LIFE AND THE LAW IN MATRIMONIAL CAUSES

By E. H. E. Barber of the Victorian Bar

Delivered at a meeting of the Medico-Legal Society held on Saturday, 19th June, 1954, at 8.30 p.m., at the British Medical Association Hall, Albert Street, East Melbourne.

THOSE of us who have grown up in a British community and under a British system of law are apt to take for granted that our laws and methods of administration of justice are infinitely superior to those of any other nation or community. British justice and law enforcement are, we are told, the envy and admiration of the rest of the world. In general, this comfortable satisfaction may be fair enough, but even the most complacent admirer of our legal system must entertain some doubt as to whether our law relating to matrimonial causes is quite the acme of perfection. Some of us even entertain a suspicion that some better system could be devised, or even that some better system may exist elsewhere. This suspicion is strengthened by the attitude of those people in our midst who have lived under a different legal system. The foreigner's view of our divorce law is apparent to anybody who has tried to explain to an intelligent New Australian just why he cannot approach his divorce problems on the same basis as he could in his own country; why, for example, he cannot make what is plainly a sensible and civilized arrangement with his wife that one of them will divorce the other on terms mutually advantageous to both of them.

If this attitude of mind causes us to re-examine our divorce laws with a critical eye, some good may result. Some at least of the principles which together go to make up our divorce law, in their modern form and present-day application, undoubtedly lead to results which are far from satisfactory either to the individual litigant or to the community.

It is my purpose to-night in presenting this paper for your consideration to examine briefly the history, course of development and present effect of several of the principles of law currently existing in the divorce jurisdiction. The principles I have selected to discuss are, I believe, fair samples illustrating the more curious aspects of the law.

In examining the history of these principles you will find that the same pattern occurs in the course of their development. You will find in the first place a rule laid down which was probably strictly in accordance with the ideas of morality and social behaviour current at and shortly after the passing of the first divorce legislation in England in 1857, and somewhat slavishly followed after the passing of similar legislation in Victoria in 1861. Subsequently one finds an attempt at some stage to liberalise the principle, such attempts usually occurring in the 1920s and 1930s, and finally one discovers a victory either for the forces of liberalism or of reaction, with a distinct tendency at the present time towards reaction. It is hoped that examination of the principles, the historical reasons for them, and their present effect, may enable some of the medical members to discern a psychological basis for the legal principles involved.

The first of these principles I propose to discuss is the rule governing a co-respondent's liability for the petitioner's costs.

In cases where the husband petitions against his wife on the ground of her adultery with a named co-respondent and the decree is granted, the co-respondent is usually condemned to pay the husband's costs. At an early stage is became necessary for the Courts to decide what was to be the co-respondent's liability for costs in a case in which he did not know that the woman with whom he had committed adultery was married. One possible view was that a man who indulges in extra-marital intercourse does so at his peril, and if in fact the woman turns out to be married he has only himself to blame if her husband seeks costs against him. The opposing view was that no man should be condemned in costs unless it is established that at the time of his misbehaviour he actually knew he was invading the preserves of another. A third intermediate approach might have been that the co-respondent would have been condemned in costs unless he came to Court and established to the Court's satisfaction that he did not have any knowledge of the lady's married state. Rather surprisingly the view which was at first adopted was that a petitioner in order to obtain costs against a co-respondent must establish that the adulterer knew that the woman was married. Originally the rule was very strict. It was laid down within twelve months of the passing of the original divorce legislation in 1857, in the case of *Teagle v. Teagle and Nottingham* 1858 at S.W. & T. 188 and again in *Preske v. Preske and Goldby* 1860 4 SW. & T. 238. In the first of

these cases Cockburn C.J. stated, "it does not appear that the co-respondent was aware that the respondent was a married woman", and the Court refused to order costs against him although the circumstances clearly suggested that he might well have known. In Preske's case the woman was said to be dissolute and had lived apart from her husband but was supported by an allowance from him. There was evidence that the co-respondent was heard to say that "it was very convenient to have an allowance". This piece of evidence was pressed on the Court as being a strong indication that the co-respondent did know the lady had a husband, but the Court held that it was better to adhere to a strict rule, because it had not been positively established that the co-respondent did know.

