> These decisions [*Henderson v. Toronto General Trusts Corporation* and *Jarrott v. Ackerley*] rest upon the incapacity of an unincorporated and unregistered association to assert any position which is maintainable in law only by a legal entity. In principle, therefore, they are equally applicable whether the position so asserted be that of landlord or tenant.[14]

It is hoped that the consideration of the previous cases has demonstrated that no clear single basis such as this can be found. Indeed, what inferences there are to be drawn from the cases tend against this view. The avoidance of consideration of this matter of 'legal personality' would make it possible to decide such cases upon the legal requirements of tenancy and convenience to the law in permitting or rejecting such leases. It has been shown[15] that unincorporated associations are entities recognized by the law for limited purposes at least and a large part of the activities of such bodies presupposes that this is so. In most instances unincorporated associations hold property by means of trustees, which is a comparatively simple device, and so this issue appears very seldom in this form. But the case does illustrate an area of the law, the fundamental assumptions of which are obscured and developed to further obscurity in a considerable number of cases, and which viewed generally is rather frightening. It is probably a correct decision in view of existing authority, but it seems that the time is long past when the law could afford to ignore to this extent such a large and important sphere of group activity. Societies can manage to operate by means of a few rather strained devices, through which they play a game of 'let's pretend', and few could regard this as satisfactory.

F. VINCENT

McGINNES v. McGINNES[1]

Foreign recognition of decrees pronounced under Parts III and IIIA Matrimonial Causes Act (Cth.) 1945-1955—Full faith and credit—Armitage v. Attorney-General—Fenton v. Fenton

A wife who was resident in South Australia instituted proceedings, pursuant to Part III, Commonwealth Matrimonial Causes Act 1945, for a decree of judicial separation on the ground of cruelty, consonant with the laws of her domicile—Victoria. Two months later, and three days after the husband (who, at all material times, was domiciled and resident in Victoria) entered an appearance in the South Australian suit, the husband instituted divorce proceedings

[14] *Canada Morning News Co. v. Thompson* [1930] 3 D.L.R. 833, 836.
[15] Dr H. A. J. Ford: 'Dispositional of property to unincorporated non-profit associations' (1957), 55 *Michigan Law Review* 67.
[1] [1958] V.R. 104. Supreme Court of Victoria; Sholl J.

in the Supreme Court of Victoria on the ground of adultery. Whilst the South Australian suit was still pending, the husband's petition came on for hearing and, due to misunderstandings between the solicitors for the parties, it proceeded as an undefended suit, and a decree *nisi* was granted. When the wife's solicitors became aware of the situation, they made an application under section 115 of the Marriage Act 1928 (Victoria) to have the decree *nisi* set aside on the ground that the wife desired to defend her husband's suit and that she denied adultery.

Sholl J. held that, in the light of the interpretation given section 115 in *Littlehales v. Littlehales*[2] and *Fuller v. Fuller*,[3] a single judge has jurisdiction, in appropriate circumstances, to set aside a decree *nisi* for dissolution of marriage. His Honour came to the conclusion that the present case was a proper one for the exercise of his discretion, especially emphasizing:

(i) the fact that he had not been informed, at the time of the application for the decree *nisi*, that there was a suit pending in the South Australian Supreme Court;

(ii) 'the apparently genuine denial of adultery'[4] by the wife; and

(iii) 'an apparently genuine desire to set up that denial in answer to the petitioner's allegations in the suit'.[5]

So far as the decision is concerned, all that can be said is that it is a straight-forward application to a given set of facts of section 115, as interpreted in *Littlehales v. Littlehales*[6] and *Fuller v. Fuller*.[7]

In addition, however, Sholl J. heard argument on 'four very interesting questions',[8] to which the existence of the South Australian suit had given rise:

1. Whether the respondent could continue with her judicial separation suit in South Australia pending a decree absolute in the Victorian Supreme Court, even if the decree *nisi* were not set aside.
2. What effects there might be by way of issue estoppel if the present decree *nisi* stood and the South Australian suit proceeded, *or* what effect there might be by way of issue estoppel if he were to set aside the decree *nisi* and an order were made in the South Australian suit before the petition was re-heard in Victoria.
3. Whether the respective respondents could counter-petition in the two jurisdictions.

