THE OPERATION OF THE COMMONWEALTH MATRIMONIAL CAUSES ACT IN NEW SOUTH WALES

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The First Four Years

The object of this article is not to discuss in detail any of the questions of law which have arisen under the Matrimonial Causes Act 1959 (Cth), but merely to review in a fairly general way the manner in which the Act has operated since it came into force in February, 1961. My remarks will necessarily be confined, in the main, to experience in New South Wales since that is the State in which I have seen the Act operating but presumably the experience of Judges and practitioners in this State will not be greatly dissimilar from that of their opposite numbers in the other States of the Commonwealth. In one respect, however, the position of legal practitioners in this State is unique for New South Wales alone of the States still clings obstinately to the pre-Judicature Acts method of pleading. Accordingly, the provisions as to pleading contained in the Matrimonial Causes Rules made under the Act were at first viewed here with some dismay for the wealth of detail which the Rules require was entirely foreign to the experience of local solicitors with the exception, perhaps, of those who practised in Equity and, as a rule, the divorce specialists had little or no experience in the equitable jurisdiction. For some time after the Act came into force, it was the usual procedure to brief counsel to draft the pleadings, with consequent increase in the cost to the litigant, and this is still a common practice. On the whole, it may be said that the fears of divorce practitioners were ill-founded for they had little trouble in adapting themselves to the new procedure. It is not surprising, however, that there should still be a considerable diversity in the standard of pleading, and pleaders frequently have trouble in distinguishing between facts and the evidence by which the facts are to be proved. Applications for further and better particulars are not uncommon and occasionally, application is made to strike out a pleading on the ground that it is prolix and embarrassing. In a recent case, a respondent seeking an order for further particulars had sought from the petitioner seventy odd particulars in a simple issue of adultery. In another, the respondent sought to strike out as prolix and embarrassing a paragraph in a petition alleging habitual cruelty running into well over a hundred sub-paragraphs.

On the subject of applications, it might be worth mentioning that unnecessary confusion is often caused by the absence in the Rules of a

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suitable designation for the respondent to an application. Often such respondent is the petitioner, the applicant being the respondent in the suit. A simple amendment to the rules would overcome this difficulty.

Conciliation and Reconciliation

There is considerable emphasis in the Act and Rules on conciliation and reconciliation of the parties. It is sought to achieve this both directly and indirectly. The direct attempt includes the provisions of Part II relating to marriage guidance organisations, the provisions of Part III laying on the Court the duty of giving consideration, from time to time, to the possibility of a reconciliation in appropriate cases and providing certain courses which a Judge may adopt when he considers that there is a reasonable possibility of reconciliation and the provisions of rule 15 which require a solicitor to certify that he has brought to the attention of his client the provisions of the Act relating to reconciliation and the existence of approved marriage guidance organisations and that he has discussed with his client the possibility of reconciliation. Indirect attempts include the provisions of section 43 prohibiting the institution, without leave of the court, of proceedings for dissolution of marriage within three years of the date of the marriage, with certain exceptions. A subtle indirect attempt is made by section 68 which, in effect, requires a petitioner to include in his petition all claims for ancillary relief except where permitted to do otherwise by the rules or by leave of the court. The effect of this section is to bring home to a potential petitioner at the time he is instructing his solicitor to institute divorce proceedings, the full implications of a dissolution of his marriage. His attention will be directed to the destination of his property, to questions of maintenance, to the custody of his children of the marriage and to the arrangements to be made for their welfare, advancement and education. He may have entered into marriage with little or no thought as to what it is going to involve but the Act and Rules ensure that he will give considerable thought to what is involved in its dissolution.

The provisions for approval and subsidy of marriage guidance organisations have been most beneficial to those organisations. The granting of substantial subsidies has freed them to a great extent from the perpetual dissipation of their energies in fund-raising activities and has enabled them to extend the area of their operations and to operate in appropriate premises. The official imprimatur which approval involves has enhanced their prestige. But it is too early yet to be able to form any estimate of the extent to which these benefits have enabled such organisations to reduce the divorce rate by bringing about reconciliation.