At this stage it was clear that the onus was always on the husband to firmly establish the co-respondent's knowledge, and if he failed to do so no costs were awarded. In neither of these first two cases was any basis for the rule stated by the Courts, and it is all the more curious that the rule emerged in this strict form having regard to the fact that in the old action of criminal conversation, which was replaced by the petition for adultery, it was not necessary for the plaintiff to plead or prove that the adulterer knew the woman was married. The rule in its strict form continued until about 1920. It was even applied up to that stage to cases where the co-respondent became aware of the respondent's married state after the adultery had commenced, and in a somewhat sporting way the Court held that he should not be condemned to pay any costs merely because he was not cad enough to abandon the woman after he discovered she had a husband. However, in 1928 Sir Henry Duke P. refused to follow the principle that the co-respondent must have knowledge at the commencement of the adultery. He said that there was no such rule, and where a man had formed an adulterous relationship with a woman which was discontinued and again resumed at a later stage, costs were ordered because on the second occasion the co-respondent did know the woman was married. In two subsequent cases, one in 1920 and one in 1922, Sir Henry Duke continued what could almost be called his campaign, and refused to follow the strict rule. In Victoria as late as 1919 in the case of *Lillycrapp v. Lillycrapp* 1918 V.L.R. 320, Hood J. affirmed the strict rule and refused costs against the co-respondent who was ignorant of the woman's marriage at the time his association with her began but con-

tinued his association with knowledge. The matter was dealt with in England in the case of *Butterworth v. Butterworth* 1920 P. p. 126 at 154. Mr. Justice McCardie there reviewed all the authorities, and the learned judge decided that the Court has always had a discretion to award costs in any case, but that it was now too late to question the long-established practice that they should not be given against the co-respondent who has no knowledge, and that the burden of proving knowledge has always, perhaps regrettably, been thrown on the petitioner.

In Victoria in 1934, Martin J. after having the English text books cited to him in the case of *Green v. Green* 1934 V.L.R. 226, said that he had an unfettered discretion under Section 127 of the Victorian Marriage Act, and awarded costs against the co-respondent merely on the probability that the co-respondent knew that the respondent was married. It is still, however, the practice in the Victorian Courts that an order for costs will not be made against the co-respondent unless it is established by the petitioner that the co-respondent knew that the respondent wife was a married woman.

Whether any kind of moral can be drawn from this brief history I do not attempt to say. It is somewhat curious that in the middle of the last century, when according to present views Victorian morality was so strict, a rule should have been adopted which in effect protected the promiscuous adulterer from the results of his activities, and that in times when the standards of the community are considered to have been generally lower, a rule more favourable to wronged husbands and less favourable to adulterers should have been preferred.

In considering the changing views as to the liability of co-respondents, I encountered one historical sidelight which, while strictly irrelevant to the matter under discussion, is of some interest. When the original divorce bill was introduced into the Legislative Council of Victoria in 1859 (see Victorian Hansard 1858-9, Vol. 4, 354 and 505) an amendment was moved to the section which abolished the action for criminal conversation and substituted the claim for damages for adultery. The amendment proposed that no civil action should be brought for criminal conversation but that the adulterer should be liable for a term of imprisonment and to be condemned also, if he could afford it, to pay the cost of the prosecution. In the case of male adulterers the sentence to be imprisonment with hard labour on the roads or other public works of the Colony for

not less than one year or more than seven years, and in the case of females, for not less than one month or more than one year, and that the adulterer and adultress could forever be incapable of contracting marriage together. The amendment, I am happy to say, was lost.

The next matter with which I propose to deal is the peculiar effect of the rules relating to *Condonation* and the revival of condoned matrimonial offences.

A matrimonial offence once it has been condoned can no longer be relied upon by the offended party as a ground for matrimonial relief unless the offence has been revived by some subsequent offence not necessarily of the same character. For instance, adultery which has been forgiven may be revived by desertion. As far as a husband and wife are concerned the law is well settled and provides a not unreasonable working code. The effect, however, of the doctrine of condonation and revival on third parties who may be involved in the suit often works extraordinary hardship.

