



SOMETHING OLD, SOMETHING NEW

Divorce and divorce law in South Australia, 1859-1918

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**Thesis submitted in fulfilment of the requirements
for the degree of Doctor of Philosophy
in the Department of History at the University of Adelaide**

1988

Summary

The two propositions put forward in the thesis concern, respectively, divorce law in particular and the law in general. In the first instance, I claim that other analyses of divorce, notably William O'Neill's 'safety valve' thesis, see divorce as a product of the rise of the companionate marriage among the ascendant middle class of the nineteenth century. While not rejecting this argument out of hand, I argue that the most sweeping change wrought in English (and consequently South Australian) divorce was its formalization. Access to formal divorce increased so greatly in the second half of the nineteenth century that instead of focusing upon change in marriage as a cause of change in divorce law, it is more appropriate to talk about the influence of divorce law upon change in marriage. The thesis measures this influence by examining the use of divorce law by men and women who seldom came from powerful social groups but who nevertheless played an important part in changing the dominant marital values of South Australian society.

The sources used in the thesis are two distinct bodies of material: court records and fictional literature. They reveal a set of marital values shared by the South Australian judiciary and the novelists which was based on strong opposition to the resort to divorce as an alternative to unhappy marriage. Each of these two groups attempted to oppose divorce: the judiciary by using members of South Australia's ruling *élite* as moral exemplars of good marriage and the novelists by a combination of moral imperatives and romantic enticements. Each failed to forestall the resort to divorce because their positions entailed inconsistencies which were exposed as untenable against the pressure of the demand for divorce. Finally, the thesis draws conclusions from the South Australian example of divorce about the relationship between the law and its users, taking issue with other historians of the left who see this relationship as necessarily one of oppressor and victim, powerful and powerless.

Declaration

This thesis contains no material which has been accepted for the award of any other degree or diploma in any university and, to the best of my knowledge and belief, it contains no material previously published or written by another person, except where due reference is made in the text. I consent to it being made available for photocopying and loan.

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Acknowledgments

My thanks go to Dr Vivien Brodsky, of the History Department of the University of Adelaide, for providing a topic and supervising the first eighteen months of the project and to Dr Robert Dare, of the History Department of the University of Adelaide, who assumed supervision thereafter. I also wish to thank other members of the university community who offered me encouragement, help and advice: Dr Carol Bacchi, Dr Ian Davey and Dr John Wanna. Of all those who smoothed over the difficulties of postgraduate research in other ways I would like to thank in particular Ms Leonie Kallis, Ms Chris Reardon, Mr Rodney Teakle and Mrs Val Siebert, all at some stage during my research on the staff of what is now the Public Record Office of South Australia. I would also like to thank Ms Margy Burn and Ms Susan Woodburn, both Special Collections librarians at the Barr Smith Library of the University of Adelaide during the time of my research.

Abbreviations

Register

The South Australian Register

P.R.O.S.A.

The Public Record Office of South Australia

G.R.G.

Government Record Group

A.E.R. Rep.

All England Reports Reprint

L.T. (N.S.)

Law Times Reports (New Series)

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Introduction

The sixty years of divorce with which this thesis is concerned encompass the filing of South Australia's first petition under the Matrimonial Causes Act, No 22 of 1858, and the last filed in 1918 before the amendment of that year received royal assent on 29 May 1919 (No. 1356 of 1918). This amendment gave women equal access with men to the single ground of adultery for the dissolution of marriage for the first time. The thesis studies South Australian divorce as an aspect of legal history and thus says little about what was peculiar to divorce in South Australia. As a piece of colonial legislation, the Matrimonial Causes Act closely resembled both the English Divorce and Matrimonial Causes Act 1857 and divorce legislation enacted in other British colonies. The following history examines South Australian divorce law between 1859 and 1918 as a case study of the use of English divorce law in a predominantly British society; the characteristics of South Australian divorce no doubt had their counterparts in other nineteenth century English societies.

South Australian historiography has to some extent defined itself with reference to what South Australia was not. It was not a penal colony. If the absence of convicts was considered a virtue by South Australia's founders and early colonists, a disproportionately strong odour of self-congratulation still pervades the South Australian atmosphere and is exhaled through its histories, which R. J. Holton describes as predominantly Whiggish.¹ Holton's call for a South Australian history which celebrates its "plebeian" contribution, however, stresses the importance of the rise of the suburban middle classes in the twentieth century. Yet their histories are as susceptible to Whiggish interpretation as the "patrician" ones because it is the questions asked of historical material rather than the material itself which determines the Whiggishness of an historical tradition.

¹ R. J. Holton, "Twentieth Century South Australia: From a Patrician to a Plebeian View", in E. Richards (ed.), *The Flinders history of South Australia: social history* (Netley, S. A., 1986), p.550.

Our preoccupation with what South Australia was not nevertheless incorporates an assertion of what it was and was intended to be: a concentrated settlement emanating from a planned city peopled by equal numbers of men and women.² The result is an historical tradition defined with almost exclusive reference to these origins. What it lacks more than the voices of unheard groups are the answers to (and the posing of) questions which our Wakefieldian tone has tended to silence. Holton exposes this lack more effectively in his conclusion than in his introductory criticisms, when he calls for twentieth century South Australian history comprising "dilemmas such as the compatibility of community and individualism, of sectional interest and public welfare, of individual freedom and family responsibility".³ These are universal dilemmas, from which no history can claim exemption.⁴

The problem, then, is not South Australian patricianism but an exaggerated sense of South Australian uniqueness. This thesis should therefore not be dismissed for its unabashed preoccupation with a handful of prominent South Australian families; South Australian history is characterized less by its "patrician" themes than its Wakefieldian overtones. Our gentry is regarded as peculiar because Wakefield planned to have one from the outset,⁵ an emphasis which ignores the fact that colonial gentries which are not planned still develop. Scratch the surface of the most rough-and-tumble outpost of Empire and you find a colonial "aristocracy" almost as old as the colony itself.⁶ J. B. Hirst has argued that our gentry did have local idiosyncracies, in particular its tendency toward urban living and the conglomeration of its dwellings with the humble cottages of plebeian South Australians.⁷ But in South Australian historiography

² D. Pike, *Paradise of dissent: South Australia 1829-1857*, 2nd. ed. (London, 1967), pp.78-80.

³ Holton, "Twentieth Century South Australia", p.564.

⁴ A similar point has been made by Peter Munz in "Gesta Dei per Australianos", *Australia* 1888, Bulletin No.3, (December, 1979), pp.5-27.

⁵ Pike, *Paradise of dissent*, p.78.

⁶ See, for example, M. L. Kiddle, *Men of yesterday: a social history of the Western district of Victoria 1834-1890* (London, 1961) and P. De Serville, *Port Phillip gentlemen and good society in Melbourne before the gold rushes* (Melbourne, 1980).

⁷ J. B. Hirst, *Adelaide and the country 1870-1917: their social and political relationship* (Clayton, Vic., 1973), p.38.

in general, even our plebeians are depicted as peculiar because Wakefield planned to have them too.

Both too much and not enough has been made of South Australia's specialness. The need to reassert it for its own sake is reminiscent of Oscar Wilde's observation that the only thing worse than being talked about is not being talked about. The persistence of the theme of our individuality, symbolized in the motif of the Wakefield plan, suggests an adolescent unease about our identity manifested in a reticence to explore conflicts which South Australia shares with all societies. With some exceptions, our sense of difference has not produced a lively historiographical tradition which explains our idiosyncracies. The uniformity of the divorce laws which Britannia exported to her various colonies provides a common ground from which to appraise South Australia's particular reaction, if any, to Imperial laws. As the reader will be aware from the opening paragraph, however, this type of comparison is not the subject of this thesis. It is generally a futile exercise to discuss all of the theses this one might have been were it not the one that it is, in order to justify why it is not any of the ones that it is not. The exercise has some point, however, with reference to South Australian historiography. It is noteworthy that the popular motif of South Australia's history is of Wakefield's plans rather than the compromises which featured in the implementation of them (*viz*, what the plans were not). It is into this gap between the ideal and the real that we can slip the history of divorce in South Australia.

There are few more appropriate historical sources than those relating to the breakdown of marriage for dispelling some of the myths which the current government-sponsored fads for nostalgia (both the national and the local birthday campaigns) are busily trying to buttress. The testimonies of divorcing couples offer a picture which varies greatly from Wakefield's ideal of respectable married couples providing the basis of a stable society. If the number of divorces granted between 1859 and 1918 is so small that one can neither confirm nor deny the historical consequences of the equation of marriage with social stability, one can examine the consequences of contemporary faith in its validity. One group which seems to have clung particularly tenaciously to it

was that empowered to grant divorces. The South Australian Supreme Court judiciary (but not its South Australian peculiarities) is one of the subjects of this thesis. The history of the implementation of the South Australian Matrimonial Causes Act is one of conflict between ideals and the constraints placed upon them which is comparable in kind to the execution of the Wakefield plan and its deference to the exigencies of South Australian colonization. And if we give credence to the "tip of the iceberg" argument about the resort to divorce we may ask whether our forebears were as self-consciously defined in Wakefieldian terms as the most popular sources would suggest, or whether we simply prefer hearing ourselves being talked about.

*

This thesis is in two main parts, with a third which attempts to draw the two elements together. The first part examines the hearings of petitions filed under the Matrimonial Causes Act while the second discusses novels published in the period under study by women who made their home or were born in South Australia. Thus it too has a South Australian flavour. The analysis, however, takes a similar 'case study' approach to that adopted toward the divorce material. The novelists themselves are concealed behind their works and there has been no attempt to discover or define a South Australian literary genre. Nevertheless, as a historical source, the novel highlights some of the points already raised about South Australian history.

I have chosen novels which focus upon the "universal" theme of love and marriage. Yet, like the divorce records, they cannot help but tell us something about South Australia. Many of them document in considerable detail the manners and morals of the social circles in which South Australia's real-life *élite* families moved. One of the novels centres the love-plot around the story of escaped convicts hiding out in the Adelaide hills, thus exploiting a local theme. The value of the novels lies ultimately, however - like the non-fictional sources - in the universality of their themes.

The treatment of universal themes does not easily lend the novels to the type of South Australian myth-making I have described. This is not to say that myths are not an acceptable part of the history of a society. Myths, however, should be the subject of history rather than constitute the history itself, which must incorporate the "eternal" character of the myth into an understanding of change over time. The effect of subduing these myths into a historical analysis which emphasizes their universality is not to subdue the South Australian voice, but to develop themes which are local but not parochial. Accordingly, the following study of divorce discusses ideals which found expression in South Australia rather than exploring South Australian ideals.

Part I

THE COURT

Prologue to Part I

The idea that disparities of power within a society are reflected in the laws of that society forms the basis of many historical accounts of particular laws. Such analyses, however, often oversimplify by dividing historical subjects into two somewhat amorphous entities.¹ On the one hand there is the law and the powerful people it represents and on the other there is the rest of society denied, by and large, access to the law. And if such analyses perceive a society and its laws to be divisible in this way, they tend also to see power as indivisible and in the hands of the sector represented by the law. Such conclusions are unsurprising, given that laws often represent the interests or reflect the preoccupations of a few. Add the ritualized theatre which E. P. Thompson describes as part of the "elaborate hegemonic style" of the eighteenth century English ruling class,² and the power of the law seems self-evident as a branch of a larger, all-pervasive one.

English law carried its theatrical qualities to nineteenth century South Australia, but the principal actors were not always the rulers. Even Thompson's hegemony, of course, is offset by a "countertheatre" of plebeian action.³ His observations can be (and have been) transposed into specific discussions in the field of legal history. Divorce law in South Australia is peculiarly amenable to historians wishing to join Thompson's challenge to assumptions about power. Although it borrowed terminology from the criminal jurisdiction of the legal system - even concepts of innocence and guilt - divorce law was not essentially concerned with the issue of crime and punishment. There are no easy parallels between social status and a matrimonial equivalent of criminality. Accuser and accused were not divided by inter-class loyalties, but by internal conflict engendered in the marriage relationship, that symbol of unity, harmony and social order.

¹ These studies are discussed briefly in Chapter One and at greater length in Chapter Seven.

² E. P. Thompson, "Patrician Society, Plebeian Culture", *Journal of social history*, Vol. 7, No.4 (Summer, 1974), p.389.

³ *Ibid.*, p.396.

While the history of South Australian divorce law confirms the view that justice is more often blinkered than blind, the question of exactly how the blinkers were placed is paramount. Transactions of power are most vividly expressed in the exchange of ideas about marriage. The peculiarities of matrimonial litigation were such that the law's defence of one social group was piecemeal where it was possible at all. Because marriage was regarded by the judiciary to be so crucial to social order, too strenuous an enforcement of customary allegiances could conflict with judicial marital values and beliefs. A double standard in marital values - one for the powerful and one for the powerless - was untenable. I am again reminded of Thompson: "Only a ruling class which feels itself to be threatened is afraid to flaunt a double standard".⁴ On the divorce court battleground, those whom historians often perceive as allies could become antagonists, while many of the victors came from the social ranks commonly considered to be the vanquished. Power in the courtroom, reflecting that in South Australian society at large, emerges as diffuse rather than monolithic.

⁴ *Ibid.*, p.394.

Chapter One

THE IMPERIAL LAW IN THE COLONIAL COURTROOM

The rise of the companionate marriage

The study of divorce has traditionally been conducted in either of two ways: the study of the phenomenon itself, or the use of divorce records to find out about marriage, social relationships and the relative status of men and women. Of course the two are related and often overlap, and this is particularly the case when it comes to offering causal explanations for divorce. For example, William O'Neill's study of the divorce debate in *Divorce in the Progressive era* and Nancy Cott's studies of eighteenth century family life through Massachusetts divorce records share an essential similarity in the way they perceive the relationship between marriage and the demand for divorce. The rise of the conjugal unit as the centre of social organization, says O'Neill, necessitated divorce as a "safety valve" for the strains built into this arrangement.¹ By protecting the new type of marriage from its worst abuses, divorce reinforced the conjugal family's newly-acquired character as a social unit.² (D. Kelly Weisberg, in her discussion of Massachusetts divorce law, echoes O'Neill in the description of Puritan marriage as a form of social control).³ Although the substance of Cott's work is markedly different from O'Neill's, its conclusions, while more tentative, are not. The nature of Massachusetts divorce law, which granted equal access to both husbands and wives to the ground of adultery led Cott to attribute changes in divorce patterns over the period 1693-1876 to changes in social attitudes. The increasing number of female petitioners in adultery suits "may have signified a retreat from hierarchical models and an advance

¹ W. L. O'Neill, *Divorce in the Progressive era* (New Haven, 1967), pp.6-7.

² *Ibid.*, p.12.

³ D. K. Weisberg, "'Under Greet Temptations Heer': Women and Divorce in Puritan Massachusetts", *Feminist studies*, II (1975), p.190.

toward ideals of complementarity in the prevailing conception of the marriage relationship".⁴ For both O'Neill and Cott, divorce is a mirror of social values.

Variations on the theme of changing expectations of marriage have been offered by a number of other American writers. For example, Linda K. Kerber, examining divorce in eighteenth century Connecticut, notes that changes in grounds sought over the century "suggest changes in expectations of marital behaviour and, perhaps, some changes in this behaviour itself".⁵ Sheldon S. Cohen's study of eighteenth century Connecticut divorce sees the "post-Revolutionary upsurge" in divorce petitions as indicating that "more spouses were coming to re-examine and demand more of [the marriage] contract".⁶ Elaine Tyler May argues that between 1880 and 1920, the expansion of industrial capitalism and the consequent growth of consumer society, combined with the rise of the companionate marriage, produced expectations which the marriage relationship was often unable to fulfil.⁷ Carl Degler's analysis of divorce in *At odds* discusses the issue of women in marriage, seeing the rapid rise in the number of North American divorce petitions in the last three decades of the nineteenth century as a response to women's increased autonomy in marriage.⁸ In these works, change in marriage is seen as a first cause, and the change they are all talking about is the evolution of the modern 'companionate' or 'romantic' marriage.

The causal explanation adopted by these writers is discussed by Roderick Phillips in *Divorce in New Zealand*. The 'pre-romantic' marriage was bound by economic constraints so that "any form of family breakdown and separation was discouraged not only by prevailing ideology but also by material conditions of

⁴ N. F. Cott, "Divorce and the Changing Status of Women in Eighteenth-century Massachusetts", in M. Gordon, ed., *The American family in social-historical perspective*, 2nd ed. (New York, 1978), p.130.

⁵ L. K. Kerber, *Women of the Republic: intellect and ideology in Revolutionary America* (North Carolina, 1980), p.163.

⁶ S. S. Cohen, "To Parts of the World Unknown": the Circumstances of Divorce in Connecticut, 1750-1797", *Canadian review of American studies*, Vol. 11, No. 3 (Winter, 1980), p.288.

⁷ E. T. May, *Great expectations: marriage and divorce in post-Victorian America* (Chicago, 1980), *passim*.

⁸ C. N. Degler, *At odds: women and the family in America from the Revolution to the present* (New York, 1980), p.168.

existence".⁹ He also entertains the view, however, that the growth of a social climate which tolerated divorce was not solely a consequence of changes in marriage. "Possibly, as divorce became more readily available", he conjectures, "couples became less tolerant of marital disharmony, resulting in a lowered threshold of acceptable discord within marriage".¹⁰ In other words, the availability of divorce itself could have been one of the causes of the demand for divorce. The effect of Phillips's suggestion is to break down the linear causal model proposed by the other writers discussed, and to point to the substitution of a circular one in its place.

To adopt a circular, rather than a linear, account of the relationship between changes in marriage and the rise of divorce makes even more sense when we realise that 'modern' marriage (and therefore 'modern' divorce) have some far-flung antecedents. R. H. Helmholz, in his study of *Marriage litigation in medieval England*, describes how the persistence under canon law of lay forms of marriage mitigated the influence of law in regulating it. Although marriages were very hard to dissolve, they could be nullified with comparative ease, and the reason given for repudiating a spouse and contracting a subsequent union was in some instances so flimsy that "no doubt it was only a pretext for escaping from an unhappy marriage".¹¹ The prevalence of the element of choice in marital arrangements in an ostensibly non-divorcing society is confirmed by Samuel Pyeatt Menefee in *Wives for sale*, which describes another form of 'self-divorce', originating "perhaps as early as 1073, with scattered cases as late as the twentieth century".¹² Rather than merely another instance of the treatment of women as chattels of their husbands, wife sale, Menefee points out, was frequently by mutual consent.¹³ The impression we are left with is that the notion of the individual's choice of a spouse as a private

⁹ R. Phillips, *Divorce in New Zealand: a social history* (Auckland, 1981), p.77.

¹⁰ *Ibid.*, p.83.

¹¹ R. H. Helmholz, *Marriage litigation in medieval England* (Cambridge, 1974), p.61.

¹² S. P. Menefee, *Wives for sale: an ethnographic study of British popular divorce* (Oxford, 1981), p.2.

¹³ *Ibid.*

concern had its beginnings long before the prevailing social and legal structures acknowledged its existence. The 'traditional' equation of duty with marriage is found alongside, if not in harmony with, the 'modern' one of freedom with divorce. The concept of individual choice in marriage, therefore, was not entirely dependent on the companionate marriage gaining a foothold. For all that, the companionate marriage undoubtedly accelerated its spread, so that the nineteenth century saw the type of marital arrangement described by Helmholz and Menefee gaining widespread acceptance in orthodox marital arrangements.

The origins of nineteenth century divorce

Edward Shorter distinguishes the 'traditional' from the 'modern' family by characterizing the former as an institution that places the interests of wider kin and community foremost, while the latter places primary importance on the individual and the immediate family.¹⁴ In accordance with this distinction, the term 'traditional', generally applied, is often equated with 'public' while 'modern' denotes 'private'. Evidence of couples over several centuries taking their marital disputes into their own hands blurs this distinction. The distinction is further blurred when we examine the development of the laws governing marriage and divorce. Historians have unanimously agreed that the successive attempts over time to formalize marriage procedures were a muddled mess of contradiction and red tape. Part of the confusion was due to the existence side by side of ecclesiastical and secular courts, each with differing positions on what constituted a valid marriage, so that neither had a complete hold over the laws of marriage and divorce. During the sixteenth and seventeenth centuries, confusion in English marital litigation continued to escalate. While both the laity and the clergy were increasingly regarding the church wedding as the correct ceremony of marriage, secular courts continued to recognise the old lay contracts *per verba de praesenti* and *per verba de futuro* (respectively, "by words of present consent" and "by words of

¹⁴ E. Shorter, *The making of the modern family* (London, 1976), pp.18-19.

future consent") as constituting legal obligation. The Church's attempts to close this gap, by declaring church marriages adulterous if it could be shown that a prior oral contract existed between the bride or groom and a third person, added to the confusion.¹⁵ Lawrence Stone notes that further restrictions, such as those on the time and place at which a valid wedding could be celebrated, "resulted in a brisk trade carried on by unscrupulous clergymen, operating in districts which were immune from superior ecclesiastical supervision, who would marry anyone for a fee, no questions asked".¹⁶ The notorious Fleet marriages, for example, thrived as a means by which the poor in the London area could contract cheap but valid marriages, even though the officiating ministers in such ceremonies were deemed to be breaking the law.¹⁷ In this early modern setting, we find little that accords with Shorter's notion of a "traditional" society where widely-acknowledged values are imposed upon the community at large. By the same token, there was not much that was "modern" in the new, uniform marriage and divorce laws apart from the movement of the marital relationship from the private to the public domain. This movement facilitated the imposition of a distinct, formal set of marital values more effectively than the ambiguous arrangements which flourished in the early modern period but also, somewhat paradoxically, offered the means by which these values could be changed. As we shall see in the history of the South Australian Matrimonial Causes Act, the public nature of modern marriage and divorce legislation facilitated change to an extent which less formal procedures could not.

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Lord Hardwicke's Marriage Act of 1753 acknowledged the ambiguity of pre-existing marriage legislation. An Act "which at last brought coherence and logic

¹⁵ L. Stone, *The family, sex and marriage in England 1500-1800* (London, 1977), p.32.

¹⁶ *Ibid.*, pp.32-33.

¹⁷ *Ibid.*

to the laws governing marriage",¹⁸ it set down that only the church marriage, which had to be entered in the parish register and signed by both parties, was valid, and that prior oral contracts were no longer binding. Enforcement of the marriage law "was transferred from the feeble control of the Church courts to the secular courts".¹⁹ Stone's jubilant welcome to the forces of logic and coherence overlooks to some extent the inevitability of legislative change through which the aristocracy so clearly stood to gain:

The prime reason for the Bill was frankly stated as being the fact that "both men and women of the most infamous character had opportunities of ruining the sons and daughters of the greatest families in England, by the convenience of marrying in the Fleet and other unlicensed places".²⁰

The proliferation of informal and invalid marriage procedures constituted a threat to the aristocracy which private arrangements could not allay. The regularization of procedures put marriage for all classes more firmly in the public domain, but while the definition of valid marriage under the new Act was both clear and consistent, "it is by no means certain how many of the poor or the Dissenters were able or willing to comply with it".²¹

Following the Marriage Act, the process of dissolving marriages also became subject to increased formalization. As in the case of the Marriage Act, the lead was taken by the aristocracy. At ecclesiastical law, the proof of adultery only warranted the awarding of a *divorce à mensa et thoro* ("separation from bed and board") where husband and wife were permitted to live apart, but the marriage bond was not broken.²² The consequence of this state of affairs was an "intolerable situation" for the aristocratic man whose wife wronged him twofold by betraying her marriage vows before producing an heir.²³ As a result, divorce by Act of

¹⁸ *Ibid.*, p.35.

¹⁹ *Ibid.*

²⁰ *Ibid.*, pp.35-36, quoting W. Cobbett, *Parliamentary history of England* (London, 1813), XV, Col. 2, note.

²¹ *Ibid.*, p.37.

²² Helmholz, *Marriage litigation*, p.100.

²³ Stone, *The family, sex and marriage*, p.38.

Parliament came into use at the end of the seventeenth century, but because of the high cost, it was almost entirely the resort of the nobility.²⁴ There were exceptions, as Hilary Golder has pointed out. The protection of property through the safeguarding of legitimate inheritance did fit the needs of those members of the professional and commercial classes who could afford Parliamentary divorce.²⁵ The effect was that, even by the nineteenth century, "English views of divorce were still based on the relationship between legitimacy and property".²⁶ Meanwhile, among the poor, extra-legal means of divorce such as desertion, bigamy and wife-sale persisted.²⁷ Caught between these two extremes was "the great majority in the middle who could not afford the cost of the one or the social stigma and remote risks of prosecution of the other".²⁸

The somewhat ironically-named "divorce by Private Act" publicized the marital disputes of the aristocracy, contributing to middle-class resentment of aristocratic privilege. The "persistent attack by middle class people on the privileges of aristocracy" was one of the causes of the 1850 Royal Commission on the divorce law. "The necessary inference was inescapable", says O. R. McGregor. "Divorce by Private Act had either to be abolished or the facility cheapened and generalised".²⁹ The ensuing Divorce and Matrimonial Causes Act 1857 effected the latter alternative and consolidated the principles upon which aristocratic divorce was based. Decrees for divorce were granted on the same grounds as Private Act dissolutions, that is, simple adultery by a wife and aggravated adultery by a husband.³⁰ The decree of judicial separation for adultery, cruelty or desertion substituted the ecclesiastical one of *divorce à mensa et thoro* for adultery, cruelty or heresy and apostasy.³¹ The ancestry of the new Act was

²⁴ *Ibid.*

²⁵ H. Golder, "'A Sensible Investment': Divorce in Nineteenth-century New South Wales", Ph.D thesis (University of N.S.W., 1982), p.79.

²⁶ *Ibid.*, p.83.

²⁷ Stone, *The family, sex and marriage*, pp.38,40.

²⁸ *Ibid.*, p.41.

²⁹ O. R. McGregor, *Divorce in England: a centenary study* (Melbourne, 1957), p.17.

³⁰ *Ibid.*, p.18.

³¹ *Ibid.*, pp.3,18.

remembered in the frequent use of pre-1857 precedents in decisions.³² Provisions for lesser relief were similarly backward-looking:

In all Suits and Proceedings, other than Proceedings to dissolve any Marriage, the...Court shall proceed and act and give Relief on Principles and Rules which ... shall be as nearly as may be conformable to the Principles and Rules on which the Ecclesiastical Courts have heretofore acted and given Relief.³³

Despite the conservatism of its stance, the Act did introduce change of a substantive nature which was significant to the status of women, but which is dealt with by little more than a passing reference by most historians, even feminist ones. Keith Thomas points out that the old ecclesiastical court decree of *divorce à mensa et thoro*, while seemingly equitable in granting access to either spouse, was of as little use to female petitioners as divorce by Act of Parliament, because a separated woman was unlikely to be able to support herself:

In other words, she was now in a state of virtual outlawry, for her husband retained all his rights over her property, including even the wages she might earn after her separation; she was incapable of conducting a legal action by herself, and she could not even claim access to her children. All she had was a small allowance in the shape of alimony and the payment of this was often difficult to enforce.³⁴

The new Act did not sweep away all of the old iniquities; at common law until the early twentieth century, custody of children automatically went to the husband and access seems to have been largely on his sufferance, and the payment of alimony was still difficult to enforce. But the Act granted orders for the protection of earnings and property to deserted wives and, more importantly, accorded both deserted and judicially separated wives the status of *femme sole*. Upon the granting of an order or decree, a wife was entitled to any money or property subsequently acquired by lawful industry. She was also competent to sue

³² R. Pearsall, *The worm in the bud: the world of Victorian sexuality* (London, 1969), p.171.

³³ Divorce and Matrimonial Causes Act (20^o & 21^o Vict., c.85), s.XXII.

³⁴ K. Thomas, "The Double Standard", *Journal of the history of ideas*, Vol. XX, No.2 (April, 1959), p.200.

and be sued, and to enter into contractual obligations.³⁵ Until the passage of the Act, the status of *femme sole* was not available to a woman whose husband was still alive. Although the new divorce law discriminated against women in the grounds for relief offered, the greater legal autonomy which it granted to separated and deserted women meant that public marital values could be shaped by women to a far greater extent than before. The Divorce and Matrimonial Causes Act was thus a gathering of conservative forces, but it was more than this. The Act therefore incorporated the old and the new in a way which meant that the two often worked against each other. By making divorce more public, marriage was subjected to hitherto unparalleled pressures for change; one in particular was the greater autonomy the Act accorded to women.

The South Australian Matrimonial Causes Act 1858

After the passage of the English Divorce and Matrimonial Causes Act, the Colonial Office invited Australian governments to follow suit,³⁶ which South Australia rapidly did in 1858. South Australia's Act was virtually a copy of the English one, with two important exceptions. An English wife's charge of adultery with desertion could only be made two years after the desertion, whereas her South Australian counterpart could file for divorce on these grounds after one year. Condonation of adultery, which was an absolute bar to divorce in England, was only a discretionary bar in South Australia.³⁷ To summarize and clarify the state of divorce under the South Australian Matrimonial Causes Act, then, the various degrees of relief and their respective grounds were as follows:

Judicial separation: Obtainable by either husband or wife on the ground of adultery, cruelty or desertion without cause for two years and upwards.

³⁵ Divorce and Matrimonial Causes Act, s.XXI and XXV.

³⁶ M. D. Broun, "Historical Introduction", in P. Toose, R. Watson and D. Benjafield, *Australian divorce law and practice* (Sydney, 1968), p.c.

³⁷ R. M. Hague, *History of the law in South Australia 1837-1867* (Unpublished typescript: Adelaide, 1936), p.948.

Restitution of conjugal rights: Obtainable by either husband or wife. *Osborn's Concise law dictionary* defines conjugal rights thus: "A married person is entitled to the society and the cohabitation of his or her spouse, unless they are judicially separated, or have agreed to live apart".³⁸

Protection order: Obtainable by a wife deserted without cause at any time after the desertion for the protection of any money or property acquired by her lawful industry since the desertion against her husband, his creditors, or any person claiming under him.

Dissolution of marriage: Obtainable by a husband on the ground of his wife's adultery, or by a wife on the ground of her husband's incestuous adultery, bigamy with adultery, rape, sodomy, bestiality or "adultery coupled with such cruelty, as without adultery would have entitled her, under the Ecclesiastical law...to a *divorce à mensa et thoro*", or adultery with desertion for one year and upwards.³⁹

Aside from the fact of adultery, the successful petitioner in a suit for the dissolution of marriage had to prove that there had been no collusion in or connivance at the marital fault. *Osborn's Concise law dictionary* defines collusion as "[t]he arrangement of two persons, apparently in a hostile position or having conflicting interests, to do some act in order to injure a third person or deceive a court".⁴⁰ Connivance is defined as "[t]he intentional active or passive acquiescence by the petitioner in the adultery of the respondent".⁴¹ Certain discretionary powers were accorded the presiding judge in a divorce hearing. Judicial discretion - suggested, for example, in the waiving of the absolute bar of condonation - may have misleading connotations of liberalism. The judge's discretionary powers were laid down in the Act in terms which invited decisions against the granting of a

³⁸ *Osborn's Concise law dictionary*, 6th edition by John Burke (London, 1976), p.88.

³⁹ South Australian Matrimonial Causes Act (No.22 of 1858), s.4,5,6 &12.

⁴⁰ *Osborn*, p.79.

⁴¹ *Ibid.*, p.88.

decree. The Court was "not...bound" to grant a decree if it was found that the petitioner had been guilty of adultery, or had condoned the adultery complained of in the petition, or if he or she had been guilty of unreasonable delay in presenting the petition, of cruelty, of desertion without reasonable excuse before the adultery complained of, or "of such wilful neglect or misconduct as has conduced to the adultery".⁴²

The 1867 consolidation and amendment of the Matrimonial Causes Act, often cited, mysteriously, as South Australia's first divorce law,⁴³ did not change the grounds for relief laid down in 1858, but effected some procedural alterations as well as significant extensions to the Court's discretionary powers in adultery cases.⁴⁴ The Court was still not bound to pronounce a decree if the petitioner was found guilty of adultery or cruelty. It was specified, however, that the petitioner's marital fault not be condoned.⁴⁵ The other possible bars to a decree remained unchanged. Another important addition was a section which allowed the Court, in cases where the respondent had opposed the relief sought by the petitioner on the grounds of a petitioning husband's cruelty, adultery or desertion, or a petitioning wife's cruelty or adultery, to grant to the respondent the relief to which he or she would have been entitled had he or she petitioned to that effect.⁴⁶ This increased flexibility of the law was checked by the addition of sections which empowered the presiding judge in a suit for the dissolution of marriage to appoint a Crown Proctor of his choice, "who shall argue...any question in relation to such matter which the Court may deem it necessary or expedient to have fully argued".⁴⁷ It was not only the Court who had access to the Crown Proctor. Any person could give him notice of matters material to the decision in a divorce case. If the Crown Proctor, on such

⁴² Matrimonial Causes Act 1858, s.16.

⁴³ For example, by Broun in his "Historical Introduction", p.c.

⁴⁴ Throughout the thesis I will refer to the Matrimonial Causes Act meaning both the original 1858 Act and the 1867 consolidation. Although the consolidation included amendments significant to the conduct of cases, it retained the principles of the initial Act. It will be clear from the context when I am discussing matters pertaining specifically to the consolidation.

⁴⁵ Matrimonial Causes Act (No.3 of 1867), s.33.

⁴⁶ *Ibid.*, s.28.

⁴⁷ *Ibid.*, s.30.

information, suspected collusion, he could intervene in the case under the direction of the Attorney-General and by leave of the Court.⁴⁸ These sections of the Act asserted baldly that divorce was not just the subject of private litigation; it was a matter for South Australian society at large.

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The sixty years with which this study is concerned witnessed South Australia's first petition under the Matrimonial Causes Act, in 1859, and its last before the 1918 amendment made dissolution of marriage on the single ground of adultery available to wives. The period under study, therefore, did not see change in the letter of the law. Change nevertheless took place. Divorce historians have tended to see the law as imposed upon a society, rather than as part of it, interacting with other social forces, despite the efforts of writers such as E. P. Thompson to break down this monolithic image.⁴⁹ Thus Margaret James dismisses Victorian legislation in the nineteenth century aimed at improving the lot of women as "paternalistic".⁵⁰ The tendency of divorce historians to put law and society into two distinct categories is most sharply illustrated by Roderick Phillips in his work on divorce in Revolutionary France. The liberal French divorce law of 1792 offered the same set of grounds for relief to both men and women. Phillips argues that the study of "the important question of the differential resort to divorce by women and men" is "rendered pointless" if the law under study discriminates in the access granted to men and women respectively.⁵¹ By contrast, he argues, the Revolutionary divorce law, because of its liberality and availability to rich and poor,

⁴⁸ *Ibid.*, s.36 & 37

⁴⁹ See, for example, his conclusions in *Whigs and hunters: the origin of the Black Act* (London, 1975).

⁵⁰ See M. James, "Political Liberalism and the Oppression of Women", *Australia 1888*, Bulletin No.4 (May, 1980), pp.28-36.

⁵¹ R. Phillips, "Women's Emancipation, the Family and Social Change in Eighteenth-Century France", *Journal of Social History*, Vol. 12, No.4 (Summer, 1979), p.555.

offers the historian the chance to examine actual marital behaviour in the period.⁵² Divorce hearings were conducted by family courts composed of the relatives of the parties, and Phillips concludes from this state of affairs that their records are free of distortion by judicial institutions:

One of the prime values of the records of the *tribunaux de famille* - apart from the rare insight they provide into family life - is that the descriptions of events are not those of outsiders such as priests and doctors or of middle-class investigators of conditions among the lower orders, but of those most intimately involved; the spouses themselves and those who shared their activities.⁵³

Phillips's position arises from the sensible view that legal institutions tend to reflect the interests and uphold the values of the groups with the greatest political power in a society, seen, for example, in the case of the interests of the aristocracy and the ascendant middle class prompting change in marriage and divorce legislation. But the distinction Phillips and other writers have overlooked is the one between legislation and law in practice. Phillips is not so naïve as to assume that the removal of discrimination against women in the divorce law removes all other constraints placed on divorcing women, but he appears anxious to pit the class prejudice of professionals against the 'objective' view of a marriage presented by "those most intimately involved". There is a lack of subtlety in acknowledging social constraints on women petitioners despite a liberal law, and ignoring the effect of the same constraints on the judgment of those "intimately involved" in marital breakdown - *especially* those intimately involved. Moreover, to do so is to portray the law as having no reference to the society which produced it. The argument that law is properly analysed in relation to its society maintains that those who are subject to a law, who may not have the political power to make or change laws by direct means, nevertheless shape the law when they use it. An illiberal law such as the Matrimonial Causes Act, which demonstrates the types of constraint described

⁵² *Ibid.*, pp.554-555.

⁵³ R. Phillips, "Women and Family Breakdown in Late Eighteenth-Century France: Rouen 1780-1800", *Social history*, 2 (May, 1976), pp.207-208.

by Phillips, is as valuable to the historian as a liberal one. This study of the Matrimonial Causes Act is the study of the interaction of the constraints imposed by the Act upon its users and the reciprocal pressures imposed upon it by these subjects' use of the law.

Marital fault

Because it was a law enacted by a colonial legislature, the Matrimonial Causes Act followed English authority in South Australian decisions, and English precedent was used almost exclusively throughout the period. In addition to English divorce law manuals, such as Rogers's *Ecclesiastical law* and Pritchard's *Law of divorce*, judges and lawyers consulted authorities such as Halsbury's *Laws of England* and Best's *Principles of the laws of evidence*. And of course, there was also the ruling that in petitions other than those for the dissolution of marriage, established Ecclesiastical Court principles must be followed. For instance, Lord Stowell, in his 1790 judgment in *Evans v Evans*, laid down the Ecclesiastical Court ruling that allegations of cruelty had to establish danger, or the reasonable apprehension of it, to life, limb or health.⁵⁴ In the early years in particular of the South Australian Act, judges faithfully followed Lord Stowell's lead.⁵⁵

The early years were characterized in general by a strong concern with establishing marital fault. But the task of determining whether marital fault had taken place was at times fraught with complication. In a somewhat convoluted summing up of the 1863 petition of *McPharlin v McPharlin*,⁵⁶ the Chief Justice of South Australia, Sir Richard Hanson, juggled the evidence of respective witnesses on a key allegation in the suit, that the husband, during an altercation with his wife and mother-in-law, had struck his wife with a bullock-whip:

⁵⁴ *Evans v Evans*: (1790) A.E.R. Rep. 414.

⁵⁵ It is interesting to compare South Australian judgments with nineteenth century American interpretations of Stowell's dictum. See R. L. Griswold, "The Evolution of the Doctrine of Mental Cruelty in Victorian American Divorce, 1790-1900", *Journal of social history* (Fall, 1986), pp.127-148.

⁵⁶ P.R.O.S.A. G.R.G. 36, Series 23, No. 57: *McPharlin v McPharlin*.

Before proceeding to draw any inferences the Jury would have to decide whether the respondent struck his wife intentionally,...or that being in a rage he struck recklessly, without caring whether he hit her or not, that, in his opinion, would be sufficient to justify them in finding cruelty....If, on the other hand, the wife rushed in while the husband was beating the mother-in-law, and was struck accidentally, the aspect of the case was altered. But he would go further, and say that there was ground enough for the finding of cruelty if the wife, in rushing in to shelter a relative who had come to see her in her illness from the blows of her husband, received some of the blows on her person, although there was no intention on his part to injure her. It would be for the Jury to say, looking at all the attendant circumstances, whether the blows were struck deliberately, recklessly, or accidentally; or whether the wife received them while endeavouring to ward them off from her relative.⁵⁷

The jury found, "after a brief absence" that, all things considered, the blows had been delivered recklessly⁵⁸ and the wife was awarded a decree *nisi* for judicial separation.⁵⁹

If issues involving cruelty could be complex, those concerning adultery had the potential to be far more so. The discretionary bar to a decree under certain circumstances brought to the fore issues about marriage which extended beyond the mere fact of adultery. In 1897, George Nairne Clarke, an aerated water manufacturer, brought a petition for dissolution of marriage against his wife on the ground of her adultery.⁶⁰ In his judgment, Acting Chief Justice James Boucaut considered several aspects of the parties' married life. Although he sympathized with the view "that it was far better for society where people could not live together that the Court should not be astute in finding reasons for binding them together where there was every reason for separating them", he was not entirely happy with the evidence against Mrs Clarke. He admitted that there were suspicious circumstances, but these were to some extent mitigated by the fact "that the respondent had been a barmaid, and probably free and easy in her manner, but it by

⁵⁷ *Register*, 18 June, 1863, [p.275]: *McPharlin*

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, 20 June, 1863, [p.283].

⁶⁰ P.R.O.S.A. G.R.G. 36, Series 54, 115 of 1897: *Clarke v Clarke and Howell and Dunn*.

no means followed that barmaids were not as virtuous as other classes". Moreover, George Clarke's allegations about his wife were contradicted by his renewed cohabitation with her, and, more importantly, by his having left his wife, before the alleged adultery, for no reasonable cause. His petition was dismissed.⁶¹

It is important to note that a key precedent to Justice Boucaut's decision was Sir James Wilde's judgment in the English petition of *Jeffreys v Jeffreys and Smith*, a comparable case in which the petitioner was denied a decree because he was guilty of desertion before the adultery charged. In dismissing this petition, Justice Wilde had stated, "If chastity be the duty of the wife, protection is no less that of the husband".⁶² The respective duties of husband and wife - passed down through English common law but not explicitly stated in the Act - reverberated through the South Australian divorce courts and shaped judicial approaches to the petitions presented in them. Decrees of divorce and the discretionary bars which governed them were not solely dependent on proof of marital fault. Although an Act by which couples could choose to end their marriages, the Matrimonial Causes Act set strict limits on the choices offered and reinforced these limits with appeals to duty.

We are reminded of O'Neill's 'safety-valve' thesis: marital fault in the context of the delineation of marital duties suggests not so much the dissolution of marriage as the defence of it - or at least, a particular type of marriage. O'Neill describes a clear logical progression behind the ostensible contradiction: divorce strengthened marriage as an institution because it was a means of getting rid of marriages that did not work. O'Neill's 'safety-valve' analogy is of a self-regulating system, so that the contradictions are seen, in the final analysis, to be functioning in harmony. What causes the logic of this system to break down is its omission of the influence exerted by its users - divorcing couples themselves. With the greater access to divorce which the Matrimonial Causes Act offered, the distinction between

⁶¹ *Register*, 10 September, 1897, p.3: *Clarke*.

⁶² *Jeffreys v Jeffreys and Smith*: (1864) 10 L.T. (N.S.) 309.

community and individual interests was no longer simply that between public arrangements and private, informal ones. The incorporation of individual interests into the public arrangements set up a conflict between personal choice and public duty in marriage and divorce, visible in the limitations on divorce imposed by the Act. The divorce court became the battleground upon which this conflict was fought out.

Marital duty

Ideas about duty can be assessed through judgments in petitions heard under the Matrimonial Causes Act. The case of *McPharlin* already mentioned highlights the complexities that could be involved, but there were many decisions which were more straightforward. Justice Gwynne's judgment in *Buck v Buck* in 1859, a petition filed by the wife of a tinsmith, for example, adhered to the criterion of danger to life, limb or health in finding for the wife.

There being no attempt on the part of the husband to controvert the evidence on which the above facts are grounded and believing as the Court does that the Petitioner has been the object of the most disgusting cruelty on the part of her husband and that her life would be endangered by a continuance of cohabitation with him, the Court has no hesitation in decreeing that she is entitled to a sentence [sic] of judicial separation....It is clear that in the present case a state of affairs exists which render[s] the continuance of cohabitation between these parties for useful purposes impossible.⁶³

At the hearing of another petition, that of *Crossman v Crossman*, filed in 1862 for a dissolution of marriage on the grounds of the cruelty and adultery of a butcher,⁶⁴ witnesses testified to evidence, in the form of bruises, of violence to the petitioner, and there were also eyewitness accounts of the cruelty. Justice Gwynne observed that one witness

seemed indisposed to say that the bruise he saw on the petitioner's leg was the result of violence, and even seemed desirous to lead the Jury to think it was the result of a fall while in a state of intoxication.

⁶³ P.R.O.S.A G.R.G. 36, Series 23, No.3: *Buck v Buck*.

⁶⁴ P.R.O.S.A. G.R.G. 36, Series 23, No. 51: *Crossman v Crossman*.

There was, however, without his statement, sufficient evidence to enable the Jury to return their verdict.⁶⁵

After a brief consultation the jury did return a verdict, in favour of the petitioner.⁶⁶ Despite the existence of one witness whose testimony contradicted that of the others, the onus of proof on the petitioner was satisfied by the fact that the greater part of the evidence was in her favour.

The case of *Hanna v Hanna and Kennedy*⁶⁷ shows the Court's reticence to pronounce a decree if a charge was not well substantiated. Here, adultery was alleged to have been committed during the petitioner's absence, with a person working on his property. Proof of adultery was more open to dispute than that of cruelty under the Act because in the former instance, eye-witness accounts could seldom be found to corroborate a charge. As a general principle, however, the courts followed the ruling that the opportunity to commit adultery combined with the intention to commit it had to be shown. When Mrs Hanna was accused of adultery with Kennedy, she told her husband "that she had been attacked against her will", and she accompanied him when he went to the Port Elliot magistrate for advice and subsequently laid an information against Kennedy.⁶⁸ After the husband had made a statement the wife, in a private hearing, reiterated to the magistrate her claim of innocence by telling him that

the defendant Kennedy had been "romping" with her, and began by asking her for a needle and thread. She went into her bedroom to get it, and he followed her; that he pulled her about, but offered no indecency whatever. She said he threw her on the bed, but it was in endeavouring to wrest the needle and thread from her, and no indecency occurred.⁶⁹

The adultery was alleged to have taken place in 1856 - nine years before the petition was filed. It is perhaps because of this delay that the petitioner's major witness gave very equivocal evidence as to the respondent and co-respondent being alone

⁶⁵ *Register*, 25 March, 1863, [p.291]: *Crossman*.

⁶⁶ *Ibid.*

⁶⁷ P.R.O.S.A. G.R.G. 36, Series 23, No. 79: *Hanna v Hanna and Kennedy*.

⁶⁸ *Register*, 14 June, 1865, [p.259]: *Hanna*.

⁶⁹ *Ibid.*

together in the house.⁷⁰ In summing up, Justice Gwynne drew attention to the "slight and unsatisfactory" nature of the evidence, and emphasized the importance of the private statement of the wife, "a young woman, who from delicacy it might be presumed would not say anything in open Court". The jury consulted briefly and returned a verdict that the respondent and co-respondent were not guilty of adultery.⁷¹

The above examples of divorce hearings illustrate the similarity with criminal proceedings. Marital fault, like a crime, was decided on the weight of evidence, and in accordance with legal precedents laid down in the authorities. It is noteworthy, however, that the assumption of the "delicacy" of the wife in *Hanna* made a significant contribution to the rejection of the evidence against her. Thus the absence of marital fault was in part determined by the *presence* of characteristics in the wife which lent credence to her claims. With this in mind, a closer look at *Crossman* reveals that the circumstances under which the cruelty was alleged to have taken place were at least as important as the cruelty itself. For instance, one witness testified to having seen the respondent strike the petitioner with a boot slung in a shirt, which left a mark on the side of her face. In response to a question put by respondent's counsel, Andrews, regarding the blow, the witness replied that she "[d]id not know what it was for" and added, presumably in response to another question, that she had never seen the petitioner intoxicated.⁷² The next witness, again in response to Andrews "[d]id not know that the petitioner had been very aggravating".⁷³ It can be seen from *Crossman*, then, that the possibility that the petitioner had provoked the marital fault had to be allayed in order to justify relief.

Even in undefended cases, such as *Lott v Lott*, a petition for dissolution of marriage on the grounds of adultery and cruelty heard in 1877, these conditions prevailed. In this case the petitioner had the evidence of her twelve-year-old

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² *Register*, 25 March, 1863, [p.291]: *Crossman*.

⁷³ *Ibid.*

daughter, Julia, that the respondent, a photographer, did not confine his brutality to his wife, but subjected his daughter to frequent thrashings and obscene behaviour.⁷⁴ William Lott was clearly a thorough barbarian, and it can hardly have been a surprise to those present in court when Chief Justice Way deemed it "one of the most glaring and brutal cases he had ever known" and pronounced the charges abundantly proved.⁷⁵ Justice Way's comments and the newspaper report of the case indicate a sense of outrage. Frances Lott is repeatedly characterized in evidence as victim to William Lott's persecutor. Describing an incident in April, 1874 in which the respondent jumped on her while she was in an advanced state of pregnancy, Mrs Lott testified that the assault was "entirely unprovoked".⁷⁶ The petitioner described herself as "treated...like a dog",⁷⁷ This image of defencelessness was further embellished by a witness's account:

Mrs. Lott's behaviour was very submissive. She seemed only glad if she could get out of the room without receiving a blow. There was nothing at all in her conduct to justify this treatment. She worked from 6 in the morning till 12 at night.⁷⁸

The evidence in *Lott*, like that in *Crossman*, establishes two things: that the marital faults charged did take place, and that the wife did not by her own actions invite the committing of them. But it establishes more than this. Not only did the petitioner claim extreme and almost daily violence over about ten years, but she mentioned ways in which she had responded to this treatment. She had left her husband twice before her final departure but had returned on his promise of good behaviour.⁷⁹ The effect of her natural timidity was increased by the weak condition in which her husband's cruelty left her. Her weakness did not prevent her, however, from giving voice to her sense of propriety in remonstrating with her

⁷⁴ *Register*, 23 June, 1877, p.3; 25 June 1877, p.3: *Lott v Lott*.

⁷⁵ *Register*, 25 June, 1877, p.3: *Lott*.

⁷⁶ *Register*, 23 June, 1877, p.3: *Lott*.

⁷⁷ *Ibid*.

⁷⁸ *Ibid*.

⁷⁹ P.R.O.S.A G.R.G. 36, Series 23, No.311: *Lott*.

husband over his public displays of intimacy with one Miss Hebblewhite.⁸⁰ All in all, the evidence reads as much as a panegyric to Mrs Lott as a proof of her charges. Mrs Lott's virtues are revealed as charity and forgiveness in returning to her husband on two occasions, submission to and lack of provocation of her husband's ill-treatment, indignation at his familiarity with his female assistants in front of employees and children, and application to her tasks despite the adversity of her husband's behaviour. Mrs Lott's entitlement to relief was based not only on the truth of her claims, but on her own behaviour as a wife.

It can be argued that the above cases were nevertheless decided on the basis of evidence of marital fault presented in court, despite assumptions about acceptable wifely behaviour discernible in them. This objection can be met by examination of some of the unsuccessful charges in the divorce records, for instance, *Hawke v Hawke*, a petition for judicial separation on the ground of the cruelty of a locomotive engineer, filed in 1894.⁸¹ After hearing the evidence of the petitioner to support her claims of violence and threats of murder on the part of her husband⁸², Justice Boucaut stated that

if he believed that the petitioner had any reasonable apprehension of bodily injury he would have allowed the case to go further, but her own evidence and her demeanour in the box convinced him that such was not the case. It was not every angry word or chance blow from a husband in a domestic quarrel that would justify a wife in seeking judicial separation. Summing up the evidence His Honor added that on the woman's own showing the husband had not been unreasonable. Her own ungovernable temper had brought about a good deal of the unpleasantness.⁸³

What is significant to the marital fault/marital duty issue here is the fact that Mrs Hawke's petition was not rejected on the basis of evidence alone. Returning to the *Lott* case for comparison, we are reminded that Mrs Lott had not only to establish a case for her husband's marital fault, but for her own innocence on the basis of her

⁸⁰ *Ibid.*

⁸¹ P.R.O.S.A. G.R.G. 36, Series 54, 98 of 1894: *Hawke v Hawke*.

⁸² *Ibid.*

⁸³ *Register*, 11 May, 1894, p.3: *Hawke*.

conduct in the marriage. The thrust of Justice Boucaut's summing up in *Hawke* is that Mrs Hawke failed in the latter task.

In the light of *Lott* and *Hawke*, the dismissal of *Clark v Clark*, another petition for judicial separation on the ground of cruelty, filed in 1888, appears as more than a simple rejection of the evidence as insufficient.⁸⁴ In the hearing of the petition, Mrs Clark testified that the cruelty began two years into her fifteen-year marriage, that her husband, a farmer, "beat her with a stick, and struck her with his fists. At one time he knocked out two of her teeth, and dragged her to a waterhole. Frequently he knocked her down and kicked her severely".⁸⁵ To add insult to injury, Mrs Clark claimed that she had not known that the respondent had a daughter until three years after marrying him. Moreover, she was unable to call her physician to Court because he said the money she offered him for appearing was insufficient.⁸⁶ The petitioner also had to deny that she had been accused of drunkenness by her husband. When in the witness box the husband denied having kicked, beaten or threatened to put the petitioner in the waterhole, although he

admitted that once when she had the "horrors" after a drinking bout he picked her up and gave her "a bit of a shake". He gave a long list of the petitioner's delinquencies arising out of her bibulous propensities, and produced evidence in support".⁸⁷

We cannot tell whether it really was Mrs Clark's "delinquencies" which weakened her case, but it is clear that they were regarded as important aspects of the respondent's evidence.

Like *Crossman* and *Lott*, the cases of *Hawke* and *Clark* raise the issue of provocation, but *Hawke* in particular concentrates our focus on the presentation of evidence in the courtroom. The consequences of a wife's courtroom demeanour are amply demonstrated in the hearing of *Heylen v Heylen*, reported by the *Register* in 1879. This was another petition for judicial separation on the ground of cruelty,

⁸⁴ P.R.O.S.A. G.R.G. 36, Series 23, No. 647; *Clark v Clark*.

⁸⁵ *Register*, 25 July, 1888, p.3: *Clark*.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

and the *Register* found some of the details of the allegations so disgusting as to be "unfit for publication".⁸⁸ Ann Heylen stated that on the occasion referred to above, her shopkeeper husband had punched her repeatedly in the face and then made her look at the damage he had done. Other cruelty was alleged to have taken place in a period about two months before a pregnancy reached full term. The petitioner claimed that she would complain that the housekeeping money was insufficient: "He would then lay hold of me by the throat and punch me in the face".⁸⁹ Her husband had beaten her not once, but continually during their marriage. He had pushed her out of doors at night when she had her baby in her arms, because he said she was "not attentive enough" to his illegitimate sons.⁹⁰ He had once been fined in the Police Court for assaulting her, and was ordered to pay her separate maintenance, which he failed to do, and on her renewal of proceedings he begged her to return to him, which she did. He had also neglected her during illness by repeatedly refusing her medical aid. The respondent's answer to the petition denied the allegations and claimed not only provocation but condonation of any cruelty found, and that the petitioner had deserted him without cause and was guilty of unreasonable delay in filing the petition.⁹¹

Under cross-examination, Mrs Heylen was called upon to verify that she had never "twitted" her husband about his two illegitimate children (it is not stated whether these were the product of the respondent's adultery, but as the parties were married in England when the respondent was seventeen, it seems likely that they were). She had also to swear that she "[n]ever used opprobrious language or swore at him".⁹² She stated that on a particular occasion "I did not pelt him with stones or call him every dirty name I could think of", adding that the respondent had thrown a hammer at her.⁹³ Elaborating on her own part in the domestic conflict, Mrs Heylen

⁸⁸ *Register*, 16 August, 1879, Supplement, p.1: *Heylen v Heylen*.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

⁹² *Ibid.*

⁹³ *Ibid.*, p.2.

said, "In my vexation I might have called him a dirty old wretch; no, I never said 'wretch', but 'old man'".⁹⁴ Mrs Heylen also admitted to having thrown a pomatum-pot at her husband "because he said something disgusting to me and called me a horse, a cow, a pig, and a goat before my children".⁹⁵ On another occasion she followed her husband to a hotel where he was playing billiards. She denied that she searched for him "under every bed".⁹⁶ In the quarrel which precipitated the court action the respondent, according to Mrs Heylen, "threatened to knock my head off if I did not mind what I was about, and I afterwards left the house altogether. I left because I was afraid of him".⁹⁷

The respondent's reply to his wife's petition charged both condonation and provocation of the cruelty, and because the case hinged on these issues, it is necessary to clarify the distinction between the terms. I have mentioned above that, under the Matrimonial Causes Act, a judge could disallow a petition for dissolution of marriage if the adultery charged in it was found to have been condoned. Hearings of cases during the period under study, however, indicate that proof of condonation was effectively an absolute bar to the granting of a decree not only where the charge was adultery, but also where cruelty was charged. Thus the respondent's claim of condonation in *Heylen* was an important one. Proof of condonation was one of the "grey" areas of the Act because although condonation had forgiveness as "an essential element",⁹⁸ this forgiveness did not have to be expressed verbally. *Black's law dictionary* describes condonation as

conditional remission or forgiveness, by means of continuance or resumption of marital cohabitation, by one of the married parties, of a known matrimonial offence committed by the other, that would constitute a cause of divorce.⁹⁹

⁹⁴ *Ibid.*, p.1.

⁹⁵ *Ibid.*, pp.1-2.

⁹⁶ *Ibid.*, p.2.

⁹⁷ *Ibid.*

⁹⁸ *Osborn's concise law dictionary*, p.87.

⁹⁹ H. C. Black, *Black's law dictionary* (St. Paul, Minn., 1979), pp.267-268.

This is the sense in which condonation was most commonly interpreted in hearings under the Matrimonial Causes Act. Provocation, which the Act did not explicitly state to be a possible bar to a decree, is described by *Osborn's concise law dictionary* as "[a]cts which are sufficient to prevent the exercise of reason and to deprive a reasonable man of his self-control, so negating the existence of malice".¹⁰⁰ It is worth noting that *Osborn* uses the example of reducing a charge of murder to manslaughter to illustrate how the counter-charge of provocation is used.

The *Australian legal dictionary* adds that

since provocation has the effect of reducing the severity of an offence it cannot be pleaded in the case of common assault since this is the least serious of all criminal assaults. In these cases, evidence of provocation may however be adduced with a view to mitigating the punishment.¹⁰¹

Provocation in matrimonial cases thus appears somewhat anomalous. The charge of cruelty is clearly not comparable to homicide, yet it was in a separate category from common assault: a counter-charge of provocation was made not in order to reduce the severity of the charge but to dismiss the charge altogether, as there were no degrees of "punishment" if cruelty was found.

