

‘DOMESTIC PROMISES’ AND THE DIVISION OF FARMING PROPERTY IN AUSTRALIA

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In Australia, property law represents a particular historical narrative of social ideas. To illustrate this proposition, two judgments are examined concerning the division of family property following divorce, and one judgment concerning Family Provision legislation. The objective is to build on the idea that in legal disputes property has been divided in a way that privileges ‘productive’ male labour and minimises the contributions of women. A second objective is to show how the division of property reflects a particular notion of Australian history and associated ideas about economics, sexuality and domesticity. Finally, it will be demonstrated that a phenomenon, which will, for the present, be called ‘domestic promises’, has been interpreted to exclude certain familial expectations regarding rural property.

I INTRODUCTION

‘No set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning.’¹

Alexander has argued that ‘exclusion theorists’ have considered that property properly concerns only the relationships between the owners and non-owners.² However, some property theorists argue that we should also examine the relationship between the stakeholders of property owners through how the law governs their relationship with each other.³

To carry out an examination of this kind, I concentrate on an era of Australian history up to the time that Paul Kelly called the *End of Certainty*.⁴ Kelly characterised this period, prior to the 1970s, as being a form of capitalism based on ‘White Australia, Trade Protection, Wage Arbitration, State Paternalism and Imperial Benevolence’.⁵ This was the period of history when Australia was called the ‘settler state’⁶ and it was said of Australia that it ‘rode on the sheep’s back’ and that the pastoral industry carried the economy of the country.⁷ During this period, a

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¹ Robert Cover, ‘Nomos and Narrative’ (1983) 97(4) *Harvard Law Review* 1.

² See, eg, Penner who argues that property rights cannot be ‘fully explained by using the concepts of exclusion and use’ and that such concepts are ‘intertwined’; see James Penner, *The Idea of Property in Law* (Clarendon Press, 2000) 68.

³ Gregory Alexander, ‘Governance Property’ (2012) 160 *University of Pennsylvania Law Review* 1853.

⁴ Paul Kelly, *End of Certainty* (Allen & Unwin, 1994) 661.

⁵ Lloyd adds to this list by adding agricultural marketing, the Federal/State financial arrangements and State owned banks; see Christopher Lloyd, ‘Regime Changes in Australian Capitalism: Towards a Historical Political Economy of Regulation’ (2002) 42 *Australian Economic History Review* 238.

⁶ See Phillip McMichael, *Settlers and the Agrarian Question: Foundations of Capitalism in Colonial Australia* (Cambridge University Press, 1984).

⁷ Paul Cashin and John McDermott Cashin, ‘Riding on the Sheep’s Back: Examining Australia’s Dependence on Wool Exports’ (2002) 78 *The Economic Record* 249.

particular ‘rural ideology’ prevailed over farming and rural life. According to this ideology, the farm was a man’s realm and women were background figures in the landscape. Farming life, on this account, was based on the acceptance of male hegemony, domestic ideals for women, and a commitment to self-sufficiency and individualism without government interference.⁸ What has been called the ‘pioneer legend’ celebrated many of the values associated with rural life, such as courage, enterprise, hard work and perseverance. In a different way, the emergence of the ‘bush legend’ also encapsulated some of these values with its masculine ideal of fiercely independent, practical, rough-and-ready, self-made men.⁹ Another version of this theme emerges in the language of ‘agrarianism’ and the idea of ‘countrymindedness’.¹⁰ These sentiments have continued into later times, but I wish to concentrate on how they were imbricated with law in an earlier period.

While farmers in many instances settled family disputes within their own family circles, they sometimes could only resolve their disputes in the courts. My approach to texts that judicially allocate family property is not only to examine cases as ‘family legal texts’ but, more importantly, to view them as particular representations of rural ideology. I examine them as specific compilations of forms of knowledge such as that contained within the field of economics, and look for ways in which they are inscribed with notions of ‘sexuality’.

By the term ‘family law texts’ I mean those texts which provide rules for the distribution of property following a dispute over a will, a divorce settlement or a family trust property.¹¹ My purpose is not to discover the political reasons why family law texts have been enacted as law, hence I am not interested in the usual form of legal history that seeks to discover why or by what process a certain rule came to be authoritative, or how a rule may have reflected patriarchal or vested economic interests. With my emphasis on the word ‘text’ I seek to differentiate my analysis from traditional legal analysis. My approach is to concentrate on the disciplines the texts adopt rather than trying to locate the proposition a case stands for. As a form of specialised literature, these texts consist of ‘social textual practices’ that seek to impose particular meanings on the world. Textual practices have been used systematically to appropriate, privilege and secure a specific and limited set of meanings, accents and connotations. In the production of meaning, the literary practices of law displace and reject alternative meanings.¹²

To complete an examination of these legal texts, I examine how economics as a discourse on efficiency has been imbricated or combined with ideas of sexuality. I indicate the changes in register of essential ideas in family law texts—ideas of work and productivity—and how these words have come to carry ideas of sexuality as dangerous or productive. I am aware that this connection

⁸ Margaret Alston, *Women on the Land: The Hidden Heart of Rural Australia* (New South Wales University Press, 1995).

⁹ Russel Ward, *The Australian Legend* (Oxford University Press, 1958) 16–17.

¹⁰ Don Atkins, ‘Afterword: Return to “Countrymindedness”’ in Graeme Davison and Marc Brodie (eds), *Struggle Country: The Rural Ideal in Twentieth Century Australia* (Monash University ePress, 2005) 11.

¹¹ This view of family law texts does not represent a typical approach to family law. The conventional taxonomy of legal subjects has its own genealogy. As Sugarman has pointed out, it arose partially out of the classification system commenced by legal textbook writers, see David Sugarman, ‘Legal Theory, The Common Law Mind and the Making of the Textbook Tradition’ in William Twining (ed), *Legal Theory and the Common Law* (Blackwell, 1986) 26.

