

MATRIMONIAL CAUSES AND PERSONAL STATUS CODE.

12° and 13° GEO. VI., No. LXXIII.

No. 73 of 1948.

AN ACT to Amend and Codify the law relating to Matrimonial Causes and to Declarations of Personal Status and for other purposes incidental thereto.

[*Reserved 21st January, 1949.*]

BE it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Legislative Council and Legislative Assembly of Western Australia, in this present Parliament assembled, and by the authority of the same, as follows:—

Short title.

1. This Act may be cited as the *Matrimonial Causes and Personal Status Code, 1948*, and shall come into force on a date to be fixed by proclamation.

Division into parts.

2. This Code is divided into parts as follows:—

PART I.—PRELIMINARY.

1. Repeal provisions, s. 3.
2. Definitions, s. 4.

PART II.—JURISDICTION OF THE COURT.

1. General, ss. 5–13.
2. Domicil, s. 14.
3. Dissolution of marriage, ss. 15–16.

4. Judicial separation, ss. 17-19.
5. Nullity of marriage, s. 20.
6. Declarations as to personal status, ss. 21-23.
7. Parties, s. 24.
8. Principles on which the Court acts, ss. 25-29.
 - General, s. 25.
 - Absolute bars, s. 26.
 - Discretionary bars, s. 27.
 - Inquiries and intervention, ss. 28-29.

PART III.—TRIAL, SS. 30-43.

PART IV.—MATTERS ANCILLARY TO ACTIONS.

1. Custody of children, ss. 44-45.
2. Maintenance and settlements, ss. 46-49.
3. Orders to set aside and restrain transactions, s. 50.

PART V.—RIGHT OF APPEAL, REHEARING AND NEW TRIAL, SS. 51-53.

PART VI.—ENFORCEMENT OF ORDERS, SS. 54-55.

PART VII.—VALIDITY AND EFFECT OF FINAL ORDERS, SS. 56-57.

PART VIII.—REMARRIAGE, S. 58.

PART IX.—MISCELLANEOUS, SS. 59-64.

PART I.—PRELIMINARY.

3. (1) Paragraph (e) of subsection (1) of section 16, section 19, and Part VI. of the Supreme Court Act 1935-1946, are hereby repealed. Repeal.

(2) Section 19 of the Evidence Act, 1906-1930, is hereby repealed.

4. In this Code subject to the context—

“action” includes counterclaim;

“adultery” means willing sexual intercourse between a married person and another person of the opposite sex who is not married to that person. The term also includes a rape on the part of a married person against some person of the opposite sex not a party to the marriage;

Definitions.

“child” means a child of a marriage, a child legally adopted by one or both parties to a marriage, or any child to whom one or both of the parties to a marriage stand in loco parentis;

“code” means the Matrimonial Causes and Personal Status Code, 1948, as enacted by this Act;

“collusion” means an agreement or arrangement between the parties or any of the parties to an action or their agents to manufacture false evidence in order to obtain relief; or to withhold evidence as to the true circumstances or true motive for seeking relief and present a case which although true in fact has been put forward for the purpose of hiding the true circumstances; or to withhold material facts which if known to the Court might result in the Court refusing the relief claimed. Collusion shall not be inferred merely by reason of the fact that the parties make an agreement as to maintenance or as to custody of children or as to costs or as to any damages to be paid by a co-defendant adulterer or adulteress;

“condonation” means forgiveness of the party at fault by the wronged party with a full knowledge of the circumstances and the intention of reinstating that party in the matrimonial relationship: Provided that if the party forgiven is subsequently guilty of a matrimonial offence, whether of the same kind as that forgiven or not, or of conduct which falls short of a matrimonial offence but which indicates that the party forgiven has not accepted the forgiveness in the full sense of reinstatement then such forgiveness shall not be deemed to amount to condonation;

“conduct conducing,” “conduct contributing” means some culpable act or neglect by one party which is reasonably calculated in the circumstances to lead to the matrimonial offence of the other, or to bring about the conditions on which the claim to relief is founded;

“connivance” means some prior active acquiescence or culpable passive acquiescence in or toleration of the matrimonial offence of the other party;

“rules” means the Rules of the Court made under this Code;

“settlement” includes any disposition or limitation of any estate or interest in property by a husband in favour of a wife or vice versa before and in contemplation of marriage or during marriage, without adequate consideration in money or money’s worth.

PART II.—JURISDICTION OF THE COURT.

(1)—*General.*

Jurisdiction of court. Cf. 36 of 1935, s. 16 (1e) and s. 19.

5. The Court shall have jurisdiction to grant—
Dissolution of Marriage,
Judicial Separation,
Declarations of Nullity of Marriage,
Declarations as to Personal Status,

and to make orders ancillary thereto in accordance with the provisions of this Code.

Originating process. Ibid. s. 91. Cf. Order 7, rules 2 and 7, Qd. R.S.C.

6. (1) Proceedings under this Code for dissolution of marriage, judicial separation, nullity of marriage or declarations of personal status shall be instituted by writ of summons or such other originating process as may be prescribed by Rules.

(2) Every such Writ of Summons or other originating process shall be served on the party or parties to be affected thereby either within or without the State in such manner as the Rules may provide: Provided that the Court may dispense with such service where it seems necessary or expedient to do so.

Damages against adulterer. Ibid. ss. 80, 83, 94.

7. A plaintiff husband or wife may claim damages against an alleged adulterer or adulteress.

Counter claim by defendant. Ibid. s. 81.

8. A defendant may counterclaim for relief on any ground on which a separate action might have been commenced and the Court may grant the defendant relief in the same way as if the defendant had brought a separate action.

9. An order granting relief may be made notwithstanding that the acts or circumstances constituting the ground therefor occurred or existed wholly or in part before the commencement of this Code or outside the State.

Retroactive application of Code.
Application to occurrences outside State.

10. Whenever the evidence adduced by the plaintiff fails to establish the grounds of relief claimed but is sufficient to establish some other ground under this Code the plaintiff shall be entitled to relief on that ground subject to the giving of such notice and on such terms as the Court shall think just.