Justice Boucaut's directions to the jury in *Heylen* were that the cruelty had been proved, but that it had been condoned, and that there was no cruelty subsequent to that which had been condoned. He left the question of provocation open to the jury, but stated that "it was impossible for him to shut his eyes to the conduct of the petitioner, as being in his opinion sufficient to cause provocation".¹⁰² Not surprisingly, the jury found that Mrs Heylen had provoked her husband's cruelty.¹⁰³ Her case was no doubt weakened by her principal witnesses, her son and daughter, who "gave evidence as to one or two of the assaults spoken of by the petitioner, but their recollection was not quite distinct, and they did not know of

¹⁰⁰ *Osborn's concise law dictionary*, p.269.

¹⁰¹ S. E. Marantelli, *The Australian legal dictionary* (West Melbourne, 1980), pp.203-204.

¹⁰² *Register*, 16 August, 1879, Supplement, p.2: *Heylen*.

¹⁰³ *Ibid.*

their own knowledge what led up to the assaults".¹⁰⁴ The evidence in favour of the petitioner was thus regarded as insubstantial, not because it did not establish cruelty, but because it did not refute provocation. Compare this evidence to the plethora of independent witnesses to Mrs Lott's uninvited suffering, and you have the suspicion that a wife could only obtain relief if she presented herself as both passive victim of cruelty, and an active champion of virtue.

There are several instances, however, in which the petitioning wife who was alleged also to have been guilty of violence did not lose her case. The petition of *Dunn v Dunn*, filed in 1860, for example, was for a judicial separation on the grounds of the husband's cruelty and adultery. George Dunn, a sheepfarmer, filed an answer which denied the adultery and claimed that he was not guilty of cruelty, because on the three occasions when he had been compelled to "raise [his] hand" to his wife, he had been provoked by her violence.¹⁰⁵ To substantiate his allegations, he gave details of an alleged attempt by his wife to poison him, which was the subject of an enquiry before a magistrate. During the enquiry, according to Dunn, a witness stated "that the said Mary Dunn had offered the said Witness a handful of Sovereigns to mix some Strychnine with my food".¹⁰⁶ Dunn's answer also stated that on another occasion, he went with two men to collect a chest of drawers and some papers from the house occupied by his wife, when she "was so violent and abusive that the men were afraid to assist me until I threatened the said Mary Dunn to use force if she interfered further".¹⁰⁷ To crown George Dunn's grievances, he told of an information he laid against his wife in April, 1860, for throwing a large stone at Mary Simms, the woman with whom he was alleged to have committed adultery, and who was "seriously injured" by the attack. At the hearing of the information, Mary Dunn had said in her defence that she had meant the stone for her

¹⁰⁴ *Ibid.*

¹⁰⁵ P.R.O.S.A G.R.G 36, Series 23, No. 23: *Dunn v Dunn*.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*

husband. She was convicted of the assault. Despite these counter-charges made by her husband, Mary Dunn was awarded her separation.¹⁰⁸

There are several possible explanations of why Mary Dunn won her case, many of which cannot be either denied or proven, such as the differing views of the presiding judges in different cases, the arguments of counsel, and so on. Adultery was a more serious marital fault than cruelty; conclusive evidence of the former may have swung the case for cruelty in the petitioner's favour. But if this was so, it could also have been the case that a dubious charge of cruelty would have cast doubt on her charge of adultery, if the doubts cast on the general credibility of the petitioners in *Hawke* and *Heylen* are any guide. It can hardly be that Mary Dunn succeeded where Ann Heylen failed because evidence of her provocation was less or that of her wifely virtues more, particularly as the violence charged against the husband in *Heylen* is among the worst I came across in the records. Nor can we interpret the discrepancy satisfactorily by a comparison of the testimony of witnesses. A key to the differences of outcomes can be found, however, in the fact that Mrs Heylen lost her case because of her provocation and condonation of the cruelty, not the insufficiency of her evidence. Mrs Heylen's evidence was reported to have been given "in such a garrulous and contradictory manner ... that [Justice Boucaut] at length declined to take any more of it, and ordered her to stand down".¹⁰⁹ But despite the judge's exasperation, he did not refer to the contradictory nature of the evidence as to cruelty in summing up, and directed the jury to find for the wife on this issue.¹¹⁰ The reasons for which she *did* lose her case need closer scrutiny.

The case for condonation rested on the fact that Mrs Heylen left her husband as the result of a threat of violence, not an actual deed in that instance. The argument of the petitioner's counsel that the husband's threats of further violence revived the acts of cruelty which had been condoned fell on deaf ears. Yet the

¹⁰⁸ *Ibid.*

¹⁰⁹ *Register*, 16 August, 1879, Supplement, p.2: *Heylen*.

¹¹⁰ *Ibid.*

judgment in the *Buck* case referred to earlier shows that there was a precedent for such an interpretation. On the subject of Mrs Buck's condonation, Justice Gwynne's judgment had stated:

[I]t is clear & settled law that condonation (even when it exists) is not absolute forgiveness on the implied condition that the misconduct shall not be repeated. Even harsh & insulting treatment tho' unaccompanied by personal violence has been held to be a breach of such implied condition.¹¹¹

Why, then, did Justice Boucaut direct the jury to find condonation in *Heylen*? To answer this question, bearing in mind the finding in *Hawke*, we return to Mrs Heylen's supposed provocation of the cruelty. When we look closer at Justice Boucaut's comments on this aspect of the case, they are almost invariably uttered along with comments about Mrs Heylen's conduct in the witness-box. Her evidence was not just "contradictory", but described by the *Register* as "garrulous" and her manner deemed "most improper" by the judge.¹¹² Her counsel expressed the hope that "she would never come to him again with a case".¹¹³ Indeed, throughout the report, it is hard to distinguish between references to the evidence itself, and those to the petitioner's manner of giving it. Justice Boucaut had this final comment to make on the case:

[I]t would be unfair to the husband not to say that in every instance where the petitioner's statements could be tested by cross-examination it was seen that, however wrong in themselves his acts were, he was provoked to them in a very high degree by the petitioner's conduct. A great deal of what she said in her examination in chief she unsaid in her cross-examination, and *her demeanour was such as to deserve reprobation*.¹¹⁴

There is no comparable report on how Mary Dunn presented her evidence in the witness-box, but the report of *Heylen* included so many comments on the petitioner's conduct from her counsel, the judge and the reporter covering the case

¹¹¹ P.R.O.S.A G.R.G. 36, Series 23, No. 3: *Buck*.

¹¹² *Register*, 16 August, 1879, Supplement, p.2: *Heylen*.

¹¹³ *Ibid*.

¹¹⁴ *Ibid*. My emphasis.

that her behaviour must have been regarded as noteworthy. These comments suggest that not only did the courts require proof of marital fault, not only did they require absence of condonement to or provocation of the fault, but that the courtroom demeanour of a petitioning wife was an important means by which justice was seen to be done.

In the theatre of the divorce court, Ann Heylen failed to deliver a performance capable of convincing the judge that she was the victim of cruelty which was unprovoked and uncondoned. Thus, she threw doubt on her credibility, and consequently on the credibility of the judge if he were to entertain her petition. The respective fates of Frances Lott and Ann Heylen suggest that the courts equated submission to violence with virtue and that a successful petitioning wife would be one whose witnesses and courtroom appearance affirmed that virtue. Between Frances Lott and Ann Heylen, however, lies Mary Dunn, whose case was not damaged by evidence of some spirited opposition to her husband. The "virtue rewarded" theme has been well worked in Australian women's history ever since Anne Summers articulated the polar opposites of behaviour into which the first colonial women were obliged to fit. Sophisticated variations, such as Jill Matthews's *Good and mad women* have appeared, but in Australian divorce history, the application of the damned whores/God's police thesis has resulted in a failure to venture beyond a "passive victim" analysis of women and the law. Although we cannot know the extent to which courtroom demeanour made or lost a wife's case, the example of Ann Heylen suggests that a bad courtroom performance could compound the effect of less-than-watertight evidence. If this was true, then so was its converse - a wife who established, through her visible behaviour and through evidence, that her life, limb or health had been endangered, as we assume Mary Dunn did, could win her case without having to present herself as irreproachable.

It is clear from the cases discussed above that judges were interested in more than marital fault, and more than the respective duties of protection and chastity.

The public acknowledgment of Mrs Lott's worth as a wife and Mrs Heylen's lack of it signifies a preoccupation with marital duty in a broader sense than that laid down in the authorities. The effect of this preoccupation, as we have seen in *Heylen*, was more than a blurring of the distinction between marital fault and marital duty. Criteria of marital duty entered into and distorted decisions which were concerned ostensibly with marital fault. Two further cases illustrate this tendency at work in Supreme Court decisions.

The case of *Durbridge v Durbridge*, filed in 1866, a suit for dissolution of marriage on the grounds of the cruelty and adultery of a teamster shows how, despite the fact that cases were evaluated according to a legal definition of cruelty, notions of acceptable marital behaviour could be incorporated into this definition. In her petition, Elizabeth Durbridge detailed several acts of violence which occurred "without provocation", including an assault with the carcass of a cat. On this last occasion, Mrs Durbridge, "being in fear that the said Simeon Durbridge would do me some grievous bodily harm and take away my life fled from the house" and did not return to cohabitation.¹¹⁵ At the hearing of the petition, the daughter of the parties, Ellen Durbridge, testified that on the occasion of the assault described, her father had given her mother two black eyes, and told her that if she was still there when he returned he would put her on the fire. She also described other acts of considerable cruelty, and her mother's continual attempts to please her father in spite of them.¹¹⁶

In summing up, Justice Boothby's vacillation over the intent behind the assault with the carcass recalls Chief Justice Hanson's quandary over the whipping in *McPharlin*:

[I]t was for the Jury to consider the evidence as to the charge of cruelty...and whether they would believe the story of the cat as described, in which case it would be an act of cruelty, or that it was

¹¹⁵ P.R.O.S.A. G.R.G. 36, Series 23, No. 94: *Durbridge v Durbridge*.

¹¹⁶ *Register*, 26 September, 1866, [p.307]: *Durbridge*.

simply a kind of throwing, as was attempted by the respondent's counsel to set up.¹¹⁷

The judge was less equivocal about the other acts of cruelty described by the daughter, calling them "unjustifiable", but his censure was wholehearted when he came to compare the cruelty with the manner in which the respondent had conducted his adulterous relationship. The blows administered

were acts of corporal cruelty, but there was what he considered far worse when he took into his house where his own daughter was living a woman with whom he was living in adultery. To take a woman into his house and live in adultery with her before the eyes of their child, and contaminate her, and run the risk of banishing from her mind all the modesty of her sex, was a far grosser act of cruelty towards the wife than giving her a black eye or drawing blood from her temple. And there was the taking his daughter to the inns with him - with what intention, it was for them to judge. These things, if they considered them proved, would entitle the petitioner to a verdict.¹¹⁸

While the acts of violence described in evidence satisfied the legal definition of cruelty, the respondent's disregard of his daughter's innocence did not. In Justice Boothby's instructions to the jury, the latter gained so much more prominence than the physical violence that it obscured the legal issue with which judge and jury were supposed to be concerned.

Eleven years after the hearing of *Durbridge*, Joseph Ward, a labourer, appeared in the Supreme Court with his petition for judicial separation on the ground of his wife's cruelty. It was the only petition of this kind filed by a husband which came to hearing during the period under study. Ward clearly felt that his wife's behaviour satisfied the requirement of constituting danger to life, limb or health. An intemperate woman, she was allegedly given to destroying the household furniture, and to attacking her husband with such missiles and weapons as a teapot, a carving knife and a glass lustre. Like many of the wives who

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

petitioned, Ward added weight to his claims with the fact that the Police Court had sentenced his wife to a month in gaol for her violence.¹¹⁹

The respondent's defence was that her husband, by his own intemperance and cruelty, had conduced to any cruelty found.¹²⁰ At the hearing, the petitioner admitted that he sometimes "took a little more drink than was good for me, but I was never incapable like her".¹²¹ He went on to describe how his wife's drinking had run him into such debts that he had been compelled to sell off all the furniture. He claimed that, while waiting for the buyer to arrive and remove it, his wife had tried to destroy it. Edward Vick, the buyer, testified to the truth of this claim, and also witnessed that when the petitioner tried to restrain his wife, she threw a glass lustre at his hand.¹²² When it was her turn in the witness-box, Louisa Ward offered a slightly different version of the acts of which she had been accused, but by and large admitted the truth of the petitioner's story. Mrs Ward's evidence gives an impression of a degree of violence on both sides, and her case was helped by a witness who attested to the petitioner's drunkenness. One of these witnesses also "[o]nce saw Mr. Ward holding [the respondent] down on the floor in a threatening attitude".¹²³

After all of the evidence had been heard, counsel for the respondent argued that "[t]here was nothing to render cohabitation dangerous to the petitioner, although it might be unpleasant".¹²⁴ To this the petitioner's counsel replied

that the alleged cruelty was coupled with the destruction of property and personal violence towards the petitioner. He asked His Honor to take into account the conviction attained in the Police Court....

His Honor said he thought it would be much better if the petitioner would give his wife another trial.¹²⁵

¹¹⁹ P.R.O.S.A. G.R.G. 36, Series 23, No. 335: *Ward v Ward*.

¹²⁰ *Ibid.*

¹²¹ *Register*, 20 October, 1877, p.3: *Ward*.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

Judgment was reserved when the petitioner "assured His Honor they would never agree".¹²⁶ Chief Justice Way did not deliver judgment until some eighteen months after the hearing, because the case "had quite escaped his notice" earlier.¹²⁷ Perhaps he hoped that the Wards would settle their differences if left to their own devices for a while, or perhaps his having forgotten about the case reflects upon the seriousness with which he took it. Whatever the cause of the delay, when he recapitulated the evidence, he did not deny that the wife had been violent, but he implied that a degree of provocation on the part of the husband had to be taken into account. The reason why this provocation was so important to the Chief Justice has to do with how he interpreted this particular violent relationship. The means by which he did so was to avoid the dichotomy of aggressor and victim which he highlighted in *Lon*:

The complexions of the acts complained of so far as they are used for obtaining a Judicial separation are altered when it is added that the blow and the bite were given in a struggle when the husband had sold and was removing the whole of the furniture from the house for the payment of his debts. This sale of the furniture probably explains the real cause of the suit. The wife is of intemperate habits. The husband complains that the wages he has earned and paid to her for the maintenance of the home have been wasted in drink and that he has been run into debt in Consequence [sic]. I look upon this suit as really instituted not because of cruelty but for the purpose of getting rid of a thriftless and drunken wife.¹²⁸

As was the case with *Durbridge*, issues extraneous to those of marital fault were brought to the fore, only this time in order to conclude that the marital dispute did not warrant judicial intervention. The Chief Justice admitted that the wife had been guilty of violent behaviour, but balked at calling it legal cruelty, and directed attention to the other sources of unhappiness in the marriage, which were not grounds for relief.

The petition was dismissed, ostensibly because Joseph Ward had failed to show that his wife's behaviour threatened his life, limb or health. Again the issue of legal cruelty was obscured. Why? It is interesting to speculate on how the case

¹²⁶ *Ibid.*

¹²⁷ *Register*, 1 April, 1879, Supplement, p.1: *Ward*.

¹²⁸ P.R.O.S.A. G.R.G 36, Series 23, No. 335: *Ward*.

could have been different if Joseph Ward had not gone to court when he did. Supposing he had continually condoned his wife's violence until finally he could stand it no more, and then retaliated with equal, or greater, force. And Mrs Ward decided that she had a reasonable apprehension of danger to life, limb or health if she stayed under the same roof as her husband, and filed for a judicial separation. He, for his part, would no doubt have been incensed at this injustice - he had lashed out only once after tolerating so much from her - and would have filed an answer alleging provocation. In court, it would emerge in evidence that Mrs Ward was a drunken and thriftless woman who neglected her household duties because of her intemperate habits, and who was given to outbursts of unreasonable and violent rage, which extended to injuring her husband and destroying his furniture.

When we hold the real *Ward* up against the hypothetical one, the allegations of cruelty in one become allegations of provocation in the other. We have seen how wives were expected to validate their grievances by proving that there had been no provocation of the cruelty alleged, and how a successful counter-charge to this effect could lose a wife her suit. With Louisa Ward's marital faults presented in court in the form of provocation, it is highly likely that her husband would have gained a sympathetic hearing and won the case, just as Ann Heylen's husband did. Although the facts of Mrs Ward's behaviour are not changed in our hypothetical case, their context is, and this throws some light on the reason why Ann Heylen lost and Louisa Ward won. The legal definition of marital cruelty carried with it the implication that a woman found guilty of it would be seen to be terrorizing a man. To charge a wife with provocation of a husband's cruelty - no matter how great the former and how minor the latter - acknowledges women's capacity for violence in a way that does not challenge accepted beliefs about how husband and wife should be. Asserting that a wife is capable of such cruelty as endangers a husband's life, limb or health does, suggesting as it does that the foothold of male supremacy could be lost by an overpowering wife. Thus, while Justice Boucaut could condemn Ann Heylen for violence which justified her husband's attacks, Chief Justice Gwynne

balked at finding Louisa Ward's violence to be the cause of her husband's suit. How much easier to accuse a wife of thriftlessness and intemperance than to charge her with physical brutality!

Conclusion

William O'Neill's "safety valve" thesis argues that marriage as an institution was strengthened by easier divorce because it was a way of freeing people caught in unsatisfactory unions to form better ones and so to give marriage a better press. Applied to such cases as *Lott*, this argument appears to hold for South Australian conditions as well; here was a wife who had all the virtues chained to a man with all the vices. Freed from him, she would be able to make another marriage more worthy of the name. O'Neill's argument, however, retains its logic only so long as it is applied to divorce laws which regard the ascendancy of the companionate marriage as desirable. The backward-looking Matrimonial Causes Act adhered to the aristocratic, property-based form of marriage, reinforced in the courtroom by notions of marital duty which were equally the legacy of the past. Moreover, the specific marital duties either overtly or covertly appealed to in South Australian decisions pointed toward the more general duty of staying married, again a characteristic of pre-Matrimonial Causes Act marriage. While giving people unprecedented liberty to divorce, the Act attempted to check the consequences of this liberty by retaining the limitations on choice which belonged to an era in which choice was not acknowledged at all. Far from a law which espoused the companionate marriage, the Matrimonial Causes Act adopted a position which was essentially, and paradoxically, anti-divorce. Concepts of marital duty were so important to the South Australian judiciary that issues of marital fault were at times overshadowed to the point where, in cases such as *Ward* and *Heylen*, they were all but eclipsed. In such cases, the granting of relief was regarded as a greater evil than the perpetuation of marriages which were at best unpleasant, and at worst, hotbeds of marital fault. The chief concern of the Supreme Court hardly seems to have been

one of giving marriage a good press. Rather, it ran the risk of seeming to encourage marriages which its own tenets would suggest it should have dissolved.

It may not be necessary to throw O'Neill's baby out with the bathwater, however. The courts, in their reticence to grant decrees, were protecting something. By allowing the continuation of marriages in which marital fault was found, the courts were in effect saying that it was better for the institution of marriage in general for these particular marriages to continue. Let us try to fit *Lott* into this picture. The retributive system of justice, upon which divorce law was based, demanded that the perpetrator of a crime, in this case, William Lott, be 'punished' by the awarding of a decree against him. Because there was a guilty party, there had also to be an innocent one, and pressure was brought to bear on Mrs Lott to establish her husband's guilt partly by evidence of her own innocence. Thus her suffering was at least as important to the Court as what she claimed to be the cause of it. By establishing her good name as a wife despite the trials of her marriage, she was rewarded with a legal means of ending it. *Lott* thereby highlights a further paradox of divorce in South Australia: exemption from the duty of marriage was granted to those who demonstrated the greatest willingness to perform it. The unresolved contradiction entailed in this position means that the internal logic of O'Neill's "safety valve" argument cannot be applied to South Australian conditions.

The Matrimonial Causes Act fell irrevocably between two stools. Its priorities were such that the opportunity to make a better marriage did not in itself justify the dissolution of a bad one, yet its very existence acknowledged the increase in formal recognition of the element of choice in marriage. This latter fact appears to vindicate O'Neill. The difference between his view and the argument which this thesis will put, however, is that O'Neill sees choice built into the dominant form of marriage by virtue of the function of divorce as a safety valve, while the South Australian Supreme Court saw marriage and divorce as antithetical. Movement toward greater choice in marriage therefore could not originate from within the law.

In place of the O'Neill thesis, I wish to propose a modified version of it. The South Australian Matrimonial Causes Act did protect the institution of marriage, but not through its conservative principles. On the contrary, its failure to align itself completely with either the old, duty-based marital values or the new, choice-based ones laid it open to influences over which it had only limited control. These influences came from the men and women who used the Act to their own advantage and hastened the widespread acceptance of the companionate marriage. The durability of marriage as a social institution was not ensured by the formal incorporation of divorce as a necessary adjunct to the modern marriage, as O'Neill argues. Instead, it was ensured by the use of an Act which did not acknowledge that there was anything "modern" about nineteenth-century marriage, but which nevertheless provided the opportunity for men and women to wipe the slate clean and start again when their marriages failed.

Illustration of the relationship between the law and its users is furnished by *Dunn*, which demonstrates that, while proof of contributory marital fault could jeopardize a petitioner's chance of a favourable decree, it was not necessary that all petitioners appear spotless before the Bench in order to obtain one. The varying degrees of severity with which the onslaught against divorce was conducted was another of the chinks in the divorce court armour. The weight which the Act gave the discretionary powers of individual judges meant that judges could be appealed to in a number of ways. While the nature of the courtroom, with its theatrical overtones, required that those appearing in it often play the familiar parts most likely to achieve results: the battered wife, the outraged husband, the loving parent, it also offered opportunities for the unexpected and the unprecedented. The consequences of a particular law are thus to be measured in the terms of both its practitioners and its users. The following two chapters aim to demonstrate that South Australian divorce law continually ran itself against a wall of contradiction within, and the force of popular will without.

Chapter Two

NOBLESSE OBLIGE AND JUDICIAL OPPOSITION TO DIVORCE

Noblesse oblige

Paradoxes within the 'anti-divorce' approach of South Australian judges put them on a dangerous precipice. On one side, the tide of divorce was rolling in, but the only escape was to plunge into the abyss on the other: that of perpetuating fault-ridden marriages. Given that each was equally bad (in the judges' eyes), why did they not fling themselves to one side or the other, and thus lend some dignity to defeat? One aspect of the anti-divorce position which offered the possibility of averting defeat was the assertion it entailed that some marriages, at least, were worth saving. The only way for the courts to maintain a foothold in their precarious circumstances was to establish that this assertion was a legitimate one. During the period under study, this task became the basis of an elaborate process of appraising divorce petitions according to the social origins of the litigants involved. The criterion by which bad marriages were distinguished from good ones was that of marital duty. Marital duty became a matter of *noblesse oblige*, imposed by the judiciary upon members of the upper echelons of South Australian society. As social leaders, they were expected to behave better in, and work harder at, maintaining their marriages than the bulk of dissatisfied couples who appeared before the Bench.

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In October, 1898, Elizabeth McBride, the wife of a wealthy and socially prominent sheepfarmer, filed a petition for judicial separation on the grounds of adultery and cruelty. This was not the first time Mrs McBride had tried to obtain relief from the courts. Ten years earlier, she had petitioned for judicial separation

on the single ground of cruelty.¹ Because this original petition is among the incomplete material in the Public Record Office and does not appear to have been reported in the *Register*, it is not possible to tell whether it was abandoned or dismissed. However, as there is no reference to a previously unsuccessful petition in the 1898 hearing, it seems likely that the first was abandoned.

The second petition revealed a considerable degree of marital fault. The petitioner claimed that the respondent had habitually committed adultery with a domestic servant during 1896 and 1897, in which latter year the servant gave birth to a child of whom the respondent was alleged to be the father. Numerous acts of cruelty were also mentioned, dating from 1859, three years after the parties' marriage. The petitioner stated that she had repeatedly left her husband on account of his cruelty, but had been induced to return on his promise of reform, until she finally left him for good in September, 1898. The respondent contested the charges, adding that she had condoned any adultery or cruelty found. Further details of the marital conflict are presented in the petitioner's interrogatories, in which the respondent was alleged to have struck his children and insulted his wife in the presence of the servants. They also mentioned an agreement made between the parties on 7th April, 1898, which set out the rights and duties of husband and wife. A question in Mrs McBride's interrogatories intimated that, upon providing her with a trap as part of the agreement, the respondent had said words to the effect of "I hope the first time you ride in it you'll break your neck".²

At the hearing of the petition, the petitioner's counsel, Josiah Symon, opened his address with the familiar juxtaposition of good and bad to support his case. But surprisingly, what followed was not a drawn-out battle to establish either the truth of the petitioner's allegations, or that Mrs McBride was unworthy of relief. In his address, Symon produced letters that had passed between both parties'

¹ P.R.O.S.A. G.R.G. 36, Series 51, No.645: *McBride v McBride*.

² P.R.O.S.A. G.R.G. 36, Series 54, No.270 of 1898: *McBride v McBride*.

lawyers to show that the respondent had rejected offers of a separation. This point was taken up by Justice Boucaut:

His Honor thought that it would have been much better if some arrangement could have been arrived at to avoid public scandal, as the consequences to the children and grandchildren would be dreadful.

Mr. Gordon [for respondent] intimated that his client was only too willing -

His Honor said he thought it well to interpose thus early, because the case might get to such a point that no Judge could help the parties....There were unfortunate differences sometimes, whoever were to blame, and the only thing to be fought out was who was to blame. Both parties might be to blame, but he was thinking of the family.³

After an hour's *in camera* consultation, itself a rare occurrence, an amicable settlement between the parties was reached. The antagonism of opposites which was so important in the winning of cases such as *Lott*, and on which the adversary system of justice supposedly thrives, was defused, but not this time by the introduction of the mitigating powers of the Matrimonial Causes Act. Justice Boucaut's conciliatory tone was reiterated in his address to the jury, when he said that

as Christian men he was sure they were heartily glad that a dispute of this painful nature had been settled....It was hard in cases like this to say where the blame lay. Often both parties were in fault, and it would have been most painful to the children and grandchildren for years afterwards if differences which might have been avoided at the proper time were brought into open Court.⁴

In *McBride*, the judge appeared, not as arbiter of right and wrong, but as conciliator. He did not apportion blame to one party, but nor did he deny the petitioner her relief. The decree awarded in the case stipulated that the petitioner's charges should be abandoned without prejudice to her right to revive them in the future, and also judicially separated her from the respondent.⁵ The odd fact of the petitioner having gained a separation out of court yet through judicial means

³ *Register*, 14 December, 1898, p.9: *McBride*.

⁴ *Ibid.*

⁵ P.R.O.S.A. G.R.G. 36, Series 54, No.270 of 1898: *McBride*.

suggests that she would have obtained a judicial separation had the usual procedure been followed. Thus, the reasons for avoiding a court hearing were not to do with insufficiency of evidence to support her case and even if this were so, the question remains of why her petition was not defeated in open Court. An explanation of what eventuated in this case lies, again, beyond legal issues of marital fault.

The direction taken in the *McBride* hearing can, like *Lott*, be explained in terms of notions of marital duty, but with significant differences from *Lott*. Although *McBride* offered ample opportunity for vivid contrasts between innocent and guilty, Symon's pitting of the respondent's "ungovernable temper" against the suffering of a "patient hard-working woman"⁶ did not appear to inspire either outrage or compassion in the judge. Justice Boucaut showed a similar reticence to pronounce judgment on a patently guilty spouse in *Hall v Hall and Wilson*, a petition which comprised quite different allegations.⁷ In *Hall*, extensive evidence of the wife's adultery with a Unitarian minister was brought to Court. Although the petition was contested, no substantial counter-allegations were brought against the husband, a consulting mining engineer. After a long and ugly hearing, adultery on the part of the wife was established. Toward the close of it Sir John Downer, for the co-respondent, objected that he had not yet been heard. Justice Boucaut replied:

Mr. Piper [for the respondent] made a speech for two whole days. You can occupy four days if you like, and I will listen anxiously and patiently to you, and even in my heart I hope you will be able to succeed, because it seems to me that the woman is the principal party to be considered, not the man at all - unless a respondent is colluding with a petitioner.⁸

Justice Boucaut's discomfort with the decision he was bound to hand down punctuates the *Register* report of his summing up. With references to "this unfortunate woman" and her "painful position" on being accused by her servants, he arrived at his judgment with this final expression of regret: "I was anxious that I

⁶ *Register*, 14 December, 1898, p.9: *McBride*.

⁷ P.R.O.S.A. G.R.G. 36, Series 54, No.114 of 1902: *Hall v Hall and Wilson*.

⁸ *Register*, 26 August, 1902, p.8: *Hall v Hall and Wilson*.

should not unjustly be the means of sending this woman from her home and her friends to the world....The petition of this man is allowed".⁹ Never, in all the records of divorce cases of the time, was a flagrant adulteress condemned with such grace!

It is clear that Justice Boucaut was acutely aware of the other losses sustained by a married woman who lost her honour but, as he himself admitted, "as a Judge and a lawyer I have no right to allow myself to be influenced by any sympathy of that sort".¹⁰ After all, his role in the divorce court was to punish someone who took the marriage contract so lightly as to commit the marital fault which carried the strongest penalty offered by the Matrimonial Causes Act. Some similarities between *Hall* and *McBride* suggest that he was indeed motivated by feelings other than sympathy, but that these feelings were not governed by a perception of himself as an impartial representative of British justice. A further petition, that of *Sweetapple v Sweetapple*,¹¹ which began hearing in 1903, the year following that in which Martha Hall lost her entitlement to membership of Adelaide society, develops a theme, the first notes of which can be detected in *McBride* and *Hall*. In *Sweetapple*, judicial influence upon the final outcome of the case is of a kind and a degree which adds a different dimension to the normative character of judgments of the type discussed in the preceding chapter.

*

Florence Julia Sweetapple, the petitioner, was descended from the families of Major O'Halloran and Dr Woodforde, described by the Chief Justice, Sir Samuel Way, in his judgment in the case as "two old colonists, whose names were highly honoured in the early history of the state".¹² Her husband, Dr Herbert Algar

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ P.R.O.S.A. G.R.G. 36, Series 54, No.51 of 1903: *Sweetapple v Sweetapple*.

¹² *Register*, 19 April, 1904, p.3: *Sweetapple*.

Sweetapple, was a well-respected medical practitioner in Adelaide. Thus, both Mrs Sweetapple's family background and her husband's occupation placed her in the same social group as that to which the McBrides and the Halls belonged, the "Group 1" described in Appendix 2. On the face of it, the Sweetapples seem to have been an exemplary couple. Sir Samuel Way, in his judgment, drew attention to the public aspects of the relationship in arguing for the return to cohabitation:

I think that until Mrs. Sweetapple left her husband's home on December 2, 1902, there were very few persons in the outside world who did not regard their marriage as a happy one....Dr. Sweetapple was a man whose life appears to have been centred in his home and his practice....The doctor appears to have been equally fortunate in his wife....There was no imputation of extravagance against her. She acted, not merely as a mother to the children, but also as a nursemaid up to when the second child was expected. She....waited for her husband when he came in at 8 o'clock in the evening, and gave him his tea with her own hands, and until nearly midnight she was occupied in assisting him with his books, and preparing for his engagements on the morrow.¹³

A closer look at these examples, used to promote a view of the couple's suitability to each other, reveals that they were largely drawn from Mrs Sweetapple's catalogue of grievances. For instance, the petitioner's noted thrift was a substantial source of conflict brought out in the hearing. Describing an incident in which she had failed to pay a grocer's bill on time, Mrs Sweetapple stated that on the grocer complaining to the respondent, "he came straight into my room and struck me as hard as he could for daring to let the bill run so high".¹⁴ She claimed that he allowed her £2 a week, which was to cover payment for the baker, grocer, milkman, greengrocer, the newspaper and reading matter for the doctor's waiting room as well as tram fares. The judge commented, "I should be glad if I could get the classes of tradesmen enumerated paid out of a similar allowance weekly".¹⁵ The petitioner, continuing her evidence, stated that she did not tell her husband when she was in arrears, and was too frightened to let him see the bills.

¹³ *Ibid.*

¹⁴ *Register*, 23 March, 1904, p.7: *Sweetapple*.

¹⁵ *Ibid.*

She recounted that on another, similar occasion, her husband had given her money towards the payment of an account, saying she would have to refund him out of her housekeeping allowance.¹⁶ In praising Mrs Sweetapple as a model of wifely frugality, the Chief Justice ignored the petitioner's allegation that this frugality was practised out of necessity, occasioned by her husband's miserliness and her fear of reprisal if she did otherwise.

A similar reworking of the petitioner's claims about the failure of the marriage was achieved in the Chief Justice's reference to her assistance in the doctor's bookwork. Again, in his rose-coloured view of conjugal harmony he failed to take notice of the contention surrounding it in the hearing. Mrs Sweetapple claimed that she did not begrudge helping her husband, but told how on one occasion, just before the birth of one of the children, she said that she was too ill to go on working and received a blow on the back with his fist in response. In giving evidence for the petitioner her sister, a Mrs Ross, described how Mrs Sweetapple had been sobbing when she emerged from the room in which she had been working with her husband, although it seems that she did not recount in detail to Mrs Ross what had happened. Shortly afterwards, the petitioner went into labour. In judgment of the case, Sir Samuel Way confessed that, of all the incidents described, this had given him the greatest anxiety in arriving at his decision to reject Mrs Sweetapple's petition.¹⁷ His conclusion about it echoes to some extent the issues raised in *Lott*, but with greater ramifications:

I cannot conceive a woman in these circumstances, with the life of her unborn child as well as her own in danger, keeping treatment of that kind from the knowledge of her sister....There must be some mistake on the petitioner's part in the suggestion that the blow was struck at the time and in the circumstances to which I have referred.¹⁸

¹⁶ *Ibid.*

¹⁷ *Register*, 19 April, 1904, p.3: *Sweetapple*.

¹⁸ *Ibid.*

It is noteworthy that the last sentence in this passage implies that the Chief Justice did not dispute the striking of the blow, only the time of striking it. Sir Samuel Way clearly believed that if Mrs Sweetapple had not confided details of the incident immediately to her sister, she herself had neglected an important marital duty. It also implies that if the blow were delivered under other circumstances, as he believed it was, it would not have fallen under the legal definition of cruelty. It would only have constituted cruelty if the petitioner were believed, and to be believed she would have had to react to the blow in quite a different manner. The nature of the petitioner's response as she described it thus called the whole of the evidence into question.

Sir Samuel Way's rejection of this crucial piece of evidence rested on the belief discussed in Chapter One, that the petitioner could contribute to the marital fault of the respondent. The specific nature of this justification for throwing out the evidence, however, meant that it could not be applied to the testimony of other witnesses. Mrs Ross claimed that after the petitioner went into labour she called the respondent who, arriving half an hour later, gave his wife some medicine, which had no effect. When called again by the witness, the respondent allegedly complained of tiredness:

Witness suggested that the nurse should be sent for, and he replied - "It is awfully rough on a poor horse to send it out at this time of night". Witness offered to go for the nurse herself, and the doctor then sent for her....He was present at the birth of the child, but did not look at the baby before he went out to visit his patients. He just looked in through the bedroom door, and said to his wife - "Goodby [sic], I am off" or words to that effect.¹⁹

In response to Mrs Ross's account of the cruelty alleged, the Chief Justice said, "I don't think what Mrs Ross said was intended to be untrue",²⁰ the clear implication being that he did not believe the witness. The interpretation of evidence by recourse to notions of marital duty was, as we saw in Chapter One, well established by the

¹⁹ *Register*, 25 March, 1904, p.3: *Sweetapple*.

²⁰ *Register*, 19 April, 1904, p.3: *Sweetapple*.

time Mrs Sweetapple brought her petition before Sir Samuel. Evidence substantiated by witnesses from outside the marriage could not be disposed of in this way, hence the selective use of the Chief Justice's credulity. If the rejected evidence were true, then we should have proof, by his own acknowledgment of the seriousness of the charge, of legal cruelty.

We must ask, therefore, why the Chief Justice rejected the evidence. As we have seen above, he was loath to damn Mrs Sweetapple as a liar, preferring to call her "mistaken", and here we find our clue. He held her in as high regard as a wife as he did the doctor as a husband, and thus saw no reason for cohabitation between them to cease. His belief in the marriage as basically a good one meant that his criticisms of the petitioner did not allow the inference that she invited or deserved the cruelty, as was intimated in the rejection of the *Hawke* and *Heylen* petitions. In reference to suggestions made in evidence that Mrs Sweetapple was short-tempered he said, "I dare say that was true of almost any woman who was worth having" and sympathized with her strong reaction to being called a liar by her husband in front of a servant, saying, "It was a very gross affront to a high-spirited woman; in fact, to any woman to be accused of untruthfulness before a servant".²¹ The Chief Justice concluded that "it is the respondent's duty to apologise to his wife for the scene which resulted in her leaving him",²² but it was Mrs Sweetapple who received this final warning to look to her laurels:

In the interests of herself, her husband, and, above all, her children it would be a dreadful thing if these little ones, whom both parents love so much, were deprived of the care and affection of either parent. I don't hesitate to say, having gone so frankly into the case, that her duty points in that direction....I knew Mjr. O'Halloran by sight and Dr. Woodforde personally, and I think I may say that they were both animated by a lofty sense of duty to the extent of self-sacrifice in the performance of it, and I hope that, encouraged by their example, and beckoned on by the love of their children, both parties, husband and wife alike, will see that their own interests, the interests of the public, and the interests of their dear children, will be best secured by their resuming cohabitation.²³

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

Beyond the common social origins of all the parties concerned, the similarities between *McBride*, *Hall* and *Sweetapple* may not immediately be apparent. It seems rough justice indeed that the suffering of Florence Sweetapple should be met with the backhanded compliment of a rap over the knuckles while Martha Hall, who appears in evidence as the archetypal abandoned woman, should move the judge so greatly on her behalf. It may well be asked, too, why Justice Boucaut shielded the McBride marriage from public view while Sir Samuel Way held that of the Sweetapples - or his version of it - up for public inspection. An important difference between these two cases was in the husbands involved in the respective suits. Josiah Symon could find no description which more aptly fitted the respondent in *McBride* than "deranged". In his defence of the respondent in *Sweetapple*, he made use of the same description, but this time to argue for the absurdity of the petitioner's charges of cruelty:

According to the definite testimony of the petitioner and her witnesses Dr. Sweetapple had, within three months after the marriage ceremony given way, in the presence of his sister-in-law, to passion and violence, which was diabolical because it was petty....If the witnesses had depicted a man who was either a fool or a madman such conduct might be credible, because it could be attributed to a person who should have been in a straight [sic] jacket at the times referred to.²⁴

The reason why the allusions to insanity worked for Elizabeth McBride but against Florence Sweetapple have to do with the other evidence brought to bear regarding the husband in each case. In *Sweetapple*, Sir Josiah drew attention to the other side having admitted that the respondent had "comported himself as a gentleman".²⁵ Elsewhere in his address, "[h]e emphasized the fact that there had been no allegation of unfaithfulness or drunkenness, and no immorality of any kind had been suggested".²⁶ Even Mrs Sweetapple retorted with a swift "Certainly not"

²⁴ *Register*, 25 March, 1904, p.3: *Sweetapple*.

²⁵ *Ibid.*

²⁶ *Ibid.*

when asked under cross-examination whether her husband drank.²⁷ In short, the respondent's major drawcard was his virtue, which was conveyed both through witnesses and through his own demeanour in Court; even evidence suggesting that some of the servants had changed their testimony regarding the husband's behaviour after a visit from his legal representatives²⁸ did not tarnish his image. The gentlemanly conduct of the respondent was affirmed through such exchanges as this one, which took place during cross-examination:

The first question put to the witness was "Do you adopt your counsel's phrase 'diabolical invention' with respect to some of the charges?"

Dr. Sweetapple's reply was - "I do not apply that term to my wife".

The Chief Justice - That is a very proper retort.²⁹

This gallantry toward the woman who sought to discredit him as a husband was matched by the frequent references in evidence to the husband's role as a family man. These were deftly incorporated into a suggestion during the cross-examination of Mrs Sweetapple that she, perversely, discouraged his paternal devotion:

When was the photograph taken? (Photograph of Dr. Sweetapple fondling his child.) - It was taken in 1902.

They seem pretty affectionate there? - Yes.

Was that picture hung in your house?....The photograph was knocked off behind the piano in the drawing room, and I never picked it up.

Why? - Because I never liked the picture.

Who knocked it off? - I did accidentally.

And left it with scorn on the floor? - I left it there, but not with scorn.³⁰

Compare the above exchange with the opening address in *McBride*, in which Symon told the jury that the respondent "sometimes conducted family prayer lasting two hours, which he thought was in itself cruelty, and he was wont to earnestly pray that God might take his wife and young children".³¹ As we have

²⁷ *Register*, 23 March, 1904, p.7: *Sweetapple*.

²⁸ *Register*, 1 April, 1904, p.3: *Sweetapple*.

²⁹ *Register*, 31 March, 1904, p.8: *Sweetapple*.

³⁰ *Register*, 23 March, 1904, p.7: *Sweetapple*.

³¹ *Register*, 14 December, 1898, p.9: *McBride*.

seen, Symon's gauntlet was never taken up, due to the intervention of Justice Boucaut. His stated reason for intervening was the avoidance of public scandal: an irony when we consider that publicity was the very stuff of some hearings, such as *Sweetapple*, in which matrimonial litigation was used to set a moral example. The charges against Robert McBride, however, did not offer the potential to be turned in his favour in the way that the charges against Herbert Sweetapple were. Unlike Dr Sweetapple, McBride had to answer charges of adultery which would not have been dismissed with ease - the claim of his having fathered a child by a servant would not have been made lightly. The respondent's morality was offered a further challenge in the allegation that he had introduced "two women servants...of bad reputation" into his house, who had allegedly acted familiarly toward the parties' two sons and who had been the source of a dispute between husband and wife and the sons, which had precipitated further violence.³² Moreover, the respondent failed to err on the side of propriety by dismissing the servants.³³ The petitioner claimed that she had left her husband not once, but several times, and the existence of the marriage agreement, as evidence of an attempt to solve severe marital discord out of the courtroom, would no doubt have lent credence to her claims. Presumably, it was only the failure of this document to achieve marital harmony which brought Mrs McBride to law. In the truncated hearing of *McBride* we glimpse, then, what appears to be a solid case for marital fault on the part of the husband. If he could not acquit himself with the aplomb of a Herbert Sweetapple, so much the better, surely, for the smooth carriage of justice. Instead of a replay of *Lott*, however, we witness the whole issue swept under the rug of judicial concern for the consequence of a scandal for the family. In both *Sweetapple* and *McBride*, the marriage itself was represented as more important than the charges of marital fault. Let us return now to *Hall*, a petition involving a socially prominent couple where the case for marital fault was both heard and won.

³² P.R.O.S.A. G.R.G. 36, Series 54, No. 270 of 1898: *McBride*.

³³ *Ibid.*

The adultery in *Hall* was of a particularly flagrant nature. The petitioner's work took him away from home for a large part of his married life and, rather than place herself above suspicion during his absences, the respondent made use of them:

In consequence of words between [the parties] petitioner told his wife that he would not have Wilson about the place. But respondent persistently received Wilson at her house while her husband was away. Throughout 1901 Wilson almost lived there. He used frequently to stay all night, but petitioner never heard that his injunction had been disobeyed until February of this year.³⁴

During the hearing of the evidence (which was suppressed for a time from the Press), it emerged that the relationship between Mrs Hall and Wilson had divided the respondent and her children and had outraged the respondent's niece, who was a governess in the house. The servants, too, had considerable evidence of adultery, with which they confronted the respondent, and they allegedly attempted to blackmail her before informing the petitioner of what had been taking place. In testifying against the respondent, the niece, Kate Belt, stated that the petitioner

made a practice of bringing presents for his wife and children, and also for witness and the servants, whenever he came home. He was always kind, gentle, and forbearing in his treatment of his wife, and was an indulgent father.³⁵

Her suspicion about Wilson's visits led her to investigate the pair sufficiently to obtain eyewitness evidence of familiarities between them.³⁶ Allegations of an improper connection between the petitioner and a young lady were raised during the hearing, but they did not constitute part of the formal counter-charges, and the petitioner was not bound to answer questions tending to show his own adultery, so that the allegations caused little more than a ripple. Thus the evidence in *Hall* presented a pretty watertight case for the wife's marital fault, and for the character of the petitioner as a good husband and father.

³⁴ *Register*, 25 July, 1902, p.3: *Hall*.

³⁵ *Register*, 9 August, 1902, p.3: *Hall*.

³⁶ *Ibid*.

After stating which aspects of the evidence constituted proof of adultery, Justice Boucaut elaborated on the impropriety of Mrs Hall's response to the accusations made by her servants:

Complaints were made to the lady, but what did she do? I recognise that she was in a painful position, but she did not at the time send for the police and give the servants in charge as a virtuous woman would do. She barneyed with them, talked to them, and explained to them....If she was innocent it was her duty straight away to have communicated the facts to her husband, to have dismissed her servants, and to have left it to Mr. Hall whether he prosecuted them or not....In that respect the lady, if she were innocent, neglected her commonsense duty to her husband, to her children, and to the conventional laws of society made for the protection of the marital state.³⁷

If we paint Martha Hall on the broader canvas of marriage in general, as Justice Boucaut did in his summing up, we can reconcile this rigid code of acceptable wifely behaviour with his almost personal engagement in the woman's fate. The evidence suggests that until she developed her attachment to Wilson she had appeared to the outside world as beyond reproach as a wife during the seventeen years in which the parties lived together. The judge made little of the injury to the husband - indeed, he rather damned him with faint praise as "not at all a bad husband as husbands go".³⁸ One suspects that to emphasize the loss of a wife with whom he had not lived for five years before the alleged adultery took place would not be appropriate. Moreover, the loss to the husband was not the judge's primary concern - the loss to the married state and the duties entailed in it was. A woman who had successfully brought up the family of a prominent man whose character as a husband could not be faulted in any substantial way had openly flouted her principal marital duty of chastity. More than the tales told by eavesdropping servants, which the Press conveyed to its readers with such lip-smacking relish, Justice Boucaut's sorrow makes a lasting impression upon reading the report. It is the sense of the blow to marriage in general which lends import to

³⁷ *Register*, 26 August, 1902, p.8: *Hall*.

³⁸ *Ibid*.

the Hall marriage in particular. Although the circumstances of *Hall* were quite different from the other cases discussed so far in this chapter, the two shared the characteristic that, in the courtroom, judicial response to them pointed to concerns which went beyond even those considerations of marital duty described in Chapter One.

A question which remains unanswered is why Martha Hall was dragged over the coals of a protracted hearing while Robert McBride was ushered out of Court at the first opportunity. To answer it, let us return to the marital duties already discussed. A wife's principal duty was chastity, a duty which Martha Hall not only violated, but was seen to violate by her family and, more importantly, her servants. She thus had to be seen to be punished for it. A husband's marital duty, as conceived at English common law, is less straightforward. The husband's principal duty was not chastity (hence the necessity for wives to prove aggravated adultery in divorce suits), but the protection of it. Thus the husband's principal duty of protection did not constitute acknowledgment of a wife's right not to be physically assaulted by her husband, as the margin of justifiable cruelty explored in the preceding chapter shows. The marital duties of *both* husband and wife referred to the all-important issue of female chastity. The protection owed by a husband to a wife was that of ensuring, by attention to her personal and economic welfare, against the temptation or the need to commit adultery. The *Clarke* judgment, also mentioned in Chapter One, exemplifies the application of this interpretation of protection.

Although there was plainly a concept of unjustifiable cruelty, cruelty alone was not an abuse of the principle upon which marriage was based, and it certainly did not follow that a guilty wife who could prove her husband's cruelty would go unpunished. If such a case were to be supported successfully (and none is in the South Australian material) the charge of cruelty would have to show that this cruelty extended or amounted to neglect of the husband's duty of protection. Because there is no evidence that Robert McBride took his wife's chastity as lightly as he seemed

to do his own, the need for justice to be seen to be done was not so pressing. He was nevertheless a bad husband and an embarrassment. Moreover, although he was accused of marital fault which constituted grounds for divorce, his wife only sued for judicial separation. Her desire to retain the marriage tie, for whatever reason, may have provoked a wish on the judge's part to have that tie appear in public in the least unfavourable light possible. The hearings of the petitions of South Australia's ruling *élite* add a further dimension to the importance of the respective duties of husband and wife in the interpretation of marital fault. Behind these duties inherited from English common law lay a Supreme Court commitment to the higher duty of remaining married. The importance to the judiciary of the petitions of socially prominent couples was as a buttress to the 'anti-divorce' position adopted in matrimonial decisions in general.

It was not the case, then, that judges closed ranks when faced with the prospect of bringing disgrace upon litigants who were their social equals. On the contrary, the sympathy shown for Robert McBride and Martha Hall are manifestations of judicial attitudes which assigned responsibilities rather than granted liberties to members of their social stratum. In the case of Florence Sweetapple, her charges of cruelty became to some extent the source of her own disgrace. The absence of incontrovertible evidence of a gross dereliction of duty on the part of the husband, coupled with the wife's continued cohabitation, gave the lie to her claim that her husband's behaviour rendered the marriage intolerable. By dragging a marriage into court which, by one interpretation, was exemplary because untainted by adultery on either side, Mrs Sweetapple appeared to be undervaluing her marriage, even to the extent of hiding her own light under a bushel. The advertisement she offered for the married state meant that her claims of marital fault could not be entertained. Where a charge of marital fault was unavoidable, it could still be accompanied by judicial comments of a didactic nature, as we saw in *Hall*. The establishment of a dichotomy of innocence and guilt, which had as its logical outcome the granting of relief to the innocent party, however, clearly ran in

opposition to the ideal of perpetuating the marriage tie. Among the petitions of the socially prominent, then, this dichotomy was replaced, where possible, by attempts to sidestep it, with the result that the rules governing proof of marital fault could be sacrificed, as seen in *Sweetapple*, or avoided altogether, as in the case of *McBride*.

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There is a sense in which judicial preoccupation with marital duty was apparent in general in the records of hearings under the Matrimonial Causes Act, regardless of the social status of those who were appearing before the Bench. It would be surprising if this were not the case, as the setting of an example necessitates a group of followers who, if the example is to be effective, must by and large be judged by the same standards. Judicial moralizing and conciliation can indeed be found in cases involving couples drawn from the lower social groups. One such petition is that of *Martin v Martin*, a judicial separation on the ground of cruelty filed by the wife in 1903, the same year as that in which Florence Sweetapple filed her petition.

Ernest Edward Martin was a telegraph operator. His wife, who had left him a few years earlier on account, she said, of his cruelty, which included the transmission by the respondent of a venereal disease to her, which required surgery, upon recovering from which she left him in October, 1899. The respondent filed an answer alleging that the petitioner had used threatening language and physical violence over the last five years of cohabitation, that she had condoned any cruelty found on his part and that she had deserted him.³⁹ The petitioner had attempted to execute a deed of separation when she first left her husband, but he had allegedly denied charges of cruel treatment and told his wife that she was free to return home.⁴⁰

³⁹ P.R.O.S.A. G.R.G. 36, Series 54, No.102 of 1903: *Martin v Martin*.

⁴⁰ *Register*, 5 September, 1903, p.4: *Martin*.

When her petition was heard, Mrs Martin testified that about four weeks after the marriage, the respondent stayed out until five a.m., and as he had not told her that he would be so late, she waited up for him. When he returned home, he accused his wife of staying up to see when he arrived home, and from that time on the late nights became frequent, without an explanation ever being given. The petitioner also gave details of verbal and physical abuse during the marriage, and told of how she had left the respondent once but had returned when he expressed contrition and promised to change.⁴¹ As regards the charge of communicating a venereal disease, the petitioner said that she had not made it three and a half years ago when attempting to obtain a deed of separation because she had not wanted to mention it. A witness from Laura testified that the respondent had "a bad reputation" there, but this evidence was counterbalanced by an affidavit sworn by a chemist who denied ever treating the respondent for a venereal disease.⁴² (It was later alleged that the chemist refused to appear to testify to the truth or otherwise of the claim about the respondent's venereal disease).⁴³ One of the petitioner's doctors, who gave evidence, could not remember any reference made by her regarding a venereal disease, and saw no connection of that kind with her operation in 1899.⁴⁴

Without the drawcard of the venereal disease claim, the petitioner's case crumbled; it was already on shaky ground due to the respondent's evidence of her violent language and behaviour, and of his own forbearance:

He caught hold of her wrists to prevent her from hitting him. He visited her nearly every day while she was in the hospital, but she always gave him a cool greeting....Since she left him he had kept the home going, and had employed a housekeeper....The house was always open to her, and he was still willing to allow her to return to the home if she wished to do so.⁴⁵

⁴¹ *Register*, 11 September, 1903, p.9: *Martin*.

⁴² P.R.O.S.A. G.R.G. 36, Series 54, No.102 of 1903: *Martin*.

⁴³ *Register*, 15 September, 1903, p.6: *Martin*.

⁴⁴ *Ibid.*, 12 September, 1903, p.5: *Martin*.

⁴⁵ *Ibid.*

In addition, the petitioner's doctor commented that his patient was a neurotic, whose "condition was closely allied to hysteria, and in sufferers from it there was a tendency to exaggerate and invent".⁴⁶ This testimony was followed by that of a relative of the respondent, who had stayed with the parties on occasions and who had, on one of these occasions, heard them quarrelling in an adjoining room:

They then came into the bedroom of witness, respondent holding the wrists of petitioner, who was going to hit him with a broom handle. Petitioner, who was much excited, bit Martin's hand, and he let her go....Next morning petitioner expressed sorrow to witness that she could not control her temper. She said, "I have pulled my hair out by handfuls to keep from getting wild". Respondent did not assault petitioner as far as she knew. He generally treated his wife kindly, but seemed afraid of her when she appeared so desperate.⁴⁷

By contrast, the petitioner's corroborating evidence of what she had suffered at her husband's hands was sparse.

Sir Samuel Way's judgment in *Martin* bears many similarities to that which he delivered in *Sweetapple*. He

said the case was a sad one. During the whole of his married life the respondent had held a respectable position in the Government service, and he could not help feeling that there was no reason why, with a little mutual concession, he and his wife should not have lived happily together.⁴⁸

In his conciliatory approach to the Martins' marital difficulties, the Chief Justice echoed his *Sweetapple* judgment in pointing out the good aspects of the marriage:

It was not possible for him to say that the husband had been blameless, but he could not find that the allegations made in the petition had been proved; and he thought it was a pity Mrs. Martin ever left her home. Now that she had had an opportunity of airing her grievances he hoped that she would realize that it would be better for herself, as well as for her children, that she should return to her home, which had always been open to her; and that the common love which the parties bore for the children would eventually lead to a reunion.⁴⁹

⁴⁶ *Register*, 15 September, 1903, p.6: *Martin*.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

As in the case of *Sweetapple*, charges that the petitioner provoked or contributed to the cruelty played a part in the rejection of the evidence against the respondent, but were not highlighted in the reasons given for the dismissal of the petition. Again, the shift of emphasis occurred because the marriage was regarded as worth saving, and in this respect there is no essential difference between *Sweetapple* and *Martin*. The emphasis in both cases on the consequences of marital disharmony for the children of the marriage suggest further similarities which transcend social boundaries. It is clear from the passage above that Chief Justice Way was reminding Mrs Martin of her wider duties just as he did Florence Sweetapple, but in Mrs Martin's case, he appealed to her solely as a wife rather than as one belonging to the social group for whom the connection between private marriage and public good was forcefully expressed. We therefore see Mrs Martin as following in Mrs Sweetapple's footsteps. All good marriages were worth saving, but members of the uppermost social group carried the responsibility for other marriages as well as their own.

Marital fault *sans noblesse*

Despite the breadth of interpretation allowed by the Matrimonial Causes Act, it nevertheless required that judges grant decrees where marital fault was clearly found and where contributory fault was not. Where charges of marital fault were uncontested, where evidence of fault was free of the legal subtleties which could turn a case against a petitioner, the judge's task was to listen to evidence and report that of marital fault to the Full Court, the first step toward granting a decree *nisi*. Examples of "rubber stamp" hearings abound in the newspaper reports of the time. In the 1862 hearing of *Hilbig v Hilbig and Opitz*,⁵⁰ Chief Justice Hanson summed up a labourer's evidence of adultery:

His Honor...remarked to the jury that...the only question was, were they satisfied that the respondent had committed adultery with the

⁵⁰ P.R.O.S.A. G.R.G. 36, Series 23, No.40: *Hilbig v Hilbig and Opitz*.

co-respondent. He thought it was sufficient to establish this to show that she had been in the habit of visiting a single man during the night time, and sitting with him in his sleeping apartment; that she had neglected to desist from such intercourse after being remonstrated with; and that she had been seen in the company of that person after her husband had refused longer to cohabit with her; and that she had, under such circumstances, given birth to a child.⁵¹

Ebenezer Ward's evidence of adultery was more equivocal than Johann Hilbig's. He and his wife (with whom he had eloped and had married when she was only seventeen)⁵² had been trying to rid themselves of each other since 1866, when Matilda Ward filed an unsuccessful petition for dissolution of marriage on the grounds of adultery and cruelty.⁵³ In the following year, Ebenezer filed his first petition for dissolution of marriage on the ground of adultery,⁵⁴ which was dismissed because he could not name a co-respondent and had not filed an affidavit to that effect,⁵⁵ but his persistence ultimately achieved results in 1869. At the close of the hearing, Acting Chief Justice Gwynne

briefly summed up, telling the Jury the question for their consideration was whether the respondent committed adultery or not, and upon this they had only circumstantial evidence. As men of common sense, however, they could draw their own conclusions as to what character a woman was likely to be who consorted with prostitutes, and had resided for three years in a brothel.⁵⁶

In 1884, John Elliott testified that during the time that he and his wife kept the Criterion Hotel at Quorn, she

gave way to drink and deserted her husband while he was suffering from illness. It was shown in evidence that she had since lived a bad life, and committed adultery with George Young, a former landlord of the Galatea Hotel, Hindley-street.⁵⁷

⁵¹ *Register*, 13 September, 1862, [p.267]: Hilbig.

⁵² J. B. Hirst, "Ebenezer Ward", *Australian dictionary of biography* Vol. 6 (Carlton, Vic., 1976), p.351.

⁵³ P.R.O.S.A. G.R.G. 36, Series 51, No. 92: *Ward v Ward*.

