> I think the M'Naghten Rules are in large measure shams. That is a strong word, but I think the M'Naghten Rules are very difficult for conscientious people and not difficult enough for people who say 'We'll just juggle them'.[45]

In view of the proposition above that ultimately the question of insanity is a legal one, to be decided by lawyers, and not doctors,[46] surely the best test is ultimately the obvious one propounded by Lord Cooper:[47] Is this man mad, or is he not?

N. H. M. FORSYTH

DENNIS HOTELS PTY LTD v. VICTORIA[1]

Constitutional law—Duties of excise—What constitute—Victualler's licensing fees (Vic.)—Constitution, section 90—Licensing Act 1958 (Vic.), sections 19 (1) (a), (b)

The plaintiff company by its statement of claim alleged that it had paid certain sums of money for the renewal of its victualler's licence for the year 1958 and for temporary victualler's licences during the same period; that these sums were demanded from it under sections 19 (1) (a) and 19 (1) (b) of the Licensing Acts;[2] that these provisions were invalid as amounting to the imposition of excise duties by a State in contravention of section 90 of the Commonwealth of Australia Constitution;[3] that the fees had been paid by it involuntarily and were recoverable by it as money had and received. The defendants demurred to the whole of the statement of claim heard before the Full Court.

The Court held by a majority (Fullagar, Kitto, Taylor and Menzies JJ.: Dixon C.J., McTiernan and Windeyer JJ. dissenting) that the demurrer

[45] *Ibid.* para. 290. In para. 295 the Commission quotes Mercier, *Criminal Responsibility* (1905), who described the stretching of the plain words of the Rules 'until the ordinary non-legal user of the English language is aghast at the distortions and deformations and tortures to which the unfortunate words are subjected, and wonders whether it is worth while to have a language which can apparently be taken to mean anything the user pleases'. *Cf.* Lewis Carroll, *Alice Through the Looking-Glass* (1871) where Humpty-Dumpty says 'when I use a word it means exactly what I choose it to mean, neither more, nor less'.

[46] The Report of the Royal Commission recounts the opinion of the Royal Medico-Psychological Association that, although the Rules are based on 'a very out-of-date idea of sanity and mental illness', the Association 'could not suggest a suitable alternative'. (Cmd 8932 para. 245.)

[47] *Supra* n. 38.

[1] (1960) 33 A.L.J.R. 470; [1960] Argus L.R. 129. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Kitto, Taylor, Menzies and Windeyer JJ.

[2] The Court throughout referred for convenience to the consolidating 1958 Act: ss. 19 (1) (a) and 19 (1) (b) of that Act respectively prescribe that the fees for a victualler's licence 'shall be equal to the sum of six per centum of the gross amount . . . paid or payable for all liquor which during the twelve months ended on the last day of June preceding the date of application for the grant or renewal of the licence was purchased for the premises' and the fees for a temporary victualler's licence shall include 'a further fee equal to the sum of six per centum of the gross amount . . . paid or payable for all liquor purchased for sale or disposal under such licence'.

[3] The relevant portion of s. 90 of the Constitution states: 'On the imposition of uniform duties of customs the power of the Parliament to impose duties of customs and of excise . . . shall become exclusive.

On the imposition of uniform duties of customs all laws of the several States imposing duties of customs or of excise . . . shall cease to have effect.'

was to be allowed with respect to the fees payable under section 19 (1) (a) which were not duties of excise and that therefore section 19 (1) (a) was valid; and by a majority (Dixon C.J., McTiernan, Menzies and Windeyer JJ.; Fullagar, Kitto and Taylor JJ. dissenting) that the demurrer was to be overruled in relation to the fees payable under section 19 (1) (b), for these fees were duties of excise and therefore section 19 (1) (b) was invalid as infringing section 90 of the Constitution.