Alternative relief.

11. No action shall fail merely by reason of the fact that the evidence adduced shows that the grounds on which relief is claimed have not completely accrued at the commencement of the action where such grounds become complete before the hearing of the action is concluded. In such case the Court shall order such amendment of the proceedings as shall be necessary to the justice of the case and may direct such notice of the amendment to be given to any other parties to the action as the Court thinks necessary and after service of such notice proceed to determine the action as if it had been commenced when the grounds of action became complete.

Action not to fail because grounds not complete at commencement if they are complete before conclusion of hearing.
Amendment of proceedings in such case.

12. (1) No other subject of contention shall be joined or litigated in an action between parties under this Code except as follows:—

Provision as to joinder of actions.

(a) A dispute between husband and wife as to the validity or effect of any agreement made between them before or after marriage or as to any disposition of property to one or both of them or as to the right or title of one or both of them to any property as against the other; or

Dispute as to property.

(b) a dispute between husband and wife—

(i) as to an actionable wrong committed by the husband in respect of the separate property of the wife and in respect of which an action is maintainable under section 12 of the Married Womens' Property Act, 1892; or

Dispute as to wrong in respect of property. See 55 Vic. 20, ss. 12 and 17.

(ii) as to any matter which may be made the subject of an application under section 17 of the said Act; or

Declaration as to personal status.

(c) a claim for a declaration as to personal status in any action within the jurisdiction of the Supreme Court relating to the validity of any will, settlement, or disposition or to the administration of the property of a deceased person or to the right of any person or class of persons to make any claim thereunder where such declaration is relevant or necessary to the determination of any question arising in such action:

Court may order separate trial.

Provided that the Court may order a separate issue or action to be tried where the joinder of any such subject matter would cause unnecessary inconvenience or expense to one or more of the parties, or may permit the joinder on terms as to costs.

Or may permit joinder on terms as to costs.

Avoiding multiplicity of proceedings.

(2) Subject to the preceding subsection the Court shall try all causes of action joined in the one action in order to avoid multiplicity of litigation and to quiet all claims between the parties and persons claiming through, under or in conflict with them.

Court may grant injunction in addition to order.

13. (1) The Court may grant an injunction where in the opinion of the Court the justice of the case requires that an injunction should be granted in addition to any order nisi, final order for dissolution of marriage, judicial separation or nullity of marriage, or any ancillary order, or any declaratory order relating to personal status.

Interim injunction.

(2) Where in the opinion of a Judge it is necessary to protect the rights of a party or to preserve property pending trial he may grant prior to the trial an interim injunction on such terms as may be just.

(2)—*Domicil and Domiciliary Status.*

As to Actions for Dissolution, Nullity and Judicial Separation.

Jurisdiction depends on domicil and domiciliary status. Cf. 36 of 1935, s. 69.

14. (1) In actions for dissolution of marriage or judicial separation or nullity of marriage the Court shall have jurisdiction to grant relief—

(a) if the husband wherever resident is domiciled in the State at the commencement of the action;

(b) if both parties are resident in the State but the husband is domiciled outside the State at the commencement of the action and by the law of the domicile of the husband the plaintiff would be entitled to obtain relief on grounds substantially similar to the grounds on which relief is claimed;

(c) to a plaintiff wife who is or has been deserted by her husband if the domicile of her husband immediately prior to the desertion was in the State and she has lived apart from her husband ever since the desertion;

(d) to a plaintiff wife who at the commencement of the action is legally separated from her husband by order of any competent court or by an agreement made between the parties, if her husband was at the date of the making of the order or agreement domiciled in the State;

Cf. N.Z. 16 of 1923, s. 12 (2).

(e) to a plaintiff wife who has lived in the State apart from her husband for a period of not less than three years immediately prior to the commencement of the action if in the circumstances she would had she been unmarried be deemed to have a domicile in the State.

Cf. N.Z. 43 of 1930, s. 3, amending s. 12 of 16 of 1928.

(2) "Residence" for the purpose of this section shall mean bona fide residence in the State and the Court is required in every case to satisfy itself of that fact and if the evidence does not establish the fact or if the residence is a mere resorting to the State for the purpose of obtaining an order the Court shall dismiss the action.

Meaning of "residence."

(3)—*Dissolution.*

15. Subject to the absolute and discretionary bars hereinafter set out the Court may grant any married person an order for dissolution of his or her marriage on any of the following grounds:—

Grounds for dissolution. Cf. 36 of 1935, s. 69. Adultery.

(a) Adultery committed by the defendant during the marriage.

Cf. 1 Ed. VIII and 1 Geo. VI c. 57 (Imp.), s. 1, proviso.

Sodomy and bestiality.

(b) Sodomy or bestiality committed by the defendant during the marriage.

Prenuptial incontinence.

(c) Where the wife is the defendant, incontinence prior to the marriage whereby at the time of the marriage the wife is pregnant to a man other than her husband; and where the husband is the defendant, incontinence prior to the marriage, whereby at the time of the marriage a woman other than his wife is pregnant to him: But this right is conditional in either case on the action being commenced not more than nine months after the marriage.

Attempted murder or assault with intent to do grievous bodily harm.

(d) Conviction of the defendant during the year preceding the commencement of the action of attempted murder of the plaintiff or of assault on the plaintiff with intent to inflict grievous bodily harm.

Desertion.

(e) Desertion by the defendant for a continuous period of three years or more.

Failure to pay maintenance pursuant to court order or agreement.

(f) Entire or habitual failure by a defendant husband during a period of three years at least immediately prior to the commencement of the action to make periodical payments of maintenance which he is obliged to make by the terms of an order of some competent court or by any agreement between the parties under which the parties have been separated during such period. In this paragraph "maintenance" means maintenance which the defendant is obliged to pay for the benefit of the plaintiff alone or for the benefit of the plaintiff and any child or children or for the benefit of any children.

Meaning of "maintenance."

Habitual drunkenness.

