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SOME ASPECTS OF THE NEW MATRIMONIAL CAUSES ACT

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I

The Matrimonial Causes Act, 1959[1] received the Royal assent on 16th December of that year. It has been proclaimed to commence as from 1st February, 1961, pursuant to s.2 of the Act. It now provides exclusively the general law relating to divorce, matrimonial causes and certain ancillary matters throughout Australia. This is the first time in our history that this situation has been achieved.

The Act represents a very substantial exercise on the part of the Commonwealth Parliament in a vital social field. It is probably the most complete attack to be made so far in a single statute on the social problem of instability of marriage in any part of the English-speaking world. Therefore it cannot truly be evaluated merely in terms of the constitutional powers which support it or of the legal rules governing matrimonial relief which it contains. Sonsequently, as a prelude to a discussion of those matters, matters which no doubt to readers of this Review are like to be regarded as of paramount importance, it is appropriate that I call attention to the philosophies on which the Act is founded. It will be convenient at the same time to call attention to the relationship of our historical development as a people to the point of time at which the Bill, which has matured into the Matrimonial Causes Act, was introduced.

Australia, it seems to me, has benefited greatly by the combined effect of a number of factors, some of them perhaps no more than fortuitous, which has resulted in the first complete attack upon this social question being made so late in our history as the year 1959.

The first of these factors is basic. It is that the founding fathers proposed the cession to the Federal Parliament of the power to make laws with respect to marriage and with respect to divorce and to matrimonial causes, though

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[1] No. 104 of 1959.

deliberately confining power with respect to any further matters of matrimonial and family concern to such as were ancillary to divorce and matrimonial causes.

Perhaps the need for Australia-wide recognition of marriages and decrees of divorce entered into or made in one of the several colonies was the starting point of the movement in thought which ended in the inclusion of the powers now granted by paragraphs xxi and xxii of s.51 of the Constitution. But, along the path of that movement, the need for and the advantages of uniform rules of law throughout Australia in such matters as marriage, divorce and matrimonial causes were clearly recognised; and, in retrospect, this recognition may properly be regarded as the real mainspring of the final proposals. To the end, however, they remained proposals of a limited nature; there was no wholesale transfer to the Federal Parliament of power with respect to family and matrimonial life generally. The desire to confine the granted powers to matters which were ancillary to divorce and matrimonial causes was expressed during the Conventions and was suitably achieved in the final draft by the words "in relation thereto" now to be found in paragraph xxii of s.51.

There is not much in the record of the Convention Debates which betrays what one might suspect as also a circumstance encouraging the cession of the powers: but one can have little doubt that the reluctance of Her Majesty in her later years to assent to Bills, passed by colonial legislatures and reserved for Her Majesty's personal approval, which liberalised divorce to a substantial extent, was a very real contributing circumstance. Those who favoured the cession of the powers to the Commonwealth felt that there would be less opportunity for disallowance by the British Crown of laws passed under the proposed Federal instrument. The view was probably held notwithstanding the insertion into the Constitution of s.59, which contains a general power of disallowance by the Queen within one year of the Governor-General's assent. It is interesting to note in passing that the first occasion on which there has been a petition to the Queen to exercise her power of disallowance under s.59 was made recently in connection with the Matrimonial Causes Act itself. The petition was transmitted to Her Majesty by the Governor-General for Her Majesty's personal consideration. Notwithstanding the declaration of the 1930 Prime Ministers' Conference as to the lapsing of the power of disallowance of dominion legislation and the supervention of the Statute of Westminster and its adoption by the Commonwealth, the statutory power remains itself unrepealed. In accordance with current constitutional practice, the Queen dealt with the petition on the advice of her Australian Ministers.

But one does see in the record of the Convention Debates an evident unwillingness on the part of some of the colonies to have the more liberal, or at any rate, different provisions then operative in some other colony or colonies made applicable to all the colonies. However, notwithstanding this expressed unwillingness, the recognition of the need for and the benefit to be derived from uniformity of law regulating such aspects of personal and family life as the ceded powers do authorise, carried the day. Section 91 of the British North America Act 1867 placed marriage and divorce in the list of powers exclusively vested in the Dominion Parliament; but s.92 places the solemnisation of marriage within the Province in the list of matters exclusively within the power of the Provincial Legislature. Our forefathers took a bolder course and that they did so was, in my view, most fortunate. For the topics marriage and divorce were eminently suitable in due time to be the subject of the

Commonwealth's legislation, for in relation to them a time could be foreseen when there would be no circumstance which of necessity required the topics to be dealt with locally to accommodate local needs rather than nationally for all Australians on the same footing. Indeed, it is a source of envy on the part of my American friends that Australia has avoided the not inconsiderable burden of diversity of law in this field under which that great country labours. The grants of power made in the Constitution were ample enough and so clearly expressed as to lead to the conclusion that the absence of any general law of marriage, divorce or matrimonial causes, in the years intervening between 1901 and 1959 was not due to any lack of appreciation of the existence and of the width of the available powers.

The second factor, a matter somewhat related to the last preceding sentence, from which I think Australia has now derived benefit, is that no attempt to make a general law in exercise of the granted powers, with one exception to which I shall refer, was made until 1957. I think this has proved an advantage in that the expressed unwillingness on the part of some of the colonies to accept, in connection with these aspects of family life, the standards of other colonies, would most probably in the interim have been too strong to permit of the passage of a general Bill attacking the social problem and formulating a new rather than merely aggregating existing grounds of dissolution. An Act in narrow terms on contemporaneous traditional lines would almost certainly have resulted from any attempt at a comprehensive law which might have been made in the period. The alteration of such a law would have been a far greater task than the introduction of such a measure as the Matrimonial Causes Bill as itself the first general exercise of this constitutional power. The ingrained unwillingness of a government to court unpopularity in this particular field would have been fed by the very existence of a Commonwealth law upon the subject. The extent of the acceptance of and support for the Matrimonial Causes Bill throughout Australia was a notable feature of its passage in 1959. That acceptance and support depended to no small degree upon the stage of development of the national character and upon the measure of national maturity which we have so recently achieved. Not only had the country not progressed in earlier years to the point where the citizens of the former colonies thought of themselves as Australians rather than as citizens of the State of their current residence, even to the extent of realising that there was no ground upon which the rules of law in this field ought to be different, according to where the parties had their home or their residence for the time being, but those generations in themselves were not such that legislation in the terms of the 1959 Bill could have been regarded and accepted as an attempt to find a solution to the social problem. These generations, I think, could only have seen it as legislation merely to aid if not, indeed, to encourage, the dissolution of the marriage bond.

The exception to my general statement in the last paragraph was a private Member's Bill introduced into the Senate and read a first time on 11th September, 1901—the proponent being Senator Dobson of Tasmania. The Bill was a general divorce measure representing an attempt to collate the divorce laws of several colonies but upon a very conservative basis, the grounds of divorce being strictly on traditional lines. Senator Dobson was a Hobart solicitor who had been in political life for a considerable number of years. He had been Premier of that State between 1892 and 1894 and had represented Tasmania at the Federal Convention of 1897. The Senator's Bill did not proceed beyond

the first reading. There being no second reading or second reading debate, there is no parliamentary record from which the precise reasons for the dropping of the proposal can be discovered. Maybe the full realisation of the force of unwillingness expressed during the Conventions on the part of some colonies to accept the views and standards of some of the others in this field was borne in upon the proponent by the public reaction to his proposal. At any rate, the Bill was dropped. I should hasten to add, however, that this fate was not unique in that Parliament, for the record shows a remarkable number of Bills which did not progress to a second reading debate during the first Parliament; but, whatever the precise reason for the short life of Senator Dobson's attempt, no like attempt was made in the ensuing half-century, notwithstanding the existence of at least the basis for a Bill in Senator Dobson's fairly comprehensive draft.

The third factor in the combination was that during the Second World War difficulties based on the domicile of women who desired to approach a State court for matrimonial relief arose in many instances in connection with marriages with servicemen from other countries. Somewhat the same difficulties arose in many instances in connection with marriages when either one or both of the spouses, due to the exigencies of war, had moved throughout Australia in connection with their employment. The problem was not confined to Australia but the acuteness of it locally and the great injustice which was apparent stimulated a measure which became the Matrimonial Causes Act 1945.

A like problem, but not of the same dimension, occurred at the close of World War I. But it was not met by an exercise of Commonwealth power under paragraph xxii of s.51. The Imperial Parliament passed in 1919 the Matrimonial Causes (Dominion Troops) Act 1919, a measure to enable competent courts of the United Kingdom to entertain matrimonial proceedings in respect of certain marriages contracted during the war by members of the forces domiciled outside the United Kingdom. This Imperial Act applied to Dominions which passed laws to so apply it. The Matrimonial Causes Expeditionary Forces Act 1919, which was repealed in 1934, did apply to the Commonwealth the Imperial Act. However, the Commonwealth Act was not founded on Commonwealth power but, like the Copyright Act of 1912, depended on the Imperial statute as the source of power.[2]

The 1945 Act, however, was a self-contained Commonwealth measure generated by circumstances occurring in Australia. I mention this and the succeeding facts as factors benefiting the country in relation to the passage of a general law of divorce and matrimonial causes, because these facts brought some practical aspects of matrimonial affairs forcibly to the attention of governments, so forcibly indeed that the traditional reluctance of governments to sponsor changes in the laws of divorce and matrimonial causes was overcome, partially at first, as evidenced by the 1945 and 1955 Acts, but in the long run completely as evidenced in the sponsoring of the 1959 Bill.