The usual pattern of the adoption of a strict rule by the Court, followed by an attempt at liberalising and reversion to the strict rule, appears clearly in regard to this branch of the law. It was at first held that when the offence had been condoned as against the respondent and co-respondent and subsequently revived by the respondent's conduct, it was also revived in respect of the co-respondent. That is to say, that where a husband forgives his wife's adultery and she subsequently commits some offence which revives her adultery, it was revived also as against the co-respondent even though he was not concerned in the subsequent offence. The hardship of this rule was mitigated in effect by the case of *Bernstein v. Bernstein* 1893 P. 292, and the Bernstein decision was for some years followed in Victoria. However, in the 1940s the English Courts reconsidered the position and in *Barnes v. Barnes* 1947 2 All. E. R. 326 and *Lloyd v. Lloyd* 1947 P. 89, the doctrine was reintroduced of revival against the co-respondent. These cases were not followed in Victoria. In *Hemsworth v. Hemsworth* 1948 V.L.R. 483, the Court held that no order to pay costs should be made against the co-respondent whose adultery was only a ground of divorce because of the doctrine of revival after condonation and who has not been concerned in the conduct which brought about revival. However, in *Jacobsen v. Jacobsen* No. 2 1953 V.L.R. 514, the question was considered whether or not an adulterer whose adultery had

been revived after condonation should be a party to the suit or whether the petitioner might obtain an order dispensing with the co-respondent. In that case the woman was alleged to have committed adultery in Austria, the adultery was clearly condoned, and the husband and wife lived together in Victoria for a number of years. In 1952 the wife allegedly deserted the husband in Victoria, thereby reviving her adultery; her Austrian lover was named as co-respondent. Although he had never been in Victoria and the subsequent offence which revived the adultery was no concern of his, the Court refused an application by the petitioner to dismiss the co-respondent from the suit, holding that the mere fact that the adultery had been condoned and that the alleged adulterer had not had any part in its being revived as a ground of divorce did not afford a reason for dispensing with his being made a co-respondent. The position, therefore, is that although a co-respondent in the position of the adulterer in Jacobsen's case will not have an order made against him for costs, he must be joined as a party to the proceedings.

The manifest unfairness of this rule lies in the fact that a co-respondent who has long since ceased his association with the respondent can be, and indeed must be, made a party if the original adultery is relied on by the petitioner, without any subsequent ill-conduct on his part. This leads to some startling results. It may be a little unnerving for a number of respectable citizens in this community to realize that some peccadillo of their youth can be brought up against them in their respectable old age. For example, a young man in his early twenties, as a result of a temporary fascination for a young married woman, commits adultery and is found out. The husband, however, forgives his wife and the incident is, from the adulterer's point of view, closed. Twenty years later the adulterer, by this time a highly respectable married man with a loving wife and family, one day finds a process server on his door-step handing him a petition in which he is the co-respondent; it appearing that his former lady friend has after twenty years deserted her husband. The position is equally painful in the case of a respondent husband and some woman with whom he has committed adultery. Under our present Supreme Court rules a woman with whom a husband respondent is alleged to have committed adultery must be named in the petition if her identity is known, and a notice served on her informing her of the fact and offering her

the opportunity of coming into Court and being heard in defence of her good name. In theory this is an excellent provision and enables an innocent woman to protect her character, whereas without the notice the case might be undefended and her character blemished without her knowledge. In practice, however, 99 such women in every 100 ask nothing better than to be left alone, and the last thing they want to do is to come to Court as a party in somebody else's divorce suit. In my own experience this rule has worked grave hardship when coupled with the principles relating to revival of condoned offences. A woman who in her youth may have parted very temporarily from the path of virtue and who in later years has become a respectable wife and devoted mother may well find her family life disrupted by the arrival of a notice which informs her husband and family as well as herself that she was once guilty of adultery. The object of the rules which combine to bring about this result is of course perfectly proper. It is highly desirable and in accordance with the principles of justice that no man or woman should be condemned or branded as an offender without being given a chance to be heard in his or her defence. Moreover, it has always been a firm principle of the Divorce Court that the fullest possible disclosure of all the facts should always be made, and our Courts apparently feel that the more parties there are before the Court the more likely it is that the whole facts will emerge. Nevertheless, one cannot help feeling that a strict logical application of these principles has, in this branch of the law, led to a situation which in practice causes a good deal of avoidable human misery.

I now turn to another matter currently being canvassed in the Courts.

