Legislation for Reconciliation

When the *Matrimonial Causes Act* was enacted by the Commonwealth in 1959, the Parliament inserted in it certain provisions designed to promote the reconciliation of parties to matrimonial proceedings.[1] It would be cynical to suggest that these were intended to serve no better purpose than to be a sop to those who opposed the liberalisation of the law of divorce which the Act was to bring about, notably the introduction of separation for five years[2] which many regarded as putting the seal of public approval upon immorality and marital infidelity.[3] There is no doubt, however, that the inclusion of these provisions enabled the proponents of the Act to claim in effect that they would more than counteract any harmful results that the more liberal availability of divorce grounds might produce. Indeed, the Attorney-General of the day and chief architect of the Act, Sir Garfield Barwick, outlined the philosophy underlying the new law. This was the recognition of the stable marriage as part of the fundamental organisation of the community. From this there follows logically the further recognition that "a formal bond which has no vitality . . . is not performing the social function of stable and sound marriage".[4] The provision of marriage guidance and reconciliation on the one hand, and of means for dissolving the formal bond with justice, when all chance of reconciliation has completely disappeared, on the other, is the two-pronged weapon with which it was intended to slay the double-headed dragon of marriage breakdown. And in their preface Toose, Watson and Benjafield, the learned authors of the standard work on Matrimonial Causes state that the Act "is widely acknowledged to reach a peak of legislative excellence unequalled in the countries which have inherited the English tradition as to marriage and divorce",[5] a view which presumably is meant to apply to reconciliation no less than to the other provisions of the Act, but which has already been doubted[6] and, it is respectfully submitted, is likely to be subject to continuing and increasing doubt.

Unfortunately, if the Parliament had any great expectations of beneficial effects of the reconciliation provisions, these have not, except perhaps to a marginal extent, been realised. No statistics are available from which their impact may be measured, directly or even indirectly, and any appraisal must therefore be based on the impressions of those who have had some experience of the law in action. Where such impressions have been recorded, they suggest disappointment and pessimism.[7]

*This paper was prepared for delivery at the A.U.L.S.A. Conference held in Brisbane in August, 1970.

1. Part III, ss. 14-17 *Matrimonial Causes Act* 1959—See Appendix A.
2. s. 28(m), *Matrimonial Causes Act* 1959.
3. See e.g. Mr. A. A. Calwell, M.H.R., Commonwealth Parliamentary Debates, 1959, House of Reps. Vol. 25, p. 269.
4. Barwick, "Some Aspects of the New Matrimonial Causes Act", 1961, 3 Syd. Law Rev. 409 at p. 414.
5. Toose, Watson and Benjafield, *Australian Divorce Law and Practice*, Law Book Co., Sydney, 1968.
6. Pearce, "The Broken Marriage—Is Modern Divorce the Answer?", in *Divorce, Society and the Law*, Butterworths, Sydney, 1969, p. 53 at p. 67.
7. See Mr. Justice Selby: "The Development of Divorce Law in Australia" (1966) 29 M.L.R. 473, at p. 487; Pearce, *loc. cit.*; Mr. Justice Barber, "Divorce—The Changing Law" in *Divorce, Society and the Law*, p. 69.

Their prototype in the British Commonwealth was, as in so many cases of enlightened social legislation, a New Zealand enactment, the *Domestic Proceedings Act* 1939. Under s. 5(1) of that Act,[8] no complaint seeking a separation order could be heard by a magistrate unless it had first been referred to a marriage conciliator, or unless the magistrate ordered otherwise, which he could do only if he considered such reference inexpedient.[9] In view of the experience of twenty years of operation which was therefore presumably available in New Zealand, it is interesting to wonder whether inquiries were made there to find out how successful in the experience of the courts these provisions had been. Reference to a leading authority suggests that they had proved on the whole ineffectual, that magistrates were usually content to rely on the solicitors' assurance that conciliation was unlikely to be effective.[10] Indeed, it appears that applications to dispense with conciliation were made in the most casual manner, on the mere letter of a solicitor's clerk for example which rather suggests that the whole scheme soon became a dead letter.[11]

Nevertheless, in their disenchantment with the reconciliation provisions of the *Matrimonial Causes Act* judges and practising lawyers often express the view, that while it is usually too late to conciliate once the parties have got into the divorce court, the possibility of bringing them together again is likely to be much less remote if the attempt could be made at an earlier stage. It would consequently be better to do so in relation to lower court proceedings, such as maintenance applications before magistrates.[12] Two States, Queensland and Tasmania, have in fact enacted legislation to promote reconciliation in lower courts[13] and a brief examination of these provisions may help in assessing their effectiveness.[14] Where these provisions are substantially identical, or where nothing turns on any differences that may exist between them, the word "judge" is used indiscriminately for magistrate in the present discussion.

Sections 8 and 9 of the Tasmanian *Maintenance Act* follow closely sections 14 and 16 of the Matrimonial Causes Act. Section 14 of the *Matrimonial Causes Act* and section 8 of the Tasmanian Act do five things:

(1) They lay a duty upon the court to give consideration from time to time to the possibility of reconciliation between the parties (sub-section (1)). Where there appears to be a reasonable possibility of a reconciliation, the judge may
(2) adjourn the case to give an opportunity for reconciliation, (sub-section (1) para. (a)),
(3) with the consent of both parties, interview them in chambers, with or without counsel (sub-section (1), para. (b)),

8. Substantially re-enacted in the *Domestic Proceedings Act* 1968, ss. 13-18.
9. Inglis, *Family Law*, Sweet & Maxwell, Wellington, 1960, (1st ed.), p. 241.
10. *Ibid.*
11. Inglis: "The Hearing of Matrimonial and Custody Cases", in *Family Law Centenary Essays*, Sweet & Maxwell, Wellington, New Zealand, 1967, p. 40.
12. See Mr. Justice Barber, *loc. cit.* p. 75.
13. The *Maintenance Act of* 1965 (Qld.) s. 130, see App. B; *Maintenance Act* 1967 (Tas.) ss. 8, 9.
14. The author wishes to acknowledge with gratitude the help given to him in carrying out a survey of the operation of the Tasmanian sections by the present Tasmanian Attorney-General, the Hon. E. M. Bingham, M.H.A. and his predecessor, the Hon. R. F. Fagan, M.H.A. and the several magistrates and legal practitioners who were kind enough to offer him the benefit of their experience. In relation to Queensland, thanks are due to the Minister for Justice and Attorney-General, the Hon. P. R. Delamothe, O.B.E. who was good enough to make available the observations of several Queensland magistrates.