As regards the other provisions relating to conciliation and reconciliation, there seems to be no evidence to indicate that they have had

any significant effect. The largest marriage guidance organisation in New South Wales reported that, in the past twelve months, two cases were referred to it by the Divorce Court. Statistics supplied by the Commonwealth Bureau of Census and Statistics show a steady, though not spectacular, rise in the number of petitions filed in Australia in the last five years, 1962 being the only year in which there was a slight drop. The figures are as follows :

1960	1961	1962	1963	1964
8,187	9,579	9,329	9,686	10,244

In New South Wales, 2,303 petitions were filed in the first six months of 1965 indicating a probable 4,600 for the whole year. This conforms to the pattern of a steady rise over the last few years, 4,517 petitions having been filed in this State in 1964.

The figures do not necessarily imply an increasing proportion of broken marriages in the Commonwealth. Increasing population and the disposal of a backlog of cases under grounds for divorce not previously available in the more populous States would account for part, at least, of the rise. But the inevitable conclusion seems to be that the provisions for reconciliation have failed to produce any significant effect.

Children

A feature of the Act is its solicitude for the welfare of children of the marriage which is receiving the attention of the Divorce Court. Section 6 includes in an artificial definition of children of the marriage a child of either husband or wife (including an illegitimate child of either of them and a child adopted by either of them) if, at the time when the husband and wife ceased to live together, the child was ordinarily a member of their household. It has come as a shock to some petitioning husbands, and to respondent husbands, to find that a child of their wife by a previous marriage is regarded as a child of the existing marriage. When matrimonial proceedings are instituted, such husbands are often ordered to maintain the child of another man or obliged to satisfy the Court that proper arrangements have been made for the welfare, advancement or education of the child. The child, or more properly, perhaps, its mother, is in an unusually favourable position, for the mother can look to both the natural father and to the step-father for the support of the child : see comments by Burbury C.J. in *Viney v. Viney*.[1]

[1] (1965) 6 F.L.R. 417.

The most important reform in relation to children is the provision of section 71 which prevents a decree from becoming absolute until the Court has declared that it is satisfied that proper arrangements have been made for the welfare, advancement and education of children under 16 or that such special circumstances exist that the decree should become absolute notwithstanding that the Court is not satisfied that such arrangements have been made. If the particular circumstances of the case justify it in so doing, the Court may order that the section apply to a child who has attained 16. Barry J. made such an order in the case of an 18 year old child who suffered from congenital deafness and a spastic condition affecting the use of his hands : *Paull v. Paull.*[2]

In a paper delivered to the Thirteenth Legal Convention at Hobart in January 1963, Sir Stanley Burbury, Chief Justice of the Supreme Court of Tasmania said that he found it difficult to escape the conclusion that in most cases the protection intended to be given by the Act to children is largely illusory.[3] The Chief Justice pointed out that the only sanction for failure to make proper arrangements is the withholding of a decree absolute but that once the decree becomes absolute, the parties may alter or ignore the arrangements as they wish. A Court may not consider it proper, in the circumstances, that young children should be living with an adulterous mother and her lover and it may order that the father have the custody of the child. If the father is agreeable, the child may be returned to its mother the next day or may never be taken out of the mother's *de facto* custody. A Court may order a father to pay a specified sum by way of maintenance of children as part of the " proper arrangements ". But it is for the mother to decide whether or not she will enforce such order. Frequently the mother wishes to have nothing whatsoever to do with her former husband, particularly when there is available a man who is prepared to contribute to the support of her children. The maintenance order against the father becomes an empty formality but legal formalism is satisfied.

I am in complete agreement with the conclusion reached by Burbury C.J. as to the illusory nature of the protection afforded by section 71 but I would emphasize two implied reservations in His Honour's conclusion. He did not say that the protection was invariably illusory but limited his remarks to " most cases ". He did not say that protection was entirely illusory but " largely " illusory. These reservations leave room for a body of cases in which the section provides substantial protection for the children and I think that such body is not inconsiderable. Rule 41 requires a petitioner to include in the

[2] (1961) 2 F.L.R. 107.
[3] See (1963) 36 A.L.J. 294.