¹² Les Moran, *Homosexual(ity) of Law* (Routledge, 1996); Peter Goodrich, *Reading the Law: A Critical Introduction to Legal Methods and Techniques* (Basil Blackwell, 1986) 3.

between economics and sexuality may surprise the reader, as we normally think of economics as the science of scarcity or of the choices made regarding the allocation of goods, and the mechanics that govern that process. In my use of the term 'sexuality', it does not refer to an innate or historically given set of biological predispositions, but rather to a set of practices, techniques, or behaviours that have emerged in the context of capitalism. This conjunction of terms calls attention to the way they are reciprocally constituted. Opposed terms are correlatives, like 'work and play'; each takes on a signification through that relationship.

II SAMPLE CASES ON FAMILY PROPERTY

The selection of cases to be examined was made on the basis that each case was representative of the emphasis given to the long-term survival of the farm in the interests of male farming involvement on the farm. Furthermore, these cases contain unfulfilled 'domestic promises' which were constructed in a way designed to avoid their detection. The period of these texts (1912–89) straddles the development of four important features of life in Australia. I take these to be the development of the economy based on agricultural products, the redeployment of forms of sexuality associated with capitalism, the development of notions of domesticity for women and the linking of economic texts with notions of 'sexuality'.

A *Robinson v Robinson*¹³

In 1954 Mr Robinson bought a block of farming land and transferred it into his own name as sole proprietor. He then started to build a house on the land financed by his bank. Later that year he met a recent immigrant (later, Mrs Robinson) and they moved into the uncompleted house. After they married in 1955, Mr Robinson asked his wife to continue to work in order that her wages could go towards the cost of the home. She also subsequently did manual work about the house and supposedly 'kept house'. Mr Robinson promised that this arrangement would be of advantage to them because the house would belong to both of them. In the lounge room one night, Mr Robinson said 'everything here belongs to both of us' and 'it's all yours, and it's all ours'.

The judge decided, as a matter of fact, that the husband did say something to this effect, but he construed these words as an advanced version of the marriage vow that 'all my worldly goods with thee I share'. As regards the wife's claim on the house, a half share of the land and a share of the contribution made to the couple's expenses, the judge found as follows. Firstly, he found, as regards the land, that he was only empowered to declare who the legal owner was and not whether it should be shared according to notions of fairness and equity.¹⁴ This was indeed the case, because at the time the case was heard, the relevant law under the *Married Women's Property Acts* only permitted the courts to decide issues as to title.¹⁵ Secondly, as regards the wife's contribution to general household expenses, the judge applied the presumption that they

¹³ [1961] WAR 56.

¹⁴ Each state had their own act, see for example *Married Women's Property Act 1892* (WA).

¹⁵ Ian Hardingham and Marcia Neave, *Australian Family Property Law* (Law Book Company, 1984) 32, 45; W Davies, 'Section 17 of the Married Women's Property Act: Law or Palm Tree Justice' (1967) 8 *University of Western Australia Law Review* 48.

were a gift to him and that there was no resulting trust back to the wife. I describe the significance of these two factors later.

B *Parker's Case*¹⁶

This case involved a dispute between husband and wife as to their respective contributions under the *Family Law Act 1975* (Cth). Under this legislation, property could be divided according to the contributions of the parties.¹⁷ The husband was from a third generation farming family in northern Queensland. In 1971 he commenced farming with his father on a property which had been acquired by his grandfather in 1896, and which was currently owned by his father. Prior to this he had already built a family home on the property with the help of his parents and some borrowed money. In 1970 he married, and his wife left her clerical job one month prior to the birth of their first child (who by time of the hearing was 18 years old). In late 1972 she returned to work part-time and continued with part-time work until 1977. During this time their second son was born, in 1975 (he was 15 years old by the time of the hearing). In 1977 the husband, with his father, transferred all the plant, machinery and growing sugar to a family trust. The trust also took a lease on the farm from the father. During this period, in the late 1970s, the wife did the farm bookwork. In 1978 she had their third son.

In 1981 the husband invented a packaging machine, and the wife assisted in the clerical work for that operation. In 1984 she took outside work for three years. In 1985 the husband's father died and the husband received part of his wealth, including a part interest in another farm, which he subsequently operated. The wife also kept the books for the second farm property. The partners were found to have separated in 1989. The judge assessed their assets as being \$2 011 655. As regards the wife's contribution, it was accepted that she had worked as a homemaker and parent as well as on the farm, and that in the packing shed she had worked to her full capacity. The trial court judge accepted that she had far heavier duties than might normally be the case.

It appears that the court had some hesitation in accepting this evidence, and the trial court judge was reluctant to consider a maintenance element for the wife, as she would have received a large award and was capable of work. The wife also had responsibility for the three children, who at the time were between 12 and 18 years of age, but the conflict with work which parenting involved was not thought to be noteworthy. The judge accepted that the husband was a 'highly driven, highly motivated man who had been industrious throughout the 20 years of marriage'. The crucial factor in the husband's favour was the assets he had brought into the marriage, and the work he had done on the farm after the separation of the parties (an eight month period). The judge awarded the wife 30% of the assets, amounting to \$507 639, and payable within 90 days, in settlement of her property claims, and further ordered that she be paid \$100 a week for each child to cover parenting costs. On appeal, The Full Family Court awarded the wife an additional sum of only \$30 000, based on a mistaken assessment made by the lower court judge.

¹⁶ Appeal 59 of 1990 Suit No TV 2478 of 1989.

¹⁷ The Act sets out general principles that a court must consider when deciding financial disputes after the breakdown of a marriage. Sections 79(4) and 75(2) make explicit the principles a court must consider, which includes the financial contributions of the parties and their future needs.

What is striking here is the brevity of the period the husband had worked on the property before the marriage, and how late in the marriage the husband had received the property inherited from his family, as weighed against the uninterrupted 20 years during which the wife had contributed to both the family and the business.