The next step in the progression was the Matrimonial Causes Act 1955. Mr. Joske, Q.C., now His Honor, Mr. Justice Joske of the Commonwealth Industrial Court and of the Supreme Court of the Australian Capital Territory, a distinguished practitioner in the field of matrimonial relations, became in 1951 a Member of the Federal Parliament representing in the House of Representatives the division of Balaclava in the State of Victoria. He turned his

[2] *Cf. Leo Feist Incorporated* v. *Gramophone Co. Ltd.* (1928-29) 41 C.L.R. 1.

endeavours to the remedy of apparent injustices of a like kind to those which had prompted the Matrimonial Causes Act 1945, but which were not governed by it. He introduced a private Member's Bill which remedied the particular situations. A very partial exercise of the Federal power, the Matrimonial Causes Act 1955, resulted.

Success in this led Mr. Joske, as he then was, with his knowledge of the practical consequences of diversity of laws in this field, to essay the most difficult task of proposing a general law of divorce and matrimonial causes as a private Member's Bill. He was encouraged to this course by work which had been done by a committee established by the Attorney-General of the day and by further work and recommendations done and made by the Law Council of Australia. This work had in part resulted in the submission of a draft Bill to the Government. Mr. Joske's Bill was not merely for a general law of divorce but contained the elements of an attack on the social problem of unstable marriages. It passed the second reading in the House of Representatives, though with substantial criticism principally because the Bill sought uniformity by collating the existing grounds of relief in the States substantially on the basis of the highest common denominator.

The sum of these factors was that by 1958 the utility of the powers given by paragraphs xxi and xxii of s.51 and the need for a comprehensive Australian measure which would attack the social problem had been borne in upon, not merely the Government of the day, but, as events have shown, also Australians themselves. The combination of these factors thus conditioned the national scene so as to make possible a Bill not merely collating and rendering uniform, in the sense of removing diversity from, the existing law of divorce and matrimonial causes, but attacking the social problem on a broad front.

Let me remark in passing on the use of the word "uniform" in this connection. The Bill during its passage through the Parliament was referred to on all hands as the Uniform Divorce Bill and the Act is similarly styled in general discussion. Viewed from the standpoint of citizens of different States subject to diverse rules of law, the Commonwealth Act does render them subject to uniform rules; but viewed from the standpoint of the Commonwealth, the Act is but a general law operating throughout the Commonwealth and some of its Territories. Unlike a taxation statute or a statute providing for bounties, which apart from constitutional requirements could readily be designed to operate unevenly in different parts of the Commonwealth, a Matrimonial Causes Act could scarcely contain other than uniform rules of law. The emphasis on the supplanting of existing State divorce laws may well be expressed by saying that in contrast the Federal law produces uniformity but it is scarcely technically accurate to designate its quality as a Federal law by saying as in supposed contrast to other Federal laws on other subjects or to another possible Federal law on the same subject that it is a "uniform" Federal law of matrimonial causes.

Another use of the word "uniform" has grown up to describe State and Territorial laws which are in identical terms. This state of affairs is currently being sought to be brought about by conference between the Attorneys-General of the Commonwealth and of the States assisted by departmental officers, as, for example, at present in connection with company law and soon, I hope, in other fields, such as the adoption of children and perhaps the maintenance of wives. To describe the several resultant statutes of the States and ordinances of the Territories as they emerge as a result of these conferences as uniform

Acts is probably acceptable, the appellation calling attention not to the operation of the statute in the area to which it applies but to its substantial content in relation to like laws of other States or Territories upon the same subject matter.

But the perhaps imprecise but convenient style of uniform divorce law is acceptable enough and will continue current, certainly amongst those who have worked under the diversity of the State provisions.

II

I would now turn to speak of the philosophy behind the attack on the social problem of unstable marriage which the Act of 1959 represents. There is no need for me to elaborate here upon the social problem itself. It has two aspects: on one hand, the disintegration of the marriage itself; on the other hand, the impact of the hopelessly disintegrated marriage both upon the persons concerned and upon the community. Both aspects may seriously involve the lives, not merely of the spouses but of the children; and the consequences to the parties and to the children are gravely reflected in the life of the community itself. Where at all possible, the incipient or even advanced disintegration on the one hand should be arrested; and on the other the parties to a hopelessly disintegrated marriage must be afforded appropriate bases for relief. To say that there is such a social problem in Australia is not to say that it has reached catastrophic proportions. But it is a substantial problem which cannot be ignored.

The basic element of the philosophy underlying the Act is that stable and sound marriage is indispensable to the maintenance of our way of life: the family unit is basic and not susceptible of substitution. To many, these two sentences may well seem trite but they are not universally true of all peoples. It may be that with some peoples a tribal unit is basic; or it may be with others that some more artificial community unit is basic. It is thus not out of place to remind ourselves of the place which marriage and family life occupy in our own practice of civilization. The Parliament's task is to attack such a social problem and, if possible, to find a remedy for it. It does not, of course, enter the field governed consensually by the churches, but deals only with the civil aspects of marriage.

The stable marriage which the Parliament seeks as part of the fundamental organization of the community is a real relationship playing its part in the organic life of the community. To the Parliament a formal bond which has no vitality, where the spouses bound by it are irreconcilably estranged, apart from each other and in many cases entertaining intense hatred of one another, is not performing the social function of stable and sound marriage, lack of which is the very social problem that Parliament seeks to surmount. The Act represents the Parliament's endeavour in this respect.

The Parliament has provided mechanisms firstly to stabilize marriages which are formally current so as to retain and promote their vitality and their function, both for the spouses and for the community: secondly, the Parliament has provided a means of resolving the formal bond with justice when all chance of reconciliation, or restoration of vitality, has completely disappeared.

The provisions of the Act which are designed to support current marriages are to some extent exploratory though in some part there are prototypes or precedents for the actual provisions of the Act. Probably the most significant

step taken by the Act in this respect is the provision of a subsidy to aid the work of the marriage guidance organizations. The Act takes power to give such subsidies to approved marriage guidance organizations and leaves wide discretions in the Attorney-General to determine the conditions upon which approval shall be granted. It also gives power to revoke such approval as a means of ensuring compliance with the stipulated terms and conditions. In addition, there is power to vary the conditions from time to time. There is, therefore, ample means at the disposal of the Attorney-General to ensure the maintenance of a high standard in the work of these organisations and also to ensure that so far as they are subsidised their activities are and remain within the limits both of the constitutional power of the Commonwealth and of the exercise of that power which the Act represents.

There is already a very substantial body of experience in marriage guidance both abroad and in this country. It has lacked the public recognition which, I think, it ought to have had, largely it seems to me because of a somewhat incredulous attitude to the possibility of a third party intervening with success in a matrimonial difference, but partly because our strong feeling for privacy in family life makes it seem not right for a stranger to intrude, particularly, as is sometimes thought, a stranger who has no particular experience or training and who seeks to interfere predominantly out of a desire or impulse to be a busybody.

To my mind, these approaches have been and are quite wrong. Experience has already demonstrated the great utility to the parties and, therefore, through them to the community, which the marriage guidance counsellor can have and has had. It is, of course, necessary that he or she should be well trained and highly skilled in the particular task as a result both of formal education and of actual experience gained in observing other skilled persons at work in marriage counselling, and by participation in that work under the direct control and tutelage of an expert person. There will undoubtedly be at the outset a dearth of workers in this field, a dearth to which the lack of financial support of the organizations has contributed.

But technical skill and experience is not enough; there is the further requirement of personality, temperament and personal background. In the selection of persons to be allowed to do this work no doubt their own experience in relation to marriage may prove an important consideration. It is hoped that a standard course of training and a standard regimen of selection of persons to do counselling or conciliation work will emerge in the relatively near future and that all approved agencies will in a short time have recourse to it. The ability of the Attorney-General to withhold subsidy from those who do not conform to standards which he, upon the advice at his disposal, thinks to be minimal will be a very substantial factor in securing a high standard and some degree of uniformity in the basic training and standard of personal selection of counsellors. The provision of subsidy itself to approved organizations should in the long run prove a stimulus to suitable people to train themselves for this work and for many of them to make it their career. It is worth noting in passing that a trained officer of considerable experience has now been placed on the Attorney-General's staff to advise him on the financial needs of the organisations upon the standard of work which they are maintaining, and also to assist organizations in matters of technical import in connection with the work itself.

Both as a means of rendering the service of the counsellor or conciliator

more efficacious and as an encouragement to parties to utilise their services, the Act in sections 12, 16 and 17 provides for complete secrecy to be maintained as to what transpires during a period of counselling or during an attempt at reconciliation. A question of policy arises in this connection, namely, as to whether knowledge of the commission of criminal offences obtained during the course of counselling or of an attempt at reconciliation ought to be excepted from the general ban on disclosure which these sections constitute. The Parliament has resolved this by preferring to take the chance of what must be a very unusual case, that some criminal offence goes unpunished because the counsellor or conciliator is not able to disclose knowledge which, if not the only knowledge of the commission of the offence, might be the critical knowledge to set the criminal law in motion. The sections' prohibition of disclosure is not limited to admissions relevant to matrimonial relationship. But any physical assault or other criminal act done during the counselling or an attempt at reconciliation would be provable, as the sections I have quoted are limited to things said or admissions made, unless, of course, such acts themselves form part of an admission.

Other features of the Act directed towards preservation of an existing marriage include the duty cast by s.14 upon the court to be astute to recognise a chance of reconciliation, and the provisions furnishing the court with the necessary powers to put in train an endeavour to reconcile the parties. Perhaps the most significant part of s.14 is its emphasis on the part to be played by the legal profession for the future in matrimonial causes. Both in this and in some other respects the Act lifts the significance of this jurisdiction and gives the profession a greater scope for an honourable function in its administration.

A further provision in this connection is s.43, which places a restraint on the taking of proceedings for dissolution within the first three years of marriage without the leave of a court. There is English precedent for this provision. The Morton Commission examined the experience of its use and favoured its retention. Excepted from this restraint are certain cases, including that of adultery, cases of such a nature that there would not, except in rare cases, be any real chance of reconciliation after the commission of acts required to satisfy the excepted grounds. There is something to be said for the view that adultery ought not to have been excepted from the general restraint of this section. It may well be that after some period of experience under the Act the community may come around to accept that position. Parliament, however, has not thought at this time that a refusal to except the case of adultery from the provisions of this section would accord with the current views of the population or of the majority of it.

