The Approach of the Courts to Applications under Part 19 of the Property Law Act

The Honourable Justice Dutney
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[1] After his retirement from the Legislative Assembly, former attorney-general Matt Foley told me that he regarded Part 19 of the *Property Law Act 1974* (Qld) as his biggest single contribution to the development of the law in Queensland. While Part 19 of that Act was a major exercise in consolidating and defining the rights of de facto couples, both heterosexual and homosexual, in the event of relationship breakdown, there is a danger in overstating the extent of the change to the law the legislation effected.

[2] Prior to 21 December, 1999, the date the legislation came into effect, there had already been considerable development in this area, much of it driven by the recognition by the courts of general jurisdiction of the equity in recognising non monetary contributions made by one partner to the acquisition of property by the other. In *Baumgartner v Baumgartner* (1987) 164 CLR 137, the High Court recognised that a constructive trust might arise in relation to property even where the person claiming the interest had made no direct financial contribution to the acquisition or retention of that property where it would be unconscionable to deny that party's interest. In that case, the contribution of the party claiming the interest was financial in the sense that the parties had pooled their incomes with the claimant's income being used for living expenses and the respondent's for the acquisition of the property.

[3] I applied these principles in a de facto property case of *Hardman v Hobman* [2002] QSC 112. Relying on *Baumgartner, Muschinski v Dodds* (1986) 164 CLR 137 and a decision of the Court of Appeal from Queensland of *Turner v Dunne* [1996] QCA 272, I concluded that:

> *"… a constructive trust with respect to an interest in property in the name of one party to a relationship may be created in favour of the other party where the demands of equity and good conscience so require, having regard to the contribution (both financial and non-financial) made to the acquisition or retention of the property by the party in whose favour the trust is declared."*

[4] The decision was appealed. The principal ground of appeal was that I had not made precise calculations of the value of the appellant's non-financial contributions during the course of the relationship and had adopted a broad brush approach to the apportionment of the property. This was rejected by the Court of Appeal. I believe that the end result was not dissimilar to the result that would have been achieved, at least had the case come before me, under Part 19 of the *Property Law Act.* That was certainly my intention.

[5] In South Australia, the moves to equate the law of constructive trusts in domestic relationships with the principles applicable to marriages under s 79 of the *Family Law Act 1974* (Cth) have advanced even further. In *Pajic v Pajic* (1997) 72 SASR 153 at 166

– 168, Debelle J, with whom the the other members of the Full Court agreed, expressly adopted the approach more commonly associated with the statutory regimes. Debelle J said:

> *"When determining the respective contributions of the provider and the homemaker, it is not appropriate in every case to make a detailed analysis of the quality of performance by each partner of their respective roles in any relationship… Thus, where the parties have acted in what might be the normal range of roles no detailed assessment is either called for or is appropriate… In the case of the partner working for financial reward, regard will be had to the extent to which business, professional or entrepreneurial skills or business acumen of that partner have contributed to the income. But even where there has been a high level of professional skill coupled with a picture of long hours of work over many years, the resultant imposition on the other party is not to be disregarded. In those cases where industry or skill have produced the assets which fall within what might be described as a medium range, other aspects being equal, the general approach is to approximate equality."*

[6] There could be no plainer statement that courts of general jurisdiction had already to a significant degree grasped the nettle of property rights alteration even before legislation was introduced.

[7] I mention this in part to demonstrate that over time principles of common law and equity have the capacity to develop to achieve fair outcomes without the need for statutory intervention. In part it is also a recognition that the jurisdiction the higher courts exercise in relation to de facto property under Part 19 of the *Property Law Act* is not a jurisdiction with which the courts are entirely unfamiliar.

[8] As a result of difficulties which sometimes arise in relation to proof of the existence of a de facto relationship it is worth remembering that the Court does have a separate equitable jurisdiction to declare a constructive trust in relation to property based on contributions both monetary and non monetary which, in many respects, parallels the statutory regime but suffers from none of the limitations the statute imposes. In particular, it does not depend on the existence of a de facto relationship within the statutory definition which, as I shall explain, is not always such an easy thing to prove.

What constitutes a de facto relationship?