(4) nominate an organisation or person to endeavour, with the parties' consent, to effect a reconciliation (sub-section (1), para. (c) (i) and (ii)).
(5) After fourteen days has elapsed from an adjournment pursuant to (2), either party may request a resumption of the hearing and in that event, the hearing must be resumed, either by the same or by some other judge (sub-section (2)).

Section 16 of the *Matrimonial Causes Act* and s. 9 of the Tasmanian *Maintenance Act* protect anything said in the course of an attempted reconciliation, by making inadmissible in evidence in any court or judicial proceeding anything that has been said or any admission made during such an attempt.

The Judge as Conciliator

The Tasmanian *Maintenance Act* has no equivalent to s. 15 of the *Matrimonial Causes Act*. That section provides that where a judge has himself unsuccessfully attempted to conciliate between the parties pursuant to s. 14(1)(b), he shall not continue to hear the case himself, except at the request of the parties, and in the absence of such request the resumed hearing must take place before another judge. This provision appears to have been an original departure from the New Zealand precedent and, at first sight, might have been expected to offer substantial advantages by way of savings in time and costs. Its presence, on the contrary, may lead, and indeed has led to problems as will hereafter appear. In New Zealand, by contrast, conciliation was to be undertaken by reference of the case to a conciliator, as a result of which these particular problems could not have arisen.

Section 13 of the Queensland *Maintenance Act,* in sub-section (1) follows the form of the Commonwealth Act much less closely than does the Tasmanian Act, but is not so very different in substance. The principal differences are that the powers of the court, which as in the Commonwealth and the Tasmanian Acts arise upon the appearance of a likelihood of reconciliation, are stated rather in the form of a general discretion to "do all such things and take all such steps as may, in the opinion of the court effect a settlement of the dispute or difference by conciliation". Presumably this would include the kind of action spelt out in the two other Acts, e.g. to refer the parties for outside conciliation, or for the magistrate to conciliate between them himself. Sub-section (3) substantially reproduces the effect of s. 16 of the Commonwealth and s. 9 of the Tasmanian Acts. But unlike the Tasmanian Act, there appears in subsection (2) of the Queensland Act a proviso that is somewhat similar to s. 15 of the Commonwealth Act. Again, however, the discretion given to the court is more widely conceived, in that it leaves it to the court to decide in its "absolute discretion" whether it, the court, is or is likely to be biassed by matters transacted pursuant to the reconciliation attempt. If it does so decide, it appears that the court is thereupon debarred from proceeding further, although it is not clear what consequences would then ensue. One would expect that the matter could be referred to another magistrate, but it may be open to argument that the court may have to dismiss the matter there and then.

The implications of s. 15 of the Commonwealth Act are considerable, and a reference to the Parliamentary Debates of 1959 shows that their significance was fully appreciated by some at the time. The possibility of a judge continuing with a court hearing after having taken part in an attempt at reconciliation was attacked in a spirited debate in the Senate, particularly by Senators McKenna and Vincent, both experienced barristers, and by Senator Anderson, a non-lawyer but one who displayed considerable insight into the problems to which

the provision could give rise. Attention was called, incidentally, to the position of certain senators who had opposed a similar provision in the *Conciliation and Arbitration Bill* 1956, but who saw nothing objectionable to it in matrimonial causes. Senator McKenna moved an amendment seeking to debar a judge in such circumstances altogether from continuing the hearing, even though the parties might have no objection. He pointed out that it might be very difficult for a judge to eliminate from his mind at any subsequent hearing admissions that had been made, or facts that had emerged in the course of a discussion in the judge's chambers. He felt that the judge would be very unwise to embark on such a process and that if it failed, nothing on earth would persuade him to continue with the hearing, even if the parties requested him to do so, if he felt his mind had been coloured by it. Otherwise there was a danger that justice would not appear to be done[15]. Senator Vincent put a similar point of view[16] and even Senator Wright, another extremely able and experienced barrister, who was not prepared to vote for Senator McKenna's amendment, agreed that for a judge to be the recipient of a confidence would constitute a great embarrassment to his continuance of judicial duties.[17]

This kind of embarrassment has in fact been the experience of several magistrates acting under the Tasmanian *Maintenance Act*. One specific instance occurred where a defendant husband in his sworn evidence expressed his willingness to return to the complainant wife. When the parties were subsequently interviewed in the course of an attempt at conciliation by the magistrate in the privacy of his chambers he declared quite categorically that he would on no account return to her, while the wife indicated her own willingness to resume cohabitation. In circumstances like these the magistrate is under a considerable difficulty at the resumed hearing in trying to dismiss from his mind what he has learnt during the interview. Indeed, how could he, in such a situation and in the light of his knowledge, conscientiously go through the farcical and complete unreality of basing an order, or the dismissal of an order, on the expressed willingness of a party to resume cohabitation which he knows to be insincere? The case is by no means uncommon as the comments of other magistrates, both in Tasmania and in Queensland showed. In fact the effectiveness of reconciliation is not likely, by the very nature of the conciliation process, to be subjected to testing in court except on the rarest of occasions. One such case which reflects the difficulty is *Luther* v. *Luther*,[18] a decision of the Queensland District Court in an appeal from a magistrate. It appears that the decision of the magistrate was objected to on the ground that he had taken irrelevant and inadmissible considerations into account, being matters that had been put before him during an attempted reconciliation in chambers, and that he had thereby erred in law. As it turned out, the District Court set aside the magistrate's order but not on this ground, in relation to which it held that the magistrate was authorised by the Act to continue hearing the case himself after an abortive reconciliation conference. But so far as one can judge from the report one may speculate that what took place in the magistrate's chambers, and subsequently in open court may have been very much the same kind of display of contradictory attitudes on the part of one, or perhaps even both of the parties, which could have led to the magistrate's difficulties. The decision does underline the soundness in Senator McKenna's arguments in support of his abortive amend-

15. Commonwealth *Parliamentary Debates*, Senate, 1959, Vol. 16, p. 1920.
16. *Ibid.* p. 1922.
17. *Ibid.* p. 1921.
18. [1969] 63 Q.J.P.R. 87.

ment to s. 15 of the *Matrimonial Causes Act*. The plain fact of the matter is that the present adversary method of procedure in matrimonial cases does not readily lend itself to the admixture to it of an inquisitorial function, which the conciliation method of settling disputes basically involves. Moreover, judges or magistrates are not as a rule qualified or experienced in matrimonial conciliation, a function which for a variety of reasons they do not see as part of their duties. The expedient of using a judge as a conciliator therefore cannot inspire any confidence that the problem is in the best possible of expert hands.[19]