petition the details of the proposed arrangements for the children. This means that at the time of taking instructions from his client, the solicitor must bring to the petitioner's attention the necessity of making arrangements which are likely to be regarded as proper. From time to time this involves an approach to the respondent so that arrangements may be made by agreement. At the hearing of the suit, even though it be undefended, the Judge may say that the proposed arrangements are not good enough. The parties may again get together and work out satisfactory arrangements. Although, as mentioned, adherence to these arrangements is not policed by the Court, the parties have been obliged to give thought to the fate of their children and to devise a means to secure their welfare as best it may be secured in the circumstances. It may not, perhaps, amount to excessive naiveté to suppose that many parents who approach the Divorce Court have a genuine affection for their children and, having worked out a satisfactory arrangement for their children's welfare, are prepared to adhere to such arrangement, despite the absence of any compulsion once the marriage has been dissolved.

Section 85 (2) empowers the Court to adjourn any custody proceedings until a report has been obtained from a welfare officer on such matters relevant to the proceedings as the Court considers desirable. The report may then be received in evidence. It is not uncommon to find a custody contest which has degenerated into a mud-slinging match. The father and his witnesses speak of the shocking conditions in which the mother lives with the children and the way in which she neglects and ill-treats them. The mother and her witnesses make a similar attack on the father. In this, and other types of cases, the report of a welfare officer is often of the greatest assistance to the Court, giving an impartial picture by a trained observer. It is not an uncommon experience to find a party withdrawing extravagant and unfounded charges when confronted with such a report.

Collusion

Mention has been made of a petitioner and respondent working out between them satisfactory arrangements for the children. It is considered by many that the question of contact between parties to divorce proceedings has been significantly affected by the Act and Rules as a result of which, the bogey of collusion has dwindled to a mere shadow of its former self. English Judges have detected the smell of collusion arising from the approach of one party to another even when the intention was no more sinister than to attempt to reach agreement on the amount of maintenance to be paid. Australian Judges, in the main, have been somewhat less ready to suspect the existence of collusion when the parties have entered into friendly discussion of any aspect

of their case but practitioners under the State Acts were, as a rule, most meticulous in avoiding any sort of agreement which could come anywhere near to being regarded as collusive. When the provisions of the Federal Act became known it was at once suggested that the legislature had intended to narrow the general conception of collusion so as to exclude from its fatal embrace a *bona fide* agreement between the parties which neither kept relevant evidence from the Court nor presented false evidence to it. For section 40, in dealing with this absolute bar to the making of a decree of dissolution of marriage, did not use the single word " collusion " but referred to a petitioner " guilty of collusion with intent to cause a perversion of justice ". This view was confirmed by the Rules for not only is a rapprochement permitted, it is, in certain circumstances, made compulsory. Division 6 of Part XI of the Rules provides for the compulsory holding of a conference between the parties to a defended suit which includes proceedings with reference to maintenance of a party or child, settlements, custody or arrangements for the welfare of children under 16 when the parties are unable to agree as to the arrangements which should be made. A conference within the meaning of Division 6 is defined by rule 167 as " a conference at which the petitioner and respondent discuss and make a *bona fide* endeavour to reach agreement on " the matters specified.

The statistics give no inkling as to the number of compulsory conferences which are successful or partially successful, but there are many occasions on which agreement is reached on one or more of the matters discussed. The general scheme of the Act and Rules tends to increase the number of cases which are defended for since all ancillary relief claimed must be included in the petition and since virtually each claim for ancillary relief constitutes a separate matrimonial cause, a husband, for example, who wishes to oppose the making of a settlement sought by his wife or any respondent who wants a different custody order from that sought by the petitioner, must file an answer, thereby making the suit a defended one. The provisions relating to compulsory conferences to some extent counteract this tendancy by giving the parties an opportunity of reaching agreement on ancillary matters.