(g) In the case of a husband defendant, habitual drunkenness for four years or more and during that period habitually leaving the plaintiff without means of support or being guilty of habitual cruelty towards her; and in the case of a wife defendant, habitual drunkenness for four years or more and during that period habitually neglecting her domestic duties or rendering herself unfit to discharge them.

- (h) Imprisonment for a period of not less than three years where the defendant is still in prison under a commuted sentence for a capital crime or under sentence of imprisonment for seven years or more; or in the case of a husband defendant, frequent convictions for crime or misdemeanour within five years, the sentences for which aggregate at least three years and leaving his wife habitually without the means of support. Imprisonment.
- (i) Confinement of the defendant as a lunatic or person of unsound mind in an asylum or other institution under the Lunacy Act, 1903 (as amended), in Western Australia, or in a like institution elsewhere for a period of not less than five years immediately preceding the commencement of the action, or for periods of not less than five years in the aggregate during the seven years immediately preceding such commencement, whether such confinement is in one such place or in a number of such places and where the defendant is unlikely to recover from such lunacy or unsoundness of mind. Incurable insanity.
- (j) Separation of the parties to the marriage for a continuous period of not less than five years immediately preceding the commencement of the action where there is no reasonable likelihood of cohabitation being resumed. Five years' separation where resumption of cohabitation unlikely. Cf. 35 of 1945, s. 2.
- (k) Physical incapacity or incapacity arising from nervousness or hysteria or invincible repugnance of the plaintiff or defendant to consummate the marriage, or the wilful refusal of the defendant to consummate the marriage: Provided that—
- (i) action shall not be commenced until the expiration of three months from the marriage;
- (ii) a marriage shall not be dissolved on the ground of such incapacity to consummate—
- where the action is not commenced within three years of the date of the marriage, or
- Incapacity or refusal to consummate.

facts before the marriage or if the parties have freely cohabited as man and wife after the originally incapable party attained an age of capacity to marry.

- (n) Duress brought to bear or fraud practised on the plaintiff by the defendant or by some person which brought about the marriage: Provided that where the plaintiff has freely cohabited with the defendant as man and wife after the duress or with full knowledge of the facts constituting the fraud such ground shall not be available to dissolve the marriage.

Duress or fraud.

Declaration of Presumption of Death.

16. (1) Any married person who claims that reasonable grounds exist for inferring that the other party to the marriage is dead may claim an order that it be presumed that the other party is dead and that the marriage be dissolved.

Presumption of death an order for dissolution. Cf. S.A. 51 of 1941, ss. 4 and 9.

(2) If the Court is satisfied that such reasonable grounds exist it may make an order for presumption of death and dissolution of the marriage.

Provided that the absence of any such order shall not invalidate the remarriage of any person if such remarriage would have been otherwise valid prior to the commencement of this Code.

See Regulation 41, Appendix to Marriage Act, 1894-1932, reprinted Sessional Vol. 1934.

(4)—*Judicial Separation.*

17. Either party to a marriage may claim an order for judicial separation upon any of the following grounds:—

Grounds. Cf. 36 of 1935, s. 86, and 28 of 1922, s. 2

- (a) Adultery committed by the defendant during the marriage.
- (b) Sodomy or bestiality committed by the defendant during the marriage.
- (c) Cruelty by the defendant to the plaintiff or their children during the marriage.
- (d) Desertion of the plaintiff by the defendant.

- (e) The wilful refusal of the defendant to provide reasonable maintenance for the plaintiff or any children which he is obliged by law to provide.

Effect of the Order.

Effect of order.
Cf. 36 of 1935, s. 86 (2), and 28 of 1922, ss. 5 and 10.

18. On the granting of an order for judicial separation the plaintiff shall be no longer bound to cohabit with the defendant so long as the order continues in force although the legal tie of marriage shall remain, subject, however, to the provisions of this Code relating to succession to the property of a party to such a marriage on the death of one of the parties intestate.

Voluntary resumption of cohabitation.
Cf. 28 of 1922, s. 13.

If the plaintiff shall voluntarily resume cohabitation with the defendant after the granting of an order for judicial separation the defendant may apply to the Court and the Court shall grant an order discharging the order for judicial separation.

Devolution of property in case of judicial separation.
Cf. 36 of 1935, s. 100.

19. (1) So long as an order for judicial separation remains undischarged the property of the husband and of the wife shall devolve, should either die intestate, as though the survivor had predeceased the intestate.

Where maintenance order not complied with husband to be responsible for wife's necessaries.
Ibid.

(2) Where on or after any order for judicial separation maintenance has been ordered to be paid and has not been duly paid by the husband he shall be liable for necessaries supplied for the use of the wife.

Parties may exercise joint powers.
Ibid.

(3) Nothing in this section shall prevent the husband and wife from joining at any time during the separation in the exercise of any joint powers given to the husband and wife.

(5)—*Nullity of Marriage.*

Only grounds of nullity.

20. (1) The only grounds on which a marriage is void under the laws of the State are as follows:—

- (a) That it is contrary to the law relating to consanguinity or affinity.
- (b) That one or both of the parties were incapable of contracting marriage by reason of being lawfully married to some other person.

(c) That the marriage was celebrated by some person who had no authority to celebrate it and both parties were aware or had at the time reasonable grounds for believing that such person had no authority.

Cf. 58 Vic. 11, s. 29.

(2) The Court may make an order declaring a marriage void on any of the grounds set out in the preceding subsection.

Declaration of nullity.

(6)—*Declarations as to Personal Status.*

21. (1) Whenever any question arises or is likely to arise in the State concerning—

Actions for declarations of status. Cf. 36 of 1935, s. 89.

(a) the right of any person or of someone under or through whom such person claims—

(i) to status as a natural-born or naturalised British subject; or

As natural-born British subject.

(ii) to status of legitimacy; or

Legitimacy.

(b) the validity of any marriage on which such question depends,

Validity of marriage.

any person interested in maintaining the affirmative or in maintaining the negative of any such question may commence an action for a declaration under this part of this Code and the Court may decide all such questions according to the proper law applicable, if necessary applying principles of international law; provided that nothing herein contained shall prevent any person claiming a declaration under the provisions of paragraph 6 of section 25 of the Supreme Court Act 1935-1946, on any such question in any action in which such question may arise, but any judgment or order made on such declaration shall be binding only on the parties to the action and those claiming under them.