C *The Parr Case*¹⁸

This case was an instance of a contested will under the *Testator's Family Maintenance* legislation.¹⁹ This legislation allowed a family member who was not adequately provided for in a will or an intestacy to bring proceedings for further provision. In such actions, wives' claims are given 'paramountcy' should they be perceived to have been dutiful wives and their claims not be disallowed by disentitling conduct.²⁰ In *Re Parr* this older, stricter attitude is maintained.

In this case, the female applicant was 23 when she married her husband, who was a drover. The judge thought he was probably then a 'hard working young country fellow':

It is evident that he was one of those types, of whom the country may fairly be proud, who go out into the backblocks, take up virgin soil, clear it themselves, and live a hard life, working all hours and gradually improving their property.²¹

The judge found that the wife was 'probably more delicately nurtured', as she had lived all her life in the more comfortable circumstances of a girl living in Melbourne. After marriage, they went to the country to live. For some years, while the husband was droving, the wife was left to her own devices. Eventually he 'took up' a farmstead and 'made there his home'. The wife swore that her husband required her to live on the property in a one-roomed hut with an earthen floor and which had no windows or proper conveniences. The judge believed the wife to be a 'delicate woman who required special food and who really required constant attention', and that her husband never gave her proper food. On the other hand, the husband's family saw her as a typical girl from the town who, finding herself in the backblocks, craved to return to the city: 'Not cut out for country life she let him see it, and looking after herself, left him to shift for himself'. They alleged she refused to cook his meals and was always looking for an opportunity to get back to Melbourne. After 10 years of marriage she deserted him and refused to return when he wrote to her. Shortly afterwards he contracted pneumonia and died.

The judge saw the question to be decided as follows:

Now, the real question is, which is the correct view to take? Is it a case in which the widow did in her husband's lifetime separate herself from him? Did she make her own bed, and must she lie on it? Or, were the hardships and the trials to which she was subjected, in her particular circumstances, such that the Court would say that he must have been an unnatural or a heartless man and that he could only expect if he treated her in that way that she would leave him, and that he had no right to complain of her conduct towards him.

¹⁸ *Re H F Parr* (deceased) [1929] 30 NSWSR 10.

¹⁹ In New South Wales the governing act was the *Testator's Family Maintenance and Guardianship of Infants Act 1916 (NSW)*.

²⁰ John De Groot and Bruce Nickel, *Family Provision in Australia and New Zealand* (LexisNexis, 2012) 89–90.

²¹ *Ibid* 11.

The applicant wife alleged that two years prior to their separation, the husband had made her a co-partner in his business and had made her a half-share gift of his stock, implements and chattels but not of the farming land. As evidence of this agreement, the wife produced letters which her husband had given her as ‘a sort of guarantee of good faith’. But the judge accepted evidence from the husband’s mother who argued that this was not true. The wife argued she had suffered from gastric trouble, leaving her without energy. However, the judge supposed it was not her lack of energy which led her to separate herself from her husband, but rather ‘a disinclination to share the life deliberately chosen by her when she married him’.

The real difficulty, the judge decided, was that she did not lead the life of a settler’s wife, or share the hardships which a settler’s wife was called upon to share. His view was that she did not carry her share of the burden, and that she was not unable to do so but rather had a ‘frank disinclination to do so’. Such was the judge’s view of the evidence that, had the husband applied for restitution of conjugal rights, or had his wife applied for maintenance, the husband would have won, because she had deliberately separated herself from her husband. Despite the ten years of marriage prior to her leaving her husband, the judge decided that he should apply the same principles to determine whether she should obtain maintenance. As she had ‘deliberately cut herself off from her husband and left him to his own devices’, she should receive no maintenance but only her half share of the business.

III THE CONTEXT OF THESE CASES IN AUSTRALIAN HISTORY AND THE REPRESENTATION OF WOMEN IN THESE TEXTS

The cases discussed above reflect connections with the pioneer settlement of Australia and versions of the Australian myth of ‘farming as a way of life’.²² The law in these cases reflects some ideas on property imported through the sensibilities of immigrants²³ and their notions of work and domesticity, which emphasised productive labour for men and domestic roles for women.²⁴ Collectively the cases enshrine the idea of the necessity for a stable rural sector and the idea that women were needed as ‘civilising agents’ and in need of patriarchal protection. In this scheme of thought women were required to maintain an orderly position and help create a prosperous nation.²⁵ This group of cases also imbricate the idea of family history, based on the value attached to keeping and perpetuating the name of the family in its district. The patrimony a

²² This is a supposition as regards the *Robinson and Parr* cases.

²³ Here I meant the shadow of ideas left behind from English culture associated with the expropriation of common lands and the enclosures. These ideas existed alongside ideas that land belonged to those who could develop it. For a description of various attitudes to land, see Nicola Graham, *Landscape: Property, Environment and Law* (Routledge, 2011).

²⁴ The downgrading of women’s contribution has been well commented on by family law scholars. On the special recognition in law given to productive efforts to increase or preserve the ‘viable’ aspect to property, see the law of waste. Under the law of waste, a life tenant is liable for voluntary waste, which diminishes the property, see Chris Bessant, ‘From Forest to Field: A Brief History of Environmental Law’ (1991) 16(4) *Legal Service Bulletin* 160. Secondly, see the rule that requires the trustee to sell declining or depreciating assets under the rule in *Howe v Dartmouth* 7 Ves 137. Thirdly, early forms of leases in colonial Australia required that improvements were to be carried out as a condition of the grant, as explained by Stefan Petrow, ‘Discontent and Habits of Evasion: the Collection of Quit Rents in Van Diemen’s Land 1825-1863’ (2001) 117 *Australian Historical Studies* 240.

