the Australian Security Intelligence Organization and the Attorney-General, ' information ' as used in section 5 (3) meant something more than ' chit chat or idle social talk '. Alternatively, he submitted that arguments similar to those raised in relation to ground (b) applied and before something could be ' information ' it had to be something not known by the recipient.

Joske J. intimated that he would not entertain grounds (b) and (c) of the above submission. However in relation to ground (a) he ruled that *mens rea* was an essential element of the offence charged. The jury was then recalled and after refreshing the jury's recollection of the charges against Webbie, Joske J. proceeded—

> Now, the essence of that offence . . . is that he must have . . . a guilty mind, and that involves, in the case of this particular offence . . . that he should have knowingly communicated . . . knowingly in the sense that he knew that what he was communicating had passed over the telephone system and that there had been an interception of it. Now, it is not enough . . . simply to say, ' This communication had in fact passed over the telephone system and he had in fact communicated it to her.'

There being no evidence that Webbie actually knew that the tape recording was a tape recording of something that had passed over the telephone system Joske J. directed the jury to return a verdict of not guilty.

A. CIRULIS*

PENNY v. PENNY[1]

Matrimonial Causes—Maintenance—Order to Secure—Nature and effect —Whether personal covenant security—Power of Court to vary Matrimonial Causes Act 1959, *section* 87 (1.) (j), (1.), (2.).

The applicant applied to the court to have previous orders to secure maintenance made against him by the court discharged or varied.

The applicant's first marriage was dissolved in 1952. In 1957 the applicant's second marriage was the subject of a decree of judicial separation.

In 1957 the Registrar made an order against the applicant for the maintenance of his first wife. By this order the applicant was ordered to secure to this wife for her life an annual sum by a deed containing a personal covenant. The applicant executed a deed in compliance with this order. On the same day an order was made by the Registrar for the maintenance of his second wife. By this order the applicant was to pay to this wife for her life an annual sum also. This sum was to be

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[1] (1965) 6 F.L.R. 45, 81 W.N. (N.S.W.) 531, Supreme Court of N.S.W. ; Selby J.

secured by a deed consisting of the personal covenant of the applicant, a charge over the furniture in his house and an encumbrance over certain real property. The applicant also executed a deed in accord with this order of the Registrar. The applicant sought to have the order made by the Registrar in favour of his first wife discharged or suspended by discharging or suspending the order, or by discharging or suspending the deed made in pursuance of the order. He sought to have the order made in favour of his second wife suspended on condition that he paid her a fixed sum per week, or alternatively that the order be suspended in part, or alternatively that the effect of the order be modified by cancelling the deed or suspending the covenant to pay in the deed.

The applicant contended that these orders were in essence orders to pay periodic sums made under section 40 of the Matrimonial Causes Act 1899-1951 (N.S.W.). The respondent contended that these were orders to secure maintenance made under section 39 of that Act. Selby J. held that the order in favour of the second wife was an order to secure within the meaning of section 39 of the New South Wales Act because the order was in the usual form of an order made under section 39 and security was given by way of a charge over the applicant's furniture and an encumbrance over some of his real property. However, the order in favour of the first wife caused some difficulty as it contained no provisions for the giving of a security over property but required only that the applicant should personally covenant by deed to pay the annuity.

The question for His Honour to decide was whether the security contemplated by section 39 could consist of a personal covenant alone or whether it contemplated the existence of a fund out of which the stipulated amounts could be paid. He interpreted certain dicta of the High Court in *Redgrave v. Redgrave*[2] as saying that although it was not usual to find security consisting of a personal covenant alone there was no reason why this should not occur, and if it does, then the husband's personal covenant becomes the security. Consequently it followed that the order in favour of the first wife was also an order to secure within section 39 of the New South Wales Act.