Another mechanism the Act provides which may have a considerable bearing in the course of time on the maintenance of the marriage is s.71, which provides that, where there are children of the marriage, the decree nisi shall not become absolute unless the court by order has declared that it is satisfied that proper arrangements in all the circumstances have been made for the welfare, and, where appropriate, the advancement and education of the children, or that there are such special circumstances that the decree should become absolute notwithstanding that the court is not so satisfied. The parties will be bound from the very outset to consider in some detail and with a degree of responsibility the impact which their contemplated divorce would have on the children of the marriage and their ability to propound a satisfactory scheme within their means for the welfare of the children. The consideration of their

position may very well, in some instances, recall the parties to a proper sense of their great responsibilities and persuade them to renew their endeavours to maintain their own marriage. Parliament has no doubt thought that too often the personal differences of the spouses gain undue prominence and the consideration of the children and of their future too little.

Of course, no universally true statement can be made in this field. Indeed, there are situations in which unquestionably the children would be far better off out of a home in which the parents are forever bickering and in which hatred has displaced all affection. The wise counsel of a legal representative, as conscious of the human significance of the proposed litigious procedures as of their legal consequence, may be of critical significance at this point in the life of the client. In this, as in other respects, the Act gives greater opportunity for exercise of the training and talent of the lawyer. It permits, if indeed it does not require, what might appear to be a changed emphasis in the relationship of solicitor and client in this particular field, although in reality there is nothing new in this for, in truth, the family solicitor of other days projected himself to an even greater extent into the family life of his clients.

III

These are the principal steps which the legislature has taken in its positive attack upon the social problem. I turn now to the other aspect of the Act, namely, the provision of relief where a marriage is irretrievably lost. In this connection, the question of deciding the principle on which the grounds of dissolution shall be selected arises in quite an acute form. Traditional grounds for the dissolution of marriage have been devised so that a party, innocent of legally defined and discernible matrimonial guilt, may promote a suit for dissolution where some act or acts which the law has declared to constitute a matrimonial offence has or have been done by the other party who, being guilty, is left without all remedy. The verbal formulation by statute of a matrimonial offence really does double service, of which one aspect is very apt to be overlooked. In truth, such a formulation defines the area of conduct which will remain innocent in a matrimonial sense. On the obverse side it denominates those acts which can be castigated as guilty in a matrimonial sense. But the function of setting the periphery to the area of innocence is probably the more significant and the one least observed.

Conduct, however gross and however unacceptable to one's moral sense, is yet "innocent" if it does not pierce the periphery of the area set by the verbal formulae of matrimonial guilt. The artificial character of these areas of innocence and of guilt must always be borne in mind in any discussion of the shift of basic philosophy which the Act of 1959 represents.

Because traditionally the grounds which have been chosen as grounds of dissolution have been largely influenced by particular situations which have been sought to be met, the grounds of divorce had become a patchwork, the patches bearing no necessary relation to each other in point of form, of substance or of consequence. A quiet perusal of all the grounds obtaining in the States will, I am sure, drive home this observation. The traditional approach represents an endeavour to alleviate the personal situation. The problem has, traditionally, been attacked by attempting to approximate the norms of marital

conduct, conduct as between two persons, to the norms of conduct as between the community and the individual, casting the prescription of these norms of conduct into the language of the criminal law, into the language of guilt and of innocence.

The admixture of these ideas results in what are in large part arbitrarily chosen formulae suited to meet some of the marital situations which can and do frequently but not, of course, of necessity, result in the complete breakdown of the marriage itself. One may be pardoned for speculating as to whether, if there were no concepts of innocence and guilt in this field of the law, some marriages which now break down on the commission of one of these specified offences, the innocent party being over-conscious of the other's guilt, might not be maintained, the parties able to overlook and live down the conduct and to evaluate its human significance for them as two individuals. No doubt the moral sense of the contemporary community has been fully exercised in deciding in respect of each ground how far the law should go towards relief of the individual by setting up the ground of dissolution. Nonetheless, the traditional approach has been directed to the benefit of that spouse whose conduct falls short and does not go beyond the periphery of what I have called the area of innocence. There must remain within that area many matrimonial situations in which, if they were fully examined and the truth known, the conduct of the party now expressed to be innocent would be readily castigated as matrimonially and humanly intolerable. The philosophy on which the traditional approach seems to be based has seemed scarcely satisfactory to the Parliament when the social problem of instability of marriage is recognised and calls for preservative as well as remedial action. To describe exhaustively in general terms all matrimonially intolerable conduct, so that by applying the conception of innocence or guilt to any situations all justifiable occasion for a rupture of matrimonial relations could be identified, is scarcely possible.

Put another way, it does not seem possible to express with completeness and universality the rules by which the community can sit in judgment with complete justice on the intimate lives of married people. The marital relationship is so personal, the quality of conduct so dependent upon the personality and the background of the parties, that what is unbearable as between some, is almost a commonplace between others. To this should be added the great practical consideration that the curial methods of discovering the truth are not so economical of time and effort or so efficient in their processes that the truth can be elicited with tolerable celerity, expense and certainty in matrimonial contests, apt as they are to be notable for bitterness and cunning, and often heartless mendacity. The question, therefore, for the Parliament in approaching the remedial aspect of a law of divorce and matrimonial causes is whether, by adhering to the traditional approach and confining the grounds of dissolution to formulae prescriptive of innocence and of guilt in particular situations, the social problem would be adequately met. The Parliament thought not. When it can properly be concluded that a marriage has lost its reality, its significance for the parties and its significance for the community, and this situation is evidenced in the complete physical separation of the parties, the Parliament could no longer regard that marriage as stable or sound, could no longer regard it as performing the function stable and sound marriage performs in the organization of society. The situation proving incurable and the marriage insusceptible of being revitalised, then in the view of the Parliament the basis exists for dissolution of the now lifeless bond. Viewed in the context of a

statutory attack upon a social problem, it seems inescapable that such a marriage should be susceptible of dissolution, not because it died for some particular reason or because one of its parties did an act which fits a description in some enacted formula but because it is dead and, in truth, exists only in name. Thought of this order resulted in the adoption by the Parliament of what is conveniently and compendiously called the principle of the breakdown of marriage as a principle to furnish a ground of dissolution. The Parliament in this Act has accepted and put into practice this principle.

IV

Having accepted this concept, there remains the further question of whether or not it will be the exclusive principle from which the grounds of dissolution shall be derived, or whether or not it will be associated for that purpose with the traditional principle of the matrimonial offence. This question was much debated by the Morton Commission on marriage and divorce. The results of the deliberations of nineteen members as expressed in the Report are very illuminating. Nine of its members thought that only the traditional principle of matrimonial offence should provide the grounds of dissolution, the basis for specifying those acts which were currently thought to constitute such a breach of marital obligation as to warrant the dissolution of the marriage at the instance of the innocent party. An equal number, another nine, were of opinion that the traditional principle ought not exclusively to provide the grounds of divorce, but that a ground based upon the principle of breakdown of marriage should be incorporated in the same law as those grounds which depended upon the traditional view. One remaining member of the Commission expressed himself very definitely that the only principle which should provide grounds for dissolution was the principle of the breakdown of marriage. He, however, being a Scot, was impressed by the logical inappropriateness of combining grounds based on traditional principle with those based on the principle which he preferred, namely, that of the breakdown of marriage. He, therefore, wrote that if he could not be one of the majority to favour only grounds based on the principle of breakdown of marriage he would prefer to be one of a majority to favour grounds founded only on the traditional principle. In other words, he did not favour a mixture of grounds, some founded on one and some on the other philosophy, the principles being to him incorrigibly antithetical.

There was, therefore, a majority which accepted the principle of the breakdown of marriage as a basis on which to determine some grounds of divorce, but no majority for the view that the ground or grounds based on that principle should be associated with grounds based on the necessity for the commission of a matrimonial offence. It is worth noting in passing, however, that those who favoured grounds based on the principle of the breakdown of marriage could not obtain any unanimity as to the form in which the ground or grounds should be expressed or as to the elements which the ground or grounds should contain. That, it seems to me, had the least significance. The important matter was that, in truth, the majority in number of this Commission were prepared to accept the principle of the breakdown of marriage and to base a ground or grounds of dissolution upon it.

The Parliament in the 1959 Act has adopted the view, however inappro-

priate logically, that it ought to combine in the one statute the grounds based on the traditional principle of matrimonial offences with ground based on the principle of breakdown of marriage where the commission of an offence is not an element. This is no doubt a compromise but, like so many compromises, has I think assisted to secure acceptance of the measure as a whole. The result in a practical sense of combining the two philosophies is that a party who cannot be proved to have committed a matrimonial offence in the terms prescribed by the statute, may take the initiative in a suit for a dissolution where the other party can be proved to have done such an act, and do so earlier than the party who has committed such an offence and also earlier than either party could have done if no such offence has been committed by either.

I have called attention to what I have perhaps inaccurately called the arbitrary nature of the description of a matrimonial offence in traditional statutes of divorce, and I have taken leave to suggest that there are many acts or combinations of acts which on a human or social level constitute a denial of the substance of the marriage, and yet do not fall within the description of any of the traditional grounds. One such has recently been discussed. Does a woman who allows herself to be artificially inseminated from a donor other than her husband, without his consent, and indeed against his will, "wrong" her husband, to speak in the language of an earlier day? She does not commit adultery for reasons to be found in the interestingly expressed judgment of Lord Wheatley in the case of *McLennan* v. *Shortland*[3] in the Court of Session in Scotland. Nor does she commit any other traditionally expressed offence. But, in truth, has she not done something which constitutes a grave breach of her relationship to her husband and which some husbands might well feel was destructive of the relationship itself? Or, again, does a woman who, against her husband's will and despite his protests, submits to abortion, being pregnant to her husband, give cause to regard the marriage itself as no longer viable? Yet, no law so far in any part of the English-speaking world has described any such conduct as a matrimonial offence for which relief can be obtained, though it is right to say that the members of the Morton Commission thought that the first instance I have given ought to be made a matrimonial offence by statute, and so recommended.

