook Co Ltd, 2007), at [7.310] pages 310-311.

<sup>46</sup> See for example the NSW report in 1897 by the Upper House which stated that it was 'better to leave [money] in the hands of the man who was trained in business matters, rather than put it in the hands of the wife who had never had any such experience: in J. Leary, *Sydney Morning Herald*, 3<sup>rd</sup> November, 1878 cited in Jocelyne A. Scutt, Principle v. Practice: Defining "equality" in family property division on divorce', (1983) 57 *The Australian Law Journal* 143, see footnote 3 on page 143 – also married women often needed their husband's guarantee to obtain an advance from financial institutions, see *Hepworth v Hepworth* (1963) 110 CLR 309.

<sup>47</sup> See for example *The Fruitpickers Case* (1912) 6 CAR 61 where Higgins J held that where a woman was employed in a job that could potentially displace a man's employment, she would only be entitled to half of a man's wage.

<sup>48</sup> *Robinson v Norris* (1848) 11 Q.B. 916, see Lord Chief Justice Denman at 919-920.

<sup>49</sup> The Act was not the first act to govern the private realm. It was possibly the third behind the *Infant Custody Act* 1832 (UK), and the *Matrimonial Causes Act* 1856 (UK).

<sup>50</sup> *Johnson v Johnson* (1887) L.R. 35 Ch. D. 345 at 348.

<sup>51</sup> *Jupp v Buckwell* (1888) L.R. 39 Ch. D. 148.

to his daughter Mary Buckwell, her husband Daniel Buckwell, and Daniel's sister Harriet Buckwell, in equal parts. The question arose as to whether each should acquire a third share in the land, or whether, because of the unity of Mary and Daniel, that they should take a half share and Harriet should take the other half. The court held that the Act intended to alter a married women's capacity to take property between herself and her husband – i.e. within a marriage. In a marriage a wife was a separate legal entity. To a third party, however, a husband and wife were still seen as one person. Kay J stated that 'if [it was the Parliament's intention to give a married women a separate legal personality with third parties] I should have expected to find in the Act an express provision to the effect, for example, that in all questions relating to property the husband and wife should be considered, not only between themselves, but also as between them and third parties, two separate individuals, and the old law of unity of person should be abolished.'<sup>52</sup> The court concluded that the Act did not alter any rights except those exclusively between a husband and wife.

As a result Mrs. and Mr. Buckwell were together entitled to one half of the land and Harriet Buckwell was entitled to the remaining half. The Act then provided that a husband and wife to take a moiety (or equal half share) interest of the land as their separate property. This left Mrs. Buckwell with a one quarter interest in the land - merely half the amount that Harriet was entitled to. This is an example of the continuing disability suffered by married women because of marriage. Although the Act provided that a married women was effectively a single woman, *Jupp v Buckwell* demonstrates that in reality the doctrine of unity, in conjunction with the courts interpretation of the Act, continued to deny married women the same status as unmarried women. This is another example of a married woman's persisting public disability.

The Australian High Court did not follow the English court's interpretation in *Jupp v Buckwell*. *Registrar-General of NSW v Wood (Wood)* is a leading example of this diversion of judicial interpretation. *Wood* involved a dispute about the operation of a tenancy by entirety after the enactment of the Act. In 1914 a real estate company transferred land to Mrs. Annie Wood and Mr. Harry Wood as tenants by entireties. In 1918 Mrs. Wood transferred other land to herself and her husband as tenants by entireties. In 1925 Mrs. Wood was sued and the Supreme Court of New South Wales ordered a writ against Mrs. Wood's estate. The court requested that the Registrar sell Mrs. Wood's real property to finance her debts. The order was made on the grounds that under the Act a married woman could deal with her own property separately from her husband during marriage – and so she was liable upon default of any contracts she enters into.<sup>53</sup> However, Mrs. Wood was a married woman in a tenancy by entireties which meant at common law she could not use her real property to guarantee her debts without her husband's consent.<sup>54</sup> The problem was that the Act established a separate property regime for all married women which appeared to contradicted with nature of a tenancy by entirety. The High Court was faced with the question of which law was paramount in the situation.

A tenancy by entireties is a type of joint tenancy which assumes that a husband and wife are legally the same person. The majority in *Wood* abolished the doctrine of

<sup>52</sup> *Jupp v Buckwell* (1888) L.R. 39 Ch. D. 148, at 154.

<sup>53</sup> See *Married Women's Property Act* 1893 (WA), s 1(b).

