THE PETITIONER'S DISCRETION STATEMENT.*

Some months ago when the organisers of the Summer School asked me to write a paper on some aspects of the modern developments in Family Law my first re-action was to go to the Reports and look for some startling decision handed down by some revolutionary Judge of the Eastern States.

However, having allowed procrastination to get the upper hand and really only getting the grips of the problem within the last fortnight or so I came to the conclusion that it may be of more value to dwell on the recent "practical" if not "recent legal" developments affecting the filing and result of filing discretion statements by the parties to Matrimonial Causes and the possible assistance that these statements can become to the opponent spouse.

I suspect that the position in Western Australia is much the same as it appears to be in New South Wales where Selby J. in *Nestor v. Nestor*[1] observed that counsel for a petitioner who did not desire the contents of his discretion statement to be disclosed argued *inter alia* that: "the secrecy of discretion statements and the provision of the rules whereby they are required to be filed in a sealed envelope, and the previous practice of the court justified the common practice of counsel and solicitors assuring their clients that the disclosures made in the discretion statements would not be available for inspection until the hearing of the suit."

Very briefly the parentage of the discretion statement now required by the Matrimonial Causes Act 1959-1965 comes from section 41 of that Act.

Section 41 provides as follows:—

"The Court may, in its discretion, refuse to make a decree of dissolution of marriage upon a ground specified in any of paragraphs (a) to (l) inclusive, of section twenty-eight of this Act, if, since the marriage—

(a) the petitioner has committed adultery that has not been condoned by the respondent or, having been so condoned, has been revived;"

Whilst it is true as section 41 goes on further to provide that other discretionary bars include:

The petitioner's cruelty to the respondent

* A paper read at the 1966 Law Summer School held at the University of Western Australia.

1 (1965) 6 F.L.R. 394, at 395.

The petitioner's wilful desertion of the respondent

— and —

The habits of the petitioner conducing or contributing to the existence of the ground

it is only the petitioner's adultery that requires the specific statement and self incrimination.

Practitioners will, of course, recall that division 5 of the Matrimonial Causes Rules provides for the necessity of the preparation of discretion statements by a person who is seeking a decree of dissolution of marriage on a ground specified in any of the sub-paragraphs of section 28 save for sub-paragraph (n) that is the presumption of death ground.

Rule 164(1) of the original Rules provided that "A person other than the Attorney-General or a person authorised in writing by the Attorney-General, is not entitled, by searching at the office of a Court, by inspecting any records of a Court or by making any other enquiries, to be informed whether or not a petitioner or respondent in proceedings has deposited a descretion statement in accordance with Rule 161 of these Rules."

This Rule has, of course, now been repealed and by the insertion of Rule 40(A) Gazetted on the 15th of January, 1963 the exact opposite situation has developed.

Rule 40(A) provides that:—

"Where a petitioner for a decree of dissolution of marriage on a ground specified in any of paragraphs (a) to (m) inclusive, of section 28 of the Act has committed adultery since the marriage but before the filing of his petition, his petition shall state that the Court will be asked to make the decree notwithstanding the facts and circumstances set out in his discretion statement."

Pursuant to the Statutory Rules 1965 No. 29 the petition of the petitioner who has committed adultery to comply with Rule 40(A) reads *inter alia* as follows:

"Exercise of Court's Discretion

The Court will be asked to make a decree not withstanding the facts and circumstances set out in the discretion statement filed herewith."

It would seem that the insertion of Rule 40(A) and the deletion of the original Rule 164(1) has had a rather unexpected practical turn so far as the adulterous petitioner is concerned.

Prior to the 28th of February, 1963 and subsequent to the institution of the Matrimonial Causes Act 1959-1965 the respondent

could well not have had any knowledge that in a divorce suit brought against him the petitioner would admit that he had digressed from the true and straight path of purity.

Whilst I would have thought that the situation as existed in the first couple of years of the existence of the Act was, in fact, of assistance to encourage petitioners to make honest and true statements of their adultery because the fact that the adultery would be kept from the respondent and be prima facie exclusively for the judge it would seem that on at last two occasions there have been judicial opinions expressed in Australia that the original Rules under division 5 of the Rules were unsatisfactory. I might observe that prior to the 1st of March, 1963 the majority of the Judges of the Supreme Court of Western Australia favoured the position that respondents with no knowledge of the petitioner's adultery could not use section 99 of the Act as the fishing line to catch a party cited.