The division of the Court was largely the result of different views of the effect of these licensing provisions, and not because of widely divergent views of what constituted an excise within the meaning of section 90, although the actual decision of the case stemmed from a different view of the law by Fullagar J. All judges, in seven separate judgments, agreed that these particular provisions constituted a tax.[4] Dixon C.J., McTiernan, Kitto, Menzies and Windeyer JJ. agreed that the decision in *Parton v. Milk Board*[5] had established that an excise, for Australian purposes, was a tax 'upon goods', 'in respect of', 'in relation to' goods, directly affecting commodities and that a tax on the production or manufacture of goods or on the sale or purchase of goods at any point before sale for consumption was an excise duty. Taylor J. considered that this was true 'in some circumstances at least'.[6] The members of the Court were, however, divided about whether the provisions of the Licensing Act fell within this definition. Dixon C.J., McTiernan and Windeyer JJ. all agreed that the result of the licensing provisions and the purport which permeated all of them was the collection of revenue,[7] by the imposition of a tax of six *per centum* on all lawful sales of liquor in Victoria. Kitto and Taylor JJ. considered that the Act was more concerned with the regulation of the liquor trade, and that the fees were paid, not as a tax upon liquor but for a licence monopoly to conduct a business,[8] the value of which licence was estimated by reference to a percentage of the previous year's purchases by the business. Menzies J. also considered that the fee for renewal of a victualler's licence was a price of a franchise to carry on a business, but regarded the fee for a temporary licence to be in a different category and to amount to a duty of excise. Fullagar J., who had taken a different view of the law in deciding that a tax, to be an excise, had to be on the production or manufacture of goods and that taxes upon subsequent distribution and sale were not excise taxes, did not have to characterize the licensing provisions to the same extent, as

[4] And were therefore outside the preliminary characterization problems raised by the previous excise cases of *Vacuum Oil Co. Pty Ltd v. Queensland* (1934) 51 C.L.R. 108, *Crothers v. Sheil* (1933) 49 C.L.R. 399, *Hartley v. Walsh* (1937) 57 C.L.R. 372, *Matthews v. The Chicory Marketing Board* (1938) 60 C.L.R. 263, *Hopper v. Egg Board* (1939) 61 C.L.R. 665. [5] (1949) 80 C.L.R. 229. [6] [1960] Argus L.R. 129, 153.

[7] The useful sum of about two million pounds per annum was being paid into consolidated revenue. *Ibid.* 174, *per* Windeyer J.

[8] As in *Downs Transport Pty Ltd v. Kropp* [1959] Argus L.R. 1 (sub nom. *Browns Transport Pty Ltd v. Kropp* (1958) 100 C.L.R. 117), where the High Court held that a licence fee for a transport operator could be calculated from a percentage of the revenue of his business without infringing s. 90, and in *Hughes and Vale Pty Ltd v. New South Wales* (1953) 87 C.L.R. 49, where a tonnage rate of tax upon a transport operator was considered by Dixon C.J., Williams and Webb JJ. not to be a duty of excise.

no tax fell by virtue of sections 19 (1) (a) and (b) upon any producer or manufacturer.

Upon an examination of the provisions of the Licensing Act, it is not surprising that, while the members of the Court (with the exception of Fullagar J.) took substantially the same view of the law, they differed about the characterization of the statute. The problem was almost the antithesis of *R. v. Barger*[9]: in the present case a State Act on its face had two purposes—one of regulating an industry, and the other of collecting revenue by taxation. Previous State licensing Acts before Federation had openly professed both purposes.[10] The question, in effect, was which purpose was truly the dominant one, for if the intent was to raise money regardless of who paid the tax, the tax would be 'upon' the commodity, liquor, and be an excise duty; but if the real intent was to regulate the liquor industry and to impose a licence fee upon a business, it would not be a tax upon a commodity and therefore not a duty of excise. Not only the very nature of an excise duty but also particular provisions of the Act made a difference of opinion in relation to the dominant intent almost inevitable. For example, section 19 (1) (a) provided that the fee for renewal of a licence should include six *per centum* of the gross amount of the previous year's purchases. This was the case whoever applied for the renewal, and so two different conclusions could be drawn from this equivocal provision: the one (drawn by Dixon C.J. and McTiernan J.) that the legislature was concerned more with the liquor purchased than the licensee, the other (drawn by Kitto and Taylor JJ.) that the fee was concerned with the renewal of the licence 'and therefore with the person who takes it out or renews it rather than with the person who made the purchases',[11] and hence with the licensee rather than the liquor. The very basis of calculation of the tax by reference to a percentage of the amount paid for purchases could be construed (as it was by Dixon C.J., McTiernan and Windeyer JJ.) as being an excise tax on the commodity, or (as it was by Kitto and Taylor JJ.) as being an estimation of the value of the monopoly right granted to the licensee.

Other provisions of the Act appeared to be unequivocal: some supported the characterization as a tax upon liquor, others the characterization as a tax upon the licensee. Among the former (and relied on by Dixon C.J. and Windeyer J.) was the exception provided by the Act that wholesale sellers of liquor such as brewers,[12] licensed spirit merchants[13] and licensed grocers[14] did not have to pay any fee upon sales made not to consumers but to other persons licensed to sell liquor (and who would

[9] (1908) 6 C.L.R. 41. In that case the High Court was divided on the question whether the Commonwealth Excise Tariff Act 1906 was intended to be an excise duty (and therefore valid) or to regulate industry in the States (and therefore invalid).