Actions under s. 25 of 36 of 1935.

(2) No action under this part shall be entertained by the Court unless some question of status actually arises or there is a reasonable prospect of such question arising and the Court is satisfied that it is necessary for the plaintiff to bring such action in order to determine any matter arising in consequence or to perpetuate or preserve the testimony in order to support his claim.

Action may be brought only where question of status arises.

Attorney General to be made defendant and every person affected to be named as defendant.

Directions as to service.

Order ineffectual unless person affected is party to proceedings or has been given notice thereof.

Inferior court may determine validity of marriage where question arises incidentally but only for purpose of proceedings before inferior court.

Provision for removal to Supreme Court.

On removal Supreme Court may deal with the matter.

(3) In every action under this Part the Attorney General shall be made a defendant to the proceedings and the plaintiff shall name as defendant every person who may have any interest in the question of status or in the title to any property within the jurisdiction of the Court the title to which may be affected by any judgment rendered in the action, and in order to effectuate such proceedings the Court may give directions as to service on the persons or classes of person who may be affected by any such order and may dispense with service on any particular person or class of person: Provided that no order of the Court shall affect any person unless the person has been made a defendant or party to the proceedings either personally or as one of a class of persons or derives title from or through some person who was bound by such order or has been given notice of the proceedings by direction of the Court and has had an opportunity to come in and contest the issues in the action.

22. (1) Notwithstanding the jurisdiction vested in the Supreme Court by this Part any other Court may determine any matter within its jurisdiction in which any question may arise incidentally for determination which might be made the subject of an application for a declaration under the preceding section, but such determination shall have effect only for the purpose of the proceedings before the Court, and if during the hearing or before judgment any party applies for a stay of proceedings to enable that party to obtain an order from the Supreme Court removing the proceedings into the Supreme Court such other Court shall refrain from further dealing with the matter until the application has been made to the Supreme Court and dealt with by that Court: Provided that if the party applying for the stay of proceedings does not within a period of 21 days from such application duly prosecute his application for removal to the Supreme Court the stay of proceedings shall lapse unless the Supreme Court orders otherwise and extends the time for making the application for removal.

(2) On such removal into the Supreme Court the Supreme Court shall have jurisdiction to determine the matter as if it were the tribunal specifically invested with jurisdiction and may further, in order to avoid

multiplicity of proceedings, try the issue as if it had been raised in an action under this Code and for that purpose may direct such other parties to be joined or that notice of the proceedings be given to such other persons or classes of person as shall appear to have a right to contest the proceedings.

Supreme Court may try issue and may direct joinder of other parties.

23. Nothing in this Part shall affect the validity of any final order, which shall have effect according to the principles hereinafter set out in that Part of this Code dealing with the validity and effect of final orders.

Final order not affected..

(7)—*Parties.*

24. (1) Subject as hereinafter provided only the parties to a marriage shall be entitled to take action for dissolution of the marriage or judicial separation.

Parties in action for dissolution or judicial separation.

(2) A marriage which is absolutely void may be called into question by any person not a party to the marriage notwithstanding the death of either or both of the parties to the marriage, so long as the person seeking to impeach the validity of the marriage comes within any of the categories described in the next following subsection.

Where marriage absolutely void.

(3) The following classes of person shall be entitled to commence action for a declaration of nullity of a questioned marriage where it is claimed that the marriage is absolutely void or to commence an action for dissolution of marriage where it is claimed that the marriage should be dissolved by reason of the insanity of one party at the time of the marriage or of the legal incapacity of one or both of the parties on the ground of nonage or of duress brought to bear or fraud practised on one of the parties on whose behalf it is sought to have the marriage dissolved, subject however to the like conditions and limitations as would be applicable if the party himself took action—

In actions for declaration of nullity.

- (a) the parent or guardian or brother or sister whether of the whole blood or the half blood of a party to the marriage; or
- (b) the personal representative of a deceased party to the marriage; or

- (c) the committee or duly appointed manager of the estate of an insane person or person incapable of managing his affairs, or the duly appointed representative to sue on behalf of such insane or incapable person who is a party to the marriage; or
- (d) a person claiming to be lawfully married to one of the parties to the questioned marriage; or
- (e) a person claiming to be a child of one of the parties to the questioned marriage by another and lawful marriage; or
- (f) a person claiming to be entitled to any interest under any disposition of property or under any intestacy where the right to such interest depends on the invalidity of the questioned marriage.

(8) —*Principles on which the Court acts.*

General.

Court to exercise discretion in case where ground is five years' separation. Cf. 85 of 1945, s. 2.

25. (1) In an action for dissolution of marriage on the ground that the parties have lived apart for a period of not less than five years immediately preceding the commencement of the action and are not likely to resume cohabitation the Court may in its absolute discretion grant or refuse relief except where the Court is precluded from granting relief by reason of any absolute bar: provided that in every case before granting an order nisi the Court is required to see that provision is made for such maintenance of the defendant and any children and the care and custody of any such children as in the circumstances the Court thinks proper.

Dismissal of action for nullity on ground of incapacity where parties have agreed to separate without taking action.

(2) Where in any action for dissolution of marriage on the ground of incapacity to consummate the defendant proves to the satisfaction of the Court that the parties have agreed either to live together but not as man and wife or to separate in consequence of such incapacity without recourse to action and that the defendant has complied with the terms of the agreement binding on the defendant the Court shall dismiss the action.

(3) In all other cases where the Court is satisfied that a plaintiff has proved the grounds on which relief is sought then, provided there is no absolute or discretionary bar to the granting of relief as hereinafter set out, the Court shall be bound to grant the plaintiff the relief claimed.

In all other cases plaintiff entitled to relief on proving his case.
Cf. 36 of 1935, s. 83.

Absolute Bars.

26. The Court shall not make an order for dissolution of marriage or judicial separation if the evidence discloses—

Circumstances in which Court shall refuse relief.
Cf. 36 of 1935, ss. 76, 78.