I refer to these two instances as possibly offering reasons acceptable to some persons for terminating the matrimonial relationship completely. Whether this result should follow is, of course, a matter of personal choice, a choice in which many imponderables will have their place, personality, temperament and personal background all playing their part. But, if the marriage does break down irretrievably, is not that breakdown significant to the community to the point where some remedial action is required? Parliament in this Act, however, has not sought to extend the description of conduct constituting matrimonial offences by including any of the conduct to which I have referred. It felt that the social awareness of the community to all the implications of such circumstances has not yet made itself so manifest as to warrant the creation of the appropriate matrimonial offences to cover the circumstances to which I have referred. And the Parliament was conscious that any resultant breakdown of the marriage will support a case for separation where that separation has taken place and continued for the statutory period. Consistent with its general approach to the social problem, I think Parliament would in any event have

[3] (1958) S.L.T. 7.

preferred this solution.

The philosophy behind the Act's attack on the social problem insofar as it has involved the inclusion of a ground of "separation" in s. 28(m) has not received universal acclaim. Nor should one have expected that it would. This is a change in basic thinking in respect of which a division of opinion must be expected, each side of the division entertaining honestly held and forcefully expressed views. The resolution of such differences in the community must be by the Parliament in and by the Act itself — this, in our parliamentary democracy, being the means by which such differences are solved. In the present case the overwhelming vote in favour of the inclusion of the ground of separation, in a House where none of the members was subject to party discipline or pressure as to the manner in which his vote should be cast, represents a striking example of the acceptance by the Parliament of that responsibility.

V

With these prolegomena, I turn to discuss the Act and its constitutional basis. The Act has as its area of general operation the six States, two internal Territories — the Australian Capital Territory and the Northern Territory — and one external Territory, Norfolk Island, though certain sections are extended to all the Territories of the Commonwealth by s.7(3).

The general constitutional basis of the Act is to be found in paragraph xxii of s.51 of the Commonwealth Constitution, which gives the Commonwealth power to make laws with respect to "Divorce and Matrimonial Causes; and in relation thereto, parental rights, and the custody and guardianship of infants".

It will be seen that paragraph xxii involves some constitutional limits in this field. These have been taken into account. Although the Act has provisions relating to proceedings with respect to the maintenance of a party to a marriage or of the children of a marriage, both as part of the final disposal of the proceedings in a matrimonial cause, and also pending the disposal of such proceedings, there are no provisions for the grant of maintenance generally — that is, without any claim to some principal matrimonial relief.

In this respect, the Act observes a somewhat narrower scope of the constitutional power than did the Bill introduced by Mr. Joske in 1957. That Bill provided for a suit for maintenance to be brought in a Supreme Court without any need for the claim being joined with any claim for any other matrimonial relief. Mr. Joske seems to have been moved to this provision by two practical reasons: Firstly, he knew of the use of a suit for judicial separation as a means of obtaining an order for alimony from a superior court; and in his Bill judicial separation was not provided for. Secondly, he knew of professional dissatisfaction in Victoria with the assessment of maintenance in a summary way, particularly where the parties were of substantial means.

Let me say in passing that the evident dislike, at least on the part of the legal profession, of judicial separation as a form of matrimonial relief, to which Mr. Joske's Bill defered, is not unreflected in the Act. While the Act retains judicial separation as a form of principal relief, in substance it confines it to a form of what I might call interim relief in that the separation worked by the Court's decree counts for the purpose of computing the period of time required by s.28(m) as an element in that ground for dissolution. By means of

a judicial separation suit a party may obtain an order for alimony from a superior court but cannot by such a suit bar the grant of a decree of dissolution at the instance of the other party when the five year period has elapsed and all hope of reconciliation is gone. Indeed, by bringing the suit the proof of the passing of that time might well be facilitated.

But, in any case, I think Mr. Joske took a wide view of the constitutional power, a width which the Parliament has not wished on this occasion to exploit. The grant of maintenance where no principal matrimonial relief as defined in the Act is sought is left to the State legislation. Section 89 will be seen to be no exception to this general approach. That section provides that where a court upon the merits of a suit is unwilling or unable to grant the principal relief claimed, it may, nonetheless, go on to determine the question of maintenance where it is satisfied that the proceedings for the principal relief were instituted in good faith to obtain it, and that there is no reasonable likelihood of the parties becoming reconciled. If the court desires to make an order for maintenance without granting principal relief in such circumstances, it must do so at or immediately after dealing with the proceedings for the principal relief. This provision is designed to save the loss of the costs involved in preparing the whole suit for trial at one hearing, as the Act in s.68 really requires.

I may also say in passing that there is great scope for bringing into a common form the laws of the States and of the Territories with respect to the maintenance of wives as well as the enforcement of summary orders for such maintenance. The growing confidence of the Attorneys-General of the States in the process of conference at ministerial level supplemented by conference at officer level, in order to obtain agreement on common forms of legislation where the subject matter lends itself to common treatment, and where such common treatment would truly benefit Australians, is a very promising phenomenon which no doubt will, in due course, extend to the matters that I have mentioned. Thus, whether or not the Commonwealth power extends to the regulation of the maintenance of wives, uniform and up-to-date treatment of the matter could be achieved.

The Act also relies to some extent on paragraph xxi, s.51, viz. "marriage". Part II of the Act relating to marriage guidance organizations is, no doubt, at least in part founded on this power. The same is true of much of Part IV dealing with void and voidable marriages.

In some part the Act also relies on the incidental power in paragraph xxxix of s.51, but it is not quite within the scope of this article to follow out the very interesting but detailed question of how far resort may be necessary to this paragraph to support any particular provision of the Act.

The Parliament has not chosen to constitute a Federal court for the exercise of the judicial jurisdiction under the Act. It could, of course, have done so, and, indeed that was a proposal in the forefront of Mr. Joske's Bill. The Parliament has taken the course of investing the Supreme Courts of the States with federal jurisdiction under the Act and otherwise committing it to the Supreme Courts of the Territories to which the Act applies.[4]

Not only is the primary jurisdiction so vested and committed but, in the case of the State Supreme Courts, the first appeal is channelled to the Full Court of the State Supreme Court. These courts were invested with appellate

[4] See Part V of the Act.

jurisdiction accordingly.[5] Any further appeal will be to the High Court, but only by its special leave.[6]

The Parliament in thus investing the State Supreme Courts with federal jurisdiction has subjected the investiture to the conditions and restrictions of s.39(2) of the Judiciary Act 1903-1959, so far as they are applicable. But s.93 of the Act, in precluding appeals to the High Court except by its special leave, precludes s.39(2)(b) from applying, and s.39(2)(c) is in terms inapplicable. In the result, only s.39(2)(a) is operative, this paragraph making the decisions of the Supreme Court final except insofar as appeal may be brought to the High Court. The impact of this provision on appeals to the Privy Council as of right from the Supreme Court will be at once observed.

However, provision for settling a point of law arising during the currency of the trial of a suit for divorce in a State or a Territorial court is made by s.91. A special case may be stated for the opinion of the High Court (but not of any other court s.91(3)), the High Court being given power to draw inferences of fact from the stated facts or transmitted documents.

The policy behind the course taken in these various provisions is not far to seek. Unlike the Constitution of the United States of America, our Constitution does not confine the jurisdiction of the paramount court of the Commonwealth to federal matters. It not only invests the High Court or permits it to be invested with an original jurisdiction of an embarrassing width, but it confers an appellate jurisdiction from all State Supreme Courts, irrespective of the subject-matter of the impugned decision. Already the High Court has a large original jurisdiction and an extremely large appellate jurisdiction running through the whole gamut of the law. Fortunately, the views of the Justices of the High Court in *Minister for the Army* v. *Parbury Henty & Co.*[7] lend some aid towards reducing the appellate burden imposed on the High Court by s.39(2) of the Judiciary Act in respect of the whole area in which original jurisdiction can be given to the High Court under the Constitution.

To look forward a quarter of a century gives one leave to doubt the capacity of the Court to deal with the volume of work which its jurisdiction will inevitably attract if nothing is done to stem the rising tide of appellate work, to say nothing of the trend of the work in the original jurisdiction. The High Court's principal functions are conceived to be to interpret and to safeguard the Constitution, to secure uniformity of interpretation, decision and practice upon and with respect to the general and statute law of the Commonwealth and of the States, and to ensure that other federal courts and the courts of the States do not infringe basic principles of justice or of practice or procedure in the trial and decision of matters within their several jurisdictions. A great volume of work involving nothing or little more than a contest on particular facts significant only *inter partes* must endanger the performance of the High Court's greater functions as I have briefly outlined them.

In addition, the Supreme Courts of the States, themselves great courts of some antiquity and much dignity, ought in general to be the final arbiters in the personal quarrels of the citizens of the Commonwealth where no question of any substantial principle of law is involved. Where no such principle is to be decided and there is no egregious error of fact, manifest injustice or grave departure from settled practice, it might well be thought that the decision of the Supreme Courts of the States on appeal should be final and that mere

[5] See s.92 in Part IX of the Act.
[6] See s.93.
[7] (1945) 70 C.L.R. 459.

error of fact or of application of a properly understood principle of law is insufficient warrant for a second full appeal on fact and on law. In addition, the Supreme Courts of the States already administer Matrimonial Causes Acts which are in greater part similar to the Commonwealth Act, although unquestionably the latter has a new emphasis and some novel features.

As matters stand at the moment, the only court to which an appeal could be sent from a federal divorce court would be the High Court. Such appeals would frequently involve examination of minutiae of evidence of fact upon narrow issues hotly contested by estranged spouses. Parliament has decided not to risk the consequences of added burdens of this kind being placed upon the High Court and has, therefore, followed the course of investing the State Supreme Courts with federal jurisdiction both primary and appellate.