[10] For example, an Act of the Legislative Council in New South Wales in 1825, 6 Geo. IV, No. 4, had stated: 'Whereas it is necessary to the orderly conduct of public houses . . . and whereas it is expedient in consideration of the licences to be granted to such public houses to raise certain sums of money . . .'. The history of such licensing provisions is set out in the judgment of Windeyer J. in the instant case [1960] Argus L.R. 129, 173-177.

[11] [1960] Argus L.R. 129, 148, *per* Kitto J. [12] Ss. 17, 19 (1) (g) and 124.

[13] Ss. 11 and 19 (1) (c). [14] Ss. 11, 12 and 19 (1) (c) and (d).

therefore pay the tax themselves). This exception was not considered by Kitto, Taylor and Menzies JJ. Among the latter were provisions that certain licence fees, such as a vigneron's[15] and a billiard table licence,[16] were fixed amounts per person and did not vary according to the volume of sales or purchases. These provisions supported (in the opinions of Kitto, Taylor and Menzies JJ.) the general characterization of the Act as a tax upon persons or businesses rather than on sales of liquor. Dixon C.J. considered that these were exceptions to the general purpose and that the vigneron's licence was a fixed amount as it was contemplated that he would sell to wholesalers or licensed victuallers who would pay the tax. Also section 19 (1) (a) provided that the tax should be paid on past purchases of liquor, and thus if by reason of lapse or surrender the licence was not renewed, no tax was payable. Dixon C.J. and Windeyer J. thought this was a theoretical exception, and that the whole Act was framed on the basis of a continuing scheme without non-renewals and that classification for legal purposes should not depend on the exceptional case. Kitto, Taylor and Menzies JJ., however, thought that this was not an exceptional case but demonstrated that it was not the liquor or the purchase of it which attracted the tax, for there was no legal liability for the fee at the time of the purchase, and there might never be any liability at any time.

Also, the very nature of an excise, as a tax upon commodities and thus entering to some degree into the price of a commodity, caused different characterizations. Dixon C.J., McTiernan, Menzies and Windeyer JJ. thought that section 19 (1) (a) was an 'indirect' tax and was likely to be 'passed on' to the ultimate consumers in the price they paid for it.[17] Taylor J., however, considered that it was impossible for a licensee to pass on his tax to his purchasers, for the extent of his sales could not be ascertained until the end of the trading period.[18]

There appears to be no purely logical reasoning by which it is possible to say that either view is better. If there are two intents equally manifest in an Act, it is impossible to say by logic which is the dominant one. Here, certain provisions conflicted with either view and had to be regarded as exceptions. Perhaps, however, one might agree with the Chief Justice that the exemptions from tax of sales by wholesalers to other persons who would pay the tax were the provisions disclosing the true intent of these sections. For in these cases it cannot be said that the six *per centum* tax is based on the value of the business, for it has no relation to the sales or turnover of the business, and from this it is not a great step to assume that where a six *per centum* tax is levied on retailers by the same section, this tax may also not be based on the value of the business.[19]

[15] S. 19 (1) (f). [16] S. 19 (1) (h).
[17] [1960] Argus L.R. 129, 131, 137, 165, 169. [18] *Ibid.* 155.
[19] Also the fact that there might be no legal liability under some circumstances did not prevent the High Court in *Attorney-General for New South Wales v. Homebush Flour Mills Ltd* (1936) 56 C.L.R. 390 from holding that the effect of the provisions constituted an excise because of the general contemplation of the Act, even though in exceptional cases (if the miller failed to exercise the option to repurchase) there would be no actual liability at all.

Unfortunately, however, because it was unnecessary for Fullagar J. to express an opinion on either view of these provisions,[20] the result is that the High Court is equally divided on the characterization of such licensing provisions. Indeed, on the same day as judgment was given in this case (26 February 1960), in the case of *Whitehouse v. Queensland*,[21] which involved similar provisions in the Liquor Acts 1912-1958 (Queensland), the members of the High Court were divided in exactly the same way as they were in relation to the Victorian Act. Also, there has been no previous decision on such a percentage victualler's licence fee in the High Court, although three previous *dicta*[22] had indicated that it was not a duty of excise, and one[23] that it might or might not be.

