Matrimonial Causes Jurisdiction, by ZELMAN COWEN, B.C.L., M.A. (Oxon.), B.A. (Hons.), LL.M. (Melb.), and DEREK MENDES DA COSTA, LL.B. (Lond.), (Law Book Co. of Australasia Pty Ltd, Sydney, 1961), pp. i-xx, 1-163. Price £1 12s. 6d.

It was Professor Cowen who, together with His Honour Mr Justice Fullagar, first initiated Australians into the subtleties of 'Full Faith and Credit' and he has since explored in various publications[1] both conflictual and constitutional problems in Australia. Mr Mendes da Costa, who is Senior Lecturer in Law in the University of Melbourne, has made Conflicts of Laws his special study and has contributed to the periodical literature on the subject both in England and in this country.

It is therefore fitting that the first book to explore the Matrimonial Causes Act which, though passed in 1959, has only recently come into actual operation, should have come from these two authors.

The book does not purport to be a study of divorce law or of family law. It deals with the conflictual problems associated with jurisdiction, choice of law and recognition of foreign decrees which are involved in this new piece of legislation. However, in Australia private international law problems readily shade into those of constitutional law and the book naturally has to indicate the nature of the jurisdiction conferred by the new Act in the light of the Australian constitutional provisions regarding the grant of judicial power.

The book, after a general treatment of the courts involved, follows the technique of treating the various matrimonial remedies, *viz.* dissolution of marriage, nullity of marriage, judicial separation, *etc.*, from the viewpoint both of jurisdiction and choice of law, and then passing to consider in one chapter the general question of the recognition of foreign decrees no matter of what nature. Included in this treatment is the action for a declaratory judgment and also, incidentally, jactitation of marriage. However, the action for damages against a co-respondent is considered at a later point and is immediately followed by the two last chapters of the book dealing with, respectively, proceedings for ancillary relief and the transitional provisions of the Act.

Sir Garfield Barwick's Act betrays a keen consciousness of the existence of private international law problems and an earnest desire to solve them, thereby providing, at least so far as the aspect of nullity of marriage is concerned, a striking contrast with the prior Acts of 1945 and 1955. However, from the careful and penetrating analysis to which it is subjected in this book, there clearly emerges the fact that many questions in relation to nullity of marriage still remain substantially unanswered. Perhaps no statute can ever satisfactorily solve the intractible possibilities of the null marriage situation once foreign elements are involved.

Undoubtedly the most stimulating part of the book is that dealing with the question of recognition. The authors show an acute perception of the various possibilities of the *Travers v. Holley*[2] doctrine and it would certainly seem that in spite of the provisions in the Act, which represent a piecemeal adoption of some of its effects, the question whether the doctrine in its wide form applies, may well come up yet for decision. Whilst this remains the most interesting part of the work, one should

[1] Cowen, *Bilateral Studies in Private International Law. No. 8 American-Australian Private International Law.* (1957); Cowen, *Federal Jurisdiction in Australia.* (1959).
[2] [1953] P. 246; [1953] 3 W.L.R. 507; [1953] 2 All E.R. 794.

not forget to pay token to the clarity and force of the discussion on the question of local jurisdiction in both divorce and nullity proceedings. As instances of the range of matters which are discussed by the authors, there may be mentioned the question of jurisdiction in actions for a declaratory judgment, the question whether it is enough in proceedings for divorce that there was an existent domicil at the time of the institution of the proceedings notwithstanding a change of domicil before the time the decree is pronounced, the recognition to be afforded to a form of decree apt for the dissolution of a polygamous marriage when purporting to operate on a monogamous marriage and the rather fascinating problem of the possible matrimonial jurisdiction of the High Court in 'diversity' cases. Some of the rather odd aspects of the Act are pointed out, *viz.* the fact that the provision which substantially gives jurisdiction where a wife can point to a three years' residence does not make jurisdiction depend on residence but on a 'deemed' domicil, the fact that whilst the Act in the case of the three years' residence jurisdictional rule applies this to nullity proceedings and gives recognition to a foreign decree based on the like jurisdictional *substratum,* this reciprocity is lacking in the deserted wife rule, that is to say jurisdiction is given to the home court in divorce and nullity in a deserted wife situation but recognition in such a situation occurring within a foreign jurisdiction is extended only in the case of divorce decrees.

The most difficult portion of the work to read is the chapter on the Transitional Provisions.[3] Whilst inclusion of this aspect is no doubt desirable and whilst what is written here will no doubt help to solve some practical problems from a practitioner's point of view, there is no doubt it makes very dull reading and seems a little overloaded with statutory material.