²⁵ Lynette Finch, *The Classing Gaze: Sexuality, Class and Surveillance* (Allen & Unwin, 1993) 106–24.

son received in this notion of family life took the form of a partnership or custodianship rather than that of a piece of land as such, as the lengthy process of transfer meant that the farm was in a continuous process of transfer between generations.²⁶

While professional economics as a form of calculation existed in its own discursive realm, my approach to these family law texts is to examine how ideas of rationality and productive behaviour were imported from the discipline of economics into family texts and were imbricated with notions of sexuality.²⁷ This form of argument makes two moves. Firstly, I argue that economic values emanating from economics as a calculative science have been applied to the household realm. Secondly, I argue that economics as an idea of efficiency became connected to sexual norms concerning appropriate domesticity for women and a productive ideal for men. Prior to the notion of the economy as 'a totality of monetarised exchanges in a defined space',²⁸ the family was regarded as a 'household economy'.²⁹ With the emergence of the notion of government in relation to the family there developed the idea that family property should be used efficiently and that a good family should have no wastage of income due to inappropriate transfers out of the family.³⁰

These texts thus reveal the incorporation of economic values into the idea of a family economy. Hence ideas of what was perceived as productive labour—necessary for the long-term custodianship of the family—became part of the prescriptive norms imposed on women as dependents, as mothers and housewives, and conceived of them as less productive than men and as unfit economic agents.³¹

Furthermore, these professional expectations embedded in the texts regarding productive labour and support for family members were inscribed with ideas of 'sexuality'. Thus in terms of these norms,

²⁶ Berenice Carrington, *Pekina: An Ethnography of Memory* (Unpublished Doctorate, Australian National University, 1997) 14, 121–3.

²⁷ For a further development of this argument, see Malcolm Voyce, 'Governing from a Distance: The Significance of the Capital Income Distinction in Trusts' in Susan Scott Hunt and Hilary Lim (eds), *Feminist Perspectives on Equity and Trusts* (Cavendish, 2001) 197.

²⁸ Tim Mitchell, *Rule of Experts: Egypt, Techno-Politics, Modernity* (University of California Press, 2002) 4.

²⁹ The *oeconomy* was the governance of the household (of servants, women, children, animals) and the *political oeconomy* was the governance of the state as household through its constituent households. See Mitchell Dean, *Critical and Effective Histories: Foucault's Methods and Historical Sociology* (Routledge, 1994) 189.

³⁰ See Christina Twomey, *Deserted and Destitute: Motherhood, Wife desertion and Colonial Welfare* (Australian Scholarly Publishing, 2002) 4–14; and her discussion on the action of wives under the *Deserted Wives and Children Act (1840)* (Vic). Magistrates' clearly indicated that marriage was an economic partnership and that men should not abandon their responsibilities. For further evidence on the nature and duty of families, see the debates on the *Family Maintenance Legislation* in New South Wales; see Lisa Young, 'Sissinghurst, Sackville-West and 'Special Skill' (1997) 11 *Australian Journal of Family Law* 268; Malcolm Voyce, 'The Impact of Testator's Family Maintenance Legislation as Law and Ideology on the Family Farm' 7 *Australian Journal of Family Law* (1993) 191. On this responsibility between the two wars, see Joy Damousi, *Depraved and Disorderly: Female Convicts, Sexuality and Gender in Colonial Australia* (Cambridge University Press, 1997).

³¹ On the position of women and Victorian economists, see Peter Groenewegen, *Feminism and Political Economy in Victorian England* (Edward Elgar, 1994); Michele Pujol, *Feminism and Anti-Feminism in Early Economic Thought* (Elgar, 1992). These authors discuss major figures of this period and their views on the market economy as a male preserve. On the view of classical economists and primogeniture, see D L C Miller, 'Rights of the Surviving Spouse: A Distinct System in Scotland and Developments in England' (1980) *Acta Juridica* 49.

those who were sexually dangerous or irresponsible with property were to be marginalised or punished, as they were deemed unproductive with property and at fault. Likewise, those who exhibited the positive attributes of masculinity were seen in a favourable light and as suitable recipients of property.

This form of argument deploys Foucault's notion of how sexuality was connected to economic ideas such as that of productive behaviour.³² In this context 'sexuality' should not be regarded as a bodily phenomenon but as a discursive formation that readily connects with other ideas. Thus the idea of an efficient household economy emerged and became the norm, with the result that those who were subject to this discourse were required to act efficiently and with self-restraint. Along with this there evolved domestic ideals for women and productive ideals for men.

Official reports and cases from the period show a strong expectation that women should possess attributes that accorded with prescriptive notions of work, domesticity, and concern for the preservation and retention of family property. In other words, 'property' should be preserved by marriage partners through the application of effort and self-restraint.³³ I have indicated how these texts reflect a particular view of Australian history and the subservient position of women as regards the construction of their labour and how it is rewarded. How have these texts been compiled? Or, to put the question in a way that accords with my earlier suggestion, 'what does an examination of these texts reveal?' Before I answer this question, two caveats are in order. Firstly, I acknowledge that 'law' does not necessarily reflect ordinary activities of everyday life. I make this rather obvious comment because lawyers often mistakenly believe that the law describes the world as it actually exists.³⁴ Secondly, while the above analysis of cases shows the priority given to masculine labour and the invisibility of female labour, this analysis hides the role of agency, or what some scholars call 'resistance'. I make this comment, as it may be tempting to read the position of women as prescriptively defined by men or by an exploitive patriarchal ideology. That makes it necessary to balance such accounts with readings that open up strategic avenues of self-transformation for women.³⁵

³² See Michael Foucault, *A History of Sexuality* (Penguin Books, 1985) vol 1, 127; David Halperin, 'Is There a History of Sexuality?' in Henry Abelobe, Michele Barale and David Halperin (eds), *The Lesbian and Gay Studies Reader* (Routledge, 1993) 416–31.

³³ Alan Hunt, *Governing Morals: A Social History of Moral Regulation* (Cambridge University Press, 1999) 86.