The Cost of Conciliation

Another criticism that may be made is the increased costs which any adjournment, including an adjournment for the purpose of reconciliation almost inevitably brings with it. It is a problem that is more acute at Supreme Court level, but it will also arise in the lower courts. It must certainly militate against any willingness of litigants to avail themselves of reconciliation during court proceedings. This objection was also foreseen during the *Matrimonial Causes Bill* debates. Sir Garfield Barwick himself adverted to it when he said:

> "I am conscious that a judge, who unwisely intervenes and fails of his purpose, may thus cause the parties delay and expense while another judge is found and the case recommenced. But I would expect judges not to conciliate unless there are sound prospects of success, and the parties will no doubt realise before giving their consent to conciliation by the judge himself that they may thereby involve themselves in some additional costs."[20]

This point was also made by Senator McKenna who said that depending upon the stage the proceedings had reached, the costs of adjournments might be very substantial.[21]

These sobering comments provoked the ingenuous reaction of one idealistic member. Mr. Stewart, the member for Lang and, needless to say, not a lawyer himself, referred to the fact that marriage counselling had been and would most likely continue to be done by people acting in a voluntary capacity as the Attorney-General had previously indicated. He thought therefore that it was reasonable to expect that

> ". . . the legal men acting in the case should also volunteer their services out of a similar sense of vocation, in order to preserve the welfare of the family. Without being in any way disparaging, let me remind the House that lawyers are able to act in divorce matters only because of the unhappiness of the unfortunate married couples and if they are prepared to take on such cases, then surely they should also be prepared, if a judge attempts to conciliate, to refrain from charging extra fees".[22]

19. The problems raised by an involvement of judges and attorneys in the actual processes of conciliation or attempting to conciliate are discussed in an article by Conway, P.L.: "To Insure Domestic Tranquility: Reconciliation Services as an Alternative to the Divorce Attorney", 9 J. Fam. L. 408, (1970). Among the points there made are the lack of knowledge as to conciliation processes and services among lawyers, the litigation orientedness of most divorce lawyers, the conflict of interests where a lawyer attempts to conciliate and the likelihood in such an event of having to abandon a case if conciliation is unsuccessful.—See also Isaac, S.M.: "The Family Lawyer and Extra-Legal Resources", 1 Fam. L.Q. 13 (1967).
20. *Commonwealth Parliamentary Debates,* H. of R. 1959, Vol. 23, p. 2227.
21. *Commonwealth Parliamentary Debates,* Senate, 1959, Vol. 16, p. 1921; cf. Senator Wright, ibid.
22. *Commonwealth Parliamentary Debates,* H. of R. 1959, Vol. 25, p. 2709.

Allied to this outlook was a touching faith in the ability of judges to effect reconciliation, displayed by Mr. Duthie, the member for Wilmot, though in a former minister of religion such faith was perhaps not out of place. Commenting on Part III of the Bill he expressed the hope that it would:

> ". . . create a new race of judges—men with a complete new outlook on this vital matter, men who will find themselves acting as conciliators and not just giving judgments, because they will be getting couples together in their own chambers, prior to or at any stage of proceedings right up to the final stage, in order to prevent marriages from going on the rocks. These men will need to be of a special type. They will need to be humanitarians and I think that they should be Christians as well because this legislation will place on their shoulders a great responsibility."[23]

Apart from the obvious comment that even a judge cannot be expected to prevent a marriage from going on the rocks if it has already done so,—which is why it has come before him in the first place,—it is suggested without any disparagement that the hopes of neither Mr. Stewart nor of Mr. Duthie have materialised, nor are they likely to do so. A more scientific approach would be to realise that neither the functions of lawyers and of marriage conciliators, nor the processes through which they respectively operate, are sufficiently similar to allow of any ready or successful amalgamation of the functions of the two professions.

Conciliation and court intervention

It is not suggested that the present provisions be abandoned—at least not unless something more effective can be put in their place. They are of some utility and better than nothing. According to the estimate of the Chief Stipendiary Magistrate in Brisbane—and it is no more than a guess, since no statistics are available to allow of greater precision,— the percentage of success through conciliation before magistrates may be in the vicinity of 2%.[23A] In the absence of any follow-up procedure the durability of even that number of patched up marriages cannot be measured. In the nature of things, however, one would expect even this low percentage of apparent successes to be much higher in relation to lower court than in Supreme Court proceedings. The assumption underlying this paper is that if there is evidence of any success at all in marriage guidance, however slight, it is worth persevering with it, and if the success is greater in lower court proceedings than it is in the Supreme Court then it is especially worth while persevering with conciliation in that jurisdiction.

One other State at least has shown some interest in lower court reconciliation. Last session, the Victorian State Opposition put forward a private members' bill to set up Family Courts to promote reconciliation in magistrates' courts. As yet this bill has not come on for debate. But the State Attorney-General, Mr. G. O. Reid is believed to be not unsympathetic to some such measure, and the Victorian Family Council also has submitted proposals to him which would tend in the same direction. None of these proposals however would go any

23. *Ibid.* p. 2739.

23A. Since the total number of maintenance cases heard in Queensland Magistrates' Courts in the 12 months ending 30th June 1970 amounted to 665, it will be seen that even a success rate of 2% will be well worthwhile. In point of fact, however, the above figures relate both to applications for maintenance orders and applications for variation of such orders, and it is likely that the latter category of case would not lend itself to conciliation as readily as initial applications, by reason of the effluxion of time.

further in essence than to reproduce provisions similar to some of those now to be found in Part III of the *Matrimonial Causes Act*. In some respects they are in fact distinctly inferior. One glaring defect is the provision designed to confer privilege upon conciliation attempts so as to protect them from subsequent disclosure in court proceedings. Where both the Commonwealth and the Tasmanian Acts provide that: "evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation . . . is not admissible in any court . . .",[24] the Victorian Bill merely provides that "a person who has given guidance or advice to any person upon the order of or at the request of a family court shall not be competent or compellable to disclose any communication made to him for the purpose of considering the circumstances of the case".[25] This is obviously much less far reaching. It would not prevent disclosure by a party of anything that had been said in chambers, and even a conciliator would not be immune in respect of matters that were said in his presence but not to him for the purpose of considering the case.