It is appropriate at this point to refer to a problem which can arise where State Supreme Courts are invested with federal jurisdiction by an exercise of the power given by s.77(iii) of the Constitution. As the device thus authorised is indigenous to this country there are no precedents to be had elsewhere to which reference can be made; nor has there been any exhaustive judicial discussion in Australia to which the legislature can turn when providing for the investitute of federal jurisdiction in State courts. But some of the limits of the power, in respects relevant to the Matrimonial Causes Act, were referred to in *Le Mesurier* v. *Connor*;[8] in *Adams* v. *Charles S. Watson Pty. Ltd.*;[9] and in *Peacock* v. *Newtown, Marrickville and General Co-operative Society (No. 4) Ltd.*[10]

A question much agitated at some stage of the discussion as to a federal law of divorce both in connection with Mr. Joske's Bill and the Bill which has become the present Act was whether, where the State statute allowed a registrar or other officer to perform some delegated function of a judicial nature with respect to jurisdiction given to the court by a State statute, the Commonwealth could allow a like course in respect of the Matrimonial Causes Act when investing the State Supreme Courts with federal jurisdiction. The conclusion sought to be drawn was that no delegation of federal judicial functions to the officer of the court was possible. In the course of this discussion, much resort was had to the expression that the Commonwealth Parliament must take the State court as it finds it and that the Commonwealth cannot alter the court's organization—the emphasis being placed on the court as composed exclusively of the judges. In this connection, the basic facts of *Le Mesurier* v. *Connor* need to be observed and recalled in connection with the most significant passages of the judgment of the High Court in that case.

Under an arrangement authorised by s.78 of the Commonwealth Public Service Act 1922-1928, an officer of the State Public Service was appointed to perform the duties of Registrar in Bankruptcy of the District of Western Australia. This was a federal office created by s.12 of the Bankruptcy Act 1924-1928. Subsection (5) of s.12 purported to make the occupant of that office an officer of the court. The Act also affected to place jurisdiction under the federal Bankruptcy Act in, *inter alia*, such State courts as were specifically authorised by the Governor-General by proclamation to exercise that jurisdiction.[11] The Act in s.24 gave certain powers, duties and functions to the Reg-

[8] (1929) 42 C.L.R. 481.
[9] (1938) 60 C.L.R. 545.
[10] (1943) 67 C.L.R. 25.
[11] See s.18(1) of the Bankruptcy Act.

istrar in addition to any powers that may be delegated to him by the court under the provisions of the Act. Orders of the Registrar made under any of his powers were deemed to be orders of the court. The High Court[12] regarded these interdependent provisions as an attempt on the part of the Commonwealth through the Bankruptcy Act to make the Registrar part of the organization of the State court. It is important to observe that this was not an attempt to allow an officer of the State court to exercise in relation to the invested federal jurisdiction like powers which the State statute by and under which the State court was organized allowed him to exercise in respect of State jurisdiction conferred by the constating statute or by some other State statute.

Bearing this distinction in mind, two passages from the Court's judgment should be quoted. I do so in the inverse order to that in which they actually appear in the Report, indicating the pages of the Report from which I draw them.

The Court said (at page 498): "This view"—referring to a view already expressed as to the meaning of s.77(iii) and the place and purpose of s.77 and 79 of the Constitution—

> is that express and particular powers are thereby conferred with respect to State courts because general legislative powers did not extend to authorise legislation regulating their jurisdiction or their constitution and that the power given by s.77(iii) contemplates the selection by Parliament of an existing judicial organ which depends alike for its structure and its being upon State law and the grant to that Court of powers of adjudication upon specified subjects of federal jurisdiction.

And at page 496, referring first to the possibility that the general powers given with respect to some substantive topic could authorise legislation giving jurisdiction to State courts, the Court said—

> It is no less certain that these general powers cannot be interpreted as authorising legislation dealing with the organization of State courts. The power conferred by s.77(iii) is expressed in terms which confine it to making laws investing State courts with federal jurisdiction. Like all other grants of legislative power, this carries with it whatever is necessary to give effect to the power itself but the power is to confer additional judicial authority upon a court fully established by or under another legislature. Such a power is exercised and its purpose achieved when the Parliament has chosen an existing court and has bestowed upon it part of the judicial power belonging to the Commonwealth. To affect or alter the constitution of the court itself or of the organization through which its jurisdiction and powers are exercised is to go outside the limits of the power conferred and to seek to achieve a further object, namely, the regulation or establishment of the instrument or organization of government in which judicial power is invested, an object for which the Constitution provides another means, the creation of Federal courts. Section 77(iii) therefore does not enable Parliament to make a Commonwealth officer a functionary of a State court and authorise him to act on its behalf and administer part of its jurisdiction.

Another feature of the power to invest State courts with federal jurisdiction should be noted. Whilst federal judicial power could not be directly reposed in a federal judicial officer whose tenure of office was less than for life, by investing the State court with federal jurisdiction, federal judicial power may

[12] (1929) 42 C.L.R. at 495.

certainly be exercised by a judicial officer whose tenure is of limited nature.

The question is whether an officer who, under a State statute setting up a court, may receive and exercise a delegation of functions of a judicial nature from its judges may be allowed by federal legislation to receive and exercise a like delegation in respect of federal jurisdiction invested in that court by dint of s.77(iii). Whatever the answer to that question, it seems to me that neither *Le Mesurier* v. *Connor*[13] nor any of the cases which followed it, nor the decision of the *Waterside Workers' Federation of Australia* v. *Alexander*,[14] decide it in the negative. The latter case truly is irrelevant and the former in my view rather gives encouragement to an affirmative conclusion. But the answer in any given case can only be given after a detailed examination of the statutory organization of the State court and the relationship of the officer to the court under and by dint of that statutory organization.

Parliament has not sought in the Act to base its provisions upon an affirmative conclusion to the question which I posed. This is natural enough in such a complicated constitutional field. But in addition the pattern of the Supreme Courts throughout Australia is not uniform in the use of registrars or officers to perform such functions as the determination, after a curial contest, of the amount of alimony or the custody of children. Nor do all the States have officers presently trained to undertake and perform such work. The need to look at the overall picture of the Commonwealth in deciding questions of this nature is often overlooked by practitioners in the more populous States who yearn for a continuance of old habits and paths to them well trodden. The Act and its complementary Rules have sought to avoid the need to resolve the constitutional question whilst at the same time seeking to take off the shoulders of the judiciary some of the detailed work associated with the complete resolution of the matrimonial situation which comes before the court. Expedients falling short of a delegation of judicial function have been used, expedients which have seemed to the Government quite practical and efficacious for these purposes. For example, provision is made in the Rules in Part XIV, Division 3, rule 211 *et seq.* for the giving of a certificate of means by an officer of the court which is evidence of its contents before the court when assessing maintenance. The parties can accept it before the court or challenge it in whole or in part.

Again, where maintenance pending suit is required, the officer of the court is empowered to make an assessment which can be accepted or challenged by carrying the question to the court itself. Failure to challenge the assessment leads to liability to pay the amount assessed which will derive from an order of the court and not from the assessment itself.[15] These functions of the officer are not considered to be judicial though, of course, he must act "judicially" in his procedures and in the exercise of his judgment as expressed in his certificate of assessment. The Rules made under the Act have observed and sought to profit by the distinctions of *British Imperial Oil Company's Case*,[16] *Munro's Case*,[17] and the *Rola Case*,[18] and adopt the view that no judicial function is given by them to the officers of the Supreme Courts.

In all this the door has not, of course, been finally shut upon a federal system of matrimonial causes courts. In another day it may be found suitable

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[13] (1929) 42 C.L.R. 481.
[14] (1918) 25 C.L.R. 434.
[15] See Rules 206, 207.
[16] (1925) 35 C.L.R. 422.
[17] (1926) 38 C.L.R. 153.
[18] (1944) 69 C.L.R. 185.

to set up such a system, particularly if a new federal court emerges to which appeals from a Federal Divorce Court could be sent. But my own feeling is that the reasons I have given and the satisfaction which the State courts will give as the profession, both on the Bench and before it, becomes accustomed to the new procedures, will make posterity unwilling to make such a change.

The jurisdiction of the courts to entertain a suit for dissolution or a suit for nullity of a voidable marriage is the domicile of the petitioner in Australia. In this respect, s.24 gives a deserted wife the benefit of her husband's domicile, if it remains Australian, or if not, the benefit of her own pre-marital domicile, or of that of her husband immediately prior to the desertion. In addition, a wife who has been resident in Australia for the three years immediately preceding the date of her petition, and is still so resident, is deemed to be domiciled in Australia.

The jurisdiction of the court in a suit for nullity of a void marriage or for judicial separation, restitution of conjugal rights or jactitation of marriage can be founded either on the domicile or residence of the petitioner in Australia.

A suit may be commenced in any Supreme Court (subject to a special qualification of six months' residence in the case of the Territories), but appropriate provisions are to be found in s.26 to enable the courts to see that the suit is brought in the court most suitable in the interests of justice for the determination of the case.

VI

It is now appropriate that I turn to say something of the grounds of dissolution which are provided in the Act. They total in number fourteen, some in substantially identical terms as grounds to be found in the State statutes which the Act now completely displaces. Others have their prototypes in those statutes, but their precise terms have resulted from a fresh consideration of the elements which they should contain and the language in which they should be expressed. The principles upon which the grounds have been formulated, as I have already indicated, include both the traditional principle of matrimonial offence and the newer principle of the breakdown of marriage. But the Act contains no ground for which no prototype was to be found in the law of any State. In this respect the Act does not go beyond Australian experience nor does it experiment with any ground which was wholly new to and unexplored in Australian conditions. Yet even though the basic ideas behind all the grounds have already been acceptable to a substantial body of Australian opinion, the Act represents both the re-examination of these basic concepts and a complete revaluation of what should be provided to express and develop them in current circumstances. There is not much significance in contrasting the number of grounds for dissolution provided by the Act with the tally of the grounds provided by the various State statutes formerly operative in this field. That tally was in fact thirty but that number includes many grounds which are but variants of others and some of which overlap others.