[9] When parties can be said to be in a de facto relationship is a matter which has required some scrutiny. A marriage either exists or does not exist. It commences when the parties sign the register and ends with a decree from the Family Court. It is not always obvious whether a relationship is such as to fall under Part 19.

[10] Mahoney JA in the Court of Appeal in New South Wales provided a useful description of a de facto relationship in *Hibberson v George* (1989) 12 Fam LR 725 at 739-740 which has been adopted in Queensland as a result of the decision of the Court of Appeal in *S v B* [2005] 1 Qd R 537; [2004] QCA 449:

> *"There is, of course, more to the relevant relationship than living in the same house. But there is, I think, a significant distinction between the relationship of marriage and the instant relationship. The relationship*

> *of marriage, being based in law, continues notwithstanding that all of the things for which it was created have ceased. Parties will live in the relationship of marriage notwithstanding that they are separated, without children, and without the exchange of the incident which the relationship normally involves. The essence of the present relationship lies, not in law, but in a de facto situation. I do not mean by this that cohabitation is essential to its continuance: holidays and the like show this. But where one party determines not to 'live together' with the other and in that sense keeps apart, the relationship ceases, even though it be merely , as it was suggested in the present case, to enable the one party or the other to decide whether it should continue."*

[11] The onus of proving the existence of the de facto relationship lies on the party asserting its existence.[1] This is to be contrasted with the position where, for example, a party to a marriage seeks to prove separation under the same roof. The position in relation to a marriage was described by the Full Court of the Family Court in *Pavey v Pavey* [1976] FLC 90-051 at 75,213 - 75,214 in these terms:

> *"In such cases, without a full explanation of the circumstances there is an inherent unlikelihood that the marriage is broken down, and common residence suggests a continuing cohabitation. Such cases therefore require evidence that goes beyond inexact proofs, indefinite testimony and indirect inferences. The party or parties alleging separation must satisfy the Court about this by explaining why the parties continued to live under the one roof, and by showing that there has been a change in their relationship, gradual or sudden, constituting a separation."*

[12] This burden of proof in these cases is not always academic. *S v B* itself illustrates this. In that case there was evidence which satisfied the primary judge and the Court of Appeal that the relationship had ceased to exist by late January 2000. Part 19 of the *Property Law Act* applies only to relationships which existed on or after 21 December 1999. The evidence established that the relationship existed until a period described as "late 1999". There was a gap in the evidence between "late 1999" and Christmas 1999. In the end the applicant failed because she failed to establish positively that the relationship was still in existence on the relevant date.

[13] In *S v B* (supra) at 549; [48] I said:

> *"Applying the passage of Mahoney JA in Hibberson v George, which I set out earlier, a de facto relationship ends when one party decides he or she no longer wishes to live in the required degree of mutuality with the other but to live apart. It does not seem to me that it is necessary to communicate this intention to the other party providing the party that is desirous of ending the relationship acts on his or her decision. I do not think it is necessary that the other party agree with or accept the decision. Once the parties cease to jointly wish to reside together in a genuine domestic relationship, a situation usually ascertained by looking objectively at the whole circumstances of the relationship, the de facto relationship ceases. The relationship ceases even though one party is still anxious to try to save it."*

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[1] *S v B* [2005] 1 Qd R 549; [2004] QCA 449 at [49] – [50].

[14] This should not be interpreted as meaning that a secret uncommunicated desire to end a relationship with no objectively observable change in behaviour will be sufficient and this was not how Byrne J understood it in *JJR v PH* [2005] QSC 253.

[15] In *JJR v PH* at [35], Byrne J assessed the relationship objectively in this way:

> *"Soon after the cessation of sexual relations, R decided that the relationship with H was so miserable and unsatisfying that he must be able to do better: hence his increased internet activity to find someone new. The bitterness over the rejection of his marriage proposals and then H's evident unwillingness to sleep with him probably persuaded him that H bore him no affection, and that there was little, if any, hope that things might improve. But if that was his attitude, he did not communicate it to H, directly or indirectly. She continued buying his food, cooking the evening meal for both, washing, and performing the other household tasks that he had for years accepted were her lot. She still contributed money and services to the joint household; and she provided some care to him after his hip surgery. She was not just the lodger. His commitment to the relationship had diminished. But he did not altogether withdraw from it until the end of February this year with the solicitors' letter. In these circumstances, it is not surprising that it was not actually suggested for R that, if a de facto relationship subsisted at the beginning of 2004, it had finished before late February this year."*