And although a substantial agreement was reached about the meaning of 'duties of excise' in section 90 of the Constitution, many questions relevant to this still seem uncertain. If it be agreed that an excise duty is a tax 'upon goods', must it be only upon goods produced in the State imposing the tax, or can it be upon imported goods also? Dixon C.J.[24] and McTiernan J.[25] thought that if it be imposed upon goods without regard to their place of origin it could still be called an excise and at least invalidated in regard to the goods locally produced. Taylor J.[26] and Windeyer J.[27] tended towards the same conclusion; Fullagar J.[28] and Menzies J.[29] thought that a tax upon goods not produced locally was not an excise.[30] It may be considered, then, that the present view of the High Court is that a tax which does not discriminate between goods manufactured locally and abroad may infringe the excise provisions of section 90. This seems to be the better view for

> it would be ridiculous to say that a State inland tax upon goods of a description manufactured here as well as imported here was not met by s. 90 . . . because the duty was not confined to goods imported and so was not a duty of customs and was not confined to goods manufactured at home and so was not a duty of excise[31]

and the view is supported by the decision in *Commonwealth v. South Australia*[32] that a duty on the first sale of motor spirit wherever produced was an invalid excise duty.[33] In relation to duties on goods manufactured solely abroad, *dicta* of Starke J. in *Commonwealth v. South Australia*[34] and *Attorney-General for New South Wales v. Homebush*

[20] But His Honour remarked that if he had to decide the matter, he would 'have difficulty in saying that a tax imposed on retailers of liquor as such is a duty of excise if it is measured by quantity of liquor purchased, but is not a duty of excise if it is measured by annual value of the premises'. *Ibid.* 142.

[21] [1960] Argus L.R. 178.

[22] *Peterswald v. Bartley* (1904) 1 C.L.R. 497, 509, *per* Griffith C.J.; *Parton v. Milk Board* (1949) 80 C.L.R. 229, 248, *per* Latham C.J., and 263, *per* Dixon J.

[23] *Commonwealth v. South Australia* (1926) 38 C.L.R. 408, 426, *per* Isaacs J.

[24] [1960] Argus L.R. 129, 130. [25] *Ibid.* 137. [26] *Ibid.* 153.

[27] *Ibid.* 170. [28] *Ibid.* 141. [29] *Ibid.* 165.

[30] But as Menzies J. held the undiscriminate tax of s. 19 (1) (b) invalid, presumably His Honour took the same view as the Chief Justice in respect to undiscriminate taxes.

[31] *Ibid.* 130-131, *per* Dixon C.J. [32] (1926) 38 C.L.R. 409.

[33] Also *cf. Parton v. Milk Board* (1949) 80 C.L.R. 229, 260, *per* Dixon J.

[34] (1926) 38 C.L.R. 409, 438.

Flour Mills Ltd[35] support the view that these are not excise duties, while *dicta* of Rich J. in the same cases[36] maintain that they are.[37]

Also, the decision of Fullagar J. raised the question of whether an excise duty within the meaning of section 90 had to be on the manufacture or production of goods. It does, according to the definition of a unanimous High Court in *Peterswald v. Bartley,*[38] but the decision in *Commonwealth v. South Australia*[39] had cast doubt upon this; the facts of later cases[40] were limited to goods manufactured or produced within Australia, but the question arose squarely in *Parton v. Milk Board,*[41] where a levy of one one-eighth of a penny *per* gallon of milk sold was imposed upon a distributing agent, a dairyman. It was held by Rich, Williams and Dixon JJ. (Latham C.J. and McTiernan J. dissenting) that this was an excise duty. And in the present case the members of the Court, including McTiernan J. but excluding Fullagar J., followed this view. It is possible to reconcile *Parton v. Milk Board*[42] with *Peterswald v. Bartley*[43] by deciding that although an excise tax is a tax on the production or manufacture of goods, a tax on the sale or purchase of goods at any point before sale for consumption is to be regarded as a tax on production or manufacture.[44]

Accordingly it may be regarded as established now that 'to be an excise the tax must be levied upon goods. . . . The tax must bear a close relation to the production or manufacture or sale . . . of goods and must be of such a nature as to affect them as the subjects of manufacture or production or as articles of commerce'.[45]

Another question involved in this case was whether section 113[46] of

[35] (1936) 56 C.L.R. 390. [36] (1926) 38 C.L.R. 409, 437; (1936) 56 C.L.R. 390, 403.