It is impossible to avoid the suspicion that there are times when the parties at a compulsory conference go much further than was contemplated by the Rules and fall into just those collusive agreements which were feared by the English Judges when parties come together on any aspect of their case. It happens at times that a husband, for instance, will agree to withdraw a cross-petition on his wife agreeing to accept a more reasonable sum for maintenance than she originally claimed or a wife will agree to drop counter-charges against her husband on his agreeing to her having the custody of the children. There can be little doubt but that some of these agreements are collusive even within the

narrower conception of collusion contemplated by the Act and a Judge would be failing in his duty if it were clear that an agreement reached at a compulsory conference was intended to cause a perversion of justice by the suppression of relevant evidence. But although it would not do to be blind to the existence of a collusive agreement, there are probably occasions when one blind eye is turned in that direction. It is not, however, suggested that Begg J. was using less than both eyes when he held that in the circumstances of the case before him there had been no collusion with intention to cause a perversion of justice when, following agreement between husband and wife as to orders for ancillary relief, the wife proceeded on the ground of desertion only, refraining from adducing evidence in support of an allegation of adultery : *Grose v. Grose.*[4]

Grounds for Dissolution of Marriage

Section 28 provides a number of grounds for divorce not previously available in New South Wales but before referring to any of these, brief mention might be made of two long-recognized grounds, adultery and desertion. It is not suggested that adultery under the Federal Act is different from what it was under the State Act but it was a sound move to set at rest the conflict which had developed between the High Court of Australia and the Court of Appeal in England as to the standard of proof to be applied in cases of adultery. Since the High Court decided in *Briginshaw v. Briginshaw*[5] that the criminal standard of proof beyond reasonable doubt was inapplicable, that Court has resolutely refused to follow successive statements by the Court of Appeal that adultery must be proved beyond reasonable doubt : *Wright v. Wright*[6] ; *Watts v. Watts*[7] ; *Mann v. Mann.*[8]

It seemed inevitable that sooner or later the question would go to the Privy Council for decision, but section 96 has now deprived aspiring counsel of a trip to London for, in providing that a matter of fact shall be taken to be proved if it is established to the reasonable satisfaction of the Court, the legislature has clearly indicated that the standard of proof to be applied is that described by the High Court in *Briginshaw's* case.[9] In *Florence v. Florence*[10] Mayo J. made an interesting review of the mental processes involved in attaining " reasonable satisfaction ".

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[4] [1965] N.S.W.R. 429.
[5] (1938) 60 C.L.R. 336.
[6] (1948) 77 C.L.R. 191.
[7] (1953) 89 C.L.R. 200.
[8] (1957) 97 C.L.R. 433.
[9] (1938) 60 C.L.R. 336.
[10] 7 May 1965 (as yet Unreported).

Constructive Desertion

The High Court had long since made it clear that conduct might amount to just cause and excuse for withdrawal from cohabitation and yet fall short of constructive desertion : *Bain v. Bain.*[11] Following the decision of the Court of Appeal in *Buchler v. Buchler,*[12] Australian Courts laid increasing emphasis on the subjective test of a respondent's conduct, refusing to regard conduct as constructive desertion unless satisfied that there was an intention to drive the other party away. This caused considerable hardship in the type of case where a party had left home because of the intolerable conduct of the other spouse but failed in a suit based on constructive desertion because of inability to prove an expulsive intention on the part of the respondent : see *Baily v. Baily*[13] ; *Sharah v. Sharah*[14] ; *Deery v. Deery*[15] ; *Magaard v. Magaard.*[16] The Privy Council had alleviated the position to some extent in *Lang v. Lang*[17] by holding that, in the appropriate case the necessary intention could be imputed to a respondent but *Magaard v. Magaard*[18] demonstrated that conduct might still justify a spouse in leaving home but fall short of constructive desertion. Section 29 has now come to the rescue of victims of such conduct by providing that conduct will constitute desertion if it justifies the other party in living apart and causes him so to do whether or not the intention was to cause a separation.