The "unsatisfactory aspects" of the original division 5 were referred to by Nield J. of the Supreme Court of New South Wales in delivering his decision in *Taylor v. Taylor (No. 2)*[2] where he said:—[3]

> "I might also draw attention to another aspect of the case which presents difficulties beyond the usual difficulties that exist in matters of this kind. There is no longer any requirement that a petitioner who has been guilty of adultery shall in any way disclose the fact of that adultery to the respondent. I think this is a most undesirable thing so far as the Act and the Rules are concerned. The parties are not required to mention it in the petition; they are not required to pray the exercise of the court's discretion in their favour. They are required by the Rules to file a discretion statement but they are not required to give notice to the other side that a discretion statement has been filed. There is only one person, the Attorney-General who is entitled to know that a discretion statement may involve the whole question as to whether the respondent defends the suit or not. That the respondent is denied knowledge, by that course of procedure, of facts which may easily give rise to a sound defence is in my view a most undesirable situation."

Barry J. of the Supreme Court of Victoria in delivering his decision in *Moore v. Moore*[4] said:—

> "The requirements of r. 161 and of r. 162 (except sub-rr.

2 (1961) 2 F.L.R. 371.
3 *Ibid.*, at 378.
4 (1962) 3 F.L.R. 113, at 115.

(6) and (7)) are therefore sensible and necessary, but the same cannot be said for the elaborate provisions for secrecy in r. 162 (6) and (7) and r. 164. These provisions have created administrative difficulties for the court's officers since the commencement of the Act, and still do, and in my opinion they are unnecessarily cumbersome and serve no genuinely useful purpose. Nothing like them has a place in the procedure of this court when it exercised jurisdiction under State legislation, and I can recall no genuine instance of injustice occurring because of the lack of them. Because it involves a disregard of the duty of sexual fidelity, adulterous conduct has traditionally been regarded as more conclusively disruptive and repudiatory of the obligations of marriage than other grounds. In the present climate of social opinion there is no defensible analogy between a person charged with a criminal offence and a person guilty of adultery who seeks relief in the matrimonial causes jurisdiction. Protection against self-incrimination is a valuable and necessary safeguard in the criminal jurisdiction, but it is misguided to endeavour to maintain a similar protection for persons seeking relief who themselves have committed adultery. Such a person "may be said to be *in petitorio,* and bound to disclose all material facts by analogy to the rule long acted on with regard to what were called 'petitions of course', and orders thereon (per Cussen J. in *Adams v. Adams* [1928] V.L.R. at p. 93). Acting under r. 164 (3) it is my practice to require a discretion statement to be tendered in evidence and to order that it be retained on the file and not destroyed. I have not seen any advantages in the present procedure that aims at preserving the statement from disclosure before trial, though I have on occasions found it productive of inconvenience and delay because of the need to grant adjournments when the hearing of the case is commenced and the contents of the discretionary statement are disclosed."

In any event subsequent to the 1st of March, 1963 by his close reading of the petition served on him the respondent should be put on his or her guard by the notice endorsed thereon as prescribed.

Many respondents have, one suspects, not only been told of the petitioner's fortune in finding solace with another as a result of reading the petition but as a result of that notice have seen fit to defend the petition and cross-petition (if there be such a procedure) purely on

the fact of the notice aforesaid or alternatively to admit the ground included in the petition but to seek that that petition be refused because of the petitioner's own adultery.

It would seem therefore that the practice which I am confident has developed in this State and to which I referred to in the opening paragraphs of this paper of assuring petitioners that they could frankly and fully disclose their adultery as it became only contained in a document which was literally between them and the judge ought to be discontinued. I do not wish to be taken as implying that petitioners should be discouraged from making a full and frank disclosure of their adultery but practitioners should at least save their own subsequent embarrassment by telling their clients quite frankly, when asked, that on the modern law they stand a good chance that by disclosing their adultery they will become subjected, in due course, to a cross-petition against them.

The practical effect of giving this advice to many clients will be for the clients to decide not to disclose their adultery which, of course, seems to be a highly undesirable thing.

It is for this reason that I subscribe to the view that while the discretion statement as completed by the petitioner obviously ought to be tendered in evidence at trial, the trial judge should exercise, with the greatest of care, his discretion to allow the respondent to, at trial, amend his answer so as to seek a ground of dissolution of marriage on the facts contained in the discretion statement.

It seems to me to be a proper state of affairs that the petitioner having made the full disclosure of his or her adultery should be subjected to cross examination by the respondent at trial as to the contents thereof in order that the trial judge can draw proper conclusions as to whether or not, subject to the ground of the petition being made out, the court may, in its discretion, refuse to make the decree of dissolution of marriage sought; but that the petitioner should be in the position that where the respondent has not bothered to enquire about the petitioner's misdoings or where the petitioner's misconduct is not really relevant to the question of the breakdown of the marriage than the petitioner's "lover" should not become the subject of being made a party to the proceedings.