³⁴ Many scholars have noted the limits of state law given the continuation of customary forms of law in most states, as well as the existence of different groups at the margins of capitalist modernity, see Boaventura de Sousa Santos, 'The Law of the Oppressed: The Construction and Reproduction of Inequality in Pasagada' (1977) 12 *Law and Society Review* 5; Stuart Macaulay, 'Non-contractual Relations in Business: A Preliminary Study' (1963) 28 *American Sociological Review* 55. Rather than seeing law as a stable domain which *relates* in some complicated way to society or political economy or class structure, law is simply the practice and argument about the relationship between something posited as law and something posited as society, see David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 *Wisconsin International Law Journal* 1, 8.

³⁵ For an account of agricultural shows and beauty pageants for women, and how they enhance the position of women see Kate Darian-Smith and Sara Wills, 'From Queen of the Agricultural Show Girl, Embodying Rurality in the Twentieth-Century Australia' (2002) *Journal of Australian Studies* 17. See Teather for her contribution as regards the Country Women's Association, Elizabeth Teather, 'Remote Rural Women's Ideologies, Spaces and Networks: Country Women's Association of New South Wales 1922-1992' (1992) 28(3) *Australian and New Zealand Journal of Sociology* 369 and Elizabeth Teather, 'Tailoring Rural Women

How have the texts I have analysed been compiled? I argue they incorporate the 'social facts' of the family. I follow Durkheim's approach in showing how these 'social facts' came to be composed.³⁶ Durkheim argued that belief systems, customs and institutions are observable. 'Society', he argued, has a reality of its own, over and above the individuals who comprise it. Members of society, he contended, were constrained by common beliefs and moral codes passed from one generation to another and shared by the individuals who make up society. These common beliefs, Durkheim argued, constitute social facts.³⁷ I utilise this approach to argue that family law texts incorporate the social facts of rural settlement. This process is wider than the process of judicial notice. I perceive these social facts to be the opening up of rural Australia for farming settlement through the allocation of family blocks of land, as based on the patriarchal family and the needs of the settler state to have a viable economy within the imperial trade environment. I take these 'facts' also to include the perception that farming was a 'way of life' and that there was a rural norm to be enforced in some cases as regards the desire of the family to pass on a sound business to the next generation.³⁸

This approach to the texts shows that with the development of the economy there occurred a key change in particular concepts or register of words.³⁹ I refer to the meaning of words used in conjunction with the idea of productivity—words such as 'work' and 'labour'. In the past these terms and associated ways of thinking belonged to a 'different form of knowledge and vocabulary of government', related to older forms of 'economic life'.⁴⁰ These cases indicate that law installs limits to the discursive domain with respect to the positions of individual subjects. Foucault has outlined how 'dividing practices' separate the good from the bad, the sick from the insane.⁴¹ In terms of family law texts, these dividing practices separate the appraisal of work as productive and as non-productive. In detailing these practices, I put the positive term in the opposing pair first. The relevant binary notions in my account are 'non-fault' and 'fault',⁴² 'contribution' and 'non-contribution' and 'business asset' and 'domestic (family) asset'.

in Australia, Canada and New Zealand: A Touch of Silk' (1997) 52 *Journal of Australian Studies* 102. On how women collect and manipulate their own property meanings, see Moya McFadzean, *Glory Boxes: Femininity, Domestic Consumption and Material Culture in Australia, 1930-1960*, (Unpublished Doctorate, Melbourne University, 2009).

³⁶ Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, 1992) 117.

³⁷ Emile Durkheim, *The Rules of Sociological Method* (Free Press, 1993) 13, 102.

³⁸ Ruth Gasson and Andrew Errington, *The Farm Family Business* (CAB International, 1993).

³⁹ For an insightful parallel study on the change of the meaning of 'dependency' see Nancy Fraser and Linda Gordon, 'Genealogy of Dependency: Tracing a Key Word of the US Welfare State' (1994) 2 *Signs* 309; Jamie Peck, 'Workfare: A Geopolitical Etymology' 16 *Environment and Planning D: Society and Space* (1998) 133.

⁴⁰ Mitchell Dean, *Governmentality* (Sage, 1999) 45.

⁴¹ Michael Foucault, 'Afterword: The Subject and Power' in Hubert Dreyfus and Paul Rabinow (eds), *Michael Foucault: Beyond Structuralism and Hermeneutics* (Harvester, 1st ed, 1982) 208.

⁴² Under the *Family Law Act* 'fault' as a grounds for divorce and as a basis of property division has been abolished, see Leonie Star, *Counsel of Perfection: The Family Court of Australia* (Oxford University Press, 1996); H A Finlay, 'The Grounds for Divorce: The Australian Experience' (1986) 6 *Oxford Journal of Legal Studies* 368. My approach is not so much to develop the idea of fault in the second sense, but to note that while fault as a ground for the assessment of property settlements has been abolished or legislated out the front door it still lurks in the shadows.

The commonality of these binary oppositions involves productivity. The oppositions separate those deemed productive from those who are deemed blameworthy, morally deficient or involved in non-economic behaviour such as child-care or housework. I collate these ideas of non-productivity together on the basis that their commonality is that of *fault*. Considered within a wider focus ‘fault’ has the inherent quality of an ‘offence’ or a ‘deficiency’ which hinders conduct. These ideas are contrasted in economics with notions such as the rational productive man and accumulative behaviour. This ‘offence’ is thus quantifiable through economic calibrations incorporated into the dividing practices in the texts. While legal language and legal categories (for example, ‘dividing practices’) are open to interpretation, judges use interpretative or background assumptions to adhere to traditional interpretations *above all other methods*.⁴³ Although the specific oppositional form of a dividing practice may change through law reform,⁴⁴ the historical tradition of awarding property to the male, and the values within the settler state, remain relatively constant.