In his lucid exposition of the effect of the section in *Manning v. Manning,*[19] Burbury C.J. expressed some regret at the fact that the type of conduct described in section 29 should be called desertion which, by its very nature, required an intention to destroy the matrimonial consortium. However, except from the point of view of the academic (and by this I am not implying that the label fits Burbury C.J. in any derogatory sense) it seems unimportant what name the conduct is given. Experience has already shown that section 29 provides a means of doing justice to a number of people who would have been denied it under the pre-existing law. At the same time, it has been made clear that trivial misconduct will not suffice and if it is conduct which does not amount to a matrimonial offence in itself, it must be grave and weighty before it will be regarded as just cause for leaving and, hence, constructive desertion : *Fronten v. Fronten*[20] ; *Meek v. Meek.*[21]

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[11] (1923) 33 C.L.R. 317.
[12] [1947] P. 25.
[13] (1952) 86 C.L.R. 424.
[14] (1953) 89 C.L.R. 167.
[15] (1954) 90 C.L.R. 211.
[16] (1958) 99 C.L.R. 1.
[17] [1955] A.C. 402.
[18] (1958) 99 C.L.R. 1.
[19] (1961) 2 F.L.R. 257.
[20] (1963) 4 F.L.R. 314.
[21] (1962) 4 F.L.R. 407.

Cruelty

Habitual cruelty is a new ground for divorce in New South Wales as it is in most of the other States of the Commonwealth. After the House of Lords decided in *Gollins v. Gollins*[22] and *Williams v. Williams*[23] that intention was not in all cases an essential element in legal cruelty there was a tendency amongst some practitioners in this State to institute proceedings based on this ground in cases where the conduct complained of consisted of entirely trivial acts and fell far short of cruelty by any definition. The Courts, however, have heeded the well-known words of Denning L.J. (as he then was) in *Kaslefsky v. Kaslefsky*,[24] " If the door of cruelty were opened too wide we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperilled ". Australian Courts seem to have resisted the temptation and there appears to be no danger of divorces being granted on the ground of incompatibility of temperament under the guise of cruelty. As a ground for divorce, habitual cruelty has run a steady fourth over the last four years, the figures of the Commonwealth Statistician for the four most frequent grounds on which decrees of dissolution have been pronounced being as follows :

	1961	1962	1963	1964
Desertion ..	3,639	3,645	3,531	3,468
Adultery ..	1,855	1,548	1,676	1,833
Separation ..	350	1,272	1,495	1,687
Cruelty ..	238	207	254	316
Total on all grounds ..	6,712	7,245	7,476	7,917

Separation

The most vigorous and sustained attack on the Matrimonial Causes Bill as it was going through Parliament was aimed at the ground of five years' separation. The most vociferous of the critics prophesied such a flood of divorces on this ground that the stability of marriage in the Commonwealth would be endangered. The figures cited above have shown these critics to be false prophets and even these figures

[22] [1964] A.C. 644.
[23] [1964] A.C. 698.
[24] [1951] P. 38, 48.

fail to give a true picture of the situation. In saying this, I am not attacking the accuracy of the figures but I am referring to the inherent inability of statistics to illustrate every aspect of a given situation. Many petitions on the ground of separation are based on facts which would support an allegation of desertion and in a considerable number the facts would support allegations of habitual drunkenness or cruelty. Where the parties have lived separately for five years there is a tendency to rely on the ground of separation no doubt, in many cases, because this is easier to prove than the matrimonial offence which is also available. There is no reason to suppose that these petitions would not have been brought had separation not been made a ground for divorce but the tendency distorts the true picture by swelling the number of decrees based on this ground.

The real difficulty in dealing with petitions based on separation has arisen when a respondent has relied on one of the bars to the pronouncing of a decree created by section 37 (1) and yet, somewhat ironically, this sub-section, which was inserted to act as a brake on section 28 (m), has proved, in the main, quite ineffective. In the early days of the Act, the creation of an absolute bar by such vague and general words as " harsh and oppressive " was fiercely criticized by Nield J. : *Taylor v. Taylor*.[25] In subsequent reported cases, Judges have dealt with the sub-section in milder language than the somewhat intemperate words of Nield J. but have been singularly reluctant to find that the circumstances of the case would make it harsh or oppressive to the respondent to pronounce a decree. In *Lamrock v. Lamrock*,[26] Wallace J. uttered a warning against the use of reported cases as precedents in deciding questions under section 37 (1) as the sub-section specifically refers to " the particular circumstances of the case " and leaves no room for the setting up of standards of general application. Although not satisfied with the genuineness of objection to divorce on religious grounds which the respondent had raised, Wallace J. said that he could envisage special cases in which a respondent's objections to divorce on religious grounds could make it harsh and oppressive to grant a decree.