[37] But Rich J. in *John Fairfax & Sons Ltd v. New South Wales* (1926) 39 C.L.R. 139, 146-147 partly retracted his first view.

[38] (1904) 1 C.L.R. 497, 509, *per* Griffith C.J.: 'It is intended to mean a duty analogous to a customs duty imposed on goods either in relation to a quantity or value when produced or manufactured and not in the sense of a direct tax or a personal tax'. [39] (1926) 38 C.L.R. 408.

[40] *John Fairfax & Sons Ltd v. New South Wales* (1926) 39 C.L.R. 139 (a tax on each copy of a newspaper issued for sale in New South Wales); *Attorney-General for New South Wales v. Homebush Flour Mills Ltd* (1936) 56 C.L.R. 390 (a tax on flour milled in New South Wales); *Matthews v. The Chicory Marketing Board* (1938) 60 C.L.R. 263 (a tax upon chicory grown in Victoria).

[41] (1949) 80 C.L.R. 229. [42] *Ibid.* [43] (1904) 1 C.L.R. 497.

[44] This reconciliation was first made by Higgins J. in *Commonwealth v. South Australia* (1926) 38 C.L.R. 408, 435, and has since been followed many times; in the present case it was followed by Dixon C.J. ([1960] Argus L.R. 129, 131), Kitto J. (143-144), Taylor J. (153) and Menzies J. (164-165). McTiernan J. (137) and Windeyer J. (172) regarded themselves as bound by *Parton v. Milk Board* (1949) 80 C.L.R. 229.

[45] *Matthews v. The Chicory Marketing Board* (1938) 60 C.L.R. 263, 304, *per* Dixon J., with the reference to consumption deleted in accordance with His Honour's deletion of it in *Parton v. Milk Board* (1949) 80 C.L.R. 229, in deference to *Atlantic Smoke Shops Ltd v. Conlon* [1943] A.C. 550 in which the Privy Council held that a tax on the retail price of tobacco to be paid at the time of making the purchase by anyone who buys tobacco for his own consumption was a 'direct' tax (even although Viscount Simonds expressly stated (565) that excise duties could be direct taxes—possibly 'excise' in this context was in the wide English use of the term which does not apply in Australia: *Peterswald v. Bartley* (1904) 1 C.L.R. 497).

[46] 'All fermented distilled or other intoxicating liquids passing into any State or remaining therein for use consumption sale or storage shall be subject to the laws of the State as if such liquids had been produced in the State.'

the Constitution would protect the licensing provisions. The express statements of Fullagar J.[47] and Menzies J.[48] and the assumptions of the other justices indicated that it would not.

It was also stated by Fullagar J.[49] that the classification of an excise as an 'indirect tax' was misleading and of no authority in Australia.[50] Starke J. in *Matthews v. The Chicory Marketing Board*[51] had previously said that this classification, and the Canadian cases[52] classifying taxes as 'indirect' and entering into the price of a commodity (and being *ultra vires* a State legislature) or 'direct' and being imposed on a person rather than a commodity (and being *intra vires* a State legislature), were descriptive rather than authoritative. However, judgments in the High Court[53] have long referred to these Canadian cases and to the classification of 'indirect' or 'direct', and found them helpful, though not essential, in classifying a tax as an excise or not.

The result is that now in fifteen cases the validity of State legislation under section 90 has been tested before the High Court. This area of the law has been shown to be extremely uncertain[54] but possibly now it may be thought that the definition of the term is becoming settled for the High Court. Some consequences flowing from that definition (for example, whether a tax imposed solely on goods manufactured abroad is an excise) remain uncertain. Also, the settling of the definition has been so recent that the result of its application to a difficult characterization problem must remain unpredictable to a large degree until the definition is applied in more cases.

In view of these uncertainties, one may welcome the fact that the plaintiff company, Dennis Hotels Pty Ltd, has applied to the Privy Council for leave to appeal,[55] for it may be that the *fulmen* of the Privy Council will conclusively settle some of these doubtful points. The political result of a decision against the State of Victoria in this case would probably mean that the Licensing Act would have to be amended so that the tax was imposed upon the ultimate purchasers of the liquor[56] and the licensees or other sellers made collecting agents, and thus the revenue derived from the liquor industry might be safeguarded.

J. G. WILKIN

[47] [1960] Argus L.R. 129, 137-138. [48] *Ibid.* 160. [49] *Ibid.* 139-140.

[50] His Honour referred to an article about *(inter alia)* the economics of excise taxes by Professor Arndt: 'Judicial Review under Section 90 of the Constitution. An Economist's View' (1952) 25 *Australian Law Journal* 667, 706.