There is a further provision to which some exception would no doubt be taken. The Bill would empower a magistrate, in a suitable case, to "direct the parties to confer with any person nominated by him or with the representatives of any organisation nominated by him with the object of effecting a reconciliation."[26] Although one would guess that a court would not lightly use such a coercive power, it seems that just in such a case of compulsion the chances of reconciliation will be at a minimum. And the probability of increased costs occasioned by the necessary adjournment would probably exacerbate the hostility of the parties. With this must be contrasted the Commonwealth and Tasmanian provisions which, in similar circumstances, stipulate the consent of both parties. These provisions may not be very effective, but compulsion is not likely to make them more so.

The duty to conciliate

One of the provisions in the *Matrimonial Causes Act* and in the Tasmanian *Maintenance Act,* but lacking both in the Queensland *Maintenance Act* and in the Victorian *Family Courts Bill* is the opening statement that "it is the duty of the court . . . to give consideration from time to time to the possibility of a reconciliation of the parties to the marriage . . .".[27] Not only has this statement the merit of expressing the legislative policy and thereby setting the keynote for the provisions that follow, but as was shown by the comments of several Tasmanian magistrates on this point, it did serve to back up their attempts at reconciliation. Particularly was this so in the face of opposition of parties or of counsel who, prior to its enactment, sometimes used to insist that it was the function of the court to proceed with the hearing of the complaint before it, and that it had no business to embark on issues which were not strictly before it and which could, in a technical sense, lead to a direct frustration of the application before the court without any determination being made.

Reconciliation—when, how and by whom?

But when all is said and done, it would be very much better if conciliation could be attempted before the parties confront the court. In an optimistic speech Mr. Bandidt, the member for Wide Bay said that he had "seen people who

24. S. 16, *Matrimonial Causes* Act; s. 9(1) Tasmanian *Maintenance Act.*
25. *Family Courts Bill,* clause 8(2).
26. *Family Courts Bill,* clause 6(2).
27. *Matrimonial Causes Act,* s. 14(1); *Maintenance Act* (Tas.) s. 8(1).

entered a court in very hostile frame of mind leave that court and embrace each other. That is where the value of reconciliation lies. Human nature is such that reconciliation is never impossible".[28] While most lawyers will agree that this does sometimes happen, they will also agree that it does so very rarely and it is a fact that even on those rare occasions any reconciliation is not always due to any deliberate attempt to bring it about but may be caused by some quite different circumstance.

It remains an unfortunate fact that reconciliation in or as a result of court proceedings can be attempted only as a last resort. As was said by Senator Anderson:

> "The atmosphere of the court tends to drive the marriage partners into their separate litigant corners and the contending lawyers are set the task of painting with heavy brushes the alleged character defects and misdemeanours of the parties . . . . Once the parties get into the court arena, with lawyers operating on either side there is a duty upon each lawyer to do his best for his client."[29]

This point was made also by Senators McKenna[30] and Vincent.[31] The difficulty is of course endemic in the nature of the proceedings. Lawyers see their function in being legal spokesmen for their clients, whose duty it is to put into legal language the merits of their clients' case, and to draw attention to any weaknesses in the legal position of their opponents. A barrister engaged in a negligence action does not normally see it as any part of his duty to dissuade his client on ethical grounds from proceeding any further. On this ground alone any attempt at reconciliation ought to be introduced at an earlier stage in the progress of the case.

Underlying the various criticisms that have been made, mainly by lawyers, of reconciliation provisions like those in Part III of the Matrimonial Causes Act is the very real difficulty with which lawyers feel that they are being faced when they are expected to dabble in a highly complex activity, the consequences of which may affect the lives of men and women and their children for many years to come, and for which they have not been trained. Although the provisions are not without value, they are not an effective substitute for systematic and expert remedial action. Since the *Matrimonial Causes Act* was enacted in 1959 great progress has been made in the field of marriage conciliation. The statistics show that whereas in 1960-61 4,854 persons sought marriage guidance under the provisions of the *Matrimonial Causes Act*, in 1968-69 that number had risen to 11,132. Considerable experience has been gathered and the writings of experts in marriage guidance shows the intricacies and sophistication of this highly specialised activity.[32]

Encouragement and expansion of marriage guidance is of course completely feasible within the present framework of the Acts—federal and State. One of the difficulties is that even experienced lawyers are not usually trained in recognising symptoms and causes of marriage breakdown, and therefore not always able to recognise a case that might benefit from expert advice. Another difficulty is that

28. *Commonwealth Parliamentary Debates*, H. of R. 1959, Vol. 24, p. 250.
29. *Commonwealth Parliamentary Debates*, Senate, 1959, Vol. 16, p. 1800.
30. *Ibid.* p. 1923.
31. *Ibid.* p. 1922.
32. See Harvey, "Marriage Counselling: a therapeutic approach to marital disorganisation", in *Divorce, Society and the Law*, p. 35; Goding "The Psychology of Marriage Breakdown", *op. cit.* p. 17; Benn: "Marriage Breakdown and the Individual", *op. cit.* p. 111.

notwithstanding statutory provisions encouraging conciliation the prime responsibility of a lawyer engaged to present a client's case is to do just that. The forensic lawyer is by his experience conditioned to think of compromise as a tactical manoeuvre, rather than as a clinical exercise. One very valuable proposal has been put forward by Mr. Justice Toose of the Supreme Court of New South Wales to the effect that postgraduate courses should be instituted for lawyers to give them some knowledge and understanding of the psychological processes involved in marriage and marriage conciliation. Many American law schools include some such instruction in their basic family law courses,—as witness several of the modern university texts.[33] There is no doubt that such instruction will help lawyers in recognising cases that might benefit from attempted conciliation and this would lead to an increase in cases so referred. But it will be no substitute for actual training in reconciliation and this is an activity for people to undertake who are able to specialise in it—usually not practising lawyers.

The need for a new framework

The ingenuity of legislators and reformers—and this category, one would hope, will always include lawyers,—would therefore be better deployed in working out a scheme that will encourage parties with matrimonial difficulties to seek help as early as possible. It is difficult to devise such a pattern. One suggestion that may well be worth investigating is that before court action of any kind is instituted, the party desiring to do so must first try to seek guidance, unless the case is patently one where this is not appropriate—e.g. where the respondent's whereabouts are unknown, or where—he has been absent for a long time and not responded to attempts to get in touch with him, or where he has entered into an apparently stable quasi-marital relationship with some third party. It may be possible to write such criteria into the legislation, making an attempt to conciliate, or the inappropriateness of doing so, a part of the conditions on which the jurisdiction of the court to grant relief is founded.