<sup>54</sup> *Robinson v Norris* (1848) 11 Q.B. 916.

spousal unity within a marital tenancy and effectively abolished the laws of coverture which up until the Act had governed real property rights of a married woman within a marriage. All tenancy by entireties were given the same effect as if the married couple had entered a joint tenancy.<sup>55</sup> The leading judgement was made by Isaacs J who contended that there was no doubt that ‘the ... Act intended to emancipate women in this respect.’<sup>56</sup> The court found that despite the words the ‘tenancy by entireties’ in the transfer document, Mrs. Wood acquired a separate proprietary interest in the land. This is because a tenancy by entirety created an incident of ownership in a married woman, even though it was only a concurrent incident. The statute intended that *any* incident of ownership, include incidents found in a tenancy by entirety, should give a married woman a separate right to real property. Reflecting on his decision, Isaacs J concluded that ‘the immoveable object has triumphed over the irresistible force.’<sup>57</sup>

So what was the effect of the courts decision on Mrs. Wood? Mrs. Wood was equally entitled to the use, possession and enjoyment of the property as her husband.<sup>58</sup> She was equally entitled to the rents and profits of the property. In theory, a married woman had the same political and economic decision making power as the husband on a private level. In reality a married woman was disadvantaged because she did not hold the same decision-making power at public level. Once again, her disability at public level ultimately disadvantaged her at private level. This inevitably led to inequalities before the law. This will be discussed in detail in the following chapter.

### **3. Settling Property Dispute between a Husband and Wife**

In this section I seek to identify how Australian courts have sought to settle property disputes between spouses. I will also compare and contrast Australia’s experience with the English Court of Appeal between the 1950s and 1960s. Of greatest importance is the affect that ordinary property law had on married women in the public context. I will conclude that the ordinary legal principles disadvantage women in the Australian social context.

The establishment of a separate property regime within marriages inevitably meant that the courts would be called upon to settle disputes which arose between married couples. Section 17 of the Act states that ‘in any question between a husband and wife as to the title to or possession of property, either party... may apply by summons... to any judge...and that judge may make such orders with respect to the property in

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<sup>55</sup> This is assuming, however, that the four entities of possession, interest, title, and time are satisfied. If one of the unities was absent a tenancy in common would persist which would again alter the proprietary interest of the wife and husband. For a good explanation see Adrian J Bradbrook, Susan V MacCallum, Anthony P Moore, *Australian Real Property Law* (4<sup>th</sup> ed. Sydney, Lawbook Co Ltd, 2007), at [12.10 – 12.60] pages 426-431. It is interesting to note that before the Act a tenancy by entireties assumed that there were five unities. The fifth unities being that the husband and wife were one in right of the husband i.e. the unity of spouses.

<sup>56</sup> *Registrar-General v Wood* (1926) 39 CLR 46, at 54.

<sup>57</sup> *Registrar-General v Wood* (1926) 39 CLR 46, 57

<sup>58</sup> Adrian J Bradbrook, Susan V MacCallum, Anthony P Moore, *Australian Real Property Law* (4<sup>th</sup> ed. Sydney, Lawbook Co Ltd, 2007), at [12.10] page 426.

dispute...as he thinks fit.’<sup>59</sup> The demand for court proceedings pursuant to this section increased in the post-World War Two period due to the increased number of divorces.<sup>60</sup> In the 1950s and 1960s the courts were frequently required to identify what proprietary rights a married women had upon divorce. A more relevant question when dealing with real property may have been; what was a married woman’s separate interest in the matrimonial home or, as Lord Denning called it, the family asset?<sup>61</sup> The courts found that answering this question was not as straight forward as settling disputes between non-married persons. The courts were bound to settle property disputes between married couples by applying the ordinary laws of property.<sup>62</sup>

Married couples often mixed or pooled their finances to purchase a matrimonial home. In the absence of an express agreement the contributions to the property were not always readily identifiable. The lines continued to blur when houses were put in the sole name of either the husband or wife and yet both contributed to the purchase of the property. Three rules of equity were used to resolve this issue. These were the presumption of advancement, the presumption of resulting trust, and the concept of ‘palm tree justice’.<sup>63</sup> Judicial interpretation was problematic because the Act tried to settled disputes between spouses in the same way that the ordinary property law did between strangers.