In *Judd v. Judd*,[27] Monahan J. considered that the respondent's strong opposition to divorce on religious grounds afforded an additional reason for saying that it would be harsh and oppressive to grant a decree in the particular circumstances of the case. In *Painter v. Painter*[28] the Full Court of South Australia (affirming the decision of Mayo J. in *Painter v. Painter*[29]) attached little importance to the respondent's

[25] (1961) 2 F.L.R. 371.
[26] (1963) 4 F.L.R. 81.
[27] (1961) 3 F.L.R. 207.
[28] (1963) 4 F.L.R. 216.
[29] (1962) 3 F.L.R. 370.

religious objection to divorce, saying " It seems to us that, if the appellant is genuinely convinced that the marriage tie is indissoluble by human judgment, the decree will not alter her belief or her position. She can disregard it."[30] In Queensland, the Full Court has also considered the question of a respondent's religious beliefs and stated that religious objection to divorce would be a factor to take into consideration with all other relevant circumstances when deciding whether it would be harsh and oppressive to pronounce a decree : *Kearns v. Kearns.*[31] In *Macrae v. Macrae*[32] I dismissed a husband's petition on being satisfied that because (*inter alia*) of the respondent's religious beliefs it would be harsh and oppressive to pronounce a decree. However, an appeal against this decision is pending and the decision has already been criticized.[33]

One way in which harshness and oppressiveness could be caused to a respondent would be by the financial hardship which a decree might involve but most cases of financial hardship would be covered by section 37 (2) which provides that a decree shall not be made until the petitioner has made arrangements to the satisfaction of the Court in cases where it is of the opinion that it is just and proper that the petitioner should make provision for the maintenance or other benefit of the respondent. Circumstances might exist in which such arrangements should be made but, owing to the petitioner's situation at the moment, could not be made. In such circumstances it might be harsh and oppressive to the respondent to grant a decree. Such circumstances could exist in a case where a wife respondent would be deprived of pension rights on divorce and was considered to be entitled to some provision for her maintenance if a decree should be pronounced but could not get such maintenance because of the petitioner's financial situation at the time of the hearing : *Ferguson v. Ferguson.*[34]

In New South Wales, the Full Court considered at some length the bar created by section 37 (1) and held that the mere fact that the petitioner himself had brought about the separation and the innocent respondent did not want to be divorced would not make it harsh and oppressive to the respondent to grant a decree on the ground of separation, nor would the granting of such decree in the circumstances be contrary to the public interest. The Court considered that the phrase " harsh and oppressive " connoted some substantial detriment to a respondent : *McDonald v. McDonald.*[35]

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[30] (1963) 4 F.L.R. 216, 220.
[31] (1963) 4 F.L.R. 394.
[32] (1964) 6 F.L.R. 224.
[33] (1965) 39 A.L.J. 134.
[34] (1964) 6 F.L.R. 31.
[35] (1964) 6 F.L.R. 58.

It will be seen that section 37 (1) has already been considered by a Full Court in three States of the Commonwealth and none of the three decisions gives much comfort to a respondent wishing to oppose the granting of a decree under section 28 (m) on the ground that to pronounce such decree would be harsh and oppressive.

Another aspect of the ground of separation has been dealt with in New South Wales by the Full Court. Certain dicta of the High Court in *Main v. Main*[36] gave rise to doubts as to whether parties could be said, by analogy with a recognized line of cases on desertion, to be living separately and apart within the meaning of section 28 (m) whilst they were living under the same roof. The Full Court held that it was a question of fact in each case and the mere fact that they had lived under the same roof during the period relied upon did not, of itself, preclude the conclusion that they were living separately and apart : *Crabtree v. Crabtree*.[37]