There is no doubt, as the Australian marriage guidance figures given above indicate[34] that the success of marriage guidance is to a large extent a matter of public relations. The community is becoming more conciliation conscious, but this could be greatly improved. The fairly successful experience of the Los Angeles Conciliation Court has shown that it is only as a result of persistent and continuous proselytising that this can be achieved.[35] Doctors and social workers as well as lawyers should be encouraged to an even greater extent than in the past to keep the possibility of conciliation constantly in mind when dealing with cases of marriage breakdown and to encourage the parties at all times to consider seeking out appropriate agencies if there is even the slightest chance of success. Marriage conciliation should become established, along with other forms of social assistance, as a great community service, rather than that miracles should be expected from the courts and the legal profession who have little chance of mending what is usually too far gone before it first comes to their notice. The present requirement which imposes a duty on solicitors to refer their clients to

33. Goldstein and Katz: *The Family and the Law*, Free Press, N.Y. 1965; Foote, Levy and Sander: *Cases and Materials in Family Law*, Little Brown & Co., Boston, 1966. A special seminar in "Family Law and Psychiatry" was held experimentally at Monash University in 1970 and it is hoped ultimately to include something on similar lines as a permanent feature of the Family Law course.
34. See p. 30, above.
35. See Finlay "Family Courts—Gimmick or Panacea?", 43 A.L.J. 602.

marriage guidance organisations[36] is not, by itself, sufficient to make marriage guidance more widely accepted. One hesitates to raise the catch-cry of "Family Courts" as the cure-all for this unsatisfactory situation. Cliches are empty concepts and have no magical power to achieve anything. But the possibility of removing the various jurisdictions involving disputes between husband and wife or their children from the area of adversary litigation is one that should certainly be given the most serious consideration. Indeed there already are in the Matrimonial Causes Act certain rudimentary processes from which could be developed some kind of institution designed to deal with family problems on a more rational and systematic basis than is at present the case. They include such things as the potentially inquisitorial procedures which the certificate of means provides,[37] the compulsory conference[38] which could become an effective conciliatory device if it were taken more seriously, and the power of the court, little used at present, to call for reports of welfare officers of its own motion.[39] Again, in relation to the ground of separation there are a number of matters as to which the court is under an obligation to satify itself, whether they be raised by a party or not, i.e. whether there is any likelihood of a reconciliation,[40] and the various discretionary bars in relation to this ground that arise under section 37 of the Matrimonial Causes Act.[41]

Excursus—Evolution or Planning? The rise and fall of palm-tree justice

But it would be a mistake to leave the development of Family Courts to chance, or to some mystical self-generating evolutionary process, or even to the ingenuity of the judiciary. Particularly is this to be avoided in our federal system with its bifurcation into state and federal jurisdiction and the problems which this dichotomy engenders. A good example of judicial law making in this field can be found in the attitude of the courts to settling questions of property arising between spouses. In England this attitude found expression in the "palm-tree justice" line of cases, developed largely under the sponsorship of Lord Denning and accepted, though not without reservations, by the Court of Appeal, from *Rimmer* v. *Rimmer*[42] to *Pettitt* v. *Pettitt*.[43] It was when the latter case went to the House of Lords[44] that the attempt by judicial interpretation to create a system of community of property, by the use of an unfettered discretion acting upon the concept of "family assets" and engrafted upon section 17 of the *Married Women's Property Act* 1882 foundered, when the view was adopted that the section was designed as a procedural measure only which conferred no discretionary powers to vary pre-existing proprietary interests. It was an implied or express conclusion in all the judgments in that case that any different view could be given effect to only by legislation.[45] Lord Reid drew a distinction between cases dealing with "lawyer's law" and cases where the courts deal with

36. Rule 15, *Matrimonial Causes Rules.*
37. Rule 212, *Matrimonial Causes Rules.*
38. Rules 165-169, *Matrimonial Causes Rules.*
39. *Reeves* v. *Reeves,* (1961) 2 F.L.R. 26, cf. also *Reeves* v. *Reeves* (No. 2) (1961) 2 F.L.R. 280; *Sing* v. *Muir,* Tasmanian Supreme Court, unreported, but discussed in Finlay: "Natural Justice in Custody Proceedings", 2 A.C.L.R., Pt. 3.
40. S. 28(m), *Matrimonial Causes Act.*
41. Under s. 37(1) of the *Matrimonial Causes Act* the court must enquire whether the granting of a decree would be likely to be harsh and oppressive to the respondent or contrary to the public interest.
42. [1953] Q.B. 63, C/A.
43. [1968] 1 All E.R. 1053, C/A.
44. *Pettitt* v. *Pettitt* [1969] 2 All E.R. 385, H/L.
45. *Ibid.* at pp. 390 letters B-C, 391 letter H (Lord Reid), 395 letter D, 397 letter A, 398 letter H (Lord Morris of Borth-Y-Gest), 403 letters F-G, (Lord Hodson), 409 letters E-F (Lord Upjohn).

"matters which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy and on which non-lawyers are as well able to decide as are lawyers. On such matters," concluded Lord Reid, "it is not for the courts to proceed on their view of public policy, for that would be to encroach on the province of Parliament.[46] Lord Diplock went even further by saying that it would "be an abuse of the legal technique for ascertaining or imputing intention to apply to transactions between the post-war generation of married couples 'presumptions' which are based on inferences of fact which an entire generation of judges drew as the most likely intentions of earlier generations of spouses belonging to the propertied classes of a different social era."[47]

Events in Australia took a somewhat similar turn to begin with but were to be given an additional twist by the federal system. The attitude of the House of Lords in *Pettitt* v. *Pettitt* was anticipated by the High Court by some thirteen years or so in *Wirth* v. *Wirth,*[48] which in a very similar fashion put a stop to an attempt, exemplified by the Supreme Court of Victoria in *Wood* v. *Wood*[49] to develop the palm-tree doctrine in the Australian courts.