[2] [1920] V.L.R. 75.
[3] [1920] V.L.R. 585.
[4] [1958] V.R. 104, 108.
[5] *Ibid.*, 109.
[6] *Supra*, n. 2.
[7] *Supra*, n. 3.
[8] [1958] V.R. 104, 109.

4. Whether the court of the residence ought in general, when a question arises under section 13A of the Federal Act, to defer to the court of the domicile, and in a proper case to refer proceedings before it to the court of the domicile.

In the result, His Honour found it 'unnecessary to discuss . . . the first two matters'.[9] With respect to the third and fourth matters, however, he drew some interesting conclusions.

Competence of Respondent to cross-petition

The main issue here was whether the respondent in a suit begun under Part III or Part IIIA could counter-petition in the State of the petitioner's residence, there being little doubt as to the respondent's competence to counter-petition if the original petition was brought on a common law basis *(e.g.,* domicile). His Honour was of the opinion that a respondent in the former case (Parts III and IIIA) *could* counter-petition in the court of the residence of the petitioner and that the Supreme Court had jurisdiction to hear such plea by reason of the definition of 'matrimonial causes' in section 3 (1) of the Federal Act to include '. . . cross or counter proceedings . . . incidental to such suit'. Finally, Sholl J. agreed with the decision of Hudson J. in *Dyball v. Dyball*[10] that a respondent would not be precluded from counter-petitioning in a court of residence under Part III or Part IIIA by reason of his non-compliance with the twelve months' and three years' residence requirements respectively. Such requirements, he considered, were relevant only to the competence of a party to *institute* proceedings under the Act, and thus had no relation to the competence of a cross-petitioner. In the case of a petition under Part III, when, by section 11, the law applicable to the petitioner's suit would be the law of the domicile, His Honour considered that a respondent cross-petitioner could avail himself of grounds peculiar to the law of the domicile. Similarly a respondent cross-petitioner in a suit instituted under Part IIIA can avail himself of grounds peculiar to the law of the petitioner's residence, even though he has no domiciliary or residential nexus whatever with the former.

The conclusions of the learned judge on this point may be summarized as follows:

1. The statutory requirements of Part III and IIIA are inapplicable to the competence of a cross-petitioner.
2. A respondent is entitled to have his cross-petition determined in accordance with the same law as the Act specifies in the case of the original petition.

As regards the first proposition, it is submitted that the view adopted,

[9] *Ibid.,* 109. [10] [1953] V.L.R. 517.

though by no means an inevitable one, is sensible and in accordance with what must have been the draftsman's intention, namely an abolition—at least in part—of the former rigid jurisdictional rules and a forward step towards the erection of a federal unit in matrimonial causes, for jurisdictional purposes at least.

The effect of the second proposition is that once a petition has been instituted in a court of the residence under Part III or IIIA, the respondent thereon becomes entitled to present a cross-petition and further to have it determined, not on the basis of his own personal law or even a law which the Commonwealth has seen fit to *deem* his personal law, but rather in accord with what Parliament has deemed to be the personal law of the *wife*. It is very doubtful whether the aim of the Commonwealth draftsman included substantial addition to the substantive rights of the husband.[11]

Recognition of decrees pronounced on the basis of Parts III and IIIA, or section 75 Marriage Act 1928 (Vic.)