In expressing the grounds found in s.28 of the Act, the course has been

taken of qualifying them, not by expressions within the ground itself or by provisos physically placed contiguous to the ground, but by separate sections. Thus, to comprehend fully the extent of the ground and its availability in any particular circumstances it may be necessary to refer to one or more of the sections 29 to 38 which contain the important qualifying provisions. Besides qualifying the ground, some of those sections have removed part of the dross which time and judicial explication have allowed to develop in the general law at present applicable in the States. Thus, s.29 removes the possibility of such a conflict as developed in *Lang* v. *Lang*,[19] and expressly provides that rather by their deeds shall ye know them; for hereafter there will be no doubt that conduct which, in fact, affords just cause for separation, will support a finding that a party who has so conducted himself or herself has wilfully deserted without just cause or excuse, even though it should be demonstrable that an actual intention to desert or to drive out the other party was not entertained by the actor.

Again, s.30 enables desertion to begin notwithstanding the existence of a separation agreement between the parties if one of the parties has made a *bona fide* request to resume cohabitation which is refused by the other without reasonable justification, which justification may be based on conduct before or after the execution of the separation agreement. Section 31 ensures the continuity of the period of desertion notwithstanding the insanity of the deserting party which supervenes after the actual commencement of the desertion.

It may be convenient at this point to digress and refer to some of the evidentiary provisions of the Act to be found in Part XI, which also sweep away some existing rules in this field of law. Section 96 makes it quite clear that no more than what is compendiously called the civil onus has to be satisfied in the proof of any matter of fact under the Act. The use of the expression "reasonable satisfaction" rather than the expression "comfortable satisfaction", which Sir George Rich favoured on one occasion, should leave less room for uncertainty. Section 97 places on a statutory basis the extent of the competence and compellability of husband and wife, ensuring that both are compellable as to communications passing between them during marriage either before or after the commencement of the Act. Section 98 displaces the inhibition expressed in the rule in *Russell* v. *Russell*, whilst making it plain that neither spouse, although competent, is compellable to give evidence which would or would tend to bastardize a child.

Section 99 contains a somewhat different provision as to the compellability of a witness to give evidence tending to show adultery on his or her part, a party to the suit being included for this purpose as a witness. There have been sundry attempts to ameliorate the traditional provision that no witness who has not already denied adultery can be asked or made to answer a question tending to show the commission of adultery on his or her part. Section 99 is framed on the view that there is no reason why a witness, whether a party or not, should not be compellable to answer any question which is relevant to proof of the adultery charged in the suit or to the proof of adultery which is itself relevant to some other issue in the suit. In particular, there seems little room in this instance for use of the maxim that no person should be required to incriminate himself, regarding an admission of adultery as a form of self-incrimination. Consequently, whilst subsection (2) of s.99 prevents questioning

[19] (1955) A.C. 402.

as to the commission of adultery as a matter of the personal credit of the witness, subsection (1) of that section makes it clear that witnesses, including the parties, are compellable to answer questions proving or tending to the proof of adultery on the part of the witness where proof of that adultery is material to the decision of the case, even though that adultery is not precisely an issue in it. It will be noticed, however, that witnesses (including parties) who will be subject to the provisions of subsection (2) must either have voluntarily proferred themselves as witnesses or have been called by one of the parties to testify as a witness. Other provisions in Part XI are designed to facilitate proof of certain matters to avoid submitting people twice to the recital of unpleasant and perhaps psychologically disturbing events.

Perhaps I should say now something as to the grounds themselves. A single act of adultery, whether on the part of husband or of wife, unaccompanied by any circumstance of aggravation, suffices to warrant a decree of dissolution. This is in line with the laws of all the States with the exception of Victoria, which retained the necessity for repetition or aggravation in the case of a respondent husband.

Desertion for two years, as recommended by the Law Council of Australia, rather than three years, as is now generally required under the law of the States, is a ground. This reduction of the period, proper as I think it is in itself, bears on the problem of restitution suits, as I shall later mention.

Wilful and persistent refusal to consummate the marriage is the third of the listed grounds of dissolution. This ground is to be distinguished from the ground in section 21(1)(a), on which a marriage is voidable at the instance of either party for incapacity to consummate the marriage, unless the party suffering from the incapacity was aware of it at the date of the marriage, in which case only the other party may sue for a decree of nullity (s.48(a)). In the case of the ground of nullity, the party is by nature incapable of consummating the marriage, whereas the ground of dissolution pre-supposes a capacity to consummate, a capacity which the party wilfully and persistently refuses to exercise. The Act in providing this ground has not gone as far as the Tasmanian statute, which makes a wilful and unjustifiable refusal to permit marital intercourse in a consummated marriage the equivalent of desertion.

It is interesting to note in passing that, in England, wilful refusal has been a ground of nullity of marriage since 1937; but the Morton Commission recommended that wilful refusal should be made a ground of divorce, and not of nullity. The Commission's reasons, which are to be found in paragraph 89 of its Report, are as follows—

> 89. Refusal to consummate the marriage may be evidence of impotence in the psychological sense, as for instance, some invincible aversion or repugnance which makes consummation impracticable. Such incapacity presumed to exist at the time of the marriage is a non-statutory ground of nullity in both England and Scotland. Wilful refusal, on the other hand, connotes capacity to consummate the marriage but unwillingness to do so. To make this a statutory ground of nullity suggests some confusion of thought. Nullity should be granted for some defect or incapacity existing at the date of the marriage. Wilful refusal is something that happens after the marriage, and should therefore be a ground of divorce.

Habitual cruelty *per se* during a period of one year has been chosen as a ground rather than any of the various State grounds which require additional elements. The South Australian prototype of this ground is to be found in sec-

tion 6(b) of the Matrimonial Causes Act, 1929-1941 of that State, where the ground is stated simply as "habitual cruelty for one year". This provision has been the subject of considerable judicial consideration. In *Dunkley* v. *Dunkley*[20] Murray, C. J. said: "Habitual cruelty as a ground for divorce means a course of conduct during one year at least such as to involve a constant or continuing danger or apprehension of danger, to life, or limb, or bodily or mental health".[21]

State and Territory legislation in general has provided for rape, sodomy and bestiality as a ground on a wife's petition. The Act follows the South Australian and Western Australian provisions which make the ground available to a husband as well as to a wife. The ground is directed against principals in the first degree, not accessories.

Rape, as distinct from adultery, is in the Act as a specific ground of divorce. Adultery has the dictionary meaning of "voluntary sexual intercourse of a married person with one of the opposite sex other than his or her spouse". Where the rape is on a woman other than his wife, he will also commit adultery. However, in certain cases, for example, where there is in force a separation order[22] or a decree of judicial separation, a husband may be guilty of rape of his wife; this would not, of course, constitute adultery. Section 101 enables rape, sodomy or bestiality to be proved in proceedings under the Act by certificates of conviction, signed by registrars or other appropriate court officers.

Habitual drunkeness and addiction to drugs are dealt with in paragraph (f) of s.28. The period stipulated is not less than two years and the ground does not require in addition failure of the husband to support the wife or neglect by the wife of household duties during the period. The two year period may consist in part of periods of habitual drunkeness and in part of other periods of intoxication by excessive use of drugs.

The grounds relating to convictions set out in paragraphs (g) and (h) of s.28 of the Act may conveniently be considered together. The paragraphs read as follows—

> (g) that, since the marriage, the petitioner's husband has, within a period not exceeding five years—
> (i) suffered frequent convictions for crime in respect of which he has been sentenced in the aggregate to imprisonment for not less than three years; and
> (ii) habitually left the petitioner without reasonable means of support;
>
> (h) that, since the marriage, the other party to the marriage has been in prison for a period of not less than three years after conviction for an offence punishable by death or imprisonment for life or for a period of five years or more, and is still in prison at the date of the petition;

The ground in paragraph (g) meets the case of frequent short convictions but the petitioner will have to show that the respondent has habitually left the petitioner without reasonable means of support. It will not be necessary to prove that the petitioner was left without support for the full period of five years.[23] Section 33 provides that periods served under concurrent sentences

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[20] (1938) S.A.S.R. 325, 326.
[21] See also *Cox* v. *Cox* (1949) S.A.S.R. 117, 118, and *Sorrell* v. *Sorrell* (1954) S.A.S.R. 113, *per* Napier, C.J. at 116.
[22] *R.* v. *Clarke* (1949) 2 All E.R. 448.
[23] See *McCue* v. *McCue* (1926) 43 W.N. (N.S.W.) 148.

arising out of the same acts or omissions are to count only once in the aggregate.

The basis of the matrimonial offence in paragraph (h) does not seem so much to be that the other spouse has been deprived of consortium for the period, as is the case in desertion, but that the guilty spouse has repudiated, or must be taken to have repudiated, the marriage by the commission of the crime for which he or she has been imprisoned for the requisite period. Conviction for an offence carrying a penalty of imprisonment for five years appears to establish a degree of repudiation, incompatible with the continuance of the marriage or finally destroying the basis of confidence and respect, without which a sound relationship cannot continue. This is an artificial and to some an unconvincing explanation of the basis of this ground in terms of the principle of matrimonial offence. It rather assists to demonstrate how artificial and, indeed, arbitrary are some of the elements in grounds based on the traditional principle.