State legislation thereupon took a hand and sought to entrench the palm-tree doctrine by amending section 161 of the *Marriage Act* 1958 (Vic.),[50] the Victorian equivalent of section 17 of the English *Married Women's Property Act* 1882. The amendment, which in the traditional phraseology of the section purported to apply to "any question between husband and wife as to the title to or disposition of property,[51] in effect set out the criteria derived from *Rimmer* v. *Rimmer*[52] and summarised by Smith J. in *Wood* v. *Wood.*[53] The effect of the amendment was characterised by Herring C.J. in *Hogben* v. *Hogben*[54] as making, and having been intended to make, "a revolutionary change in the law of Victoria".[55] What that change amounted to was explained in the same judgment as substituting for the rebuttable presumption of advancement or other presumptions of law or equity (e.g. resulting trusts) a rebuttable presumption of joint ownership, subject always to sufficient evidence of intention to the contrary on the part of the spouses, or special circumstances rendering it unjust to make the substitution.[56] But the substituted presumption, it is also pointed out, has no greater effect than that which it replaced. In short it can be said that while the Victorian expedient goes as far as is possible within the limitations of palm-tree justice to mitigate the rigours of the traditional approach to married women's property, it was subject to its own limitations. It was born of the recognition that the 1882 legislation was no longer appropriate for the 1950's and that new principles ought to be applied to the subject of matrimonial property. But like the law it replaced, it had the inflexibility of any doctrine of law that is enshrined in a statute. The judge who takes it upon himself to refashion the law by interpretation and the use of fictions labours under the same disadvantages as Procrustes: however much he may lengthen or shorten the subject and thereby extend the number of those that can be accommodated

46. *Ibid.* p. 390 letters B-D.
47. *Ibid.* p. 414 letter I.
48. (1956) 98 C.L.R. 228.
49. [1956] V.L.R. 478.
50. S. 3, *Marriage (Property) Act* 1962, Act No. 6924.
51. S. 161(1), *Marriage Act* 1958 (Vic).
52. [1953] Q.B. 63.
53. [1956] V.L.R. 478 at p. 488.
54. [1964] V.R. 468.
55. *Ibid.*, p. 471.
56. *Ibid.*, p. 472.

within its four cornerposts the statute, like the bed, always remains the same. The heart-searching question confronting the judicial lawmaker is always whether he is doing the litigants, the community and ultimately the law itself a greater service if he seeks to bend the law to the times than if he follows it strictly, knowing that the anachronism or anomaly that has been revealed by his decision will sooner or later help to bring about a thoroughgoing revision. For hard cases make bad law! All this is of course cold comfort to the unfortunate litigant who may feel he is being offered up at the altar of law reform in the meantime. The question that cannot be answered is: if palm-tree justice had never been, would the law reform have come sooner?

The bifurcation of Australian matrimonial property law

To return to the Australian dichotomy: it is interesting to note that the date of the Victorian amendment to the *Marriage Act* was 1962, almost two years after the *Matrimonial Causes Act* had come into force.[57] For although *Horne* v. *Horne* had then just been decided[58] the Victorian Attorney-General of the day, in introducing the Bill declared that it was "expressly to negative the restrictive judgment of the High Court in *Wirth v. Wirth*".[59]

The limitation upon the scope of married women's property legislation which *Horne* v. *Horne* brought to light was the submergence of that legislation *in so far as it relates to matrimonial causes* in the power conferred under the *Matrimonial Causes Act* upon Supreme Courts exercising matrimonial causes jurisdiction to deal with settlements, and even maintenance, under sections 86, 84 and 87 of the Act. Certainly a valiant attempt was made by Adam J. in *Macintosh* v. *Macintosh*[60] to preserve the amended jurisdiction from federal encroachment. At first sight the formulation of the view in what must now be described as the Macintosh heresy has the attraction of apparent logic. Section 8(2) of the *Matrimonial Causes Act* which has turned out to oust section 161 of the Victorian *Marriage Act* in cases that have attracted the matrimonial causes jurisdiction as defined in the federal Act—that is where a matrimonial cause for principal relief within section 5(a) and (b) has been instituted, whether completed or not,—prohibits proceedings "for any relief or order *of a kind* that could be sought" under the *Matrimonial Causes Act* from being instituted except under that Act.

The applicability of this provision and the question whether it will oust state married women's property jurisdiction in cases otherwise falling within section 8(2) will depend on the interpretation to be given to the phrase "of a kind". *Macintosh* v. *Macintosh* sought to distinguish married women's property proceedings from settlement proceedings under Part VIII of the *Matrimonial Causes Act* on the ground that the former were concerned merely with "delineation or declaration of . . . title in disputed property",[61] whereas the latter was "confined to making orders for the settlement of property".[62] These latter are concerned with obtaining "new rights in property from another party by way of a proper maintenance provision".[63] The argument which was ultimately to

57. The *Matrimonial Causes Act* came into force on 1st February, 1961, the Victorian *Marriage (Property) Act* 1962 on 20th November, 1962.
58. (1962) 3 F.L.R. 381. Judgment was given on 30th August, 1962.
59. Victorian *Parliamentary Debates*, Legislative Assembly, 12th September 1962, p. 117.
60. (1963) 7 F.L.R. 42.
61. *Ibid.* at p. 45.
62. *Ibid.* at p. 47.
63. *Ibid.* at p. 45.

prevail,[64] that in the course of exercising its power under section 86 a court would in cases of dispute first have to investigate questions as to title to property did not appear to Adam J. to be relevant to the question of the nature of the relief that could be obtained under section 86. Yet it is this very function that was conceived to be of the essence of the court's power under married women's property legislation, even though there it might go no further, while in relation to settlements it might be incidental or preliminary to a wider power. But even though that be the case in relation to the orthodox married women's property jurisdiction, as one recent commentator points out, in relation to the Victorian *Marriage Act* there is in any case by reason of the 1962 amendment a power to vary pre-existing property rights, though not of course to the same extent as under the federal act.[65]

It is beyond the scope of the present paper to discuss in detail the conflict between married women's property legislation and Part VIII of the *Matrimonial Causes Act* which has been largely, if not wholly[66] resolved,[67] and which has recently formed the subject of a detailed and penetrating analysis.[68] It is only intended here to suggest that attempts by courts to develop new principles of equity, although perhaps laudable in themselves, may be doomed to failure in the end as was the palm-tree justice doctrine. The delay that thereby ensues for a systematic reform of the law through the appropriate legislative channels may ultimately prove to be to the detriment of litigants, however beneficial the decisions of the courts may have been in the meantime. At the same time it cannot be denied that the enlightenment of judges can do much at once to alleviate the hardships to litigants resulting from outmoded laws and to call attention to the need for reform. The attempt of the late Sir John Barry to give effect to the notion of a wife's equity in property acquired by her husband, even after separation of the parties, is an example of such an attitude which, though not immediately effective, points the need for new developments.[69]

In view of the federal-state division in Australia, the appropriate judicial agency for adjusting property between parties to a matrimonial cause is clearly