In this context, His Honour handed down two important propositions. The first is a warning to the profession to the effect that 'it is the duty of solicitors advising petitioners who seek to take advantage of these extensions of matrimonial jurisdiction [Part III and Part IIIA, and 'the same applies' to section 75 of the Marriage Act 1928 (Victoria)] to advise their clients that a divorce obtained in accordance with the exercise of such a jurisdiction may be invalid outside Australia, and indeed it may well be negligence on the part of a solicitor not to give that advice'.[12]

As the learned judge points out, there is no possibility of a decree pronounced under Part III or Part IIIA not receiving full recognition throughout Australia, by reason of section 13 of the Matrimonial Causes Act. It is submitted that apart altogether from section 13, a Victorian court would be bound in any case, on the authorities, to recognize such a decree by reason of the constitutional mandate contained in section 118 of the Constitution; indeed on *Harris v. Harris*,[13] the Victorian court would be precluded, not merely from denying recognition to such a decree, but also from an investigation of the jurisdictional basis on which it was given.[14]

Similarly it is submitted that the same reasoning must oblige the courts of a sister State to grant full recognition to a decree pronounced under a section like section 75, despite the rather incon-

[11] *Cf.* the present Bill prepared by Mr Joske, Q.C., and now adopted by the Government, with its emphasis on uniformity throughout Australia of the *substantive* aspects of domestic relations. [12] [1958] V.R. 104, 110. [13] [1947] V.L.R. 44.

[14] Professor Cowen has suggested that s. 13 is a particular statutory expression of s. 118. On *Harris v. Harris* see Cowen, (1952) 6 *Res Judicatae*, 1-7; Wolf, (1948) 1 *University of Western Australia Annual Law Review* 369; *Gibbons v. Gibbons* [1948] S.A.S.R. 267; especially Griswold, (1951) 25 *Australian Law Journal* 248.

gruous decisions of the High Court in *Ainslie v. Ainslie*[15] and the Victorian Supreme Court in *Perry v. Perry*.[16] In neither case, however, is there any mention of full faith and credit, nor does the point appear even to have been argued.[17]

As regards extra-Australian recognition, Sholl J. cites *Fenton v. Fenton*[18] as showing that some courts at least would be bound to treat such a decree as invalid.

It is useful to consider what has been the effect of *Fenton's* case. In so far as a decree pronounced on the basis of Part III is concerned, it is submitted that there is no possibility of its being denied recognition in Anglo-American courts. To be competent to petition under Part III, the petitioner must be resident in the State of the forum *and* domiciled in some other Australian State. Thus, by reason of the common law doctrine of unity of domicile, both husband and wife must *of necessity* be domiciled within Australia at the institution of proceedings. As already shown, the court of the domicile would be *bound* to recognize the decree by virtue of section 13 Commonwealth Matrimonial Causes Act 1945-1955 and full faith and credit. On the authority of *Armitage v. Attorney-General*,[19] such a decree would therefore be recognized in all common law jurisdictions.

However, in the case of Part IIIA petitions, there is no requirement as to the petitioner being domiciled within Australia at the date of the institution of proceedings. Thus the position outlined above with regard to a Part III petition would be applicable to a Part IIIA petition, *if* the petitioner[20] (and thus also the husband) were domiciled in Australia at the relevant date. Were the husband domiciled outside Australia, however, at the date of the institution of proceedings, *e.g.*, in Ruritania, clearly no question as to section 13 or full faith and credit could arise. Whether Ruritania as the *forum domicilii* would recognize the decree therefore would depend on its 'recognition rule' and it is in this context that the rule in *Fenton v. Fenton* becomes relevant. Should the Supreme Court of Ruritania adopt the attitude, as did the Victorian Full Court, that it will only recognize decrees based on domicile, irrespective of whether it would

[15] (1927) 39 C.L.R. 381. [16] [1947] V.L.R. 470.

[17] It is submitted the only possible explanation of these cases is that they dealt with judicial separation, a remedy which has traditionally been regarded as 'territorial' and 'protective'; *quaere* whether in following the 'traditional' approach, the courts have neglected the Constitution and the special conditions of the Australian community.

[18] [1957] V.R. 17; note also Marriage (Amendment) Act 1957, s. 4. *Quaere* its efficacy in *all* such cases.