(a) that the parties to the action or some of the parties to the action are in collusion as to the ground on which, or the matrimonial offence in respect of which, relief is claimed;

Collusion.

(b) that the plaintiff has connived at the matrimonial offence in respect of which relief is claimed;

Connivance.

(c) that the plaintiff has condoned the matrimonial offence in respect of which relief is claimed;

Condonation.

(d) in the case of an action for dissolution of marriage on the ground that the husband and wife have lived apart for a period of not less than five years immediately preceding the commencement of the action and are not likely to resume cohabitation that the plaintiff—

Where ground is five years' separation.
Cf. 35 of 1945, s. 3.

(i) has in the five years preceding the commencement of the action—

been guilty of adultery;

Plaintiff's adultery, etc.

been guilty of sodomy or bestiality;

been convicted of attempted murder of the defendant or of assault on the defendant with intent to inflict grievous bodily harm;

Attempted murder or assault of defendant.

been imprisoned for an offence or offences against the criminal law for a period exceeding three years or for periods amounting in the aggregate to at least three years;

Imprisonment.

Default in
payment of
maintenance.

- (ii) is in default when the action is commenced in respect of maintenance payments under any antecedent court order or under any agreement for the payment of maintenance for the defendant or any child of the marriage.

Discretionary Bars.

Discretionary
bars.
Cf. 36 of
1935, ss. 77,
79.

27. Subject to any particular provisions of this Code precluding the Court from granting relief, the Court shall not be bound to make an order for dissolution of marriage or judicial separation but every such order shall be in the discretion of the Court in any of the following cases:—

- (a) If the plaintiff has been guilty of adultery, sodomy or bestiality during the marriage.
- (b) If the plaintiff has been guilty of cruelty to the defendant during the marriage.
- (c) If the plaintiff, where the ground of action is adultery, has deserted the defendant prior to the adultery.
- (d) if the conduct or habits of the plaintiff have conduced or contributed to the matrimonial offence complained of or, where the ground is lunacy or unsoundness of mind, to that condition.
- (e) If there has been unreasonable delay in commencing the action in the sense that the plaintiff with full knowledge of the circumstances has culpably failed or neglected to take any action.

Inquiries and Intervention.

Grounds for
intervention.
Cf. 36 of
1935, s. 82,
paras. (2)
and (3).

28. (1) Intervention may be made in an action at any time before final order on any of the following grounds:—

- (a) that fraud is being practised or is about to be practised by a party claiming relief;

PART III.—TRIAL.

Procedure.

30. Subject to the provisions of this Part and to the Rules, the trial of an action under this Code shall follow the procedure for the trial of a civil action at law in the Supreme Court.

Onus of proof on plaintiff.

31. Notwithstanding that a party against whom any issue is raised does not defend the action or contest that issue, the party seeking relief shall be obliged to prove all material facts on which the claim to relief depends, and in default of such proof the Court shall dismiss the action.

Court's discretion where evidence is uncorroborated.

32. The Court may grant, but shall not be bound to grant, an order where the plaintiff's evidence is uncorroborated, or where the plaintiff relies entirely on the uncorroborated testimony of a paid agent or entirely on the confession or confessions of any party or parties to the action.

Abolition of Rule in *Russell v. Russel* (1924 A.C. 687).

33. In any proceedings under this Act, either party to a marriage may give evidence proving or tending to prove that the parties to the marriage did not have sexual relations with each other at any particular time, notwithstanding that such evidence would show or tend to show that any child born to the wife during the marriage was illegitimate.

Onus of proof.

34. It shall be sufficient for the plaintiff to establish the grounds according to the reasonable probabilities of the case and in accordance with the normal standards of proof required in an action at law, and the burden of proving material facts and grounds on which relief is claimed shall be on the party seeking to establish the same.

All trials to be had before single judge unless otherwise ordered. Cf. 36 of 1935, ss. 72, 103, 106.

35. (1) Subject to subsection (2) of this section, all trials of actions or of any issue in an action, or of any question as to the quantum of damages in an action, shall be had before a single Judge.

(2) On application being made by any party to a Judge, the Judge may in his discretion order that any action or issue shall be tried and determined with a jury.

36. (1) The Judge may exercise any of the jurisdiction conferred on him by this Code either in open Court or in Chambers, and may adjourn the hearing of any action from open Court to Chambers, or *vice versa*, and any sitting held in Chambers shall be as valid and effectual as if it were held in open Court.

Judge may sit in Court or in Chambers. Cf. 36 of 1935, s. 107.

(2) Without limiting the generality of the preceding subsection, the Judge may, in his discretion, if in his opinion the interests of public morals require it, hear and determine any action in camera.

Hearing in camera.

(3) The Judge may make an order forbidding the publication of any report or account of the evidence or other proceedings in any action, including the names of the parties, the grounds of the action, and the determination thereof, and any breach of such order or colourable or attempted evasion thereof may be dealt with as contempt of Court.

Judge may forbid publication. Cf. 36 of 1935, s. 108.

37. A defendant shall be entitled to cross examine another defendant or his witnesses where the other sets up a case adverse to him on the issues before the Court, or the Court is of opinion that such other defendant has in his evidence or in the development of his case attacked the case of the party seeking to cross examine.

Cross examination of one defendant by another.

38. (1) In all cases, costs shall be in the discretion of the Court, and the Court may award costs against a wife on the same principles as it may award costs against a husband.

Costs. Cf. 36 of 1935, s. 109.

(2) Without limiting the effect of the preceding subsection, the Court may order a co-defendant who has been found guilty of adultery to pay the plaintiff's costs of the action, including any costs which the plaintiff may have been ordered to pay to the defendant.

Costs against co-defendant.

39. (1) In assessing damages against an adulterer or adultress, the damages shall be determined according to the loss estimated to have been or which is likely to be sustained by the plaintiff from loss of consortium and the breaking up of the marriage home: provided that if the Judge shall certify that in the special circumstances the case is one which calls for punitive damages a sum may be awarded accordingly.

How damages are assessed against an adulterer.