Perhaps the writing of this paper has been inspired by a late 1965 widely followed decision of D'Arcy J.[5] which decision, though cast on the most correct legal principles, certainly appears from what

[5] Grant v. Grant. Not reported.

has been said by fellow practitioners to have caused some surprise and perhaps confusion amongst the profession. In the particular suit the wife petitioned for a decree of dissolution of marriage on the ground of her husband's adultery with a named co-respondent. It would appear that on two occasions about six months after the final cessation of cohabitation the petitioner had committed adultery with a man named in her discretion statement. In that suit the respondent had, by his solicitors, requested the petitioner for particulars. The first particular sought by the respondent was the full name address and occupation of the person or persons with whom the petitioner committed adultery since the marriage. The petitioner, through her solicitors, quickly replied to the request for particulars and dealing with the subject of the petitioner's adultery declined to give these particulars on the ground that the request for the said further particulars was a request for "privileged information."

No doubt it would, at first brush, seem to be the proper answer to the request because on a reading of Rule 164 as amended it would seem that the respondent was asking for information which the petitioner was bound to give and self incriminates the petitioner and is seeking information which the petitioner, pursuant to the Rules, gives to the court under a veil of secrecy by way of a sealed envelope.

In this particular case the husband then applied (without success) to a Judge in Chambers for leave to file an answer containing allegations of adultery. The reasons for the Chamber Judge declining to give the respondent such leave are not clear though it would appear that the Chamber Judge may well have been acquainted with the decision of *Clear v. Clear*.[6] That case decided *inter alia* that leave to amend an answer because of the existence of a discretion statement was in the discretion of the court. Hodson L.J. in that case says as follows:—[7]

> "The present position is that the statement which is lodged with the court is not open to inspection by the opposite party until it is put in, and all that has happened in this case is that the husband has had notice by the wife that at some future date she was going to make an admission which she has not yet made. I do not think that it could be said in those circumstances that there was material on which the husband could have put in an answer of alleged adultery by reason merely of the existence of that prayer."

[6] [1958] 2 All E.R. 353.
[7] *Ibid.*, at 357.

Subsequent to the said Order of the Chamber Judge the respondent nevertheless once again, by letter, approached the petitioner's solicitors stating *inter alia* that "he is determined to establish the petitioner's adultery which the filing of her discretion statement indicates she has committed . . . . Would you therefore indicate at your earliest convenience whether you are prepared to give us any information which may save expense in proving the petitioner's adultery."

It seems once again the petitioner's solicitors behaving in what I would consider to be an acceptable fashion (pursuant to Western Australian practice) prior to the particular case which is now which is now being dealt with ignored the letter.

Shortly before trial the respondent's solicitors once again wrote saying:—

> "It is doubtful that the trial will proceed beyond the petitioner's cross examination as soon as the contents of her discretion statement have been disclosed. We propose to seek an adjournment for the purpose of amending the respondent's supplementary answer and cross petition or filing a further supplementary answer on the grounds of the petitioner's adultery.
>
> If an adjournment is acquired it will be as a result of your client's refusal to supply the details requested and we shall ask for the costs of the adjournment and tender in support of our application copy of our request (for particulars) of the 11th of March and a copy of this letter and a copy of our letter (previously referred to) of the 28th of April.
> In the circumstances the petitioner may like to consider her refusal and should she do so we would like to hear from you at an early date."

Once again the petitioner declined to supply the information.

The final step taken, before trial, by the particular respondent was to serve a formal notice to admit facts. One of the facts asked to be admitted was that "Since cohabitation ceased the petitioner has committed adultery with . . . . ."

The petitioner was not prepared to admit this fact though she did in fact make an admission of other facts contained in the notice.

The progress of the trial was uneventful until the petitioner completed her examination-in-chief.

At this point the trial judge referred the petitioner's counsel to

paragraph 12 of the petition (this paragraph was complying with Rule 40(A) of the Matrimonial Causes Rules.)

The petitioner's counsel took the view (I suggest at variance with the practice of the majority of the Supreme Court of Western Australia) that all the petitioner had to do concerning her admitted adultery was to file a discretion statement. The trial judge was clearly of the opinion that the document should at least, before cross examination of the petitioner, come before him so that he would have read the contents thereof.

This proposition of law seems to be quite clear though it is apparent from sitting in the court and observing the cases (especially undefended ones) that a considerable number of practitioners in this State do not seem keen to follow the proposition.