The Effect of Insanity upon the Continuance of Desertion

At the outset of this portion of the subject I wish to make it quite clear precisely what I am not discussing. I am not discussing the general subject of insanity as a ground for divorce or even as a defence to matrimonial wrongs in general. This wider subject has been discussed in the Courts in recent years, and the latest English authority dealing with this subject is *Swan v. Swan* 1953 P. p. 258. While insanity was probably always a defence to a matrimonial charge such as adultery or desertion there has been considerable doubt whether it was a defence to an accusation of cruelty. This case makes it clear that in a suit

either for divorce or judicial separation the insanity of the respondent is a defence where cruelty is the ground. The fascinating field of insanity as a defence has been, so far, insufficiently exploited by the divorce lawyer. These seems no reason why respondents should not present to a divorce court the defence so familiar and successful in the criminal jurisdiction. For example, in an adultery case, to take the defence that at the time of the offence the respondent was so inflamed as a result of the circumstances in which he found himself that he was not aware of the nature and consequences of his act and, therefore, not responsible for his action. There is a kindred defence applicable to the man found in the wrong bed who establishes to the Court's satisfaction that his actions were those of a sleep-walker.

The sole matter to which I desire to advert is the question of the effect of insanity upon the continuance for the statutory period of the respondent's intention to desert. It is clear law that a petitioner on the ground of desertion must establish to the Court's satisfaction that the respondent had an animus, an intention to desert the petitioner, and that such intention persisted throughout the three year period. If the respondent was insane at the time of desertion no difficulty arises because he would never have had the initial animus to desert, but the problem does arise where desertion occurs by a sane respondent who subsequently during the three year period becomes insane.

There is a line of authorities dealing with the problem of whether the statutory period of desertion was interrupted by the imprisonment of the respondent or his detention in an asylum for some part of the period. The effect of the cases was that no such interruption occurred by reason merely of the respondent's detention, and without any very careful examination of the effect of his insanity on the mental element of desertion, courts were prepared to grant decrees for desertion even where for part of the time respondent was certified and detained in a mental institution. However, after the mental element of desertion began to receive the close attention that it has done in recent years, a different view developed. This school of thought held that the moment a respondent became certified as insane he lost the power of retaining the intention to desert and desertion immediately terminated. In effect it was said there is an irrebuttable presumption that a person certified insane cannot have an animus deserendi. The present position

has been settled for us by the House of Lords in the case of *Crowther v. Crowther* 1951 A.C. 723 and the Victorian cases of *Scherger v. Scherger* 1952 V.L.R. 89 and *Kertesz v. Kertesz* 1954 V.L.R. 195. The position now is that there is no irrebuttable presumption that a respondent certified as insane has no capacity to retain his intention to desert. There is such a presumption, but it is rebuttable by the petitioner on whom there lies the onus to establish that the respondent did retain the animus deserendi.

In Scherger's case the evidence was that the husband deserted his wife in February 1945 and on the 19th day of May 1945 he developed symptoms of lunacy and was admitted to an asylum. He was discharged in October 1949. Since that date he made no attempt to resume cohabitation with the petitioner but made it clear in his letters that he had no intention of ever doing so. There was medical evidence from the senior medical officers of Mont Park and Ararat, and both doctors agreed that whilst an inmate of their establishments the husband would know he had a wife and whether he was living with her and whether he intended to return to her. The Chief Justice was satisfied of the original desertion and satisfied that on regaining his sanity the respondent had the intention to desert, and on these facts was able to hold that his intention to desert had continued throughout the period of his detention.

In Crowther's case the desertion is said to have begun on the 26th June 1946. The respondent was admitted to an asylum under a reception order on the 28th July 1948, and was there detained until the 11th October 1948. The petition was presented in July 1949. The Judge of first instance having taken the view that the existence of the certificate was an absolute bar to the grant of the prayer in the petition, the House of Lords considered the matter without having before it any real evidence of what in fact was the state of the respondent's mind. Having come to the conclusion that the certificate did not raise an irrebuttable presumption against the petitioner the suit was sent back to the Divorce Court to investigate the medical evidence as to whether in fact the respondent's mental condition was such that he could have retained his intention to desert. In Kertesz's case Sholl J. followed the principles in Crowther's case and applied them to a case of constructive desertion.

The matter now rests as I see it in this way: As in every case the petitioner may, and in order to succeed must, establish

by medical and other evidence that the mental condition of the respondent was such as to enable him to retain his intention. If this is not established, then the petitioner must fail.

The legal problem has thus been solved by the lawyers--doubtless to their complete satisfaction. In each case the respondent's mental capacity is a question of fact to be decided on medical evidence. This seems to throw the whole problem squarely into the lap of the medical practitioner.