(2) Without limiting the provisions of the previous subsection, the Court may take into consideration in mitigation of damages any wrongful or culpable conduct or carelessness of the plaintiff which may have contributed to the adultery complained of, or the fact that the domestic calibre of the defendant is of little consequence.

Order nisi.

Order nisi.
Cf. 36 of
1935, s. 84
(1).

40. Every order for dissolution of marriage shall, in the first instance, be an order *nisi*, which shall not be made final while an appeal or an application for a new trial, or an intervention proceeding, is pending, or in any case until after the expiration of three months from the time the order *nisi* is made, unless the Court when it makes such order *nisi* fixes a longer period not to exceed six months.

*Showing Cause Against the Making of a
Final Order.*

Cause may be
shown why
order nisi
should not be
made final.
Ibid. s. 84
(2).

41. (1) Cause may be shown against the making of any final order on any ground on which intervention might have been granted before the making of the order *nisi*, and all the provisions relating to intervention shall apply accordingly.

(2) Notwithstanding that a party to the action has made default or has not raised any issue on which the showing of cause depends, or has contested the action and has had an issue found against him, such party may, on obtaining leave of the Court and on furnishing such security (if any) as in the circumstances the Court may deem just for the costs of any other party who may be affected, show cause why the order should not be made final.

(3) The Court shall give all necessary directions for the reopening of the action and the trial of all matters relevant, and after hearing evidence, may itself grant the final order or may rescind the order *nisi*, or may refer the action to the Trial Judge or any other Judge to hear any additional evidence brought forward by the party seeking to show cause, and to make any necessary determination thereon.

Final Order—How Issued.

42. After the making of an order *nisi*, when the time fixed for making the final order has expired, subject to the result of any appeal or of any intervention proceedings, the Registrar shall, on application being made in the prescribed form and on being satisfied that the requirements of the Code have been observed, issue the final order to the party entitled in accordance with the Rules.

Issuing of
final order.

43. Where a plaintiff entitled to take out a final order does not take out the order for a period of one month after the time when the plaintiff first became entitled to do so, then the defendant may apply on motion to the Court in the prescribed manner to have the order *nisi* made final, and the Court, on being satisfied that the application comes within the provisions of this section, may in its discretion grant the final order; and without limiting the generality of the discretion of the Court under this section, the Court may take into consideration the fact that—

Where plain-
tiff fails to
take out final
order defen-
dant may
apply.
Cf. 36 of
1935, s. 84.
(2).

- (a) any costs awarded against the defendant or co-defendant in the action have not been paid; or
- (b) that the defendant is in arrears with maintenance payable by the defendant under any order of a competent Court for the benefit of the plaintiff, or of any children;

and in either case may adjourn the application pending the payment of such costs or arrears of maintenance and the furnishing of such security as the Court thinks adequate for the future fulfilment of the defendant's obligation to pay the maintenance; and if the costs or the arrears of maintenance are not paid or the security furnished within the time fixed by the Court, the Court may dismiss the application.

PART IV.—MATTERS ANCILLARY TO ACTIONS.

(1) *Custody of Children.*

44. (1) The Court may make such order as it thinks just either before or at the hearing of the action or on any subsequent application or applications from time to

Custody of
and access to
children.
Cf. 36 of
1935, s. 99.

time for the custody of or access to or for the maintenance and education of any children but in all cases the guiding principle shall be the welfare of the child and neither party shall have any prior right against the other.

(2) Where an action for dissolution of marriage, judicial separation, or declaration of nullity has been tried and the Court for any reason whatsoever, other than lack of jurisdiction, does not grant an order for dissolution, judicial separation or declaration of nullity as the case may be the Court may nevertheless make such orders and give such directions as the justice of the case requires for the custody of or access to or for the maintenance and education of any children and may in like manner as in applications under the preceding subsection make further orders from time to time.

Where mother or father unfit to have custody of children Court may give custody to someone else.
Cf. 36 of 1935, s. 99 (1), and 15 of 1920, s. 9.

45. On the application of any party or on its appearing to the Court in the course of any action or in any ancillary proceeding under this Code that some person other than the husband or the wife party to an action should have the custody of a child the Court may, notwithstanding any previous order for custody of or access to the child, make an order giving the custody of the child to the applicant or to some other suitable person who is willing to undertake the custody, or failing any such suitable person the Court may declare the child to be a ward of the State under the provisions of the Child Welfare Act, 1947.

(2) *Maintenance and Settlements.*

Court may make order for maintenance and may make order in favour of guilty party.
Cf. 36 of 1935, ss. 96-100.
S.A. Act, 1946, ss. 32 and 33.

46. (1) At any stage of an action or on making of a final order for dissolution of marriage or an order for judicial separation or order for nullity of marriage or at any time thereafter the Court may make such order or orders as it thinks proper for the maintenance of one party to the marriage by the other party and may make an order in favour of a guilty party.

Conduct and circumstances of parties to be considered.

(2) The Court shall have regard to the means, circumstances and conduct of the parties.

Interpretation of "conduct"

(3) "Conduct" for the purpose of this section includes conduct of either party during the marriage or subsequent to final order for dissolution of marriage or an

- (i) make any other order (whether of the same nature as those mentioned in the preceding paragraphs or not and whether or not it is in accordance with the practice prior to the passing of this Code) which it thinks necessary to do justice;
- (j) deal with any one or more of the matters mentioned in this section when making an order;
- (k) include its order under this Part in and as a condition of an order *nisi* or final order.

Settlement of damages. Cf. 36 of 1935, s. 94 (3).

48. The Court may order a settlement of any damages awarded against an adulterer or an adultress for the benefit of the parties to the marriage or the children or all or any of them as in the circumstances the Court shall think just.

Application to prior proceedings.

49. This Part of this Code shall apply to all matrimonial proceedings instituted before the commencement of this Code as well as to actions under this Code.