It is hard to imagine that a married couple, whom pledge to pass their lives together, would formally and separately organise the purchase of a home in the same way as two strangers might. In such a case the courts were asked to determine the terms of a non-existent marital agreement. The Courts did so by inferring the party’s intention at the time of purchase.<sup>64</sup> In *Roger’s* the Court observed that ‘[w]hen two people are about to be married and are negotiating for [the purchase of] a matrimonial home it does not naturally enter the head of either to inquire carefully, still less to agree, what should happen to the house if the marriage comes to grief.’<sup>65</sup> His Honour goes on to explain that the judge’s role in this situation is to ‘try to conclude what at the time [of purchase] was in the parties’ minds and then make an order which must be taken to have been intended at the time of the transaction itself.’<sup>66</sup> It is clear that the minds of a married couple would be substantially different then that of strangers. Property laws evolved from a time where coverture was socially acceptable. It is difficult to imagine that the ordinary rules of property would do the same justice between a husband and

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<sup>59</sup> *Married Women’s Property Act* 1901 (NSW), s 22; *Married Women’s Property Act* 1890 (Qld), s 21; *Law of Property Act* (1936) (SA), s 105; *Married Women’s Property Act* 1935 (TAS), s 8; *Married Women’s Property Act* 1928 (Vic), s 20; *Married Women’s Property Act* 1892 (WA), s 17; *Married Women’s Property Act* (1882) (UK), s 17. NB I will refer this section as ‘section 17’ throughout the remainder of the section.

<sup>60</sup> This is true both in Australia and England.

<sup>61</sup> This terms was, to my knowledge, first coined by Denning L.J. in *Cobb v Cobb* [1955] 1 WLR 731, at 734 which he used to describe matrimonial property which a husband and wife jointly enjoyed during marriage.

<sup>62</sup> See Dixon J in *Wirth v Wirth* (1956) 98 CLR 228 at 231; ‘The law of property governs the ascertainment of the proprietary rights and interest of those who marry and those who do not.’

<sup>63</sup> It was Lord Denning who coined this concept in its modern manifestation; *Rimmer v Rimmer* [1953] 1 Q.B. 63.

<sup>64</sup> See A. Bissett-Johnson, Ownership of “Family Assets” (1972) 46 *The Australian Law Journal* 436.

<sup>65</sup> *In re Rogers’ Question* [1948] 1 All E.R. 328; citing in *Rimmer v Rimmer* [1953] 1 Q.B. 63.

<sup>66</sup> *In re Rogers’ Question* [1948] 1 All E.R. 328.

wife as it did to non-married parties. Nevertheless this is what the courts were asked to do.

### *Interpreting Section 17 – the English Court of Appeal*

There has been much judicial debate about whether section 17 was intended to be procedural or whether it gave judges the discretion to redistribute property within marriage.<sup>67</sup> The English Court of Appeals gave affect to the latter interpretation. The courts position is best described in the words of Lord Denning in *Rimmer v Rimmer*;<sup>68</sup> ‘in 1882, when Parliament declared that a wife was entitled to have property of her own, it enacted that in any question between husband and wife as to the title to or possession of property, the court was to decide the matter as it thought fit. Parliament laid down no principles for the guidance of the courts, but left them to work out the principles themselves. That is being done. In cases when it is clear that the beneficial interest in the matrimonial home... belongs to one or other absolutely, the court will give effect to their intention: see *In re Roger’s Question*; but when it is not clear to whom the beneficial interest belongs, or in what proportions, then, in this matter, as in others, equality is equity.’<sup>69</sup> Where no intention was readily observable at the time of purchase the courts assumed that the couple intended that each should be entitled to a half interest in the property. This also applied where there was uneven contribution to the purchase price. The Court of Appeal had done ‘palm tree justice’.

The court held that the joint efforts of the husband and wife ultimately enabled them to purchase property. It was most often the case that the husband would save his income and the wife would use her income to pay for food, clothes, and living expenses. Similarly it was often the husband who earned the higher wage and contributed most to a family’s finances. The Court of Appeal suggested that in such a case it was the role of the wife to keep the husband healthy in order to preserve his earning capacity. It was also her job to keep the home and raise the children. While the husband was frequently the financially dominant party, his ability to continue to produce an income was taken to be a direct result of role the wife assumed in the relationship. Given the mutual role in reproduction the Court of Appeal did not consider this to be a just reason to bestow upon the husband greater proprietary interest than the wife. This is what the ordinary rules of property dictated. This is seen as the source of equality in a relationship and the words in the Act were broad enough for judges to do palm tree justice in such cases.