Maintenance

The provisions of the Rules as to assessment by the Registrar of maintenance and, where necessary, the issue of a certificate of means, looked most attractive and, on the face of it, provided a commonsense method of dealing with maintenance problems. Unfortunately the system has not worked as well in New South Wales as was anticipated. No trouble is experienced where assessments are concerned but a serious situation has been reached with regard to certificates of means. When working under the State Act and Rules the Registrar and his deputies had no trouble in keeping up to date with applications for maintenance, both permanent and *pendente lite*. It was not often that they would reserve judgment and their awards of maintenance were seldon challenged. Their judgments were characterized by sound common sense and based on a realistic approach to what was often a difficult problem. Under the Federal scheme, however, the necessity to confine their findings in the strait jacket of a certificate of means has slowed them down to a stage where a most unsatisfactory situation has been reached. Many weeks elapse between the date of application for a certificate of means and the date on which the hearing begins and with scores of judgments reserved, it is often months before judgment is delivered. This is unsatisfactory not only to the litigants and to the members of the legal profession concerned ; it also imposes an all but intolerable strain on the Registrar and his deputies. The inevitable delay has nullified the object of the Rules which was to provide a simple and expeditious method of assessing maintenance. Time after time, applications are made to a Judge for interim orders for maintenance pending

[36] (1949) 78 C.L.R. 636.
[37] (1963) 5 F.L.R. 307.

the hearing of the suit, for wives and children would be left near-destitute whilst waiting for months for the issue of a certificate of means. Practitioners in New South Wales look longingly at South Australia where the Master, apparently, awards maintenance : *Nicholls v. Nicholls.*[38] A test case in New South Wales was to be stated by way of special case for the opinion of the High Court pursuant to section 91 but unfortunately the application was discontinued.

Whilst referring to section 91, mention might be made of the decision of the Full Court in *Horne v. Horne.*[39] It was there held that the provisions of section 91 do not deprive the Court of the power under section 86 of the superseded State Act to refer a matter of law to the State Full Court, but Barwick C.J. has recently expressed considerable doubt as to the validity of the Full Court's decision on this point : *Shaw v. Shaw.*[40]

One other matter might be mentioned under the heading of maintenance. The provisions of the State Act in New South Wales, as in other States of the Commonwealth, required the making of an application for permanent maintenance at, or very shortly after, the pronouncement of decree absolute. If no such application had been made, the ex-husband was able to go on his way rejoicing for he had acquired an immunity from an order against him for permanent alimony. However, in *Alderdice v. Alderdice,*[41] the Full Court held that the Act had destroyed this immunity and, in the appropriate circumstances, an ex-husband might be made liable to the payment of permanent maintenance at any time after decree absolute.

Settlements

In the early days of the operation of the Act it was the practice of the Court in New South Wales when ordering the making of a settlement to limit the meaning of the word to some extent and to provide for the appointment of trustees or trustees for sale. In *Horne v. Horne,*[42] the Full Court construed the word " settlement " in the widest possible terms, holding that it included a straight out transfer of property. Following this decision, many practitioners developed a tendency to include in a petition almost as a matter of course, a claim for an order that the respondent transfer to the petitioner his or her interest in the matrimonial home whenever the respondent either owned the home or had a joint interest in it with the petitioner. Such tendency now appears to have been checked following a series of decisions in New South Wales

[38] (1962) 3 F.L.R. 478.
[39] [1963] S.R. (N.S.W.) 121 ; (1962) 3 F.L.R. 381.
[40] (1965) 39 A.L.J.R. 139.
[41] (1963) 5 F.L.R. 1.
[42] [1963] S.R. (N.S.W.) 121 ; (1962) 3 F.L.R. 381.

and other States wherein it has been pointed out that it was not the intention of the legislature that a settlement should be ordered as a punishment for the commission of a matrimonial offence : *Blinkco v. Blinkco*;[43] *Jones v. Jones*;[44] *Grieveson v. Grieveson.*[45] By the time section 86 was considered by the High Court in *Lansell v. Lansell*[46] it had become recognized that the section provided its own criterion. The Court would order such settlement of property as it considered just and equitable in the circumstances of the case. As the Full Court recently held in New South Wales, an order under section 86 (1) for a settlement of property may not be made in general terms requiring a party to settle, for example, a sum of money on the other party. It must relate to specific property : *Smee v. Smee.*[47]