[16] In contrast, in *S v B* the facts showed that around the period from November 1999 until the end of January 2000 the parties were reduced to communicating in writing by leaving notes in their respective letter boxes. The appellant had refused to attend relationship counselling, telling the respondent, "You're the crazy one. A psychologist isn't good enough. You need a psychiatrist." He refused to see the respondent on Christmas day, preferring the company of his drinking buddy. He went out alone on New Year's Eve rejecting an invitation to go out with the respondent to celebrate the millennium. On his return the next day he told the respondent he had met someone who was neither as fat nor as ugly as the respondent so that it was useless her trying to rekindle their relationship. Shortly thereafter he told the respondent to *"piss off"* and she changed the locks not long after that. It is that context that it was unnecessary for the appellant to communicate his intention to end the relationship. His intention was obvious to everyone from the steps he had taken put it into effect. It was also in that context, where the manifestation of the intention was spread over a relatively short period before and after the critical date, that the onus of proof became critical.

[17] While the end date of a de facto relationship can sometimes be uncertain, the commencement is sometimes equally uncertain.

[18] The starting point is the definition of de facto partner in s 32DA of the *Acts Interpretation Act 1974* (Qld) which provides:

> *(1) In an Act, a reference to a "de facto partner" is a reference to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other.*
>
> *(2) In deciding whether 2 persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account, including, for example, any of the following circumstances –*

> *(a) the nature and extent of their common residence;*
> *(b) the length of their relationship;*
> *(c) whether or not a sexual relationship exists;*
> *(d) the degree of financial dependence or interdependence, and any arrangement for financial support;*
> *(e) their ownership, use and acquisition of property;*
> *(f) the degree of mutual commitment to a shared life, including the care and support of each other;*
> *(g) the care and support of children;*
> *(h) the performance of household tasks;*
> *(i) the reputation and public aspects of their relationship.*
>
> *(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether 2 persons are living together as a couple on a genuine domestic basis.*
>
> *(4) Two persons are not to be regarded as living together as a couple on a genuine domestic basis only because they have a common residence.*

[19] Section 261 of the *Property Law Act* defines a *de facto relationship* as the *relationship between de facto spouses*. A *de facto spouse* is defined in s 260, *inter alia,* as either one of two persons who are, under s 32DA of the *Acts Interpretation Act*, de facto partners of each other.

[20] Whether a de facto relationship exists in any particular case is a question of fact. The factors enumerated in sub-section (2) are merely matters to be considered in deciding whether the ultimate fact, whether a de facto relationship exists, is established.

[21] Common residence might be thought to be a critical feature which distinguishes a de facto relationship from something less. The reference to "living together" , the content of paragraph (2)(a) of the definition and sub-paragraph (4) of the definition all tend to this conclusion.

[22] Despite this common residence is not necessarily critical. The most public example of a de facto couple who did not live together was Woody Allen and Mia Farrow. It is not surprising considering their public personas that even their private arrangements were of an eccentric nature. But they were from New York.

[23] Closer to home, *PY v CY* [2005] QCA 247 is an example of a de facto relationship being found where the parties lived apart from March 1997 until the relationship was found to have ended on 25 December 2000. The findings of the primary judge which were not disturbed by the Court of Appeal are set out at paragraph [18] of the appeal judgment:

> *"As I observed earlier, I do not accept the evidence of the respondent or his witness. There is no acceptable evidence that the respondent prior to the 25 of December 2000 decided that he no longer wished to live as he had done with the applicant, but to live apart. He did not communicate any such intention to her... to all outward appearances, and in his behaviour in the relationship he remained committed to he and the applicant as a couple. I accept that the applicant remained committed to that at least until the incident between the respondent and her son at Christmas 2000. It is the case they did not cohabit, except on average every second weekend and on holidays when the respondent came down from Rockhampton. However I do not think that means there was not a*

> *de facto relationship. The explanation for that on the evidence is not that he wished to withdraw and live apart but that the exigencies of finalising his business affairs in Rockhampton required it."*

[24] In discussing the issue Williams JA at [31] dealt with the issue this way:

> *"In the course of argument counsel for the appellant referred on a number of occasions to a passage in my judgment in S v B [2004] QCA 449. I there said that the de facto relationship between the parties in that case was not "evidenced by a number of the more concrete indicia which are frequently seen as an integral part of such a relationship." However, what will constitute a "concrete indicia" will vary with the circumstances of each case. Often a somewhat intangible consideration, such as how the couple presents to the public, will be the most decisive consideration. In the present case counsel for the appellant submitted that a common residence was the most telling "concrete indicia" of such a relationship, and its absence strongly suggested that the parties were not "living together as a couple on a genuine domestic basis." But, as Jerrard JA has pointed out in his reasons in this case, a couple may still be living together on a genuine domestic basis although separated by considerable distance because of prevailing circumstances."*

[25] These issues have more commonly arisen in circumstances where it is sought to extend the de facto relationship beyond the period in which the parties lived together. Applicants have had mixed success in this regard. The most difficult task is to persuade the Court of the existence of a de facto relationship prior to the commencement of actual cohabitation.

[26] *S v B* was itself a case in which the primary judge rejected the plaintiff's contention that the de facto relationship preceded the parties cohabiting in the same house as their usual place of residence. Her Honour found that the parties shared a close and supportive relationship extending to one of a mutually exclusive sexual nature. The defendant assisted the plaintiff with the care of her son. The plaintiff assisted the defendant with household tasks. In rejecting the existence of a de facto relationship at that stage the primary judge relied on the fact that there was limited financial dependence and interdependence. For example they did not share a bank account. The primary judge found that the plaintiff exaggerated the extent of her contribution to the domestic tasks at the defendant's residence. Most importantly, however, the primary judge relied on the fact of separate residences.

[27] The only case of which I am aware that was decided under Part 19 of the *Property Law Act* prior to *S v B* was a decision of Dodds DCJ in the District Court in *J v S* [2003] QDC 436. Again the issue of cohabitation arose. In that case Dodds DCJ found that the de facto relationship lasted for about three years. He also found that the relationship was a developing one during the first period the plaintiff was in New Guinea and became a de facto relationship on his return in December. The facts there were that the plaintiff lived in New Guinea and apart from the defendant from April 1997 until December 1997and from March 1988 until the relationship ended. The parties visited each other on occasions. It is not entirely clear from these findings whether the relationship was to be regarded as a de facto relationship prior to the parties residing together or not. That period was not described as a de facto relationship. On the other hand the period of three years would necessarily date back to a time prior to actual cohabitation.

[28] In finding that a de facto relationship existed, Dodds DCJ relied on the loving nature of the relationship, the expectation and fact of sexual exclusivity and the financial support of the defendant by the plaintiff. At [24] His Honour found that:

> *"I think the concept of living together as it is used in the Act where from time to time the parties are physically in different places is a question of degree. The Act does not require both to be physically in the one place for a total of two years. It rather requires the parties satisfy the description of living together as a couple on a genuine domestic basis based on intimacy, trust and personal commitment even though from time to time, work commitments, for instance, may require one party to be physically elsewhere."*

[29] Where does that leave us? Theoretically, Woody Allen and Mia Farrow could be found to reside together in a genuine domestic relationship despite never having shared a relationship. In practice it will be difficult to establish a relationship without some initial cohabitation although even in the short period the legislation has been in operation, the Courts have been willing to find that such a relationship can survive even long periods of separation.

[30] From a practical point of view the Courts have to date looked to identify a starting date and a finishing date for the relationship. Of course, it is entirely likely that given the ephemeral nature of a de facto relationship, many couples might well slide in and out of that state. So far, no litigant has sought to advance such a case in the courts. The practical reason for this is that one side usually asserts the existence of the relevant relationship and the other denies it. No attention is given to the third possibility that the relationship might exist for periods and disappear for periods as the indicia of the relationship wax and wane. There is no reason in law why such a finding might not be appropriate in many cases.

Miscellaneous time considerations

[31] De facto property cases, like all others, have time limits. Section 288 of the *Property Law Act* requires the application to be commenced within two years of the day the de facto relationship ends. Again it is important to establish a beginning and end of the relationship.

