entirely satisfactory. Alternatively manslaughter by criminal negligence could have been relied on as sufficient grounds to substantiate the conviction.[21]

The ruling in *Haywood's* case provides a guide in an area of existing confusion and is thus welcome. It indicates that a self-induced state of automatism will operate as a general defence in our system.[22] The reasoning is sound and in accord with basic legal principle and because of this it is an authority of some importance despite the fact that it did not emanate from an appellate tribunal. However, one may well ponder the social consequences of allowing the defence of alcohol or drug induced automatism. Drug taking is an increasing socal problem and to allow self-induced automatism as a complete defence 'might open the flood-gates to unpunishable, anti-social conduct involving destruction of the life or health or property of other members of the community. You may think that it is a defence which is easy to assert and may be hard to disprove'.[23] The defence did not succeed in *Haywood's* case. He was found to be guilty of manslaughter as there was sufficient evidence before the jury for it not to accept the plea of automatism. It is possible however that cases may arise where an accused is acquitted and acquittal in the circumstances is socially undesirable. Of course the offence of manslaughter by criminal negligence may be useful in this area as an alternative (and one would think a favourable alternative on legal principle) to that of manslaughter by unlawful and dangerous act. But are the existing common law offences adequate in an area which is of relative recent origin and may gain more significance in society in the near future? Perhaps legislative intervention is necessary for the creation of new offences with appropriate and socially acceptable remedial sentences.

NEAL B. CHAMINGS

COMINOS v. COMINOS[1]

Federal Jurisdiction of State Courts—Matrimonial Causes.

The power afforded by section 77(iii)

> . . . the Parliament may make laws—
>
> (i) . . .
>
> (ii) . . .
>
> (iii) Investing any court of a State with federal jurisdiction

of the Australian Constitution to Federal Parliament, has been subject to judicial scrutiny in several recent cases.[2] The most recently reported decision is that of *Cominos v. Cominos*[3] which arose in the Supreme Court of South Australia as a suit for divorce and ancillary relief. The respondent contended that a judge of the Supreme Court, sitting in its matrimonial jurisdiction under

[21] *Ibid.*
[22] A point unsettled since *D.P.P. v. Beard* [1920] A.C. 479.
[23] Taken from the transcript of Crockett J.'s charge to the jury in *Haywood*, p. 24a.

[1] (1972) 46 A.L.J.R. 593. High Court of Australia; McTiernan, Menzies, Walsh, Gibbs, Stephen and Mason JJ.
[2] *Kotsis v. Kotsis* (1971) 45 A.L.J.R. 62 and *Knight v. Knight* (1971) 45 A.L.J.R. 315, in both of which the meaning of 'court' was litigated; *Capital T.V. and Appliances Pty Ltd v. Falconer* (1971) 45 A.L.J.R. 186, in which the problem was posed (*inter alia*) whether 'court' encompassed a territorial court.
[3] (1972) 46 A.L.J.R. 593.

the Matrimonial Causes Act 1959-1966 (Cth), had no power to make any orders concerning maintenance, property settlements or costs and that sections 84, 86, 87(1) and 125 of the above Act were invalid.

A submission challenging the concurrent legislative power of the Commonwealth had previously been held[4] to give rise to a question as to the limits *inter se* of the constitutional powers of the Commonwealth and the several States. Therefore the matter was removed into the High Court by section 40A of the Judiciary Act 1903-1970 (Cth). McTiernan J., under section 18 of the Judiciary Act 1903-1970 (Cth) directed that the *inter se* question be argued before the Full High Court.

The challenge to the above provisions was that each purported to confer upon the Supreme Court a non-judicial power. One limit upon the power to invest State courts with federal jurisdiction is that the invested power must be a judicial one.[5] To contend that section 86 was invalid was a bold step because earlier,[6] the High Court had upheld the validity of section 86 as an exercise of the power of the Commonwealth to make laws pursuant to section 51(xxii) of the Constitution. Admittedly, the argument that a State Court had been invested with non-judicial power had not been raised in that case.