⁵⁴ P.R.O.S.A. G.R.G. 36, Series 51, No. 102: *Ward v Ward*.

⁵⁵ *Register*, 1 June, 1869, [p.219]: *Ward v Ward*.

⁵⁶ *Ibid.*, 11 November, 1869, [p.158]: *Ward v Ward*.

⁵⁷ *Register*, 2 December, 1884, p.7: *Elliott v Elliott and Young*.

Even where evidence of marital fault was not strong, the failure of the respondent to contest the allegations helped a petitioner's case considerably, as exemplified in the 1906 petition of *Lane v Lane and Pengilly* where, although both the respondent and co-respondent filed answers,⁵⁸ they did not appear at the hearing. Justice Gordon found the charge of adultery proved, adding, "Neither the wife nor the co-respondent was in Court to defend the case, which would have been a thin one if the facts were denied".⁵⁹ Contested petitions, as we have seen, were subject to greater judicial scrutiny than uncontested ones, but the preponderance of couples of modest income and with little formal education meant that a respondent who wished to contest a petition was not always able to do so. The respondent in *Haniford v Haniford* did not make objection to the charges against him until the hearing, in 1907. Justice Homburg informed him that he could not give evidence as he had not entered an appearance, and the only course open to him now would be to appeal against the decree *nisi* when the application came before the Full Court.⁶⁰ The *Register* does not report whether the respondent did apply to the Full Court; if he did, he was unsuccessful, as the petitioner was awarded her decree.⁶¹ The records contain several instances of respondents who were given leave to file late answers because their unfamiliarity with legal procedure had resulted in failure to reply to the petition within the permitted length of time. Many other suits must have gone uncontested for similar reasons, without the Court's stay of proceedings being sought, not to mention the many more which would have passed through the courts uncontested because of a respondent's lack of money to defend a petition. Cases such as *Lane* also suggest the possibility that in many marriage breakdowns, the filing of an answer to the petition was merely a formality.

Had the profile of users of the Matrimonial Causes Act contained a larger proportion of wealthy and socially prominent couples, defended petitions would

⁵⁸ P.R.O.S.A. G.R.G. 36, Series 54, 272 of 1906: *Lane v Lane and Pengilly*.

⁵⁹ *Register*, 4 December, 1906, p.8: *Lane*.

⁶⁰ *Register*, 6 March, 1907, p.10: *Haniford v Haniford*.

⁶¹ P.R.O.S.A. G.R.G. 36, Series 54, No.382 of 1906: *Haniford*.

have been more frequent, and favourable decrees less so. As it was, an overwhelming five hundred and fifty-four of the six hundred and eighteen marriages involved in this study involved parties from the Group 2 and 3 categories described in Appendix 2. Even where petitions from members of these two groups were contested, counter-charges were frequently disposed of in a routine manner. Among these cases, the moral issues which seemed so crucial to the upper group cases are given a less theatrical treatment, such as in the 1904 hearing of *James v James*:⁶²

His Honor - Are there any counter charges?

Mr. Bleechmore - Yes, your Honor.

The Judge - Then I must look at them, as they have not been withdrawn, and are part of the *res gestae*. To witness - Were you in the habit of getting drunk?

Petitioner - No....

Did you give respondent any provocation to ill-treat you? - I did not.⁶³

The petitioner's innocence established, Justice Gordon turned again to her evidence of adultery, with which he was still not entirely happy:

His Honor - Cannot you get any evidence regarding the name of the woman who is alleged to be living with the respondent? As the case stands now there is no proof of another woman being there at all. Respondent admitted that the children were his; but for all we know they might be offspring by another marriage....

The petitioner, recalled, deposed that the children she saw at the house were very young, one being only about four years of age.⁶⁴

This information seems to have satisfied the judge, as Mrs James got her decree, as did many other petitioners whose evidence of marital fault was convincing. *James* demonstrates a thoroughness on the part of the judge in his evaluation of the evidence, but little emphasis is placed, in the report of the hearing at least, on the petitioner's marital duty.

⁶² P.R.O.S.A. G.R.G. 36, Series 54, No.347 of 1903: *James v James*.

⁶³ *Register*, 7 May, 1904, p.4: *James*.

⁶⁴ *Ibid*.

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In the hearings which involved the marriages of the socially prominent, judge and litigant spoke the same language; when Sir Samuel Way admonished Florence Sweetapple to return to her husband and children he did so by appealing to standards and obligations she would have understood, if not sympathized with. When Justice Boucaut made every effort to avoid the public airing of the McBrides' marital difficulties, he would have been personally cognisant of the social damage that scandal could cause the couple and their descendants. These cases provide stark contrast with the vast majority of petitions heard in the period under study. Moreover, the settings of domestic conflict were different. The possession of one or more many-roomed mansions often provided the opportunity for discretion, for all the prying eyes and ears of servants. And where discretion was not possible, servants could, at times, be induced to bear favourable witness, as the hearing of *Sweetapple* implies.⁶⁵ Indeed, the combination of material circumstances and a different set of social values suggests that for the majority of litigants, discretion was not really an issue at all. At the hearing of the suit of George Read, a telegraph clerk,⁶⁶ in 1899, a Mrs Monaghan, with whom the respondent had lived, testified that the respondent, her children and the co-respondent all occupied the same room in a boarding-house at Goodwood.⁶⁷ The co-respondent also deposed that he visited the respondent when she lived in a house in Wakefield Street, Adelaide. He admitted to having visited her at six a.m. on occasions, but denied having slept there. He said that the bedroom was the only place in which Mrs Read could entertain friends.⁶⁸ The very circumstances under which many of the parties to matrimonial petitions lived invited judges who were accustomed to far stricter

⁶⁵ *Register*, 1 April, 1904, p.3: *Sweetapple*.

⁶⁶ P.R.O.S.A. G.R.G. 36, Series 54: No.268 of 1898: *Read v Read and Forster*.

⁶⁷ *Register*, 22 March, 1899, p.3: *Read*.

⁶⁸ *Ibid.*, 23 March, 1899, p.3: *Read*.

criteria of domestic propriety to conclude, rightly or not, that adultery had taken place. The *Read* judgment stated that

no one out of a lunatic asylum would come to any other conclusion except that the respondent and co-respondent had committed adultery. He would not have accepted the evidence of Monaghan, a drunken woman, showing so little sense of propriety, but the way in which the acquaintance was made and the manner in which they lived together and subsequent circumstances induced him to believe that they had committed adultery.⁶⁹

The *Register* reported Mrs Read as "living in a house which was almost a brothel",⁷⁰ and made much of the undesirable company she kept, but this information was probably included largely for the entertainment of readers; her circumstances were not substantially further beyond the pale than those of many other respondents. Read himself appears to have been far from a model spouse:

Occasionally took too much drink. Never took drink into the bedroom. Never got under the bed to drink it. Do not remember taking carbolic acid. Never took poison. Would not say he was not drunk on Christmas Eve, 1893. Would not say he did not take poison then. Had no recollection of it. Would deny that he threatened to cut his wife's throat with a razor. A man when drunk might say anything.⁷¹

Read's denial of the allegations against him has a lackadaisical air: "A man when drunk might say anything". One has the impression that he did not mind too much what sort of impression he made in Court, provided he got what he went there for. He lacked the measured eloquence of Herbert Sweetapple, but nor did he need - never having possessed such a thing - to defend his good name. The respondent's domestic circumstances, when combined with other evidence of her adultery, left no reasonable doubt of her guilt in the mind of Chief Justice Way - whose reticence in other cases has been noted - despite suggestions of blemishes on the petitioner's character. The ease with which Read achieved favourable results is partly attributable to his sex. Apart from the overt differences in expectations of male and

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, 22 March, 1899, p.3: *Read*.

⁷¹ *Ibid.*

female behaviour, cruelty, which was a typically 'female' ground for relief applied for, was more open to interpretation in accordance with the prejudices of judges than adultery.⁷² The Read case, however, highlights the social differences between users of the Matrimonial Causes Act, which created a sharper division between litigants than sex differences.

There are other indications in the records that husbands and wives in the lower social groups had different conceptions of marriage from the judges before whom they appeared. The strongest of these is the evidence of the many *de facto* solutions to marital difficulty which appear in the records. George Oyler, a general dealer who, since his wife left him in January, 1895 because of his alleged cruelty, had been living under the name of George Hobson with another woman, greeted the service of his wife's petition with the comment, "I expected her to go in for a divorce long before this".⁷³ In 1903, Hannah Biles seemed similarly unconcerned with the social consequences of the transfer of her affections from her farm-labourer husband⁷⁴ to the farmer on whose property the couple worked. The petitioner alleged that one night, she refused to sleep with him, and that the co-respondent subsequently approached him with the solicitous request, "Could Mrs. Biles sleep in my room instead of the chaff-house".⁷⁵ Although the petitioner claimed he tried to win his wife back, she apparently said to him, "All I want you to do is to put my box on the road, and I will go my way and you can go yours".⁷⁶ The 1911 petition of Edwin Jukes, a land agent,⁷⁷ shows that the possibility of having her name dragged through Court made as little difference to the respondent's plans as it did those of George Oyler and Hannah Biles. The impression we gain of the formal acknowledgment of marital breakdown as being of peripheral importance to many respondents is strengthened by Mrs Jukes's ignorance of divorce law. At the time

⁷² The issue of women and divorce legislation is treated in detail in Chapter Seven.

⁷³ P.R.O.S.A. G.R.G. 36, Series 54, No.153 of 1896: *Oyler v Oyler*.

⁷⁴ P.R.O.S.A. G.R.G. 36, Series 54, No.12 of 1904: *Biles v Biles and Bubner*.

⁷⁵ *Register*, 5 May, 1904, p.3: *Biles*.

⁷⁶ *Ibid.*

⁷⁷ P.R.O.S.A. G.R.G. 36, Series 54, No.229 of 1911: *Jukes v Jukes and Hastings*.

she was served with the petition and citation she was sharing a room with the co-respondent and using his name. She is reported to have remarked, "What a funny thing! We were saying only this morning what a long time seven years would be to wait in order to be married. I hope he is not going for costs as we have no money".⁷⁸

Noblesse oblige and the Matrimonial Causes Act

The respondents in the above cases appear to have given the social consequences of divorce little more than a passing thought. It is true that they were on the "guilty" end of their respective petitions, but they differed from their upper-stratum counterparts in that they made few attempts to cover their tracks. Those who did, such as George Oyler by assuming a different name, chose means of doing so which corresponded to their social status; a socially prominent respondent would not have been able to "disappear" so easily. Audrey Jukes's mention of money offers a possible explanation for George Oyler's alias: that it was not the social, but the financial cost of divorce that he wished to evade. By contrast, attempts at obfuscation among members of the uppermost social group tended to occur while the parties were still living together, not after the guilty party had bolted. Moreover, judicial responses to the uppermost group cases suggest an attitude that concealment was preferable to exposure, if it ensured perpetuation of the conjugal unit. Concern for the honour of the wife of a prominent man in *Hall* occasioned the fine-toothed combing of the evidence against her, to remove all shadow of doubt before condemning her, and consequently her marriage, to public disgrace. The studied avoidance of the conclusion that Herbert Sweetapple was a wife-beater was an equally vigorous avowal of his marriage as a good one, in order to argue that marriage in general was a social good. Because of the bad press adulterers and wife-beaters gave the married state the concealment, wherever possible, of marital fault among South Australia's social leaders seems to have been

⁷⁸ *Register*, 10 November, 1911, p.8: *Jukes*.

regarded as to some degree commendable. The judge's reticence in finding against Martha Hall can be compared to Justice Bunday's response to *Anderson v Anderson and Clindening*, a case which was also comparable to *Hall* in some of its characteristics.

The marriage between a middle-aged civil engineer and the twenty-eight-year-old daughter of an Adelaide gentleman went badly from the start. On the day of the wedding the pair embarked on their honeymoon to India and Great Britain:

After recovering from the first sea sickness, Mrs. Anderson, instead of showing the affection which might be expected of a wife, began to repel her husband. Not only that, but she allowed other men, more or less, to be familiar with her. Since then she had never allowed the embrace of her husband; in fact the marriage had never been consummated. On the way to Bombay Mrs. Anderson carried on a flirtation with a Bombay gentleman....Her husband remonstrated with her, pointing out that, however she treated him in private, she should not make demonstrations against him in public.⁷⁹

According to the petitioner's counsel, the warning had absolutely no effect upon the respondent, who was found subsequently in dark places on board the ship in the company of one of the ship's officers.⁸⁰ On the couple's return to Adelaide, the respondent's coolness toward her husband persisted, and matters came to a head with the arrival on the scene of a former lover, Frederick Clindening.

The petitioner's son, Tressilian Anderson, testified that Clindening was in the habit of visiting the respondent during the petitioner's absence, and on one occasion the two were alleged to have been in the drawing-room with the gas turned down low.⁸¹ The witness also gave evidence relating to the key allegation of adultery in the case:

About 4 o'clock in the morning, not feeling well, I called the nurse to get my clinical thermometer. She went to get it. Afterwards heard Clindening and Mrs. Anderson talking. The voices came from the direction of Mrs. Anderson's room. Next heard a man's footsteps going from the same direction out of the house. Later in the morning Mrs. Anderson seemed exceedingly tired as if she had

⁷⁹ *Register*, 13 September, 1889, p.3: *Anderson v Anderson and Clindening*.

⁸⁰ *Ibid.*

⁸¹ *Ibid.*

had no sleep. Father returned from Broken Hill that day, and Mrs. Anderson, in reply to a question, said she had not slept during the night. I said, "Yes; I heard you talking during the night". She suddenly retired without answering.⁸²

Later, the respondent allegedly asked the witness how many people knew of this incident, and he replied that only he and Eliza, the nurse, knew. She appeared relieved that the petitioner did not. Subsequent to this conversation, young Anderson wrote to Clindening, warning him not to let such an incident happen again. The witness then gave an account of a further conversation he had with Mrs Anderson:

Next day respondent sent for me, and I told her that I knew what had been going on. She confessed that Clindening had kissed her "plenty of times", and that they had "tiffs" and made them up again. Told her that Clindening had been in the house all night, and that if it occurred again I would inform her father and my father. On March 30 I went to Glenelg for a change, returning on April 4. On entering the cottage I noticed a man's nightshirt on the line, recently washed, and after making some enquiries I communicated everything to my father.⁸³

The proceedings for divorce were the result of this alleged communication.

In his summing up of the evidence, Justice Bunday mentioned Tressilian Anderson's testimony in some detail:

If he believed his stepmother was guilty his act in writing the letters to Clindening was the act of a true friend, and his conversation with her was the act of a gentleman, and worthy of one entering on [the medical] profession, showing, as it did, that a lady's honour would be safe in his hands. Had the co-respondent taken the advice given in the letter they should not have had to try the case. Mr. Tres. Anderson had a divided duty. As a gentleman he protected the lady with whom he was living, but as a son he had to take care of the honour of his father. But the co-respondent having disregarded the warnings, he had nothing to do but tell his father.⁸⁴

The question of whether adultery took place on the night referred to was a crucial one to the suit. The petitioner's case rested on this evidence and that of familiarities between the respondent and co-respondent, in order to establish the existence of an

⁸² *Ibid.*

⁸³ *Ibid.*

⁸⁴ *Ibid.*, 21 September, 1889, p.6: *Anderson*.

opportunity to commit adultery and an intent to do so. The judge's opinion of the evidence described was that "unless a reasonable explanation was given of the incidents of the night of March 15 they led to a violent presumption of guilt".⁸⁵ His remarks about honour are important here. In Tressilian Anderson's discovery of the alleged adultery, a conflict between the respondent's honour and that of his father was established. The judge commended young Anderson for his decision to shield his stepmother from his father's knowledge of the incident, on condition that impropriety was not repeated. The subsequent repetition of impropriety, however, put the petitioner's honour at stake, in much the same way as his wife's open flirtation on the ship had done: he objected more to her public flirtation than to her private repulsion of his affection. The tenor of his son's warning was that, while the petitioner would be none the wiser for one indiscretion, its repetition was inexcusable. The wrongness of adultery, then, could be one of degree, and the explanation of this conception could lie in the fact that repeated adultery was more prone to public discovery. Once the risk was realized it would become a matter of honour for chastisement to take a public form. By this interpretation, Justice Bunday regretted not so much a single act of adultery, although a single act was punishable, but that adultery ever came to light. Just as the judge's sympathy for Martha Hall may be interpreted as regret at the public failure of the ostensibly good and proper marriage of a well-respected man and his wife, his concern for Maud Anderson's honour can be regarded in the same way.

George Anderson's plea to his wife to keep her shipboard intrigues out of the public eye shows that at least some litigants in the uppermost social group shared the judiciary's notions of propriety in marriage. The high proportion of settlements and attempted settlements out of court among this group suggests that they shared with the judges a willingness to resolve their marital disputes away from the public gaze (although the often vast discrepancy between public and private conduct among these litigants indicates that they were more concerned for

⁸⁵ *Ibid.*

their privacy than the future of marriage). Alternatively (or additionally) they thought that they could achieve the results they wanted more efficiently through other avenues. Nearly half of the twenty-one couples from the uppermost group are known to have attempted private arrangements either before or during proceedings. The evidence given in some of their petitions indicate concern about the public exposure of marital fault. Eliza Hosking, a wealthy widow who in 1880 had married a plausible rogue ten years her junior, discovered in the following year that he had committed adultery with a young woman who had become pregnant by him. Mrs Hosking was persuaded by her husband that to avoid scandal they should take Isabella Watt to England to give birth to the child there.⁸⁶ When Miss Watt again became pregnant to the respondent in 1883, the petitioner complied with the respondent's plan to take her to Sydney and instal her in an apartment.⁸⁷ It was not until the petitioner had evidence that the adulterous relationship was still continuing in 1884 that she filed a petition against her husband,⁸⁸ and even then it was only after attempts at a private separation had been made. Negotiations fell through because the respondent's demands were too high.⁸⁹

When Edith Kuhnel, the wife of a piano merchant,⁹⁰ "displayed an extraordinary passion for a young nephew" in 1905, it seems that the petitioner and the respondent's family (perhaps anticipating that the marriage would end on a sour note), persuaded Mrs Kuhnel to go for a twelve-month trip around the world.⁹¹ Apparently, this attachment was not Mrs Kuhnel's first indiscretion, as it was alleged that she had two years earlier "developed a partiality for men below her in social standing and intellectual gifts",⁹² but it was not until she fell headlong "into a grocer's arms" and eventually ran away with their owner to Canada that the

⁸⁶ P.R.O.S.A. G.R.G. 36, Series 23, No.563: *Hosking v Hosking*.

⁸⁷ *Register*, 1 October, 1884, Supplement, p.2: *Hosking*.

⁸⁸ P.R.O.S.A. G.R.G. 36, Series 23, No.563: *Hosking v Hosking*.

⁸⁹ *Register*, 1 October, 1884, Supplement, p.2: *Hosking*.

⁹⁰ P.R.O.S.A. G.R.G. 36, Series 54, No.321 of 1908: *Kuhnel v Kuhnel and Peters*.

⁹¹ *Register*, 9 July, 1910, p.15: *Kuhnel*.

⁹² *Ibid*.

petitioner made the failure of his marriage public by going to law.⁹³ Although the petitioner claimed he had threatened his wife with divorce proceedings in an earlier attempt to persuade her to give up her clandestine meetings with a painter, he had accepted his wife's suggestion of a separation agreement, and had even offered that "if she assured him she would live a good life for a year and have nothing more to do with other men, she could come back".⁹⁴ The petitioner's counsel argued that the husband's magnanimity was born out of affection for his wife, but the case also shows that both parties and the wife's family had the will and the ability to settle the couple's differences by means other than the divorce court, up to a point. When Mrs Kuhnel finally sacrificed the pecuniary benefit of a private separation and threw her lot in with the grocer, the Matrimonial Causes Act was the last card left for Kuhnel to play.

The best illustration of the interplay of issues at stake for upper-group litigants under the Act is provided by the case of *Drew v Drew*, filed in 1917. The charges raised in the suit, filed by the wife of a company director, were never heard in court; the extensive legal correspondence included in the archival records shows us why. In January, 1917, the husband's solicitor set out his client's grievances in a letter to the wife, and announced his intention to arrange a separation, in view of "the unhappy differences which have existed between you and himself for a long period, and have gradually intensified and grown so much worse that continued cohabitation is impossible".⁹⁵ Mrs Drew's refusal to accept that the marriage had broken down, and her failure to persuade her husband to "[l]et bygones be bygones" caused her firstly to refuse to vacate the matrimonial home and then to threaten him with proceedings for restitution of conjugal rights. In reiterating his refusal to return to his wife, Drew accused her of acting against her own and the children's interests by her preference for a lawsuit "in the hope - quite vain let me tell you - of forcing me to live with you in unhappiness and misery by threats of

⁹³ *Ibid.*

⁹⁴ *Ibid.*

⁹⁵ P.R.O.S.A. G.R.G. 36, Series 54, No.102 of 1917: *Drew v Drew*.

washing dirty linen in public. Very well, so be it".⁹⁶ When Mrs Drew called her husband's bluff and instituted the proceedings, he relented, stating in a letter written to her in February, 1918, that "[t]o return and live under compulsion of a warrant or order publicly made would not, I think, conduce to the betterment of our relations in fact, or in the public eye, besides entailing needless costs."⁹⁷

Conclusion

As the closest colonial equivalent to an aristocracy, the uppermost social group identified in this chapter was the most likely one to adhere to the aristocratic conception of marriage which coloured the basic principles of the Matrimonial Causes Act. If we are to assume a similarity between the colonial and the English ruling classes, however, we should not be surprised to find that, by and large, South Australia's social leaders appear to have carried on the customary practices of their English counterparts where they could. It may even be the case that, with the movement of divorce even further into the public arena, high-status South Australian couples resorted to private arrangements to a greater degree than they would have under the old law, thus contributing to the lower-middle-class face of formal divorce in South Australia, despite its aristocratic heritage. That this social composition was not peculiar to South Australia is borne out by other divorce studies, conducted both in Australia and elsewhere.⁹⁸ The aristocratic principles of marriage which the South Australian Act defended, then, were out of step with the marital values of the majority of people who used it to end their marriages. Such a state of affairs boded ill for any attempt to stem the tide of divorce from the Bench. The South Australian judiciary was on shaky ground even before it started to dispense its backward-looking justice.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ See, for example, the studies by Phillips, mentioned in Chapter One and the other studies of Australian colonial divorce such as those by Golder and James. Golder in particular points out the disparity between the Imperial origins of divorce legislation and its use in colonial society.

Chapter Three

THE RETREAT OF THE JUDICIARY

Noblesse sans marital duty

If Justice could turn a blind eye to important evidence in cases such as *Sweetapple*, she was more often forced to let the scales fall from her eyes and deliver judgment in accordance with the law, as seen in *Hall* and *Anderson*. The pressures upon the Supreme Court judiciary were not solely occasioned by the misguidedness of using divorce law to forestall divorce, however. A principal source of the judiciary's weakness was a misconceived distinction between upper group litigants and their counterparts from the lower social orders. If representatives of the ruling *élite* shared judicial reticence with regard to public knowledge about their private lives, they did so for different reasons. The very act of presenting a petition in the divorce court indicated that the petitioner concerned, at least, did not hold the view that marriage should only be dissolved on the death of a spouse. Small in number as they were, the petitions of the socially prominent nevertheless establish that their actions were governed by short-term personal concerns rather than long-term social ones. The consequence of this disparity of goals was to expose South Australia's social leaders as holding more in common with the bulk of petitioning couples than is suggested by the judiciary's appeal to a code of *noblesse oblige*.

The 'levelling' effect of the Matrimonial Causes Act had its limitations, however: judicial treatment of the petitions of 'moral exemplars' remained different from those of the socially insignificant. Members of South Australia's social *élite* had the public eye upon them, but they also had greater means at their disposal than ordinary men and women to achieve the results they desired. Nor could judges salvage their position by extending their own normative role and applying rigid definitions of marital fault to all comers. As this chapter will show, the Matrimonial

Causes Act was at the disposal of representatives of any social group who had evidence of marital fault. The result was that the precipice upon which the judiciary stood was eroding rapidly, hastened by the difficulty of maintaining a consistent position against divorce in the face of the determined opposition of both the unpropertied majority and the minority whose access to the law was often facilitated by wealth and influence.

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In 1881, William John Morier, a medical practitioner, filed his first petition under the Matrimonial Causes Act.¹ It was for judicial separation on the ground of cruelty and, had it gone to hearing, it would no doubt have provided an interesting comparison to *Ward*. Dr Morier's petition was abandoned, and in the following year a new petition, this time for dissolution of marriage and adding charges of adultery to those of cruelty, was filed. His reason for abandoning the first was given in the second: that he had agreed to halt proceedings against his wife if she promised to return to England with her brother. The brother did not arrive to collect Mrs Morier. The petitioner also stated that he had, since the filing of the first petition, gained considerable evidence of his wife's adultery.²

Where Martha Hall and Jessie Anderson were very indiscreet, Susan Ewing Morier was reckless. She was accused of "drunken and violent conduct" and "lewd and indecent behaviour".³ The petitioner's counsel successfully moved that, with the consent of the parties, the hearing be conducted *in camera*, "on the ground that the evidence was of too indecent a nature to be heard in open Court".⁴ Although Dr Morier had retained his charges of cruelty in the second petition, they were counted as immaterial to the petition once the adultery with the co-respondent, Dr Horton,

¹ P.R.O.S.A. G.R.G. 36, Series 23, No.452: *Morier v Morier*

² P.R.O.S.A. G.R.G 36, Series 23, No.505: *Morier v Morier and Horton and Shelton*.

³ *Register*, 3 May, 1883, p.7: *Morier*.

⁴ *Ibid.*

was established. (The other co-respondent, Shelton, was dismissed, presumably for the usual reason of lack of evidence against him. Because this part of the petition was heard *in camerâ*, we cannot tell whether the allegations raised later by Horton, discussed below, entered the hearing at this stage).⁵

Once the doors to the hearing were thrown open to the general public, its focus turned to the allegation of condonation which the respondent had made in her answer. Proof of condonation rested entirely on the evidence of the respondent, who was described as an alcoholic. The question then arose of whether her testimony could be believed. When Justice Boucaut asked the jury whether they did believe her, one member requested that her evidence continue. It did, but was followed by witnesses to the respondent's lack of credibility under oath. The dissenting jurymen gave way under the weight of this testimony, and the opinion of the jury became unanimous that the respondent's evidence was valueless:

Mr. Justice Boucaut, addressing them, expressed his approval of their finding. They would not have been acting up to their duty if they had come to any different decision. The continual contradictions shown in Mrs. Morier's evidence, and the horrible way in which she exposed her character before the Court in her evidence, were circumstances that utterly deprived her statements of the smallest degree of credibility.⁶

Of course, Mrs Morier's evidence was not valueless because its contradictory nature, combined with her damning conduct in the box, constituted its very worth for the Court. It furnished ample justification for finding against her with the consequence that condonation of the adultery with Dr Horton was not found.⁷

Morier did not end there, however. What followed was the revelation of evidence against the husband which was ignored in a manner which anticipates *Sweetapple*. Dr Horton, who had been unable to defend himself at the appropriate time because he was in gaol, appealed against the verdict, and added substantial new material to the case. Referring to the dismissal of the co-respondent Shelton,

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *Ibid.*

Dr Horton's affidavit stated that, had proceedings against Shelton continued, his evidence would have established collusion on the part of the petitioner.⁸ It was read at the hearing of the motion for a rule absolute in the petition, presided over by Justice Boucaut and Chief Justice Way and was followed by a statement made by the dismissed co-respondent, Charles Shelton. This statement contained details of an alleged attempt by the petitioner and his lawyer to bribe Shelton to make an affidavit confessing adultery with the respondent. Shelton claimed that when he refused payment of £100 or £150, Dr Morier replied, "You will suffer for it".⁹

Upon Shelton's statement being read, Dr Horton's counsel said that he "could show most startling revelations if the Court would only prolong the rule". Sir Samuel Way would not hear of it, retorting, "That has nothing to do with it. Where do you find collusion in that?"¹⁰ Strictly speaking, the Chief Justice was right; the petitioner could not be guilty of collusion if nobody colluded *with* him, but rejecting the charge on this basis - and I can see no other upon which he could have done so - is the kind of sophistry a judge resorts to when he badly wants events to go a certain way. He was clearly dealing with a charge of attempted collusion, tinged with the darker hue of menaces in Dr Morier's alleged threat, which required further investigation. Added suspicion is cast on his decision to proceed with making the decree absolute by the wording of the decree itself, from which all references to Dr Horton's part in the adultery were expunged. The Court's acquiescence in the co-respondent's protestations of innocence did not extend to responding to the demands of consistency by revising the question of the respondent's guilt.¹¹

The cause of the Chief Justice's refusal to stay the proceedings for a decree absolute again concerns the public face of the marriage. Susan Morier was as bad as Florence Sweetapple was good. The two alternatives for the Chief Justice were

⁸ P.R.O.S.A. G.R.G. 36, Series 23, No.505: *Morier*.

⁹ *Register*, 4 December, 1883, Supplement, p.2: *Morier*.

¹⁰ *Ibid.*

¹¹ P.R.O.S.A. G.R.G 36, Series 23, No.505: *Morier*.

to sanction conduct which, even if it could have been proved to have fallen short of adultery, was far beyond the pale, or to punish her at the risk of approving the dubious means by which the petitioner brought his evidence of marital fault to court. It was a choice between the devil and the deep blue sea; the second option entailed the hair-splitting of the Chief Justice's definition of collusion, but at least it was face-saving to a degree. The point that collusion had not taken place could be stretched, at a pinch, to a denial that collusion had been attempted, a position which was less damaging to principles of marital duty than allowing Susan Morier to continue making a public mockery of her marriage vows.

Had the Moriers had a lower social profile, the onus to set an example of marital propriety would not have been so bound up with the issue of proving adultery. The public behaviour of the "free and easy" ex-barmaid of *Clarke* mentioned in Chapter One, for instance, was deemed by Acting Chief Justice Boucaut not to count against her as it would have done "if the woman had been brought up in a religious household and free from the freedom generally recognized as part of the business of the barmaid".¹² It was not until the petitioner had gathered stronger evidence and filed a second petition that Mrs Clarke was found to have committed adultery with one of the original co-respondents, Howell.¹³ Susan Morier was from the same social class as Martha Hall. She had to be seen to be punished, and because she did not have Mrs Hall's good past record, nor even her minimal discretion, there was no need to consider her welfare in the event of her guilt becoming known, or to express regret at the failure of the marriage. With nothing to salvage of the marriage, Dr Morier could appear as wholly wronged, wholly forbearing - and wholly innocent - until Dr Horton's affidavit and Shelton's statement threw a spanner in the works.

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¹² *Register*, 10 September, 1897, p.3.

¹³ P.R.O.S.A. G.R.G.36, Series 54, No.48 of 1900: *Clarke v Clarke and Howell*.

James Frederick Maslin was another prominent South Australian who filed two petitions against his wife. The son of a well-known sheepfarmer, Maslin had married below his station when the daughter of a boundary rider on his father's property became pregnant by him.¹⁴ Much was made of this difference in social backgrounds by the petitioner's counsel during the hearing of the second petition, in order to argue for the immediate end of "an ill-assorted marriage"¹⁵. The first petition, which was undefended, survived to the hearing stage, and the wife's adultery was found by Justice Gordon.¹⁶ Before the decree *nisi* could be awarded, however, new material in the case came to light which resulted in the intervention of the Crown Proctor. His plea alleged collusion and the suppression of facts concerning the petitioner and respondent, in particular the petitioner's adulterous relationship with one Alice Thornton Mills.¹⁷ The allegations of collusion were to the effect that the petitioner had offered the respondent £500 if she did not contest the suit.¹⁸ In order to dispense with the collusion charge, the petition was abandoned and re-filed in 1908, when the respondent did defend the case, alleging the petitioner's adultery and his conducement to any adultery found on her own part, due to his wilful neglect and misconduct.¹⁹

The evidence of the adultery with Miss Mills, the family governess, was so strong that in his reply to the respondent's answer, the petitioner did not attempt to deny it, but pleaded condonation.²⁰ Justice Homburg's finding for the petitioner incorporated an avowal of the view that, although the adultery of both parties had been proved, a husband's adultery could be excused where a wife's could not.²¹ The wife's condonation of her husband's fault was found but his conducement to

¹⁴ *Register*, 18 December, 1908, p.3: *Maslin v Maslin and Brown*.

¹⁵ *Ibid.*

¹⁶ *Ibid.*, 15 August, 1907, p.8: *Maslin*.

¹⁷ P.R.O. G.R.G 36, Series 54, No.151 of 1907: *Maslin v Maslin and Brown*.

¹⁸ *Register*, 22 May, 1908, p.3: *Maslin*.

¹⁹ P.R.O.S.A G.R.G. 36, Series 54, No.198 of 1908: *Maslin v Maslin and Brown*.

²⁰ *Ibid.*

²¹ *Register*, 22 December, 1908, p.10: *Maslin*.

her adultery was not.²² The decree *nisi* was made on 23rd December, 1908.²³ From here on in, the plot thickened. On 10th June, 1909, the Crown Solicitor revived the charge of collusion.²⁴ A subsequent affidavit charged, among other things, that the petitioner had covenanted to pay the respondent £500 per annum after the decree was made absolute, which agreement was to be made void if the decree was not made absolute. It was also charged that the respondent was induced by her solicitor not to defend the suit further than she had done.²⁵ The Supreme Court disallowed further intervention in the suit, but this decision was overturned by a successful appeal by the South Australian Crown Solicitor in the Australian High Court.²⁶ With the re-opening of the case, heard this time by Chief Justice Way, the Crown Proctor pleaded that at the time he presented his first petition, the husband had been for some years habitually committing adultery with Miss Mills, and that he connived at the respondent's adultery.²⁷ It was charged that the petitioner had broken his promise to have nothing further to do with Miss Mills by carrying on a clandestine correspondence with her which, when discovered, he would not let the respondent see. It was also charged that he "required the Respondent to do hard and laborious work and refused to provide her with adequate assistance" while continuing his adulterous relationship.²⁸

In *Maslin*, we witness the spectacle of the Supreme Court judiciary champing at the bit to grant Maslin his decree, thereby countenancing both his moral turpitude and his disingenuous means of concealing it. Chief Justice Way's summing up of the evidence brought to support the new charges was characteristic. Addressing the question of the petitioner's conducement to the respondent's adultery, he found that the husband had not neglected his duty of the protection of his wife, concluding that

²² *Ibid.*

²³ P.R.O.S.A. G.R.G. 36, Series 54, No.198 of 1908: *Maslin*.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Register*, 2 October, 1909, p.13: *Maslin*.

²⁷ P.R.O.S.A. G.R.G. 36, Series 54, No.198 of 1908: *Maslin*.

²⁸ *Ibid.*

there is no evidence connecting her intimacy with Brown [the co-respondent] with the petitioner's alleged conduct with Miss Mills....[W]e cannot lay down a rule that the adultery of husband and wife is any justification in itself for adultery by the other.²⁹

Nor did he find anything damning in the allegation that, when discussing separation, the petitioner had told his wife, "You cannot get a divorce, because you have forgiven me. If you do anything wrong I will provide for you" (meaning that if Mrs Maslin undertook to commit the marital fault that would free her husband from the marriage, she would be compensated for it in the form of an alimony after the divorce).³⁰ His response to this piece of evidence was that "supposing these words were said", they were "merely words spoken in anger" and that there was nothing to suggest that the petitioner intended them to be acted upon.³¹ Moreover, his references to Maslin's marital fault were discreet in the extreme (compare "her intimacy with Brown" and "the petitioner's *alleged* conduct with Miss Mills"). He also found that the proposed settlement of money on Mrs Maslin was not collusive. His analysis of the evidence thus disposed of the two most serious charges against the parties, and the special jury called for this hearing returned a verdict of no collusion in or connivance at the wife's adultery. In response, the Crown Proctor moved that the jury's finding was against the weight of evidence and that these charges be submitted for retrial.³²

It was nevertheless the issue of the wife's condonation of her husband's adultery which was of key significance when the Full Court heard argument on the ensuing motion to rescind the decree *nisi*. The petitioner's counsel, Sir John Downer, harangued the Court on the subject of the responsibility of the wife, only to be met with a softening of Chief Justice Way's customarily hard line on wifely propriety, who said, "However strong her belief that her husband had committed adultery, it was not condonation to live with him subsequently. Where could she

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ P.R.O.S.A. G.R.G. 36, Series 54, No.198 of 1908: *Maslin*.

³² *Ibid.*

go, and what could she do? She had only a suspicion".³³ The Crown Proctor's representative, Cleland, reminded the Bench of the moral consequences of dissolving this marriage, and he proceeded to drive his message home by declaiming that

there were wider issues at stake than whether Maslin could possibly remain virtuous if he did not obtain his divorce....There were the marriage status, the children, and the relations of all concerned, and to grant a divorce in this case would be to override and ignore the principles of every English case for centuries past....Maslin's was worse than the ordinary adultery from the point of domestic life and everything connected with it, and he hoped it would never be the policy of South Australia...to grant a divorce to a man who had been guilty of such misconduct as Maslin had, without a single redeeming feature, from beginning to end. If a divorce was granted in this case, it could never be refused in any other case, because one could not imagine a worse case than this.³⁴

Perhaps it was Cleland's exhortatory address which led the Chief Justice to re-examine the view he had expressed earlier, that the adultery of husband or wife did not in itself constitute justification for the adultery of the other. In rescinding the decree *nisi*, he interpreted evidence of familiarities, which could have been used against Mrs Maslin, with liberality:

That there was an improper intimacy between Mrs. Maslin and Brown before the former finally left her home few would be inclined to doubt, but there was no evidence of it. In the absence of some friend to guide this woman, she was foolish enough and wicked enough, in revenge for what she conceived to have been her husband's conduct, to form this intimacy; but there was no evidence of that until after she had left her home.³⁵

Maslin, with the Court resisting rescindment of the decree *nisi* until the eleventh hour, appears to stand the principle of *noblesse oblige* on its head. Does it attest, instead, to the view of the law, described in the Prologue to Part I, that the courts tend to deliver judgments which favour the interests of powerful members of a society? The Chief Justice, in rejecting evidence of the husband's collusion and

³³ *Register*, 8 June, 1910, p.9: *Maslin*.

³⁴ *Ibid*.

³⁵ *Register*, 20 June, 1910, p.10: *Maslin*.

connivance was in a position where he could not do otherwise, but not, however, purely and simply because justice was blinded by class interest. Collusion and connivance were graver charges than that of adultery because they were not marital faults *per se*, but expressions of contempt for both the institution of marriage and the legal system. If adultery was a fault which constituted an abuse of marriage so great as to warrant dissolution of the bond, connivance at it betrayed a wilful and premeditated intent to acquiesce in the commission of this culpable act. Nor could the charge of connivance be mitigated by appeals on the basis of the temporary recklessness of the wrongdoer, and it carried undertones of attempts to deceive a court of law. In the case of collusion, the deception was not even suggested, it was indisputable. Maslin had emerged from the new evidence as both an adulterer and a breaker of promises, but even these facts could be held to be lesser faults than his wife's adultery. To admit that he was a conniver or a colluder against the courts to obtain a decree would display him in a far poorer light, as well as implicating the legal advisers (including Justice Homburg) who had assented to the property settlement before the decree was made absolute.

Still, the new evidence brought to bear in the case demanded some judicial acknowledgment of the extent to which not one, but both of the parties to the marriage had veered from the straight and narrow. The only course left for the case to take was for it to be found that the wife had not condoned her husband's adultery. The report of the hearing to rescind the decree *nisi* shows that the Crown Proctor had a willing audience when he stated that

There were larger issues in this case than the vice or virtue of the Maslins. What good would it do the children -

The Chief Justice - To have them put under the control of Miss Mills, who has ousted the mother from her home.³⁶

To agree that the Supreme Court upheld the values of particular social groups does not preclude saying that it sometimes did so at the expense of individual

³⁶ *Register*, 8 June, 1910, p.9.

representatives of such groups. Conspiracy theories do not account for conflicts of interest within class boundaries. Nor do they account for conflicts within the legal system so that, at times, it operated against its own interests. The rescindment of the decree in *Maslin* was a Pyrrhic victory for the Supreme Court, because its outcome was the perpetuation of a prominent marriage in which the only examples to be found of marital behaviour were bad ones. The Supreme Court position against divorce so frequently evident in South Australian cases was untenable because it was built on the assumption that socially prominent couples saw themselves as bound by *noblesse oblige* to shoulder the burden of marital duty. Their presence in the divorce court, although their number was small, indicated that they were not doing so.

The irresistible force and the immovable object

The tactics of South Australia's social leaders in the divorce court have taken us a long way from the trials of Frances Lott, the good plebeian wife suffering at the hands of her ogre of a husband. But the courts would have fared no better in maintaining a consistent position had the salt of the earth, rather than their profligate "betters", provided the moral models. The complex character of marital breakdown was increasingly difficult to fit into the morality play of vice and virtue acted out in the *Lott* case. The Matrimonial Causes Act set up a dichotomy of innocence and guilt but also undermined the effectiveness of this dichotomy with the many discretionary bars to divorce which it offered. The overturning of the original *Maslin* judgment is a case in point: innocence went by the board and the parties, each as guilty as the other, perpetuated their guilt-ridden marriage with the sanction of the Court. I have already touched briefly on this strange logic. If the rules governing proof of marital fault had as their consequence that those who were the most exemplary spouses were rewarded with a means out of marriage, the equally ironic corollary was that spouses who did each other wrong were 'punished' by continuation of the bond. Not only did this outcome amount to the perpetuation of

the marriages which fell far short of the ideal prescribed in notions of marital duty, it could even be interpreted as *carte blanche* for continued misconduct. Sir John Downer attempted to make capital out of this problem when he addressed the Court on the petitioner's behalf at the hearing of the motion to rescind the decree *nisi* in *Maslin*, when he asked, "Would it be in the interest of virtue and morality to hold these two guilty parties to the marriage bond?"³⁷

A similar point had been raised fifty years earlier, in 1860, by Rupert Ingleby, counsel for the petitioner in *Fielding v Fielding*, a suit for divorce on the grounds of the cruelty and adultery of Stephen Fielding, a cooper.³⁸ At the opening of the hearing, Ingleby admitted that Mrs Fielding had, since leaving her husband, cohabited with another man, but he assured the Court that, while she was living with her husband, "there was not a breath of suspicion raised against her conduct as a matron".³⁹ When the Chief Justice, Sir Charles Cooper, would hear no more in the case, Ingleby objected that the judge's decision

would almost amount to compelling her to live in adultery. Her present object no one could call in question, although in seeking it she must make disclosures which would to some extent incur the odium of the world. She had had three children; she had to leave her husband's house when the first was born, the second was born during his absence at the diggings, and on the last occasion she was left during a travail of five days without common necessities.⁴⁰

A brave step, to attempt to set such a precedent in the second year of the Matrimonial Causes Act. It is unlikely, with the novelty of the Act not yet worn off, that any judge would have felt the full implication of Ingleby's argument.

Fielding is unusual in that the petitioner declared her own marital fault at the outset. In cases where the discretionary bar could be applied, the customary way in which the marital fault of the petitioner was revealed was through counter-charges made by the respondent. In such cases the familiar dilemma arose: whether to find

³⁷ *Ibid.*

³⁸ P.R.O.S.A. G.R.G. 36, Series 23, No.21: *Fielding v Fielding*.

³⁹ *Register*, 28 April, 1860, [p.97]: *Fielding*.

⁴⁰ *Ibid.*

for a guilty petitioner, or to permit the continuation of an immoral marriage. Section 34 of the 1867 consolidation, which stated that successful counter-allegations could be used to make a decree for the respondent, offered a way of resolving the dilemma, but it was rarely resorted to. It is not clear why this was so, although a case cited in a study of divorce in Victoria by Tess Moloney throws some light on the matter. In this case, a respondent wife gave her reason for defending the petition of her husband, from whom she was living apart, as being that she would lose the maintenance to which she was entitled under her deed of separation.⁴¹ This explanation suggests the possibility that, in some instances, out of court remedies were regarded as preferable to judicial ones, rather than that respondents wanted their marriages to continue.

It may be that members of the judiciary were aware of the consequences of their dilemma: the customary result of counter-allegations made against a petitioner was that they were not found. Take the example of *Brown v Brown*, a petition filed in 1899 for dissolution of marriage on the ground of adultery in which the husband, a smith, offered considerable evidence that his wife had been earning her living by prostitution. Mrs Brown claimed in response not only her husband's adultery, but his connivance at and conducement to any adultery found against her, which she denied. Particulars of his marital fault alleged cruelty, drunkenness and "abusive, violent, threatening, indecent and obscene language". She also deposed that the petitioner had neglected to provide for herself and their two children between January, 1894 (a year after she left him) and March, 1898.⁴² The hearing of the petition gave credibility to the respondent's claims. The petitioner admitted that in September, 1894, he was fined in the Police Court for assaulting his wife in the street, although he "[w]ould still swear that he never struck the respondent". He added that the alleged assault had taken place after his wife had deserted him, and

⁴¹ T. Moloney, "A Consideration of the Divorce Legislation in Colonial Victoria and the Divorce Petitions in 1861 and 1891", *Australia 1888*, Bulletin No.13 (November, 1984), p.66.

⁴² P.R.O.S.A. G.R.G. 36, Series 54, No.183 of 1899: *Brown v Brown*.

that she had always refused his repeated requests to her to return home.⁴³ At this point the respondent's counsel, after consulting with her, withdrew his client's denial of her own adultery and all of the counter-charges, except that of conducement to her adultery.⁴⁴ Chief Justice Way was

satisfied that the petitioner's conduct immediately prior to the final separation had not been such as to warrant the respondent in abandoning her home. In judging the petitioner's actions at this time they must bear in mind his statement that he had reason to suspect that the respondent had been guilty of improper conduct. This fact would mitigate, although it did not excuse, his conduct....He was not required to find whether the petitioner had been irreproachable, but whether his conduct had been such as to conduce to the adultery, and he was satisfied that his conduct had not been such as to warrant the respondent in forsaking her home.⁴⁵

Had the judge upheld the respondent's allegations, he would have ratified the petitioner's marriage to a prostitute. The decision he made was the only one which retained with any coherence the principles of marital duty upon which the Matrimonial Causes Act was based.

The bringing of counter-charges against a petition for divorce sometimes resulted in the law being bent to the point of contortion. In *Kerr v Kerr and Rundle*, a petition for dissolution of marriage on the ground of adultery filed in 1906, evidence against the petitioner was simply ignored. The wife's answer alleged adultery on the part of the petitioner, substantiated by a letter from Broken Hill, where he worked as a miner, in which he wrote:

Broken Hill

Beatrice You need not trouble to write any more as I am full up of you. you can go to the devil for all I care you are not harve as good to me as the woman that I have got. besides you cannot give me a baby to love so I have got one from her or will have soon you need not follow me as I am go-[sic] up the north on a station you would never find us. I told you when I gave you the last thumping that I

⁴³ *Register*, 10 November, 1899, p.6: *Brown*.

⁴⁴ *Ibid*.

⁴⁵ *Register*, 18 November, 1899, p.4.

was sick of you. this one is more to my taste Good bye for ever
your happy husband

James Kerr⁴⁶

In the witness-box the petitioner stated that "[t]he envelopes produced were in his handwriting, but no part of the letter (produced) had been written by him". The letter above was reported to have been read privately by Justice Homburg.⁴⁷ Little wonder; as it was, the report made nothing of the petitioner's improbable denial that he wrote the letters which had found their way into his envelopes. The role of the outraged husband would have been inappropriate indeed if the evidence had been read in open Court, and the case, won by the petitioner, shows the strain that was imposed upon the courts by the fault-based divorce system.

Against the background of irreconcilable opposites described in the cases above, the 1912 case of *Myers v Myers* comes both as a logical conclusion and as a milestone. It is a milestone because the petitioner's circumstances bear a strong resemblance to those of the wife in *Fielding*; a logical conclusion because it demonstrates how the irresistible force had eventually caused the immovable object to give. In vindicating *Fielding* it demonstrates how change in use of the law was not the preserve of jurists, legislators, or those who could use their social status as a means of circumventing the Matrimonial Causes Act. Like Letitia Fielding, Emily Myers admitted her own adultery, which had occurred subsequent to her husband's desertion:

In an attempt to support herself petitioner had conducted a small boarding house, but had succumbed to the temptation to commit misconduct with George Howitt, and a child was born on February 1, 1908. [The petitioner's counsel] requested His Honor to exercise the discretion which was vested in him in favour of the petitioner, as her misconduct was conducted to by that of her husband.⁴⁸

Justice Murray found that the petitioner's adulterous relationship with Howitt began two or three years after he became one of her boarders in 1902, that she cohabited

⁴⁶ P.R.O.S.A. G.R.G. 36, Series 54, No.73 of 1906: *Kerr v Kerr and Rundle*.

⁴⁷ *Register*, 7 August, 1906, p.6: *Kerr*.

⁴⁸ *Register*, 6 November, 1912, p.9: *Myers v Myers*.

with him until his death in 1908, and that she had since "lived a chaste life". Her decree was made absolute in 1914.⁴⁹

Private divorce and public morals

The cases involving socially prominent marriages examined in detail so far - *Maslin*, *Morier*, *Hall*, *Anderson*, *McBride* and *Sweetapple* - share the common feature of having been contested, as did most of the petitions filed by members of this social group. Thirteen of the twenty-one respondents answered the allegations of marital fault.⁵⁰ With two sides to the story, the choice for the presiding judge in each case was whether, on the basis of evidence, to play partisan or peacemaker in the courtroom battle. I have attempted to show that this choice was governed, as it was in the divorce cases in general, by more than issues of marital fault, and that the setting of examples of marital duty was regarded as more important than marital fault alone. The uncontested petitions of South Australia's social leaders did not lend themselves so easily to this aim. For the respondent with the resources to do so, failure to answer a charge of marital fault was a tacit agreement to the granting of relief for the reasons given by the petitioner.

It is not surprising, then, that these uncontested petitions bear a closer resemblance to the more straightforward petitions of the lower social groups than to the contested petitions of their peers. Far from drawing attention to these uncontested petitions, members of the judiciary seem to have done their best to expedite proceedings quietly. The *Register* was piqued at the exclusion of the Press from *Ewbank v Ewbank and Ellis*, a surgeon's petition for dissolution of marriage on the ground of his wife's adultery, filed in 1906. An article entitled "A Divorce Case which was not Reported" stated that the hearing date was fixed after

⁴⁹ P.R.O.S.A. G.R.G. 36, Series 54, No.220 of 1912: *Myers*.

⁵⁰ In this number I have included one who filed an appearance under protest on the ground that a deed of separation was pending at the time of proceedings being instituted, and one in which denial of the marital fault was entered but where written confession of the fault was reported to have been made. One should take into account that several of the remainder were abandoned before an answer could be filed.

publication of the week's cause list. The Press was notified of the hearing date of another late entry

[b]ut for some reason which has not been explained by the officers, part of whose duty is to see that the reporters are present on such occasions, no message was sent for Wednesday morning, when the Ewbank case was called on. Therefore, although it was heard "in open Court" ...the public have not had any information regarding the character of the proceedings".⁵¹

In *Ewbank*, answers denying the charge of adultery were filed by both the respondent and co-respondent, who were alleged to be cohabiting in France, but the decree *nisi* mentions written admissions of adultery made by them.⁵² The most likely explanation for this contradiction is not that the confessions were spurious, but that the answers were filed as a matter of form, or to try to avoid liability for costs. *Boucaut v Boucaut*, another suit filed on the ground of adultery, in 1908 by the son of Justice James Boucaut, was also uncontested. The wife's adultery was alleged to have taken place in South Africa with two men, both of whom filed appearances under protest on the ground that neither had had a domicile in South Australia. Correspondence in the records includes a letter of confession from the respondent, in which she adds, "Am indifferent as to what steps you take as I never wish to live with you again".⁵³

The theatrical potential of the advocacy system of justice, which thrives on the antagonism of "innocent" and "guilty", could not be realized in *Ewbank* and *Boucaut*. This factor alone, however, does not account for the absence of judicial moralizing in the reports of these cases. Although we cannot tell how much of a court hearing was edited out before a law report went into print, it seems unlikely that the change in the tenor of reports of the petitions of the socially prominent was due to an alteration in editorial policy. The *Register's* response to missing out on the details of *Ewbank* suggests as much. The report of *Kuhnel*, introduced in

⁵¹ *Register*, 19 September, 1906, p.4.

⁵² P.R.O.S.A. G.R.G. 36, Series 54, No.178 of 1906: *Ewbank v Ewbank and Ellis*.

⁵³ P.R.O.S.A. G.R.G. 36, Series 54, No.45 of 1908: *Boucaut v Boucaut*.

Chapter Two, reads like a penny-dreadful, describing with horror a string of intrigues followed by the wife's declaration that "her life was ruined" and that her husband "should have married a good-living woman".⁵⁴ The hypothesis that the change in approach occurred at the judicial level is further supported by *Souter v Souter*, filed in 1910 on the grounds of the husband's adultery, cruelty and desertion. It reveals an eagerness on the part of the judge and legal practitioners involved in the case to avoid publicizing the marital fault of a dentist and chemist described in the *Register* as "the son of the late Dr. Souter, of Parkside".⁵⁵ Personal service of the citation and petition had to be dispensed with because the respondent's whereabouts were unknown, and a letter from the petitioner's solicitors to the respondent's brother stated:

Mr. Justice Homburg said that if he could do so he would dispense with any advertisement in the South Australian papers as he wished as far as he could...to save yourself and your brother any unpleasantness or unnecessary disclosures in the matter.⁵⁶

The *Register* report of this case reveals the respondent to be foul-mouthed and brutish, but relays no judicial comment on the wife's moral entitlement to a divorce.⁵⁷

Perhaps we could conclude from *Souter* and earlier petitions such as *Morier* that judges were always willing to conceal the wrongdoing of their male peers as best they could, and saved their homilies for the wives, such as Florence Sweetapple, who sought to expose them. There was doubtless an element of class and sex solidarity of the old boys' network type contributing to the judgments in the petitions of high-status litigants. If these factors were contributory, however, judges were not always hard on wives, even if they were soft on husbands. The effect of class and sex prejudice was overridden by the inescapable contradiction of using divorce law to promote marriage, and in the 'moral exemplars' themselves.

⁵⁴ *Register*, 9 July, 1910, p.15: *Kuhnel*.

⁵⁵ *Register*, 28 March, 1911, p.3: *Souter v Souter*.

⁵⁶ P.R.O.S.A. G.R.G. 36, Series 54, No.30 of 1910:*Souter*.

⁵⁷ *Register*, 28 March, 1911, p.3: *Souter*.

Supreme Court reluctance to dissolve the marriages of the rich and powerful was overcome by the very premisses upon which this reluctance was based. The need to preserve intact a set of marital values necessitated shielding the public from evidence that South Australia's social leaders were not performing their marital duty. The extent to which both petitioners and respondents from this social group violated the principles of marital duty which the judiciary sought to uphold resulted in ever greater concealment in preference to public exposure.

Matrimonial law and matrimonial property

Even among the contested petitions, concern for the most practicable way of ending an unwanted marriage is frequently evident. The questionable measures taken in *Maslin* surrounded the division of the property. Petitioners in other cases, such as the wife in *Hosking*, claimed that private arrangements would have been made if the respondent had agreed to the terms she offered. The Matrimonial Causes Act did not constitute the means of finishing a marriage so much as the means of tying up the loose ends after - often long after - the marriage as a relationship in the sense conveyed by the term "marital duty" had ended.

Property issues in marriage were not restricted to the upper echelons of South Australian society. The frequency with which *de facto* unions are mentioned in the cases suggests that many couples did not bother with formal dissolution of their marriages until a need arose, and the need in many instances appears also to have been economic. A wife was entitled to alimony if her husband was at fault in the breakdown of the marriage. Alternatively, to attain the status of *femme sole*, a woman could go to court to establish grounds for either judicial separation or the protection of earnings and property. Matters were different if a wife brought her own property to a marriage, or acquired some during it, especially before the passage of the Married Women's Property Act 1883-4, because before then, property of the wife automatically became that of the husband. Even after 1884,

some women were caught out by the fact that if a wife were to retain her property it had to be kept in her name; once signed over to a husband, it was lost.

Matrimonial property, then, was traditionally a husband's; the concept of "joint ownership" did not exist because even if a wife did retain her own property it was earmarked as such, and did not constitute the shared assets of the marriage. The 1880 petition of *Kearney v Kearney*, a suit for judicial separation filed - and won - by the wife, furnishes a particularly vivid illustration of this principle. The bulk of Supreme Court material for this case surrounds the petition for alimony, with particular reference to the petitioner's property, Section 158 Caltowie. The petitioner claimed that, although her husband had extensive unencumbered property of his own, he had received considerable profit from her section and had finally taken possession of it and driven her from her home. The notes in the petitioner's costs to be taxed mention that the petitioner was advised that the best means of securing her person and property was by deed of separation but that the respondent had refused to consent to one.⁵⁸

Mrs Kearney had a strong case for both the respondent's violence and his habitual drunkenness, but proceedings were foreshortened in a similar manner to the way they were in *McBride*, after both sides had conferred during an adjournment. The respondent's counsel then announced that it had been arranged that his client should retain Section 158 Caltowie, including the house and furniture, except for a piano and a harmonium, to which the petitioner was entitled. The respondent would also pay permanent alimony of £200 per annum.⁵⁹ Mrs Kearney's evidence at the hearing of her petition for alimony tells us that she was almost entirely responsible for the support of herself and her children during the years 1875 to 1880 while her husband worked as manager of a neighbouring station. She added that since her husband had taken over her property, she had "not a penny". Her case for marital fault was based on the claim that she had endured

⁵⁸ P.R.O.S.A. G.R.G. 36, Series 23, No.424: *Kearney*.

⁵⁹ *Register*, 17 December, 1880, p.6: *Kearney*.

his cruelty, which persisted during the time they lived apart, for twenty-five years.⁶⁰ She did not seek judicial intervention, however, until her husband took over her property, and only then after he had refused to engage in private negotiations.