[32] If the application is not commenced within time, leave can be given under paragraph 288(1)(b) of the Act but sub-section (2) limits the grant of leave to cases where hardship would result to the applicant or a child if the leave is not given. In *J v S* [2002] QDC 222 Robertson DCJ ruled that the application for leave is not a pre-requisite to commencing the proceeding and that the application for leave should be heard at the same time as the principal action. The Supreme Court has not, to my knowledge, yet ruled on the issue and it remains to be seen whether we adhere to that view. From the Court's point of view, there are practical considerations which would support both approaches. My tentative view, however, is that the words of the section suggest that the application itself would not be incompetent. It is only the making of an order which is prohibited unless leave is given. There is no direct reference to commencing an action. It seems to follow that provided leave is given prior to any order for alteration of property interests being made the application itself is not demurrable.

[33] The other relevant time limit is that contained in s 287. This requires a de facto relationship to have endured for a period of at least two years before either party

becomes entitled to seek relief under Part 19. An exception exists where there are children of the parties or where the applicant, or a child of the applicant, has made a substantial contribution under s 291 (which relates to contributions to property) or s 292 (which relates to the welfare of the other de facto spouse or to the household which comprises more than just the parties) and it would be unjust to refuse to make an order.

[34] Mullins J found that the applicant had made a substantial financial contribution to the acquisition of the principal joint property sufficient to entitle him to relief despite a relationship of only 15 months in *E v S* [2003] QSC 378.

[35] In that case the property had been bought in joint names for $275,000 of which $71,000 was contributed in cash by the applicant and the balance of $210,000 borrowed jointly. Having regard to his substantial initial capital contribution, Mullins J found that to deny relief would result in serious injustice to him. The applicant was repaid his capital contribution from the sale of the house and the balance after repaying the mortgage was divided as to 60% to the applicant and 40% to the respondent.

How does the Court divide the property?

[36] Mattters to which the court is required to have regard in making a property adjustment order under s 286 of the *Property Law Act* are listed in sections 291 to 309 of the Act. These matters bear reasonably close comparison with the matters listed in s 79 of the *Family Law act 1974* (Cth) and the matters in sub-s 75(2) of that Act.

[37] Express recognition of the similarities between the matters the Family Court takes in to account in property cases and the matters the Supreme Court is required to take into account was given by White J in *RFB v UEB* [2005] QSC 178. At paragraph [10] she said:

> *"While the starting point must always be the words of the statute, in construing expressions such as "non-financial contribution" and "homemaking contribution" in the absence of a body of decisions in this jurisdiction the court may obtain assistance from the jurisprudence of the Family Law Court and other legislative regimes with similar provisions when making a property adjustment order, E v S [2003] QSC 378; and S v B [2004] QSC 804, on appeal [2004] QCA 449 are decisions of the Supreme Court drawing on Family Law Court cases. This is so because the Queensland legislation was based on the Queensland Law Reform Commission draft bill which was modelled on, although not always analogous with, the relevant provisions in the Family Law Act 1975 (Cth) concerning the alteration of property interests."*

[38] Such comparisons are not new to Part 19. The approach I adopted in *Hardman v Hobman* [2002] QSC 112 of taking a broad brush approach to the parties' contributions was a departure from the historical approach in constructive trust cases where precise calculations were required. The Court of Appeal ([2003] QCA 467) accepted that as a legitimate approach despite recognising in *Engwirda v Engwirda*[2000] QCA 61 that there were limits to the extent of the judge's discretion under the law of trusts.

[39] While, therefore, the concepts introduced by the *Property Law Act* were not entirely foreign to us, because of the Supreme Court's background in trust law, there is a residual prejudice in favour of a more calculated approach than is adopted in the Family Court in

many cases. This is my term for what the High Court described as an *asset-by-asset* approach in *Norbis v Norbis* (1986) 161 CLR 513. For example, in *NFO v PFA* [2005] QSC 176, Mullins J calculated in a fairly precise way the financial contributions of each party and made very minor adjustments for disproportionate contributions to domestic chores. This approach, while perfectly legitimate under the legislative scheme, reflects the difference in backgrounds and experience between judges in the Supreme Court and judges in the Family Court who are less often called on to deal in a precise way with financial contributions.