64. As propounded in *Horne* v. *Horne* by Wallace J., 3 F.L.R. 381 at p. 394, approved by the High Court in *Lansell* v. *Lansell* (1964) 110 C.L.R. 353 and *Sanders* v. *Sanders* (1967) 116 C.L.R. 366, and since followed in Victoria in *Denniston* v. *Denniston* [1970] V.R. 535.
65. Sackville, "The Emerging Australian Law of Matrimonial Property" (1970) 3 M.U.L.R. 353 at p. 382.
66. Some problems remain, for instance as to whether, and if so, when, the matrimonial causes jurisdiction ceases *after* completion of a matrimonial cause within s. 5(1) and (2)—See *Re Gilmore and Conveyancing Act,* [1968] 3 N.S.W.R. 675 in the N.S.W. Court of Appeal—but compare *Miller* v. *Miller* [1969] 1 N.S.W.R. 615 which was heard by a differently constituted Court of Appeal and where the same question was simply not dealt with, the competing application under Married Women's Property legislation being simply stood over—presumably by consent.
67. *Sanders* v. *Sanders* (1967) 116 C.L.R. 366.
68. Sackville, *loc. cit.*—see also Bissett-Johnson "The Interaction of State and Federal Provisions in Matrimonial Property Disputes" (1970) 1 A.C.L.R. 143.
69. *Noske* v. *Noske* [1967] V.R. 677, 10 F.L.R. 192. Reversed on appeal by the Full Court: see note at 42 A.L.J. 183.—In *Noske* v. *Noske* Barry J. quoted from an address by Sir Jocelyn Simon P. entitled: "The Seven Pillars of Divorce Reform" (1965) 62 Law Society's Gazette 344. The President of the Probate Divorce and Admiralty Division there developed the concept of the economic division of labour, commonly adopted by spouses. The gist of the address is this: "In the generality of marriages the wife bears and rears children and minds the home. She thereby frees her husband for his economic activities. Since it is her performance of her functions which enables the husband to perform his, she is in justice entitled to share in its fruits."—The Full Court showed no great enthusiasm for the "Seven Pillars" but reduced a lump sum payment of maintenance of $60,000 ordered by Barry J. to $30,000 simply on the basis that it was excessive in the circumstances.—The matter arose under s. 84 of the *Matrimonial Causes Act.*

a court exercising jurisdiction under the *Matrimonial Causes Act*. Here the discretion is a wide one and is capable of achieving all that could be achieved under married women's property legislation and more. This latter is no longer, since *Wirth* v. *Wirth* and *Pettitt* v. *Pettitt*, able to do full justice in conformity with contemporary attitudes to spouses viewed in economic partnership, and even if it were extended as it has been in Victoria, it is still more restrictive in scope than the matrimonial causes jurisdiction. This latter has also in England been held to be the more appropriate means of adjustment.[70]

The Need for a Policy

The present time is clearly a time of transition and it seems likely that Australia will sooner or later follow in the footsteps of other jurisdictions[71] and substitute breakdown of marriage for the offence concept as the basis of dissolution to an increasing extent, ultimately no doubt eliminating the latter altogether. It would be a pity if the opportunity were not taken, at the same time that the substantive law was amended, of eliminating the state-federal dichotomy and creating a single jurisdiction on an Australia-wide basis.[72] The present position where different principles operate in different jurisidictions—as exemplified in the above described laws and cases on matrimonial property—is highly unsatisfactory. If different principles apply to the apportionment of matrimonial property according to whether a matrimonial cause has or has not been instituted, it will in some cases lead to discontent on the part of the public and a feeling of injustice if a party's entitlement to property can vary according to jurisdictional circumstances. The situation could indeed arise in Victoria in a case where a marriage has broken down but no matrimonial cause has yet been instituted because for example the ground of desertion has not yet accrued, where the wife makes an application under section 161 of the *Marriage Act* concerning the matrimonial home. The husband, in order to overcome the presumption of equality of ownership, believing that he would be better situated under the settlement provisions of the Matrimonial Causes Act, may feel driven, in order to invoke that jurisdiction, to institute a petition for restitution of conjugal rights. He might then succeed in obtaining an injunction[73] and even although his petition for restitution stands in danger of being ultimately dismissed for want of *bona fides*, the delay occasioned by such proceedings might be sufficient to enable him to bring himself within the two year period of desertion, whereupon a petition for dissolution will lie.[74] This is obviously undesirable. Any law or system of laws that directly or indirectly favours the

70. See *Ulrich* v. *Ulrich and Felton* [1968] 1 All E.R. 67 C/A., under s. 17(1) of the *Matrimonial Causes Act* 1965 (England).
71. *Divorce Reform Act* 1969 (England); *Family Law Act* 1969 (California).
72. For the jurisdictional problems involved, see Sackville and Howard: "The Constitutional Power of the Commonwealth to regulate Family Relationships" (1970) 4 F.L. Rev. 30. Interpreting the powers of the Commonwealth at their widest, it seems that only a narrow area would remain outside, e.g. that dealing with paternity suits and illegitimacy cases. Since it seems desirable that these cases should be dealt with in the same jurisdiction that deals with other family matters, this could perhaps be referred by the States to the Commonwealth under s. 51 (xxxvii) of the Australian Constitution.
73. Under s. 124, *Matrimonial Causes Act;* see e.g. *Horne* v. *Horne* (1962) 3 F.L.R. 381, *Jones* v. *Jones* [1968] Argus L.R. 381; *Shepherd* v. *Shepherd* [1968] 1 N.S.W.R. 64.
74. Two recent reported cases where injunctions under the *Matrimonial Causes Act* were obtained upon a petition for restitution of conjugal rights were *Shepherd* v. *Shepherd* [1968] 1 N.S.W.R. 64, *Vincent* v. *Vincent* [1969] Argus L.R. 797.—It is of course not suggested here that the petitions in these cases were other than *bona fide*.

institution of proceedings cannot but be detrimental to the philosophy underlying the Matrimonial Causes Act which is avowed to be the salvaging of broken marriages, and to leave recourse to the courts as a last resort.