Fault in the divorce cases of *Robinson* and *Parker* amounts to not being productive in farm work. In *Robinson* the woman was involved in some manual work, but as she was tied to the house, she was deemed not to be working on the property. In *Parker*, while the woman worked in the packing shed and on the books, this work was not seen as of the same order as the man’s work. Finally, in *Parr*’s case fault was judged in terms of the male standard of a committed pioneer settler who was prepared to take on the hardship of family life.

The cases I have discussed were selected on the basis that they reflect older judicial values regarding marriage and the family. Under the *Family Law Act 1975* (Cth) the courts may now assess the contributions made by the parties to the marriage.⁴⁵ Fault is not supposed to be an issue under the *Family Law Act*. However, some conduct does take on the quality of fault.⁴⁶ With my wider approach to fault, I argue that the labour of the women claimants was regarded as deficient, as in *Parkers*’ case, where the wife was not of an entrepreneurial mould. Her labour was regarded as of a

⁴³ Richard Ingleby and Richard Johnstone, ‘Judicial Discretion Making’ in Rosemary Hunter, Richard Ingleby and Richard Johnstone (eds), *Thinking About the Law: Perspectives on the History, Philosophy and Sociology of Law* (Allen and Unwin, 1995) 182.

⁴⁴ For instance the fault/no fault division changed as a result of the *Family Law Act 1975* (Cth). Prior to 1975 fault under the State matrimonial acts, fault consisted of a matrimonial fault such as desertion or adultery. Post 1975 ‘fault’ in the context of divorce law consists of unproductive conduct in its various forms.

⁴⁵ In the context of divorce, settlements and farms see Joseph Kary, ‘Farmland Free Markets and Marital Breakdown (1992) 11 *Canadian Journal of Family Law* 41; Peter Jacobson, ‘Murdoch v Murdoch: Just About What the Ordinary Rancher’s Wife Does’ (1974) 20 *McGill Law Journal* 308; Australian Law Reform Commission, *Equality Before the Law: Justice for Women The Commission Report*, Report No 69 Part I (1994) 221–4. Discussion on farm cases has focused on the ‘business contributions’ of the male, see Lisa Young, ‘Sissinghurst, Sackville-West and ‘Special Skill’ (1997) 11 *Australian Journal of Family Law* 268. As regards will contests’ see Malcolm Voyce, ‘The Impact of Testator’s Family Maintenance Legislation as Law and Ideology on the Family Farm’ (1993) 7 *Australian Journal of Family Law* 191; Richard Cook, ‘Still Sexist and Unreformed: Testator’s Family Maintenance in the 90s’ (1993) 67 *Law Institute Journal* 950.

⁴⁶ It is accepted that differential evaluations of property are made on the basis of inheritances and property which are brought into the marriage. I also mention the assessment of violence. However differences in awards *are* made on the basis of economic conduct against the party deemed to be deficient or what must be called *fault*. For support for my approach, see Juliet Behrens, ‘Domestic Violence and Property Adjustment: A Critique of ‘No-Fault’ Divorce’ (1993) 7 *Australian Journal of Family Law* 9; Jocelyne Scutt, ‘Principle v Practice: Defining ‘Equality’ in Family Property Division on Divorce’ (1983) 57 *Australian Law Journal* 143, 152, 155.

different order to the 'highly motivated industrious man'.⁴⁷ While the principal axis of these oppositions revolves around the idea of productive conduct, the oppositions we see here were shaped primarily by the *law/fact* dichotomy. The law/fact dichotomy is the foundational dividing practice operating in these texts. This dividing practice incorporates the dividing practices mentioned above. In these texts it is clear that the descriptions of facts were created by the rules themselves. In other words, the events were transformed into 'fact' on the basis of the existing legal categories and the traditions of thought which underpin them. While the law/fact distinction is supposed to be a political strategy to check the abuse of power, the dichotomy is in reality a textual device, as there is no neat distinction between law and fact.⁴⁸ The consequence is that male productivity was seen as productive and rewarded above the level accorded to female productivity.

One of the law/fact applications here is the presumption of advancement applied in the *Robinson* case. This presumption is often paired with the idea of a resulting trust. Under the presumption of advancement, there is an assumption that the recipient may keep the gift. This presumption applies where the contributor was the husband but not where the contributor was the wife. Under this line of reasoning in the *Robinson* case, the husband kept his wife's contributions towards family expenses. However, this case illustrates how the presumption did not apply in the case of a wife's gift to her husband.⁴⁹ In this case, this presumption overrode the alternative method of looking at the facts—through the notion of a resulting trust. Under this doctrine, the proportionate contribution would have reverted to the donor.

Another application of the law/fact distinction was the provision under the law that judges could only allocate property according to who had rightful title under the family law as it then stood. The role of the court was to declare who had the proprietary interest; it was not to allocate the property based on fairness. The law at this earlier stage of development revealed a concern for a 'rights based' approach and was not dealing with what has been the called a 'utility approach'.⁵⁰ A rights based approach was concerned with distinctive legalistic forms of claims, such as torts or contract. At this stage of its evolution, the state was not concerned with corrective justice or with distributive justice.

The *Robinson* and *Parker* cases deal with property following a divorce. I now want to analyse the testamentary promise issue in the *Parr* case. This case reflects a liberal ideology as regards property, in that promises in the private realm (what I have called 'domestic promises') were deemed private affairs and were not considered enforceable.⁵¹ Atiyah writes that the main object of

⁴⁷ Two lines of cases show that farming property has been divided on a different basis from non-farming property. One line of cases, from 1977–85 held that land used for farming purposes which was essential for the production of income was consequently different from the category of land simply used for a place from the home. A second line of cases held that 'business assets' are in a different category than other assets and the special skill as regards their accumulation ought to be rewarded, see Malcolm Voyce, 'The Farmer and His Wife: Divorce and the Family Farm' (1993) 3 *Alternative Law Journal* 76.