Economic motives, then, were the most likely cause of the proceedings but although Mrs Kearney won the battle by being awarded a judicial separation, she lost the war. Nor could she have emerged victorious if she had declined to settle. She was doubtless aware that the little she gained through private settlement was likely to be more than she would through the judicial process.⁶¹ Her source of livelihood was exchanged for a sum which was substantial, due to her husband's wealth, but which put her in the position of a dependent until, if she could, she acquired the wherewithal to buy more land. Meanwhile, she had lost the custody of her daughters because when she left, she "had no means to take them away, and no place to take them to".⁶² It would be surprising if Mrs Kearney had retained her property in 1880, when married women's property rights were not acknowledged in the statutes. Nevertheless, Martha Kearney's story is a particularly sad one; not all wives left the divorce court in a worse position than when they entered it.

The issues of marital fault and the division of matrimonial property were not as separate as it would appear from *Kearney*. In 1902, the wife of a clerk, who admitted her adultery,⁶³ was told by her husband's solicitor, when she asked for 15/- instead of 10/- per week maintenance before the hearing, "that her husband was not under any obligation to support her, as she had been guilty of misconduct" and that "she was lucky to get anything in the circumstances".⁶⁴ This statement conflicts with one made in *Maslin* that an adulterous wife was entitled to "something

⁶⁰ P.R.O.S.A. G.R.G 36, Series 23, No.424: *Kearney*.

⁶¹ For example, in his discussion of *Maslin*, Chief Justice Way stated that the practice was to award an injured wife one fifth of the husband's income "unless the man is very wealthy", where "wealthy" was in the league of "a millionaire like some of those [in] South Africa" (P.R.O.S.A. G.R.G. 36, Series 54, No.198 of 1908: *Maslin*).

⁶² P.R.O.S.A. G.R.G 36, Series 23, No. 424: *Kearney*.

⁶³ P.R.O.S.A. G.R.G. 36, Series 54, No.216 of 1902: *Gottschalck v Gottschalck*.

⁶⁴ *Register*, 18 November, 1902, p.3: *Gottschalck*.

sufficient something that would prevent her from going on the street".⁶⁵ It could be that such allowances were only made to the wives of the wealthy. Nevertheless, both cases confirm that a guilty wife could be 'punished' by the withholding of funds, while a guilty husband did not have property taken away from him.

The protection of a husband's property was firmly grounded in the conception of marriage which the Matrimonial Causes Act inherited, that is, of marriage as a property arrangement where property was held by the husband. With the growth of an industrial capitalist economy, matrimonial property remained, by and large, in the hands of husbands, even though the rise of the companionate marriage meant that the marriage relationship changed vastly in other ways. With regard to matrimonial property, then, the Act was far more adaptable to nineteenth- and early twentieth-century marriages than were the principles of marital duty. This aspect of divorce offers a reason why the distinction between cases such as *Kearney* and those involving high-status couples was often small, especially in the second decade of the twentieth century.

Six petitions from the high-status group were, like *Kearney*, judicial separations filed by wives. Let us examine the property issues raised by them. Three of the judicial separations reached hearing: *Hosking*, *McBride* and *Sweetapple*. *Hosking*, which was the result of failed private negotiations, was unique among them because the wife's wealth, inherited from a former marriage, constituted the matrimonial property. The judicial separation would have restored to the wife all property not transferred to the husband: a dependent husband was not entitled to a penny of his wife's property after separation. The settlement out of court of *McBride* meant that the wife was entitled to maintenance rather than alimony, for practical purposes just a difference in terms, but maintenance did not fall under matrimonial jurisdiction and carried even fewer connotations of the division of matrimonial property than the awarding of alimony did. In the case of *Sweetapple*, private negotiations were attempted both before and after filing the

⁶⁵ P.R.O.S.A. G.R.G. 36, Series 54, No.198 of 1908: *Maslin*.

petition. Contention over the custody of the elder child seems to have prompted renewal of the proceedings in the second instance.⁶⁶

The three judicial separations which did not reach hearing give considerable weight to the matter of matrimonial property. The first, *White v White*, was filed by the wife in 1878, and the petition for alimony pending litigation and the respondent's answer to it contain details of the property of the husband, a wealthy farmer. The petitioner's bill of costs mentions that the respondent made overtures toward an out of court settlement.⁶⁷ The dismissal of the petition before hearing suggests that the overtures were followed through. *Pearse v Pearse*, concerning a grazier and his wife, was filed in 1910 and appears to have been abandoned after the dismissal of the petitioner's application to have the respondent examined at the hearing of the petition for alimony pending litigation.⁶⁸ *Crozier v Crozier*, filed in 1917 by the wife of a pastoralist, was contested on the ground that the respondent had been willing to abide by an oral separation agreement made earlier in the year, which gave the petitioner £275 per annum maintenance and the respondent sole custody and control of their child. The petitioner's next step was to apply for access pending litigation, saying that the respondent would not give her access to her son unless she agreed to the terms of an oral agreement which she denied had been made. She stated that she had not hitherto applied for access "because from time to time since the institution of the suit there have been negotiations for an amicable settlement of their differences but these are now definitely broken off".⁶⁹

Formal ratification of the breakdown of the marriage was clearly not the top priority in at least two of the three petitions, *White* and *Crozier*. And in *Pearse*, property issues were important, if not the most important aspect of the litigation. Appeals to *noblesse oblige* were thus doubly ineffective. Not only were socially prominent couples prepared to throw in the towel when their marriages failed, they

⁶⁶ P.R.O.S.A. G.R.G. 36, Series 54, No.51 of 1903: *Sweetapple*.

⁶⁷ P.R.O.S.A. G.R.G. 36, Series 23, No.359: *White v White*.

⁶⁸ P.R.O.S.A. G.R.G. 36, Series 54, No.97 of 1910: *Pearse v Pearse*.

⁶⁹ P.R.O.S.A. G.R.G. 36, Series 54, No.359 of 1917: *Crozier v Crozier*.

frequently looked to the courts to help them out when their subsequent property settlements went awry. If their ears were so deaf to the call of duty before they reached the courtroom, it is no wonder that judges cried in a wilderness. The result of the ineffectiveness of their position was that the gap was closed between couples, such as the Croziers, who were rich and had important social connections and those who were rich but with a lower social profile, such as the Kearneys. The only victory which the divorce court could claim was that the tendency of judges to uphold the property claims of husbands to the detriment of those of wives kept matrimonial property intact, and no doubt deterred many wives of the propertied from entering court at all.

The retreat from the practice of setting moral examples also had the result that, while marriages in the public eye were disposed of with increasing alacrity, greater attention was being paid to the petitions of the merely rich. *Ramsay v Ramsay and Lett* was filed by an importer in 1913, claiming the adultery of the wife, who answered her husband's charge with allegations of his cruelty, his adultery with two women, and of unreasonable delay in filing his petition. The petitioner denied the allegations, and claimed that one of the women, Kate Dover, was hired by him to watch the respondent and the co-respondent, Norman Lett. Mrs Ramsay retaliated that the co-respondent had been hired to trace her husband's movements with Kate Dover!⁷⁰ To begin to make a case for the adultery on either side, it was necessary first to discredit the claims about the respective employment of Lett and Dover. In the hearing it emerged that both parties had more than a purely business relationship with their putative detectives. The respondent had a photograph of Lett and had sent him cards. Witnesses testified to having seen Lett on her premises in the early hours of the morning when she was staying at Glenelg with her three daughters, and to having seen him helping her in the yard and exchanging endearments with her. Moreover, one of the daughters, Maud, who openly sided with her father against her mother, claimed that her mother and Lett

⁷⁰ P.R.O.S.A. G.R.G. 36, Series 54, No.173 of 1913; *Ramsay v Ramsay and Lett*.

had exchanged gifts, and that she had seen them kissing each other. The petitioner claimed that the respondent had admitted the adultery.⁷¹ Allegations were made against the petitioner as to his spending time with Kate Dover in Melbourne, to kissing her and to having "interfered with her clothes".⁷² The respondent also claimed that the petitioner had admitted adultery with Dover. Substantiated evidence of cruelty on both sides was also given.⁷³

Arthur Ramsay had been anxious to get a divorce for some time. Letters written by him in 1912 which were submitted as evidence offered to pay the respondent £200 plus legal expenses if she would bring proceedings against him. In making the offer, he promised not to defend the case, and told her she was free to "[c]all any manufactured evidence". He warned that if she refused to comply with his request he would fight, and in that event he would be "bound to win".⁷⁴ The judge, alarmed at the tenor of these letters, had them sent to the Attorney-General for an opinion as to whether the Crown Proctor should intervene on the ground of collusion. The petitioner's counsel argued that collusion was negatived by the fact that the husband and not the wife had brought the proceedings, and the case was being bitterly fought.⁷⁵ The hearing eventually resumed without the intervention of the Crown Proctor, so presumably the argument of counsel was considered to be legally sound.

No reference to this episode is recorded either in the transcripts or in the *Register* report of Justice Gordon's summing up. What we do have is an analysis of the case made with such meticulous regard for fair play and the rules of evidence as to put it far above the skullduggery of the petitioner and the prurient voyeurism of both the parties and their witnesses. Dealing with the case against the respondent first, Justice Gordon emphasized the need for corroboration of evidence of the intent as well as the opportunity to commit adultery. Drawing on a New South

⁷¹ *Ibid.*

⁷² *Register*, 3 April, 1914, p.5: *Ramsay*.

⁷³ P.R.O.S.A. G.R.G.36, Series 54, No.173 of 1913: *Ramsay*.

⁷⁴ *Register*, 12 December, 1913, p.9: *Ramsay*.

⁷⁵ P.R.O.S.A. G.R.G. 36, Series 54, No.173 of 1913: *Ramsay*.

Wales judgment, itself an unusual departure from the customary reference to English cases, Justice Gordon reminded the jury that suggestions of impropriety needed to be measured against the more relaxed social manners of the Australian way of life!⁷⁶

In concluding his discussion of the evidence as to the respondent's adultery, Justice Gordon doubted the likelihood of its having been committed in the places alleged, being either a public place accessible to the view of passers-by, or in small houses where there was always at least one other person present. He was also unconvinced that the petitioner's adultery took place because, apart from the evidence as to familiarity with Miss Dover and a Miss Marshall, there was no corroboration of Lett's accounts of a more serious nature, and thus no reliable evidence.⁷⁷ The jury duly exercised caution in finding the charges against the petitioner unproven, but could not agree on the question of the respondent's adultery. This charge was the subject of a retrial, where caution was replaced by a finding in the petitioner's favour and the decree *nisi* was awarded in September, 1917.⁷⁸

In Arthur Ramsay's letters to his wife which were read in Court, he referred more than once to how they both had suffered for the entire nineteen years of their marriage. Ramsay described himself at one point as "the incubus that has harassed you". The second of his letters concluded with the words, "It is business now, so let me know when the whole matter can be arranged".⁷⁹ When Mrs Ramsay refused to come to the party, he availed himself of the opportunities offered by the Matrimonial Causes Act and freed himself of his marriage. He was aided and abetted by the Court. Although Justice Gordon adhered closely to the rules of evidence in his judgment, the petitioner was cleared of the charge of collusion; Ramsay's self-confessed readiness to lie did not damage his case in the long run, as

⁷⁶ *Ibid.*

⁷⁷ *Register*, 3 April, 1914, p.5: Ramsay.

⁷⁸ P.R.O.S.A. G.R.G. 36, Series 54, No.173 of 1913: Ramsay.

⁷⁹ *Register*, 12 December, 1913, p.9: Ramsay.

there is no doubt thrown on his veracity in the judge's notes for summing up. Nor are there any appeals to duty. The judge's strict adherence to the rules of evidence, rather than highlighting the severe defects in the petitioner's character, is reminiscent of some of the recalcitrant 'moral exemplars'. Arthur Ramsay may not have had social prestige of the type commanded by the older families, but he did have capital at a time when unvenerable capital was in the ascendant, and afforded the means to get the best the legal system had to offer. As an owner of capital, he also had something to protect, and it may be because of this that he got the better of the legal system.

Collapse from within

The changes in judgments in the period under study demonstrate how the courts relinquished ground to the demands of litigants who used the Matrimonial Causes Act for ends which were not dictated by the principles of marital duty to which judges appealed in their decisions. Their weakness is also evident in the petitions of the 'moral exemplars'. The success of the majority of petitions filed by members of this group (ten of the twenty-one petitioning spouses gained the decree they sought), testifies to the failure of the courts to shore up their anti-divorce position by appealing to a code of *noblesse oblige*. The alternative explanation, that judges were willing, whenever they were able, to grant decrees to these couples, does not account for their ambivalence which is evident in hearings, if not in cold figures. Judges regretted the decisions they had to make, worried about the effect the outcome of these cases would have, and appealed to couples to settle privately for the sake of the family - and of The Family. The peculiarities of these cases point to the conclusion that they carried more weight, in the eyes of judges and practitioners of the Court, than the bulk of cases heard under the Act, through which ideas about marital duty were also disseminated, but in the interest of promoting social good rather than of providing models of socially good behaviour.

Table 1
SUCCESSFUL PETITIONS

Timespan	Total successful petitions	Successful petitions as % of total petitions	Total successful male petitions	Successful male petitions as % of total successful petitions	Total successful female petitions	Successful female petitions as % of total petitions
1894-98:	38	67.8%	21	55.3%	17	44.7%
1899-1903:	52	62.7%	28	53.8%	24	46.2%
1904-08:	57	77.0%	30	52.6%	27	47.4%
1909-13:	90	74.4%	51	56.7%	39	43.3%
1914-18:	116	71.6%	76	65.5%	40	34.5%
TOTALS:	353	71.2%	206	58.4%	147	41.6%

Notes: 1. Does not include applications for protection orders on ground of desertion.
 2. Figures calculated on basis of Supreme Court archival material alone, as the incompleteness of the *Register* material would distort results.
 3. See Appendix 1 for explanation why figures calculated from 1894 only.

Sources: P.R.O.S.A. G.R.G. 36, Series 51 and 54.

Table 2

PETITIONS HEARD WHICH WERE UNSUCCESSFUL

Timespan	Dismissed	Settled by Court	Out of court settlement during hearing	Reconciled during hearing	No decree recorded after hearing	Lesser decree awarded	Total
1894-98:	2	1	-	1	1	-	5
1899-1903:	4	-	-	-	1	-	5
1904-08:	1	-	-	1	-	-	2
1909-13:	1	1	-	-	-	-	2
1914-18:	3	1	2	-	1	1	8
TOTALS:	11	3	2	2	3	1	22

Notes: 1. Does not include applications for protection orders on ground of desertion.

2. Figures calculated on basis of Supreme Court archival material alone, as the incompleteness of the *Register* material would distort results.

3. See Appendix 1 for explanation why successful petitions calculated from 1894 only.

Source: P.R.O.S.A. G.R.G. 36, Series 54.

Table 3
PETITIONS NOT HEARD WHICH WERE UNSUCCESSFUL

Timespan	Abandoned before hearing	No evidence of having reached hearing	Out of Court Settlement before hearing	Reconciliation before hearing	Abandoned and refiled	Total
1894-98:	3	9	1	-	-	13
1899-1903:	8	11	1	1	5	26
1904-1908:	1	12	-	-	2	15
1909-1913:	4	23	-	-	2	29
1914-1918:	7	26	1	-	4	38
TOTALS:	23	81	3	1	13	121

Notes: 1. Does not include applications for protection orders on ground of desertion.

2. Figures calculated on basis of Supreme Court archival material alone, as the incompleteness of the *Register* material would distort results.

3. See Appendix 1 for explanation why successful petitions calculated from 1894 only.

Source: P.R.O.S.A. G.R.G. 36, Series 54.

Table 1 (see page 106) shows that, although the proportions of successful petitions among male and female petitioners, both respectively and *in toto*, dipped and climbed over the years 1859-1918, more petitions were successful than not in each five-year period.¹ Not only were there more successful petitions than unsuccessful ones, only half (eleven out of twenty-two) of the unsuccessful petitions which gained a hearing failed because of insufficient evidence presented in Court (see Table 2 on page 107). Table 3 (page 108) shows that the bulk of unsuccessful petitions fell by the wayside before they reached hearing. A number of these abandonments would have been the result of decisions made by the petitioning spouse for reasons such as the lack of funds to continue proceedings, a reconciliation with the respondent or other changes in circumstances which rendered the continuation of proceedings unnecessary or undesirable. One possibility is that solicitors were unwilling to proceed in suits which they were in danger of losing. The effect of weeding out the weak petitions would have been that those which had run the gauntlet to the courtroom would have been those with the strongest evidence. Far from revealing an insurmountable wall of legal solidarity, this explanation suggests that the interests of solicitors anxious to win cases and those of judges attempting to hold together the fabric of society were at times mutually exclusive. If solicitors took the responses of judges into account when deciding whether to proceed with a case, it was not because they shared their normative priorities. Otherwise, they would have assisted judges in driving their moral message home by filling the courts with cases which were unlikely to win.

Conclusion

The judicial position against divorce could not be maintained because the premisses upon which it was based were contradictory. The horns of the dilemma were these: either judges refuse to dissolve marriages and thus allow the perpetuation of marriages where marital fault was committed and marital duty

¹ I will discuss the overall fall in success rate of female petitioners in Chapter Seven.

ignored, or they adopt the lesser of two evils, as they did, of dissolving marriages, thus acquiescing in the demand for divorce. The social composition of South Australia's divorcing population between 1859 and 1918 was the *reductio ad absurdum* of attempts to target divorcing couples from among the *élite*. It accentuated the quixotic element in judicial thinking which was already discernible in the use of an Act which facilitated divorce in order to forestall it. The effect of the dearth of social leaders among divorcing couples was compounded by the unwillingness of the few there were to accept the burden of responsibility which judges thought they should shoulder. By their very appearance in the divorce court, litigants of high social standing indicated that their priorities lay in the private, not in the public, realm. They pursued their interests through fair means, as did Florence Sweetapple, or foul, the instances of which are many.

These petitions also highlighted the point that neither marital duty and "innocence" nor marital fault and "guilt" went hand in hand. What emerged from the lengthy and bitter battles was a large degree of marital misbehaviour on the part of "innocent" and "guilty" alike. In the face of this outcome, the judiciary had increasingly to expedite proceedings without parading the tarnished image of its 'moral exemplars' more than could be avoided. There were two means adopted by judges to accommodate this undesirable state of affairs, neither of which could be reconciled to their notions of marital duty. One was to wink at abuse of the law, a practice which, if used too often, would appear as judicial contempt of the judicial process. The other, which occurred increasingly throughout the period, was to silence the call to marital duty in favour of presiding over the division of matrimonial property, which had the effect of putting all petitions involving either social position or capital (or both) on the same level of importance in the eyes of the court.

The contradictions built into judicial opposition to divorce in South Australia were exacerbated by another irony surrounding the use of the Matrimonial Causes Act between 1859 and 1918. The Act proved to fit best the needs of those its tenets

ostensibly ignored: the unpropertied. Decisions about marital fault for these petitioners were unencumbered by considerations of either social position or property. In petitions which focussed on issues of marital fault alone, to deny relief against the weight of evidence would not only hold the law in contempt, it would further undermine it by encouraging the perpetuation of "self-divorce". The cases show that *de facto* marriage was common among lower-status litigants. To place the Act beyond the reach of petitioners from the lower groups would have amounted to judicial erosion of *de jure* marriage as a social institution and the encouragement of common law marriage as a substitute. Thus the *coup de grace* against the judiciary was delivered by the litigants themselves. Those who reached the divorce court arrived there - for the most part - with cold, hard evidence of marital fault unadorned by shining examples of marital duty and uncomplicated by considerations of status and property. The call to duty and self-sacrifice was unintelligible to the majority, and ignored by those at whom it was principally directed.

Epilogue to Part I

Although practitioners of the law held a powerful position in South Australian society, the limits of their power are demonstrated by the nature of the Matrimonial Causes Act which, while its retrogressive nature harmonized with the judiciary's 'anti-divorce' views, also served the 'pro-divorce' ends of litigants. The Act's usefulness to one group against the interests of another questions some popular theories about law and power, and about power and ideas. Historians of the left characteristically see the law as an instrument of a dominant ideology, a view which the example of South Australian divorce law suggests is oversimplified because it leaves out many of the complexities of the law's function in a society. The implementation of the Matrimonial Causes Act poses the question of which marital values *were* dominant. The views held by members of a society's institutions, such as that of the law, may only be dominant because they are the most visible to the historian.

Hegemony in the Marxian or Gramscian sense is also popularly assumed to entail one dominant set of values. Our study so far has shown the ruling *élite* to be divided on the issue of marital duty, depending upon which side of the Bench its members found themselves. In the theatre of the courtroom, the legal representatives of this group regretted the public nature of marital breakdown under the Matrimonial Causes Act, using such purple phrases as "the sacred curtain of married life".¹ These words were uttered by Sir John Downer in *Anderson*, when the case for his client looked very grim indeed. For the members of the uppermost social group, the "sacred curtain" hid a multitude of sins. Public knowledge of their private behaviour appears to have been regretted, not because the institution of marriage was sacrosanct, but because divorce hearings betrayed the falsity of the "appearances" which they strove so hard to keep up.

¹ *Register*, 21 September, 1889, p.6: *Anderson*.

Leonore Davidoff has tackled this matter of "appearances", arguing that aristocratic social rules in nineteenth-century Britain were aimed at keeping the ascendant middle classes out of "the best circles".² The anxiety shown among divorcing couples of South Australia's aristocratic equivalents regarding the public face of their marriages parallels ruling-class behaviour as described by Davidoff. Her analysis offers an apposite explanation of upper group interests in drawing the "sacred curtain" across their marriages in order to perpetuate a myth that husbands and wives from this group treated each other "better" than those in the lower ones, thus justifying the rulers' supremacy over the ruled. Sir Samuel Way's complicity in the murky dealings of *Morier* and Justice Bunday's congratulations to the petitioner's son in *Anderson* suggest a solidarity which confirms the validity of such an analysis. While the application of Davidoff's thesis to South Australian divorce would explain the attempts at secrecy and the obstruction of the course of justice, however, it cannot explain the 'moral exemplar' aspect of the judicial approach to divorce. The courts maintained their opposition to divorce throughout hearings under the Matrimonial Causes Act, regardless of the social status of the litigants involved, as universally as they did the championship of marital duty.

Thus, on the whole, judges did not conspire with their social peers to keep their marital indiscretions as secret as possible in order to close ranks and maintain a public image of propriety. More often, they attempted to oppose their interests in the endeavour to make them lead a way that they thought all should follow. However, the flat refusal of the "leaders" to lead rendered the judiciary's attempts futile. When first the marriages, and then the private negotiations, of the *élite* broke down, some of them were not above sacrificing aristocratic dignity by rubbing shoulders with their inferiors in the divorce court. The opinions about marriage held by the South Australian judiciary, then, were not echoed by their divorcing peers and can thus be seen to represent, not a hegemony of marital values, but one

² L. Davidoff, *The best circles: society etiquette and the season* (London, 1973), *passim*.

colour on the spectrum of beliefs held in South Australian society between 1859 and 1918. What others were there?

Part II

THE NOVELS

Prologue to Part II

If the pen is mightier than the sword, perhaps it is also mightier than the judge's gavel, and so we turn to fictional literature as a rich source of ideas in the period under study. Part II comprises the analysis of twenty novels published by South Australian women between 1859 and 1918. As the following chapters will show, the pen has its limitations, even when writers are not, like Supreme Court judges, in daily confrontation with those whose values differ markedly from their own. The marital values of novelists were subject to the same combination of internal inconsistency and external social factors which contributed to the undermining of judicial opposition to divorce. No attempt will be made here, however, to establish a causal link between the ideas expressed in the novels and social factors surrounding divorce. There has been no attempt to isolate a readership of the novels.

The absence of a causal link is not intended to deny the impact of divorce on the writers of the novels. If they met few (if any) divorced people socially, their works show that they were both aware of - and disturbed by - the effect that divorce was having upon the nature of marriage. Nor did their concern focus upon the leaderless masses who threatened Supreme Court judges with sleepless nights. Divorce is mentioned rarely in the fictional literature but when it is, it directly touches the lives of the main protagonists, who are all drawn from the upper echelons of British and Australian society. Nevertheless, the chief measure used by the novelists to confront the issues raised by the phenomenon of divorce was to ignore it. In this respect, their answer to the threat of divorce echoed that from the Bench: to rid society of divorce one must reinforce the position of marriage.

From this shared objective, it would be expected that their paths would diverge considerably, not the least because novelists can bend people and events at will, whereas judges, even Supreme Court ones, cannot. Surprisingly, though, despite the diversity of styles, plots and settings in the twenty novels to be

examined in the following three chapters, people and events are bent in a markedly similar way, not only to each other, but to the interpretations placed upon real-life events by members of the Supreme Court judiciary. These similarities, both within the fictional literature as a body and those between the fictional and non-fictional sources, warrant the appraisal of these works as a means of expressing opposition to divorce comparable to the opposition expressed in the courtroom. These similarities do not, however, furnish evidence of a cultural hegemony any more than does the divorce court. The marital values of the novelists shared with those of the judiciary the weaknesses which made them prey to the influence of the supposedly voiceless members of South Australian society.

Chapter Four

"A PEARL OF GREAT PRICE": THE DUTIFUL SPOUSE IN NINETEENTH CENTURY FICTION

The evolution of the novel as a literary form was in part due to the growth of a leisure class of women.¹ It is perhaps this female readership which quickly allowed women to gain the forefront of literary art, giving them also an outlet for intellectual expression long before the doors of schools and universities were open to them.² From the eighteenth century, women's part in the rise of the novel "contributed a great deal to women's entry into public discourse".³ Until recently, though, writing women have rarely attained the epithet "social critic", let alone the more grandiose "social theorist". Female essayists are few in English literary history but female novelists, by comparison, are legion. It is because this vast contribution to intellectual history is so frequently overlooked that the selection of novels with which the following three chapters is concerned is limited to works by women, and not because love and marriage are popularly considered to be "women's themes".

Duty in the nineteenth-century novel

I have attempted to establish that marital duty was regarded by the judiciary as a social good, but the connection between "marital duty", which suggests obligations to one other person, and "social good", which involves wider relationships, was never stated as a Supreme Court creed, even at the times when Sir Samuel Way was in full flight. Novelists, perhaps because their work so often

¹ I. Watt, *The rise of the novel: studies in Defoe, Richardson and Fielding* (London, 1960), pp.43-45.

² As Olive Shreiner observed in *Women and labour* (London, 1911), pp.158-159; quoted in S. Higgins, "'That Singular Anomaly, the Lady Novelist' in 1888", *Australia 1888*, Bulletin No.7 (April, 1981), p.72.

³ J. Spencer, *The rise of the woman novelist: from Aphra Behn to Jane Austen* (Oxford, 1986), p. xi.

comes directly from the heart, tend to speak more plainly than lawyers. Nine of the twenty novels to be examined were published in the nineteenth century. Conceptions of marital duty are posited, but the companionate marriage is also advocated. The ostensible conflict between duty and self-interest is resolved, not through the victory of one or the other, but through an integration of the two, so that the fulfilment of duty is expressed as part of the fulfilment of self.

The resolution of this conflict is perhaps most clearly expounded in the earliest novel of those under study, *Mr Hogarth's will*, by Catherine Helen Spence, published in 1865. In its opening pages, we are introduced to Francis Hogarth, the principal heir to the estate of the recently deceased Henry Hogarth. A stranger to others attending the reading of the will, notably Hogarth's nieces, Alice and Jane Melville, Francis is declared to be Hogarth's son by a woman with whom he had an "irregular" Scots marriage (of the kind referred to in Chapter One that proliferated throughout the British Isles before the passage of the 1753 Marriage Act). It is later revealed, however, that the product of this union had died shortly after birth. The Melville sisters had been raised by their uncle since he took them, on the death of their mother fifteen years earlier, from their "careless and unprincipled father".⁴ To them, however, Hogarth has left nothing but £12 per annum for the following three years, by which time, he had expected, they would be financially independent. The rest of his estate is bequeathed to Francis, who has earned his entitlement to the Hogarth estate more by his hard work than his status as heir at law.⁵ His difficult climb to the position of head clerk in a bank had been aided only by having his education paid for by an anonymous benefactor (Hogarth), and, on its completion, the same pittance that it is now the turn of the nieces to receive.⁶

While Alice Melville despairs at this sudden disinheritance, her sister Jane resolves to live up to her uncle's belief that women are as capable as men of earning

⁴ C. H. Spence, *Mr Hogarth's will* (London, 1865), Vol. 1, p.10.

⁵ *Ibid.*, Vol. I, pp.4-5.

⁶ *Ibid.*, Vol. I, pp.12-13.

their own living.⁷ In doing so, she shoulders responsibility not only for herself, but for the disconsolate Alice, promising to take care of her.⁸ The practical and responsible Jane has a kindred spirit in Francis, as illustrated in her first visit to his cottage:

Jane was agreeably struck with the comfort and neatness of everything about it. The furniture, without being costly, was good of its kind; the very excellent collection of books was methodically arranged in ample book-shelves, and carefully preserved by glass doors; the bright fire in the grate ... all gave an air of comfort and repose to a dwelling much humbler than she had been accustomed to live in.⁹

Francis shows equal admiration for Jane, which initially expresses itself in "strong affection ... to the one who treated him with so much delicacy of feeling and such generous confidence. It was like finding a long-lost sister".¹⁰

The changes wrought by the task which Mr Hogarth's will has imposed upon his nieces are often presented through the eyes of Francis Hogarth. After a period of separation, occasioned by the sisters' removal from their uncle's home, Francis observes that Alice's suffering has added an intense quality to her looks, "[b]ut it was to Jane that Francis' eyes turned affectionately and anxiously, and he grieved to see the traces of weariness, of care, and he even thought, of tears, on the face which to him was the most interesting in the world".¹¹ Jane's own thoughts about her suffering, however, are an important indication of her ability to equal the task. She tells Francis that impoverishment has given both of them strength and courage.¹² Jane's developing maturity is paralleled by Francis's growing admiration, so that Jane's is also a growth toward marriageability.

Volume II of *Mr Hogarth's will* opens with Francis's resolution to win Jane, but he realizes that to do so will entail more than the engagement of her heart:

⁷ *Ibid.*, Vol. I, p.10.

⁸ *Ibid.*, Vol. I, p.13.

⁹ *Ibid.*, Vol. I, pp.63-64.

¹⁰ *Ibid.*, Vol. I, p.65.

¹¹ *Ibid.*, Vol. I, pp.234-235.

¹² *Ibid.*, Vol. I, pp.236-237.

She was to be convinced that it was right that she should marry him, and then the whole of her affectionate and ardent nature would abandon itself to the pleasure of loving and being beloved. It was because she had no husband to occupy her heart that she dwelt so fondly on those abstractions of public duty and social progress, and he would convince her that out of an aggregate of happy homes a happy people is composed.¹³

In recognizing that the "affectionate and ardent" part of Jane is a little too overshadowed by her dutiful facets, Francis also acknowledges that the balance is in the other direction in himself, and that he owes his development, both personal and public, to his acquaintance with Jane:

Whether he rose or fell in the world; whether he gained social influence or lost it in the career that he had again to begin, her foot would be planted firmly beside his; her insight and sympathy would heighten every enjoyment and fortify him for every trial.¹⁴

If poverty brings out the best in Jane, it is Jane who brings out the best in Francis. While marriage with her would increase his happiness, an indirect benefit would fall to all those affected by Francis's actions in the public arena.

Francis is hampered in his object by a clause in the will which commands him to give up his inheritance if he marries one of his cousins. When Jane becomes aware of his affection for her, her decision to sacrifice personal happiness to public duty proves to be a stumbling block:

To see Francis in the British Parliament was a worthy ambition, and to give up such a probable career for an inglorious and obscure life with herself was not to be thought of. His wistful looks and earnest tones were to be treasured up in her heart for ever; but her own love for him was not of that imperious and unreasonable nature that she could not live without him.¹⁵

Even when it is revealed that Francis is not a blood relation, the circumstances of this knowledge (which are too tortuous for the purposes of this discussion) cannot be made known publicly, so that the choice for Francis remains that between wealth

¹³ *Ibid.*, Vol. II, p.2.

¹⁴ *Ibid.*, Vol. II, p.3.

¹⁵ *Ibid.*, Vol. II, p.187.

and happiness. In erring too much on the side of duty and the abnegation of self, Jane's mistake is to deny Francis the opportunity to prove his own worth by renouncing his wealth and position for her. But the contrast to Jane provided in *Mr Hogarth's will* in the character of Mrs Phillips shows that too much of a good thing is far preferable to none of it at all.

By making possible a successful marriage to a gentleman, Mrs Phillips's great beauty had saved her from the life of poverty that her vulgar background might otherwise have decreed. She is thoroughly spoiled by her kind and devoted husband, her abandonment to material comfort and her own petty interests most strikingly revealed on the death of one of her children from a bout of scarlatina. She is quite unable either to anticipate this outcome, or to feel deeply the loss of her child:

Everything had gone so prosperously with her since her marriage; she had known no sorrow, and little annoyance; she had always had her husband at her side to smooth everything for her, so that she really scarcely knew what the contingencies and trials of life were.¹⁶

It seems odd that Spence should describe Mrs Phillips as spoiled. We know from the outset that her origins are "low", and later we learn that throughout her childhood she experienced more than her fair share of "the contingencies and trials of life" - certainly far more than the Misses Melville had at that age. Once the full story of Mrs Phillips's miserable past becomes known, it is seen by the protagonists of *Mr Hogarth's will* as some extenuation of her selfishness. It is interesting, then, that her faults are attributed by Spence to her fortuitous marriage. Regardless of her rough ride before it, the presence of her husband "to smooth everything for her" has made her expect that events will always turn in her favour. There is a sense, then, in which marriage makes people. In light of the negative example of the Phillips marriage, the prospective union between Jane Melville and Francis Hogarth acquires a new urgency. Francis's capacity for doing great things

¹⁶ *Ibid.*, Vol. II, p.262.

depends upon a partnership with Jane. And Jane needs marriage to Francis in order to be able to give full reign to the passionate and tender part of herself which will enhance her dutiful nature.

Jane leaves for Australia with the Phillipses, with whom she is engaged as governess and manager of the household and lady-help respectively, accompanied by Alice, who is employed by the family as lady's maid. Francis throws himself into public life with greater alacrity than before, but he is still indebted to Jane for his ability to do so. The continued development of his character is presented in the context of his goal of marriage to her. The final stage of Francis's growth to maturity and marriageability is when he decides to forfeit his inheritance and follow Jane to Australia. When they meet there, his manner has a new forthrightness to it:

I have given up everything - the property, the seat in Parliament; and now that I have no career to relinquish, perhaps you will acknowledge that you love me?"

"Oh, Francis, I have always loved you! but I could have lived without you all my life if I had thought it for your good and your happiness".¹⁷

In the epilogue of *Mr Hogarth's will*, the reader visits the main protagonists some years after the events described in the rest of the novel have taken place. Alice and Jane have established themselves in Australia and are prosperous and happy with their respective spouses. These are the rewards of good marriage. Courtship is progress, not just toward happiness, but toward self-realization. For Jane and Francis, the realization of self is also the acknowledgement of one's place in the public arena. Both pursue a public life after marriage which is dedicated to social betterment, while their home is a scene of domestic tranquility presided over by Jane. The happiness and prosperity of the Phillipses, by contrast, has no beneficiaries beyond the bounds of the conjugal family. Phillips is portrayed as a kind and sensitive man, but blinded by his devotion to a wife whose self-

¹⁷ *Ibid.*, Vol. III, p.258.

centredness is pernicious: the death of their child is a dark cloud on their narrow horizon.

Spence explores similar themes in *The author's daughter*, published in 1868. As in *Mr Hogarth's will*, she avoids descent into Gothic romance by a slow development of the love-match between the two main characters, Amy Staunton and Allan Lindsay. Early in the novel, we learn that Amy has been deprived of the benefits of her high birth. Her mother, after a prudent but unhappy union which had the saving grace of being cut short by her husband's death, had married her true love, Gerald Staunton, against her family's wishes. Upon her own equally untimely death, Staunton had travelled to South Australia with Amy, their child. The novel's action begins shortly after their arrival there, when Staunton is thrown from a spring-cart and also dies.¹⁸ Left completely alone in the world, Amy is taken in by the family of Hugh Lindsay, a prosperous but humble Scots farmer. She takes on the position of tutor to two of the Lindsay girls and to Allan who, although very intelligent, has not been able to acquire a formal education because he is indispensable on his father's farm.¹⁹

In the Lindsay household, Amy is surrounded by models of marriage where mutual love is enhanced by the virtues of labour, frugality and generosity. The example set in this regard by Mr and Mrs Lindsay is reinforced by their daughter, Jessie. Allan Lindsay shares his sister's virtues, and ample indication is made of his suitability as a husband. Allan feels himself at a disadvantage with Amy because of her rank and education, but in the Australian bush, where he is in his element, he exhibits a strength which more than transcends social barriers. It establishes the superiority of the honest yeoman farmer over the Old World aristocracy and its colonial imitators. But Amy is not yet mature enough to appreciate what Allan has to offer her. When her half-brother in England learns that her father is dead and that Amy is languishing among her social inferiors in the

¹⁸ C. H. Spence, *The author's daughter*, (London, 1868), Vol. I, Chapters I-IV.

¹⁹ *Ibid.*, Vol. I, pp.125-136.

backblocks of Australia, he decides to put an end to the family quarrel and writes to her asking her to return to the family immediately.²⁰ Allan, who has fallen in love with Amy, is desolate and begs her to stay and marry him.²¹ Amy refuses, but promises to return to him in three years' time if "I see no one whom I like better, and feel that I miss you".²² Amy's reservation about Allan is that she does not love him enough because "I don't think you perfect, as mamma thought papa was".²³

Restored to her position in her mother's family, Amy befriends Lord Darlington, an elderly distant cousin who it had once been hoped would marry her mother. He endears himself to Amy with his warmth, spontaneity and the interest he takes in her Australian experiences and her parents, neither topic being allowed mention among other members of the family.²⁴ Amy regards the earl as a paternal figure and she is shocked when he proposes marriage.²⁵ With the support of the rest of the family, he steps up his campaign to win Amy, but in doing so reveals to her the selfishness of one whose social position has always enabled him to have his own way. Amy finally takes flight at the same time that Allan Lindsay arrives from Australia.²⁶ Allan renews his suit, to which Amy responds that "I have hungered for a love that would not sting me, for that calm, resolute, truthful nature of yours to depend on".²⁷

Amy's progress to the mature choice of a husband is marked by her refusal to bend to her family's view of marriage as a means of preserving the blood line and which is presented in *The author's daughter* as mercenary and incestuous. The decadence of aristocratic marriage is symbolized by the decline of Lord Darlington. When the young couple comes across him at the opera, Amy notices how ill he looks. Repulsed at the sight of him, "she crept closer to her husband with a sense

²⁰ *Ibid.*, Vol. II, pp.6-7.

²¹ *Ibid.*, Vol. II, p.11.

²² *Ibid.*, Vol. II, p.16.

²³ *Ibid.*

²⁴ *Ibid.*, Vol. II, pp.120-131.

²⁵ *Ibid.*, Vol. III, p.40.

²⁶ *Ibid.*, Vol. III, p.217.

²⁷ *Ibid.*, Vol. III, p.294.

of safety and protection in her heart".²⁸ Later that evening, the earl collapses with paralysis, his relentless pursuit of pleasure, particularly in the months since Amy's rejection of him, having finally caught up with him. Justice comes in the form of the impairment of his mental faculties wrought by the stroke, forcing the earl to spend the rest of his days in quiet obscurity.²⁹

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While the development of Amy Staunton's relationship with Allan Lindsay follows quite different lines to that of Jane Melville with Francis Hogarth, the theme of renunciation is common to both love stories. Amy is not misguided for refusing Allan in the first place; Spence's message is that truth in love will out once the readiness to recognise the steadfast love of a worthy spouse has been attained. Amy's renunciation of wealth and position for the sake of love is matched by Allan's patience in allowing time to bring Amy back to him. His endurance of the pain of separation with no guarantee that Amy will eventually choose him contrasts sharply with the earl's calculated attempts to make Amy feel almost obliged to marry him. The ideal spouse tempers self-gratification with self-denial.

The love of Amy Staunton for Allan Lindsay, however, has characteristics beyond the moral ones we first came across in *Mr Hogarth's will*. Although Amy makes an autonomous choice to renounce her aristocratic life, Allan appears at this crucial time from the other side of the world, undaunted by the obstacles placed in his path by Amy's family when he tries to reach her. He thus appears as Amy's rescuer, an image reinforced by that of Amy scuttling back to his side at the pathetic sight of Lord Darlington at the opera. This heroic aspect of Allan's personality is developed by Spence in her later novel, *Gathered in*. Before discussing it, however, let us examine another novel concerned with duty in the companionate

²⁸ *Ibid.*, Vol. III, p.307.

²⁹ *Ibid.*, Vol. III, pp.308-309.

marriage. Whereas Spence shows us the rewards of marriage, both personal and social, *The curate's friend*, by Mrs. J. C. Woods, published in 1867, is a cautionary tale, instilling the element of fear into freedom of choice. Her mistrust engenders a candour about sexual attraction, the most dangerous element of the companionate marriage, which Spence does not achieve in her discussion.

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The curate's friend opens with an assault on vanity. The main female protagonist, Nelly Llewellyn, is being admonished by her mother. "When you have done looking at yourself in the glass", she says, "perhaps you will go down and help Bridget to get tea".³⁰ In this opening sentence, Woods summarizes the conflict around which the novel turns and which is resolved in the conclusion of the story: that between sexuality, or passion, and duty. We are also introduced to the curate's friend of the title, John Davies, whose ungainly appearance provokes a mixture of contempt and pity in Nelly:

[H]is legs were, as usual, a great deal too far through his trousers, and his grey stockings and his shoes were a sight, mother. I do wish he would dress decently; for he is a good sort of body, as we used to say, and papa is so fond of him.³¹

The leavening of Nelly's scorn with an acknowledgment of John's good points, and her mention of her father's admiration for him, is significant. Mrs Llewellyn reproaches her daughter for her vanity, reminding her that she was not that way before she went to the French finishing school that her father scrimped and saved for. "'Dear old father', said the girl; and her beauty was wonderful, as a soft look of love stole over her face".³² The mention of her father brings out beauty of an entirely different quality to that of the mirror-gazing Nelly we first met. We

³⁰ Mrs J. C. Woods, *The curate's friend: a story* (London, 1867), p.1.

³¹ *Ibid.*, p.2.

³² *Ibid.*, p.3.

conclude, therefore, that her father's admiration is likely to be the true picture of John. And, if we are familiar with novels of this genre, we conclude that Nelly's failure to appreciate John's worth, for all the shortness of his trousers, will get her into trouble.

John is in love with Nelly, and in Woods's description of the nature of his feelings for her is the same combination of interested devotion and disinterested regard for her well-being which distinguishes the principal love relationships in the two Spence novels:

He loved her next to his God, as his all in this world or any other. And Nelly laughed at him, and liked him, and would have gone to him in any trouble or joy for sympathy or help, trusting him as she did her father; but she did not love him as Nelly thought she could love a husband. And so she played with the great earnest soul, and threw away from her a pearl of great price, for she had not yet learned its value.³³

John's love for Nelly is placed in relation to, but distinct from, his religious devotion, but Nelly's idea of love confuses the two:

Her loves of earth and of heaven were closely mingled in her nature....Nelly had read "Paradise Lost", and thought what a glorious triumph it would be for woman's love if that love could save some erring son of God, and stay his downward course, and bring him back to happiness. The fatal maxim, "Ask your own heart alone if it is right", prevented her going to her mother with every thought, and reposing in the confidence of that mother's love.³⁴

What appears at first glance to be an emotion similar in quality to John's is really self-absorbed, despite its overtones of self-sacrifice. Nelly's failure to distinguish between religious and sexual love, and her denigration of the importance of family ties turns human love into an exclusive, and therefore a selfish thing. Its irreconcilability with duties to others, particularly to family, is further demonstrated when we encounter the object of Nelly's love, the aristocrat Vivian Vaughan.

³³ *Ibid.*, p.10.

³⁴ *Ibid.*, p.12.

Nelly's family's antagonism to Vivian causes her to agree to keep their partnership a secret until he consent to her telling them, and they promise themselves to each other in a make-believe marriage one evening in the local church.³⁵ Nelly feels some remorse over this incident but Vivian's power over her has already rendered her incapable of making moral choices. "She felt like a bird fascinated by some stronger will."³⁶ Vivian's passion for Nelly, unlike John's, is not dignified either by reverence or concern for her welfare; it is purely and simply acquisitive.³⁷ Nelly's movements with Vivian are closely watched by John, not out of jealousy, but concern. In his role as Nelly's conscience he acquires an uncharacteristic mastery over Nelly:

He stood in the pathway to prevent her passing, and, somewhat against her will, took her hand and held it. "Hear me, Nelly", he said, with a strange and unwonted tone of command in his voice that surprised and subdued her. "I have been watching you, and I have often watched you before, with the same companion, in sorrow too great for anger".³⁸

John's absence of self-interest in his warning to Nelly is clear when he offers her his friendship in place of the love she will not accept, and tells her that "if the hours of sorrow come, remember you have a friend who will be more faithful to you than a brother".³⁹

Woods seems to be suggesting that romantic love and its attendant sexual passion is essentially base, that "good" marriages are made with sexually uninteresting but worthy partners such as John Davies. However, her message is that romantic love alone is not the foundation upon which to build such a relationship. In *The curate's friend*, she embraces a conception of sexuality as good when it is untainted by the selfish motives which drive Vivian Vaughan to induce Nelly to elope with him.⁴⁰ After the elopement, John reflects on his early years

³⁵ *Ibid.*, p.21.

³⁶ *Ibid.*, p.23.

³⁷ *Ibid.*, pp.25-26.

³⁸ *Ibid.*, p.27.

³⁹ *Ibid.*, p.28.

⁴⁰ *Ibid.*, pp.22-25.

with Nelly:

It was he who taught her to kiss prettily and pout her lips and walk like Lady Vaughan. And he was perfectly charmed when he saw the success of the little mimic....Then came the return from school, and the almost idolizing admiration her beauty inspired.⁴¹

John, as the architect of Nelly's coquetry, "sanctions" her sexual attractiveness with his goodness in a similar way that passion is balanced by duty in the nineteenth century novel. The absence of such a balance results in the collapse of social relationships, symbolized in the death of Nelly's beloved father of a broken heart shortly after she elopes with Vivian. Moreover, if John is, as they say, no oil painting, he is not ugly, as we learn at the beginning of the novel. "Nature had intended to make a fine handsome fellow of him; but his Welsh tailor had done his best to put that notion out of people's heads....but when John Davies smiled, you knew you must love and trust him".⁴² Nelly's departure prompts John to improve his appearance. After deciding to pursue the runaway couple, he decks himself out in a new wardrobe, which highlights his natural good looks and reflects the beauty within:

John was a different man now from the slovenly student we first met at the Curate's cottage. He was one of nature's gentlemen, and only wanted the refining influence of association to convince him of the advantage of beautifying as well as ennobling the position we have, not repining and waiting for that which is above us or beyond us.⁴³

John has learned to advertise himself so that he will attract someone who will also appreciate his qualities of self-sacrifice and devotion to duty. He is vindicated when he meets Miss Kate Digby on board ship bound for Australia.⁴⁴

Our first impression of Kate is of one "evidently young, but...so wrapped up in shawls and veiled, that it was impossible to see what she was like".⁴⁵ The

⁴¹ *Ibid.*, pp.90-91.

⁴² *Ibid.*, p.8.

⁴³ *Ibid.*, pp.148-149.

⁴⁴ *Ibid.*, pp.169-170.

⁴⁵ *Ibid.*, p.169.

veiled figure, providing stark contrast with the image of brazen vanity which Nelly Llewellyn first presents, symbolizes the modesty which Woods sees as the essential counterpoise to sexual attractiveness. From the outset she invites the protectiveness in John which had been spurned by Nelly:

John drew the little hand through his arm, which trembled sadly when he touched it....When she looked up and raised her veil to thank him for his care, he saw a young face with every feature swollen in it; for she had been crying bitterly all day, - a good honest, hearty cry, that would relieve her child-heart, and enable her to rise above her sorrows, and turn to life's work with a will when it was over. He also saw heavy coils of golden-coloured hair falling neglected on a little white neck, and great dark hazel eyes, with very long eyelashes.⁴⁶

Kate's attraction lies not just in her helplessness, but in her strength to overcome it and "turn to life's work with a will". The combination of strength of character and the need for love recalls Spence, as does the conclusion of a happy and prosperous life in South Australia, in which place a chastened Nelly surfaces, alone in the world except for a son who bears a strong resemblance to his profligate father. Having been abandoned by Vivian, Nelly has learned to follow the path of duty, engaged as a schoolmistress and dividing her time between work and the raising of her son. In place of the fashionable clothes of which she had been so fond is a simple costume resembling that of a quaker.⁴⁷ Nelly's rewards for learning her lesson are a reunion with her mother and the staunch friendship of John and Kate Davies. But they are far outweighed by the losses - Nelly will never know the joys of married happiness. She is even denied the fruit of her failed marriage who, as the heir to the Vaughan estate, returns to Wales to be educated in a manner befitting his social position.⁴⁸

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⁴⁶ *Ibid.*, p.171.

⁴⁷ *Ibid.*, pp.245-252.

⁴⁸ *Ibid.*, pp.258-261.

Both Spence and Woods share a mistrust of the aristocracy, which is represented in their works as a decadent and moribund class. In rejecting marriage based upon considerations of property, they claim that love between husband and wife is a necessary, if not a sufficient, part of good marriage. These themes are explored in *The Medhursts of Mindala* by Mrs John Immyns Waterhouse, where again, duty to family is accorded paramount importance. Although *The Medhursts of Mindala* was published thirty years after *The curate's friend*, its most appropriate place in the discussion is with the novels of the 1860s, because in some respects it takes up where *The curate's friend* left off.

We can be forgiven for thinking at the beginning of *The Medhursts of Mindala* that the characters of Edward Laurence and Ruth Medhurst are the main protagonists of the novel, due to the important tasks they are set. Edward Laurence, by virtue of an inheritance he acquires because the rightful heir is believed dead, uses his wealth to emigrate to Australia where, before investing in his own property, he hardens himself on the rigours of life as a station hand.⁴⁹ When his entitlement to the inheritance falls through, so does his prospective marriage to the daughter of the station, but Laurence rides away from this two-fold loss with a philosophic shrug of the shoulders:

"It was well for Annie and for me", he thought, "that I should lose this money. A man is what he shows himself to be under a test. I have come out badly enough under the money test. It is to be hoped that a little wholesome poverty may bring out better stuff."⁵⁰

Circumstance brings Laurence to Mindala, by which time the reader has become acquainted with how the Medhurst family has come to be there, and with the trials of Ruth Medhurst.

The eldest Medhurst daughter is an aspiring poet who snatches time to write during lulls in the "almost ceaseless" household work at the family home in Broken

⁴⁹ Mrs J. I. Waterhouse, *The Medhursts of Mindala: the story of the development of a soul* (London, 1897), pp. 1-3.

⁵⁰ *Ibid.*, p.9.

Hill.⁵¹ When her father, a medical practitioner, suggests that they buy the remote grazing-farm of Mindala, Ruth warmly supports the idea because it offers the opportunity for her mother to recover her health, which has for some time suffered under a nameless but debilitating disease.⁵² News of the move arrives at the same time as a letter from Miss Fairchild, her godmother in England, offering to bring Ruth there and provide her with the financial and literary resources necessary for the furthering of her literary career.⁵³ Ruth's letter in reply declines the offer:

I may not go to you and enjoy the future which you have planned, for I cannot leave my mother....The struggle against my own selfishness is not yet over, but I know I shall have overcome it before you read what I am now writing.⁵⁴

Because fitness for marriage and devotion to duty go hand in hand, so do Edward Laurence and Ruth Medhurst. They are templates of the virtues to be sought in husband and wife.

In the same chapter that we are introduced to Ruth, we also meet her younger sisters Lily, a minor but important character, and Eleanor. Eleanor develops into a beautiful young woman whose principal admirer is Roger Tennant. Eleanor's disdain for the everyday tasks around which Ruth's life revolves betrays her selfishness, and therefore her unfitness. Tennant is equally unfit because he also has a selfish streak. His passion for Eleanor causes him to extract a promise of marriage from her without considering the wishes of her parents, who think she is not ready to make such a promise.⁵⁵ Tennant makes his demand upon Eleanor with a "masterful tone", the thought of yielding to which Eleanor finds "delicious".⁵⁶ And Eleanor yields, despite a warning voice inside herself:

In vain she tried to remember why she had feared to pledge herself to him.

⁵¹ *Ibid.*, p.14.

⁵² *Ibid.*, pp.15-17.

⁵³ *Ibid.*, pp.18-20.

⁵⁴ *Ibid.*, p.23.

⁵⁵ *Ibid.*, pp.69-70.

⁵⁶ *Ibid.*, p.71.

An hour later she was confessing, with sobs and tears of mingled excitement, shame and happiness, the history of the evening to her mother, kneeling at her feet.⁵⁷

The juxtaposition of parental wisdom with youthful impetuosity shows a dangerous usurpation of familial authority by the romantic tie. Eleanor proves herself to be doubly misguided in the events which follow. The Medhurst parents' wish to delay, rather than obstruct, Eleanor's progress from childhood to marriage underlines Waterhouse's belief that romantic love has its place in the social framework.

As was the case in *The curate's friend*, the lessons of marital duty are illustrated in a confrontation with the values of a hedonistic aristocracy, represented in the character of Sir George Wilding, the heir to the estate which Edward Laurence had for a time thought was his. On his arrival on the property as part of a shooting party, Wilding promptly establishes himself as the farcical aristocratic buffoon and equally promptly falls in love with Eleanor. Her contempt for him is moderated by an appreciation of what she would gain both materially and socially by marrying him. When she and Tennant had been separated for a few months, they had agreed to keep diaries which they would exchange when next they met.⁵⁸ In hers, Eleanor candidly documents her quandary over the choice between him and Wilding:

I have asked myself again and again whether, if I had seen this titled donkey first, I could not have harnessed prudence with inclination to drag my car of life....I would rather be Lady Wilding than the wife of a plain Roger Tennant, because I feel sure that love is not everything, even to women. What I want to ascertain is, Does this one small item among the many conditions of life outweigh all the others?⁵⁹

The answer from Waterhouse is an emphatic "No!" When Eleanor finally opts for love and Tennant, she finds a further obstacle to her happiness in the prospect of sharing the matrimonial home with Tennant's frail mother, with whom she cannot

⁵⁷ *Ibid.*, p.72.

⁵⁸ *Ibid.*, p.74.

⁵⁹ *Ibid.*, p.117.

agree, particularly on the subject of a wife's duty.⁶⁰

Waterhouse does not entirely share Mrs Tennant's belief in wifely subservience, as shown by the example of a marriage of equals in the relationship between Ruth and Laurence. Ruth tells him

that I will not let anything come between me and the art which I believe it is my duty to study."

"You must think that I know very little of the feeling of an artist, if you think that I should feel any paltry jealousy of that sort."

"But you would not be satisfied with what might seem to you the second place?"

"There could be no question of first or second place. My aim would be to identify myself with your hopes and aspirations."⁶¹

Waterhouse's message is that wifely duty and personal ambition can be reconciled if ambition lies in an area worthy of respect. Eleanor's material greed and jealousy of her future mother-in-law clearly are not, whereas Ruth feels it is her "duty" to pursue her literary career. In her stubborn refusal to accommodate Mrs Tennant's dependence on her son, Eleanor fails to see that if she makes the right choice of a husband, the fulfilment of her own needs will not be ignored and she refuses to marry Tennant unless he separate from his mother.⁶² When he declines to do so despite the pain that losing Eleanor will cause, he reaffirms his worth as a husband for the woman who will deserve him.

The consequences of Eleanor's actions also reverberate in the Medhurst family. Her preoccupation with her own concerns means that she does not notice her mother's failing health, which had revived for a time in the healthy environment of Mindala.⁶³ Her father tries in vain to dissuade Eleanor from marrying Wilding after her rejection of Tennant, and promptly collapses from a stroke.⁶⁴ In her remorseful hope that her father will survive, Eleanor is still stubborn, declaring that if her father wakens from his coma she will reconsider her decision, and telling a

⁶⁰ *Ibid.*, p.153.

⁶¹ *Ibid.*, p.100.

⁶² *Ibid.*, p.164.

⁶³ *Ibid.*, p.173.

⁶⁴ *Ibid.*, pp. 176-177.

thunderstruck Laurence that "I should find no comfort in tardy obedience".⁶⁵ When Eleanor eventually cancels her wedding, she does not do so out of filial duty, but in response to news of the death of Mrs Tennant.⁶⁶

It is news of the death of her own mother, however, which marks the turning point in Eleanor's destructive course. Three years after her refusal to marry him, Tennant, unable to forget her, returns to Mindala.⁶⁷ Although Eleanor has in the meantime zealously applied herself to the care of her father, duty crushes her, not because she is still unwilling to perform it, but because the errors of her past have taken their toll. Tennant soon realizes that he is no longer in love with Eleanor, and that his affections have transferred to her sister, Lily, who has appeared throughout the novel as a moral force and, as Tennant had once observed to Eleanor, "a lovely miniature of your mother".⁶⁸ When Eleanor becomes aware that this has happened, her renunciation of her claim on Tennant mirrors Ruth's renunciation of her art at the beginning of *The Medhursts of Mindala*. But where Ruth's option for the path of duty has rewarded her with the eventual happiness of self-expression, both emotional and creative, through marriage, Eleanor's renunciation is her punishment for putting self before duty. Like Nelly Llewellyn in *The curate's friend*, Eleanor ends the story alone, deprived by the death of her father of even the comfort of the duty she has learned, too late, to perform.

The growth of the hero

If devotion to duty in marriage is for the common weal, neglect of it brings about the collapse of the social structure, disclosed in the readiness with which parental figures in the Woods and Waterhouse novels give up the ghost when their offspring are intractable. The negative examples provided in *The curate's friend* and *The Medhursts of Mindala* emanate from a position which is essentially similar

⁶⁵ *Ibid.*, p.181.

⁶⁶ *Ibid.*, pp.196-197.

⁶⁷ *Ibid.*, pp.217-219.

⁶⁸ *Ibid.*, p.56.

to Spence's more optimistic view of the companionate marriage as a means of developing the self as an individual and as a social being. Spence, however, turns the discussion of love and duty in a new direction in *Gathered in*, which first appeared in serial form in the *Adelaide Observer* in 1881 and 1882.