(3) *Orders to Set Aside and Restrain Transactions.*

Court may set aside or restrain transactions. Cf. S.A. Act, 1946, s. 38. Property may be taken in execution. *Ibid.*

50. (1) The Court may set aside or restrain the making or intended making of any sale, lease, mortgage charge, or encumbrance by or on behalf or by direction or in the interest of a party if it is made or intended to be made to defeat an existing or anticipated order for costs, damages, or maintenance or a settlement.

(2) The Court may order that any property the subject of any such proposed transaction may be taken in execution or shall stand charged with the payment of all such sums for costs, damages, or maintenance as may be ordered to be paid by the Court notwithstanding that such sums are not yet assessed, and that the proceeds of the sale of any such property shall be paid into court to abide its order.

Bona fide interest not affected. *Ibid.*

(3) Nothing in this section shall affect or prejudice the rights of any person who has acquired any interest in any property *bona fide* for value.

Party colluding may be ordered to pay costs. *Ibid.*

(4) A party or anyone acting in collusion with a party may be ordered to pay the costs of any other party or of a *bona fide* purchaser, lessee, mortgagee, or encumbrancee, or any other person having an interest in the property of and incidental to the transaction and of the setting aside or restraining of the transaction.

PART V.—RIGHT OF APPEAL, REHEARING AND
NEW TRIAL.

Appeals.

51. (1) Every order for dissolution of marriage or nullity of marriage or judicial separation or any order made in any intervention proceeding or by way of ancillary relief in any action may be appealed against on grounds of fact or law or both by any party bound by the order, within three calendar months of the date of the order provided that there shall be no appeal from any final order for dissolution of marriage by any party who failed to appeal against any order *nisi* on which such order was founded unless such failure was due to such party having had no knowledge that the action had been taken, or if the fact of the action having been taken did come to his knowledge he did not have reasonable opportunity of appearing and defending his rights or contesting any fact in issue raised against him.

Right of
appeal.
Of. 36 of
1935, s. 111.

(2) Every such appeal shall be made in the prescribed manner to the Full Court of the Supreme Court and all the principles relating to the review of the decisions of judges or juries applicable in the general practice of the Supreme Court in civil actions shall apply.

Appeal shall
be to Full
Court.

52. Subject to the foregoing provisions the Full Court in the exercise of its appellate jurisdiction may affirm, reverse, or modify the order appealed from and may give such judgment and make such order as in the opinion of the Full Court ought to have been given or made in the first instance, or may in the discretion of the Full Court grant an order for a rehearing or a new trial on such terms and conditions as the Full Court thinks just.

Jurisdiction
of Full Court
on appeal.
Of. 36 of
1935, s. 112.

Rehearing or New Trial.

53. Any party to an action may apply in the prescribed manner to the judge who tried the action or to the Full Court, either originally or by way of appeal from the judge if the judge refuses to grant the order, for an order for a rehearing or a new trial at any time

before an order for dissolution of marriage is made final, or within the prescribed time after the granting of an order for nullity on the following grounds:—

- (a) that fresh evidence has been discovered which could not by reasonable diligence have been discovered prior to the conclusion of the hearing of the action; and
- (b) that such evidence is material and if heard would probably affect the issue before the Court and lead to a different conclusion from that previously drawn by the Court.

PART VI.—ENFORCEMENT OF ORDERS.

Method of enforcement of judgment or order. Cf. 36 of 1935, ss. 117-145.

54. All orders heretofore made by the Court in the exercise of its jurisdiction in matrimonial causes or hereafter made by the Court in the exercise of its jurisdiction under this Code may be enforced in the same manner as other judgments and orders of the Supreme Court: Provided that where a judgment or order adjudges or orders payment of a sum of money into court or where by the Rules any such sum of money is required to be paid into court it shall not be necessary to issue a writ of sequestration to enforce obedience to such order but the party entitled to enforce the same may issue a writ of *fiери facias* or such other writ as may be prescribed to recover the amount of the judgment or order and the sheriff after deducting the costs, fees and expenses of seizure and sale shall pay into court all sums of money recovered under the writ to answer the judgment or order.

Writ of *fi. fa.*

Alternative method for recovery of overdue periodical payments. Cf. 50 of 1946, s. 2.

55. (1) In addition to and without prejudice to any other method of enforcing an order for maintenance by way of periodical payments any person entitled to enforce such order (whether made before or after the commencement of this Code) may obtain the issue of a warrant for the arrest and imprisonment of the defaulter in respect of any instalments in arrear at the time of the issue of the warrant and the defaulter shall be thereupon imprisoned with hard labour to the extent of three days for every £1 of maintenance moneys due and in respect of which such warrant is issued: Provided that—

- (a) on the making of any order for maintenance the Court may order a lesser term of imprisonment than that hereinbefore prescribed for default;

(b) no warrant shall issue in respect of any instalment which is more than six months in arrear;

(c) where there is more than one instalment overdue a composite warrant in respect of the total instalments overdue shall be issued, but so that no such warrant shall be issued for more than six months' arrears of maintenance;

(d) no person shall be imprisoned for a period in excess of six months under any such composite warrant.

(2) For the purpose of enforcing any such order the Registrar shall have power to sign and issue such warrants as may be prescribed and every such warrant shall be obeyed by police officers and by every keeper of a gaol.

Registrar to sign warrants.

(3) Where a warrant has been issued under this section a judge may on the application of the party in default and on consideration of the merits of the case suspend the operation of the warrant or discharge the same either absolutely or on terms.

Judge may suspend warrant.

(4) When the person imprisoned under any such warrant shall pay any portion of the amount payable under the warrant, then the period of imprisonment shall be reduced by a period which shall bear the same ratio to the period of imprisonment as the portion paid bears to the total amount that was payable, and the prisoner shall be entitled to be released on the expiry of the reduced period. In calculating any reduction hereunder fractional parts of days shall be disregarded.

Period of imprisonment reducible.

(5) Any term of imprisonment which a person is liable to serve under such warrant shall commence to run from the expiry of any other term of imprisonment for any cause whatsoever which the person so liable may be undergoing.

Imprisonment to run from expiry of any other sentence.

(6) No imprisonment suffered under this section shall extinguish the liability of the defaulter to pay the maintenance for the non-payment of which he was imprisoned: Provided, however, that a defaulter shall not be liable to be twice imprisoned for the same default.