⁴⁸ Alfred Simpson, 'An Analysis of Legal Concepts' (1964) 80 *Law Quarterly Review* 535; Kim Scheppele, 'Facing Facts in Legal Interpretation: Questions of Law and Questions of Fact' in Robert Post (ed), *Law and the Order of Culture* (University of California Press, 1991) 42.

⁴⁹ Lisa Sarmas, 'A Step in the Wrong Direction: The Emergence of Gender 'Neutrality' in the Equitable Presumption of Advancement' (1994) 19(3) *Melbourne University Law Review* 758.

⁵⁰ Stephen Parker, 'Rights and Utility in Anglo-Australian Family Law' (1992) 55 *Modern Law Review* 311, 323–4.

⁵¹ Frances Olsen, 'The Myth of the State Intervention in the Family' (1983) 18(4) *University of Michigan Journal*

contract law was seen as enabling people to realise their wills and to leave them to their own business affairs unrestricted by the government.⁵² In this context, the home was perceived as a haven from the market place and not a place for the application of legal rules. On this view, it was assumed that women's work was carried out for love and affection.⁵³ One could object to this approach on the grounds that familial relationships are supposed to be based on loyalty and trust and are therefore the very type of relationship which ought to be governed by the principles of the market place.⁵⁴

The *Robinson* and *Parker* cases deal with two kinds of 'domestic promise' in the rural context. Firstly, there is the kind of case where the deceased makes 'gifts' or 'promises' to heirs during their lifetime, where the recipient may have worked on the property and had a relationship with the deceased. These 'promises' or 'undertakings' are usually referred to as 'testamentary promises'.⁵⁵ It has been noted by judges that the community expected testators to recognise those to whom they had made promises of support. Some judges in this context labelled the requirements of 'unconscionable behaviour' as analogous to the moral duty concept in Family Provision applications.⁵⁶ Secondly, there is the kind of promise where the parties in a marriage agree to share their property. The question arises after the separation of such parties, or the death of one party, whether such 'undertakings' should be recognised.⁵⁷ These kinds of 'undertakings', as illustrated by the above cases, might be classified as either gifts⁵⁸ or exchanges. The importance of this distinction

of *Law Reform* 835.

⁵² Patrick Atiyah, *The Rise and Fall of the Freedom of Contract* (Clarendon Press, 1979) 8.

⁵³ *Balfour v Balfour* [1919] 2KB 571, 574 (Lord Atkin) 'The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts'. See Michael Freeman, 'Contracting in the Haven: *Balfour v Balfour* Revisited' in Roger Halson (ed), *Exploring the Boundaries of Contract* (Aldershot, 1996) 68.

⁵⁴ Anne Barlow and Craig Lind, 'A Matter of Trust: The Allocation of the Rights to the Family Home' (1999) 19(4) *Legal Studies* 468, 472; Sarah Neld, 'If You Look After Me, I Will Leave You My Estate': The Enforcement of Testamentary Promises in England and New Zealand' (2000) 20(1) *Legal Studies* 85.

⁵⁵ Such remedies may exist on the grounds of constructive trust, proprietary estoppel or contract. On the difficulties of such remedies, see Ian Hardingham, Marcia Neave and Harold Ford, *Wills and Intestacy in Australia and New Zealand* (Law Book Company, 1989) 322; Martin Davey, 'Testamentary Promises' (1988) 8(1) *Legal Studies* 92; Audley Sheppard, 'Contracts to Make Wills and the *Family Protection Act 1955*: Is the Promisee a Creditor or Beneficiary' (1985) 15 *Victoria University of Wellington Law Review* 157. None of the Australian jurisdictions has enacted testamentary promises legislation, as has New Zealand. See *Law Reform (Testamentary Promises) Act 1949* (NZ). On this legislation, see Hardingham, Neave and Ford, above n 55, 330–6. For recent cases in Australia see *Giumelli v Giumelli* [1999] 196 CLR 101; *Bridgewater v Leahy* (1998) 194; *Ashton v Pratt* (No 2) [2012] NSWSC 3. For the treatment of a recent testamentary promises as regards a farming son, see *Vigilo v Bostin* [2005] 221 CLR 191 and Malcolm Voyce, 'Vigilo v Bostin: Family Provision and Farming Sons' (2005) 10 *Retirement and Estate Planning Bulletin* 149; Malcolm Voyce, 'Testamentary Promises, Family Provision and Family Farmers' (2014) 8 *Elder Law Review* 1.

⁵⁶ Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis, 2013) 625.

⁵⁷ See the treatment of such promises in standard contract texts such as Steven Graw, *An Introduction to Contract Law* (Thomson Reuters, 2011) 115–32; Jim Davis, *Contract: General Principles; The Laws of Australia* (Thompson Reuters, 2012) 27–8. For recent reviews on the intention to create legal relations in contract law, see Bhawna Gulati, 'Intention to Create Legal Relations' (2011) 2(3) *Beijing Law Review* 127; Mindy Chen-Wishart, 'Consideration and Serious Intention' (2009) *Singapore Journal of Legal Studies* 434; Ilija Vickovich, 'The Modern *Animus Contrahendi*: Focusing on Intention through a "Contemporary Lens"' (2011) 13(1) *Flinders Law Journal* 95.