When Kenneth Oswald first meets Edith Gray, he is struck by her "commanding" appearance,⁶⁹ which reflects her personality. Her compelling presence betrays a tendency toward bossiness, her "somewhat large" mouth usually opening to deliver judgments at which she arrives too hastily. But she is drawn as a character to whom Spence is sympathetic, and with greater depth than the uniformly "good" characters in the novels examined so far. Nor is her development portrayed in the same manner as Eleanor Medhurst's roller-coaster ride from pride to humility. Edith's demeanour toward Kenneth Oswald at the beginning of their acquaintance is governed by a mistake on her part as to where his affections lie. Thinking that he has a passion for her friend, Sybil Ellerton, who is married, albeit unhappily, she takes it upon herself to counsel Kenneth. In her well-meant patronage of him, she "felt herself years older than the young man, although she was really his senior by only a month".⁷⁰

Edith Gray's virtues more than compensate for her shortcomings, particularly her sense of duty in managing the household of her widowed father. However, her weaknesses receive more attention than her strengths in *Gathered in*. The twists of plot which leave Kenneth wrongly accused of murder cause Edith to see him as

growing rapidly older in her eyes, and now when he was in prison under unjust suspicion and in some danger of an unjust sentence, she felt herself younger and more inexperienced than he was. Life is not measured by days and years alone, but by events, by emotions, and by opportunities.⁷¹

⁶⁹ C. H. Spence, *Gathered in: a novel*. With an introduction by B. L. Waters and G. A. Wilkes (Sydney, 1977 - originally pub. in the *Adelaide Observer*, 3 Sept., 1881 - 18 March, 1882), p.84.

⁷⁰ *Ibid.*, p.126.

⁷¹ *Ibid.*, p.243.

This change in Edith's thinking is essential for the development of the love relationship between her and Kenneth. Kenneth is not just elevated to the position of equal in Edith's regard; he becomes her superior in matters in which she had always felt herself to have the advantage. Although Spence sees the relationship between men and women in general to be one of equals, Edith's change in attitude towards Kenneth is expressed in terms of a relinquishing of power, of transforming the sense of her own superiority into one of her inferiority. Edith begins to see Kenneth with new eyes - the eyes of a lover. When they meet for the first time after his acquittal, she is "overpowered for a moment by the expression of Kenneth's face; the eyes, the mouth, the whole countenance were full of peculiar, of personal, of intense regard". Kenneth's power over her is matched by an unwonted helplessness on her own part.⁷²

Edith must make further changes in herself before she and Kenneth can be united. An irregular Scots marriage is again the focus of the action, in this instance one between Kenneth's mother, Isabel Oswald and Norman McDiarmid, a Scots gentleman whose family had persuaded Isabel to free him to marry well and so save their dwindling fortune.⁷³ When Kenneth declares his love for Edith, he hopes that she will overlook his illegitimacy, but she will not return his love wholeheartedly until Kenneth has vindicated his mother, who died alone and in poverty, by naming her publicly as McDiarmid's true wife.⁷⁴ Kenneth is thus torn between his love for Edith and loyalty to his father. To do Edith's will would be to indict his father as dishonourable and his subsequent marriage as illegitimate. Kenneth is determined, however, to resolve the dilemma according to his own conscience which, he tells Edith, "I must not disobey for any man or woman alive, although that woman is Edith Gray".⁷⁵ While the lovers cling to their respective positions, despite the risk of losing the other, Kenneth's tenacity is depicted as principled. Edith's position,

⁷² *Ibid.*, p.253.

⁷³ *Ibid.*, pp.308-309.

⁷⁴ *Ibid.*, p.283.

⁷⁵ *Ibid.*, p.284.

based on the mistaken belief that Isabel Oswald felt that she had a legitimate claim on McDiarmid, appears as gratuitous stubbornness.

The principle upon which Kenneth and Edith disagree is gradually subsumed in the escalating battle of wills between them, so that when Edith begins to give ground, it is not because she has been persuaded by argument:

In her heart she felt her lover's words, "You shall love me as Kenneth Oswald". She knew they had come true, that she loved him in spite of his obstinacy, nay partly because of it. Everybody at home...had yielded to her every wish, and here was a man who would not, though he might lose her for it.⁷⁶

Kenneth's aim is not just to convince her of his point of view, but to teach her "to be as generous for him as she could be for herself".⁷⁷ Accordingly, when she is eventually convinced of Kenneth's illegitimacy, she feels "ashamed of herself for her imperviousness and her obstinacy".⁷⁸ In her contrition, Edith's image of the wronged Isabel Oswald takes on a different hue:

Edith was utterly subdued. Her idea of justice to Kenneth's mother, even if it could be carried out, had last night appeared to be cruel, but this morning it seemed almost ignoble. No honours on earth...could exalt that angelic spirit which had loved so well, which had repented so sincerely, which had been, as it were, bathed in the purifying waters of self-renunciation, and had probably shown herself a better daughter and more tender mother than if no such whirl of passion had passed over her.⁷⁹

Spence's lesson is more compromising than Waterhouse's. Edith is headstrong, but also strong, a quality to be admired in a wife. Even her stubbornness is born out of strong principle and compassion; there is no doubt in the reader's mind that Kenneth has chosen wisely when he slips the ring on her "somewhat strong hand".⁸⁰ In preparing herself for marriage, Edith arrives at a new appreciation of sacrifice through the story of Isabel Oswald but also, more

⁷⁶ *Ibid.*, p.287.

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*, p.306.

⁷⁹ *Ibid.*, p.309.

⁸⁰ *Ibid.*, p.313.

importantly, through the nature of Kenneth's love. She is "overwhelmed" by Kenneth's "overpowering look", and in the final chapter, entitled "Unconditional Surrender", this is just what she does.

In Kenneth Oswald, we see the development of the heroic theme introduced in *The author's daughter* and incorporated into Spence's view that marriage makes people. The indirect power of personal worth to bring out the best in the loved one is transposed into a direct power which can bend the will of the beloved. In two novels published toward the end of the nineteenth century, both by Mrs Waterhouse, we encounter similar personal qualities combined with the familiar ones of duty and self-sacrifice. The first is unusual because the setting is not domestic. In *Bowled out*, adventures with bushrangers are interspersed with love-matches which develop the themes introduced in *Gathered in*. The second, *For Marjory's sake*, anticipates *The Medhursts of Mindala* in many ways, although the message that happiness is attained through self-sacrifice is not as strong.

*

At the opening of *Bowled out*, George Dalmaine is helping a stranger, who is later revealed to be Imogen Ormond, find her way in the London fog. Dalmaine is thwarted in his attempts to become acquainted with Imogen, and his destiny takes him to South Australia, hunting down a bushranger, Joe Rogers, and still haunted by Imogen's voice.⁸¹ We also meet Phoebe Alford, who arrives in South Australia with her mother, but without her father, who a careless Fate had allowed to be washed overboard during the voyage.⁸² Shortly after their arrival, Mrs Alford joins her husband in the hereafter, leaving Phoebe alone in a strange country, where she befriends the Ormonds, who have also migrated to South Australia.⁸³ The Ormond

⁸¹ Mrs J. I. Waterhouse, *Bowled out: a story of bushranging in South Australia* (Adelaide, 1891), pp.1-14.

⁸² *Ibid.*, p.35.

⁸³ *Ibid.*, pp.41-54.

family skeleton is that Joc Rogers is really Errington Ormond, who is hiding out on his family's property. Errington, who falls in love upon first seeing Phoebe, bears a striking resemblance to his brother, Frank, who also falls in love with Phoebe.

The allegorical message of *Bowled out* - the story is about love and marriage rather than derring-do - is conveyed by the device of the twin brothers. Frank and Errington Ormond are not so much opposites as reciprocals. Throughout the novel, Phoebe mistakes Errington for Frank, even though she shrinks from the boldness of the Errington persona. When he tells her he loves her, she wonders "why the passionate declaration of his love had not stirred her heart to any response".⁸⁴ And when he kidnaps her under false pretences she tells him she thought she loved him but now she only feels sorry for him.⁸⁵ The real Frank, who had followed Phoebe and his brother, runs to rescue Phoebe when he hears her calling the bushranger "Frank" and realizes her mistake.⁸⁶ His heroics are rather redundant because as soon as Errington had realized that Phoebe loved his brother, he had decided to give himself up.⁸⁷ The death of the bad half of the Frank-Errington dyad is marked by the union of the virtuous half with Phoebe.

The story of Errington Ormond is one of wasted potential for good. After his death at the end of the novel we learn that his wrongdoing was the product of a spoiled childhood, during which he continually stood in the light of his good brother, Frank. He joined the army, fell in with a "wild set", struck an officer and evaded punishment on a regiment horse, for which he was transported. Frank's promising future as a lawyer had been forfeited when the family followed the erring Errington to Australia.⁸⁸ Frank's sacrifice could not atone for his brother's wrongdoing, however, and he had continued his destructive course in Australia, almost against his own will. At one point he reflects upon his actions with remorse, recalling in particular the suffering of his mother. More importantly, he thinks of

⁸⁴ *Ibid.*, p.163.

⁸⁵ *Ibid.*, p.165.

⁸⁶ *Ibid.*, p.182.

⁸⁷ *Ibid.*, p.168.

⁸⁸ *Ibid.*, p.177.

Phoebe as "one beloved being" for whom, although he does not know her, "he could have made sacrifices".⁸⁹ Redemption can only come through the guiding influence of Phoebe - if only it were not too late. The possibility that Phoebe could have averted his wrongdoing if she had come into his life sooner gives her a more active role in male-female relationships than the female protagonists of the other novels discussed. Waterhouse says not only that good wives bring out the best in men, but that they can also subdue the worst in them.

Heroism takes two forms in *Bowled out*. The bravery and strength of character evident on the right side of the law have their counterparts on the wrong. The fact that Ormond and some of his fellow bushrangers live by a moral code which is in many ways similar to that of respectable society invokes the sympathy of the reader for them. Waterhouse posits heroism as a distinct value which has no intrinsic moral value of its own, and is therefore dangerous and destructive if not aligned with the moral value of self-sacrifice to family and society. She also demonstrates how this heroic dimension to human behaviour occurs in female as well as male characters. It is male heroism, however, which is featured in *For Marjory's sake*, published in 1893, two years after *Bowled out*.

In *For Marjory's sake*, Sally Barnes is Eleanor Medhurst's progenitor, but she is spared Eleanor's fate by masculine intervention. Sally and her elder sister Marjory, orphaned at an early age, live on the farm of their neighbours, the Trevors, until their older brother resumes the family property and bids his sisters come to manage the house and dairy.⁹⁰ Sally and Marjory return to the Trevors' farm for a party held to welcome a new arrival in the neighbourhood, a Mr Macguire, whose status as an object of ridicule is reinforced by his unrequited love for Sally. Before the party, Sally crawls up into the loft and falls asleep, where Captain Hal Webster stumbles upon her, mistaking her at first for a child.⁹¹ He is

⁸⁹ *Ibid.*, p.116.

⁹⁰ Mrs J. I. Waterhouse, *For Marjory's sake: a story of South Australian country life* (London, [1893]), pp.12-13.

⁹¹ *Ibid.*, p.17.

charmed by her innocent beauty but is disappointed when he first meets her awake. She is trying to persuade Macguire to wear a paper fool's cap in return for a rosebud. When he declines, she surreptitiously pins it onto his coat-tail, an action of which only the onlooking Webster is aware:

At the same moment she felt the magnetism of his glance, and looking up, she met fully the look of sorrowful disgust he fixed upon her. The spoiled and flattered girl received a severe shock.... She passed in that moment from a child to a woman.⁹²

Webster's gaze works a similar effect on Sally later that same evening when she rudely declines his request for a dance.⁹³ By the time he leaves the district on the following day, Sally has re-evaluated her whole manner of dealing with people, particularly Macguire. Not a word has passed between her and the man who caused these changes.⁹⁴

When Sally and Webster meet again, he wonders "whether this slender, dignified girl with the preoccupied expression could be the tomboy he had seen playing the rudest practical joke one short year ago".⁹⁵ Webster's stare becomes the motif for the relationship which develops between them:

There was still some pain mingling with the pleasure of this new intoxication, a pain that arose from her instinctive desire to resist an unknown power, but the magnetism flowing from Webster's eyes into hers, when she dared to let them meet, was fast subduing her will to remain outside the inmost circle of the new enchantment.⁹⁶

Webster's power is of quite a different quality from that shown by Roger Tennant when he demands that Eleanor Medhurst marry him. It is neither impetuous nor misguided, but has a confidence, which Sally intuitively feels, that Webster knows

⁹² *Ibid.*, pp.22-23.

⁹³ *Ibid.*, p.29.

⁹⁴ In her perceptive analysis of women's romances, Barbara Creed notes the importance of the hero's eyes in modern 'Mills & Boon' novels. B. Creed, "The Women's Romance as Sexual Fantasy: 'Mills & Boon', in Women and Labour Publications Collective (eds.), *All her labours* (Sydney, 1984), Vol. 2: "Embroidering the Framework", p.51.

⁹⁵ Waterhouse, *For Marjory's sake*, pp.74-75.

⁹⁶ *Ibid.*, pp.108-109.

what is good for her. This has already been seen in his "creation" of Sally's mature self.

The return to duty

The introduction of the hero into nineteenth century South Australian novels reduced the element of personal responsibility for doing one's duty which was emphasized in the novels of the 1860s, particularly *Mr Hogarth's will* and *The curate's friend*. Heroic power, however, carried with it a dangerous potential, as we saw in *Bowled out*. Personal responsibility to carry out duty in marriage was to some extent replaced by the need to be able to distinguish between the love of a moral hero and that of an immoral one. It is as if Mrs Waterhouse wanted to warn her readers of the enormity of making the wrong choice that she published the tragedy of Eleanor Medhurst six years after Sally Barnes found happiness. She is ambivalent, however. The three main characters of *For Marjory's sake* have their counterparts in *The Medhursts of Mindala*: the giddy girl, the squire who makes a fool of himself over her and the one man who can offer her true happiness. Eleanor Medhurst is held responsible for her own downfall and, to an extent, for the misery of Sir George Wilding. Sally Barnes, however, escapes a similar fate through the help of a hero who can force change upon her. The burden of *The Medhursts of Mindala* is a nagging descant: "If only Eleanor had met a Hal Webster!"

The introduction of the heroic element presented a dilemma. Novelists increasingly acknowledged the appeal - indeed, the importance - of sexual passion in a true love match. But how was a red-blooded Australian girl to know if this was "the real thing"? It was perhaps an appreciation of this problem which led Catherine Martin to choose the fate she did for just such *An Australian girl*, and that of an Australian boy in *The silent sea*, first published in 1890 and 1892 respectively. In both of these novels, Martin attempts to reconcile the romantic idea that one loves truly and deeply only once in one's life with the belief that such love is only morally

acceptable when it is in harmony with duty. Thus Martin harks back to the novels of the 1860s and the primacy of personal responsibility.

An Australian girl opens with some heavy-handed repartee between a disingenuous Stella Courtland and a squatter, Ted Ritchie, whom she far outshines in wit and intelligence. When Ted, who is described as "morally lacking in force of will",⁹⁷ pursues his favourite topic of how Stella once agreed to marry him and then changed her mind, he reminds her of his very comfortable financial position. Stella rejects the economic conception of marriage, and lists the elements of a good union as "[a] little wisdom, a little love, a little sympathy, and power of companionship - everything that we ought to have mutually".⁹⁸ Although Stella has a very clear idea about what constitutes good marriage, she doubts, with all the *Weltschmerz* that her sheltered twenty-three years can muster, that she will find such a thing, and still toys with the idea of marrying Ted.⁹⁹ Her somewhat jaded detachment is accentuated by mention of an unfortunate friend, Cicely Mowbray, who had married for love but discovered she had married a drunkard. After three years of marriage Cicely had run away with another man. Stella excuses Cicely's behaviour which, while it has put her beyond the pale of respectable society, is "less immoral than staying with the man she married".¹⁰⁰ Stella's bitter comments form the prelude to Martin's account of Stella's first meeting with a stranger later named as Dr Anselm Langdale, described by her sister, Alice, in mock-heroic terms as "Prince Charming".¹⁰¹ As the sisters discuss love and marriage further, Alice observes that Stella was "from childhood the victim of the ideal".¹⁰² Stella's cynicism, then, is a veil drawn over her high expectations, and is born of innocence, not experience.

⁹⁷ C. E. M. Martin, *An Australian girl* (London, 1891 - first published 1890), p.10.

⁹⁸ *Ibid.*, p.6.

⁹⁹ *Ibid.*, p.23.

¹⁰⁰ *Ibid.*, p.13.

¹⁰¹ *Ibid.*, p.35.

¹⁰² *Ibid.*, p.37.

When Stella re-encounters Dr Langdale, their fairytale first meeting evolves into a friendship fed on witty conversations and intellectual discussions. Although his wealth is inherited, Anselm is an excellent physician who is also interested in writing and in social problems.¹⁰³ He has a "muscular, well-formed figure" and a "strikingly noble" brow.¹⁰⁴ He has the attributes both of the responsible, dutiful citizen and the desirable love object. Stella's eventual movement from disbelief in love to a storm of feeling, which no other lover in the world could possibly have known, therefore comes as no surprise. Although Stella's fever has a touch of the comical about it when contrasted with her earlier hard-nosed pronouncements, this is no ordinary love, because it is grounded in intellectual sympathy and mutual understanding. Some other changes take place in Stella. Despite her independent nature, she assumes the stature of a child in comparison to the adult Anselm; she feels "safe" in his arms, where "the billows of life's bitter waters could not reach or affright her".¹⁰⁵ Langdale has had a prior attachment in his life, and although he is still married to this woman, she constitutes no threat to Stella because he has assured Stella that he loves her "as a man can love but once in his life!"¹⁰⁶ After three years of marriage they had separated but he "shrank" from the public exposure of divorce when his wife later committed adultery.¹⁰⁷ News of her death now offers a cleaner release from the marriage tie.

What begins as a lively and interesting novel of manners slides into melodrama as one misfortune after another seals Stella's fate. Anselm is called away to Europe. His explanatory letter is intercepted by the malign Laurette Tareling, who wants Stella to marry Ted. A substituted version of it thus reaches Stella, informing her that Anselm's wife is still alive, and that he is returning to her.¹⁰⁸ Although Stella's belief in the veracity of the letter is in a sense

¹⁰³ *Ibid.*, pp.178-180.

¹⁰⁴ *Ibid.*, p.189.

¹⁰⁵ *Ibid.*, p.270.

¹⁰⁶ *Ibid.*, p.258.

¹⁰⁷ *Ibid.*, p.296.

¹⁰⁸ *Ibid.*, pp.299-302.

understandable, it is a mistake which indicates her incomplete trust in the relationship; Martin's vision is not of an external force shaping the destiny of an antlike humanity. Stella's lack of faith is further betrayed in the fact that her present heartbreak makes her doubt Anselm's sincerity and question the validity of her feelings for him:

[T]he thought that he should love this woman was even more torturing than the knowledge that she was his wife. Should not this in itself serve to loosen the dominion of this love - this passion that had insidiously rooted itself in every fibre of her nature?¹⁰⁹

Her final act of betrayal is in her speedy marriage to Ted, consoling herself that "it was less humiliating to marry a man without loving him than to love one already married".¹¹⁰

The irony of Stella's judgment of Cicely Mowbray's failed marriage is fully realized when Stella discovers after her marriage that Ted is also a drunkard.¹¹¹ Unlike Cicely, Stella feels bound by the marriage tie, although she feels justified in withdrawing from sexual relations with Ted until his problem is cured.¹¹² Stella's plight is that in marrying Ted, she embraces all the wifely duty that this entails, but without the bond of love which makes marital duty a source of happiness. When she meets Anselm in London while travelling with her husband and discovers the truth, and that he is now free to marry her, Stella swings like a pendulum between her conscience and her heart.¹¹³ But Ted is not the black villain that Cicely Mowbray's husband is painted. Nor is Stella Cicely Mowbray; she cannot ignore her responsibility to the marriage tie, which is no less strong for her having married where she did not love. The moment of truth comes in a London church where Stella sees her girlhood hero, Cardinal Newman:

¹⁰⁹ *Ibid.*, p.310.

¹¹⁰ *Ibid.*, p.326.

¹¹¹ *Ibid.*, p.364.

¹¹² *Ibid.*, p.372.

¹¹³ *Ibid.*, p.449.

Oh, how cruelly she had failed in that care for the better nature of the man to whom she had promised her whole life! how completely she had fallen away from that lofty devotion to duty which is the truest, clearest note of womanhood!¹¹⁴

For Catherine Martin, marital happiness is only possible where love is involved, but her conclusion in *An Australian girl* is that if Stella were to do other than return to Ted she would denigrate the quality of her love for Anselm; happiness which deserts the post of duty is no real happiness at all. Duty, however, even when followed out of thwarted happiness, brings its own rewards of a kind. When Stella returns to Australia, she asks Ted for two hundred acres of his land so that it can be subdivided into farmland for the unemployed.

Love and duty are also set against one another in *The silent sea*, which opens with Miss Helen Paget preparing herself for an important meeting. Before she can do so, she visits the library "to see whether there was anything more she might do to anticipate her father's wants" so her meeting will not be interrupted.¹¹⁵ Miss Paget is the twenty-nine year-old daughter of a self-important "ex-professor of the dead languages, and a man whose mental horizon was bounded by illusions"¹¹⁶ but whom she takes "as seriously as her own identity".¹¹⁷ Her meeting is with Victor FitzGibbon, whom she had recently met on her return voyage from Europe and with whom she had soon fallen in love, "absolutely and heartily".¹¹⁸ Unlike Stella, however, who, for all the cynicism she shows at the beginning of *An Australian girl*, has a past unclouded by worldly cares, the hard road that Miss Paget has followed has already left its scars. She was the only child of her father's second wife. After her mother's death when she was only a few months old, Helen's father had placed her under the reluctant care of the eldest daughter of his first wife. Helen's social isolation had been exacerbated by the family's financial

¹¹⁴ *Ibid.*, p.455.

¹¹⁵ C. E. M. Martin, *The silent sea* (London, 1892), Vol. I, p.2.

¹¹⁶ *Ibid.*, Vol. I, p.3.

¹¹⁷ *Ibid.*, Vol. I, p.4.

¹¹⁸ *Ibid.*, Vol. I, p.8.

difficulties upon her father's resignation of his academic position, until she inherited £3,000 a year on the death of her grandfather.¹¹⁹ But Helen's new responsibility, both as mistress of a large household and her father's provider, is not of the character-building kind:

She had not been long at the head of a large establishment when she was preternaturally alive to all the small deceits and compromises, deepening into cant and duplicity, that enter so largely into the intercourse of average society....She became a little Timonesque, and recorded her impressions somewhat too incisively.¹²⁰

Miss Paget has come by her jaundiced view honestly, but the cost is a further deepening of her isolation, so that "the contrast between the homage she now received and the neglect that had been her portion when she was much younger and more eager for pleasure poisoned her enjoyment".¹²¹

In her quest for a more rewarding existence, Miss Paget had for a time launched herself into "movements for social regeneration" until she found that the objects of her philanthropy "were for the most part impervious to ideas, and capable of being converted many times with little improvement in their social condition, and no change of morals".¹²² Thus it is the accomplished hostess and not the zealous do-gooder who meets Victor FitzGibbon and wins him "with all the arts at my command".¹²³ Miss Paget's caution is evident in her suggestion that "there should be no hard and fast engagement for a time" and they agree to keep the arrangement secret until Victor turns twenty-one, in five months' time.¹²⁴ The contrast between his own ardour and Helen's prudence causes Victor some alarm:

His youth and inexperience and impulsive friendliness had led him too far. But his generosity and good feeling stood him at this crisis in the stead of a more profound affection. He could not realize all that affected Miss Paget, but when he saw her so deeply moved he

¹¹⁹ *Ibid.*, Vol. I, pp.22-26.

¹²⁰ *Ibid.*, Vol. I, pp.28-29.

¹²¹ *Ibid.*, Vol. I, p.30.

¹²² *Ibid.*, Vol. I, pp.33-34.

¹²³ *Ibid.*, Vol. I, p.35.

¹²⁴ *Ibid.*, p.57.

became conscious of an uneasy apprehension lest he should fail her in some way. A heavier sense of responsibility fell on him.¹²⁵

By now, the reader should also be alarmed. Victor's first love has none of the certainty of Stella Courtland's, and duty intercedes inappropriately - Victor feels a "heavy responsibility".

Some time after Victor and Helen's agreement, Victor takes up a position as purser in a goldmine, urged by Helen, whose insecurity about the age difference between them has caused her to grow increasingly distant, intensifying the emotional stalemate of their conditional engagement. His removal to the outback brings him into the acquaintance of Doris Lindsay, "a lovely girl past sixteen",¹²⁶ who has recently faced the death of her mother with a "moral courage and presence of mind [which] were a revelation to all".¹²⁷ She, too, is alone in the world, but where Helen is spiritually empty, Doris is sustained by an almost symbiotic relationship with her mother which transcends corporeal death. Doris nevertheless feels her loss deeply, and when Victor first stumbles upon her in the house of her guardians, she is beside herself with grief. He tries to steal away before she is aware of his presence but he fortuitously stumbles over a chair and she begs him to stay and read as he had intended.¹²⁸ Besides being captivated by Doris's beauty, Victor finds it impossible to read in the presence of such unselfconscious sorrow:

She began to sew, her long thick lashes downcast, and as he looked he saw a great tear roll down her cheek, and then another....There was something infinitely touching in the grief of one so young, and so much alone in the world.¹²⁹

The proportions of Doris's surrender contrast sharply with the emotional economy of Miss Paget. Her passion is not that of a woman in an unguarded moment, but of a child who has not yet learned the nature of social boundaries. She inspires in Victor a protectiveness which Helen's self-sufficiency will not allow him to feel.

¹²⁵ *Ibid.*, Vol. I, p.58.

¹²⁶ *Ibid.*, Vol. I, p.65.

¹²⁷ *Ibid.*, Vol. I, p.143.

¹²⁸ *Ibid.*, Vol. II, pp.2-4.

¹²⁹ *Ibid.*, Vol. II, p.6.

Doris is endowed with the gift of self-sacrifice which at first seems to conflict with her childlike personality. However, Martin sees no incongruity between her ingenuousness and her inexhaustible charity. Indeed, her good works are performed with the same spontaneous emotionalism which inspires her mourning for her mother. Compared with Helen's weary execution of her trivial social duties, Doris's joy in giving utterly and completely of herself inspires awe in Victor, who feels mean in comparison to her:

Her impulse to give not merely money, or the things that money could buy, but a part of her own life, her own gentle ministering, made him reflect penitently on his partial indifference to such matters, while largely absorbed in happy thoughts and happy plans for the future. Gradually, contact with her enlarged his moral consciousness.¹³⁰

Victor has by now realized that he "had made a frightful mistake in supposing that he loved [Helen]".¹³¹ He resolves to break with Helen when she has returned from a trip to Colombo with her father. Circumstances intervene, however, so that Doris, whom Victor has not told of his earlier commitment, learns of Helen's existence and thinks that Victor still loves her. Already showing the first signs of having contracted typhoid, Doris expresses no anger toward Victor, but gives herself up to the death wish that has hitherto been a dormant but perceptible part of her personality since she was separated from her mother:

She did not cling to the world or any of its bewildering, cruel stories. She could not understand them. She longed only for the profound love that had wrapped her round all her life, and never deceived or wounded her. She did not fear death.¹³²

At the time Doris learns about Helen, Victor is recovering from an almost fatal blow to the head. When he is well enough, he travels to Adelaide to tell Helen "all", not knowing that Doris is also in Adelaide being nursed by a physician friend of

¹³⁰ *Ibid.*, Vol. II, p.265.

¹³¹ *Ibid.*, Vol. II, p.144.

¹³² *Ibid.*, Vol. III, p.161.

Helen's. With a mocking sense of poetic justice, Martin has the two women meet at a wedding-dress bee.¹³³

When Helen had first apprehended that she was thoroughly supplanted in Victor's affections, she had nursed her bitterness inwardly:

And then she reflected how every joy that came in her way was marred by some gray [sic] spectre of what had been or might come to pass, and with that came the resolution that she would postpone her life no longer - that she would be glad in the light of the sun, and take with a grateful heart the gifts that came in her way.¹³⁴

The loss of Victor's love is thus a gain in self-knowledge for Helen. Her desperation to cling to him, however, initially prevents her from telling either of the lovers that the other is in Adelaide, and her battle with her conscience drives her to contemplate suicide.¹³⁵ Helen's eventual confession to Doris, in which she withholds no part of her deception, marks the triumph of her better self - and her absolution. The prostration of the sophisticated woman at the death-bed of the simple child is reminiscent of Stella Courtland's moral re-awakening in the presence of Cardinal Newman. Doris, who inspires images of the sufferings of Christ and of the Madonna, stirs profound thoughts in Miss Paget of the mother she had never known:

"If only my mother had lived even for a few years, so that I might remember her arms around me, her lips pressed upon mine, I think all might have been different", she said at the close....

"Dear, dear Helen, how terrible never to know your mother".¹³⁶

Helen's redemption is complete when, four months after Doris's death, she and Victor are married.¹³⁷

On first reading, the conclusion to *The silent sea* seems odd and anti-climactic after the death of the great, and only, love of Victor FitzGibbon's life. It

¹³³ *Ibid.*, Vol. III, p.265.

¹³⁴ *Ibid.*, Vol. III, p.230.

¹³⁵ *Ibid.*, Vol. III, pp.297-301.

¹³⁶ *Ibid.*, Vol. III, p.307.

¹³⁷ *Ibid.*, Vol. III, p.349.

seems doubly cruel to have him marry someone who, for all her moral worth and capacity for self-criticism, lost her claim on Victor even before Doris entered his life. Given that Victor does not love Helen, why did Martin not leave the two to spend their separate lives pondering on their past mistakes? Such a conclusion would seem to satisfy the need to convey the idea of lessons learned while not stretching the reader's credibility with a parody of a happy ending. We return to the religious imagery of forgiveness and redemption through sacrificial death for the answer to this question, which shows the novel's concord with the argument presented in *An Australian girl*. Although Victor's love for Doris is real and human, Doris herself is not. The reader's impression throughout *The silent sea* that Doris is too good for this world is confirmed by an off-hand comment made by a minor character, Mab, whose brief appearance in the novel is nevertheless significant. Mab remarks after Doris has left the wedding-dress bee that she likes "eyes with more 'go' in them....Hers are just holy".¹³⁸ Mab's comment does not condemn her as an unsympathetic onlooker, but instead marks the extent to which Doris has moved from the world of the living. Doris's morbid orientation had its beginnings in the death of her mother, and shortly after she and Victor had become acquainted she had told him that she thought she would join her mother quite soon.¹³⁹ Although they abate to a degree, her labours of grief do not end with the discovery of happiness with Victor, and she tells him that her mother's death makes her think often of the "other world".¹⁴⁰

Doris is not only infinitely giving, she is quite incapable of ignoble feelings. In contrast to Stella Courtland's headlong rush into marriage on the rebound which, if self-destructive, at least smells of mortality, Doris meets her perceived loss of Victor with a weariness of life and living. Thus she escapes the conflicts of love and duty, of self and others which Martin sees as the stuff of human existence. Helen Paget does not. Doris's role in *The silent sea*, then, is chiefly as a yardstick

¹³⁸ *Ibid.*, Vol. III, p.270.

¹³⁹ *Ibid.*, Vol. II, p.93.

¹⁴⁰ *Ibid.*, Vol. III, pp.34-35.

against which Victor and Helen are measured, much as Ruth's and Laurence's were in *The Medhurst of Mindala*. It is the emergence of Victor and Helen's better selves through knowledge of Doris which makes them fit for marital duty. For Helen, loss of Victor makes her count her blessings and adopt a new attitude to living, expressed in her devoted care of Victor during his convalescence, even though at the same time he is making plans to find Doris. It is less important that Victor does not love Helen than that he learns to appreciate the virtues that will make her an attentive and loving wife. More importantly, he learns the same moral lesson about loving itself that Stella Courtland learned in *An Australian girl*. Love is such a serious business that to trifle with it suggests not merely a want of maturity, but a want of moral fibre. Both Stella Courtland and Victor FitzGibbon make commitments which are morally binding to people whose love they do not return. There is a sense of justice being done when Stella eventually marries Ted. Her own heartbreak makes her more acutely aware of the debt of loyalty owed to him. Similarly, although Victor has not made a firm promise to Helen Paget, he has placed himself in a position of obligation to her by making rash declarations of love despite a small voice of dissent inside himself. His marriage to Helen is acknowledgement of *his* debt of loyalty. For Catherine Martin, the personal rewards of marriage cannot be realized without awareness of one's accountability to others.

Conclusion

The nineteenth century South Australian novelists discussed in this chapter were unanimous in the view that the mutual love of husband and wife was the desirable basis for marriage. Far from advocating the primacy of the individual, however, they emphasized that marriage, while offering high personal reward, carried certain duties, not only to one's spouse, but to the society in which one lived. They rejected the loveless union of fortunes as far more open to exploitation for personal gain than the companionate one, as it was conducive to a callous

disregard for the finer human virtues such as hard work, thrift and social responsibility. The purpose of marriage, they said, was to make better individuals, a claim which bore the corollary that better individuals make better societies. To their moral maxim they added parenthetically that happy individuals make happy societies, but the implications of this position sat uneasily with them. Self-fulfilment could slip into self-seeking. Thus they maintained that the highest form of happiness was found in the fulfilment of duty.

Even the equation of happiness with duty held no safeguards against imprudent marriage - one could choose unwisely with the best will in the world. The appeal of romantic love was so strong that it risked obscuring the loftier aims beyond the immediate, personal ones; Nelly Llewellyn of *The curate's friend* is good, but she is also vain and silly, her head stuffed with grandiose notions from her French finishing school. Consequently, ideas about duty were incorporated into, rather than presented alongside, the development of romantic attachments in the novels. Strength of character was reinforced by strength of will. This characteristic was developed to the extent that it heralded the entry of a new, heroic dimension to literary representations of love and marriage.

If the attempt to reconcile romantic love with marital duty had its pitfalls, the manner in which writers tried to overcome them also presented a double-edged sword. Mrs Waterhouse's *Bowled out* showed through her bushranging metaphor that strength and courage were not the preserve of the good. The problem of how successfully to steer the ship of duty without foundering on the rocks of an amoral (or immoral) romanticism remained. The novels of the 1890s directed the representation of love back to the prime importance of duty, sounding the warning that the decision to put self before others in the quest for love would make the fruit of the quest a very bitter one. But the siren call of romantic love could still be heard. If it was nobler, where love and duty clashed, to sacrifice personal happiness for moral rectitude, the knowledge that one had done right was cold comfort indeed; the tardy fulfilment of duty offered small recompense for the

damage done. Eleanor Medhurst and Stella Courtland are tragic figures for their human frailty rather than their malice. They present a gloomy prospect for the flawed mass of humanity, particularly as the rich rewards of a happy marriage were so narrowly lost. The swing back to the affirmation of duty above all else in the novels of the 1890s was not a lasting one. The twentieth century novelists, however, did not abandon a moral standpoint in favour of a wholehearted embrace of the primacy of the individual. Instead, the nascent hero took the place of overtly didactic or admonitory expositions. The result was an increased emphasis on the need for personal fulfilment in marriage which at the same time echoed the exhortations to marital duty voiced in the divorce court.

Chapter Five

"THE PEARL OF TRUTH": MARITAL DUTY AND ROMANTIC LOVE

The nineteenth century novels examined in the preceding chapter were addressed to broader criteria of duty than those with which the Supreme Court judiciary was concerned, but beyond this difference, law and literature were very similar. At the basis of the value system of both bodies of ideas was the belief that the principal marital duty was to stay married; both rejected the conclusion that bad marriages were destructive to social good and should therefore be dissolved. The concerns of the fictional literature differed from those of the Supreme Court in an important way; in the novels, ideal marriage not only fulfilled certain duties, it was happy.

In the twentieth century, the importance of happy marriage came further to the fore, with a greater concentration on personal fulfilment than on public duty, but the overriding one to stay married: if the rewards were great, the stakes were high. Novelists of the twentieth century sought to reconcile this duty with the rewards of the companionate marriage by means of the heroic strain introduced in some of the later nineteenth century novels. The result was that, although the importance of marriage in the general social picture was downplayed, the other, more specific duties of husband and wife gained greater prominence than hitherto. The respective duties of husband and wife became embodied in the heroic personality, which represented someone with whom one could live, happily, forever.

*

The development of the hero in twentieth century novels is reflected in changes in the presentation of prospective spouses. To begin with, physical

appearance has greater importance, and tends toward greater uniformity than in the fictional literature of the nineteenth century. The hero is clearly recognizable by his muscularity, the heroine by her regular features which nevertheless reveal strong character within. This crudity of description is partly attributable to the fact that most of the twentieth century novels are of the 'popular' genre, but although the literary standard is generally lower than the best of the nineteenth century, there is a continuous line in the development of ideas throughout the period under study.

Typical of the twentieth century hero and heroine are Coudrey Watson and Beatrix Arnold of Kate Helen Weston's *The partners*, published in 1911:

Watson was a man of about thirty-five, a Hercules as to frame, with a rough but handsome face, and very quick and keen grey eyes. Those who had dealings with him - and they were mostly of the darker races - could never meet those eyes and lie with impunity; for they had a way of piercing into the soul where the pearl of truth might be supposed to lie; and, besides, his punishments were swift and sure.¹

Watson's secret partner in his business as a pearler off the nor'-west coast of Australia, the beautiful Beatrix Arnold,

was a slender girl, tall for a woman, yet in stature as a child beside the man into whose hands she had thrust both her own....Her skin was clear and soft under the pallor for which the climate was responsible, and her eyes, dark as her hair, but clear, steadfast and fearless, were alive with the pleasure of meeting this man whose strong frame was shaking as he held her slim hands in his own.²

Our introduction to Beatrix reveals an interplay of strength and weakness between the two characters. Beatrix, although tall, is dwarfed by the Herculean Watson, but a suggestion of her own power is made in the reference to her "fearless" eyes which match his "piercing" gaze. The strength which lies behind Beatrix's eyes is soon revealed when we learn that she has come to the nor'-west as the wife of a missionary, Alfred Arnold, a man

¹ K. H. Weston, *The partners: a tale of the nor'-west coast of Australia* (London, 1911), pp.2-3.

² *Ibid.*, pp.6-7.

of slender physique, with an intelligent forehead and dark, brooding eyes. Mentally he was somewhat of a visionary, given from childhood to wild dreams and ambitions, which never reached fulfilment.³

Watson's comment of Arnold that "[h]e has set himself a Herculean task"⁴ makes the reader all too aware that Arnold is sadly deficient in the Herculean frame for the job.

Watson is angry at Arnold because "whatever risks he may be willing to take for himself, he should take none for you".⁵ His chivalry seems somewhat misplaced, however. Not only is Beatrix more capable than her husband of adjusting to the primitive and dangerous life he has chosen, for the most part she enjoys its freedom from the constraints of civilization. But although her strength and courage are seen as desirable attributes in themselves, in the context of her marriage they become unnatural.

The inappropriateness of the power balance is detectable in the physical differences between Arnold and Watson. While Watson's bulk gives Beatrix the stature of a child, Arnold "stooped from his own slender height and kissed her forehead".⁶ Weston's description of both Beatrix and her husband as slender makes them appear at times more as brother and sister than husband and wife, accentuated by the sterile kisses deposited on Beatrix's forehead. Beatrix needs a man whose strength *more* than matches hers. Weston's tendency to pull out all the stops whenever the character of Coudrey Watson strides across the pages of *The partners* leaves the reader with no doubt that he is the right man for Beatrix. He initially conceals his love for her because she is married. The manner in which his secret becomes known reiterates his forcefulness:

He spoke no word, but his eyes compelled hers. She lifted them to his face, and he held them there.

³ *Ibid.*, p.13.

⁴ *Ibid.*, p. 7.

⁵ *Ibid.*

⁶ *Ibid.*, p.64.

He was off his guard; he had not meant that she should know how much she was to him; but while his eyes held hers, she learned his secret - and her own - and knew that the man she loved was not her husband, but he who had come to her out of the wind and the storm, in all the strength of his lusty manhood and with the briny odours of the sea about him, his strong, conquering masculinity taking her love captive, whether she would or no.⁷

Once again, the commanding gaze of the man forms the metaphor of his power over the woman, as it did in *For Marjory's sake*. Hal Webster's gaze, however, first met Sally Barnes's in order to expose her wrongdoing; his power, although showing the heroic strain, had a moral basis. In *The partners*, the magnetism of Watson's gaze is baldly animal. The increased hedonism of love in the twentieth century novel did not abandon notions of marital duty, but accompanied new means of conveying them.

In the twentieth century novels, fictional families no longer symbolize family and social life in general, nor is the decline of the aristocracy documented in a passing parade of villains or buffoons. Instead, the hero's stature is augmented by invidious comparison with the chinless weakling. In *The partners*, Alfred Arnold represents not a class of people but a type of person - the Wrong Husband. His physical weakness is the complement (or the cause?) of his failure to inspire passion in Beatrix. The plot of *The partners* has Beatrix caught between two men who have legitimate claims upon her. Alfred has the legal tie of marriage to bind her to him, but Coudrey is her "natural mate". Her dilemma is used by Weston to demonstrate that Beatrix's strength has a more appropriate object than that of rescuing her husband from the consequences of his quixotry. The scene which leaves Beatrix "conquered" by Watson's masculinity also arouses her own forcefulness:

"Go! go!" she said brokenly to Watson, upon whose face yet lingered the flush of passion. "Do you forget that you are my husband's guest, and that I am his wife? Go, I implore you, and leave me alone!"⁸

⁷ *Ibid.*, pp.97-98.

⁸ *Ibid.*, p.99.

Watson does as he is told, and in the days that follow, Beatrix realizes that "[o]ver the impulses of her heart she had no control, for love laughs at all bonds; but to walk the path of duty was still left to her".⁹

Beatrix's strength is tested once more before Watson sets sail again. Coming upon her by chance a week after their moment of truth, she momentarily surrenders to the overwhelming power of his embrace:

A sudden mad desire to take the girl in his arms and carry her off boldly seized Watson....

She read his intention in his face and struggled wildly in his arms, and suddenly he set her down upon her feet, kissed her once more upon the lips, and pushed her gently from him.

"Go, child, lest I be tempted", he said with a break in his voice, and stood aside with folded arms, while she sped on rapid, trembling feet over the dusky slopes.¹⁰

Back to the bland propriety of her marriage. Thus duty remains paramount, but different from that in the nineteenth century novels. In *The partners*, Beatrix and Coudrey's duty is specifically to the marriage tie rather than to the network of social duties which devolve upon marriage.

Coudrey Watson's aborted attempt to carry Beatrix off with him has an odd resolution: it is she who stops him in his tracks, but his paternal bidding to "Go...lest I be tempted" puts her in a childlike relation to him. Power and responsibility are tossed from one to the other, so that domination and submission are not "fixed" characteristics of either protagonist. Because the literary representation of love emphasizes the individual, understanding of this shifting of the balance of power between man and woman is best approached from a theoretical framework which examines individual psycho-sexual issues. The Freudian psycho-analytic one is particularly pertinent to the exposition of ideas of marital duty and marital happiness in the fictional literature.

⁹ *Ibid.*, p.101.

¹⁰ *Ibid.*, p.110.

The hero as parent

In the nineteenth century, duty was a labour of love; in the twentieth, it became the very fabric of it. The hero's benign authority and the heroine's guardianship of propriety can be seen as the embodiment of the marital duties of protection and chastity as the respective duties of husband and wife established in legal precedent. In the scene from *The partners* quoted above, the lovers behave in ways which confirm both their duty and their desirability. Although a minute before she had been fainting in his arms with the "compelling passion" of Watson's kisses, Beatrix's struggle demonstrates her wifely loyalty which is no less valuable because paid to a man she does not love. Her fidelity is a part of the devotion which has led her to risk her life by accompanying her husband on his mission; her self-sacrifice recalls the eternal mother. Similarly, although Coudrey Watson is almost carried away by passion, a sharp reminder from Beatrix brings back the paternal protectiveness which governs his feelings for her. The woman's need of a protective love-object and the man's of an unwaveringly loyal one can be interpreted in Freudian terms as bestowing upon the ideal lover the characteristics of the ideal parent.

This explanation appears problematic because it confers the status of parent upon both lovers. The shifting responsibility regarding Beatrix's marriage vows from Watson to Beatrix and back to Watson again merely demonstrates that these parental qualities are not fixed. The reciprocity of parent and child is achieved by the hero appearing as father and the heroine as mother at different times. As the action of *The partners* shows, there are times when displays of strength are not called for, such as an occasion when Beatrix protects Alfred during an attack by natives.¹¹ Nor is it appropriate for her to accept responsibility for her choice of life as a missionary's wife. Such a choice is made with the understanding that her life is in Alfred's hands. Regarded in this light, his foolhardiness is reprehensible; he

¹¹ *Ibid.*, pp.79-82.

has bound Beatrix to a life in which he cannot care for her in the way a husband should. When Beatrix prevents Watson from carrying her off, she responds with a strength which is appropriate. Her duty here is to protect both herself and her lover from the consequences of adulterous desire.

*

In the nineteenth century novel, notions of marital duty were most frequently emphasized through the portrayal of the conjugal partnership against a backdrop of the family relationships of one or both of the lovers. Thus, capacity for marital duty was measured against the seriousness with which a prospective spouse took his or her family obligations. In the novels which stressed the importance of self-sacrifice most strongly - *Mr Hogarth's will*, *The curate's friend* and *The Medhursts of Mindala* - the family assumed a metaphorical function, with the death of a family member, usually a parent, illustrating the far-reaching consequences of the dereliction of duty. Loss of or alienation from a family member came to be used in the late nineteenth century less as a means of punishing an erring character, but death nevertheless retained its prominence. Both Kenneth Oswald and Edith Gray of *Gathered in* and Helen Paget of *The silent sea* are motherless; Stella Courtland is fatherless, while Phoebe Alford is orphaned at the beginning of *Bowled out*, as is Sally Barnes in *For Marjory's sake*. Consequently, protagonists of the later nineteenth century novels often appear as cut adrift in the world until the conjugal relationship of twentieth century fiction, unrivalled by other family loyalties, becomes the dominant one. Even the title of *The partners* hints at the exclusivity of the conjugal couple. The idea of love as a form of filiation is reinforced by the persistence of the phenomenon of the protagonist who has lost one or both parents, creating a void for the lover to fill. Even where parents survive, family relationships are often fraught with conflict, and frequently over the issues of love and marriage. But where the usurpation of parental authority in such

issues was frowned upon in *The Medhursts of Mindala*, it takes on the significance of a rite of passage in the twentieth century novel.

Another of Kate Helen Weston's novels, *The man Macdonald*, which followed hard on the heels of *The partners*, illustrates this new perspective on the biological parent-child tie. In many respects, John Quarton McGarvie is Coudrey Watson all over again. When he catches the eye of Helen Kerisbrook Winter in a London tea-room, it is because her gaze has been drawn "irresistibly" to his.¹² But the look which made the "alien races" squirm is softened to a degree in John McGarvie:

If ever a man's face spoke sincerity and true moral worth, it was the face of John Quarton McGarvie. The brow was calm and benign, showing a capacity for great affection under strong control. His eyes were grey, clear and steadfast; his skin ruddy, and his body powerful with the strength of a clean, strong manhood.¹³

The virtues which constitute a large part of John's attractiveness are in marked contrast to Helen's father, whom Helen's best friend, Lettie Wishart, sees as "a little tin god in his own esteem".¹⁴ Although John and Helen really fall in love with each other at first sight in the tea-room, it is not until they find themselves together on the same boat to India that they are actually introduced.¹⁵ By the time they reach Colombo, where McGarvie must debark, he has asked her father for his permission to marry Helen, receiving the reply that the matter must remain in abeyance until the Winters return from India.¹⁶

Helen and her father continue on to India while in Colombo, McGarvie's natural gallantry causes him to be compromised by a beguilingly beautiful Anglo-Indian girl named Flora Macdonald. Learning of this indiscretion, Helen's father calls off the engagement without consulting Helen and intercepts John's explanatory

¹² K. H. Weston, *The man Macdonald* (London, [1913]), p.10.

¹³ *Ibid.*, p.36.

¹⁴ *Ibid.*, p.15.

¹⁵ *Ibid.*, p.25.

¹⁶ *Ibid.*, pp.52-54.

letter to her.¹⁷ By the time events have reached this climax, Winter has remarried, releasing Helen from her filial obligation. Although this transfer of her father's dependence signifies Helen's independence, it is in a clash over her relationship with McGarvie that Helen asserts her new adult status:

"Who gave you the right to interfere between me and John McGarvie?" asked Helen, in a voice which thrilled with a resonant challenge in it.

"I have every right: I am your father, and you are my daughter."

"There are times when even a father has no right to interfere in what concerns his daughter only. I am not a child; I am a woman. Neither you nor anyone else shall forbid John to see me."¹⁸

Thus the loyalty she had hitherto maintained to her father despite his irascibility and their personal incompatibilities is succeeded by loyalty to John in the face of other odds.

The nineteenth century value of love being realized through self-sacrifice has a rough equivalent in Kate Helen Weston's view, but Weston's version of self-sacrifice is stronger. She sees true love as attained through actual suffering. Again, it is not for the sake of a larger social good that suffering is undergone, but for that of the two members of the conjugal partnership. That suffering is an essential part of love is demonstrated when Lettie Wishart, who has loved and lost, tells Helen prophetically, "Every woman has her Gethsemane, and yours will come - though I would save you from it, my dear, if I could".¹⁹ The inevitability of Gethsemane does not mean that men of necessity turn Judas as Lettie's unworthy lover did. In Weston's novels, suffering is imposed by cruel circumstance, symbolic of the nature of loving itself.

In *The man Macdonald*, John McGarvie is forced by considerations of propriety to marry Flora, who brings the inevitable dénouement to the melodrama by dying in childbirth.²⁰ John is now free to marry Helen, who has remained

¹⁷ *Ibid.*, pp.250-259.

¹⁸ *Ibid.*, p.260.

¹⁹ *Ibid.*, p.5.

²⁰ *Ibid.*, p.378.

single during John's marriage - her love belongs to him alone. Helen's unconditional love incorporates an understanding that John's cannot be as steadfast. John's chivalry in marrying Flora is elevated to the point where it bears comparison to his feeling for his true love:

"Helen," he said haltingly, "I loved her - my poor little Flora."
 "Of course you did, my dear one," she answered staunchly, with the hot tears slipping down her cheeks. "It's in the soul of you to love and cherish any weak, defenceless creature which clings to you. But you do not love me less?"²¹

On the contrary, John loves her more, the quality of her love affirmed in her suffering. The return of John McGarvie to Helen's side is a reward made richer for her suffering, while the filial labour of meeting the unreasonable demands of a petty tyrant has no reward.

*

In *The man Macdonald*, Helen Winter's disagreement with her father over John McGarvie brings conflict in the father-daughter relationship to the fore. In the three following novels, difficulties between parent and child form a more central part of the action and are therefore more complex. In all of them, the bitterness of a parent over failed love is brought into the perspective of the relationship between the main protagonists, through which conflict is resolved either directly or indirectly. All of them follow the course set in *The man Macdonald*: away from parental authority and toward a set of duties addressed specifically to the companionate marriage.

Tarella Quin's *A desert rose*, first published in 1912, begins with the heroine, Betty Curtis, leaving Melbourne, where she has grown up, to return to Bunna Bundra, her father's outback property. The barrenness of the outback is

²¹ *Ibid.*, p.391.

matched in the taciturnity of her father, who finds in Betty's beauty a strong reminder of her mother:

Only that strange law of opposites could account for the first frail attachment she had formed for the rugged man she had married. His passionate love and devotion, coupled as it had been with an unparalleled jealousy and harshness that bruised, then finally broke the slender link joining their lives, failed to keep her.²²

Betty, despite her homesickness for Melbourne, soon learns to appreciate the glory of the outback. Her ability to succeed where her mother failed is to her credit:

Her face had already lost somewhat of the girlish roundness that had characterised it, but had gained in beauty; and Betty now was no whit less charming and attractive than Betty of yore, perhaps subtly more so, for there was a forlornness about the lonely girl in her uphill struggle that lent her a new fascination.²³

As was the case in *Mr Hogarth's will*, hardship is a test of character, but the waif-like quality it lends Betty's beauty invites a protector to end her suffering.

Shortly after her arrival at Bunna Bundra, Betty discovers that her father is struggling to make a living from his land, and that this is because a selector named Sugden has taken a large portion of the best part of it, albeit in a legal transaction.²⁴ Betty's meeting with Sugden at a dance seals her dilemma. By the time she learns that "Paul" is David Curtis's enemy, it is far too late for any resolutions to hate him; in the dizzying moment when their eyes met she had recognized her one true lover:

In that brief moment, long as death, fateful as fate itself, she felt that He and She were standing alone in the world, the centre of a million whirling lights, that spun and revolved and looped about them in circling brightness. And but one face shone forth, steadfast and quiet, from the whirling chaos; and that face was grave with wonder, purposeful, and inwardly illumined.²⁵

What hope has a grumpy old man got against such brilliance? Paul's response to Betty is also one of recognition, giving him "an abiding content and peace. For into

²² T. Quin, *A desert rose* (London, 1914 - first published 1912), pp.13-14.

²³ *Ibid.*, p.39.

²⁴ *Ibid.*, p.28

²⁵ *Ibid.*, pp.109-110.

the man's life the One Woman had stepped with her satin slippers".²⁶ The relentlessness with which Paul pursues Betty is foreshadowed in the reasons he gives her for his acquisition of the best of Bunna Bundra, explaining matter-of-factly, "Mr. Curtis is only one out of many that suffered, and if I had not taken it someone else would".²⁷ Later, in a conversation about jealousy with Wilfrid Dumont, a pallid aristocrat and an admirer of Betty, Paul tells a startled but admiring Dumont that "I would *kill* the man who stood between me and what I desired".²⁸ Paul's kill-or-be-killed approach to both his business and his personal relationships is not described as a shortcoming, whereas Curtis's bitterness about failure is. Betty's filial loyalty is accordingly misplaced to some extent.

Betty's need to free herself from her father's influence becomes imperative when she agrees to marry Dumont, whose wealth will save Bunna Bundra.²⁹ Dumont is a "wimp" *par excellence*. His first appearance is in a buggy, the appointments of which "bespoke a pernickety neatness and bachelor preciseness that revealed his character in a brief flash to Betty".³⁰ His age - he is a contemporary of Betty's father - does not bestow fatherly protectiveness upon him whereas Paul's massive height does, causing him to bow his head "protectingly near the beauty of the girl".³¹ Instead, the incongruity of Dumont's age with his bachelor status and excessive dependence on his mother - "[m]y mamma doesn't like me to work on Sundays"³² - makes him a figure of fun. What passion Dumont can muster has been channelled into a lifetime's interest in native flora and fauna - in particular, beetles - until Betty's beauty turns his head.

Betty's engagement to Dumont is paralleled by that of her brother Jim to Maisie, a beautiful but heartless girl who finally accepts Jim because she thinks Betty is engaged to Paul Sugden, upon whom she has set her sights. When Maisie

²⁶ *Ibid.*, p.110.

²⁷ *Ibid.*, p.138.

²⁸ *Ibid.*, p.158.

²⁹ *Ibid.*, p.193.

³⁰ *Ibid.*, p.79.

³¹ *Ibid.*, p.111.

³² *Ibid.*, p.84.

learns that Betty and Dumont are to be married, she calls off her engagement to Jim.³³ He rides to his death in the storm which breaks the drought that has crippled Bunna Bunda.³⁴ His blood is on Maisie's hands because she trifled with his love. Betty, however, is not held responsible for agreeing to a mercenary union with a man whose sincere love she cannot return. Betty's part as willing conspirator in an alliance which flies in the face of both Dumont's unrequited love and Paul's requited one is ennobled by the fact that she offers herself to Dumont for her father's sake.

Even the breaking of the drought provides no solution because to marry her father's enemy "would kill him".³⁵ It is not clear, however, why she still has to marry her father's friend. When Dumont learns by accident that Betty is in love with Sugden, he selflessly ends their engagement.³⁶ Unlike Lord Darlington or Vivian Vaughan, his feelings toward Betty are not acquisitive, and therefore he does not personify the aristocratic conception of marriage. His role in *A desert rose* as the wrong match for Betty does highlight the damage wrought by David Curtis's lifetime of bitter resentment which, in the dénouement of the novel, is traced back to the source of his marriage.

Curtis's misery is compounded by his resolve to ask help from nobody. Aunt Eliza, the motherly neighbour who finally tells Betty the history of her parents' unhappy union, describes Curtis as

warped and hardened, a man who at heart was good, though wilful and masterful to a degree, perhaps undisciplined - just such another as Paul, dearest, and in that I have often feared for you.³⁷

Eliza need not fear, however. The essential difference between Curtis and Paul is that, for all that Paul is a "big, wilful man", he acknowledges his need of a woman. Paul, whose unknown parentage gives him the air of having grown like Topsy,

³³ *Ibid.*, p.252.

³⁴ *Ibid.*, pp.239-241.

³⁵ *Ibid.*, p.228.

³⁶ *Ibid.*, p.308.

³⁷ *Ibid.*, p.304.

lives a miserable, solitary existence in a meagre hut, despite having earned a large fortune through his acquisition of Curtis's property:

Paul fed without his coat. Years of bachelor life leave their mark on most men in the bush - on all save those few in whom the streak of effeminateness is strongly developed, and Paul, being essentially a man amongst men, virile to the core, suffered from the lack of a woman's presence to a marked degree.³⁸

The right woman can tame the wilful side of Paul's nature, free of both pernicky neatness and stubborn pride. One might object that these are not specifically maternal attributes and that the differences between man and woman could be explained in terms of "separate spheres". The theme of forgiveness and atonement in *A desert rose*, however, reinforces the link between filial and romantic love. As, one by one, Curtis's friends face his wrath and tell him he is wrong to stand between Betty and Paul, he is forced to own to the destructive part his stubbornness has played. The love between Betty and Paul atones for the wrongs of the past by acting as a catalyst for Curtis's forgiveness. Betty's willingness to sacrifice herself to a marriage which would have been wrong, just because her father desired it, is testimony to the strength of her loyalty, but the course of events which frees her of her promise exposes the injustice of the sacrifice.