The Court of Appeal in *Lewis v. Lewis*[8] held per curiam that in the ordinary case it is convenient that, where the petitioner seeks the exercise of discretion, evidence of his adultery should be given in the place of examination-in-chief where the fact chronologically appears, rather than by producing the discretion statement separately at some other stage.

Hodson L.J. said:—[9]

> "In the ordinary case where discretion is sought, whether the suit be defended or undefended, it seems to me to be convenient that the petitioner should be asked to deal with the fact of his or her adultery in examination-in-chief in the place in which that fact chronologically appears. For example, if the adultery had taken place immediately after the marriage, it should be dealt with then in evidence; and I deprecate the practice which seems to have been adopted in some cases of dealing with the whole case as pleaded and then, as if by way of afterthought, suddenly producing a document which bears the dignified name of "discretion statement", handing it to the witness saying: "Is that all right?", hoping the witness will say "Yes", and leaving it at that. The adultery which is referred to in that statement is part of the human story which the court has to investigate, and there is no magic in the discretion statement itself; that is a document which is provided for by the rules in order that these matters may be given proper consideration and that the court may have the material before the hearing,

[8] [1958] 1 All E.R. 859.
[9] *Ibid.*, at 863.

although the parties have not access to it as of right. But the matter with which the court is concerned at the end of it all is the evidence given by the parties and nothing else—not the so-called "discretion statement" any more than the petition or the answer. It is the evidence which has to be dealt with."

I would say that I certainly feel that the adulterous petitioner has a much better chance of success (that is of persuading the Judge not to exercise his discretion against her) if the petitioner freely introduces the question of her discretion statement at the appropriate chronological stage of her story. To try to sneak past the discretion statement in the words of Hodson L.J. "as an aferthought" is to tend to give the act of adultery that excuse is sought for more colour (of a soiled nature) than perhaps it deserves.

D'Arcy J. relying on the authority of the *Lewis Case* ruled that the discretion statement either be read out in open court or be tendered to the other side. His Honour indicated that it would be preferable that the document be read out and become part of the transcript of evidence.

Immediately following the document being read out in open court the respondent's counsel indicated that on the authority of *Tunney v. Tunney*[10] that at the end of the petitioner's cross-examination or re-examination he would seek leave to allege on behalf of the respondent that the petitioner had committed adultery with the man named in the discretion statement.

In fact the respondent's counsel at the close of the petitioner's case successfully obtained leave to amend to bring in the man named in the petitioner's discretion statement.

Tunney's Case held that:—

"The exercise of discretion whether to grant or withhold leave to one party in a divorce suit to amend, by adding a charge of adultery based on the facts disclosed by the discretion statement of the other party when it is put in evidence in the suit, should be guided in accordance with the following principles:

(i) where, when the evidence is complete, there appears to be a real possibility that neither side will succeed in obtaining a decree, leave is usually given, in order to avoid the useless duplication of proceedings which would result if the

[10] [1963] 1 All E.R. 303.

first suit were dismissed and a new petition based on the disclosed adultery were then presented.

(ii) In all other cases the decision to give or to refuse leave must depend on whether the ultimate result of giving or refusing leave will represent substantial justice between the parties, that is to say, whether the ultimate order of the court will fairly accurately reflect the court's assessment of the responsibility of each party for the breakdown of the marriage."[11]

If these principals are strictly followed then in my view the overall effect will be most beneficial as the necessity for delay (by serving the party named in the discretion statement) in the conduct of the case will be often obviated.

It would seem that in the case determined last year by D'Arcy J. that from the petitioner's case (including her discretion statement) there could be drawn a connection between her alleged desertion and her admitted adultry and also the judge was impressed by the argument that all matters relevant to the issue should be before the court on the pleadings. In my view to allow the respondent to amend at the close of the petitioner's case whilst not prejudging the case could well be anticipating the result.

There is another factor that would appear to be of relevance in this matter to be considered by practitioners and that is the question of costs. In the case under review the trial judge on the basis that the respondent had done all that he could to get the information from the petitioner as to her adultery ordered that the petitioner pay the costs by reason of the adjournment to allow the respondent to bring in a party cited.

It would seem therefore that practitioners would be well advised to take the most detailed instructions from their client as to the ground of the petition and as to the contents of the discretion statement before they draw the petition and discretion statement or otherwise they will not be able to properly decide as the case progresses how the respondent's application (if made) for particulars of the petitioner's indiscretion will fare before the court if the petitioner elects not to co-operate.