### *Interpreting Section 17 – the High Court of Australia*

The High Court of Australia made it perfectly clear in *Wirth v Wirth* that it would not follow the English Court of Appeal’s interpretation of section 17. Dixon J held that the ‘laws of property governs the ascertainment of proprietary rights and interest of

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<sup>67</sup> For an English perspective see; *Rimmer v Rimmer* [1953] 1 Q.B. 63, *Cobb v Cobb* [1955] 1 W.L.R. 731, *Fribance v Fribance* (No. 2) [1957] 1 W.L.R. 384, *Bedson v Bedson* [1965] 3 W.L.R. 891, *Ulrich v Ulrich* [1968] 1 All E.R. 180, *Pettitt v Pettitt* [1970] A.C. 777, *Gissing v Gissing* [1971] A.C. 886, and for Australian see, *Wirth v Wirth* (1956) 98 CLR 228; *Martin v Martin* (1959) 110 CLR 297; *Hepworth v Hepworth* (1963) 110 CLR 309.

<sup>68</sup> *Rimmer v Rimmer* [1953] 1 Q.B. 63.

<sup>69</sup> *Rimmer v Rimmer* [1953] 1 Q.B. 63, 73.

those who marry.<sup>70</sup> The discretion in section 17 could not alter existing rights in the way the English Court of Appeal suggested that they could. Section 17 was held to be a procedural provision which gave married persons the rights to have the proprietary interest determined summarily.<sup>71</sup> It was inappropriate for the courts to give effect to intention which was in no way contemplated by the parties at the time of the transaction. The Australian position was made clear in *Martin v Martin* where the court held that ‘this Court does not accept the view that provision... [17 of the Act] goes beyond procedure for ascertaining and enforcing existing rights and confers upon the court what may be described as a special power of appointment over the disputed property between the husband and wife.’<sup>72</sup>

The operation of property law between spouses resulted in inequalities. The High Court was unwilling to remedy these inequalities in the same way that the English Court of Appeal had. As a result married women in Australia were disadvantaged before the law. There are three Australian High Court cases which have dealt with the interpretation of section 17 in Australia: *Wirth v Wirth* (1956), *Martin v Martin* (1959), and *Hepworth v Hepworth* (1963). The following analysis of these cases demonstrates that section 17 disadvantaged married women in Australia.

The fact patterns in *Wirth*, *Martin*, and *Hepworth* are almost identical. Each case involved the purchase of a matrimonial home where the husband and wife made direct and/or indirect contributions to the purchase price of the home. After the purchase it was agreed that the house should be transferred to the wife. Each marriage came to grief and subsequently broke down. Either the husband or the wife then brought a claim under section 17 to have their property rights determined. The husband claimed that he continued to have an interest in the land despite the transfer. The husbands argued that they had an equitable interest in the land and asked the court to create a resulting trust<sup>73</sup> in their favour and have their proprietary interest realized. The wives claimed that her husband had gifted the land to her and that this raised a presumption of advancement<sup>74</sup> in her favour. In every case it was the husband who had made the greater contribution to the purchase price of the land. How did the High Court of Australia resolve these disputes?

Where a presumption of advancement has been pleaded the onus is on the transferor to rebut the presumption. In other words, the transferor must prove to the court, on the balance of probabilities, that he or she intended to have a proprietary interest in the property when it was transferred.<sup>75</sup> The courts must then determine from the evidence what the transferor’s intention was at the time of the transfer. Ultimately the courts’ decision turned on the facts of the case.

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<sup>70</sup> *Wirth v Wirth* (1956) 98 CLR 228, per Dixon J at 231-232

<sup>71</sup> *Wirth v Wirth* (1956) 98 CLR 228

<sup>72</sup> *Martin v Martin* (1959) 110 CLR 297, 306

<sup>73</sup> *Resulting Trust*: where there is an incomplete disposition of a beneficial interest the court of equity will presume the parties intended the beneficial interest to revert to the transferor of the property (the husband). In each case the husband was the transferor and the wife was the transferee.

<sup>74</sup> *Presumption of advancement*: an assumption that, where a person transfers property to his or her spouse who has not contributed to the purchase price, the transfer was intended to be a gift: *Calverley v Green* (1984) 155 CLR 242.

<sup>75</sup> The High Court in *Martin v Martin* (1959) 110 CLR 297, at 304 said that, ‘the onus of proof is firmly placed upon the person asserting that a trust was intended by the issue depends upon the intention with which the property was purchased.’

The transferor is the person responsible for contributing all or a substantial amount of the purchase price when buying the property. In each case the husband was the transferor. This makes sense given the social context in the 1950s and 1960s.

Although an increasing number of married women were contributing financially to the home, the husband was commonly the main contributor. This ultimately meant he played a greater role in buying the land. The Courts were predominantly concerned with the testimony of the husband when settling property disputes. The court was less interested in the intention of the wife at the time of transfer. In essence the husband spoke for himself and his wife. Was this the doctrine of unity under a different guise?