Whilst the authors depict the main features of the Act with notable clarity, it seems that when discussing some of the more subtle applications they fail to indicate precisely to what point they have reached. There is for instance a discussion which reaches the interesting conclusion that, but for one sub-section, the case of *Mountbatten v. Mountbatten*[4] might have been decided differently under the Federal Act. This view seems to depend upon a combination of the words 'effected in accordance with the law of a foreign country' in section 95 (2) with the 'deeming' provision of section 95 (3) (b). The authors assume apparently that such view is blocked by section 95 (4) but this provision is expressed to exclude a situation arising under section 95 (2). If section 95 (4) is to operate fatally to the view previously suggested, it can only be by indicating a different meaning to be attributed to the words 'effected in accordance with the law of a foreign country'. If the authors mean this, they do not make it entirely plain and the reader is left wondering if the next paragraph (page 92) has anything to do with the question. Apparently it has not.

Furthermore it seems perhaps somewhat misleading to say that section 95 (3) writes 'the doctrine' of *Travers v. Holley*[5] into the Act (page 89). The *Travers v. Holley*[6] doctrine *as a doctrine* depends upon a view that a foreign statutory jurisdiction purporting to be exercisable on certain grounds will be recognized where a statutory jurisdiction based on the like grounds exists locally, but this was substantially transformed when

[3] Chapter X. [4] [1959] P. 43; [1959] 2 W.L.R. 128; [1959] 1 All E.R. 99.
[5] *Loc. cit.* [6] *Loc. cit.*

Robinson-Scott v. Robinson-Scott[7] added that the jurisdictional grounds on which the foreign court acts need not be identical or even similar provided that the factual situation is correspondent, that is to say that the home court would have been able to grant the decree which the foreign court in fact has granted if the same facts *mutatis mutandis* had come before it. But section 95 (3) crystallizes only two particular situations. The broad principle of the two cases is that 'like' should be matched with 'like' *wherever they occur* but the Act equates only two particular sets of 'likes'. If the Act were to create additional bases of home jurisdiction, then there would be by virtue of the Act no automatic 'matching' with the corresponding foreign 'likes'—such 'matching' will exist only if *Travers v. Holley*[8] comes in by way of the common law. If the Act effected a matching in all cases there would indeed be no need to enquire whether by importation of common law principles a foreign nullity order based on a deserted wife's statute would be recognized here. Such a result would automatically follow from the Act.

There seems also considerable difficulty in grasping the point made by the authors concerning a foreign jurisdictional ground similar to that contained in section 43 of the South Australian Act (page 95). It appears that what the authors have in mind is a case which might be covered by the *Travers v. Holley*[9] principle as first formulated but not by the variation made in *Robinson-Scott v. Robinson-Scott.*[10] The principle of the latter case involves no question of similarity between jurisdictional grounds but merely a question whether the foreign fact situation *mutatis mutandis* would fit the local jurisdictional ground. It is, however, legitimate in a case where the fact situation does not fit, to go back to the 'first' or 'original' *Travers v. Holley*[11] formulation which operates on similarity of jurisdictional ground and to enquire whether this requires what the authors call complete identity of factual *substratum* in the grounds supplied by both systems of law, *e.g.* if the local law provides for continuance of wife's domicil in spite of desertion, then is it enough that the foreign law provides for continuance of wife's domicil in spite of separation? If this is what the authors mean, it is not made particularly clear. In fact, whilst they do of course treat of the extension made by *Robinson-Scott v. Robinson-Scott*[12] to *Travers v. Holley,*[13] they leave it open to considerable doubt in places as to which phase of the general doctrine they are adverting.

It seems not unfair to say, moreover, that the authors assume on the 'higher level' discussion a somewhat advanced degree of sophistication on the part of the reader. Even those who have played with the subtleties of this rather esoteric branch of legal learning may well have difficulty with some of this discussion; to those whose contact with conflicts is not continuous it may well prove a little bewildering.

One would have liked to have seen more discussion of the 'choice of law' question in nullity of marriage. *Miller v. Teale*[14] hardly did anything to clear up the confusion in this area and the standing of the second *Sottomayor* case[15] still seems to be as dubious as ever. In the case of proceedings for a marriage alleged to be void and not merely voidable, a large number of cases involving a choice of law question are

[7] *Robinson-Scott v. Robinson-Scott* [1958] P. 71; [1957] 3 W.L.R. 842; [1957] 3 All E.R. 473.
[8] *Supra.* [9] *Supra.* [10] *Supra.* [11] *Supra.* [12] *Supra.* [13] *Supra.*
[14] (1954) 92 C.L.R. 406; [1954] Argus L.R. 1109.
[15] *Sottomayor v. De Barros* (No. 2) (1877) 3 P.D. 1.

quite likely to raise the issue of 'foreign incapacities' arising from marriages celebrated in the country of another domicil. On the other hand the authors can make a case that this topic falls outside the scope of their work.