Since the decision of D'Arcy J. the New South Wales decision of *Nestor v. Nestor*[12] has determined that there are some circumstances

11 *Ibid.* See headnote.
12 (1965) 6 F.L.R. 394.

in which the contents of a discretion statement might be made available to a respondent before trial.

In *Nestor v. Nestor* the proceedings were an application on behalf of the respondent wife for orders that the petitioner furnish the names and the addresses of the persons referred to in a discretion statement filed by the petitioner and that the petitioner should provide particulars of the adultery admitted by him.

In the particular case the husband was seeking a decree of dissolution of marriage on the grounds of alleged cruelty by the respondent to the petitioner and on the ground of adultery of the respondent with the co-respondent. When the matter was argued before the judge the petitioner argued that if the respondent had an inspection of the discretion statement or an order for the particulars sought the respondent would be placed in a position of unfair advantage in that not having filed an answer she would be in a position to frame her defence around information disclosed in a confidential document. As has been seen the petitioner also argued that discretion statements were in themselves secret until the hearing of the suit.

The judge suggested that the husband's arguments would be met if the wife or her advisor set forth in detail the points on which the respondent intended to rely in her answer and cross petition. The respondent's solicitor accepted the suggestion and set out in affidavit the gist of the instructions he had received both as to the defence to the allegations of cruelty and particulars on which she would rely in her cross petition on the grounds of cruelty. This affidavit apparently contained references to allegations of improper conduct by the husband with a woman named in the affidavit and the allegations were placed under the heading of "Respondent's Allegations of Cruelty". The affidavit further contained allegations of adultery against the petitioner but did not specify the name.

Upon the judge's ruling that the person with whom the petitioner allegedly committed adultery should be named the respondent's solicitor informed the court that the person with whom adultery would be alleged was the person named in the allegation of cruelty.

Selby J. said:—[13]

> "In the present case, I consider that the affidavit of the solicitor for the respondent is in such a form that the respondent, though not bound by this affidavit to limit her answer to matters specified therein, has disclosed both to the court

[13] *Ibid.*, at 396.

and to the petitioner, through her solicitor, the general nature of her defence and cross petition, and considerable detail as to the allegations which are proposed to be made. I consider that any significant departure by her from the matters set out in the affidavit might well place her at a disadvantage when cross-examined by counsel for the petitioner, rather than place the petitioner at any disadvantage.

It is true, as Mr. Broun suggests, that there is sufficient already indicated in this affidavit to allow the respondent to file an answer and if, at a later stage, the discretion statement is made available to her or the particulars now sought are made available, it would be open to her if she were so advised to file a supplemental answer. However, I consider it is partly to avoid the unnecessary expense and delay occasioned by such unnecessary pleading that the court, amongst other reasons, is empowered to authorise disclosure of discretion statements."

The Judge therefore considered that in the case before him the respondent was entitled to particulars that she sought in paragraphs (a) and (b) of her application, namely the particulars of the name and address of the persons referred to in the discretion statement. The Judge, however, conceded that the order should be made subject to the rights of the petitioner to withdraw his petition within a specified time and that if the petition was withdrawn then of course the necessity for the compliance with the order would lapse.

I would suggest that practitioners would be well advised if faced with a respondent that apparently does not know enough to file a cross-petition but who is encouraged by the news of the petitioner's indiscretion to follow the undermentioned procedure.

(a) If the respondent asks for particulars of the contents of the discretion statement refer the respondent to the decision in *Nestor's Case* and let the matter be determined, if the respondent desires, by a chamber judge.

(b) At trial (and in fact all cases where there is a discretion statement) tender to the judge the discretion statement at the chronological stage of the petitioner's evidence to which it is relevant and if the court considers it proper to do so read out the document in open court or produce for inspection to the other side.

(c) If the respondent is trying, at trial, to cross petition—and prima facie the respondent's conduct is the conduct causing the break up of the marriage and that applying the principles of *Blunt v.*

Blunt[14] as modified and explained it is a proper case that the petitioner's adultery be excused—to press for the application of the principle expressed in *Tunney's Case* namely that the evidence should be completed before the discretion of the court to grant leave to bring in the party named be considered.

Of course, in this paper there is really nothing of a modern legal development expressed save for the reference to *Nestor's Case* but it is felt that some of the late 1965 developments are of modern practical effect and if referred to in a paper of this sort may place practitioners on their guard.

Of course, it is to be remembered that having obtained leave to amend on the ground of the discretion statement it does not necessarily follow that sufficient evidence will be obtained to prove adultery against the person named.

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14 [1943] A.C. 517.

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