The respondent then contended that because the orders to secure maintenance were made under section 39 of the Matrimonial Causes Act 1899-1951 (N.S.W.) they were unalterable and irrevocable. It was also contended that once the deeds made in pursuance of the orders were executed the applicant's obligation under the order ceased and the order was spent. Consequently, neither the orders, nor the deeds could be discharged or suspended.

The applicant argued first that these orders were within the scope of the power to discharge or suspend given to the court by section 87 (1.) (j) of the Matrimonial Causes Act (Cth) 1959. Second, he contended that a combination of the provisions of section 87 swept away the old doctrine of immutability of secured orders.

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[2] (1951) 82 C.L.R. 521.

Selby J. considered the growth of the doctrine of immutability of secured orders both in England and in Australia and came to the conclusion that section 39 of the New South Wales Matrimonial Causes Act preserved the immutability of secured orders, and that such orders could not be rescinded, nor could the effect of the orders be modified by cancellation or suspension of the deeds, unless the Commonwealth Matrimonial Causes Act contained an express provision or necessary implication that this could be done.

The only power dealing with the discharge, modification and variation of an order is that contained in section 87 (1.) (j). Selby J. held that these orders did not come within the ambit of section 87 (1.) (j) (iv) which dealt only with orders concerning amounts to be paid. He also held that section 87 (1.) (j) (i) did not apply because the applicant's liability in this case arose from the covenants in the deed and not from the orders with which he had complied. Even if the orders now spent were discharged the applicant would still remain liable under his covenants, and section 87 (1.) (j) (ii) (the power to suspend an order) had no effect on an order no longer operative. So, section 87 (1.) (j) was held not to apply to secured orders.

The applicant then submitted that the court should not interpret section 87 (1.) (j) restrictively and in the light of the previous law so as to bring the section into conformity with the superseded state legislation. Selby J. agreed with this contention but stated that his interpretation of section 87 (1.) (j) was based on the words used in that subsection.

The applicant further submitted that if section 87 (1.) (j) and section 87 (1.) (l) which gives the court power to make any order necessary to do justice whether or not such order is in accord with practice of other laws before this Act, were read together, section 87 (1.) (j) could be seen to apply to secured orders. This contention was rejected with the comment that had the legislature intended such a result it would have used express language as had been used in the Matrimonial Causes Act 1950 (Eng.). Section 28 (1.) of that Act conferred on the English courts specific power to discharge, vary or suspend an order for secured maintenance. Section 28 (2.) provided that the powers of the court were exercisable in relation to any deed or instrument executed in pursuance of the order.

The applicant's final submission was that section 87 (1.) (l) was in itself sufficiently wide to allow the orders sought to be made.

His Honour referred to his own decision in *Patton v. Patton*[3] in which he stated that the discretion given to the court by section 87 (1.) (l) must be exercised judicially, i.e. in accord with established canons of construction and recognised principles. His Honour stated that stronger words than those used in section 87 (1.) (l) would be needed to persuade the court to disregard existing principles. The result was that these applications were dismissed.

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[3] 80 W.N. (N.S.W.) 670, 672.

The conclusions of Selby J. on the effect of the various subsections of section 87 on the subject orders seem to be unexceptionable with the exception of his interpretation of section 87 (1.) (l).

His Honour has taken a very narrow view of the power conferred by section 87 (1.) (l).

This writer suggests that the plain wording of this section envisages new types of orders being made and existing and future types of orders being varied or discharged ; according to the merits of each case this subsection was intended to override, where necessary, existing legal principles, i.e. the court is given power to create new legal rights where it thinks necessary.

Finally this writer asks is there something special about secured orders ? It is suggested that there is not, and that if the cautious interpretation of section 87 (1.) (l) by Selby J. is to prevail then the Matrimonial Causes Act should be amended to include a section making secured orders subject to discharge, variation and suspension.

Support for this contention that secured orders should be subject to discharge, variation or suspension can be obtained from the fact that the English legislature has seen fit to reject the immutability of secured orders.

J. L. MERITY