In *A desert rose*, the bond between father and daughter is strong, unlike that in *The man Macdonald*, but Quin points out that it can only endure when parental authority defers to the stronger bond of romantic love. Another novel which explores father-daughter conflict in relation to love between man and woman and develops the theme of forgiveness and atonement more fully is Doris Egerton Jones's *Peter Piper*. It appeared in 1913, the year following *A desert rose*, and makes a stronger connection between forgiveness and feminine goodness.

Peter Piper begins when Peter, a girl who has been raised as a boy, is eighteen and her dormant femininity, none the worse for her masculine upbringing, is awakening. When Peter tells her father, Jim Delancy, that she wants to be a girl,

³⁸ *Ibid.*, p.211.

her request is met with fury: "You want to sully yourself in the sordid scramble of lust; to learn to lie, and love, and trick, and ruin a man's faith".³⁹ The irony of *Peter Piper* is that her beauty makes her the victim, not the perpetrator, of sexual intrigue, when she falls in love with a lawyer named Rex Ware.

Physically, Rex is cast in the Coudrey Watson mould, and he shares the loneliness of Peter's motherless existence. Rex is the product of his father's second marriage to a woman who died when Rex was young, shortly after which his father died of grief.⁴⁰ Rex is not driven by the need for love, however, but by ambition, which gives him a view of marriage as "a business proposition". When Peter asks, incredulously, if he would like to love a woman, he concurs, but says that he wouldn't necessarily marry her: "Some say marriage and love aren't compatible".⁴¹ Rex does fall in love - and with Peter - and he tells her that he thinks he would kill any rival to her affections.⁴² Satisfied that there are none, he seduces Peter the night before he is due to return to Adelaide, vowing that "no other woman will fill your place in my heart", but Peter awakens to the knowledge that he will not be back.⁴³

Peter at last realizes her ambition to be a girl when her father agrees to send her to Adelaide to board with Trixie Danish and her family.⁴⁴ She is delighted with her new life until she discovers how small the best circles of Adelaide are, and that she is constantly thrown into contact with Rex Ware.⁴⁵ If one did not know the circumstances of the estrangement between Rex and Peter, one would guess that Peter had done Rex some terrible wrong and had added insult to injury by overlooking all the opportunities given her to exculpate herself. Peter becomes attached to Rex's partner, Glen, but is subjected to Rex's accusing gaze every time he sees them together. Her engagement to Glen necessitates her telling him about

³⁹ D. E. Jones, *Peter Piper* (London, 1913), p.13.

⁴⁰ *Ibid.*, p.36.

⁴¹ *Ibid.*, p.42.

⁴² *Ibid.*, p.73.

⁴³ *Ibid.*, pp.74-79.

⁴⁴ *Ibid.*, p.97.

⁴⁵ *Ibid.*, pp.127-136.

her past and the engagement is called off.⁴⁶ Rex is dismissed from Glen's firm and Peter's anger turns to pity: "I wanted to take his big, unhappy head on my heart and comfort him like a mother does her baby - we are all mothers by instinct when trouble comes."⁴⁷ And Rex's self-righteous jealousy turns to remorse. He "never knew what purity and goodness in a woman meant before, for there is a purity of soul that is above all others."⁴⁸ And matters come to a head when Peter receives a letter from her father written before his sudden death of consumption. Peter learns that he and Trixie had been childhood sweethearts, but her family had married her off to a man named Denton whom she didn't love and who beat her. She had run away to the bush with Jim but her husband had caught up with her and taken her back while Jim was away, leaving him nothing but their new-born baby.⁴⁹

Following all this news, Peter's collapse from that good old Victorian standby, brain fever, gives her a chance to lie in a hospital bed and rethink her situation. Her discovery of her mother has only partly filled the void in her life, because Trixie is not responsible enough to be able to assume a maternal role. One indication of her immaturity is her inability to accept the consequences of having borne an illegitimate child. She begs Peter not to tell Dr Danish, whom she had met after her return to Adelaide and shortly before Denton's death. Peter, who had bravely confessed her ruin to Glen, knowing the likely outcome, wonders if all the world is full of deccit.⁵⁰ Peter is therefore almost as isolated as she was when living with a distant father who would not tell her who her mother was. Peter gains moral guidance, however, through a brief friendship with a dying woman she nicknames "Jasmine" for the flowers that Rex leaves daily at the hospital.

Jasmine is a famous and successful physician whose life is nevertheless summarized in the tragedy that she had lost the man she loved to a friend. Jasmine had been powerless to fight because "my woman's education had been neglected,

⁴⁶ *Ibid.*, pp. 230-231.

⁴⁷ *Ibid.*, p.239.

⁴⁸ *Ibid.*, p.240.

⁴⁹ *Ibid.*, pp.241-246.

⁵⁰ *Ibid.*, p.253.

you see....He married her. That's my life".⁵¹ Although Peter's thoughts toward Rex have begun to change, Jasmine hastens the process by re-interpreting the whole course of events between her and Rex:

"He always loved you. And, believing that, I am almost sorrier for him than for you. Men are more slaves to their worst selves than we, and to know he has injured beyond reparation his dear love must be keener and more living torture to a man than even yours".⁵²

Jasmine tells Peter that "love's the biggest thing in the world" and that "unless you forgive you cannot be forgiven; and to forgive truly means to forget".⁵³ Rex confirms the truth of Jasmine's observations about forgiveness by saying, "When you were unforgiving, I almost forgave myself, but now - I never shall"⁵⁴ but again, the remains of the barrier between them is seen to be a stumbling block of Peter's making:

"I am a man, not a Galahad or a romantic boy". His eyes flashed, and he flung back his yellow head impatiently; he was the Viking once more...."I didn't know it then, I thought ambition counted most, but I know now, I've known for a long time there's only one thing that matters in this whole wide world, and that is love".⁵⁵

When Rex confronts her, she realizes that he is right: she still has not forgiven him.⁵⁶ Her final inspiration to do so comes from her own recognition of the importance of love and from her father's deathbed remorse.⁵⁷

Jim Delancy's lonely death suggests that the chief onus of forgiveness in *Peter Piper* is on him. The conception of love in the novel, however, offers no possible happy ending for him. If he had lived out his solitary life as a nicer person, it is doubtful that he would have been a happier one, as Jasmine's story indicates. While Jim's love for Trixie was unwavering and unending, his feelings

⁵¹ *Ibid.*, p.263.

⁵² *Ibid.*, p.264.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p.271.

⁵⁵ *Ibid.*, p.333.

⁵⁶ *Ibid.*, p.334.

⁵⁷ *Ibid.*, p.342.

were not returned: "I was her old Jimmy, her girlish sweetheart, but her woman's soul had never been quite roused".⁵⁸ When we meet Trixie as the somewhat frivolous wife of a man who remains in the background throughout the novel, we suspect that her "woman's soul" is still sleeping, if she possesses such an article at all. Peter does, but she must learn to do it justice by acknowledging that only one man can satisfy its yearnings. With love, there is no second bite of the cherry. Rex's abandonment of her does not wrong her so much as it wrongs love itself. (It is clear that his callous behaviour toward Peter has been typical of his treatment of women up to the time of their meeting, but he is never held to account for past wrongdoing because true love was not involved). Rex learns his lesson, giving him a moral advantage from which he is at liberty to accuse her of failing to learn hers. For Peter to retaliate that Rex robbed her of her virtue is pointless because Rex's observation that "purity of soul" is more important is true, and it achieves its finest expression in the act of forgiveness. If she were not to forgive Rex, Peter would be throwing away the happiness of two people for life.

Another novel by Doris Egerton Jones, *Time o' day*, published in 1915, places parent-child conflict in juxtaposition to the healing power of romantic love, which is depicted as a haven of protective warmth. It concerns the quest for love of a girl whose parents' sense of their own responsibility is illustrated in their blessing her with the name of Thyme O'Dea. Thyme's mother has the girlish demeanour of Trixie Danish in *Peter Piper*, but lacks Trixie's compensating warmth:

She has gone to dinner at Government House tonight; she looked just lovely, far too young to be the mother of all of us....But I'm always afraid of her, she seems like a statue. I can never remember her any other way.⁵⁹

The youngest O'Dea child, Betty, is the only one who receives any attention from their mother; the injustices which Thyme suffers because of her mother's

⁵⁸ *Ibid.*, p.245.

⁵⁹ D. E. Jones, *Time o' day* (London, 1915), p.28.

favouritism give further cause for rancour. Significant to our understanding of the link between parental and romantic love is a story an aunt once told Thyme

that mother was quite different as a girl, she liked everybody, and was gay and nonsensical like me, and she was going to marry a quite poor man but he jilted her. Then she married dad. Sometimes I wonder whether she would love us all like she does Betty if the other man was our father.⁶⁰

At the beginning of the novel, Thyme confides to the reader that until recently, she has not taken men seriously, but now

I've got to get married soon, and that's a fact. In a way I even want to. It'd be frightfully nice to have someone always bothering about you, wouldn't it? Someone you could always depend on to take you everywhere and think everything you do quite right.⁶¹

Thyme, for all her self-proclaimed maturity on the subject of men, displays a child-like egotism in her search for someone both dependable and all-approving.

Jones's description of Thyme's first meeting with Bob Gale undermines to some extent the image of the hero portrayed in the other novels studied in this chapter. Bob, who impresses Thyme as "nothing to look at",⁶² is redheaded and not as tall as Thyme would like.⁶³ His shortness of stature, however, is more than compensated for by his presumption, which is conveyed as self-possession. When he fails to keep an appointment with Thyme, and then does not offer an explanation, she dashes off an angry note, to which he sends a cool reply without apology. Although he doesn't account for his failure to communicate with Thyme earlier, she feels ashamed for being angry and admits to herself that "right away down at the very bottom of them, though they'll never admit it, women rather like men taking the high hand with them".⁶⁴

⁶⁰ *Ibid.*, p.232.

⁶¹ *Ibid.*, p.9.

⁶² *Ibid.*, p.17.

⁶³ *Ibid.*, p.37.

⁶⁴ *Ibid.*, p.71.

Bob's "high hand" becomes standard operational procedure in *Time o'day*. He alternates between playing the reluctant suitor and dangling the carrot of his affection before a bewildered Thyme. Nevertheless, his uncertain status in her life does not deter him from making severe criticism of her when he perceives her to be overstepping the bounds of propriety. Thyme becomes annoyed when he patronizingly warns her of the "bad reputation" of a man in her acquaintance. Her retaliatory remark that "[w]e see a good deal of Mr Wymondham" backfires, however, when Bob retorts that any association with Wymondham casts a shadow on her own good name.⁶⁵ Later, he belittles her by telling her that women should not have the vote because a woman's duty is "to love pretty things and look as nice as she can, and when she has done that it is a man's duty to admire her".⁶⁶ Rather than argue with Bob, Thyme acquiesces, which has the effect of reducing her to childlike incompetence, while Bob's imperfections become elevated to virtues. Thyme's loss of autonomy gets her into further strife when, tongue-tied, she misses the opportunity he gives her to confess a rival suitor who arrives, on cue, immediately afterward. For Bob to respond with hurt feelings or sudden rage would not do:

Bob smiled, a pleasant smile that was more cruel than a blow. "Well, I've had a fair innings, so it seems about time I left the field clear for the next claimant. You seem to like variety, Thyme. Good-bye!"⁶⁷

Bob's icy withdrawal of his affection places the balance of power even more in his favour.

Thyme's next move, to contemplate marriage to yet another suitor - of the wealthy, chinless variety - risks repeating her mother's mistake, but illustrates how all possibility of happiness vanishes with the loss of Bob. For all her irritation at his male chauvinism, she has relinquished her self to Bob to the extent that her

⁶⁵ *Ibid.*, pp.146-147.

⁶⁶ *Ibid.*, p.182.

⁶⁷ *Ibid.*, p.261.

power to act at all is delimited by him. In her Bobless state, Thyme can do nothing to help herself apart from trumpeting her misfortune through her proposed rash actions. Her plan to marry a man she does not love is not seen as immoral but as foolhardy because she has not exhausted all means of getting Bob back.

When Thyme meets Bob's brother, Stan, by chance, his appeal to Thyme to patch up their quarrel shows how feminine initiative is restored when forgiveness is called for. Her shining hour is pre-empted, however, by the climax of the novel, which has Thyme boarding a ferry because she thinks her sister plans to elope with the wicked Mr Wymondham, only to find that Ada is not on the boat and that she, Thyme, faces social ruin if she does not marry him upon landing.⁶⁸ When Bob materializes on the same boat, offering her the escape of marrying him instead, it is the protecting, not the punishing, paternal image which comes to the fore:

"You won't go away, will you?" I sobbed. "Promise me you won't go away."

"Of course I won't", he replied soothingly. "There, don't cry any more, dearest; nobody shall hurt you any more. You're quite safe with me".⁶⁹

Bob's rescue of Thyme provides an equally fitting reconciliation as her act of forgiveness of him would have, because it results in an assertion of parent-child roles between the lovers. At the same time, atonement is made for Thyme's emotionally deprived childhood caused by the bad match between an inadequate father and a venal mother. Conjugal love is also asserted as the relationship of prime social importance, as it was in *Peter Piper*, where the beginning of the healing of the rift between Rex and Peter coincides with her father's death.

The power behind the throne

In the three novels discussed in the last section, the idea of romantic love as a form of filiation was reinforced through parent-child conflict surrounding the

⁶⁸ *Ibid.*, pp.333-335

⁶⁹ *Ibid.*, pp.336-337.

female protagonists. Louise Brown's *Paul Strange* is told from the point of view of a male protagonist. It therefore offers a different perspective on romantic love, but comes to similar conclusions to its predecessors. *Paul Strange* is the story of a boy from impoverished circumstances who becomes a politician, fiercely independent and a champion of social reform. Although his mother dies early in the novel's development, Paul has already reached adulthood, by which time her influence on his growth to maturity has been considerable. Mary Strange is a golden-hearted battler with little education who sacrifices all to the aim of giving her son a better life than hers. Described as doing "a man's work all day long",⁷⁰ her task of keeping an unprofitable farm going is made more difficult by her dissipated husband, whose only contribution to the family is the education of young Paul. The unnatural state of affairs in Paul's parentage is implied not so much in his mother's self-sacrifice as in the fact that she is forced into it by her husband's inadequacy. When he first stumbles upon the happy domesticity of the Trent family at the seaside he is fourteen years old, the same age as his future wife Barbara, their niece.⁷¹ He impresses the Trents with his odd combination of fundamentalist religious beliefs and a precocious competence in practical matters, both inherited from his mother:

Elizabeth watched him with deep interest. Paul had the tidying touch. It was instinct in him to put things straight and find their right places.

"Where did you learn how to do that?" she asked at last.

"Mother taught me. I always do it at home. I can cook too. Sometimes when mother is late with the milking I cook the tea."

"Have you no father, then?" Barbara asked gently.

"Yes, there's father."

"But doesn't he milk the cows?"

"Oh, no", replied the boy simply. "Mother does all the work."⁷²

Paul Sugden of *A desert rose* is so manly he cannot even cook decent bushmen's fare, but Paul Strange's domestic abilities offer no threat to his budding manhood.

⁷⁰ L. Brown, *Paul Strange: a novel* (2nd ed., London, 1917), p.11. It appears that this novel went through two editions in its first year of publication, as Depasquale (see Appendix 3) gives the imprint for his copy as, simply, 1917.

⁷¹ *Ibid.*, p.21

⁷² *Ibid.*, pp.22-23.

On the contrary, because he has developed them to help relieve the burden caused by his father's laziness, they are testimony to his strength of character.

Louise Brown avoids the usual heroic stereotypes in her characterization of Paul at seventeen. He "had grown into a youth with an uncommon grace of bearing. A look of thoughtful intelligence set him apart in appearance, just as his education and imagination did in mind".⁷³ Paul is nevertheless his father's son in more than intellect. Strength and weakness in Paul are directly attributed to mother and father respectively:

Paul inherited from his father's line a keen fastidiousness and the instincts which led him to passionately desire the beautiful. From his mother, he inherited a strong strain of puritanism. Her faculty of dog like devotion became in him an almost limitless capacity for worship and for idealism. But his well-developed mind and imagination impelled him on this side of his character to demand worth in the object worshipped.⁷⁴

In Barbara Westover, whom he regards "with the look of one who worships at a shrine",⁷⁵ he finds it. Like Mary Strange, Barbara Westover is endowed with the qualities of self-sufficiency and unwavering loyalty. Moreover, Barbara's integrity is of a kind of which even Paul is incapable, because of his weakness for beauty which constantly does battle with his better self. Barbara's beauty is so perfect that she takes it for granted, but she fears its effect on Paul. She tells him that she is "afraid sometimes that I may disappoint you when you idealize me so much".⁷⁶ Barbara's own devotion to Paul, however, betrays a comparable idealism. When Paul takes the bold step of going into Labour [sic] Party politics, she is unperturbed by the social ostracism she risks by remaining engaged to him, saying that "anything Paul may think fit to do I think right, simply because he does it".⁷⁷

The danger in Paul's capacity for the adoration of beauty reveals itself when he first becomes acquainted with Philippa Maitland. When Paul finds himself

⁷³ *Ibid.*, p.40.

⁷⁴ *Ibid.*, p.41.

⁷⁵ *Ibid.*, p.86.

⁷⁶ *Ibid.*, p.88.

⁷⁷ *Ibid.*, p.100.

"looking into the most wonderful eyes he had ever seen"⁷⁸, he begins a battle with himself beside which the vicissitudes of his public life pale into insignificance. The force of her physical charm is augmented by her musical talent. Paul mistrusts music because, he says, "I am extremely susceptible to music and find most of it enervating - even, shall I say, demoralizing?"⁷⁹ And where Barbara's beauty is pure and statuesque, Philippa's is sensual. The two types of beauty are given moral significance in *Paul Strange*. Philippa's beauty is something to be feared. Paul tells her that

"you are, like your music, too beautiful for a man to listen to without

..."

"Without - ?" The word came so softly it might have been an echo. Her beauty intoxicated him. He wanted to take her in his arms . . .

With a sudden contraction of the heart he remembered Barbara. Her sweet face with its cameo beauty came like moonlit vision that blotted out for a moment the glowing passionate face before him.⁸⁰

Philippa's lustre is brilliant but evanescent; the steady aura of Barbara's strength prevails throughout the trials Paul later causes her to endure.

The quality of beauty reflects the quality of love each woman can give Paul; the eternal triangle in *Paul Strange* presents more of a test of Barbara's love than it does Paul's. When Paul sends a letter to Barbara confessing his love for Philippa, he does not know that her absent-minded uncle has failed to give it to her. On the following day, Paul receives a letter from Barbara fixing the day of their wedding, which he takes as her sign of forgiveness:

Barbara would keep him, without thought of that other woman
His sweet saint to stoop so far! . . . His faith was shaken, it was tottering . . . it lay bleeding in his inmost soul like a wounded bird.
And it had been more to him than life, than Barbara herself.⁸¹

⁷⁸ *Ibid.*, p.132.

⁷⁹ *Ibid.*, p.150.

⁸⁰ *Ibid.*, p.210.

⁸¹ *Ibid.*, p.221.

Although Paul inherited his better self from Mary Strange, it is Barbara who is expected to safeguard it. When the missing letter is found, the unhappy consequence of a broken engagement is proof of the moral worth of Barbara's love. Barbara's refusal to go through with the marriage is not made in a fit of jealous pique, but in the spirit of self-sacrifice. She stands aside so that Paul can think over his dilemma.

Paul's love can be imperfect and divided but Barbara's cannot. Its quality is further evident in the sustenance Barbara gives to Paul's public self. Philippa, however, cannot inspire him in his work because, as Paul comes to learn, her interest in it is only motivated by the pleasure it gives him. Philippa's intense need of Paul has no strength about it and is driven by selfishness. Paul begins to resent Philippa when he realizes what her love will do to him:

She would sap his strength. Eventually, unless he made some resistance, she would dominate him. Philippa had spread her silken web and her captive was enmeshed and for a time he did what most captives would have done; he remained quite still. But the meshes were cutting through his flesh; soon they would reach his soul. . .⁸²

While Philippa is recovering from smallpox, contracted through her perverse refusal to be vaccinated, Paul realizes that he does not love her and that "she ha[d] stolen his strength as she would steal more in the future".⁸³ Paul's love for Barbara acquires a maturity that it had not had in the days when he worshipped at her feet.

Conclusion

In *Paul Strange*, we find a reassertion of some of the values which were so central in the nineteenth century novel and which were eclipsed to a considerable degree by the gradual development of the hero. The link between Paul's public life and his private one is a love which strengthens his ability to fight the good fight. Parental power is not usurped but is passed from one generation to the next. In

⁸² *Ibid.*, p.264.

⁸³ *Ibid.*, pp.276-277.

many respects Paul Strange is a far cry from the self-possessed Coudrey Watson who introduced this chapter. The division of his loyalties between two women leaves him doubting, unsure and unable to carry on with the work that had once fired him with so much zeal. *Paul Strange*, however, owes more to the heroic ideal of the twentieth century than to the exhortations to duty of the nineteenth, because heroism is evinced in Barbara Westover's power to shape events through the nature of her personality. Responsibility for Paul's future lies not in his own, but in Barbara's hands. And if he is not perfect, neither are his more *macho* peers. After the death of Alfred Arnold, Coudrey Watson's incomplete faith in Beatrix's love for him leads him impulsively to marry an irresponsible girl who has become pregnant out of wedlock, in order to satisfy her father's dying wish that the unborn child have a name. His action brings unhappiness on the girl, the father of her child, and further unhappiness upon himself. Similarly, John McGarvie acts unwisely and is honour-bound to marry a girl he does not love. Rex Ware fails to listen to the dictates of his heart and deeply hurts the person who is most important to him. The heroes are characteristically weak in ways which are compensated for by the heroines, who enable them to regain their foothold as the masterful protectors they generally are. For all their failings, it is the persistence of the strengths which I have delineated as paternal which make them worthy of the women they occasionally wrong. None but the brave deserve the fair.

The heroines - and they are, without exception, fair - are closer to perfect than their men. The beauty without is matched by inward powers of loyalty, of the ability to do what is morally right - and of forgiveness. Unlike their endearingly flawed heroes, they never do things which require forgiveness, but they are frequently called upon to bestow it. If they show weakness, it tends to be a failure to forgive, and the lesson is soon learned in the unmitigated misery which attends such a failure. Amid all the posturings of the male characters, the female ones exhibit a moral fortitude of which even the strongest hero is incapable; frequently occurring examples surround sex in the novels. Although instances abound of

muscular men crushing frail and fainting women to their chests in forbidden embraces, we never lose our faith that propriety will win, and that the heroine will make sure that it does. (Even when Peter Delaney gives herself to Rex Ware it is because he is morally hers - no marriage vows are betrayed by her lack of vigilance). Although attachments frequently persist in contravention of the fact that one or both of the lovers is "claimed" by another commitment, the moral order is never seriously threatened. The woman's weakness when in the sway of the powerful masculinity of her lover is conquered by her resolve to safeguard the chastity which makes *her* worthy of *his* love. Chastity, the duty of the wife, is the armour of the heroine.

The protective hero and the chaste heroine thus approximate the calls to marital duty sounded in the divorce court. Where the courts and the fictional literature parted company was on the issue of marital happiness, with which the judiciary claimed to be unconcerned. In this regard, the literary marital values have a further dimension to those posited in court. I have sought understanding of this dimension in its similarity to a parent-child dichotomy, particularly in the divisions of power and responsibility which appear. The struggle for Paul Strange's soul furnishes perhaps the strongest example in the novels examined in this chapter. At the beginning of Paul's acquaintance with Philippa Maitland, he finds his thoughts turning to her "against his will".⁸⁴ He responds to her charm "[w]ithout any will of his own".⁸⁵ His mind is "taken possession of by Philippa".⁸⁶ It is the thought of Barbara's face which checks him in the early stages of his attachment to Philippa and later, Barbara's reactions to his predicament which govern his actions. The emphasis on personal responsibility which characterized the nineteenth century conception of duty is thus replaced by a surrender of it in the twentieth century one. This surrender is not just a sign of incipient twentieth century hedonism; the fact

⁸⁴ *Ibid.*, p.145.

⁸⁵ *Ibid.*, p.164.

⁸⁶ *Ibid.*, p.189.

that responsibility is surrendered *to* the beloved, rather than abandoned altogether, suggests parent-child reciprocity.

The incorporation of parent-child interaction into the conjugal unit is also suggested in the downgrading of the importance of biological parents. "Ask your own heart alone if it is right", the "fatal maxim" of *The curate's friend*, becomes a credo in the twentieth century novel. Romantic love is depicted as having a power which obviates the need for reference to one's elders, who are more often silly old fools than founts of wisdom. Whereas in the nineteenth century novel parental authority provided a moral reference point for decisions about marriage which had a rational basis, viz, consideration of the prospective spouse's character, the hero also obviated the need for rational decisions. The heroic personality ensured that one "knew" one's true partner, even if this knowledge did not reveal itself immediately. Following its discovery, the heroine in particular is typically represented as being swept along on the inexorable tide of the hero's compelling love. If romantic love is pre-rational, it is also often pre-verbal. Lovers communicate with each other by long-range vision across a crowded room or, in cases where love is forbidden mention by mundane complications, eyes tell what lips dare not.

The decline of parental authority does not make the choice of a spouse any less weighty. Paul Strange's dilemma is intensified by the fact that, once he has made a choice, he cannot go back on it. And although true love comes only once in a lifetime, it has some very cunning imitators. The novels of Doris Egerton Jones are addressed specifically to this problem. Both Rex Ware and Bob Gale have to contend with rivals who, if not winners, are at least in the race, unlike some of their foppish predecessors. But where the protagonists of the twentieth century novels make choices at all, these choices are governed by the pattern of parent-child interchange which characterizes true love. The only instance in which the wrong choice is made in good faith - Beatrix Arnold's to marry Alfred - it is made before she had met her true spouse, which event occurs after she has come to the conclusion that her true spouse is not Arnold. The reprieve of death which undoes

this mistake is unlikely to have been offered Paul Strange if he had remained blind to the fact that Barbara Westover was his true love until he had gone through with his marriage to Philippa Maitland. Her disfigurement by smallpox is not comparable to the death of Alfred Arnold because it does not free Paul from his engagement to her. Her choice to leave the country once her beauty is ruined represents her voluntary retirement from the race that Barbara Westover has won.

The representation of romantic love in South Australian fictional literature is comparable to the moral messages delivered in the Supreme Court, although the methods were different. The twentieth century emphasis on individual happiness which substituted nineteenth century exhortations to duty was not a capitulation to personal licence in marriage and divorce but a stepping up of the campaign against it. This substitution, however, was as vulnerable to the onslaught of divorce as the position taken by the Supreme Court judiciary. The fictional representation of love was of a 'parent-child' bond so perfect that it could only exist in the realm of childish fantasy. The gap between the ideal and the real was widened by the fact that, although the duty to which the novels appeal is marital, the love which they describe is not. Apart from a few brief glimpses at the odd, smug Darby and Joan, it is the search for, not the maintenance of, a conjugal partnership which generally concerns them. Even novels which refer obliquely to the part of married life which is "mostly bread and butter and the price of meat and nurses"⁸⁷ do not indicate how hero and heroine should adjust to it. They offer a picture of successful marriage which, for all its romantic appeal, is hazy and dreamlike when compared with the more pragmatic tendency of the nineteenth century novelists to fit marital duty into a hierarchy of other social duties which the individual has no choice but to obey. While the romanticism of the twentieth century appears at first to have widened the margin of personal choice in marriage, it offered no safeguards against making the wrong choice beyond the fortuitous death of an unwanted spouse. This combination of factors, taken in the context of a divorcing society, weakened the

⁸⁷ Jones, *Time o' day*, p.61.

call to marital duty which had sounded so clearly from the pages of the nineteenth century novels.

Chapter Six

"A FULL-BLOWN ROSE": ROMANTIC LOVE AND THE RESORT TO DIVORCE

Introduction

The use of romantic love to assert the primacy of the conjugal relationship is an incorporation, rather than a disavowal, of the nineteenth century moral vision which placed duty before individual happiness. Duty in the nineteenth century novel could be a bitter pill; in the twentieth, it is offered up with the sugar-coating of heroism. The duties are, of course, different. Family and social duties are regarded by the twentieth century novelists as secondary to conjugal ones, but the certainties of parental protection and authority are uppermost in the romanticism of the twentieth century novel. Despite increased emphasis on marital happiness in the conjugal unit, the moral role of the nineteenth century parent is assumed in the characteristics of the twentieth century hero so that duty is not abandoned, but wears a different face.

The increased emphasis on marital happiness in twentieth century fictional literature suggests changes in marital values. Therefore, it could also be interpreted as reflecting to some degree the impact of the new age of divorce. Yet, despite the ubiquity of the eternal triangle, divorce is rarely mentioned, and then only *sotto voce*. The conspicuous omission of divorce as an alternative to marital unhappiness is the most telling aspect of the novelists' attitudes, although signs of a lifting of the veil from divorce are evident in a few of the novels published in the 1910s. *Time o'day* describes a divorce with some sympathy, but the utter sordidness of it suggests that Jones believes that in divorce, there is no such thing as an innocent party. Three novels to be discussed in this chapter, Kate Helen Weston's *The prelude*, Tarella Quin's *Kerno: a stone* and Doris Egerton Jones's *The coconut planter*, offer further permutations of the triangle, with vastly differing resolutions. They share, however, an admission that the search for marital happiness is so fraught with difficulty that the heart alone does *not* always know what is right.

Also at the end of the period under study comes an easing up of the rigidity of masculine and feminine ideals, which is apparent in Alice Grant Rosman's *The tower wall* and Quin's *Paying guests*. These writers examine romantic love with a critical eye and with more regard to the personal attributes of a prospective spouse than his or her ability to make the earth move and bells ring. Nevertheless, the two dominant themes found in the novels discussed in Chapter Five prevail: the parent-child dichotomy and the idea of marriage as indissoluble.

All five of the novels perpetuate the heroic myth. This chapter will demonstrate how the heroic character undermines the authors' admonitions to marital duty. The reins are tightened on galloping self-indulgence through the moral characteristics of the heroic stereotype and through the refusal to accord divorce a legitimate place in the romantic picture. Like the Matrimonial Causes Act itself, the ideas presented in the fictional literature evince an uneasy union of the old and the new. As the clash between duty and happiness assume greater prominence, duty is forced into a Procrustean bed which only exposes the weakness of the novelists' position against divorce. Although none of the three novels dealing with the theme of mistaken marriage accepts divorce as a solution to the marital problems presented, the concentration on unhappy experiences in marriage suggests that the authors were disturbed by the link between romantic love and the escape hatch of divorce. 'Anti-divorce' ideas in the fictional literature, however, did not merely succumb to a flood of popular 'pro-divorce' feeling. The principles themselves upon which the fictional representation of marriage is based reveal internal contradictions which lend them to the conclusion that divorce, not duty, should prevail when marital difficulties prove insurmountable.

Choice in the South Australian novel

Kate Helen Weston's *The prelude*, published in 1914, introduces the heroine, Nora, through her relationship with her father, the fiery Irish politician, Cormac Glayde. Their strong bond which, described in Weston's purple prose,

borders on the incestuous, contrasts sharply with the relationship between Nora and her mother. Cormac Glayde had

married a woman who, while dazzling him with her chaste beauty, was never to satisfy the demands of his ardent temperament....Cormac's eccentricities - the eccentricities of genius - annoyed her; his amorous nature disgusted her, and they drew apart by mutual consent, lest dislike should engender hatred of each other.¹

Significantly, however, the couple does not divorce. Nora Glayde is represented as a small, feminine version of her father, except in her sexual habits. Later in the novel, she also rejects divorce as an alternative to an unhappy marriage, but where Cormac Glayde's actions are not limited by the legal bond of marriage, Nora's are.

It would seem from the opening pages of *The prelude* that daddy's girl will find a husband who is like Cormac, but the death of her father - inevitable when we remember the pattern of the novels already discussed - yields unexpected results. Nora turns to an associate of his, Malcolm McCarron, for comfort and, drawn to his "apparent sincerity and strength", consents to their engagement.² Her father's will had left a substantial amount of money to her mother, provided she relinquish guardianship of Nora so that she could have free choice about her future.³ Despite the stipulations of his will, her father's death has closed off Nora's choices, precipitating a rash decision because of her emotionally vulnerable state.

Weston's emphasis on the importance of choice is grounded in a belief in the importance of marriage, even though she makes frequent references to the unhappy or boring marriages of many couples. Bad marriages in particular, rather than marriage in general, come under Weston's fire, and even Nora is not spared. Shortly after the birth of her child, Nora realizes

that she had made an irrevocable blunder in marrying a man for whom her warmest feelings were gratitude and a tolerant affection....

¹ K. H. Weston, *The prelude* (London, [1914]), p.9.

² *Ibid.*, pp.36-37.

³ *Ibid.*, p.28.

She reproached herself that she had belittled marriage by her action. A well-stalled animal may nose in gratitude the hand which feeds it; in similar fashion she had shown her gratitude by giving herself in marriage to one who had offered her respite from her loneliness.⁴

She has similarly abused motherhood by allowing it to "come to her without any extenuating passion for her partner in parenthood. It had all been a huge mistake, for which they must both pay the penalty".⁵ Nora begins to pay up when she meets David Blencowe, the man she should have married.

David's spirited radicalism, following the example set by Cormac Glayde, makes Nora even more aware of the differences between herself and her husband. His personality, like Nora's, has been shaped by parental example, in his case a work-worn widow, whose "love for me was her only incentive to stand up against the world". She ceased to do this when David was sixteen, dying of heart disease brought on by overwork.⁶ Where Cormac Glayde's legacy is the gypsy spirit inherited by his daughter, Mrs Blencowe's is the social conscience she instils in her son. When the plot thickens, however, it is the rebellious Nora who sticks close to the path of duty.

Although David subscribes to the view that marriage should in certain cases be "dissoluble without dishonour", he warns Nora that she should be certain that her unhappy marriage is one of these before taking a step from which there would be no turning back.⁷ When Nora shows herself to be willing to take such a step, it is Malcolm McCarron's opposition to divorce which prevents her from doing so, although he does agree to a temporary separation.⁸ Weston thus spares Nora the consequences of her daring through the character of McCarron. Nevertheless, she shows greater candour on the subject of mistaken marriage than in either of her earlier novels by at least considering the alternatives to killing off an unwanted spouse. Nora has a practical reason for obeying convention - David's political

⁴ *Ibid.*, p.56.

⁵ *Ibid.*

⁶ *Ibid.*, p.140.

⁷ *Ibid.*, p.212.

⁸ *Ibid.*, p.230.

career will be ruined if she does not - but the sequence of events which begins with McCarron's death shows that expediency does not govern her motives.

By the time she learns of her husband's death, Nora has made a life for herself near Townsville, watched over by Valentine, her father's retainer, who acts as confessor-cum-guardian. She tells him of her love for David and of her intention eventually to marry him, but says that she would rather forfeit this happiness if Malcolm could be brought back to life.⁹ Like Beatrix Arnold, then, her loyalty to a man she does not love is greater than that to the man she does, simply because of the marriage tie. When Nora and David are reunited he tells her that, before learning of her husband's death, he had come to the conclusion that he could not give her up. Nora does not tell him that she had also fought a battle with her conscience but

had come off victor, relinquishing her claim upon him for that larger claim which seemed of so much more importance. There was no need to speak of it now, for the barriers which had then separated them were broken, and they were free to love and live as they would.¹⁰

Nora's victory, however, is not sufficient testimony to her wifely duty to ensure her future happiness. On her last journey with David before they are to separate for a year before marrying, they are caught in a cyclone.¹¹ David's fatal wounding by falling debris brings the hopeful reader down with a thud. Why were Nora McCarron and David Blencowe not given the opportunity to reap the benefits of the fortuitous death of a spouse in the way their predecessors were?

While Weston's conception of romantic love remains the same in *The prelude* as it was in the two preceding novels by her in this study, the discussion of divorce in this latest novel gives it an important distinction. Nora's freedom of choice is emphasized throughout it, yet circumstances set strict limitations upon it. The principal obstacle to Nora's freedom remains propriety, even though she says

⁹ *Ibid.*, pp.291-292.

¹⁰ *Ibid.*, p.295.

¹¹ *Ibid.*, p.304.

she is prepared to flout it. It is in this willingness that Nora's greatest difference from her precursor, Beatrix Arnold, lies. It is because of this difference that the opportunity for happy marriage without resort to divorce is snatched away from her. If Weston is daring in creating a heroine who is willing to divorce, she is nevertheless not a crusader. She allows Nora to kick against convention, but ensures that she leaves no bruises. Nora's rebellious spirit is met by a force which leaves the reader in no doubt as to the consequences of even contemplating the abandonment of marital duty. Although Nora leaves her husband, the chastity she owes him as his legal wife remains paramount, so that by the time of his death, her conscience has enabled her to renounce her lover. Nora could not do otherwise and remain a heroine.

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Tarella Quin's *Kerno: a stone*, also published in 1914, concerns a woman who does divorce, but where Nora Glayde makes wild pronouncements while remaining a good wife to the core, Judith Acton takes bold steps which she later repents. Judith's rashness is not active, however. Throughout *Kerno* she appears as one done to rather than doing. Her passivity does not make her the ideal wife, it debars her from the heroine class of which the more outspoken Nora Glaydes are members. *Kerno* discusses the consequences of the failure to act when it is morally imperative to do so, and thus the novel does not describe heroes and heroines, except by implication. But although neither Judith, nor the principal male protagonist, Wynne Holland, are heroic in stature, they could initially be mistaken as such. In *Kerno*, Quin uses the existence of divorce to subject romantic heroism to greater scrutiny than has been attempted in the other works under study.

Wynne Holland, as he is introduced, appears to be endowed with all the attributes of the true hero. "Towering head and shoulders above his contemporaries of the younger set", Wynne is a brilliant solicitor who practises law out of love for

his profession, not financial need.¹² His personable demeanour, however, lacks the hard edge that stronger men, who have gained their strength through adversity, possess:

Glancing superficially at him one would not have immediately received an impression of vigour, nor been conscious of the keen analytical powers of the brain behind the smiling eyes, that gave him his pre-eminence as a solicitor. He was so ordinary, and so likeable that lesser stars forgave him his success and his brains.¹³

Success has come a little too easily to Wynne; his personality is not individual enough to have earned him any enemies and his expectation that all he wants will fall into his lap is exemplified in the fact that although he dances with all the ladies, none claims his undivided attention:

Regarded in this light Wynne's love became as harmless as it was tantalising. Some day he meant to seek the road to Arcady, for he imagined, poor deluded mortal, that love waited to be beckoned, and in the very sureness of his confidence in his own strength lay the small germ that might prove his undoing later.¹⁴

Quin's words of foreboding say that there is no "might" about it and that "later" will be soon. There is one lady to whom he is attentive, but she is already married: the beautiful Judith Acton.

Judith Acton's eyes bespeak tragedy. Her unhappy marriage to a domineering brute heightens her attractiveness to Wynne. He declares his love for her by saying that he would give up the world for her, and he even believes that he means it.¹⁵ Ironically, Wynne does give up the world for Judith - and suffers for it. His suffering is not caused by the sacrifice, however, but because it is not willingly made. Later that evening he finds in his pocket a token that he had seized from Judith's dress:

¹² T. Quin, *Kerno: a stone* (London, 1914), p.3.

¹³ *Ibid.*, p.4.

¹⁴ *Ibid.*

¹⁵ *Ibid.*, p.21.

It was the rose, the red rose he was even now forgetting, the flower that had rested on Judith's neck. It seemed still warm from its white resting place. The scent, the heavy scent of a full-blown rose that is withering, came to him on the night air.¹⁶

The image of the rose and the circumstances under which Wynne remembers it symbolize the relationship that is to develop between the two people. Wynne is absent-minded about the memento of Judith, betraying the unenduring quality of his feelings. The full-blown rose is already at the point of decay - no further blossoming of love awaits them - and its scent is "heavy", overpowering Wynne's senses.

In the wake of the scene of Wynne's declaration of love for Judith, we learn of how Judith came to marry Duggan Acton:

He came with all his brilliance and impudence, irresistible to a girl who knew nothing of men, and when she was nineteen Judith married Duggan. She had not intended to marry him, but in the days of her happy girlhood she had always followed the line of least resistance, and then, somehow, she did not exactly know how, he had married her.¹⁷

Again, the romantic strains have a hollow ring. Judith's childlike reaction to Duggan's forceful nature is not appropriate as it is, say, when Beatrix Arnold surrenders to Coudrey Watson, because Judith lacks the adult woman's knowledge that she can place the trust of a child in the man who has power over her. Quin draws a sharp distinction between the temporary abdication of responsibility which characterizes the parent-child dichotomy of romantic love and the immaturity which prevents Judith from seeing the destructiveness of Duggan's love for her. Moreover, Judith is mistaken when she comes to believe that Duggan does not love her. Quin suggests that, had Judith realized that his love, however cruelly it is expressed, is genuine, this knowledge "might have robbed the years of some of their torture".¹⁸ Instead, the irrevocable mistake of her marriage is compounded by

¹⁶ *Ibid.*, p.24.

¹⁷ *Ibid.*, p.29.

¹⁸ *Ibid.*, p.32.

a course of action which drags Wynne down with her.

The events which follow lead Wynne and Judith to behave with a recklessness which is most unheroic. Judith selfishly compromises Wynne by appearing alone at his rooms, while Wynne's horror that Judith has left her husband gives way to satisfaction that it is he whom she sought in her hour of need.¹⁹ He decides to send her to his family property of Kerno to think over her future but then wonders at the wisdom of his decision. He thus reveals himself as prey to the failings and weaknesses of mere mortals and lacking in the integrity and clear moral vision which put the hero above the ordinary.

In the rugged surroundings of Kerno, presided over by its even more rugged bookkeeper, Wilkie, Judith realizes that she must return to her husband.²⁰ Her return is pre-empted, however, by her husband's divorce on the ground of her adultery with Wynne.²¹ She thus pays both for her rashness and for her misplaced confidence that she does not have to answer for her actions or defend her reputation. Whereas she had initially sought asylum in the bush, she is now exiled in it.

The novels of Tarella Quin exude her love of the Australian bush and *Kerno* in particular expounds her view of it as a moral force. In *A desert rose*, it brought out the best in Betty Curtis and provided a vehicle for the expression of Paul Sugden's manliness. In *Kerno* the lessons of the bush do not prepare the protagonists for marriage, but provide a basis for their growth within it. When Wynne proposes marriage to Judith, Quin once again draws a distinction between the romantic reciprocity of parent and child, and the crippling weakness which forces Judith to cling to Wynne against her better judgment. She feebly protests against his offer of marriage, "listening with an inward ear for something she missed in Wynne's voice".²² Her failure to insist upon a delay in the marriage

¹⁹ *Ibid.*, p.60.

²⁰ *Ibid.*, pp.125-126.

²¹ *Ibid.*, p.156.

²² *Ibid.*, p.171.

shows that she has no strength to match that which she seeks in Wynne. Wynne's strongest feeling for Judith is pity.²³

Wynne and Judith redeem themselves to an extent for their crime against romantic love through the birth of their daughter, Margaret. Margaret is a child of the bush and from birth bears the stamp of determination which reveals a heroine in the making, although she is not beautiful, or even pretty.²⁴ Even as a baby, she inspires Wynne, who sees "a good deal of the spirit of his own mother dormant in this atom",²⁵ in a way Judith has never been able to. From the perspective of Margaret's infant wisdom, changes in Wynne and Judith are noted, while Wilkie discusses them with her as if she were the concerned parent. He makes no attempt to hide the fact that her parents' marriage was "disastrous".

"Your mother is growing up", said Wilkie, staring hard at her, "she'll soon be able to stand alone....She only came into existence by the concurrence of certain unfortunate events of which your father was also a victim. With her help he'll soon be able to stand alone too".

"Poor ole Wynne", said Margaret, "and dear Judif!"....

"Your father's growing up too", said old Wilkie. "Dear me! Four years ago he was as invertebrate as an earthworm in some respects. To-day, with a little disguise, it is quite possible he might pass for a man - in a few years he may be one."²⁶

As Wynne and Judith become resigned to their life at Kerno, Margaret thrives in it, until she blooms into an unusual and independent young woman. The penultimate chapter of *Kerno* has her meeting Dick Nevitt, whose virility, forthright manner and love of the outback ensure that she will relinquish her independence to the right man.²⁷

In broaching the topic of divorce with reference to two characters who, if weak, are not grossly immoral, Tarella Quin brings divorce into the realm of possible alternatives to marriage, even though it offers no happy solution.

²³ *Ibid.*, p.169.

²⁴ *Ibid.*, p.186.

²⁵ *Ibid.*, p.188.

²⁶ *Ibid.*, p.233.

²⁷ *Ibid.*, pp.271-274.

Throughout the novel, Quin seems torn between condemnation of Wynne and Judith's actions and sympathy for their plight. Judith is described in Hardy-esque tones as "born for tragedy"²⁸. She is also vindicated when Wynne returns to the city to defend a woman in another divorce suit filed by Duggan Acton, saying "I mean to fight for her as I would have had someone fight for you."²⁹ Significantly, however, Wynne, his constitution weakened by his hardships at Kerno, dies after having won the case.³⁰ In *Kerno*, destiny is not blind, but a moral vision of how things could have been otherwise had Judith been stronger at nineteen when Duggan Acton swept her off her feet. There is no doubt that once the fatal step of marriage to Acton was taken, Judith was doomed to unhappiness. Margaret is made of stronger stuff than her parents. Her superiority affirms the essentially moral character of *Kerno*.

Moral lessons aside, *Kerno* demonstrates that the force behind the literary onslaught against divorce was being depleted. Wynne and Judith's marriage is described as disastrous and yet, it was doubtless no worse than the average run of marriages, and a good deal better than many that ended in the divorce court. Quin's choice of two characters who *should* have had everything going for them - a brilliant lawyer and a beautiful socialite - draws a further interesting comparison between fiction and reality. If they could make such a mess of their joint lives, what hope for the common clerk or shopgirl? The contrast of what was promised in Wynne's mad, hot words of love and their bitter consequence could have made divorce seem attractive to the contemporary reader despite the author's disapproval of it. While South Australian novelists persisted in setting up romantic ideals, they increasingly warned against cheap substitutes which bore misleadingly similar traits. Wynne and Judith are forced to lie in the bed of their making; the clerk and the shopgirl might be more inclined to cut their losses in the divorce court.

²⁸ *Ibid.*, p.27.

²⁹ *Ibid.*, p.263.

³⁰ *Ibid.*, pp.282-283.

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The sad chain of events in *Kerno* is seen to have begun with Judith's initial mistaken choice of a husband. The dire consequences of her inability to distinguish between temporary passion and a strong love which would enable her to live happily ever after could have been avoided if it were not for her passivity. Doris Egerton Jones's *The coconut planter* (published in 1916) looks at women's choices in marriage in a different manner. Where Quin stresses responsibility, Jones sees women's actions hedged about by male control, as we have seen in her other novels. The heroine of *The coconut planter*, Sunny Shale, makes no choices. Like *Kerno*, *The coconut planter* is a tragedy, but Jones's heavy accent on paternalism takes responsibility for divorce out of female hands and condemns the heroine to a fate which she is powerless either to avert or to alleviate.

When *The coconut planter* opens, Sunny Shale is reflecting upon her desertion three years ago by her husband of two weeks, Terry Rossiter. She has taken advantage of an inheritance to fulfil a dream of buying a coconut plantation in Papua, where Terry is believed to have been killed by natives.³¹ On board ship, Sunny meets Nevil Close, whose bad first impression is encapsulated in Sunny's suspicion that his upper teeth are false.³² A flirtation nevertheless develops between them, punctuated by comments from Nevil which remind Sunny that she must ensure that none of her words or actions can be construed as improper. The contrast between Nevil's self-appointed role as Sunny's conscience with his tendency to flirt with all and sundry on board is more than just another of Jones's pæans to the sexual double standard. It is preparatory to the revelation that Nevil, who turns out to be Terry's cousin, is on his way to retrieve Terry, whom he believes is still alive, from the jungles of Papua.³³

³¹ D. E. Jones, *The coconut planter* (London, 1916), pp.2-11.

³² *Ibid.*, p.13.

³³ *Ibid.*, pp.116-118.

By the time Sunny hears this news, the flirtation has progressed to the extent that Nevil feels he has some claim on her. And for all his false-looking teeth and the insipid diminutive, Nev, by which Sunny now calls him, his claim is established by the brutal side of his nature:

I hate him for it, and yet - and yet it's interesting....Whenever I've read of women sticking to men who are cruel to them, and even caring for them, I've wondered how they could be so poor-spirited. Now, I think I understand.

....All women have in them a streak of the dog that only truly adores when it is mastered.³⁴

It is perhaps Nev's brutality, which is referred to repeatedly in *The coconut planter*, which stirs Sunny's passion in a way that Terry, a contrite and sobered person when he emerges from the jungle, cannot.

The coconut planter differs from other novels where the triangle theme is used to convey marital values in that, although Nevil responds more to the romantic stereotype, no invidious comparison is made between the two men. Terry is not held to account for his desertion of Sunny because he repents it and is prepared to make amends.³⁵ Nor does his re-appearance mean that Sunny is forced to remain married to a man whom she has replaced in her affections. For the first time, a heroine is torn between two men equally worthy of her. All Sunny's pigeons come home to roost when she realizes that, by keeping her marriage a secret, she has caused this second love to develop.

If Sunny's predicament is thus partly her own fault, its resolution is out of her control. Her predicament becomes Nev's and Terry's as they discuss the groundrules of a situation which seems to concern only the two of them:

"Sunny, dear", Terry said gently...."You don't mind me and Imp [Nevil] talking it over, do you? You see, we've got to fix it some way, and it's easier to talk about when you're not there. It doesn't seem so much like bargaining you about. You'll go inside and bathe your eyes - and don't worry, will you?"³⁶

³⁴ *Ibid.*, p.64.

³⁵ *Ibid.*, pp.301-303.

³⁶ *Ibid.*, pp.310-311.

Hitherto, choice in the fictional literature has been between the right spouse and the wrong one. In *The coconut planter*, Sunny's genuine dilemma is resolved by having the decision taken from her. Terry finally tells Sunny that he and Nevil have decided that they both should leave, Terry to return in three months, giving matters time to blow over, and so that Sunny can have time to think about how she feels about being Terry's wife.³⁷

Sunny's position demonstrates a new ambivalence toward marital duty in the fictional literature. But if Jones is reluctant to have her heroine tread the path of duty with alacrity, the alternative of divorce is even more repugnant. Sunny admits to Nev that she will love him as long as she lives, but a choice for Nevil would mean that she could not stay on her plantation:

I could never again face these kind, good people, a girl forsworn, a wife who had betrayed a generous heart, a woman divorced. At the terrible word I shivered again, but I knew, if he bade me, I should go.³⁸

Sunny's decision to resist the temptation to run away with Nevil asserts the heroic strength we have found in earlier novels.

Although duty must prevail, Sunny cannot return to her marriage because in doing so she would denigrate her love for Nevil, but she cannot choose Nevil because this choice would betray her marriage vows. Confronted by a choice for which even a moral resolution is not clear, Jones's heroine is unable to act. The novel ends with the two men going off to war, saying that when it is over, one of them will come back to her.³⁹ The reader should not spend too long puzzling over how they will arrange for one and only one of them to return from a war "where men are being mown down by thousands and tens of thousands".⁴⁰ Sunny's final thoughts as the sun sets on her plantation, "And I have my coconuts! Oh, Terry -

³⁷ *Ibid.*, p.319.

³⁸ *Ibid.*, p.334.

³⁹ *Ibid.*, pp.337-338.

⁴⁰ *Ibid.*, p.343.

Nev -- Oh God!",⁴¹ foretells a life of solitude. The alternative to a choice that is too terrible to make is nothing at all.

The retreat from heroism?

In attempting to come to grips with the problem of how to deal with freedom of choice in the companionate marriage without resort to divorce, the three novels in the preceding discussion offer no substantial criticism of the romantic ideal. The course of true love itself always runs smoothly; ripples are caused either by circumstances which intrude into the romantic dyad or by the mistaken belief that a false love is a true one. The two following novels take up the problem of distinguishing real love from its imitators, focussing their attention upon the nature of romantic love and the heroic stereotype. There is a discernible scepticism towards the heroic personality as being too much larger than life, too good to be true. However, this criticism does not amount to rejection of the principles of love propounded in the other novels examined. In modifying the principles somewhat, Alice Grant Rosman in *The tower wall* and Tarella Quin in *Paying guests*, which were published in 1916 and 1917 respectively, continue to adhere to a conception of love as filiation and of marriage as indissoluble.

Characterization and plot in *The tower wall* bear many similarities to the novels with which Chapter Five was concerned. Its main female protagonist, Julien Archer, is, like Thyme O'Dea, the daughter of a conservative politician, whose persona is scantily drawn. The infrequency with which the father contributes to the action of Rosman's novel belies his significance as the focal point around which the novel's love relationship is constructed. This relationship perpetuates the theme of romantic love as perfect, and as a form of atonement for the wrongs of the past and inadequacies in the parent-child relationship.

Rosman goes to some trouble to avoid the heroic stereotypes so prevalent in popular novels. George McMorris is introduced without mention of his physical

⁴¹ *Ibid.*

characteristics, and our first impressions of his personality are not particularly favourable.⁴² Rosman's ostensibly "warts and all" approach to romantic love, however, is not extended to the character of Julien Archer, who is introduced in conjunction with her feckless father,

that debonair, delightful father whose image was mirrored in her own charming youth, who had given her besides her ready confidence and her even more ready laughter. Yet there was another strain in Julien too, dimly outlined yet, but surely stirring, the strain of a clear spirit and very high enthusiasm.⁴³

Again, we do not learn whether Julien's features are regular, her hair golden or her body daintily fragile, but Rosman's emphasis on "spirit" is the mark of a comparable ideal. Whereas our first impression of George McMorris is altered when we learn of his good points, Rosman's development of Julien acquires no greater complexity than what is revealed in this first glowing description. She appears perpetually as breezily self-confident and completely unflappable. Her lapses in consideration for the feelings of others are so occasional as not to throw any doubt on her usual mastery of tact. Julien has inherited all of her father's good qualities and none of his bad ones. Julien has no warts.

Julien is also perspicacious. The novel's early pages show her childhood adoration of her father quickly give way to disillusionment as she observes his behaviour when his party is elected out of government. The first damning evidence against him is that he doesn't care about the principles behind political action, and this characteristic is testimony to his overall shallowness.⁴⁴ The emotional distance which Julien establishes between herself and her father as a result of her eyes being thus opened is matched by physical separation. Archer's political defeat frees Julien from her obligations as his secretary, and she travels to England. Here, again in the role of secretary, she becomes close friends with the famous author, Frances Cowle

⁴² A. G. Rosman, *The tower wall* (London, 1916), pp.5-7.

⁴³ *Ibid.*, p.15.

⁴⁴ *Ibid.*, pp.21-22.

who, unbeknown to her, is her real mother. Frances had escaped her unhappy marriage to William Archer by fabricating her own death and living under an assumed name.⁴⁵ Although she never reveals her relationship to Julien, she watches over her to ensure that her daughter does not repeat her own misfortune.

Of the two contenders for Julien's hand, one is strongly reminiscent of her father. Tony Crozier, although a socialist where William Archer is a conservative, uses politics chiefly for self-aggrandizement. Julien's initial attraction to Tony threatens to eclipse her regard for George McMorris and Mrs Cowle schemes at throwing Julien and George together more often.⁴⁶ The similarity between Tony Crozier and William Archer means that it is crucial that Julien not make the same mistake as her real mother did. The resolution of Julien's future, however, is left to time and her own good sense. Frances Cowle's active intervention extends no further than reminding Julien that some men fail to take their politics very seriously.⁴⁷ *The tower wall* therefore has an undeniably twentieth century perspective, despite its emphasis on moral worth rather than personal magnetism: individual choice is still more important than parental advice. Ultimately Julien must make her own decision. (This point is reinforced by Frances's inability to reveal her true relationship to Julien.)

The irony of the search for perfect love in all of the novels is that it achieves its goal in the acknowledgment of fallibility, which forms the basis of a dichotomy of needs and the fulfilment of them, of parent and child. Although Julien Archer's relationship with George McMorris develops slowly, its similarity with the more overtly "romantic" ones in the fictional literature is noticeable in the importance placed upon needs. Again, this importance is heightened by the failure of a marriage in the previous generation. When Frances Cowle confesses to Julien that she has been married she tells her

⁴⁵ *Ibid.*, pp.305-306.

⁴⁶ *Ibid.*, pp.137-139.

⁴⁷ *Ibid.*, p.149.

"I thought the man I married was the finest and most splendid person in the whole world. He wasn't of course. He was small and weak, but even his weakness had nothing fine about it because he was too blind, too utterly satisfied with himself, to know it or understand. I could have helped him. I tried, but he never saw that either. He would have laughed in his charming way at the idea. There wasn't a single place where I could really touch his life. Don't marry that kind of man, little girl."

"No", said Julien soberly, "I won't."⁴⁸

When the scales eventually fall from Julien's eyes with regard to Tony Crozier, it still remains for George to prove his worth by being put to the supreme test. Julien decides to offer Frances's literary contacts as a means of having a play of George's read by a famous director.⁴⁹ In heeding Frances's warning that "some men...will never admit that a woman could be of any use", Julien realizes

that if he did turn out to be like that, he would disappoint her more than anyone she had ever known, from which it will be seen that Miss Archer had reached a milestone on the road to matrimony. She had come from believing that all men are jolly good fellows to hoping that one man was perfection personified.⁵⁰

Despite the absence of hero and heroine "types" in *The tower wall*, the test of George's need for Julien affirms the idea that each person has only one true partner and emphasizes the parental quality of this exclusivity. Although "perfection" is interpreted loosely in the character of George McMorris, his passing of Julien's test proves that he is "splendidly different from all the rest".⁵¹

The tower wall can thus be seen not so much as a departure from the heroic myth as a new version of it. Equality of the sexes is strongly advocated, but equality in the conjugal relationship is nevertheless expressed in terms of a balance of needing and being needed. The down-to-earth appraisal of the ingredients of good marriage does not conceal the fact, too, that Julien Archer, at least, is every inch a heroine. Unsullied by any negative human attributes such as bad temper, self-doubt or even youthful thoughtlessness to any marked degree, she is all that an

⁴⁸ *Ibid.*, p.169.

⁴⁹ *Ibid.*, pp.257-258.

⁵⁰ *Ibid.*, pp.258-259.