It does, however, seem to leave for the future some substantial difficulties. I leave aside the obvious difficulty that the tribunal of fact may have when one or more eminent psychiatrists called on the one side are flatly contradicted by a similar number of equally eminent medical men called upon on the other side. That sort of problem is always with us. I am thinking rather of the case where a man certified as insane demonstrates by word and deed an active hatred of his wife and a firm determination to stay away from her. Or the opposite case of a man who expresses what is apparently the most sincere desire to be reunited with his wife. Will medical witnesses be able to say that because of the man's infirmity of mind he really means the very opposite to what he says, or that the expressions he uses really spring from deep emotion and are a true representation of his real intentions? In some cases also there will be people whose minds are completely blank, at any rate on the relevant subject of their conjugal responsibilities and matrimonial intentions. Mr. Justice Sholl in Kertesz's case examines the question of what is meant by continuance of a state of mind. He points out that even in the cases of the sanest of persons they cannot every minute of every day be affirmatively thinking of their intention to desert, but that it is sufficient if the intention is there on such occasions as the respondent may advert to the matter. It was suggested in argument that the intention strictly cannot persist continuously in the case of a sane person who was rendered unconscious for a substantial period, and it was argued from that that if a lunatic had lucid intervals during which he had the intention to desert, this was sufficient.

If I am right in my apprehension of future difficulties of fact, this does seem to be a case where the adoption of the more liberal view has created difficulties that would not exist if the stricter, less liberal, view had been accepted. While this is no reason for not adopting the better view, it perhaps serves

to illustrate why strict rules, easy of application, are sometimes popular.

The Present Law Relating to Collusion

Under Section 82 of the Victorian Marriage Act 1928 in case the Court finds that the petition for dissolution of marriage is presented or prosecuted in collusion the Court shall dismiss the petition.

Like most of the basic principles of the Divorce Court this section is taken from the original English Act, and the concept that parties must not present petitions in collusion was a rule developed by the Ecclesiastical Courts in their dealings with matrimonial matters prior to the Divorce Act of 1857. There is no doubt the law is, and always has been, that parties must not make collusive arrangements in relation to their divorce cases.

Collusion is not defined by the legislature and the question as to precisely what bargain or circumstances constitute collusion is one that has been canvassed in the Courts ever since the divorce jurisdiction was created. I do not propose to examine in detail the development of the concept of collusion except to say that there was a time, some few years ago, when divorce practitioners believed and acted on the belief that in order to constitute collusion there must be a bargain between the parties of a corrupt nature which resulted in the presentation of false facts to a Court or the suppression of true facts. Also, in those days the divorce lawyer acted on the assumption that, provided that the Court was satisfied that the bargain had not resulted in the suppression of the truth or the creation of false evidence, a decree would be granted, although the parties had entered into arrangements which might have affected the presentation of the petition or the intention of the respondent to defend the suit.

As a result of a number of cases in recent years both in England and in Victoria, the innocent beliefs of divorce practitioners have been rudely shattered, and it is now the law that any bargain or arrangement between the parties whereby the petitioner is induced to present his petition or the respondent induced not to defend, is of itself collusion. This is so even if the Court is satisfied that the whole of the facts have been presented to it, and even if the Court is satisfied that a ground for divorce existed quite independently of the bargain. The latest of these cases is the Full Court's decision of *Heffernan v. Heffernan* 1953 V.L.R. p. 321. The headnote in the case reads—

"Agreement between the parties to a petition for divorce that it should be commenced and prosecuted, induced by some material consideration offered by the proposed respondent constitutes collusion whether or not the agreement causes the giving of false evidence or the withholding of material facts or involves any deceit or imposition on the Court."

Now, I am not concerned to argue that Heffernan's case was wrongly decided. It has received a good deal of criticism from the profession, and the feeling exists that a review of the decision by the High Court might well at least greatly modify the strict principle adopted. Nevertheless, this case is merely the culmination—the high-water mark—of a series of cases both here and in England all tending in the same direction. For the purpose of my submission I am content to accept the decision in Heffernan's case as a correct statement of the law. I am concerned to examine the question briefly whether or not the time has come to unshackle the divorce law from, at any rate, some of the fetters originally forged in the Ecclesiastical Courts, and to see whether the strict rules against collusion as now defined really work to the public good.