Liability not extinguished by imprisonment.

Interpretation
of "mainten-
ance."

(7) "Maintenance" for the purpose of this section shall include alimony, maintenance for a wife or a divorced wife, and maintenance for children.

PART VII.—VALIDITY AND EFFECT OF FINAL
ORDERS.

Final order
generally con-
sidered order
in rem,
subject to
exceptions—
lack of juris-
diction,
fraud, etc.

56. Subject as hereinafter provided a final order for dissolution of marriage or nullity of marriage shall be deemed to be an order in rem and absolutely binding on the parties and on all persons claiming under them, save that any such order may be called into question in any court in which the validity of such order may become an issue on the ground that the court making the order had no jurisdiction in the matter and that the order of the court would not be deemed to be valid by the laws of this State, or on the ground that the order was obtained by fraud, collusion or suppression of material facts by any party.

Provided that—

Party guilty
of fraud, etc.,
not to be
heard.

(a) a party guilty of fraud or collusion or suppression of material evidence, or a party who with knowledge of any such fraud, collusion or suppression of material evidence neglects to defend the original action or neglects to intervene in such action shall not be heard to impeach the validity of any such order obtained in consequence;

Status of
children.

(b) any children born of a marriage after such final order (if the subsequent marriage is not otherwise invalid) shall, subject to any particular context in any instrument of benefaction, be deemed to be legitimate for all purposes of succession under a benefaction made in favour of children as a class or for the purpose of succession to the property of one or other of their parents on intestacy of such parent, or for the purpose of making any application under section 3 of the Testator's Family Maintenance Act, 1939 (No. 44 of 1939);

- (c) no transaction entered into by a third party and a party to any such order or by a third party and any other person on the faith that such order was regularly obtained and without any knowledge of the fraud, collusion or suppression of material evidence shall be impeached or invalidated on that ground as against such third party.

Third party protected.

57. (1) Where in any court other than the Supreme Court any question arises as to the validity of any final order for the dissolution of marriage or any order for nullity of marriage either party or any person interested in maintaining or impeaching the validity of the final order or order for nullity may apply during the hearing or before judgment to the court in which the proceedings were instituted for a stay of proceedings to enable that party or person interested to obtain an order from the Supreme Court removing the proceedings into the Supreme Court, and such other court shall refrain from further dealing with the matter until the application has been made to the Supreme Court and dealt with by that Court: Provided that if the party or person interested applying for the stay of proceedings does not within a period of twenty-one days from such application duly prosecute his application for removal to the Supreme Court the stay of proceedings shall lapse unless the Supreme Court orders otherwise and extends the time for making the application for removal.

Question of validity of final order may be removed from inferior court to Supreme Court.

See also s. 22.

(2) On such removal into the Supreme Court the Supreme Court shall have jurisdiction to determine the matter as if it were the tribunal specifically invested with jurisdiction, and may in order to avoid multiplicity of proceedings try the question of the validity of the final order or order for nullity and for that purpose may direct such other parties to be joined or that notice of the proceedings be given to such other persons or classes of person as shall appear to have a right to contest the proceedings.

PART VIII.—REMARriage

58. (1) Either party to a marriage which has been dissolved or declared a nullity may remarry after the grant of the final order for dissolution of marriage or the

Right to remarry.
Cf. 36 of 1935, s. 85, and see *ibid.* s. 114.

Reciprocal
recognition
of order.

62. (1) (a) If the Governor is satisfied that any other political entity has enacted a law substantially similar to the law of this State relating to domiciliary and quasi-domiciliary status as a qualification for jurisdiction the Governor may by proclamation declare that political entity a reciprocating state for the purpose of this section.

(b) Any such proclamation may be revoked from time to time if in the opinion of the Governor such state cease to be a reciprocating state.

(c) While any such proclamation is in force any order for dissolution of marriage or nullity of marriage or judicial separation made by a competent court of any such reciprocating state shall not be open to challenge in the courts of this State as being beyond the jurisdiction of the State which granted it and shall for that purpose be treated as valid and effectual.

(2) An order for dissolution of marriage or nullity of marriage or judicial separation granted to a plaintiff by the Court of the place where both parties are resident for a cause recognised as a ground for dissolution or nullity or judicial separation by the law of that place shall not be open to challenge in the courts of the State on the ground that the court granting the order was not the court of the matrimonial domicile and shall be accepted for such purpose as if it had been granted by the court of the matrimonial domicile: Provided that the ground on which the dissolution or nullity or judicial separation was granted is recognised by the law of the matrimonial domicile as sufficient ground for such an order.

63. At the expiration of five years from the commencement of this Code and periodically every five years thereafter, and oftener if the circumstances require, the Chief Justice shall furnish the Attorney General with a report on the working of this Code and the Rules made thereunder, drawing attention to any anomalies in the law and to any amendments that may be advisable, and the Attorney General shall submit the same to Parliament and introduce a Bill to give effect to any recommendations made in such report for amending legislation. If the Bill is passed by Parliament the Attorney General shall cause to be prepared a full reprint of the Code with

Periodical
report on
working of
Code.

the amending Act embodied therein. In reprinting the Code the aim shall be to secure uniformity of expression and logical arrangement of contents, and subject thereto the provisions of the Statutes Compilation Act, 1905, as amended by Act No. 51 of 1912, shall apply.

Rules.

Rules.

64. (1) The judges of the Supreme Court or a majority of them may make rules governing the procedure to be adopted under this Code, the costs allowable to parties, and any other matters for which it is provided that rules may be made.

(2) By any such rules the judges may delegate to the Registrar power to exercise such authority and jurisdiction as the Court may exercise with the exception of the hearing of actions or of matters relating to personal status or the liberty of the subject.

(3) Any such rules may be made in consultation with a committee which the judges may co-opt from the Law Society of Western Australia Incorporated.

(4) With the concurrence of the Treasurer the judges may make rules prescribing the scales of filing fees and other fees to be taken in the Supreme Court in relation to actions and proceedings under this Code.