The respondent's argument was that the discretion given to the Court was so wide that the legislature had attempted to delegate to the Court a non-judicial function. In this note, the theme will be to show that the definition of 'judicial power' has perhaps become strained so that a desirable and expedient result might be achieved.

An early definition of 'judicial power' which the Privy Council later approved[7] as 'one of the best definitions', was enumerated by Griffith C.J. in *Huddart, Parker & Co. Pty Ltd v. Moorehead*[8] where he considered that the judicial power refers to the power to make an authoritative decision in a dispute as to the rights and liabilities of the disputing parties. In *Waterside Workers' Federation of Australia v. J. W. Alexander Ltd*,[9] Isaacs and Rich JJ. added to the *dictum* of Griffith C.J. by insisting that:[10]

> judicial power is concerned with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist, or are deemed to exist at the moment the proceedings are instituted.

The corollary to the above *dictum* is, as was expressed in *R. v. Spicer, ex parte Waterside Workers' Federation of Australia*,[11] that judicial 'discretion must not be of an arbitrary kind and must be governed or bounded by some ascertainable tests or standards'.[12]

In *Cominos v. Cominos*,[13] Walsh J. was able to conclude that section 84 and section 86(1) fell within the above definition of judicial power. His Honour

[4] *Nelungaloo Pty Ltd v. Commonwealth* (1952) 85 C.L.R. 545, 564. Dixon J. had suggested a number of exceptions to the general principle just stated. However these exceptions, sound or otherwise, do not concern us here.

[5] *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 C.L.R. 144.

[6] In *Lansell v. Lansell* (1964) 110 C.L.R. 353.

[7] *Shell Company of Australia Ltd v. Federal Commissioner of Taxation* (1930) 44 C.L.R. 530, 542.

[8] (1908) 8 C.L.R. 330, later overruled on another point by the High Court in *Strickland v. Rocla Concrete Pipes Ltd* (1971) 45 A.L.J.R. 485.

[9] (1918) 25 C.L.R. 434.

[10] (1918) 25 C.L.R. 434, 463.

[11] (1957) 100 C.L.R. 312.

[12] (1957) 100 C.L.R. 312, 317.

[13] (1972) 46 A.L.J.R. 593.

considered that the challenged sections did not allow the judge to take into account broad policy considerations unconnected to the facts and he met the argument that the criterion to which the Court was to have regard, was too vague and general to provide a legal standard governing a judicial decision by saying that the power to award ancillary relief in sections 84, 86 and 87 was:[14]

> to be construed and applied as provisions conferring powers in aid of the exercise of the jurisdiction to hear and determine proceedings for divorce and other forms of substantive matrimonial relief. That being so it is impossible to maintain that the discretion conferred upon the Court is not a judicial discretion or that it is not governed or bounded by any ascertainable test or standard but is entirely arbitrary in its nature.

The conclusion reached by Walsh J. does not necessarily follow. The conclusion that should have followed was that the challenged provisions obtained a 'judicial colouring' from other surroundings.[15]

His Honour analysed the actual wording used in the challenged sections and in relation to section 86(1), felt that the words 'just and equitable' provided definite standards and that the contrary argument would be inconsistent with *Lansell v. Lansell*.[16] However *Lansell v. Lansell*[17] concerned the limits imposed upon Federal Parliament by section 51(xxii) of the Australian Constitution and not those imposed upon a Court acting under a Commonwealth law.

As regards section 84, Walsh J. considered that the phrase 'the means, earning capacity and conduct of the parties to the marriage and all other relevant circumstances' provided definite standards. One could respectfully argue that the phrase 'all other relevant circumstances' is anything but definite. The challenge to section 87 was dealt with briefly, the power in section 87(1)(i) being considered incidental to the powers conferred by other provisions, and the validity of section 125 was upheld without any discussion unfortunately.

Gibbs, Stephen and Mason JJ. also indicate that the phrase 'just and equitable' in section 66(1) is a definite standard. Unlike Walsh J., they cite cases[18] in which *dicta* had been expressed that such a phrase is not too vague. However despite the number of *dicta,* the writer still expresses a doubt whether the phrase really does provide a standard for judicial decision.