One also wonders whether there is any threshold choice of law problem lurking in sections 23 and 95 as to the law which should decide whether a marriage is void or voidable for the purpose of applicability of these sections, *viz.* whether the *De Reneville*[16] technique is applicable. It is true that at common law the courts have recognized a pre-jurisdictional choice of law question arising only in so far as it has been necessary to determine the question of domicil, and have not been concerned as to the situation where jurisdictional criteria have differed as between the two types of invalidity. Still less has any similar issue in a recognition context come up for consideration. While this is understandable in view of the fact that at common law, asserted differences in jurisdictional bases have constituted rather a nebulous topic, the Act, with its clear reference to void and voidable marriages, invites attention to the characterization of the marriage as being a necessary threshold step where foreign elements are involved. There seems no reason why the concepts of the *lex fori* should prevail or why section 25 (3) of the Act should not here be of some significance, though the authors' suggestion that the inclusion of this provision was dictated by constitutional considerations, is of great interest.

Lastly, on the purely constitutional law plane, it seems that the point might well have been given some mention as to whether the area covered by the Act might not well be one of the areas of 'double jurisdiction' where State courts possess both a Federal jurisdiction and a State jurisdiction. As the conferring of Federal jurisdiction is referable to section 76 of the Constitution and as it was not a matter in which jurisdiction ever was or is now conferred on the High Court, it is difficult to see why the State jurisdiction which would arise on the enactment of the Act by reason of section 5 of the *Commonwealth of Australia Constitution Act*,[17] would not co-exist. This might affect not only the question of direct appeal to the Privy Council but conceivably also the question of a full right of appeal to the High Court.

This reviewer has not made a check as to whether footnote references invariably contain the correct page of the report referred to or even whether the names of cases are correctly rendered. He is somewhat in doubt as to whether such matters pertain properly to the sphere of a reviewer; he is also under some doubt, though he puts forward the view with some trepidation, whether any minor omission or error in these matters seriously mars the quality of the work. The only thing worthy of mention seems to be that the authors in referring to the relaxation at common law of the older attitude that recognition of foreign divorces was limited to curial decrees (page 81) must have had in mind and meant to refer to the case of *Har-Shefi v. Har-Shefi* (No. 2).[18]

Nothing that has been said above is intended in any way to detract from the fact that the coverage of so many matters in a book of such small size is remarkable. It is inevitable that some things should not receive treatment.

[16] *De Reneville v. De Reneville* [1948] P. 100.
[17] 63 & 64 Vict. c. 12.
[18] The case reported at [1953] P. 220, and not at [1953] P. 161.

The book can be unreservedly recommended as an instruction medium to students and to those practitioners who are concerned with jurisdiction problems under the Act and as a stimulus to critical enquiry by those concerned in the teaching of conflict of laws and of family law.

E. I. SYKES*

Parliamentary Supervision of Delegated Legislation: The United Kingdom, Australia, New Zealand and Canada, by JOHN E. KERSELL (Stevens & Sons Ltd, 1960), pp. i-xvi, 1-178. Australian price £1 4s. 6d.

How should one manage an unruly horse? Tame it before it can go on the rampage, or shut the gate after it has bolted? If subordinate legislation is one of our modern unruly horses, we too often seem content with the latter policy—with recriminations and judicial pronouncements after the event—when we might well be able to devise useful ways to implement the former. Parliamentary supervision in one form or another is just such a way, and in recent years has been gaining increasing attention. The book under review is a comparative study of the law and practice of parliamentary supervision in four countries, as its title indicates. Some of it has already appeared in article form in the periodical *Public Law.*[1]

There can be no question of the value of the study which this book undertakes. The work of the United Kingdom committees is fairly well known, but to many readers the experience in Canada, Australia and New Zealand will be quite new. Professor Kersell demonstrates that parliamentary supervision can play a useful role in checking the propriety of subordinate legislation, even though the bulk of such legislation and the pressures on parliamentary time may prevent that supervision being as effective as it might be in an ideal world.

'The prerequisites of Parliamentary supervision of delegated legislative powers', the author concludes,

> seem . . . to be adequate provisions for publication and laying. Preliminaries of supervision are scrutiny of form and of substance. Opportunities for Parliament to bring some degree of influence to bear on the form and substance of instruments are afforded by normal and, preferably, special debates. Parliamentary influence over the effects of instruments in operation can be had through appropriate procedures by which grievances are brought to light, ventilated if necessary, and, in the last resort, presented formally to the Government for redress (page 168).

On the whole, 'Australia' comes out of Professor Kersell's review reasonably well. But what is his 'Australia'? Here one must draw attention to a serious defect in the book: it gives a quite unbalanced picture of what is in fact the Australian experience in this field.[2] When discussing 'Australian' law and practice, Professor Kersell concentrates exclusively on the Commonwealth. Despite the fact that the great bulk of subordinate legislation in the key fields of housing, town and country planning, public health, education, traffic and transport, labour and

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[1] [1959] *Public Law,* 46, 152.

[2] The criticism here made seems equally applicable to the author's discussion of the Canadian position.