[51] (1938) 60 C.L.R. 263, 285.

[52] The more important of these are discussed in *Atlantic Smoke Shops Ltd v. Conlon* [1943] A.C. 550.

[53] *E.g.* those of Griffith C.J. in *Peterswald v. Bartley* (1904) 1 C.L.R. 497, Higgins J. in *Commonwealth v. South Australia* (1926) 38 C.L.R. 408, and Dixon C.J., Kitto and Windeyer JJ. in *Dennis Hotels Pty Ltd v. Victoria* [1960] Argus L.R. 129.

[54] *Cf.* Dixon J. in *Matthews v. The Chicory Marketing Board* (1938) 60 C.L.R. 263, 293, who stated that the term 'excise' has 'never possessed whether in popular, political or economic usage any certain connotation and has never received any exact application', and Arndt, *op. cit.*, that the term is almost meaningless in economic fact.

[55] The cases previous to *Dennis Hotels Pty Ltd v. Victoria* [1960] Argus L.R. 129 were apparently regarded as raising an *inter se* question within the meaning of s. 74 of the Constitution—see *Vacuum Oil Co. Pty Ltd v. Queensland* (1934) 51 C.L.R. 108, 139. The leave has since been granted.

[56] *Cf. Atlantic Smoke Shops Ltd v. Conlon* [1943] A.C. 550 and *Attorney-General for British Columbia v. Kingcome Navigation Co.* [1934] A.C. 45.

MARTIN v. MARTIN[1]

Resulting trust—Advancement—Property bought by husband in wife's name—Proof of beneficial title in husband—Intention to escape taxation—Married Women's Property Acts

The respondent in this appeal applied by way of summons under section 105 of the South Australian Law of Property Act 1936-1956[2] in the Supreme Court of South Australia to determine the beneficial ownership of certain estates in land standing in the name of his wife, who was the respondent to the summons.

Before the parties were married, the husband owned about 2,000 acres of land, and subsequently he arranged to purchase another 1,527 acres, in two adjoining parcels of 827 acres and 700 acres respectively. The purchase price was seven hundred pounds, paid by the husband, in cash and by way of bank overdraft. The certificates of title were transferred into the wife's name by the vendors. In his evidence the husband claimed that he had not intended the beneficial ownership to pass to his wife; in his affidavit before the application, he alleged that he had intended his wife to hold for herself and him as tenants in common, but in cross-examination he claimed that he intended his wife to hold for him exclusively.

It was alleged by the wife, and indeed, stated by the husband in examination-in-chief, that one motive for his putting the property in his wife's name was to escape Federal land taxation[3] which had not been discontinued at the time of the transactions (1947). It was also shown that the husband had not avoided any taxation in this manner.

The trial judge (Abbott J.) declared that the beneficial interest in the 827-acre block only belonged to the husband, and ordered the wife to transfer the legal title. As the High Court pointed out, it is not clear whether the judge made this order as a convenient method of partitioning the shares of the husband and wife as tenants in common of the equitable estate in the whole 1,527 acres, or whether he was purporting to exercise a discretion to allocate proprietary rights conferred upon him by section 105 (2) of the Law of Property Act 1936-1956,[4] having accepted

[1] (1960) 33 A.L.J.R. 362. High Court of Australia; Dixon C.J., McTiernan, Fullagar and Windeyer JJ.

[2] Law of Property Act 1936-1956, s. 105 (1) (S.A.). 'In any question between husband and wife as to the title to or possession of property, either party or any other person interested may apply by originating summons to the court . . .' *Cf.* Married Women's Property Act 1882, s. 17 (U.K.), and Marriage Act 1958, s. 161 (1) (Vic.).

[3] Land Tax Act 1910-1950 (Cth); and Land Tax Abolition Acts 1952 and 1953 (Cth).

[4] Law of Property Act 1936-1956, s. 105 (2) (S.A.). 'The court . . . may make such order with respect to the property in dispute as such court shall think fit.' This section corresponds to the Married Women's Property Act 1882, s. 17 (U.K.), and to the Married Women's Property Act 1915, s. 20 (1) (Vic.), the latter Act having been repealed. See now the Marriage (Property) Act 1956, s. 7 (2), re-enacted as the Marriage Act 1958, s. 161 (2). 'The judge may make such order with respect to the property in dispute (including any order for the sale of the property and the division of the proceeds of the sale, or for the partition or division of the property) . . . as he thinks fit. . . .'