It might be mentioned that the Morton Commission considered as possible grounds the circumstances that a spouse — (a) is constantly in and out of prison; and (b) is sentenced to a long term of imprisonment or preventive detention.[24]

There were two main considerations that apparently influenced the Commission to decide against the inclusion of those grounds in its final recommendations: that to allow a person to be divorced in these circumstances would be to add a further penalty to the punishment laid down by law for the criminal offence, and that the prospect of returning to his wife and family may be a decisive factor in a criminal's response to reformative treatment. The view was, however, taken when the Commonwealth Act was being prepared, that the Morton Commission had placed too much emphasis on the effect of divorce on the prisoner and too little on the effect of the imprisonment on the spouse. It may be conceded that there are cases in which the matrimonial relations of the person committed to gaol for a serious offence may be a factor in his reformation when released, but this could not be affirmed as universally true. On balance, the views of the spouse who is at liberty and desirous of terminating the relationship seems traditionally to have been given preference. For the rest, a decree of divorce is not truly an additional punishment for the crime for which the respondent has been incarcerated.

Attempts to murder or unlawfully to kill the petitioner or the infliction of grievous bodily harm on the petitioner are grounds. (Section 28(i).) This paragraph deals with isolated instances of attempts and inflictions of bodily harm and is to be contrasted with the cruelty ground which requires habitual cruelty for not less than one year.

The ground in paragraph (j) is wilful failure, throughout the period of two years immediately preceding the date of the petition, to pay maintenance under a court order or agreement. It may be remarked here that a wife may be entitled to maintenance in circumstances not constituting an available ground for divorce. The Act adopts the view that non-payment of maintenance, when added to the ground on which maintenance was granted, constitutes a matrimonial offence, akin to desertion, sufficiently grave to be a ground of divorce. In South Australia and Western Australia it has been a ground of divorce that the respondent has habitually and wilfully failed, during a period of three

[24] U.K. Royal Commission on Marriage and Divorce, 1956, *Report*, paras. 97-103, *Cmd.* 9678.

years immediately preceding the petition, to pay maintenance for the plaintiff ordered by any court to be paid, or agreed to be paid under any agreement providing for a separation between the parties.

Something should be said of the ground which makes non-compliance with a decree for restitution of conjugal rights a ground of dissolution. The ground is expressed in the following terms:

> (k) that the other party to the marriage has, for a period of not less than one year, failed to comply with a decree of restitution of conjugal rights made under this Act.

For more than sixty years in New South Wales, failure to comply with a restitution order has been a ground for divorce. The New South Wales legislation does not specify the period to be allowed for compliance, but normally the period has been fixed by the court at twenty-one days from the service of the decree. The South Australian Act makes provision for judicial separation where there is non-compliance with a restitution order. It also provides, in s.19, that failure to comply with an order for restitution of conjugal rights constitutes desertion from the date of the order, desertion for three years constituting a ground of divorce. The period of non-compliance after which a decree of dissolution may be made is set in the Commonwealth Act at one year. Accordingly, proceedings for divorce founded on non-compliance with a restitution order can only be commenced after one year from the service of the decree for restitution of conjugal rights and, by reason of s.43 of the Act, in the absence of the leave of a court, where three years have elapsed since the marriage.

When it is borne in mind that a suit for dissolution may be brought for desertion for two years, and that the occasion to ground a suit for restitution of conjugal rights, namely, the withdrawal from cohabitation (if need be, derived from an application of the provisions of ss.29 or 30) would also be the commencement of a period of desertion, the suit for restitution of conjugal rights is not likely to persist as a means of obtaining speedy divorce. Facilities for a restitution suit have been retained in the Act, however, as a process which may assist in reconciliation. The period of one year has been chosen with both these results in mind, the endeavour being to set a period which would not be so long as to reduce what chances of reconciliation may remain and which, on the other hand, would be long enough to make the suit unprofitable as the vehicle for collusive divorce proceedings. Perusal of Part XVIII of the Rules will indicate the problems which the prescription of the period of one year has caused. Rules 278 and 279 represent an endeavour to accommodate the present requirement of the provision of a home in relation to such a short period for compliance as twenty-one days, to such a relatively long period for compliance as twelve months.

To cover the change-over period which commenced on the proclamation of the Act it is provided in s.116(2) that failure to comply with a decree, made under the State Act, which was complete before the commencement of the Act and which would have enabled the party in whose favour the decree was made to have obtained a dissolution under the State Act, will justify an immediate grant of a decree under the new Act. That is to say, in that case the period of one year is inapplicable.

The ground of insanity since the marriage is dealt with in paragraph (1) of s.28. At the date of the petition the other party must be of unsound mind, unlikely to recover and, for a total period of five years within a wider period

of six years from the date of the petition, have been confined in an institution. Section 35 requires the court to be satisfied that, at the commencement of the hearing of the petition, the respondent was still so confined. The Act has been drawn in its present terms to ensure, as far as it is possible to do so, that the ground is confined to the case of a party who is of unsound mind at the date of the petition and of the hearing and completely incurable. It has been thought that, after the lapse of more than six years, there seems just reason to permit a petitioner who, on the hypothesis of the incurability of the respondent, faces the balance of life without a partner, to form a regular union and begin family life anew rather than to condemn the petitioner purposelessly to a life of loneliness. Insanity has long been a ground of divorce in all States except New South Wales. Advances in the scientific treatment of mental states will no doubt make it more difficult as time goes by to satisfy a court that the case is an incurable one. It may well be that later generations will want to review this ground as being too narrow in the circumstances which may obtain at that time.

VII

At the opening of this article, now I am afraid all too long and discursive, I endeavoured to set out the philosophy behind such a ground of dissolution as is found in paragraph (m) of s.28. The text of the paragraph is as follows—

> (m) that the parties to the marriage have separated and thereafter have lived separately and apart for a continuous period of not less than five years immediately preceding the date of the petition and there is no reasonable likelihood of cohabitation being resumed.

Prototypes of this ground may be seen in the legislation of Western Australia and of New Zealand. The Western Australian provision is to be found in s.15(j) of the Western Australian Matrimonial Causes and Personal Status Code and is apparently applicable in the case of a separation under a decree. That matter, however, has not been the subject of decision by a court and the language of the section is not express on the point. Section 36(2) of the Commonwealth Act provides expressly for this matter and ensures that the time of separation under a judicial decree can satisfy wholly or *pro tanto*, as the case may be, the requirement of five years separation under this ground. It also assures that an actual separation, though not amounting to desertion on the part of either spouse, will suffice. The Western Australian provision is subject to — (a) absolute bars on the finding of certain facts; and (b) a general discretion in the court in any case to refuse a decree.

When the Commonwealth Bill was being drafted, it was considered that the bars referred to did not sort very well with the basic philosophy on which the ground itself was to be founded. Nor was it thought suitable that a general discretion to refuse a decree with no criteria furnished by the statute should be given to the courts. Consequently, the matter was approached afresh and a different attack made upon the problem of preventing abuse of the ground and preventing it from being productive of conduct offensive to the moral sense of the community. I shall return in a moment to write of the result to this new approach.

In New Zealand there are two somewhat similar grounds, the first of which was introduced by s.4 of the Divorce and Matrimonial Causes Act 1920. The

ground is now found in section 10(i) of the Divorce and Matrimonial Causes Act 1928 (a consolidating Act), and is as follows—

> (i) that the petitioner and respondent are parties to an agreement for separation, whether made by deed or other writing or verbally, and that such agreement is in full force and has been in full force for not less than three years.

This provision must be read subject to s.18 of the Act which provides as follows—

> 18. In every case where the ground on which relief is sought is one of those specified in paragraphs (h), (i), (j) and (jj) of section 10 of this Act, and the petitioner has proved his or her case, the court shall have a discretion as to whether or not a decree shall be made: but if upon the hearing of a petition praying for relief on the ground specified in paragraph (i) or paragraph (j) or paragraph (jj) aforesaid, the respondent opposes the making of a decree, and it is proved to the satisfaction of the court that the separation was due to the wrongful act or conduct of the petitioner, the court shall dismiss the petition.

Under the 1920 Act, the court had a discretion to grant a decree, the qualification of it in s.18 as just quoted not then being part of that section. The extent of this discretion received various judicial interpretations, the matter being finally settled on appeal in *Mason* v. *Mason*[25] by the following ruling—

> Neither the words of section four nor the requirements of public policy justify the adoption of any general rule to the effect that a decree of divorce should be refused to a guilty petitioner. A refusal on this ground must be justified by special considerations applicable to the individual instance, and must be consistent with due recognition of the fact that the Legislature has expressly enabled either party, innocent or guilty, to petition for a divorce on the ground of three years' separation.

Apparently as a result of this decision and the public agitation that followed it, a proviso was added by s.2 of the Divorce and Matrimonial Causes Act 1921-22 that, where the respondent opposed the decree, and the court was satisfied that the separation was due to the wrongful act or conduct of the petitioner, the petition should be dismissed.[26] This proviso now appears in s.18, quoted above.

There has been a considerable number of cases on the application of the discretion conferred by s.18 as thus amended. The most helpful seems to be *Emery* v. *Emery*[27] in which the Court of Appeal held that the words "wrongful act or conduct", as used in section 18, include all conduct that the usual standard of the community regards as blameworthy, whether or not the wrongful act or conduct amounts in law to a definite or recognized matrimonial offence. Any act or conduct on the part of a husband or wife should be regarded as blameworthy which a self-respecting spouse could not reasonably be expected to continue to suffer.

In 1953, a new ground (jj) was inserted in the New Zealand Act by s.7(1) of the Divorce and Matrimonial Causes Act 1953, as follows: "(jj) that the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years".

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[25] (1921) N.Z.L.R. 955 at 963.
[26] *N.Z. Parliamentary Debates*, Vol. 193, p. 388.
[27] (1946) N.Z.L.R. 545.