If that is the philosophy, then there is a need to evolve a policy that will carry it into effect. The question of jurisdiction is the first that must be settled. The method by which the law is to be administered is also a fundamental consideration. Is the adversary method to be retained? Its use in matrimonial litigation has been criticised[75] and if reconciliation is to be given a predominant place it is not compatible with its realisation. But if inquisitorial procedures are to be introduced, great care must be taken in the design of the court that is to administer them. It does not, for instance, seem desirable simply to entrust such procedures to judges, unaided by officers skilled in the social and behavioural sciences or other disciplines.[76] The expedient of a mixed tribunal under the chairmanship of a judge or barrister, and assisted by officers appropriately qualified as suggested by Mr. Justice Barber[77] seems far preferable. It is suggested that such a tribunal should act "according to equity and good conscience, and the substantial merits of the case, without regard to technicalities or legal forms, and shall not be bound by the rules of evidence but subject to the requirements of justice may inform itself on any matter in such manner as it thinks fit".[78]

If the policy underlying any future redesigning of Australian family law were to be informed by considerations like those that have been raised in this paper, and if divorce in particular could be based on a rational approach based on twentieth century attitudes and purged of precepts of ecclesiastical law and Victorian morality, there is hope for a more rational, more prompt and less expensive ordering of family problems. Divorce for example should be freely available, certainly by consent, once it has been established that the marriage in question could not be saved. Such a policy would be a logical development of the insights into the relationship between marriage breakdown and public policy which the House of Lords stated in *Blunt v. Blunt*,[79] followed by the High Court

75. E.g. by Mr. Justice Barber, "Divorce—The Changing Law in *Divorce, Society and the Law*, Butterworths 1969.
76. An example of what may happen where the judge is given or allowed to assume an unqualified power to carry out investigations is the Victorian case of *Shepherd* v. *Shepherd* [1954] V.L.R. 514, a matrimonial cause which arose under the Victorian *Marriage Act* 1928 before the days of the Commonwealth *Matrimonial Causes Act*. Under s. 80 on that Act (later s. 77 of the 1958 consolidation) the court was under a duty "upon any petition for dissolution of marriage . . . to satisfy itself, so far as it reasonably can, as to the facts alleged and also to enquire into any counter-charge which may be made against the petitioner." No such requirement appears in the Matrimonial Causes Act which simply provides, in s. 69 that the court "upon being satisfied of the existence of any ground in respect of which relief is sought, shall make the appropriate decree", and s. 96(2) which specifies that "where a provision of this Act requires the court to be satisfied of the existence of any ground or fact as to any other matter, it is sufficient if the court is reasonably satisfied of the existence of that ground or fact or as to that other matter". In *Shepherd* v. *Shepherd* Sholl J. held that under s. 80 the court had power, of its own motion, either to "call evidence, or to cause evidence to be called, in order to investigate more satisfactorily the allegations made in a petition, or for that matter in any other pleading, including a counter-petition. It has just as much power in that regard as in regard to the investigation of collusion. *The court itself may take any appropriate steps in the fulfilment of the duty which the statute casts upon it to test evidence which a party calls.*" (at pp. 516-517).
77. See footnote (75).
78. Cf. s. 21, *Town and Country Planning Act* 1961 (Vic.); s. 40(1) *Conciliation and Arbitration Act* 1904-1970 (Cw.).
79. [1943] A.C. 517.

of Australia in *Henderson* v. *Henderson*,[80] but which had been formulated with greater clarity some 22 years earlier by Sir John Salmond of the Supreme Court of New Zealand in *Lodder* v. *Lodder*[81] and *Mason* v. *Mason*.[82] A bold and creative development of provisions designed to achieve these ends would be within the philosophy of the *Matrimonial Causes Act* as outlined by Sir Garfield Barwick[83] and it could lead to a new and integrated structure in which both the law and the social sciences played a constructive part. It is submitted that the climate of public opinion is receptive, it only needs informed leadership to give it purpose and direction.

H. A. FINLAY*

APPENDIX A

MATRIMONIAL CAUSES ACT 1959.

PART III.—RECONCILIATION.

14.(1.) It is the duty of the court in which a matrimonial cause has been instituted to give consideration, from time to time, to the possibility of a reconciliation of the parties to the marriage (unless the proceedings are of such a nature that it would not be appropriate to do so), and if at any time it appears to the Judge constituting the court, either from the nature of the case, the evidence in the proceedings or the attitude of those parties, or of either of them, or of counsel, that there is a reasonable possibility of such a reconciliation, the Judge may do all or any of the following:—

(a) adjourn the proceedings to afford those parties an opportunity of becoming reconciled or to enable anything to be done in accordance with either of the next two succeeding paragraphs;

(b) with the consent of those parties, interview them in chambers, with or without counsel, as the Judge thinks proper, with a view to effecting a reconciliation;

(c) nominate—

(i) an approved marriage guidance organisation or a person with experience or training in marriage conciliation; or

(ii) in special circumstances, some other suitable person,

to endeavour, with the consent of those parties, to effect a reconciliation.

(2.) If, not less than fourteen days after an adjournment under the last preceding sub-section has taken place, either of the parties to the marriage requests that the hearing be proceeded with, the Judge shall resume the hearing, or arrangements shall be made for the proceedings to be dealt with by another Judge, as the case requires, as soon as practicable.

15. Where a Judge has acted as conciliator under paragraph (b) of sub-section (1.) of the last preceding section but the attempt to effect a reconciliation has failed, the Judge shall not, except at the request of the parties to the proceedings, continue to hear the proceedings, or determine the proceedings, and, in the absence of such a request, arrangements shall be made for the proceedings to be dealt with by another Judge.

80. (1948) 76 C.L.R. 529.
81. [1921] N.Z.L.R. 876.
82. [1921] N.Z.L.R. 955.
83. *Ante*, footnote 4.

*B.A. (Lond.), LL.B. (Tas), Senior Lecturer in Law, Monash University.

16. Evidence of anything said or of any admission made in the course of an endeavour to effect a reconciliation under this Part is not admissible in any court (whether exercising federal jurisdiction or not) or in proceedings before a person authorized by a law of the Commonwealth or of a State or Territory of the Commonwealth, or by consent of parties, to hear, receive and examine evidence.

17. A marriage conciliator shall, before entering upon the performance of his functions as such a conciliator, make and subscribe, before a person authorized under the law of the Commonwealth or of a State or a Territory to which this Act applies to take affidavits, an oath or affirmation of secrecy in accordance with the form in the First Schedule to this Act.

APPENDIX B

MAINTENANCE ACT OF 1965, '(Qld.)

130. Conciliation. (1) If, upon the hearing of a complaint or application under this Act, it appears to the court—

(a) that the proceedings result directly or indirectly from a dispute or difference between husband and wife; and

(b) that there are reasonable prospects of settling the dispute or difference by conciliation—

the court may at any stage of the proceedings, do all such things and take all such steps as may, in the opinion of the court, effect a settlement of the dispute or difference by conciliation.

(2) If the husband and wife fail to be reconciled, the court may complete the hearing and determination of the proceedings unless, in the absolute discretion of the court, it appears that the court is or is likely to be biassed by any statement or admission not provable or admissible in evidence made by the husband or wife, or by his or her demeanour, in the course of any thing done or step taken by the court under this section.

(3) Neither the fact that a husband or wife made a statement or admission in the course of any thing done or step taken by the court under this section to effect a reconciliation nor that statement or admission shall be used in evidence in any proceedings under this Act or under any other Act or law.