⁵⁸ Gifts are usually seen as unenforceable as in many cases they are usually incomplete, under the *Milroy v Lord* principle. The situation is different if such gifts were made by deed or consideration supplied. See

is that in the case of a gift the undertaking may not be enforceable, whereas exchanges,⁵⁹ on the other hand, are often enforceable, as there may be a degree of reciprocity.⁶⁰

In light of an anthropological understanding of the nature of gifts and exchanges,⁶¹ we may see this rigid classification as misguided because, as the above cases illustrate, this way of interpreting gifts and exchanges is at odds with how most cultures, past and present, conceptualise them. 'Gifts' and 'exchanges' exist on a continuum, and each usually contains an element of the other. Even when promises are made, and when these are not part of an express bargain, they are seldom gratuitous, as the promisor reaps value as the promisee, and may benefit from the reaction to such a promise—for example, because it may strengthen the long term relationship.⁶² In the farming context, we should recognise that such promises imply respect, through what has been called the 'successor effect', in that when there is a successor as a result of such a promise, this encourages the development of the farm. Any intimation that the father was not prepared to give the farm to a working son would imply that, under the son's management, the farm would be run down.⁶³

At the time when the above cases were heard, the law as regards equitable remedies involved a search for a common intention among the parties, rather than a search for principles of distributive justice. Such a search has come to be seen as 'unreliable and artificial'.⁶⁴ Similarly, Professor Marcia Neave has shown that this approach involved an ex post facto rationalisation of conduct, where the issue of ownership was never seriously considered.⁶⁵ It deliberately allowed the courts not to interfere, so as to allow domestic services to be ignored as having no value.⁶⁶ To conclude the point I am making here, let me note the argument of Nick Piska, who reasons that the search for what was later seen in constructive trust cases as an 'inferred' or 'imputed intention' was a fiction. I return to the notion of a fiction later. Today, of course, a wider view of equity as unconscionable conduct might have allowed a remedy.⁶⁷

Rosalind Atherton and Prue Vines, *Succession, Families, Property and Death: Text and Cases* (LexisNexis, 2013) 96.

⁵⁹ Should the offer be followed by work on the property offered there may be an action for proprietary estoppel.

⁶⁰ This may be the case in the instance where the ingredients of proprietary estoppel have been successfully made out.

⁶¹ The dominant form of exchange in primitive societies has been seen as forms of reciprocal transactions that have been conceptualised as 'gifts'. However, a fundamental ingredient of these gifts was their obligatory nature, as they were rarely gratuitous. For instance Marcel Mauss defines the essential features of a gift transaction as firstly, an obligation to give and secondly, the obligation to receive. The gift exchange was what Mauss calls a 'total social fact', that is an event that is at once social and religious, magical and economic and utilitarian and sentimental, jural and moral. See Marcel Mauss, *The Gift: Forms and Functions of Exchange in Archaic Societies* (Cohen and West, 1969) 52; Jane Barron, 'Gifts, Bargains, and Form' (1989) 64 *Indiana Law Journal* 155; Carol Rose, 'Giving, Trading, Thieving, and Trusting: How and Why Gifts Become Exchanges, and (More Importantly) Vice Versa' (1992) 44 *Florida Law Review* 295.

⁶² Melanie Leslie, 'Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract' (1999) 77 *North Carolina Law Review* 551, 554–60.

⁶³ Clive Potter and Matt Lobley, 'Aging and Succession on Family Farms' (1992) 32 *Sociologia Ruralis* 317.

⁶⁴ Simon Gardner, 'Rethinking Family Property' (1993) 109 *The Quarterly Review* 263, 264, writing on the search for intention in the constructive trust.

⁶⁵ Marcia Neave, 'Three Approaches to Family Property Disputes – Intention/Belief Enrichment and Unconscionability' in T Youdan (ed), *Equity, Fiduciaries and Trusts* (Lawbook, 1989) 247–9.

⁶⁶ Katherine O'Donovan, *Sexual Divisions in Law* (Widenfeld and Nicholson, 1985) 108–9.

⁶⁷ See, eg, *Baumgartner v Baumgartner* (1987) 164 CLR 137; Ashley Black, 'Baumgartner v Baumgartner, the Constructive Trust and the Expanding Scope of Unconscionability' (1988) 11 *University of New South Wales Law Journal* 1,117.

IV CONCLUSION: THESE TEXTS AND AUSTRALIAN HISTORY

The construction of the facts in these cases may be seen as a fiction. Piska argues, through Fuller's work on fictions, that a fiction may be seen as a 'consciously false assumption' which pervades the fact-finding process.⁶⁸ Fuller argues that a fiction reconciles a legal result with an unexpressed premise. Following this line of thought, he says fictions are like scaffolding, as they can eventually be dismantled.⁶⁹ Alternatively, fictions may be seen to reflect the operation of dividing practices which separate productive from unproductive labour—a form of discourse which embodies certain sexual connotations as regards economics. Finally, these practices, as regards the legal requirements of contractual law, exclude familial understandings with respect to gifts.

Fictions in the property context, as discussed here, are rather like steel reinforcing, which is not taken away upon completion of a building but remains in an invisible form, while retaining its structural importance. Fictions in the property context (temporary or otherwise) enshrine the values or social facts that pervade the fact-finding. As Gadamer reminded us, facts are made as much as found in the legal process.⁷⁰

Property law in the farming context, in the period examined, incorporates a narrative enshrining the needs of the settler state, which envisaged a stable rural sector depending on masculine labour and domestic ideals for men. This form of property law reflected our inherited tradition of land law, the commodification of land, and the needs of those who sought land for exclusive possession. Property law in this context may be seen not only as concerned with 'external owners' but as a governance system that sought to adjust the internal relationship of owners in accordance with the needs of a rural ideology. However, this rural ideology was endowed with aspects of rationality, as domestic promises were deemed to be business transactions rather than familial understandings.

⁶⁸ Nick Piska, 'Constructive Trusts and Construing Intention' in Martin Dixon (ed), *Modern Studies in Property Law* (Hart Publishing, 2009) vol 5, 61. See also Nick Piska, 'Hopes, Expectations and Revocable Promises in Proprietary Estoppel' (2009) 72 *Modern Law Review* 998.

⁶⁹ Lon Fuller, *Legal Fictions* (Stanford University Press, 1967) 76, 230.

⁷⁰ Hans-Georg Gadamer, *Truth and Method* (Crossroads, 1984) 38.

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Frequency	Annual
Language of Text	Text in: English
Refereed	Yes
Serial Type	Journal
Content Type	Academic / Scholarly
Format	Online
Website	http://www.law.mq.edu.au/law_journals/macquarie_law_journal/
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