The effect of the proviso in s.18 as inserted by the 1921-1922 Act in relation to cases under the 1953 ground (jj) arose in *Howell* v. *Howell*.[28] In that case, the petitioner deserted his wife in 1933 and commenced living with his secretary, by whom he had an illegitimate daughter in 1935. The petitioner and his *de facto* wife continued to live together and, in order to give this daughter the benefit of his name, he sought a divorce under the seven years' provision of the Act: section 10(jj). North, J. found that the real cause of the parting from his wife was his desire to live with his secretary. He seems to have dismissed the petition with some reluctance, saying:

> When in 1953 it was thought right to introduce as a separate ground for divorce that the petitioner and respondent are living apart and are unlikely to be reconciled, and have been living apart for not less than seven years, I doubt whether it was sufficiently recognized that the Court was left with no discretion to grant the petition if the respondent filed an answer and proved to the satisfaction of the court that the "living apart" was due to the wrongful act or conduct of the petitioner. In these circumstances, the petition must be dismissed . . . There seems much to be said in favour of the view that the court should be given a discretion to grant the divorce in proper cases, notwithstanding the fact that the petitioner was responsible for ending the marriage. However, the law is on the respondent's side, and the petition must be dismissed, and it is dismissed accordingly.

The application of this proviso to these New Zealand grounds in truth destroyed their greatest utility and, oddly enough, converted them into grounds more closely resembling divorce by consent than any other ground. If the respondent agreed by not opposing a suit based on either of these grounds a decree could be made; but if the respondent opposed and the other circumstances were present, as North, J. pointed out, the petition was bound to fail.

The Commonwealth Act makes no provision for absolute bars where dissolution is sought on the ground of five years' separation. Section 37, however, provides in subsection (1) that where the court is satisfied that, by reason of the conduct of the petitioner, whether before or after the separation commenced, or for any other reason, it would, in the particular circumstances of the case, be harsh and oppressive to the respondent, or contrary to the public interest, to grant the decree on the ground of separation, the court shall refuse the decree. These are wide and perhaps to a point vague phrases but their general import is, I think, clear. The mere absence of an offence on the part of one spouse or the presence of guilt on the part of the other cannot excite this duty to reject a petition, whilst on the other hand a studied course of conduct offensive to the moral standards of the community can have no assurance of being overlooked and of achieving a decree upon this ground. The courts will probably not often be confronted with a borderline case in relation to the criteria expressed in s.37(1); and indeed may not frequently have to entertain a case in which an exercise of the duty to decline a decree is claimed by one of the parties. And, after all, it is not unusual to commit to the judges the task of expressing the moral judgment of their contemporaries. In cases under this ground they will no doubt recognise quite clearly on which side of the line any particular case falls.

Subsection (3) of s.37 also includes a discretionary bar in the case of adultery by a petitioner seeking dissolution on the ground of separation. It

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[28] (1958) N.Z.L.J. 271.

might be thought that this subsection does to an extent weaken the concept expressed in subsection (1) and, to some extent, the basis of the ground itself. But, again, this is a discretion of a kind which the courts are accustomed to exercise. They will, no doubt, be astute to see that the discretion is not exercised with such rigidity as to defeat the policy on which the ground itself is built.

One more provision, and an important one, must be observed in connection with this ground. Section 37(2) requires the court not to make a decree in favour of a petitioner on this ground, until arrangements to the satisfaction of the court to provide maintenance or other benefits which the court is of opinion are just and proper in the circumstances of the case have been or will be made upon the decree becoming absolute. When it is borne in mind that the Act confers on the court express power to order settlements of property in proceedings under the Act[29], s.37(2) enables the court to see that financially just provisions are made for a respondent when a decree is being made on this ground. This combination of ss.37(2) and 86(1) has great significance in States where testator's family maintenance legislation is not available to a divorced wife. They will also be of great significance where a wife is in receipt of a pension which depends upon her continuing to be a wife and which will thus lapse on a decree becoming absolute. Appropriate orders made at the time of decree in the suit will secure just financial treatment of both parties. Inability in particular circumstances to make a practical order which will ensure such justice may well result in the refusal of a decree.

The greater powers which the Act gives the court with respect to the property and income of the parties and the added duties it imposes, such as that to ensure that proper provision within the means of the parties is made for children, will give the jurisdiction in divorce much more significance than perhaps it has had of former years. The last ground for dissolution, namely, presumed death of the other party, requires no elaboration here but I should call attention to the precision with which the conditions for presumption of death are expressed in s.38. The Act maintains discretionary bars to decrees of dissolution on grounds (a) to (l) of s.28 (see in this connection s.41) but these call for no specific treatment here.

VIII

There are but two other provisions of the Act to which I shall advert. The first is s.25, which for convenience I set out in full—

> 25.(1.) The jurisdiction conferred on a court, or with which a court is invested, by this Act shall be exercised in accordance with this Act.
>
> (2.) Subject to this Act, a court exercising jurisdiction under this Act in proceedings for a decree of nullity of marriage, judicial separation, restitution of conjugal rights or jactitation of marriage shall proceed and act and give relief as nearly as may be in conformity with the principles and rules applied in the ecclesiastical courts in England immediately before the commencement of the Imperial Act known as The Matrimonial Causes Act 1857.
>
> (3.) Where it would be in accordance with the common law rules of private international law to apply the laws of any country or place (including a State or Territory of the Commonwealth), the court shall apply the laws of that country or place.

[29] See s.86(1).

The main purpose of this section is constitutional. The Judiciary Act confers on State courts federal jurisdiction in certain matters arising under a law made by the Parliament, in this case the Matrimonial Causes Act itself.[30] Having regard to *Hooper's Case*[31] and also to the question as to whether or not there is a "common law of the Commonwealth", all law that is to be applied by courts administering the Act has been sought to be given the impress of the Commonwealth Parliament. In consequence, every exercise of jurisdiction under the Act will be in a matter arising under a law made by the Commonwealth.

The express adoption of the common law rules of private international law (subs. (3)) helps to avoid the question whether there is a "common law of the Commonwealth". In nullity suits it may still be necessary to apply the law of a particular State, which of course includes the Commonwealth Act itself as in force in the State. This could be important, for example, in a case in which s.19(2) is applicable. Subsection (2) of s.25, which has its counterpart in the laws of most, if not all, of the States, covers any gaps in the substantive law relating to the matters mentioned that may exist in the Act (for example under jactitation and nullity) and attracts the relevant case law. Subsection (2) is not concerned with choice of law in the private international law sense or with the basis of jurisdiction. The subsection does not have application until the court has already assumed jurisdiction. The substantive terms of the subsection are expressed to be "subject to this Act", which phrase, of course, includes subs. (3).

The other matter is the automatic conversion of the decree nisi into a decree absolute by the statute itself upon the lapse of the appropriate time. The group of sections commencing with s.70 and ending with s.75 represent a scheme under which the basic time for the decree nisi to mature into a decree absolute without further process or application on the part of any of the parties is a period of three months. This period has been thought sufficient both to enable the Attorney-General or his delegate to consider, and if thought fit launch, intervention proceedings, and for a party to move under s.75 for a rescission of the decree on the ground of fraud, perjury or suppression of evidence in procuring the decree nisi. This latter provision (s.75) is designed to avoid the need for appeal with its attendant costs where a party desires to re-open a hearing on one of the abovementioned grounds. It should also enable the rehearing to be by the trial judge himself, with the obvious advantages such a course will have.

Section 72(3) enables an order to be made shortening the time in which the decree nisi will become absolute, the exercise of the discretion to be founded on special circumstances. The ground on which courts are commonly asked to reduce such a period is the expectancy of a child and a desire for it to be born in wedlock. However, if the Marriage Bill now before the House of Representatives is enacted, its legitimation provisions will largely obviate the need for a shortening of the period within which the decree nisi will become absolute, for the child will be legitimate upon the marriage of its parents subsequent to its birth notwithstanding the impediment to their marriage which the absence of a decree absolute in the suit would represent at the time of its birth.

Where there are children of the marriage, the decree will not become

[30] See Constitution, ss.76 and 77.
[31] (1955) 91 C.L.R. 529.

absolute until one month after the order of the court has been made expressing satisfaction with the arrangements proposed to be made for the children or a period of three months, whichever is the longer. This provision should be a distinct encouragement for the parties to resolve their differences as to the provision for the children, or at any rate to submit their proposals, whether joint or antagonistic, to the court with promptitude and with frankness.

The accommodation of a basic period of three months for a decree nisi to mature into a decree absolute to the initiation and prosecution of an appeal or of successive appeals is effected by s.72(4), which automatically precludes the decree becoming absolute until one month after the disposal of the final appeal or the time at which it would otherwise become absolute, whichever is the later. Difficulties could possibly arise from the automatic conversion of a decree nisi into a decree absolute where, for instance, parties become reconciled during the period within which in the particular case the decree remains a decree nisi and omit to have the decree nisi rescinded, as s.74 enables either of them to move to do; or it may be that death of one party supervenes and no notification is received by the officer of the court. Re-marriage is available to cure the omission in the first instance, though it may be possible for the oversight not to be discovered till after the death of one of the parties. Section 72(5) precludes any effect of the second instance, preventing as it does a decree nisi becoming absolute if one of the parties dies after its making and before the appropriate time for it to become absolute, and Rule 188 seeks to minimise the possibility of the record not being accurate. Although these expedients may not cover all the ground, it is thought that the advantages of an automatic decision of a decree absolute outweigh the small risks which the situations I have mentioned may involve. The need to rescind the decree upon reconciliation, and to notify death which takes place before the time for the decree absolute, should be carefully impressed upon the parties by the legal profession on suitable occasions.

This article has had perforce to be a little more than an incomplete conspectus of a very comprehensive piece of legislation and of some of the concepts behind it. Those who are interested to continue its study will find profit, I think, in the examination of the provisions of the Act as to recognition of foreign decrees, which will be found singularly complete; the provisions virtually creating an Australian domicile without there being an express statement to that effect; and in the transitional provisions, and the restrictions on publication of evidence in divorce proceedings. No doubt the Act and the Rules together will require study, as of necessity, in the course of the gainful employment of members of the legal profession. I have written what goes before rather to excite study of a piece of social legislation embodying new and probably far-reaching principles, implemented by means of interesting and perhaps in some part novel techniques.