Injunctions

For the time, injunctions, like settlements, were treated by the profession rather as a new toy. In cases of cruelty, where both parties were still living in the matrimonial home at the date of the petition, some solicitors, emboldened by the decision of Pearce J. (as he then was) in *Silverstone v. Silverstone*,[48] included in a wife's petition as a matter of course, a claim for a mandatory injunction ordering the husband to vacate and remain away from the premises. Applications were then made, *ex parte*, for such injunctions immediately the petition was filed. In the special circumstances of the case Nield J. ordered a husband to vacate his own home, pending the hearing of the suit, and remarked on the wide and unfettered powers conferred upon the Court by section 124 : *Capper v. Capper.*[49]

The Court, in New South Wales, at least, has now made it clear that a husband will not be ordered from the matrimonial home on the filing by the wife of a petition on the ground of cruelty unless there are special circumstances justifying the granting of such an order ; *Taylor v. Taylor.*[50] In Tasmania, Crawford J. refused to restrain a husband from completing the sale of the matrimonial home which, to his wife's knowledge, he had contracted to sell : *Miles v. Miles.*[51] Even in a case where the wife owned the matrimonial home, an interlocutory injunction ordering the husband to vacate was refused when the wife wanted vacant

[43] (1964) 5 F.L.R. 40.
[44] [1964-65] N.S.W.R. 176.
[45] (1962) 6 F.L.R. 22.
[46] (1964) 110 C.L.R. 353.
[47] 23 September 1965 (as yet Unreported).
[48] [1953] P. 174.
[49] (1961) 2 F.L.R. 357.
[50] (1964) 5 F.L.R. 122.
[51] (1962) 3 F.L.R. 23.

possession, not so that she could live there herself but to enable her to sell with vacant possession : *Doran v. Doran.*[52]

However, in many unreported cases the injunction power has been freely used when circumstances justify its use and it has proved a swift and valuable instrument of justice. Parties have been restrained from leaving the jurisdiction, from taking children out of the jurisdiction, from collecting money such as superannuation payments or salary in lieu of leave payable to them, from coming upon premises occupied by the other party, and from molesting the other party. It is a common experience in New South Wales after the granting of an interlocutory injunction to find, on the application to continue the injunction, that the parties have compromised not only the dispute with which the injunction was concerned but a number of other ancillary matters as well. The value of section 124 has been strikingly proved.

Conclusions

Conclusions from a random survey such as this are not of much value but one or two matters might be mentioned. By and large the Act has achieved its purpose not only of providing a uniform divorce law for the Commonwealth but of providing a valuable piece of social legislation to meet the requirements of a modern community. The very essence of divorce is a compromise and the Act has achieved a well-balanced compromise between the need to preserve the stability of marriage and the family on the one hand and the need, on the other hand, to readjust the relationship between parties to a marriage which has utterly broken down. It has removed anomalies which existed under some of the State laws and some causes of injustice which undoubtedly existed. In general, it may be said to be working well and the prognostications of the prophets of gloom have been proved false.

One cynical query might be made. Politicians have been in the habit of saying for years that divorce legislation is political dynamite. When the Government took over the Matrimonial Causes Bill from the Member for Balaclava it must have done so with some trepidation and regarded it as something to be handled most gingerly. The pill was sweetened for the sensitive public palate by an attractive sugar coating. This took the form of the provisions, already mentioned, for conciliation and reconciliation, the requirement that the Court should be satisfied that proper arrangements have been made for the children before a decree *nisi* can become absolute and the absolute bar to the pronouncing of a decree of dissolution on the ground of separation when it would be harsh and oppressive to the respondent so to do. Yet these are the very provisions which, to some extent, have proved

[52] (1964) 6 F.L.R. 209.

unworkable, the safeguards which have been described as mainly illusory. The cynic might ask whether it was ever thought that these attractive provisions were workable or whether they were merely inserted as window-dressing to secure the passing of a Bill which might otherwise have had a rough passage. However, four and a half years is a short period in the lifetime of an important Commonwealth Act. The very novelty of some of the conceptions embodied in these provisions may have contributed to the rough handling they have received and attracted criticism from Courts unaccustomed to such novelties. Time and experience may yet prove their value and permit them to achieve their benevolent purpose in full measure.