[19] [1906] P. 135. Approved in *Fenton's* case and actually applied by the Supreme Court in *Mandel v. Mandel* [1955] V.L.R. 51.

[20] Part IIIA petitions are available only at the instance of a wife. Matrimonial Causes Act, 1945-1955, s. 12A (i) (Cth.).

itself have assumed jurisdiction if faced with a similar set of facts, then the Australian decree would go unrecognized in Ruritania and obviously the rule in *Armitage v. Attorney-General* could not possibly save it.

Precisely the same position would apply, it is submitted, with respect to a decree pronounced on a statutory basis similar to section 75. By virtue of section 75, a wife is deemed, in specific circumstances, to retain a Victorian domicile, but it seems probable that this is a domicile only for the purpose of *assumption* of jurisdiction by a Victorian court. There can be no doubt that of itself it could not require foreign courts to accord recognition on the basis of domicile to a decree so pronounced. Any recognition which such a decree would receive would need to be based on comity or some such constitutional requirement as full faith and credit. As the authorities stand in Australia at the moment, it is submitted that all Australian courts would be bound to give force and effect to a decree pronounced upon this statutory basis, but this is because of the full faith and credit[21] mandate and not because of any recognition rule based on domicile.[22]

Once again, however, if the husband is domiciled in Ruritania at the date of the institution of proceedings by the wife under section 75 and Ruritania has adopted a rule similar to *Fenton v. Fenton,* the decree will not be recognized in Ruritania or elsewhere.

The only other possibility of a decree pronounced under Part III or Part IIIA not being recognized outside Australia would be if the husband at the date of the institution of proceedings under Part IIIA were domiciled in a non-Australian law district which, though not adhering to the view taken in *Fenton v. Fenton,* would not itself have assumed jurisdiction had it been faced with precisely the same set of facts.[23] That is, if the court of the husband's domicile at the date of the institution of proceedings would not itself have assumed jurisdiction in the appropriate matrimonial cause on the basis of three years' residence within the jurisdiction immediately preceding the presentation of the petition, then even on *Travers v. Holley* the decree pronounced under Part IIIA would not be entitled to recognition.

The same conclusion must result with respect to a section 75 petition

[21] In view of the notable absence of authority, or even discussion, of the extent of the mandate of s. 118 of the Constitution, it is submitted that one is justified in predicting that our courts might some day adopt an approach to full faith and credit similar to that developed by the United States Supreme Court, *i.e.,* an interpretation of the mandate *not* as requiring an automatic preferring of any law other than the *lex fori,* but rather an application based on concepts of legislative competency in the light of the protection of 'legitimate local policy'. *Alaska Packers Association v. Industrial Accident Com.* 294 U.S. 532; *Pacific Ins. Coy. v. Industrial Credit Co.* 306 U.S. 493 *Griffen v. McCouch* 313 U.S. 495 *Clark v. Willard* 292 U.S. 112.

[22] *Le Mesurier v. Mesurier* [1895] A.C. 517.

[23] *Travers v. Holley* as interpreted in *Dunne v. Saban* [1954] 3 All E.R. 586; *Arnold v. Arnold* [1957] 3 W.L.R. 366; *Manning v. Manning* [1958] 2 W.L.R. 218; *Robinson-Scott v. Robinson-Scott* [1957] 3 W.L.R. 842.

because of the absence of a domiciliary requirement: compare Part III petitions.

To sum up, the only possibilities of non-recognition of a decree pronounced under Part III, Part IIIA or section 75 by a court other than a court of the domicile are:

(a) In the case of a petition under Part IIIA or section 75, where the husband, at the date of the institution of proceedings thereunder, is domiciled outside Australia in Ruritania and where Ruritania applies a rule similar to that in *Fenton v. Fenton;*[24]

(b) a petition under Part IIIA or section 75, where the husband is domiciled outside Australia at the date of the institution of proceedings thereunder in Jenghistan and where Jenghistan has adopted a rule similar to *Travers v. Holley* for recognition of foreign judgments, but would not itself have assumed jurisdiction had it been faced with a precisely similar factual situation.