The facts in Heffernan's case are themselves the best illustration of the sort of thing I mean. It appears that Mrs. Heffernan had evidence to justify her petition on the grounds of her husband's adultery with a named woman. For religious reasons she at first petitioned for judicial separation only. Defending this petition, the husband filed an answer denying adultery and alleging petitioner had been guilty of such wilful neglect or misconduct as had conduced to the adultery. Subsequently the husband requested the wife to amend her petition to one for divorce, and agreed that if she did he would transfer to her the dwelling house in which she resided with the four children of the marriage. Now the wife was indifferent as to whether she was divorced or not. Her religion forbade her from remarrying if she were divorced. On the husband's request, however, she consulted her religious authorities, who took what I respectfully suggest was the commonsense view and gave her permission so far as they were concerned to amend her petition to seek a decree of dissolution instead of judicial separation. Upon her application to the Court for permission to change her plea the matter was referred to the Full Court and the decision quoted above resulted.

Now, as I say, there is no doubt on the authorities that such a bargain does constitute collusion. It was clear that her petition for divorce was induced by the husband's promise, but my suggestion is that while such is undoubtedly the law, it is not the law as it should be, and that it should be altered, by legislative action if necesesary. The objection to collusion is based on the theory that in divorce suits the public as well as the parties have an interest, and it is against public policy that such agreements should be allowed to be made. If, however, one can free one's mind from the theories imposed by the historical background of the divorce law and look squarely at the problem, does it still appear that such an agreement is against public policy? What harm is done to the public or to the maintenance of the marriage state by the bargain Mrs. Heffernan proposed? Is it not, in the long run, more sensible that she should have given her husband his freedom so that she and her children could have a roof over their heads and some more adequate maintenance than they would be able to get by simply seeking a maintenance order from the Court? One would have thought that the position of the children alone was one which would induce most people to take the view that the public interest was best served in carrying out the proposed bargain.

It frequently happens in practice that a woman has good grounds for divorce, that her husband wants her to divorce him, and that she is not unwilling to do so except that she realizes that if she does she may well lose something of the security that her married status gives her—for example, her right to make a claim against her husband's estate as his widow which she loses if she is divorced from him. There seems very little wrong from the point of view of public policy in such a wife saying in effect: "You make my future secure and I will divorce you, but I will not give you your freedom to find myself depending on whatever maintenance a court may give me." As the law stands at present such an arrangement cannot be made. Of course, nobody wants to see a state of affairs where lying and untruthful people present false cases to the Court, but whether the public interest is really hurt, provided all the facts are before the Court in the making of sensible and civilized bargains between the parties, is a matter that would appear at least open to more than one view.

Another aspect of this matter is of considerable importance. Whatever be the law, people will in fact make bargains of the

kind indicated, human nature being what it is, and where people know that such a bargain will be fatal to a successful petition the temptation to hide it from the Court is exceedingly strong. In the result the present position of the law tends to drive such arrangements underground and to encourage otherwise decent citizens to conceal the facts from the Court. In my submission it is in the true public interest that such bargains should be permitted and be the subject of open investigation by the Courts. It is another instance of a rule of law which has no terrors for the perjurer or the hard-boiled concealer of the truth, but seriously embarrasses the honest man or woman.

Repeated Act of Adultery

One cannot leave any discussion on the curiosa of the divorce law without adverting briefly to what is probably the best-known of the oddities of our Victorian law. That is the provisions in our Act which entitle a husband to petition on the ground of his wife's adultery simplicita (section 76). A Petitioner wife, on the other hand, must establish either a repeated act of adultery or adultery in the conjugal residence, or coupled with circumstances or conduct of aggravation (section 75 *e*). Under section 77 she may petition on the ground of incestuous adultery or a number of other types of adultery of particular horror or combined with some other matrimonial offence. Section 77 came straight from the English Act and I am happy to say not accepted in Victoria without some protest (see Victorian Hansard 1860 Vol. 5 p. 365).

When the original Divorce Bill (containing what is now section 77) was before the Legislative Council a Mr. Fellowes moved an amendment that the word "incestuous" before the word adultery be omitted. The effect of this amendment would have been to make a wife's petition possible on the ground of adultery only. The amendment was carried but was ultimately lost in the backing and filling that accompanied the Bill on its way through the Legislative Assembly. As far as I can gather, an Act was ultimately passed after considerable pressure from the Home Government had made it clear that too many radical colonial amendments would lead to the whole Act failing to receive the Royal assent.