McTiernan and Menzies JJ. in their short joint judgment fell back for the solution of the problem upon the doctrine that the classification of a power can be determined from its context[19] and history.[20] While the reasoning of these judges is legally satisfactory in that it accords with previous decisions and in that the facts are easily accommodated within the doctrine, unlike that chosen by Walsh J. the writer views the doctrine more as an escape from the

[14] (1972) 46 A.L.J.R. 593, 595.

[15] *Cf. The British Imperial Oil Co. Ltd v. Federal Commissioner of Taxation* (1925) 35 C.L.R. 422.

[16] (1964) 110 C.L.R. 353.

[17] (1964) 110 C.L.R. 353.

[18] *Sanders v. Sanders* (1967) 116 C.L.R. 366; *Steele v. Defence Forces Retirement Benefits Board* (1955) 92 C.L.R. 177; *R. v. Commonwealth Industrial Court, ex parte Amalgamated Engineering Union, Australian Section* (1960) 103 C.L.R. 368; *R. v. Trade Practices Tribunal, ex parte Tasmanian Breweries Pty Ltd* (1970) 44 A.L.J.R. 126.

[19] See n. 15.

[20] The 'history' approach was developed in *R. v. Davison* (1954) 90 C.L.R. 353 where it was held that if the power in question was one that had commonly been given to the courts, then it should be classed as judicial.

limits imposed upon the investment of State Courts than as a true definition of judicial power.

Gibbs J. adopts also the same approach as McTiernan and Menzies JJ. while relating the 'history' doctrine specifically to section 84 and section 125. It is perhaps interesting to note that Gibbs J. states[21] that:

> the fact that a court is authorised to create or alter rights and not merely to declare and give effect to pre-existing rights does not necessarily show that the powers conferred are not judicial powers . . .[22]

Once sections 84, 86 and 125 had been upheld as valid, Gibbs J. upheld section 87 since it was seen as merely incidental to the judicial powers of the Court. The argument raised that precise reference should have been made in section 84 to pension entitlements and testator's family maintenance was rightly dismissed by Gibbs and Stephen JJ.

Stephen J. relied principally on the 'context and history' approach to uphold section 84 and section 86 and then upheld section 87(1) and section 125 as being merely ancillary to the above sections. Mason J. tackled the problem in the same way but it is perhaps interesting to note that he states in relation to section 86:[23]

> [t]he provision contains neither the expression of a criterion according to which relief is to be granted or denied, nor a statement of the considerations to be taken into account.[24]

Finally it is appropriate to mention that Mason J. stated that no complete definition of judicial power exists. Such a statement confirms the view expressed by the writer at the beginning of this note that the definition of 'judicial power' can be strained to reach a desirable result.

FRANK BRODY

PRESSER v. CALDWELL ESTATES PTY LTD[1]

Negligence—Duty of care—Vendor and purchaser—Contract for sale of land —Agent's misrepresentation inducing sale—Filled land, whether duty to disclose—Whether reliance on agent's skill and judgment.

This was an appeal by a vendor of land (the defendant) and its agent (third party) from a decision of Thorley D.C.J. in favour of the purchaser. Presser had bought a lot on an estate developed by Caldwell and had built a house on it. A year after he and his wife moved in cracks appeared in the house due to subsidence of the filling, or soil artificially brought onto the lot. Presser sued the other two parties on three counts—fraud, negligent misrepresentation, and breach of collateral warranty. Thorley D.C.J. found for the plaintiff on the second count, accepting his evidence that he had relied on Southern's statement that there was no filling, and holding that Caldwell was in breach of its

[21] (1972) 46 A.L.J.R. 593, 597.
[22] But *cf.* n. 10.
[23] (1972) 46 A.L.J.R. 593, 601.
[24] But *cf.* the judgment of Walsh J.

[1] [1971] 2 N.S.W.L.R. 471. N.S.W. Court of Appeal; Asprey and Mason JJ.A. and Taylor A-J.A.