⁵¹ *Ibid.*, p.261.

adolescent girl reading *The tower wall* would want to be. Even George McMorris's foibles are honestly come by, because they are based on misunderstanding. *The tower wall*, therefore, plays the romantic scenario on a small, drawing-room stage rather than under the proscenium arch favoured by novelists such as Kate Helen Weston. Rosman's focus on situations with which the suburban reader could identify comparatively easily suggests a concern to integrate romantic love with everyday issues in married life in a way that exotic locations would not.

Torrid scenes are similarly absent from Tarella Quin's *Paying guests* which, like *The tower wall*, asserts that true love is no less true if it does not hit you like a thunderbolt. The means by which Quin arrives at this conclusion is by the device of a mismatched couple, but the convolutions of plot customarily resorted to in order to ensure a true partnership will result are not used. The need to "kill off" an unwanted spouse is obviated both by the fact that each member of the couple, which is not a married one, makes a more suitable match and more importantly, because neither represents the bad spouse in a moral sense. Before we are introduced to this couple, we meet Nelia Summers, whose tomboyish zeal is portrayed after the fashion of Rosman's Julien Archer.

Nelia is the daughter of the Summers family, whose financial straits necessitate their taking on paying guests in their decaying homestead, Bulla Murtee, when Nelia is "just at the age to burst from bush-girl chrysalis into a butterfly".⁵² Nelia's maturing personality, like Julien Archer's, is not submissive. She declares that she does not want to be a typewriter because she would "*hate* to sit all day and be dictated to by anybody".⁵³ We also meet Mrs Summers:

Riding above difficulties as a schooner over waves, she never lost sight of the all important fact that to be successful one could stoop to anything, providing one stooped gracefully. She was better looking as an elderly woman than she had been as a girl, her grey hair suiting her soft, fresh skin and pretty brown eyes, with their dark brows.⁵⁴

⁵² T. Quin, *Paying guests* (Melbourne, 1917), p.9.

⁵³ *Ibid.*, p.11.

⁵⁴ *Ibid.*, p.8.

It is clear that Mrs Summers's matronly qualities are not echoed in her tearaway daughter. Instead, her affinities lie with her son, John.⁵⁵

The arrival of a coach-load of paying guests brings the Summers family into contact with June Vieuzeux and Kenneth Graham. The dependable qualities of Mrs Summers are most closely echoed in June of all the characters in *Paying guests*. Both June and Kenneth are characters to whom Quin is sympathetic, but their relationship is clearly wrong. When the two are together, their respective virtues become faults, because their dual natures do not constitute an interplay of strengths and weaknesses. Thus June becomes domineering and Kenneth irresponsible. The bond between them is depicted as more friendly than passionate:

Sentiment, in the usual acception [sic] of the word, did not enter into the relations between these two who had first met at childrens' [sic] parties in their nursery days....Afterwards, when they grew up, they still belonged to the same set, and to be together became a habit with them. And then, because Kenneth still thought the dusky-haired girl the most perfect girl he knew, and because the management of Kenneth had become a hobby of June's, the two drifted imperceptibly along the forward flowing tide and found themselves engaged.⁵⁶

The relationship between Kenneth and Nelia seems equally inauspicious. Hostility develops between them, Nelia taunting Kenneth with the fact that June bullies him, saying, "as long as you don't mind being tied hand and foot by a woman it's all right".⁵⁷ Once the sparring is over, a childlike companionship reminiscent of Kenneth's with June, takes its place. Their companionship, however, arises out of a growing affinity between them, not the force of habit. At the same time that Kenneth is telling Nelia that he is looking for a woman who is "a bit of a pagan like myself",⁵⁸ June is taking a critical look at her relationship with

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, pp.136-137.

⁵⁷ *Ibid.*, p.144.

⁵⁸ *Ibid.*, p.140.

him. She realizes that he is "not plastic....She must open her hand and let him go".⁵⁹

June's clarity of thought is to her credit. So is her growing attraction to John Summers, demonstrating that she is not looking for a man to tie to her apron-strings. Kenneth's elegance becomes less appealing to her than John in his unglamorous work-clothes as he goes about his masculine duties in much the same way as June undertakes her feminine ones. John's regard for June combines admiration of her ability for smoothing over difficulties by "managing" people with a desire "to see her in his own setting of bush land, to take her away and free her from the hothouse atmosphere that clung about her, and instruct her eyes and inform her heart".⁶⁰ The strength which June first encounters as a barrier of reserve eventually reveals itself in a forceful display of passion, when John tells her that "you belonged to me the moment we met - don't deny it."⁶¹ John's ardour is described as "tempestuous" and "boyish",⁶² but it differs from Kenneth's boyishness which, in his relationship with June, is manifested most strongly as a lazy inclination to let June look after him. The combination of manliness, protectiveness and sexual ardour likens John to heroes such as Coudrey Watson, even if these attributes are represented in more credible proportions. Similarly, June's ability to bear in mind in the heat of the moment that she is engaged to Kenneth⁶³ enables her to assert her chastity in a manner typical of heroines.

While John and June are sweating over the consequences of their forbidden passion, Nelia and Kenneth are on a jaunt looking for dinosaurs, suggesting that although one couple answers to a modified description of the heroic archetypes, the other is an abysmal failure in this regard. A crisis which transpires when Kenneth gets sunstroke, however, gives Nelia the opportunity of showing her ability both to think quickly in order to save him and to take care of him until he is returned to

⁵⁹ *Ibid.*, p.156.

⁶⁰ *Ibid.*, p.169.

⁶¹ *Ibid.*, p. 233.

⁶² *Ibid.*, p.237.

⁶³ *Ibid.*, pp.234-235.

June.⁶⁴ The downplaying of heroic characteristics in John and June, and the apparent absence of them in Nelia and Kenneth are part of Quin's portrayal of June and Kenneth's engagement as mistaken due to incompatibility rather than moral or emotional inadequacy, which has been the cause of other bad matches in the fictional literature.

Paying guests concludes with crisis on a larger scale than Kenneth's sunstroke, when Bulla Murtce is flooded and must be evacuated. While Nelia is rallying around by helping an elderly guest reach safety, her charge is taken from her "frail support" by her brother,

while Kenneth lifted Nelia bodily and did not put her down until shallow water was reached, when he stood her in the swift running stream out of range of the searching lanterns beneath the shed. Then he put his arm round the slight form and crushed her to him.⁶⁵

From this Kong-like vantage point, Kenneth kisses Nelia, so that the establishment of his claim on her usurps the capable Nelia we have known. Nelia, who has been presented throughout *Paying guests* as having a constitution as sturdy as her mouth is loud, is suddenly frail and crushable and upstaged in her efforts to be of use. The minor crisis of Kenneth's sunstroke serves to show that Nelia has tender feelings and is able to express them by looking after the one she loves. The major crisis of the flood completes Quin's picture of Nelia's humanity by showing her vulnerability in a manner which affirms a childlike dependence.

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The distinctive attributes of the protagonists of *The tower wall* and *Paying guests* are outweighed by their similarities to their literary forebears discussed in the two preceding chapters. Alice Grant Rosman's girl's-own-annual style depicts

⁶⁴ *Ibid.*, pp.269-271.

⁶⁵ *Ibid.*, p.291.

Julien Archer as practically perfect and her quest in *The tower wall* as for somebody who is likewise. In *Paying guests*, the idea of perfection is the subject of some good-natured derision in Kenneth Graham's rather detached delight in June Vieuxseux. But June, too, is practically perfect, her veneer of urban sophistication giving way to level-headed domesticity and a nascent love of the bush, guided by the ugly, but nevertheless comparably perfect, John Summers. Nella Summers and Kenneth Graham are reminiscent of Julien Archer and George McMorris, the early stage of their relationship emphasizing their equality with one another. As was the case with Julien and George, the fulfilment of needs becomes the measure of whether respect is worthy of the name love. And the background against which the romantic dramas are played remains the parent-child relationship. Julien Archer rejects her father, whose weaknesses are duplicated in Tony Crozier, whom she also rejects. John Summers is attracted to June's "managing" personality, which is reminiscent of that of his beloved mother. Nella Summers, who disdains her ineffectual father, finds a partner whose boyishness does not preclude the exercising of paternal control when it is necessary. With a few variations, the song sung by Coudrey Watson and Beatrix Arnold remains the same.

The failure of the romantic ideal

There are two major problems attendant upon the delineation of romantic love in the fictional literature as a form of filiation. Firstly, it risks interpreting all instances in which a heroine relies on a hero or *vice versa* as an unhealthy reversion to forms of behaviour more appropriate to the nursery. Secondly, the recourse to a Freudian framework seems shaky when it is remembered that Freudian psychoanalytic theory sees repetition of the primal love between parent and child as an integral part of adult sexual relationships. "Part" is the operative word. The literary representation of love does not merely have its roots in the parent-child bond; the balance of irresponsibility and control and the idea of perfection which characterizes it constitutes behaviour which is wholly regressive in a way that

intimacy between adults (which encompasses the mutual fulfilment of needs) is not. Instances can be found where lovers help each other in a way which is not particularly parental, such as when Julien Archer helps George McMorris with his play in *The tower wall*, but the fulfilment of needs forms the dominant theme in the representation of love, which must be perfect if it is to be any good at all.

The interchange of dependencies upon which romantic love in the fictional literature is based is one which allows for a variety of developments if we consider its consequences over a long timespan. Because the representations of hero and heroine are based upon moral as well as emotional criteria, their respective roles change according to the lesson of marital duty being taught at a particular point of the action, thus describing a balance so delicate that in real life, it would be eminently prone to collapse. Even if the roles of parent and child were fixed to a particular spouse, the fictional literature would still be in the position of encouraging the slide from heroism down the slippery slope to the divorce court. Dependency can either be outgrown or become the source of resentment; divorce lawyers grow rich on these failed expectations of marriage. South Australian novelists were advocating a form of marriage which is, almost of necessity, finite. Thus they fostered the conclusion that divorce, if not a good thing, was at least an inevitable outcome of many companionate marriages and thereby defeated their own didactic aims.

It may be argued that to read the fictional literature with basic Freudian principles in mind is to impose the benefit of late twentieth century hindsight too strictly upon the material used. Alternating strength and weakness in the fictional representation of romantic love could be explained as merely a portrait - albeit larger than life and crudely sketched - of the ebb and flow of male-female intimacy. Moreover, because Freudian explanations are addressed to what is generally termed the "nuclear" family, which is fixed in both geographical space and historical time, their use can be deemed an arrogant imposition of values in the guise of immutable truth. In answer to this objection, the description of human characteristics with

reference to post-industrial, European, middle-class society does not mean that these characteristics cannot be manifested in other societies, with different descriptions. And Freudian psychoanalytic theory offers an apt means of interpreting the literature of a society which was post-industrial, European and middle-class.⁶⁶

The appositeness of a Freudian interpretation of fictional romance is most clearly demonstrated in the link between the biological parent-child relationship and the romantic one. Even the nineteenth century novel, in which the biological family often performs a symbolic function in the description of an individual's social duties, a parallel is often made between parental and sexual love. The continuation and development of this parallel in the twentieth century novel follows two main directions: the good parent is perpetuated, and the deficiencies of the bad compensated for, in the ideal spouse. In both instances, the development of the romantic attachment is frequently accompanied or preceded by the death of a parent.⁶⁷ The parental mortality rate is so high that it surely exceeds the statistical averages of the time! The strong connection created in the novels between parental and romantic love fosters a strong connection between romantic love and divorce.

The hero as divorcee

In rejecting the property-based conception of aristocratic marriage, South Australian writers posited mutual love between spouses as a necessary basis for marriage. They did not, however, reject the notions of marital duty which had their origins in the aristocratic view. Ignoring the contradictions in their position, they attempted to shore it up by incorporating moral suasion into emotional appeal. The

⁶⁶In his defence of the use of Freudian theory by historians, Peter Gay quotes Richard Pares's observation in *The historian's business and other essays* that "if there were no such thing as human nature...no general laws could safely be laid down". P. Gay, *Freud for historians* (Oxford, 1985), p.92.

⁶⁷ Although she does not use a specifically Freudian framework, Barbara Creed mentions "the frequent depiction of the female oedipal complex in modern women's romances" with reference to the frequent juxtaposition of the death of a father and the introduction of the hero to the plot. Creed, "The Women's Romance", pp.64-65.

heroes and heroines of the fictional literature stood with one foot upon the solid rock of moral imperatives - marriage was an indissoluble bond which entailed certain duties on the part of each spouse - and another on the shifting sand of an essentially non-moral view of marriage: the search for a spouse was a matter of finding someone with whom you could share your innermost self. If we compare the unhappy endings of Catherine Martin's two novels of the 1890s with the later novels of the period under study, it seems that, while novelists of the twentieth century continued to hold a belief in the primacy of marital duty they were unwilling, where happiness and duty clashed, to embrace duty with Martin's wholeheartedness, opting for *neither* duty *nor* happiness. It is notable that these later tragedies discussed divorce in the greatest depth of all the novels.

For all their adherence to the view that those who make mistakes in marriage should live with them, the conclusions of the first three novels analysed in this chapter show at least a grudging acknowledgment of the incongruity of such a state of affairs in a society where divorce was more freely available than it had ever been before. Nora Glayde and Judith Acton are both briefly attracted to men who offer them paternal protection when they need it and both soon discover the error of using this need as the basis for the joining of two adult lives. While neither Kate Helen Weston nor Tarella Quin challenge the parental quality of the heroic ideal, both agree that it is more often found in a minefield than in a field of daisies. The protagonists of both *The prelude* and *Kerno* are punished for their mistakes, but the placement of this punishment in the context of divorce equivocates it to a degree. A similar equivocation is found in the conclusion to *The coconut planter*. The unusual position of the heroine, in love with both her husband and another man, is not resolved by having Sunny simply return to her husband and renounce her lover. The loss of both husband and lover deals Sunny a double blow but it also points to the elusiveness of the romantic ideal.

Instead of claiming that the novelists' representation of romantic love inadvertently undermined their own anti-divorce position, it could be argued that the

fictional literature was intentionally subversive of notions of marital duty such as those propounded by the Supreme Court judiciary. Given that these writers were undoubtedly limited in what they could publish by what editors would allow, perhaps they meant that one should read between the lines and conclude that, rather than hoping for the death of an unwanted spouse or resigning oneself to a lifetime of misery, one should seize the opportunities offered by the Matrimonial Causes Act. If this was the case, the link between overt moral messages and their covert implications still remains. Choice was severely limited in fictional love and marriage, but much less so in South Australian marriages after 1858. The marital values expressed in the fictional literature, whether as a form of lip service or not, succumbed to the weight of the demand for divorce in South Australia by the increasing acknowledgment of it.

And despite the criticisms of social morés which frequently surface, they nevertheless remain as part of an overriding view that, however distasteful doing right may sometimes be, there is no choice but to do it. Even the tragic stories lack a sense of waste or of irony which would tell the reader that their conclusions should not have occurred. Their rejection of the alternative of divorce is clear in their dénouements, in which all is never lost. Catherine Martin's novels had the unhappy protagonists gladly assuming the yoke of duty. The three tragedies examined in this chapter took the acceptance of duty a step further than Martin by saying that virtue is more than its own reward. Each bereft character finds life worth living, if not blissfully happy. Before his death, David Blencowe tells Nora McCarron that "life with all its great possibilities stretches before you".⁶⁸ She gains custody of young Malcolm, the child of her loveless marriage, renames him Davy and returns to her work with vigour. Judith Holland finds peace of a kind in her ill-assorted marriage to Wynne and produces a daughter who will not make the same mistakes she did. And Sunny Shale - well, Sunny has her coconuts. If these appear to be small recompense for the unrealized promise of perfect happiness, they

⁶⁸ Weston, *The prelude*, p.314.

are, but they are recompense all the same. Reflecting on the life of a fellow voyager to Papua, an old maid named Miss Brough, Sunny observes, "To have loved and lost is bad enough, but never to have had anything that you can remember, anything to look back on with a smile and a sigh ---!"⁶⁹ Although Sunny will spend the rest of her life alone with her coconuts, she will spend it productively, relegating her ability to love passionately to the smiles and sighs of remembrance.

Ironically, *The tower wall* and *Paying guests*, which contain the most vociferous rejection of the idea that women should submit to men, deny their female protagonists a means of self-expression outside of marriage. The independence of spirit which gives Nora McCarron and Sunny Shale their heroic stature also gives them the ability to survive alone. If there is anything "subversive" in the literature of South Australian women between 1859 and 1918, it is to be found in Weston and Jones's insistence that women's lives are more than the story of their loves. In a similar vein, the bitter lesson which Judith Holland learns through her youthful folly enables her eventually to mature. Her life has not been wasted because her marriage was a failure. It remains indisputable that all three women are regarded as having lost irrevocably the richest rewards life has to offer, but the opportunities which solitude brings for redirecting their energies leavens their fates with a measure of optimism. Optimism does not lie, however, in the direction of the divorce court. Although the three women carry their suffering with dignity and turn it to some personal benefit, the conclusion remains that suffering acts as a kind of punishment: for marrying the wrong man in the case of Nora and Judith, for loving two men in the case of Sunny. Any implication that things could and should have been otherwise would contradict the moral hue that suffering wears in the fictional literature.

The literary conception of love is nevertheless hard to reconcile with moral sanctions against divorce because of the fallibility it entails. The fictional literature posits "true" romantic love as significantly distinct from both biological family

⁶⁹ Jones, *The coconut planter*, p.269.

bonds and "false" romantic love. Yet true love is not distinct enough to prevent heroes and heroines from occasionally mistaking the false for the true. The creators of these romantic confusions invite the conclusion that if heroes and heroines make blunders which can ruin their two-dimensional lives, their readers face even greater risk, without the consolation of "it's only a story". Unable to embrace the old forms of marriage which saw personal choice in marriage as less important than social duty, South Australian authors balked at the conclusion that personal choice in marriage could also mean choosing to end it. The real-life existence of divorce meant that if you thought you had found a prince and ended up with a frog, or if you found a prince and realized you would prefer a frog, you did not have to spend a lifetime of leisure repenting this change of heart. The attempts made by South Australian novelists between 1859 and 1918 to reconcile choice with duty caused them to fall, like the Matrimonial Causes Act itself, between two stools and to fail to provide unequivocal opposition to the notion of dissolvable marriage.

Epilogue to Part II

Despite a wide diversity of plots and settings, the subject upon which all of the novels discussed in Part II hinge is marital love. Even *The silent sea*, much of the three long volumes of which is taken up with a tortuous story concerning the wages of greed, begins and ends with the romantic theme, which has far more literary effect than Martin's Dostoyevskian efforts. Only women writers were chosen for the preceding analysis. I suspect that the novels were also aimed at a female audience, but less because of the subject matter than because of other factors. Few of the works are of literary merit, inviting the conclusion that most of them were intended (unless the writers' imaginations extended to delusions of literary grandeur) as good entertainment for those who had the leisure to read. In avoiding the term "women's novels" to describe them, the intention has been to avoid interpretations which see them as having a chiefly ideological function. Didactic elements are certainly there, and have been referred to in the preceding discussion, but if the didactic aspects of the fictional literature were absorbed mainly by women readers, they do not appear to have been aimed solely at women. The importance of the love-plot to action involving "public" life - which persisted in twentieth century novels such as *Paul Strange* - marks a continuous line of argument throughout the period under study, that choices in marriage were crucial to all areas of the lives of both men and women. *Paul Strange* is as much the subject of moral scrutiny as are Barbara Westover and Phillippa Maitland. Once again, we veer from the path which leads us to conclusions about ideology and hegemony. Literary representations of love and marriage were less a form of indoctrination than the offering of a set of beliefs about love and marriage.

In the absence of any attempts to determine the impact of the novels on the reading public, or even to isolate a reading public, the analysis of the failure of the fictional literature contrasts to that of the Supreme Court judiciary, whose beliefs were tested in the fire of daily confrontation with those whose marital values

differed vastly from their own. The conclusion that the writers of the fictional literature failed, merely because the ideas they presented were at the same time inappropriate to and adaptable by a divorcing society appears simplistic. By the arguments presented in this thesis, let alone any intuitive wisdom, a "divorcing society", like any other, comprises a variety of beliefs about divorce. Some of its members will favour divorce, say, on adultery-inclusive grounds alone, while others will advocate divorce for incompatibility of temperament. The common ground, however, remains the view that, under certain conditions, marriage should be dissolvable, a conclusion which the authors of the fictional literature rejected of one accord and without qualification. The appeal of romantic love not only failed to make this conclusion acceptable in a divorcing society but lent itself to the demands of that society. In the last quarter of the twentieth century, the search for perfection in love continues, facilitated by easy access to divorce.

Here, perhaps, we find our ideology, our hegemony. The companionate marriage, the origins of which can be traced back so many centuries, has in this century become so bound up with the ideas of romantic love described in the preceding chapters that the two are almost synonymous. This romanticism has adapted itself to a civilization which has celebrated, not only the acceptance of divorce, but a "sexual revolution" and a revival of feminism, without changing substantially any of the principles which form the substance of the novels analysed. Turning the dial of my radio to a "commercial" station, I find the idea of perfection and the fulfilment of needs encapsulated in a song: "My babe, she gives me everything; She gives me everything I need". The success of the ideology of romantic love, however, is not the subject of this thesis, and we return to the success of divorcing couples. Denied, for the most part, effective 'voices', such as those afforded by the gavel and the pen, these couples constitute the yardstick by which both the failure to forestall divorce and the consequent 'success' of the Matrimonial Causes Act have been measured.

Part III

THE OLD AND THE NEW

Prologue to Part III

If, according to the judiciary's own script, the Supreme Court stage was set for defeat, this defeat was realized by the contribution of divorcing couples. It is no surprise that Sir Samuel Way could be assured of a hearing of his declamatory speeches on the duties of husband and wife every time he was moved to give one: after all, it was his show. What is surprising is the extent to which the lesser players could steal the limelight, not only because they constituted a "cast of thousands", but often through the exercise of their own artfulness. Thus, they were not merely actors in a piece which was written for them. The diffuseness of the law is measured not only in its lack of a monolithic power-base, but in how thinly it spreads itself. The nature of divorce law was such that its users could to some extent write their own script, and many appear to have given the matter careful consideration.

At times, they took their lines from the writers of romantic novels. Whether or not the majority of litigants were familiar with the novels described in Part II, the impact of popular romanticism was, by the early twentieth century, sufficient to be observed in divorce cases of the time. In the public performance which marital breakdown so often became in open hearings and newspaper reports, popular romanticism appeared as a useful prop in several ways, the most common of which was the increased reference in the courtroom to the expectation that marriage be happy. Although this cannot be described as a specifically "romantic" aspect of the companionate marriage, many of the divorce cases suggest that romanticism imparted to the expectation of marital happiness some of its legitimacy. Moreover, it was a prop accessible to "good" and "bad" characters alike.

Throughout the period under study, examples can be found of both petitioners and respondents making use of the law. Women, whose parts on the political and social stage were always minor, provide many examples, as will be seen in Chapter Seven. The aim in this chapter is not to suggest that all women's

experience is substantively similar: there are some good reasons for examining the use of the law by women in general. One of them is that if women's experience was diverse, it was not held to be in either of the value systems upon which I have focussed. The image of the chaste wife in need of protection, either material (according to the law) or emotional (according to the novels) did not permit of the consideration that some women's needs might remain unfulfilled by marriage, even "good" marriage. For all their diversity, all women were linked in this regard. The divorce records reveal this dominant, unified view while at the same time showing women's actual diversity, in their use of the law and in the management of their lives. As part of the scenario of power and the law, the study of women's use of the law shows how the morality play of the Supreme Court judiciary was often upstaged by the high drama of divorcing men and women.

Chapter Seven

WOMEN, MARRIAGE AND DIVORCE LAW

Introduction

Having established in Part I, through cases such as *Sweetapple*, that the interests of the ruling *élite* were often at odds, we are not out of the woods until we have examined in closer detail some important aspects of the power relations between the law and its users. These aspects concern propositions about patriarchal societies by feminist theorists over the past twenty years which have been confirmed so often that they have practically become the subject of consensus among social historians. Of particular importance is the finding that terms referring to social status commonly apply only to the male members of patriarchal society, which accords women no social status independent of the men whose wives and daughters they are. Thus it should come as no surprise that Florence Sweetapple lost her case. Chief Justice Way did not single her out as a social leader but as the wife of one, who had no business usurping his authority. While it would be naïve to deny that Mrs Sweetapple's sex was a very important factor in determining how she would be received by Sir Samuel, it would be equally naïve to leave it at that. To scribble a moustache on dame Justice and dismiss her as a lackey of patriarchy would do a great disservice to the gains made by feminist analyses of history to date.

Such a dismissal does not account adequately for women's legal victories, and the blanket explanation often applied, that the "winners" could only be those who played by male rules, is losing favour in feminist historiography.¹ Too often,

¹ In Australian historiography, the evaluation of women as active participants in their own history began some years ago. See, for example, M. Aveling, "She Only Married to be Free: or Cleopatra Vindicated", in *The push from the bush*, No.2 (Nov., 1978), pp.116-124 and R. Davidson, "'As Good a Bloody Woman as Any Other Bloody Woman...' Prostitutes in Western Australia, 1895-1939", in P. Crawford(ed.), *Exploring women's past: essays in social history* (Carlton South, Vic., 1983), pp.171-206.

however, the solution is to separate women's activity from the male world, perpetuating the much-documented "separate spheres" of the nineteenth century. The example of Frances Lott shows that some challenges to patriarchal authority were permissible. Under what conditions were they successful? Were these conditions dictated by the practitioners of patriarchal law, or could women themselves work to bring them about? If judicial opposition to divorcing couples was defeated by the very actions of divorcing couples, women were in part responsible for this defeat.

Much of importance about women's use of divorce law is lost if we approach it merely from a quantitative standpoint, without examining with particular reference to women and the law the kind of power relationships already discussed in this thesis. Part I was aimed at demonstrating how the failure of the rearguard action was in part due to the judiciary's erroneous conceptions of its own power. Similar conclusions can be drawn when we address questions about power and the law to women in particular. If their husbands were denied access to political power in South Australian society by reason of their social origins, female litigants were twice removed by reason of the sex. Rather than assume that they were doubly oppressed, however, let us assume instead that their paths to success in Court were doubly tortuous.

The discussion of hegemony begun earlier in this thesis is even more pertinent to questions about women and power than to the more general ones already raised, because the power of men over women is frequently held to be not only well-entrenched, but a unique kind of power relationship. This uniqueness is very much in evidence in marriage. In marriage, the oppressed live, eat, sleep, raise children with - and may also feel affection for - their oppressors. The historian of divorce is dealing with the consequences for women who, whether out of the desire for autonomy or not, sought to reject this intimate dominion, albeit often to succumb to another. The danger in emphasizing the peculiarities of the marital relationship, however, is to assume an accompanying ideology which is so

pervasive that it precludes the historian from finding even pockets of resistance to it. The argument for an all-pervasive male hegemony offers no means of giving historical accounts of women's acquisition of autonomy to such a point where they could demand rights that did not yet exist. We must throw out one or the other.

The most pernicious aspect of the hegemony argument as it effects the interpretation of women's use of the law is that it teeters on the brink of assuming that women accepted the view of themselves which patriarchal concepts of innocence and guilt foisted upon them. In many instances such conclusions have been encouraged by the records of carefully-rehearsed courtroom scenes. The adversary system of justice straightjacketed wives who petitioned in the divorce court by the need to prove themselves blameless. Thus the pitfalls can lie, not only in the assumptions we bring to our material, but in the material itself.

In our attempt to traverse the largely unmapped territory of women's use of the law, the landmarks may be found along unfamiliar paths. The records left by petitioning wives are in some ways inadequate to the task of discovering what women really thought about their marriages. Even the risk of assuming that petitioning wives believed all the things they said about themselves in evidence is not as great as that of assuming that respondent wives were necessarily the losers in divorce. Thus, the historical records of respondent wives are valuable for two reasons. First, the absence of the need to withhold evidence of wife's contribution to the breakdown of the marriage often results in a fuller picture of the marriage and second, these records encourage us to find evidence that in divorce, it was not solely the patriarchal conception of virtue which was rewarded.

Nor do these respondent wives represent the black sheep, the "damned whores" of orthodox men's histories and the maligned victims of orthodox women's ones. Limitations to the historian's view still apply when examining the testimonies of respondent wives, of course, but these testimonies offer more opportunities than those of their petitioning sisters to separate women's views of themselves from those held by both courts and husbands. These glimpses take us

much further than the miserable statistics of women's under-representation as petitioners in the first place, and as "successful" ones in the second. If one of the aims of feminist historiography is to question erroneous assumptions about women commonly made in historical research, the need to redefine the idea of success in the use of the legal system offers ample opportunity to pursue such an aim. We must be as sceptical about the values suggested by terms such as "success" and "failure" as we are the more blatant celebrations of patriarchal values expressed, for example, in the fictional literature examined in Part II. In the study of women and their use of the law, we must banish both the heroine and the victim.

Divorce and the ideal wife

If we were to give a short description of Frances Lott, the first model of wifely virtue to appear in this thesis, one word which would undoubtedly be included in it would be "passive". Yet she was not entirely so. Although it was established that she had submitted to extreme violence day-in and day-out for ten years, it was also stated that she was not afraid to rebuke her husband for his public displays of impropriety with his female assistants. Similarly, Florence Sweetapple was praised by Chief Justice Way for having responded with vehemence when her husband called her a liar in front of a servant. Neither is the ideal wife of the fictional literature, personified in the heroine, typified as a broken reed. Although there are notable exceptions (such as Betty Curtis in *A desert rose*), the heroine shows her worth in the strenuous defence of her honour, or the man she loves, or marital duty, whenever circumstances dictate that she defend them. The heroine is capable of acting in her own interest, but this interest is always depicted as harmonious, if not synonymous, with the code of marital values I have represented by the term "marital duty".

In the fictional view of marriage, the admonition to wives to throw their lot in with marriage and the duties it entails is reinforced through a simple scheme of reward and punishment. Adherence to duty is rewarded with either lifelong

happiness or the laurels of rectitude, neglect of it with a lifetime of misery and self-castigation. This straightforward justice could not find its equivalent in the more complex moral world of the divorce court. The respective cases of Frances Lott and Florence Sweetapple indicate why this was so. Frances Lott was a "good" wife who was rewarded with dissolution of her marriage. Florence Sweetapple, too, was seen by the Court to be good, but she was "punished" with a dismissal of her petition. This inconsistency is in part accounted for by the fact that the judge saw the denial of Mrs Sweetapple's decree as a reward. The peculiar logic which accorded a certain consistency to both reward and punishment arose out of this assumed parity between marriage and women's interests, but it was more difficult to sustain when applied to "bad" wives. If bad wives were those who were found to pursue interests which clashed with the principles of marital duty, then it could not be certain that the awarding of a decree against such a wife would constitute punishment.

The question of punishment returns us to Martha Hall and Maud Anderson, two respondent wives from the uppermost social group. Both women hotly contested the charges against them, and much was said in court about the social consequences for them if they lost their respective good names. Yet, according to the evidence of each of the petitions, both women openly flouted the ideal of wifely chastity by conducting themselves before witnesses in a manner tending to cast the suspicion of adultery upon themselves. Mrs Anderson's impropriety is particularly interesting because it set the tenor of her relations with her husband from the day of marriage. Apart from the issues of honour surrounding the charge of adultery which were discussed in Chapter Two, several other aspects of the Anderson marriage were the subjects of contention. The petitioner's allegations, first of his wife's brazen flirtation and then of acts of adultery almost as blatant, accompanied an image of Mrs Anderson as a woman of an "extraordinary, wilful, erratic disposition".²

² *Register*, 13 September, 1889, p.3: *Anderson*.

To conjecture upon how Mrs Anderson viewed her role as a wife, our discussion must be limited to the "facts" of the marriage, that is, to those events which both parties agreed took place, even though their view of such events may have been contradictory. Two important characteristics of the relationship between Mr and Mrs Anderson which were alluded to repeatedly by both parties' counsel were the wife's prolonged suffering from a series of "women's complaints" and a settlement of property - to the value of £10,000 and described as "the bulk of [the petitioner's] fortune"³ - on the wife by the husband on the day of their marriage. According to the petitioner's counsel, the disability referred to "existed only in the mind of the respondent" and was an excuse made to repel her husband's advances.⁴ The respondent's counsel argued that the accusations against a woman of good character had been drawn by an obsessively jealous husband who had failed to exercise his marital duty in consummating the union. The judge agreed that "[i]t was a terrible position to put a woman in for her husband to live with her for twelve months without carrying out to the full his marital duty". In his view, this conduct might extenuate, although it did not excuse, an act of adultery if it had been committed. He even went so far as to say that if the petitioner had carried out his duty in this regard, the case would not have come before him.⁵ As regards the marriage settlement, claims were made by the respondent that the petitioner had attempted to force her to sign some of the property back to him. At the time of the Anderson hearing, there was a bill before South Australian parliament which, if passed, could entitle an innocent husband in a divorce suit against a wife who had had property settled on her, to all or part of the settlement, regardless of whether there was issue of the marriage. (The existing matrimonial legislation was interpreted as only applying where there were children of the marriage).⁶

In his evidence, the petitioner claimed that when he had commented to his

³ *Ibid.*, 2 October, 1889, p.7: *Anderson*.

⁴ *Ibid.*, 13 September, 1889, p.3: *Anderson*.

⁵ *Ibid.*, 21 September, 1889, p.6: *Anderson*.

⁶ Editorial: "Undoing Settlements After Decree of Divorce", *Ibid.*, 20 September, 1889, p.4.

wife upon her being led behind the smoking saloon by the ship's officer with whom she had been flirting, she had replied, "I went of my own accord. I am going to do just as I like; I am quite independent".⁷ He also claimed that he had had to bribe his wife to stay with him in the matrimonial home by offering her a pony-chaise. He stated that on this occasion he had said to her, "You treat everything in connection with our marriage in a very businesslike way", to which she had replied, "My marriage with you is a matter of business and nothing else".⁸ In defence of his failure to consummate the marriage, the petitioner said that Mrs Anderson "forcibly prevented me. That is, she objected, and I thought I should be acting like a brute if I used force".⁹ While the respondent's counsel painted the petitioner as a failure as a husband with regard to the couple's sexual relations, Anderson's view was that he was powerless to act otherwise, given the illness to which his wife appealed whenever he approached her.

Although Mrs Anderson denied that she had repelled her husband, she did not deny the disability, and required assistance in walking when she appeared in Court. Her illness seems to have had a variety of functions. Whether or not it was used to keep her husband perpetually at arm's length, it did not interfere with either her shipboard gallivanting nor her outings with the co-respondent, Clindening. Tressilian Anderson's announcement that he had heard them both talking in Mrs Anderson's bedroom had caused her promptly to faint and then to retire to her bed for two or three days, following which the chain of events used to account for Clindening having been in her room began, the defence being made that she had fainted and had been carried there by Clindening. The evidence of Melville Jay, an Adelaide physician, was that Mrs Anderson was a hysteric, but not your common or garden tearer of hair. He described her condition as "one of extreme sensibility", a characteristic of which was frequently to simulate illness (but not consciously). Perhaps the late Victorian courtroom audience felt its credulity stretched, because

⁷ *Ibid.*, 16 September, 1889, p.7: *Anderson*.

⁸ *Ibid.*, 17 September, 1889, p.6: *Anderson*.

⁹ *Ibid.*

when Dr Jay dignified Mrs Anderson's condition with the name "hyperaesthesia", the parenthetical comment, "Laughter", followed its mention in the *Register's* report.¹⁰

Mrs Anderson's own account of the conflict over the marriage settlement offers an indication of how far she was prepared to go to protect her own interests even, as she claimed, under the threat of violence. The respondent's evidence was to the effect that her husband initially tried to induce her to sign a portion of her settlement back to him without her knowing that she was doing so. She said that when she refused to sign, she told the petitioner

"You made the settlement on me of your own free will and accord, and why should I give it back to you now?" He said, "The money is mine, my hard earnings, and I will have it back". I said, "If you are not sufficiently well off I will spend it on the housekeeping, and you ought to be satisfied. I will never sign it back. I intend always to have a house and home over my head."¹¹

Mrs Anderson clearly felt that she was not obliged to leave the matter of her economic protection in marriage to the whim of her husband. If protection was his duty, it was her right. Her testimony provides sharp contrast to the image conjured up by that of timid Florence Sweetapple, stretching every penny of her husband's money and selling her own jewellery if it did not stretch far enough.

The significant aspect of Mrs Anderson's behaviour is that she seems not to have perceived herself as bound by the social rules governing marriage among her peers. Even Martha Hall's abandonment of the appearance of propriety came after seventeen years of wifely conduct which could not be faulted. One construction to put on the Anderson marriage is that, having reached her late twenties and thus still young but in danger of being left behind in the marriage stakes, Maud Hargrave had accepted an offer which would alleviate this problem and offer considerable economic security as well (her financial circumstances before marriage are not mentioned in the hearing). It was established during the hearing that if the bill

¹⁰ *Ibid.*

¹¹ *Ibid.*, 19 September, 1889, p.7: *Anderson*.

concerning marriage settlements was passed, the petitioner did not stand to gain by it.¹²

Her illness brought to the marriage an additional dimension to that understood in the code of marital duty. The exploration of nineteenth century women's illnesses in the works of writers such as Ann Douglas Wood and Carroll Smith-Rosenberg examines women's illness as a phenomenon of patriarchal society but tends to emphasize the ways in which illnesses reinforced the power imbalance between men and women.¹³ Mrs Anderson, however, used illness as a means of asserting her interests over those of her husband and to explain and excuse behaviour which, without it, would have been unacceptable. Although she eventually lost the case against her, the husband's evidence of her conduct, if it is to be believed, displays considerable skill on her part in manipulating the stereotype of the frail wife. Even if the husband's evidence is not accepted, there is sufficient in the respondent's admissions to conclude that she used her role as an invalid to establish her own autonomy in the marriage.

If Mrs Anderson was able to exert power of a kind in her marriage, why did she place in jeopardy the thing that ensured its continuation: her reputation as a chaste wife? But her recklessness may not have been foolhardy. Rather than bargain her chastity for her husband's protection, she may have seen marriage as offering her economic protection *without* her having to "pay" for it. Mrs Anderson was sent from the court an adulteress, but the circumstances of her marriage and the end of it suggest that she may have been willing to pay the price of public scorn. The crudest interpretation we can place on her behaviour, though not the most far-fetched, is that she, having secured a marriage settlement which could not be

¹² *Ibid.*, 18 September, 1889, p.3; *Anderson*.

¹³ A. D. Wood, "The Fashionable Diseases: Women's Complaints and their Treatment in Nineteenth-century America", in M. S. Hartmann and L. Banner (eds.), *Clio's consciousness raised: new perspectives on the history of women* (New York, 1974), pp. 1-22; C. Smith-Rosenberg, "The Hysterical Woman: Sex Roles and Role Conflict in 19th-century America", in *Social research*, Vol. XXIX, No.4 (Winter, 1972), pp.652-678. Wendy Harcourt has also shown how nineteenth century medical theories conveyed an ideal of womanhood: W. Harcourt, "Tyranny of the Uterus: Women and Illness in Victorian England", B. A. (Hons.) Thesis (University of Adelaide, 1981).

revoked in the event of a decree of divorce against her, did just as she pleased, knowing that if her improper behaviour was used against her in a divorce suit, she could take the money and run.

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The Anderson case is atypical in the divorce records because of the social group to which the couple belonged. How much freedom did women perceive themselves as having in marriages where they were not protected by lavish settlements? Although Eliza Fax married a journeyman leather cutter rather than a civil engineer, she shared with Maud Anderson a dislike of the married state which seems to have begun shortly after she entered it. In his petition filed in 1860, William Fax stated that within two months of the marriage "Eliza Fax told me that she...had been a Whore before she was Married to me and that she...was able to get her living without me."¹⁴ The petitioner then alleged that, a couple of months after this announcement, his wife threw a carving knife at him, used violent language, "behaved in a very shameless manner" towards him and later barred the outer door of the house against him, following which cohabitation had ceased and the respondent had returned to the life of a prostitute.¹⁵ In giving evidence, the petitioner added to his grievances the claim that during courtship the respondent attended church with him, but that she had refused to go to worship after their marriage.¹⁶

Eliza Fax was a widow with one child when she married William.¹⁷ If it is true that she had been a prostitute before the marriage (considerable evidence is given of her living by prostitution after it broke down), she may have seen marriage to a man of modest but regular income as preferable to the life she was leading. The

¹⁴ P.R.O.S.A. G.R.G. 36, Series 23, No.28: *Fax v Fax*.

¹⁵ *Ibid.*

¹⁶ *Register*, 3 October, 1860, [p.11]: *Fax*.

¹⁷ P.R.O.S.A. G.R.G. 36, Series 23, No.28: *Fax*.

fact that the marriage ended so quickly suggests that Mrs Fax was disappointed with what marriage had to offer her and felt no obligation to the marriage tie. An alternative explanation, that she had intended to pursue the life of a leathercutter's wife and that of a whore in tandem, is further evidence that she did not see wifedom as entailing chastity. Although she and Maud Anderson were from different ends of the social spectrum, the records suggest a common attitude that they did not feel their actions limited either by the Supreme Court's concepts of marital duty or by the prospect of "punishment" in the form of a guilty verdict. The two cases also suggest an understanding on the part of both of these women of what they had to "sell" in order to gain economic security through a man.

Extending the marketplace analogy further, we can see that both women also did the equivalent of withdrawing their labour when they considered its rewards to be insufficient. This analogy offers an alternative to the dangerous assumption that women felt the punishment for their transgressions as keenly as their castigators wanted them to. Of course, not all women thumbed their noses at patriarchal authority. Some wives clearly regretted deeds which found their resolution in the divorce court. Even among these wives, however, there can be detected an understanding of what could be offered in exchange for the advantages of marriage. When Jane Burgoyne's husband presented her with evidence of her adultery which would be regarded as conclusive in a court of law, and then her relationship with her young lover ended, she was faced with the task of convincing her husband that she was still worthy as a wife.

In 1870 Thomas Burgoyne, a surveyor of roads in Port Augusta, charged his wife, Jane, with adultery with a mounted police trooper. He deposed that in 1869 he had grown suspicious of his wife's friendship with a Thomas Bartlett Gilpin and that he had sent her to Adelaide to put an end to it. Some months later, he had received a letter from Gilpin's wife telling him of her husband's association with a woman she believed to be Mrs Burgoyne and enclosing part of a love letter from this woman to Gilpin. It was further claimed that, when confronted with this

evidence of her adultery, Mrs Burgoyne confessed her wrongdoing and her husband told her that he would proceed for a divorce.¹⁸ According to the evidence of a housekeeper at the Imperial Hotel, Melbourne, Gilpin and Mrs Burgoyne had stayed there together, Gilpin subsequently leaving for New Zealand, followed by Mrs Burgoyne about a week later. The witness further deposed that Mrs Burgoyne had returned to the hotel in March, 1870, and had taken up the position of housekeeper to a gentleman in Castlemaine.¹⁹

While she was in Auckland, Mrs Burgoyne seems to have done some serious thinking about her fate, because she was alleged to have written to her husband from there in February, 1870, saying the following:

I acknowledge my great sins and humbly beg as far as is possible you will forgive them, the vilest (of which you will rightly think I am one) can do no more - I feel deep remorse for the sorrow I have caused and the wrong I have done you and my dear children.²⁰

The petitioner's reply refused forgiveness and forbade his wife to communicate with the children other than by letter.²¹ A subsequent letter from Mrs Burgoyne, sent from Melbourne in April, 1870, took quite a different tone from her first:

I have had the advice of a Lawyer who informs me that as long as I am your Wife I can compel you to support me and I may add that it is my intention to take every advantage of my legal position[.] Therefore with this you will receive a letter from my Landlord asking payment for my board, so that it is for you to take whatever steps you may think proper to avoid the consequences[.] You spoke to me of a Divorce, sue for one by all means if you think proper. I shall deny nothing it will make no difference to me and when I wrote that last letter to you I had no desire or intention of ever living in the same house as you again.²²

In Mrs Burgoyne's second letter, her position of having nothing further to lose gives her free rein to express any resentment she might have withheld from her

¹⁸ P.R.O.S.A. G.R.G. 36, Series 23, No.143: *Burgoyne v Burgoyne*.

¹⁹ *Ibid.*

²⁰ *Ibid.*

²¹ *Ibid.*

²² *Ibid.*

first. Comparison of the two letters also reveals the different means one wife could adopt to look after her own interests, in which exercise being a dutiful wife was a means rather than an end.

Jane Burgoyne's wish to remain in her marriage is initially suggested in her attempts to conceal her relationship with Gilpin. Her husband claimed that she had laughed off all of his suspicions and accusations until the love-letter was produced. The first of her letters to her husband verifies this impression of her desire to continue the marriage. In this letter, the means by which her wishes are conveyed are her abject contrition and her request for forgiveness, combined with the promise to behave better in the future. In throwing herself on the mercy of her husband to give her a second chance she assumed the role of the erring wife who fully repented her wrongdoing. Once her husband had given her his final refusal ever to live with her again, this role was no longer necessary. With the prospect of a divorce suit looming ahead, she took all the steps she could to protect herself and withdrew her plea for forgiveness, telling her husband in the course of doing so that it had not been sincere in the first place.

It appears, then, that Jane Burgoyne was prepared to accept the burden of marital duty only when it suited her to do so. Unlike the fallen women of the fictional literature, repentance was not lifelong, but represented just one step towards making up for the burning of her bridges. Mrs Burgoyne's final words to her husband could be interpreted as a desperate woman's attempt to retain some shred of dignity in her invidious position; having lost the security of her twenty-two year marriage, she had thrown her lot in with a man much younger than herself, whom she had also lost. If her position was unenviable, however, to describe her greatest loss in terms of a loss of honour would be misleading. Even wives who defended charges of adultery were not necessarily acting to preserve either their marriages *or* their reputations.

In 1881, Alfred Leane, a sanitary inspector who also owned a lodging-house in Adelaide, brought a charge of adultery against his wife. Eliza Leane

contested the petition, denying adultery but charging condonation, on the ground that her husband had continued to cohabit with her since the alleged adultery. In reply to the charge of condonation, the petitioner argued that his wife had refused to leave the premises. When he had attempted to remove her bodily, "she violently resisted and not wishing to cause a public disturbance I desisted from my endeavours to remove her therefrom".²³ According to the petitioner, his wife's resistance to legal proceedings against her did not end here. He deposed that his wife had been selling household furniture and effects which he claimed were his. When he had asked her if she had done so, "she replied that she had and that she intended to sell more for the purpose of raising money for her Lawyer".²⁴ The respondent allegedly continued to remove various articles from the matrimonial home, until she reportedly told a witness that she "had things enough away to furnish a house".²⁵ In her own defence the respondent deposed that she had removed the articles in order to pay for her support, and to settle a debt incurred by her husband. She claimed that she had received no maintenance from him, and that curtains and bedlinen had been made into wearing apparel for herself and the children.²⁶

The allegations of adultery gave instances of familiarity between the respondent and the co-respondent in the boarding-house. A witness also testified to having seen them walking arm in arm since institution of the proceedings. Justice Boucaut felt that the petitioner's evidence was sufficient for a finding in his favour, but for the fact that he couldn't accept all of it. The evidence of the couple's daughter, that she had seen her mother go quietly upstairs without her boots on and enter the co-respondent's room, was found not to have been mentioned by her "till she heard her father wanted to get rid of her mother. That was not the tone of feeling or sentiment that any Court in the world would encourage in a daughter".²⁷

²³ P.R.O.S.A. G.R.G. 36, Series 23, No.450: *Leane v Leane and Altmann*.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Register*, 8 August, 1881, p.6: *Leane*.

Here we find judicial preoccupation with duty of a different kind, which, like precepts of marital duty formed one consideration for rejecting the petition. But had Justice Boucaut's anger at a daughter's treachery not encouraged him to doubt the father's motives, he would have fulfilled the strict requirements of the Matrimonial Causes Act and saved the unfortunate Leane much trouble and expense.

A subsequent Leane petition shows much stronger evidence of the wife's marital fault which she was, this time, at no pains to conceal. This second petition was heard in 1884 and resulted in a decree of dissolution of marriage on the ground of her adultery with the same co-respondent, Gustav Altmann. The records of both petitions reveal the actions of a woman who successfully protected her own interests against those of her husband, in the first instance by contradicting him and in the second by acquiescing in the charges against her. At the hearing of the second petition, several affidavits testified to the respondent and co-respondent cohabiting in Adelaide. Moreover, a witness quoted the respondent as saying, "My husband could not get a divorce when he tried before; he could get it now, and I hope he will, as I wish to get married again".²⁸ Thus Mrs Leane's defence of the first petition was not based upon fear of loss, either of status or of the financial security of the marriage.

Although the circumstances of the two petitions are peculiar among the divorce records, they offer insights into women's use of the Matrimonial Causes Act. For some reason or other, possibly her paramour's lack of money to pay for the petitioner's decree, Mrs Leane wished to oppose her husband's charges in the first petition, but not in the second. The two petitions present a strong image of women's capacity for self-interested action in marriage and divorce, even when they appeared as respondents in divorce litigation. They also present the punishment/reward dichotomy in a different light from that in which the fault-based divorce system is often seen by historians. Just who was being punished and who rewarded? Nor could judges punish "bad" wives by ordering them to return to their

²⁸ *Register*, 25 July, 1884, p.3: *Leane v Leane and Altmann*.

marriages in the hope that they would reform, without executing a blatant miscarriage of justice. If Mrs Leane was rewarded for her efforts in establishing in the first hearing that she was not an adulterous woman, it seems that she was equally rewarded in the second because it was found that she *was* one, simply because it suited her better to be divorced in 1884 rather than 1881. The final outcome of Alfred Leane's wrangles does not leave our hearts bleeding for the woman taken in adultery or for the woman oppressed by a male-supremacist legal system but for Leane, who had to go to court twice to gain legal recognition of the end of his marriage.

*

The judicial idea of a guilty wife's loss of status was reinforced in the fictional literature by the message that neglect of duty brought lifelong unhappiness. Neither Jane Burgoyne nor Eliza Leane appear to have turned upon themselves the burden of guilt, but other wives readily assumed definitions of themselves as bad. The petition of *Hockey v Hockey and Howie*, a commercial manager's suit filed in 1901 on the ground of his wife's adultery, shows a wife declaring her culpability, but at the same time stating her resolve to continue her guilty course. According to Frederick Hockey, his wife left their home in Jamestown in March, 1901, ostensibly for a short stay in Adelaide. An anonymous letter suggesting that Mrs Hockey was running away with another man caused the petitioner to write to his wife, who angrily denied the rumour and said she was returning home. When she did not do this, Hockey was sufficiently rapid in tracing his wife's movements to be able to take the same train to Melbourne as the co-respondent, finding his wife at the station on arrival. He claimed that when she saw him she walked away, and when asked for an explanation she replied, "Fred for God's sake don't speak to me I cant [sic] look you in the face or talk to you".²⁹

²⁹ P.R.O.S.A. G.R.G. 36, Series 54, 228 of 1901: *Hockey v Hockey and Howie*.

Among the evidence in the case is a letter from the respondent to her sister-in-law, describing her predicament, which bears many similarities to that endured by Beatrix Arnold or Nora McCarron. Mrs Hockey calls her marriage "a lie", but whereas the romantic heroine would see her misery as no justification for adultery, Frances Hockey is adamant that she can keep up the pretence no longer. Throughout the letter, she condemns her own actions, but declares that "I have made up my mind that if any attempt is made to bring me back, they'll take me back a corpse".³⁰ It is hard to picture Benjamin Howie the cabdriver in the shoes of Coudrey Watson, but in Mrs Hockey's appeal to "the dictates of my heart", the marriage she regards as "all a mistake" is held in invidious comparison to her new romantic attachment. Borrowing her expressions from the romantic mode, Frances Hockey nevertheless rejected the moral imperatives which accompanied it in the novels we examined in Part II. Her cabdriver does not remind her of her duty, but takes her away from it, and she describes him as "dearer to me than my children, Fred, home, friends, all, though I know how wrong it is, but right or wrong can make no difference to me in this case".³¹

The moral framework in which Nora McCarron's love for David Blencowe was presented enabled Nora to be separated from, but not divorced by, her husband and the father of her child. Although the authors of the fictional literature attempted to reconcile courtroom notions of duty with romantic ones of happiness, they offered instead a contradiction which could rarely be resolved in actual marriages. Frances Hockey's abandonment of her duty to husband and family carried the romantic theme to its logical conclusion, and resolved the contradiction in favour of the romantic call to follow "the dictates of one's heart". Using the language of the moral framework adopted in the fictional literature, Frances Hockey expressed - and perhaps attempted to assuage - her guilt, but she did not allow it to interfere with her happiness. Despite the moral sanctions regarding marital duty which the courts

³⁰ *Ibid.*

³¹ *Ibid.*

attempted to enforce, and which the fictional literature attempted to strengthen, it was the belief that marriage should offer personal fulfilment which governed Frances Hockey's actions and furnished her explanation of them, as her words to her sister-in-law indicate.

This belief also had a voice in the novels of the twentieth century. Despite the emphasis on the moral tenor of the dictates of one's heart achieved through the intensely righteous nature of the heroic personality, the final verdict of the fictional literature was more amenable to a Frances Hockey than to a Stella Courtland. The device of the mother who cannot reveal her identity which was used in *Peter Piper* and to even greater effect in *The tower wall* indicates how far into the background the importance of parental influence had slipped by the early twentieth century. This device gives the twentieth-century novel its sense of urgency. The crucial importance of individual choice over parental guidance meant that the individual must find guidance elsewhere. The above novels reveal the fruition of an idea which had developed alongside the developing hero, that even if the heart alone does not know what is right, better the occasional casualty than marriages arranged by meddling parents. The reality of divorce meant that even the occasional casualty could be remedied. And in everyday South Australia there may well have been many wives who were only too happy to be deemed guilty in court of law if it was an effective means of escape from men who, like Duggan Acton in *Kerno*, committed "every vice that the law allows".³²

Women as petitioners

The cases discussed above share the characteristic that each of the wives concerned seems to have been prepared to stand the hazard when her aims conflicted with precepts of marital duty, with the difference that some wives appear to have played their hands more shrewdly than others. But while some women

³² Quin, *Kerno*, p.7.

might have been prepared to gamble with the marital stakes, others left little to chance: the events which landed them on the "wrong" end of divorce proceedings give the impression of having been cleverly orchestrated. This impression, however, invites the conclusion that if women wanted to end their marriages, they had to step beyond the pale of acceptable behaviour, an impression which, at first glance, is confirmed by the relatively low success rate of women who filed petitions under the Matrimonial Causes Act. Although the timespan covered for evaluating the success of petitions in the period is small, Table 1 (see p.106) nevertheless suggests a decrease in successful petitions filed by wives as the twentieth century wore on. At best, the figures remained stable during the period under study, culminating in an ominous downswing in the years 1914-1918. However, there are a number of factors to be taken into consideration before discussing the consequences of this low success rate for the claims I am attempting to make about women, marriage and divorce. The most important aspect of divorce law in relation to these claims is that it was far easier for a husband to petition for divorce than a wife.

The requirement that husbands produce only one ground for divorce is important not only because it means that husbands were less likely to be frustrated in their attempts to end their marriages through the judicial process. It also suggests the strong possibility that couples who agreed between themselves to resort to the law decided that the wife should be named as the guilty party. The popular image of the would-be aristocratic divorcé of Victorian England nobly leaving his shoes alongside a female pair in a hotel corridor³³ does not apply to South Australian conditions of the nineteenth and early twentieth centuries. If the appeals to *noblesse oblige* were unintelligible to South Australian litigants, so was the code of chivalry which said that a gentleman must protect a lady from the scarlet brand by taking the charge of adultery upon himself. The number of women among the South

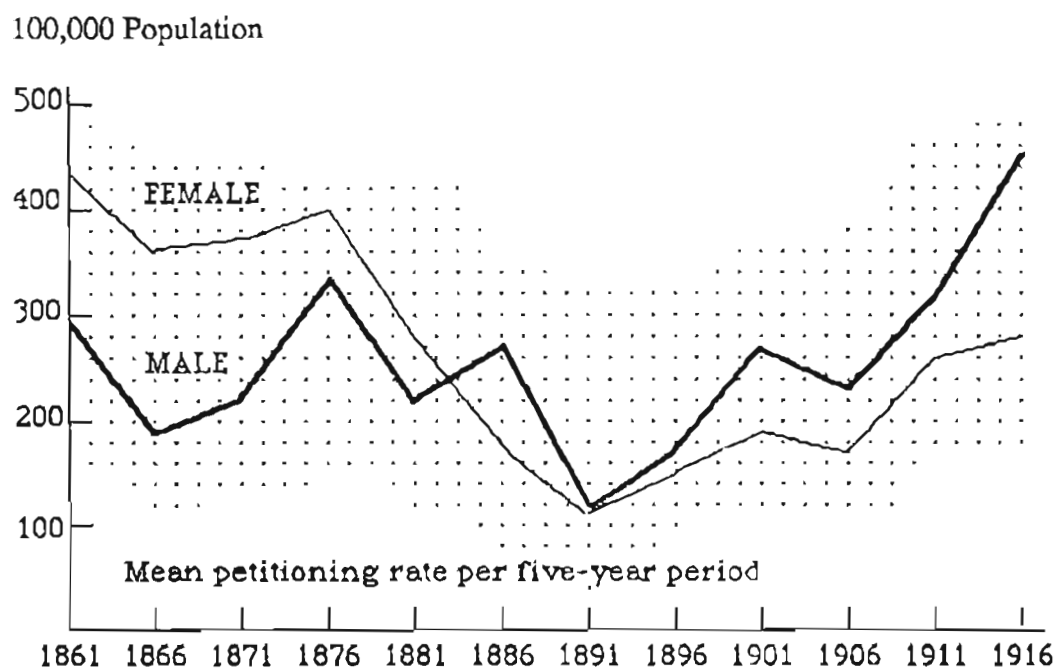
³³ As the British parliamentarian, Josiah Wedgwood, did in 1918. He later announced in the Press that the evidence of adultery was fabricated: C. V. Wedgwood, *The last of the radicals: Josiah Wedgwood, M. P.* (London, 1951), pp.126,133-135.

Australian records who were reported to be living in *de facto* unions before divorce proceedings were instigated are the rule rather than the exception.