The judicial system of dispute resolution favoured the financially dominant partner and as was held in the three cases above, this was the husband. The wife's perspective was somewhat redundant because her intention was of little relevancy when applying the ordinary laws of property. Her words were relevant only to the extent that they helped identify the intention of her husband. In both *Martin* and *Hepworth*, the High Court found inconsistencies in the wife's testimony and considered her evidence unreliable.<sup>76</sup> This does not necessarily mean that the judges were adjudicating unfairly by favouring the husband's evidence. In each case the judges were following the correct procedure for resolving property disputes where there was no express intention. These procedures favoured the husband to the detriment of the wife. A matrimonial home is usually bought with the intention that both should cohabit together 'till death do us part'. It is, at least at some point, a life interest. For this reason property disputes between a husband and wife should be treated differently to the disputes between non-married people. This was the same opinion as the English Court of Appeal. The High Court Justices were less willing to infer this intention. Non-financial contributions were not considered a relevant consideration when applying the ordinary rules of property.

Despite making financial contributions to the marriage, a wife did not gain a proprietary interest unless she made direct contributions to the purchase and paying off of the real property. In many cases a wife would use her income to purchase food and clothing for the house and the husband's income was used to save or pay off their mortgage. The rules of advancement and trust did not recognise these indirect contributions despite the fact that they enabled the husband to dedicate his time and energy to earning wages. A wife who contributed to the running of the home gained no interest in the real property. She remained an 'angel in the house' whose interests were confined to the private realm and did not transpose into the public realm. It can be concluded that the Act did not provide an equitable means of resolving property disputes between spouses. Equity before the court was inequity between a husband and wife. This ultimately diminished a married woman's proprietary interest in the land.<sup>77</sup>

### ***Reflecting on a Herstory***

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<sup>76</sup> *Hepworth v Hepworth* (1963) 110 CLR 312 per Kitto J and Taylor J.

<sup>77</sup> This was the case in *Martin* and *Hepworth*. However, in *Wirth*, it was determined that the wife had acquired an exclusive interest in the property and she succeeded on her claim that the husband gifted the land to her after the transfer.

The main focus of this paper was to identify the effect of the Act on the proprietary interests of married women. The Act sought to give married women greater property rights during marriage. Here it succeeded. However, the Act failed to eliminate the inequality between husbands and wives. The causes of the failure can be found in the history of married women's property rights and the society in which the laws developed.

In 19<sup>th</sup> Century England women's groups lobbied parliament to have their coverture removed. Up until the 19<sup>th</sup> century married women lived in a society where she had no right to property. A married woman's legal and public personality was transferred to her husband upon marriage. The Act established a separate property regime for all married women during marriage. The Act supposedly gave a married woman the same rights and interest in property as a single woman. Despite words to this effect, the Act did not guarantee this right. Social stereotypes governed a married woman's right to property as much as the Laws of Parliament did; perhaps even more. The Act did not correct the inequality between a husband and wife during marriage.

Disputes between married persons were dealt in the same way as disputes between non-married persons. It appears from the research that this disadvantaged married women. For example, the equitable rules of advancement and resulting trust favoured the financially dominant partner and in Australia this was predominately the husband. Property disputes often turned on the intention of the husband. As a result, married women were often rendered voiceless before the courts. The Australian courts held that it was not in their power to alter the laws of property to resolve this inequality because the Act intended that the ordinary rules of property should apply. It seems inappropriate to me that the law should apply to married persons. Disputes between husbands and wives could not have been in the contemplation of the courts and parliaments who originally formulated the laws of property. Most of these laws would have been made in a time where coverture governed the legal relationship between married couples. The application of these rules between spouses did not facilitate justice. Nor could equity correct the injustices of law; for example resulting trusts favoured married men.

It was with this in mind that the English Court of Appeal sought to correct the law. Noble as their act was, the House of Commons later rejected the Court's arguments in *Rimmer v Rimmer* and *Pettitt v Pettitt* and seemingly followed a line of interpretation similar to the Australian Courts. The courts were unable to correct the shortcomings of the Act.

The Act was the first step in the long march towards equal property rights for women within marriage. It provided the impetus for married women to ask for greater rights and demand greater equality within marriage. It is evident that a married woman's access to and relationship with real property continued to be marred by masculinist notions of contribution and need. Legislating for social change has been the dominant method used to reform these gender imbalances in Australian society. This paper has identified that formal legal change began with the *Married Women's Property Act*. The Act helped facilitate the pursuit of equality between married persons. We continue to approach equality, though our ultimate aim is to reach it.

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