Whatever may be said of the influence on the divorce law of Courts and Counsel, this particular oddity is not the responsibility of the lawyers, but is entirely the creature of the legis-

lature. Indeed, most lawyers and judges have for many years been scornful of this distinction between a husband's and a wife's petition. The distinction has been abolishd in England and in all States except Victoria, but despite the protest of feminist organizations and people interested in law reform, no Victorian government has changed it, and indeed Victoria is clinging to this ancient distinction with a conservative affection worthy of a better cause. The interesting thing is why such a distinction should have been originally thought necessary. It apparently relates in some way to what used to be called the "double standard" of morality apparently current in Victorian times. The basis seems to be that while any wife who slips once from strict virtue is worthy only to be cast out into the snow without further ado, an erring husband is to be treated a little differently and allowed, like the dog, one bite before incurring liability. In these days of equality of the sexes preservation of this distinction seems absurd, but possibly psychologists might say that there was some sane basis in the different temperatures of the two sexes for what appears on the face of it to be a ridiculous and unfair distinction. Could it be that the distinction recognized some vestigial inclination towards polygamy in the human male, not thought to be in the make up of the human female? Whatever be its origin, no good purpose seems to be served by its preservation at this stage of human progress.

These necessarily fragmentary excursions into the legal principles of divorce law has served to illustrate the general picture of the way the law has developed in England and Victoria since 1857. Examination of the history and development of other doctrines current in the Divorce Court confirms what is suggested by the development of the principles that we have looked at to-night and shows the same pattern persisting. The law has developed over the last 100 years, by no means steadily, but by fits and starts. The occasional intervention of the legislature has from time to time widened the grounds without really departing from the general principles laid down originally in the ecclesiastical jurisdiction. It is apparent that two forces, two bodies of opinion, exist, and always have existed in the community; the one exercising pressure for a wider and more liberal divorce law, the other resisting any change on the basis that any change must be for the worse. The substantial opposition to change has apparently frightened our local legislature so effectively that there has

been no real alteration to the law for fifty years or more. Perhaps the real reform that is called for is not so much a widening or increasing of the number of grounds for divorce but a liberalizing of the subsidiary rules of law that tend to stultify the existing grounds. As I have said, these principles of collusion, condonation, connivance and so forth stem from the original ecclesiastical jurisdiction, and it may well be that the time has come to free the divorce law from their inhibiting influence.

There is, of course, a perfectly intelligible view that divorce is a bad thing and that no provision for dissolution of marriage should exist at all. Once this attitude is abandoned, however, and a divorce law of some sort permitted, there is surely a good deal to be said for having a law that is fair both to the parties themselves and to the community, and that is not kept in a straightjacket as a result of applying concepts and theories invented in the wholly different circumstances of the past.

Finally, while much of what I have said is of direct interest to lawyers rather than to medical men, there is a psychological aspect on which some views from the medical profession would be valuable. There is no doubt, as any divorce practitioner knows, that a great number of the people involved in divorces are obviously psychologically upset and frequently neurotic. Whether an easier divorce law resulting in more of such people more easily acquiring their freedom would tend to lessen the incidence of neurosis in the community, or whether on the other hand the less divorce is made available to the population the less they will suffer from psychological maladjustment is a matter on which perhaps medical opinion would be a useful guide to the legislature.

Discussion

DR. GUY SPRINGTHORPE opened the discussion. He said that the strange twists and turns of conduct that come to light in matrimonial cases reminded him of the statement in the Book of Exodus that we are "fearfully and wonderfully made". He suggested that the risks which adulterers run of being compelled to pay the costs in matrimonial proceedings would be reduced if all persons were obliged by law to wear an identity disc round their waists on which were engraved their marital status and age.

On the question of the influence of insanity on desertion, he said that the legal concept of insanity in this field raises the same difficulties as the legal concept of insanity in criminal cases. He understood that lawyers were now giving consideration to the problem of bringing irresistible impulse and partial responsibility within the ambit of the law. For himself, he could see no commonsense justification for the rule that a period of desertion can be interrupted by intervening insanity.

His clinical observations led him to believe that many married women declined to bring divorce proceedings because of the consequential financial disadvantages. To enter into an agreement designed to overcome these disadvantages would, he understood, often be held to be collusion. If any change were to be made in the unequal laws relating to adultery applicable to men and women, he suggested that the change should not be made before the Olympic Games have been held. He doubted whether the proposition that men were polygamous could be established. Many men were barely monogamous.