It is respectfully submitted therefore that although the actual value of His Honour's warning as to the duty of solicitors can in no sense be minimized, it is not to be read without qualification. The plain fact of the matter is that as regards what, it is submitted, is the majority of cases, decrees pronounced under the Commonwealth legislation *will* receive recognition outside Australia. Thoughtless application (by solicitors) of His Honour's valuable warning could lead to serious practical limitations being placed on the operation of the Matrimonial Causes Act—an aim certainly not expressly avowed by His Honour.

Finally, His Honour indicates one very appropriate case for the application of section 13A of the Commonwealth Act. By section 13A, when it comes to the notice of a Supreme Court proceeding on the basis of residence under Part III and Part IIIA that proceedings for matrimonial relief are pending in the court of the plaintiff's domicile, then one suit should cease 'in the proper interests of justice'. The learned Judge here suggests that 'it is a sound precept, tending to the establishment of that end that the courts of the domicile should ordinarily be left to decide a matrimonial cause *if it is contested*'.[25]

When qualified as shown above, such advice is clearly of value as a practical guide to the workings of a system based on the 'proper interests of justice'; if not so qualified, however, it is submitted that it could result in serious and unwarranted limitations being placed on such statutory modifications of the common law rule, modifications which have done so much to alleviate the burdens of litigants in matrimonial causes and of wives in particular.

J. T. HEALY

[24] Investigation has failed to reveal the existence of any other country which has adopted a rule similar to *Fenton v. Fenton.*

[25] [1958] V.R. 104, 110. (Italics added.)

WARD v. WARD[1]

Husband and wife—Dispute as to property—Limitations of statutory discretion—Purchase on behalf of both spouses—Rebuttal of presumption that each entitled proportionately to contribution—Married Women's Property Act 1928 section 20; Marriage (Property) Act 1956 section 7

During their marriage the defendant, W., and the plaintiff, his wife, acquired a matrimonial home which was purchased in the husband's name and paid for by instalments over a period of ten years. The plaintiff was the financial manager of the family income which consisted of her own wages, the defendant's wages, and a small sum contributed by the eldest child, and out of this income she paid the living expenses of the family and the instalments on the home. Subsequently the marriage was dissolved and the plaintiff brought this action, seeking against the defendant a declaration that he held, as trustee for her, all, or alternatively some part, of the rights vested in him as the purchaser named in the contract of sale of the home, and an order directing him to assign all or part of such rights to her. The court held that the plaintiff was entitled to a declaration that the defendant held all the rights in the property upon trust for the plaintiff and himself in equal shares, and granted an order directing the defendant to assign to himself and the plaintiff in equal shares all the rights subject to the trust.

The decision was based on the proposition that 'if the ordinary rules of law and equity, when applied to the facts of the present case, locate the ownership in accordance with an actual intention disclosed by the evidence, the result of the action cannot be affected by any statutory discretion that may exist'[2] and Smith J. was able to discover such an intention. His Honour was satisfied that the defendant, when he entered into the contract, was acting in pursuance of an understanding that he should buy the property for and on behalf of himself and the plaintiff, and so held the rights under the contract on trust for them both. He then referred to the presumption that the parties were entitled to those rights in proportions corresponding with the proportions in which they contributed the purchase money,[3] but said that this presumption was rebuttable by proof that a definite intention to the contrary existed at the time of the purchase.[4] His Honour was able to discover such an intention and, in particular, the fact that the payments for the home were likely to come from a mixed fund contributed to by them both in amounts

[1] [1958] V.R. 68; [1958] Argus L.R. 216. Supreme Court of Victoria; Smith J.
[2] [1958] V.R. 68, 72.
[3] *Cf. Bull v. Bull* [1955] 1 Q.B. 234.
[4] *Cf. Drever v. Drever* [1936] Argus L.R. 446; *Russell v. Scott* (1936) 55 C.L.R. 440.