[40] On the other hand, the approach adopted by Philippides J in *S vB* was much closer to the more broad brush consideration reflected in Family Court cases although whether an apportionment to the plaintiff of 12% of the asset pool after a relationship found to be of nine years duration and in which the plaintiffs contribution was mainly of a non-financial kind would find favour in that court is something about which Family Court practitioners would have a better idea than me.

[41] In *J.R. v P.O.* [2002] QDC 289, Wall DCJ sought to explain the philosophical reason for a difference of approach between the Family Court and State courts exercising jurisdiction under Part 19 of the *Property Law Act.* Despite its length, it is a passage worth setting out in full because it is the only such statement of which I am aware given by a judge in this State in the course of a judgment which tries to justify the subtly different approach taken by State judges in Queensland from judges of the Family Court.

> *"The applicant submitted that the property of the parties at separation should be divided equally. The respondent submitted that each should retain what each had. The applicant relied upon traditional family law principles applicable to married couples.*
>
> *In my view a de facto relationship is not the same as a marriage. Over time it may bear many of the hallmarks of a marriage, but that does not make it a marriage. Each case is different and the same rules will not, as a matter of course, apply to all. In a de facto relationship the parties may not be willing at the commencement or for some time, if at all, for any number of reasons to make a lifetime commitment to each other. There may exist reservations about the relationship. Often there is a reluctance to go the whole way. Many couples maintain a degree of separateness of property including pre-existing resources as opposed to that pooling of property and resources which invariably occurs in a marriage, subject, of course, to pre-nuptial agreements.*
>
> *Parties enter a marriage forever, or at least that is what they initially intend. That is not necessarily the case with a de facto relationship. A de facto relationship ends when one party leaves or both decide it is over. Nothing more is required. When parties marry they commit to a lifetime together joining themselves and their separate property; what belonged to each then belongs to them both. People go into de facto relationships for any number of reasons, for example, 'Let's try it out', 'Let's see how we go', but not necessarily forever. Some may say, 'Let's just live together for a time.' Young people often live together sharing expenses but never intend to marry. They may, in fact, end up marrying each other. Many young people intend to marry later, but not necessarily to the person they are living with. A de facto couple may 'live together on a genuine domestic basis in a relationship based on intimacy, trust and*

> *personal commitment to each other' (section 260(2) Property Law Act), but without a lifetime commitment and intending to retain their own property and income after sharing expenses. There is not necessarily that pooling of resources and income which is normally associated with a marriage. Permanency exists in a marriage but not necessarily in a de facto relationship. Neither of the de facto parties stand opposite each other at the commencement of the relationship and say words to the effect, 'We are going to live in a de facto relationship forever.' Persons getting married stand opposite each other before they are married and effectively say to each other, 'We will be together for life.'"*

[42] I agree with Judge Wall that a Court exercising jurisdiction under Part 19 of the *Property Law Act* starts from a different position from a Court exercising jurisdiction under the *Family Law Act.* While in the end the result might be similar, the assumptions that a Court is entitled to make about the parties' intentions in the case of a marriage are not necessarily applicable in the case of a de facto relationship and would need to be the subject of evidence. In some cases, such as where the relationship is of long duration, the parties have children and the financial affairs are inextricably mixed, those facts alone are likely to provide the necessary evidence. In all practical respects, such a relationship is a marriage in all eyes but the law's. Do not assume that the Supreme Court, at least, is likely to start from a position of equality in the average de facto case and move one way or another from that point. It will not. It will need to be persuaded that an alteration in property rights is justified. In that respect, it is still too soon to assume we have moved a great distance from the law of trusts from which we started.

Conclusion

[43] In many cases the results will be similar under the *Property Law Act* to equivalent cases under the *Family Law Act.* It would be a mistake, however, to think that because the statutory provisions are similar and the Supreme Court in particular has recognised the assistance to be derived from the extensive jurisprudence in the Family Court that the result in one court would necessarily be reflective of the result in the other

[44] The other important feature to remember is that the provisions of Part 19 have been in place only since December 2000. The first property adjustment decided under the legislation was not decided until 2003. Since then there has been an increasing volume of cases which have resulted in a rapid growth in the experience of judges in this area. The Court of Appeal has only looked at the legislation on three occasions. It would be a mistake to think that very much has been finally settled as yet.