The final question posed by Mr. Barber was a supreme example of the advocate's art, and the kind of question that was the despair of the expert witness. He was under no obligation to answer it, and, not being in Court, did not propose to do so. In addition to the two questions posed by Mr. Barber, he posed himself two more—whether easy divorce would lead to more neurosis, or whether less easy divorce would lead to more neurosis. He had thus doubled the field of inquiry, but he did not propose to answer the second two questions either. Apart from all other reasons for refusing to answer, nobody knows what neurosis means.

Assisting persons who have encountered matrimonial difficulties was an enormous problem of preventive psychiatry, which had to take account of tension and personality and many other factors. In many cases the personality disorders appeared to be almost insoluble, and there were great difficulties in the way of bringing to a successful conclusion any form of intervention in these troubles. The main factor underlying the tendency to increase in divorce was not so much neurosis or mental disorder as lack of moral development and disorder of character. The whole answer to the problem was not to be found either in the field of law or in the field of psychiatry.

Mr. G. H. Lush said that divorce could be encountered running in successive generations of a family, and also running

through groups of persons almost all of whom would be found to be divorced. He suggested that the reason for this was that the petitioner, although appearing as the wronged party in Court, in fact appeared as one who had failed in his or her matrimonial experiment. Such persons tended to justify their failure by influencing others to follow the same course as they themselves had followed.

MR. P. E. JOSKE, Q.C., said that recent decisions in the law of collusion were of an undesirable kind. When he first came to the Bar, practitioners went in fear and dread of the word collusion, but in the 1920s the then judges developed a different approach to the problem which encouraged candour on the part of parties and practitioners coming to the Courts.

Unfortunately recent Victorian decisions have adopted a view of collusion which goes back to the 1890s, with a result that all forms of collaboration and agreement between the parties are treated as things to be suppressed. The result tended to be that the parties, having learned from their first set of advisers what the difficulties were, went to a second set of advisers to whom they gave a very limited account of the facts. The real and only question should be whether the Court is being told the truth about the grounds on which the divorce is sought. If the Commonwealth Parliament ever passed a Divorce Act, he hoped that he would be able to exclude from it the doctrine of collusion.

DR. MICHAEL KELLY said that he agreed with Dr. Springthorpe's proposition that the question of character and moral fibre which emerged in this problem was far more important than the question of neurosis. He thought that the existence of facilities for divorce tended to make persons less careful to ensure before marriage that they were suited. He thought that, prior to the development of birth control as a common practice, the different standards applicable to men and women in relation to adultery were justifiable on a commonsense basis, but in the present times he felt that he did not know whether the justification remained.

MR. X. CONNOR said that, in relation to the suggestion that there should be a Statute of Limitations limiting the time within which condoned adultery could be revived, the law which proceeded on the assumption that it was in the public interest that possession established for years should remain undisturbed

might very well take the view also that established domesticity should remain undisturbed.

MR. D. MACKINNON said that only the State of Western Australia permitted divorce on the ground that the parties had been separated for a period of five years and were unlikely to come together again. This had led to a migration of petitioning husbands to Western Australia where they found the climate so attractive that they settled there permanently and acquired a domicile. By chance it frequently happened that after obtaining a divorce the husband found himself back in his original State. This practice rendered nugatory, in the cases in which it was followed, the laws of other States relating to collusion.

MR. E. H. E. BARBER, in reply, said that it might be most convenient, in the light of Dr. Springthorpe's remarks concerning insanity, for co-respondents to be able to plead that their conduct was the result of irresistible impulse or emotional motivation. He pointed out that his comments on the financial position between husband and wife had been directed, not to criticism of the amount of payments awarded by way of alimony or permanent maintenance, but to the fact that the wife has, while still married, a powerful bargaining weapon which she loses when divorced. While married, she has rights under the Testator's Family Maintenance Act, and is also in a position to bargain for capital benefits as the price of separation or divorce. He could see no inherent vice in this, provided it did not lead to distortion of the facts which constituted the grounds of the divorce. In relation to the fact that divorce often ran in families, he said that he had encountered families which seemed to suffer, not from an inherited disposition to obtaining divorce, or to being divorced, but from a family incapacity to choose suitable mates. He agreed with Mr. Mackinnon's statements as to the operation of the Western Australian law relating to separation, but thought that in fact that law provided a useful loophole for husbands who were able to avail themselves of it.