To the existence of a divorce law prejudiced against women, we must add the prejudices of lawyers, judges and juries. The records of hearings suggest that criteria of marital duty were more strictly applied to wives than to husbands. Part of this tendency must be due to the nature of the charges wives were often obliged to bring in order to obtain relief from the courts. Cruelty, for instance, was open to greater latitude of interpretation than, say, desertion or adultery. The question of what constituted cruelty, what provocation, and so on, were therefore subject, as we have seen, to the vagaries of judicial interpretation to a greater extent than that of what constituted adultery. As wives brought by far the majority of cruelty charges, it was they who most often fell foul of the "grey" areas of matrimonial legislation. If the "weeding-out" process suggested in Chapter Three did prevail, ambitious lawyers would have been unlikely to pursue the petitions of wives who stood in danger of losing their cases. Even if it did not, wives who were forced by circumstance to finance their own suits would doubtless have abandoned proceedings which seemed unlikely to have yielded return for the investment of funds.

The factors mentioned so far appear to give little cause for optimism with regard to the impact of women's interests of the divorce law, and on social attitudes in general. Figure 2 on page 242, however, reveals a change in the type of petition filed by wives between 1859 and 1918. A fairly steady decline in petitions for judicial separation is matched by a comparable increase in those for dissolution of marriage. The graph suggests that although the success rate of wives showed a gradual decline toward the end of the period, wives were becoming increasingly willing to risk proceeding for dissolution of marriage, even though suits of this type carried with them a greater onus of proof on the petitioner than those for judicial separation. Even the decline in wives' petitions for dissolution of marriage toward the end of the period is not the beginning of a long-term decline in wives'

Figure 1
PETITIONING RATES IN SOUTH AUSTRALIA, 1859-1918

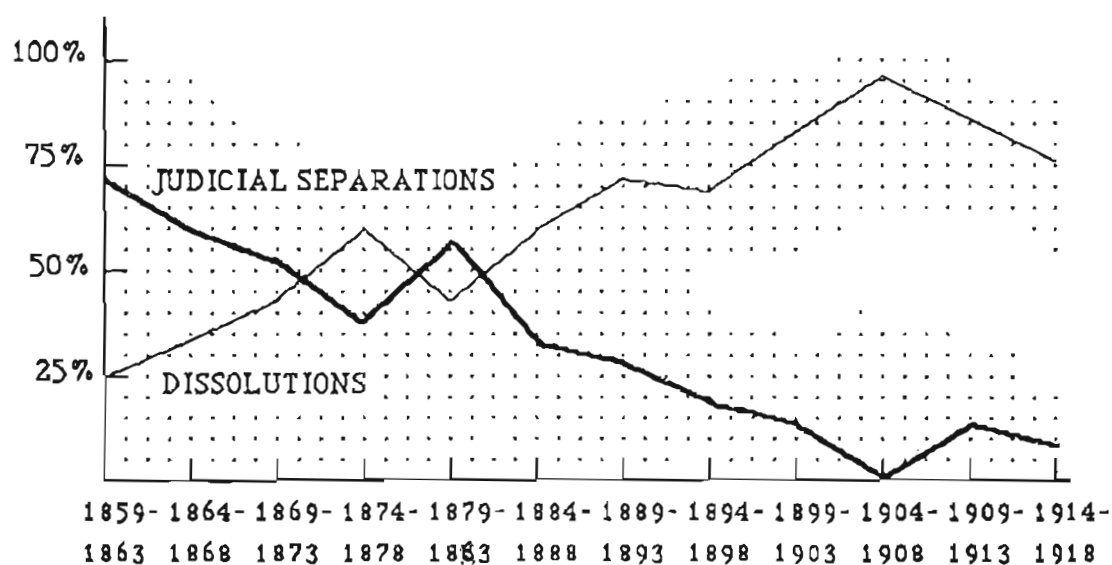


Notes: 1. Does not include applications for protection of earnings on ground of desertion.
 2. For further explanation of how graph was calculated see Appendix 1, Note on Figures.

Sources: *South Australian year book*, No.21:1986 (Adelaide, 1986), p.193;
 P.R.O.S.A. G.R.G. 36, Series 51 and 54.

Figure 2

**WIVES' PETITIONS FOR JUDICIAL SEPARATION AND
DISSOLUTION AS PERCENTAGE OF ALL WIVES' PETITIONS**



Note: 1. Total wives' petitions include petitions for *either* judicial separation *or* dissolution of marriage, those for decree of nullity of marriage and for restitution of conjugal rights, and applications to sue *in formâ pauperis*.
2. See also Appendix 1, Note on Figures.

Source: P.R.O.S.A. G.R.G. 36, Series 51 and 54.

petitioning rates. Figure 1 (see page 241) indicates that from 1906 onwards, wives' overall petitioning rate was on the increase, and the divorce 'explosion' of the twentieth century suggests that this trend continued after 1918.³⁴

Returning to Table 1 on page 106, we see that the lowest success rate for petitioning wives was during the years 1914-1918, which saw the large-scale departure of young men to fight in the first World War. A number of petitions filed in this period concerned adulterous relationships entered into by wives whose husbands were either abroad or in military camps. Not only did the absence of a husband facilitate proof of adultery in cases where wives at home became pregnant, the level of patriotic fervour at the time would have made some judges react with sympathy, as the judge did in *Sanders v Sanders and Carlstron*, to returned soldiers who charged their wives with adultery. In this petition, filed by a labourer in 1918,³⁵ the judge commented that "it was a shocking thing that a gallant soldier should come back to find that his wife had been guilty of unfaithful conduct. His Honor had deep sympathy for him".³⁶ The years 1914-1918 were also those immediately prior to the 1918 amendment to the Matrimonial Causes Act which enabled wives to sue for dissolution of marriage on the single ground of adultery. It is thus possible that, once the amendment seemed imminent, some wives waited for it to come into practice. Hilary Golder's examination of the equivalent amendment in New South Wales, however, points out that few women took advantage of their new rights immediately,³⁷ and this may well be the case in South Australia also. These conclusions are thus only speculative, as analysis of South Australian divorce after 1918 is beyond the scope of this thesis.³⁸ The question

³⁴ There are no complete published figures showing respective petitioning rates for husbands and wives in South Australia covering 1919 to the present.

³⁵ P.R.O.S.A. G.R.G. 36, Series 54, No.202 of 1918: *Sanders v Sanders and Carlstron*.

³⁶ *Register*, 4 July, 1918, p.3: *Sanders* [*Register* has spellings "Saunders" and "Carlstrom"].

³⁷ H. Golder, "An Exercise in Unnecessary Chivalry: The NSW Matrimonial Causes Act Amendment Act of 1881", in J. Mackinolty and H. Radi (eds.), *In pursuit of justice: Australian women and the law 1788-1979* (Sydney, 1979), p. 46.

³⁸ Ken Elford offers a cursory one, however, and finds that the majority of petitions immediately after the 1918 amendment were instigated by husbands returning from the war: "Marriage and Divorce" in Richards, *The Flinders history of South Australia: social history*, p.329.

remains of whether the Matrimonial Causes Act, instead of binding women within the tight strictures of the legal perception of the dutiful wife, gave women the opportunity to manipulate and even to loosen them.

To measure the success of wives under the Matrimonial Causes Act solely in terms of their petitioning rates risks creating an unwarrantedly pessimistic picture of women's options in marriage and divorce, for the reasons I have just given. Such a picture suggests a view of divorce from the same standpoint as that adopted in the courtroom and by the authors of the novels, that women saw their interests as bound up with marriage, and preferred to enter litigation (which they only entered under extreme circumstances), as the wronged party who had adhered faithfully to her duty. Even the possibility that some of the "guilty" wives discussed in this chapter colluded with their husbands does not detract from the alternative to the moral stance of judges and novelists which their frequently brazen behaviour offers.

The usefulness of their records extends beyond the familiar forms of offering the chance to hear women speak without the distorting mouthpieces of counsel and court reporter and of chipping away at the damned whore/God's police polarities. The testimonies of women - upheld in Victorian morality as the more virtuous sex - fired a shot into the judiciary's flanks, and consequently into divorce law itself, heightening the contradictions of the punishment/reward dichotomy. They show the inefficacy of concepts of "innocence" and "guilt" in regulating the marital behaviour of a range of women, not just those whom the courts would have regarded as lost to polite society. The public arena of the courtroom brought the ambiguities of the ostensibly black and white procedure of rewarding the good and punishing the bad into the open. The difference between the petitioning wife who wanted a divorce and the respondent wife who wanted one is that the latter had nothing to lose.

The view of marriage as offering legal and physical protection to women in return for chastity, and in some cases, submission to a degree of cruelty which the Court held to be acceptable was challenged by women who saw their interests as lying outside of the marital bargain. But the trend in Australian divorce history has been to use it to build up a picture of the extent to which women were at men's mercy, both in their personal lives and in the eyes of the law. This focus results from the observation that men could shirk their responsibilities with far greater ease because they had the social and political privileges which enabled them to do so. True enough, but we are still left with the problem of how to interpret cases of women who shirked theirs. The acknowledgement that women as well as men were capable of opting out of their marital responsibilities as the law saw them provides the opportunity to reconsider the assumption that women were powerless in marriage and virtually powerless in their attempts to end it. This powerlessness has been epitomized in some feminist studies (not confined to divorce) of marital violence. These writers have described the range of violent behaviour, from battering to murder, in terms of a continuum of violence. Marital violence of all kinds shares the common cause of the imbalance of power between the sexes and the consequence that it is condoned by the society which perpetuates it.

One such writer, Judith Allen, examines marital violence from the perspective both of participants and the courts in New South Wales between 1880 and 1939, with particular reference to spouse murder. Allen finds that, although "[s]pouse murder and attempted spouse murder was a pre-eminently male resort",³⁹ men tended to receive lighter sentences than women found guilty of comparable offences.⁴⁰ She also notes a decline in convictions for spouse murder over the period under study, accompanied by a parallel increase in acquittals. She attributes this phenomenon to a resort to psychiatric explanations of male violence, which

³⁹ J. Allen, "The Invention of the Pathological Family: A Historical Study of Family Violence in N.S.W.", in C. O'Donnell and J. Craney (eds.), *Family violence in Australia* (Melbourne, 1982), p.3.

⁴⁰ *Ibid.*, p.13.

gained ascendancy in the war and interwar years.⁴¹ A corresponding decrease in the severity of sentences against women over the period gives Allen little joy, as she concentrates upon the obstacles to leniency which women could encounter, in particular the fact that women's comparative physical weakness made them more likely to commit murder which was deemed to be premeditated.⁴² She establishes a link between acquittals based upon psychiatric grounds and the influence of the medical profession and the social sciences upon non-fatal domestic violence, which itself was "softened" by the growth in popularity of the term 'marital conflict'.⁴³

Allen sees one of the more pernicious outcomes of this change in attitude to be the removal of the perpetrator's responsibility for violent crime. Jocelyne Scutt takes up this theme of responsibility, with some variations, in "The Alcoholic Imperative". In cases of domestic violence where alcohol is involved, argues Scutt, alcohol abuse is seen as a "triggering factor" in assaults which would not have been committed without it. Scutt thus describes attitudes which constitute a continuation of the trend toward an individualized approach to violence between the sexes which Allen perceived in her historical sources. Like Allen, Scutt takes issue with this approach and argues that violence is "built into" the masculine and feminine stereotypes that prevail in the present social structure. When the two come together in the domestic sphere, "violence potential will exist to the extent that the parties have been socially programmed to fulfil their socially dictated roles".⁴⁴ Scutt paints a grim picture indeed.

Allen offers little hope of change within capitalist patriarchy while Scutt offers none at all. Two writers, Vivien Johnson and Nancy Tomes, have presented analyses of marital violence which accept many of the assumptions upon which those of Allen and Scutt are based, but their conclusions offer a more dynamic appraisal of the position of women in marriage than that adopted by either Allen or

⁴¹ *Ibid.*, p.11.

⁴² *Ibid.*, p.12.

⁴³ *Ibid.*, p.20.

⁴⁴ J. Scutt, "The Alcoholic Imperative: The Sexist Rationalisation of Rape & Domestic Violence", *Hecate*, Vol. vii, No.1 (1981) p.93.

Scutt. Basing her observations upon the experiences of battered wives and their children who sought asylum from their marriages in women's refuges, Vivien Johnson finds that the refuges themselves have been as guilty as patriarchal institutions of perpetuating the myth of the pathological wife beater. Like Allen and Scutt, Johnson describes marital violence as encompassing a spectrum of violent behaviour but indicates the pitfalls entailed in this metaphor. In exploring the aspects of the spectrum thesis which are counter-productive to feminist aims, Johnson sees it as "reinforcing instead of dismantling the role of innocent victim of the aggression of others which is the feminine assignment under patriarchy."⁴⁵

Johnson rescues the psychoanalytic viewpoint from the apologists for violence against women criticized in Allen's conclusions and in doing so puts forward an answer to the question begged by Scutt's argument. She proposes an end to violence "built into" the social structure by encouraging values which will reshape marriage, eventually instilling expectations of complementarity rather than the opposites of dominance and submission.⁴⁶ Johnson thus follows in the footsteps of such writers as Dorothy Dinnerstein and Nancy Chodorow by arguing that solutions to women's oppression both in marriage and outside of it can be sought in the "individualist" framework of psychoanalytic theory.⁴⁷ It is her optimism, rather than the particular form it takes in this paper, which provides a basis for an appraisal of women's use of the law which is equally optimistic. By contrast, the pessimism of Allen and Scutt borrows too heavily from masculine assumptions of female passivity to see women's definition of themselves as undergoing any change over time.

Nancy Tomes also goes some of the way with Allen and Scutt. Her perspective on violence between working-class men and women in London between

⁴⁵ V. Johnson, "Children and Family Violence: Refuges", in J. A. Scutt(ed.), *Violence in the Family* (Canberra, 1980). p.198.

⁴⁶ *Ibid.*, p.202.

⁴⁷ D. Dinnerstein, *The rocking of the cradle, and the ruling of the world*, (London, 1978), *passim*; N. Chodorow, *The reproduction of mothering: psychoanalysis and the sociology of gender* (Berkeley, Calif., 1978), *passim*.

1840 and 1875, however, mitigates the image of wives as completely defenceless, without trivializing the threat to women which violence posed. Commenting upon the tendency of communities in general to sanction violence against wives, Tomes points out that wives themselves sometimes saw outside intervention in violent disputes as uncalled for.⁴⁸ Tomes is not arguing that women colluded in their own oppression. Intervention on the part of neighbours was not unheard of, but took the form of surveillance, in case marital disputes escalated into serious violence or fatality, or of shelter offered to wife escaping from her husband.⁴⁹

Tomes is clearly describing a society which was in many ways vastly different from those discussed in the Australian studies. It is perhaps because Australia is a post-industrial society that, even in the nineteenth century, it appears to have lacked the legacy of wider community networks characteristic of pre-industrial cultures. Yet she finds in common with the Australian writers a social attitude toward a degree of domestic violence as "normal", pointing out that such an attitude can prevail alongside one which deplores extreme forms of violence and murder. Tomes thus demonstrates the need for caution in asserting that the masculine stereotype gives men *carte blanche* in the physical abuse of their wives. She admits that it is difficult to ascertain the extent of a real decline in male-female violence, but nevertheless sees a drop in reported cases over the period under study as indicating "an important change in working-class attitudes".⁵⁰ She offers several explanations for this change, avoiding those which see middle-class values as imposed upon the working class without a degree of acceptance on the part of the latter.

Tomes is equally suspicious of the view of historians such as Joan Scott, Louise Tilly, Laura Oren and Peter Stearns that the decline of working-class women's status in the nineteenth century was due to the erosion in importance of

⁴⁸ N. Tomes, "A 'Torrent of Abuse': Crimes of Violence Between Working-Class Men and Women in London, 1840-1875, *Journal of social history*, Vol. 11, No.3 (Spring, 1978), p.335.

⁴⁹ *Ibid.*, p.335-336.

⁵⁰ *Ibid.*, p.341.

pre-industrial family structures,⁵¹ and "the assumption that dependency inevitably worsens women's treatment by men".⁵² The women in her study were in economically dependent relationships but "displayed a wide range of aggressive behaviour, both physical and verbal, in relation to men."⁵³ The middle-class conception of the passive wife may nevertheless have held certain attractions, particularly that of physical safety. "For this reason", Tomes concludes, "women may have accepted, even demanded a more passive role in the family".⁵⁴ Tomes uses the example of the "trade-off of power for safety" to illustrate the point that "[i]n any shift of the definition of sex roles short of complete equality, there is a balance of advantages and disadvantages".⁵⁵ Allen and Scutt would argue, correctly, that middle-class conceptions of the family offer no guarantee of safety for women, but their analyses do not admit of the existence of any rights for women at all within these conceptions, and thus neither of women's facility for using patriarchal definitions of their rights in order to lay the groundwork for recognition of their own.

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These studies of marital violence have taken us some distance from the adulterous wives who figured in the early part of this chapter, but their pertinence to each other is realized when placed in the context of women's power in the legal resolution of marital breakdown. As sources of information about women's lives, divorce records manifest the problem of veracity to a greater extent than other historical sources do. The likelihood of collusion in some divorces means that we are obliged to consider the possibility in all of them that the charges were false as we cannot, ultimately, appeal to anything other than intuition in separating

⁵¹ *Ibid.*, p.328.

⁵² *Ibid.*, p.341.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p.342.

⁵⁵ *Ibid.*

fabricated evidence from that which is legitimate. Thus, the problem for the feminist legal historian is that the nature of the legal system encourages litigants to make capital out of the cultural stereotypes which influence judges' decisions. One step toward overcoming this problem is to make very clear distinctions between the law as interpreted by its practitioners and as used by litigants. If evidence regarding adulterous wives can be used to demonstrate women's disregard of legal polarities of innocence and guilt, that regarding battered wives can possibly turn the tables on the persecutor/victim syndrome.

Because of the problem of veracity, it is more fruitful for the discussion of women's use of the law to pass over the circumstances of charges of violence and to focus upon the behaviour of the victim. We can begin by asking what the stereotype of the dutiful wife had to offer women who sought legal remedies to their marital problems. By appearing in Court as the archetypal dutiful wife, women such as Frances Lott made use of one of the principal ironies of divorce law. The acme of the dutiful wife was expressed in her willingness to stay with her persecutor against all but the most extreme odds, for which she was rewarded with release from him. Given the choice of being a Frances Lott unencumbered by a brutal William or an Ann Heylen chained by the courts to an equally brutal Thomas, it is likely that many women intent upon leaving their husbands were prepared to exploit one aspect of the feminine stereotype (wifely duty) in order to free themselves from another (submission to a tyrant). And whether their claims were true or false, they demonstrated that submission to patriarchal authority as exercised by a husband had its limits.

Women's use of the law indicates therefore, that both women and the courts interpreted the stereotype selectively. Nor can it be maintained that, in fulfilling judges' expectations of them, female petitioners merely bent to a patriarchal authority that was more powerful than that of their husbands. Although women were limited in the ways in which they could present their grievances, they nevertheless used the law contrary to the aims of the judiciary, the primary one of

which was that divorce law aid in holding marriages together. In her insightful analysis of how the New South Wales legal system perpetuated the dominance of men over women in marriage, Judith Allen has nevertheless failed to show what women made of this system. In the South Australian divorce court, the wives who tabulated their harassment can be compared to those who trumpeted their adultery. While the victims of cruel husbands may have presented themselves in Court as passive and dutiful, they belied this image (and that of the suffering heroine of the fictional literature) by receiving judicial acknowledgment that their interests and those of the married state were not synonymous.

Conclusion

It is perhaps misleading to perceive such women as acting against the marital state. Although no figures for remarriage after divorce in the period under study are available, the gradual increase in marriages this century before World War I and the stability of the rate during it,⁵⁶ suggest that a considerable proportion of divorced wives merely exchanged one oppressor for another. Those who did not assumed other burdens: social ostracism in some cases, neglected maintenance payments and poverty in others, and, worse, the possibility of retaliatory violence and even death.⁵⁷ There is, indeed, no escape from the conclusion - drawn by so many writers that (surely!) we do not need to expand upon it - that woman's role under Western patriarchy has been relegated almost exclusively to the confines of her marriage, regardless of her social class.

Nor is there any escape from the impression given by the divorce records that, no matter how high an opinion a woman might have held of herself, she had to transform herself into a performing doll in order to persuade an array of men (whose scepticism no doubt increased with their ascendancy in the legal hierarchy)

⁵⁶ *Statistical register of South Australia, 1915-16*, Part II, p.9; Elford, "Marriage and Divorce", p.319.

⁵⁷ For a discussion of the startlingly high number of women killed by their estranged partners see Allen, "The Invention of the Pathological Family", p.7.

that she should withdraw from cohabitation with one of their brothers. Yet women's persistence in going to law, which has increased so much over the century that they now form the majority of litigants,⁵⁸ suggests that both the risks of divorce and the presumably demeaning process of gaining it have been worthwhile. Few of the women represented in this study were from the social group which would enable them to exit from the matrimonial stage with all their integrity intact by slamming the doll's house door behind them: the doll's house itself was not a familiar symbol of their oppression. And we should not exaggerate the odium of play-acting. Play-acting is the essence of our courtroom procedure; the most eminent of barristers do not consider themselves stooping to indulge in it. Women's appearance as petitioners in the divorce court, then, constituted neither the end of their oppression nor even, putting a more optimistic interpretation on matters, the beginning of their liberation. As a chapter in their history, however, the gains, as well as the losses, bear counting.

Possible answers to the question of how women in the past used the law fall into two general categories: those that see change as given to women and those that see changes as initiated by women themselves. The first category is rightly out of favour in feminist thought because it sees women's rights as a product of male generosity. The second appears to be problematic to many because it carries connotations of women seizing power, instances of which are rare in historical evidence. The current preoccupation with deconstruction in some of the more rarified areas of feminist thought has tended to ignore that women as historical subjects have lived and acted in a world constructed along male lines.⁵⁹ We must

⁵⁸ For instance, decrees awarded under the Australian Family Law Act 1975 in South Australia over the past three years show a sex distribution of applicants for these decrees as follows. For 1984: 2,385 female and 1,729 male; for 1985: 2,429 f., 1,688 m. and 99 joint applications; for 1986: 2,103, 1,538 and 135 respectively. I would like to thank Ms Louise Wilton and Mr John Gale of the Australian Bureau of Statistics, South Australian Office, for providing me with these figures.

⁵⁹ Although E. P. Thompson's essay gives the impression of having been written for a male readership, his observation in it that "values are learned within lived experience and are subject to its determinations" is pertinent to the historical study of women's lives. E. P. Thompson, "The Poverty of Theory or An Orrery of Errors" in *The poverty of theory & other essays* (New York, 1978), p.175.

turn the stone of patriarchal institutions to start the wing of female action. The limitations imposed by these institutions mean that women's self-interest may often appear in disguise, usually in the form of concessions to male-defined expectations of women's behaviour. When Ann Glover, the wife of a publican at Maidstone, filed her petition for judicial separation in 1859 on the ground of her husband's cruelty, Henry Glover filed counter-charges aimed at proving that she was not entitled to her decree. He cited as an instance of this disentitlement her "habit of being away from her home till late at night and of bringing young men home with her". He added that she was also in the habit of selling his property "for the purpose...of spending the proceeds in dress beyond the means or position of the respondent".⁶⁰ In evidence, the claim of Mrs Glover's impropriety with young men appeared as largely unsubstantiated, but Glover remained firm on the issue of the sale of his property. Mrs Glover "admitted that she had sold some sugar, one bladder of lard, and some fruit out of the garden, to get clothes for her children".⁶¹ Whether or not her claims were true, the pathetic list of items sold to provide for her children paints quite a different picture than her husband's tales of her gadding about town in her finery. Her own emphasis on the importance of her duty as a mother may have been sincerely felt - or it may have been used as a tactic to gain the sympathy of the Court. In any event, she took care to make this emphasis, and would put herself in a better position than if she had simply denied the charge.

The distinction between this approach to women's history and a meliorist one is illustrated by the example of Stanley Elkins's analogous use of the behaviour of prisoners in German concentration camps during World War II in order to explain the "Sambo" role ascribed to slaves in the Southern states of the U.S.A.⁶² Although Elkins is referring to "closed systems" inhabited by dispossessed and traumatized people, he draws some conclusions pertinent to how we approach the

⁶⁰ P.R.O.S.A. G.R.G. 36, Series 23, No.15: *Glover v Glover*.

⁶¹ *Register*, 6 June, 1860, [p.231]: *Glover*.

⁶² S. Elkins, *Slavery: a problem in American institutional and intellectual life*, 3rd edition, revised (Chicago, 1976), pp.81-139.

study of women in the more "open" system of capitalist patriarchy. Of particular relevance is Elkins's reading in the group psychology of concentration camp inmates as a means of appraising "Sambo", not just as a role imposed upon the slave by white plantation society, but as a means of defence and survival within it. His conclusions lead us to ask questions about what the feminine role could offer South Australian women.

Although Elkins describes conditions of extreme dehumanization, he measures these against the moral standards of plantation society, reminding the reader "that for all the system's cruelties there were still standards of patriarchal benevolence inherent in its human side, and that such standards were recognized as those of the best Southern families".⁶³ In our own society, the law is an instrument of patriarchal power, but it is not exclusively so, as moral values such as fairness and compassion are upheld (albeit inconsistently) and extended to women (equally inconsistently). The desire to do right by women in the nineteenth century was characteristically expressed in paternalistic or chivalrous terms, as Margaret James has pointed out.⁶⁴ In rewriting our own history, which of necessity borrows from male intellectual tradition, we must choose carefully those we wish to take with us. Better to join E. P. Thompson on his ledge than to rehearse endlessly a feminist critique of patriarchal values. To decline to participate in this form of purification does not relegate the feminist historian to the enemy camp any more than Thompson's modification of Marxist structuralism invalidates his conclusions about "the class-bound and mystifying functions of the law".⁶⁵ We must take certain conditions as given in order to ask further questions about women's ability to turn paternalistic attitudes to their own advantage.

Paternalism is the benign face of patriarchal power and thus more open to influence than more authoritarian social systems. I suspect that the denunciation of paternalism derives from a discomfort with, and a desire to avoid, explanations

⁶³ *Ibid.*, p.104.

⁶⁴ James, "Political Liberalism and the Oppression of Women", *passim*.

⁶⁵ Thompson, *Whigs and hunters*, p.260.

which see change for the better in conditions for women as handed down from above. O'Neill's 'safety-valve' analogy is useful in the discussion of paternalism. Let us start with the assumption that all legislation enacted in nineteenth century England and its colonies was aimed at preserving male privilege. Paternalistic attitudes in matrimonial legislation can be described with reference to the 'safety valve' thesis as prompting legislation which protected women from the worst excesses of male power - unwarranted cruelty, aggravated adultery, sexual perversion - so that justice toward women was seen to be done while the *status quo* remained unchallenged. But the 'safety-valve' analysis encounters the same difficulties when applied to paternalism as it does when applied to marriage. The legislation which shows the benign face of patriarchy also exposes its soft, white underbelly. The slight contradiction underlying the claim that change in a piece of legislation is inspired by conservative motives is echoed in the 'safety valve' argument. The question begged is to what extent the *status quo* can change and still remain the *status quo*.

The history of women and the law customarily stops at exploring the iniquities of the statute books and the courtroom. It is clear that paternalistic legislation, in protecting the interests of even a minority of women, did not serve the interests of patriarchy alone because it allowed that at law, women had interests to be protected. The issue for women in divorce law is again comparable to the issues raised in Thompson's analysis of the Black Act. It is not a question of whether women had a right to appear in the divorce court with their grievances, but how far they could go once they found themselves "a purse and a lawyer".⁶⁶ The acknowledgment of women's statutory rights appears too often buried in arguments which proceed as if women had none. Again, we must throw out one or the other. Having dispensed (I hope) with fruitless obstacles to feminist-inspired research, we can turn to more subtle aspects of women's use of the law, such as how they exercise "theoretical" rights which are not represented in the letter of the law.

⁶⁶ E. P. Thompson, *Whigs and hunters*, p.261.

Attempts to strike the roots of our oppression cannot continue indefinitely; they become meaningless unless accompanied by attempts to unearth the seeds of our liberation.

CHAPTER EIGHT

Duty and happiness in the South Australian divorce court

Introduction

I have claimed that the very nature of the legal system meant that lawyers with professional reputations to protect had priorities which conflicted with those of judges, who saw their role as having social import. And even judges disagreed with each other. If they tended to target members of the ruling *élite* in the setting of their moral examples, opposition to divorce was not concerted nor judicial power monolithic. In this final chapter, we will look specifically at the later years of the period under study, which illustrate the ways in which the power base of the judiciary was discrete and therefore open to influence from the users of the Matrimonial Causes Act. These later years also show the influence of the existence of divorce on the plots of the novels to a greater extent than in the first decades of South Australian divorce legislation.

Although the writers of the fictional literature, like the judiciary, opposed divorce, each approached the problem of divorce from a different standpoint. A fundamental divergence between the two sets of beliefs is apparent in the contrast between the novelists' championship of the companionate marriage, for all the conditions imposed upon it, and the judiciary's preoccupation with marital fault and marital duty. The recurrent theme in the novels, that marriage should entail a bond of affection between its participants, suggests a closer resemblance to the attitudes of divorcing couples, as revealed in the Supreme Court records, than to the principles of marital duty which the judiciary strove to uphold. One of the strongest indications of judicial opposition to divorce weakening under the pressure of the demand for divorce, however, can be found by looking at the representation of the companionate marriage in the divorce court in the later years of the period under study. Judges increasingly handed down decisions which reveal the influence of the companionate marriage upon their making.

Courtroom evidence shows that judges tended to agree with the novelists that marriage should be happy, but reminded litigants that this issue was irrelevant to the Matrimonial Causes Act. They could consistently support this principle as long as it did not interfere with the principles of marital fault laid down in the Act or take priority over those of marital duty. However, courtroom evidence also indicates that, although the Act did not acknowledge the ascendancy of the companionate marriage, argument was often steered towards a consideration of the happiness of a particular marriage, even when the parties came from the social group for which marital duty was regarded by judges to be of crucial importance. Criteria of marital happiness which were, indeed, irrelevant to the Matrimonial Causes Act appeared at hearings like uninvited guests at a party, creating yet another weakness in judicial opposition to divorce.

The judges of the Supreme Court between 1859 and 1918

Sir Samuel Way's position as Chief Justice from 18th March, 1876 until 9th January, 1916, a good two-thirds of the period under study, would seem to imply that when we talk about the tendencies of the South Australian judiciary in general, we may really be talking about the influence of one judge in particular. Moreover, a number of other judges served long terms on the Bench between 1859 and 1918. Edward Castres Gwynne sat from 26th March, 1859 until 28th March, 1881, James Penn Boucaut from 25th September, 1878 to 24th February, 1905 and William Henry Bunday from 2nd July, 1884 to 30th November, 1903. In the twenty years between the second half of 1884 and the end of 1904, the Bench was occupied by the triumvirate of Chief Justice Way, Sir James Boucaut and William Bunday. There is no doubt that certain decisions bear the stamp of individual judges. In the area of divorce law both Sir Samuel Way and Sir James Boucaut (despite the latter's political radicalism¹) stand out for their dogged championship of a rigid interpretation of marital duty against the vicissitudes

¹ P. L. Edgar, "Sir James Penn Boucaut", in *Australian dictionary of biography*, Vol. 3 (London, 1969), pp.199-200.

threatened by the Matrimonial Causes Act. By comparison, judges who acceded to the Bench after Way and Boucaut's occupation - John Hannah Gordon, Robert Homburg and George Murray - showed some inclination to set precedents in their judgments. We cannot, therefore, discount the influence of individual judges upon changes in the implementation of the Matrimonial Causes Act. But although Sir Samuel Way's determination to adhere strictly to English legal tradition, particularly the sartorial aspects thereof, may well have been part of his "pervading influence" on the South Australian Bench, it has also been argued that he "made no great mark as a jurist on the [S]upreme [C]ourt".² Issues concerning marital duty were a preoccupation of judges before his appointment, and the exercise of judicial discretion in keeping with this preoccupation characterized judgments in the early years of the Matrimonial Causes Act.

Chief Justice Cooper's judgment in *Fielding* in 1860, cited in Chapter Three, where he dismissed the wife's petition on the ground of her own adultery, provides one instance of judicial affirmation of the importance of wifely chastity. Cases of the discretionary bar being waived do not, however, provide evidence of the converse, that is, lack of concern with marital duty. In *Kemp v Kemp*, a petition filed by a locksmith in 1868 for dissolution of marriage on the ground of his wife's adultery,³ the jury upheld the wife's counter-charge of cruelty but Chief Justice Hanson found "that there was no cruelty proved, or, at any rate, not such cruelty as would justify a wife in deserting her husband."⁴ We could also explain the use of the discretionary bar in *Fielding* and the waiving of it in *Kemp* by recourse to either of the two following arguments. On the one hand, we could see the judges concerned as spokesmen for a patriarchal society and say that they found for the husband in both instances because they were prejudiced against women. On the other, we could say that they evaluated each petition with legal criteria uppermost and that, by their interpretation of the law, they felt bound to ignore the respective charges of the women concerned; other judges

² A. C. Castles and M. C. Harris, *Lawmakers and wayward Whigs: government and law in South Australia 1836-1986* (Adelaide, 1987), pp.204-206.

³ P.R.O.S.A. G.R.G. 36, Series 23, No.116: *Kemp v Kemp*.

⁴ *Register*, 21 November, 1868, [p.88].

might have come to other conclusions. Both of these arguments - one based upon the belief that the dispensing of justice always concurs with prevailing ideology, and one which places emphasis on individual judges' interpretation of the law - are valid but inadequate. As we saw in Chapter Seven, judges may always have been prejudiced against women but they did not always find against them.

The decisions of both judges are in accordance with principles about marital duty widely held among members of the judiciary in general. The wife's duty to remain chaste was of paramount importance, so that in the *Fielding* case it provided grounds for denying a wife relief, whereas in the instance of *Kemp* it justified the upholding of a petition against a wife's counter-charges. The importance of duty also accounts for seemingly conflicting judgments emanating from the one man. One example of such a conflict is found in the two vastly different approaches adopted by Justice James Boucaut in his handling of *McBride* and *Hall* respectively. The explanation that Justice Boucaut's intervention in *McBride* was because of his prejudice in favour of a) a social peer and b) a member of his own sex, only goes part of the way toward explaining the difference between the judgments. If he was merely prejudiced in favour of male petitioners from a similar social background to his own, we would expect him to have made more of an example than he did of Mrs Hall. Instead, he was unwilling to find her guilty until the evidence was proved to be unequivocally against her. Alternatively, if we allow for the possibility that the judge reacted to the *Hall* case solely on a personal level, that he *liked* Mrs Hall and did not like to see her disgraced in public, his stern words about duty, for all his sympathy, still require explanation. Mrs Hall threw doubt upon her professed innocence by not reporting her servants' stories to her husband because she "neglected her commonsense duty to her husband, to her children, and to the conventional laws of society made for the protection of the marital state".⁵ The reference to wifely duty gives the case characteristics which are shared by others heard under the Matrimonial Causes Act between 1859 and 1918. The primary aim of the judiciary in implementing the Act was the preservation of a form of marriage which

⁵ *Register*, 26 August, 1902, p.8: *Hall*.

entailed certain duties on the part of each spouse. To entertain Mrs Fielding's petition would have sanctioned her dereliction of marital duty, while to entertain Mrs Kemp's counter-allegations would have amounted to the same. These two cases offer examples of the practice of upholding judicial ideas about marital duty which were established before any one judge or core of influential judges began presiding over South Australian divorce hearings.

If individual judges exerted a significant impact on the interpretation of the Matrimonial Causes Act, we would expect personnel changes on the Bench to be reflected with some immediacy in the outcomes of petitions or in petitioning rates which Table 1 on page 106 and Figure 1 on page 241 show did not happen. Moreover, the low incidence of dismissal of petitions which reached hearing (see Table 2, page 107) suggests that, even in the years dominated by the judges most prone to using criteria of marital duty to oppose decrees, judges in general were either unable or unwilling to dismiss petitions once they had obtained a hearing. It is our knowledge of individual judges which allows us finally to dismiss the argument that one or two judges determined the way the Matrimonial Causes Act was used. We know from the records of hearings that judges such as Way and Boucaut were not unwilling to prevent decrees. Like their colleagues, however, they frequently handed down decisions which conflicted with their oft-stated beliefs that marriage was a solemn duty, only to be abandoned when the marital fault of one party and the marital duty of the other was clearly established.

The tendency of judges to say one thing and do another, for example to find that a petitioning spouse had not fulfilled his or her marital duty and yet to grant that spouse a decree, still eludes understanding if we resort to explanations based on the power of the judicial system. No one, especially not a Supreme Court judge, likes to be seen to be contradicting himself if he can help it. We must therefore conclude that judges who contradicted themselves could *not* help it. The law and its implementation are not - as has been argued in Chapter Seven - synonymous. We find in laws themselves powers which can be used by people other than judges, by people who resort to the law. If

judges toward the end of the period under study were liberal in their interpretation of divorce law, they rode a wave that had been swelled by the actions of litigants in the divorce court, as seen in Justice Murray's findings in *Myers*, cited in Chapter Three, in which the discretionary bar against a petitioning wife's adultery was not used. The historical antecedents to *Myers* are in the numerous instances given in the preceding chapters of issues of marital fault running up against criteria of marital duty.

Although litigants could lose their cases if they did not convince the Court that they fulfilled the criteria required of the dutiful spouse, this outcome did not always prevail. As we have seen, marital duty was not always the complement of marital fault, and examples have been given of litigants reaping the benefits of this lack of fit. Nor was it always the case that male litigants, advantaged by a discriminatory law and even more discriminatory judges, were the sole beneficiaries, as *Myers* itself shows. Men and women alike "beat the system"; they were able to do so because the system was shot through with inconsistencies. These little victories were not anomalies in an otherwise sound framework, like "dole cheating" in the late twentieth century, in which government power is defrauded on an individual level but no challenge is offered to the *status quo*. The decision in *Myers* is evidence of change to the *status quo* made possible by the limitations of judicial power rather than the beneficence of isolated judges.

The rise of divorce and the decline of *noblesse oblige*

The failure of the judiciary effectively to use divorce cases involving socially prominent couples as a vehicle for setting moral examples carried with it a decline in attempts of this kind. Ten of the eighteen couples in the uppermost group gained decrees and again, their success reflected a pattern of successful divorce across the social spectrum more than the peculiarities of this group. Toward the end of the period under study, we find several instances of judges employing conciliatory measures in cases which did not involve socially prominent couples, such as *Kroehn v Kroehn*,

filed in 1910 by the wife of an ordinary farmer.⁶ This case shows that the presiding judge was reluctant to pronounce a decree, as Justice Boucaut was in the case of *McBride*. In contrast to both *Kroehn* and *McBride*, however, the petitions of members of the uppermost group heard in the decade 1909-1918 are free of evidence of judicial interference of this kind. The *Kroehn* case does not put paid to the argument that judges targeted the ruling *élite*, but suggests that the ineffectiveness of *noblesse oblige* resulted in a shift of judicial priorities in matrimonial decisions.

A significant characteristic of *Kroehn* is that it is not actually a petition for divorce, but one for judicial separation. As Figure 2 (page 242) shows, it was filed at a time when petitions for judicial separation were unpopular among female petitioners. Although women's success rates were not increasing during these years, their tendency to petition for the more "final" decree for dissolution of marriage was. Whereas in the early years of the Matrimonial Causes Act, judges seemed more favourably disposed toward women who kept a door open by opting for the lesser decree than to those who sought the irrevocable dissolution of marriage, the increasing popularity of the latter type of decree may have reversed this tendency.

Of thirteen petitions for judicial separation filed by wives in the final ten years of the period under study, eleven did not reach hearing. Eight of these were either abandoned or show evidence of having been abandoned before the hearing. Two were withdrawn and refiled: one of these was an earlier *Kroehn* petition and the other was settled out of court after the second petition was filed. Of the two that did reach hearing, one was settled between the parties at the suggestion of Justice Murray. Thus *Kroehn* was the only petition filed in these last ten years which, first, ran the gamut of a court hearing and second, received a judicial decree. And this decree was gained despite strenuous efforts on the part of Justice Gordon to find an alternative solution.

The grievances of the twenty-three-year-old petitioner, who claimed she had left her husband after each alleged act of cruelty but that she had returned to him subsequently, amounted not only to charges of cruelty but of her husband's destructive

⁶ P.R.O.S.A. G.R.G. 36, Series 54, No.198 of 1910: *Kroehn v Kroehn*.

jealousy, which appears to have been a catalyst to his violence. Although she had medical testimony of injuries sustained during her marriage, her husband denied the charges and gave evidence pointing to his wife's own jealous disposition, and of her outbursts of violence, mainly verbal, when inflamed by it. The judge eventually threw up his hands in despair:

His Honor at this stage asked if there were a possibility of the case being settled. It was a difficult one to deal with.

Mr. Cleland [for petitioner] - So much depends on it.

His Honor - Corroboration of cruelty is required. The evidence does not confirm many of the allegations. This is an enormous expense for a poor farmer.⁷

Justice Gordon's response seems to indicate little other than blind male prejudice. Dismissing the wife's medical evidence as insufficient to constitute corroboration of her charges, his only sympathy appears to lie with the husband impoverished by his wife's litigation. Other aspects of the case, however, give a more comprehensive explanation of his conciliatory approach.

The Kroehns did not have social status to protect or large amounts of matrimonial property to divide, but they had two children, aged two and three. The petitioner took the elder with her when she left home for the last time, and applied for custody of the younger pending judicial separation.⁸ At the hearing of this application, she appeared before a very hostile Sir Samuel Way, who found that her medical testimony in no way mitigated the fact that, by her own evidence, she had finally left home because her husband would not discharge a farm servant who had done no apparent wrong. The Chief Justice described Mrs Kroehn as "a flighty, excitable woman, very fond of her children, but with a violent temper which she did not keep under control".⁹ It is beyond doubt that, had her counsel not requested that the Chief Justice not find on certain points because there was a petition for judicial separation pending, Mrs Kroehn would have lost her case for custody. English law still gave

⁷ *Register*, 8 September, 1910, p.5: *Kroehn*.

⁸ P.R.O.S.A. G.R.G. 36, Series 54, No.198 of 1910: *Kroehn*.

⁹ *Register*, 20 June, 1910, p.10: *In re E. M. Kroehn*.

custody automatically to the father unless "misconduct" (the term generally applied in court reports to signify adultery) could be shown.¹⁰ As it was, Sir Samuel did not award custody to the father, but found "that what had happened did not disentitle the husband to the custody of the child, and its welfare did not require it to be delivered to the mother".¹¹ With her options closing fast, Mrs Kroehn's anticipated petition for judicial separation was no doubt vitally important to her. It may not, however, have been important to the Court.

The high rate of abandonment of wives' petitions for judicial separation could be a direct consequence of the increasing tendency of women in general to petition for dissolution of marriage. There are several reasons for drawing this conclusion. The increase suggests either that wives were becoming more inclined to end their marriages rather than to separate from their husbands, or that the chances of success with such a petition became greater between 1859 and 1918. Of course, both reasons could apply, or another explanation, that wives wishing to separate from their husbands increasingly did so by deed of separation or by other informal means.

Let us consider the possibility that wives were becoming increasingly inclined to end their marriages rather than separate from their husbands. Dissolutions of marriage entailed proof of adultery and they were irrevocable. Thus, women were not only seeking exit from cohabitation, they were charging their husbands with marital fault which, if sustained by the Court, freed them of their duty to remain married at all. An increasing number of women claiming exemption from this duty would have created new pressures for judges concerned about the erosion of the marital state. They were less and less able to adopt the solution of directing wives to give their marriages another try. To attempt conciliation in petitions involving charges of adultery would be to ignore the gravity of the fault: it would amount to saying that adultery did not matter.

The only way that judges could stem this particular tide would be to examine the evidence as rigorously as possible in the hope that some charges were insufficiently

¹⁰ *Ibid.*

¹¹ *Ibid.*

supported to warrant the granting of a decree. When compared with this serious task, petitions for judicial separation may well have diminished in significance to the extent that judges were not prepared to hear them, encouraging the parties to draw up deeds of separation instead; the two petitions which were settled non-judicially had this outcome. Alternatively, if wives who wished to be separated from their husbands were choosing non-judicial means, such as private deeds of separation, to do so from the outset, those who still resorted to the judicial separation may have been regarded as wasting the Court's time. It could be that wives' petitions for judicial separation were discouraged in order to force women to petition for dissolution of marriage - with its required proof of aggravated adultery and greater risk of failure - or not at all. If this was so, the impact of such a tactic appears not to have been felt by South Australian women in general, as Figure 1 (page 241) indicates a gathering increase of petitioning rates from 1906 onward. This continued appearance of women in the divorce court, combined with their favouring of petitions for dissolution of marriage, means that women were putting increasing pressure on divorce law, both by their numbers and by the decrees they sought.

In other words, some women may have been deterred from filing or continuing petitions for judicial separation, but women as a group were not deterred from using the Matrimonial Causes Act. If judges were at any stage in the period under study actively attempting to discourage women from filing petitions for judicial separation, they do not appear to have altered their strategy in accordance with women's increased suit for dissolution of marriage. To respond by *encouraging* the continuation of women's petitions for judicial separation through the prospect of a reasonable chance of success would not have reduced the number of women appearing in Court, but may have forestalled the resort to the petition for dissolution of marriage. Table 1 (page 106) shows that the change in wives' petitions did not result in a substantial decline in their success rate, so that women were not only taking the harder option in the resolution of their marriage breakdowns, they were succeeding in their attempts.

If we abandon the idea that change in the nature of women's petitions over the period under study was instigated at the judicial level, the results are equally gloomy for judicial attempts to foster the belief that marriage should not be dissolved (particularly by wives). If wives themselves initiated the change, judges were failing successfully to meet the challenge it offered. The public denunciation of undutiful wives, such as Ann Heylen, and the corresponding encouragement of good ones, such as Florence Sweetapple, to play up and play the game, were not having the desired effect.

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In view of the changes in the nature of women's petitions over the period under study, Emma Kroehn's appears as something of a dinosaur. It is unlikely that it would have survived at all if it had not been her second, and if her persistence had not been greater than the judge's irritation at being obliged to preside over her case. As we have seen, the disputed custody of a child seems to have been Mrs Kroehn's main spur, but the case also illustrates some shifts in judicial approaches to divorce law which, again, signify the defeat of all attempts to foist moral imperatives upon an unwilling population. It does not, however, furnish proof that some judges were eager to conciliate in matrimonial petitions throughout the period under study, regardless of the social standing of the litigants, thereby refuting the 'moral exemplar' argument. The case was, as the judge said, "a difficult one to deal with". The petitioner's charges were matched by the respondent's, and superimposed upon these issues was that of custody, over which both parties were immovable.

There are several aspects of *Kroehn* which reflect the general picture of divorce in South Australia. Taken in isolation these facets do not vindicate the 'moral exemplar' argument, but they do show that *Kroehn* cannot be used to refute it. The case illustrates the extent to which marital fault could be a stumbling block for judges, and also sheds some light upon why they so often fell back upon criteria of marital duty in deciding difficult cases. Faced with charges from both sides in a petition which was not even

not even brought to end the marriage, Justice Gordon was caught on the horns of a dilemma. How could he find for one party and be sure that this party had acquitted him- or herself of the charges laid by the other? He could not easily summon up an appeal to marital duty, dealing as he was with a wife who had showed she was in earnest by petitioning twice in the divorce court as well as attempting to gain custody of her child outside of it.

Justice Gordon avoided the dilemma by steering the well-navigated course which by-passed the contested issues, avoiding also the straits of the marital duties of the parties, only to founder upon the rock which was at the base of the litigation, the custody of the children. But even when counsel for each side insisted that neither of their respective clients would relinquish custody, he persevered:

Each could have them for a short time - say, three or six months. I am inclined to think they are really fond of each other. They could arrange a deed of separation which could be torn up if they wanted to come together again. It is not as if there were any misconduct on either side; they have both led respectable lives.¹²

The absence of moralizing, in contrast to Sir Samuel Way's fulmination against "petticoat tyranny" in the custody application, is perhaps an illustration of differences between judges. Alternatively, it is perhaps a reflection of a shift in location of the judiciary's attempts to broadcast the marital values expressed in the earlier divorce cases. It could be that Sir Samuel, presiding over a case which was not ostensibly one concerning marital fault, had greater freedom to indulge the desire to sermonize than was now feasible in the divorce court.

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Whether or not there was a shift from one area of judicial influence to another cannot be ascertained in this study. It is clear, however, that by 1918, judicial

¹² *Register*, 8 September, 1910, p.5: *Kroehn*.

moralizing no longer occupied the place that it had done around the turn of the century. The shift which took marital duty out of issues of marital fault also brought the petitions of the 'moral exemplars' closer in kind to those of couples from the lower social ranks. This narrowing gap was a consequence of the failure of judges to stem the tide of divorce, as a closer examination of the six petitions which were filed by members of the uppermost social group from 1909 to 1918 will confirm. Three of these were for dissolution of marriage, and all were won by their respective petitioners (two female and one male). The remaining three were all filed by women, and none reached hearing. This is less an illustration of judicial prejudice against petitioning wives from the ruling *élite* than of aspects of the types of petitions filed. Two were for judicial separation, and thus not aimed at ending the marriage, and the other was for restitution of conjugal rights, a rarely-used form of litigation.

As mentioned in Chapter Three, matrimonial proceedings often appear to have been used by members of the uppermost social group in order to overcome a stalemate reached in private negotiations. Towards the end of the period under study in particular, the prospect of a courtroom battle seems to have expedited a settlement, sparing both parties a similar ordeal to that which *Sweetapple* entailed. Little is known of *Pearse*, one of the petitions for judicial separation (introduced in Chapter Three), as it appears to have been abandoned before any case material was gathered, but the records of the remaining two contain a substantial amount of correspondence. The correspondence in *Drew*, the petition for restitution for conjugal rights, introduced in Chapter Two, shows the fear of public exposure and the consequences of a decree against him to be the reasons for the respondent's reconciliation with his wife. *Crozier*, the remaining petition for judicial separation, also introduced in Chapter Three, is more complex but interesting because of the similarities it bears to *Kroehn*, notably in that access to the parties' offspring figures largely in the case material.

Violet Crozier had a solid case for her husband's cruelty, some instances of which are described in her petition as so brutal that they bring tears to the eyes. Her

charges were neither denied nor matched by comparable ones, as Emma Kroehn's were. Unlike Emma Kroehn, she did not apply for custody pending litigation, but for access.¹³ Perhaps she was aware that her chances of gaining custody were slim, and settled for access, to which she was entitled at law. She did, however, apply for custody in her petition for judicial separation.¹⁴ Under a deed of separation, the most she could hope for, no matter how reasonable the terms, was access. As was the case with Emma Kroehn, the decree of judicial separation offered the possibility of a substantially different aftermath to the breakdown of her marriage than a private settlement did.

Once Mrs Crozier had taken the step of going to law, her actions snowballed. As a wealthy pastoralist, William Crozier clearly had no financial obstacles to retaliation, and following his wife's petition and application for access pending litigation, he took out a writ aimed at ordering her to honour their oral separation agreement. At the hearing of this application, Mrs Crozier won the sympathy of the Court, as Justice Gordon said, in refuting it, that "it was a novel occasion for a husband to ask a Court to order that an alleged verbal agreement between husband and wife for separation should be ratified. There had been much varying evidence given as to the conditions".¹⁵ Although Mrs Crozier was awarded access pending litigation in July, 1918,¹⁶ her petition appears to have lapsed, as I found no further record of matrimonial proceedings.

Had Mrs Crozier persisted in the divorce court, it is more likely that events would have taken the turn they did in *Kroehn* than that a repetition of *Sweetapple* would have taken place. Among the six petitions filed by members of the upper group in the last ten years of the period under study, there is no indication in any of them that they were used to remind litigants of their social duty to set moral examples in marriage. How are we to decide whether this fact supports an

¹³ P.R.O.S.A. G.R.G. 36, Series 54, 359 of 1917: *Crozier*.

¹⁴ *Ibid.*

¹⁵ *Register*, 20 July, 1918, p.11: *Crozier v Crozier*.

¹⁶ *Ibid.*, 3 July, 1918, p.9: *Crozier*.

argument for the failure of attempts to appeal to *noblesse oblige* or one that only some judges looked to this group to set moral examples some of the time? Although the two petitions for judicial separation and that for restitution of conjugal rights were abandoned before hearing, the three for dissolution of marriage went to hearing and resulted in decrees for the petitioners concerned. It was relatively easy, then, for some upper group petitioners in this ten-year period to obtain decrees. Again, however, the types of petition filed in these ten years bear further consideration.

We have seen that, among members of the uppermost social group, petitions for judicial separation were the most likely ones to be filed when out of court negotiations failed. Because of the higher stakes involved, petitioners from the upper group who brought suits for dissolution of marriage were likely to have very substantial evidence of marital fault, attested to by the comparatively high success rate of such petitions filed by members of this group. The public denunciation of adulterers and adulteresses of gentle birth in the divorce court was successful up to a point. The call to duty could not bear too many silent responses, however, without sounding ridiculous.

To these now familiar characteristics of divorce in South Australia, we add the decreasing popularity of the petition for judicial separation, coupled with the increase in popularity of that for dissolution of marriage among petitioning wives. Divorce in South Australia had an entirely different hue in the 1910s to that which it had borne early in the century, when Florence Sweetapple appeared before Sir Samuel Way. It is unlikely that a petition for judicial separation filed by a socially prominent wife carried the same threat to the *status quo* as it did in Florence Sweetapple's day. One of the greatest limitations to the use of the Matrimonial Causes Act to serve normative ends was the charge of adultery, which was not often used in petitions for judicial separation, particularly once those for dissolution of marriage became favoured by both husbands and wives. It was the absence of an adultery charge which enabled Sir Samuel Way to justify his view of Herbert

Sweetapple as a model husband. The growth of the demand for the decree of divorce severely limited the number of cases in which judges could send unhappy wives from the courtroom with their grievances used as evidence against them. Instead, they were faced with the immediate threat of embarrassing disclosures about the sexual morality of South Australia's social leaders whenever a socially prominent wife filed a petition for dissolution of marriage. Such a prospect would doubtless have reduced the seriousness of petitions for lesser decrees even more than would have been the case among litigants of lower social rank. The increase in proportion of petitions for dissolution of marriage meant that judges had more pressing concerns than the sorting out of disputes among socially prominent couples over who should have the house and the children.

Regardless of the social origin of the petitioning wife, judges had grown unaccustomed to presiding over petitions for judicial separation by the last ten years of the period under study. Thus, they were also unaccustomed to the tenacity with which Emma Kroehn pursued hers and these factors explain the judge's conciliatory treatment of her case. While it is likely that he regarded the marriage as important - as all marriages were to an anti-divorce judiciary - there is no evidence that he held it to be substantively similar to those of couples with a higher social profile. Differences based on the social status of the parties involved are particularly noticeable in the attempts made in the later petitions for dissolution of marriage among the social *élite* to conceal facts about the cases from public knowledge. Two of the suits falling in the last ten years of the period under study entailed such attempts: in *Souter*, the suppression of advertisement in the newspapers seeking the respondent's whereabouts and in *Heaslip*, Sir Samuel Way's consent to hear the petition *in camera*. *Sweetapple* is peculiar because of the explicitness of the moral message which was delivered in it, not for the judicial attitudes which were expressed.

Marital duty meets marital happiness

During the hearing of *Kroehn*, the parties complied with the judge's wishes by adjourning briefly, but an agreement could not be reached and they returned to the courtroom, each attempting to better the other's score of wrongs suffered. Eventually, a judicial separation was awarded to the petitioner, with leave reserved for the parties to apply for custody.¹⁷ The petitioner's victory in *Kroehn* shows how the Matrimonial Causes Act could be used by litigants, even to the extent of overriding the wishes of the presiding judge. When all was said and done, *Kroehn* was a case decided upon the issue of marital fault, as the respondent's counter-allegations were not used by the Court to conclude that Mrs Kroehn was an undutiful, and therefore an undeserving, wife. In showing the limits which the Act placed upon judges' interpretation of the law, *Kroehn* again shows a broad scope for manipulation by petitioners. The general form which this manipulation took was the infiltration of values which said that choice was of prime importance in marriage, thus displacing the primacy of duty in judgments. Judges themselves, however, were not above manipulation, and the form it occasionally took showed them to be willing to use values associated with the companionate marriage in the service of their duty-based ends.

In his desperation at trying to resolve *Kroehn* out of Court, the judge referred to an aspect of the marriage which neither the Act nor those who presided over its implementation customarily associated themselves. Of the Kroehns, Justice Gordon said, "I am inclined to think they are really fond of each other". His acknowledgment of the importance of bonds of affection in marriage has a complicated history. The sequence of events in *Kroehn* is not merely the outcome of a gradual replacement of duty-based conceptions of marriage with those associated with the ascendant companionate marriage. To begin with, *Kroehn* bears some significant similarities to *Sweetapple*, in which the conception of marriage as a duty was exploited to the fullest. Neither petition entailed charges of adultery on

¹⁷ P.R.O.S.A. G.R.G. 36, Series 54, 198 of 1910; *Kroehn*.

either side and in both cases, the judge in question was eager to see the parties reconciled. Moreover, both cases show an odd judicial perspective on the supposed dichotomy of marital duty and marital happiness.

The view of marriage as entailing a bond of affection, conspicuously absent from the Matrimonial Causes Act and long professed by judges to be irrelevant to petitions filed under it, appeared in *Kroehn* as a reason in favour of continuing the marital relationship, although the supposed fondness of Mr and Mrs Kroehn for each other was not used to justify a dismissal of the petition. This was despite the fact that the evidence revealed neither of the parties to be the archetype of the dutiful spouse. Moreover, although the outcomes of *Kroehn* and *Sweetapple* were vastly different, judicial emphasis on marital happiness in the later petition is foreshadowed in the earlier one.

In his attempts to win *Sweetapple*, the respondent's counsel, Sir Josiah Symon, made considerable efforts to establish that Mrs Sweetapple was happy with her husband:

Do you remember the doctor and you planting some scented verbenas a few days before the separation?...

[Mrs Sweetapple] - I do not remember the incident.

Sir Josiah - Don't you remember the doctor saying during the planting, "This will be in loving remembrance of to-day?"¹⁸

This exchange and others like it in the cross-examination of the petitioner show how Sir Josiah was able to use the question of the happiness of the parties to corner Mrs Sweetapple. His image of domestic bliss was presented in such a manner as to silence argument to the contrary. Mrs Sweetapple did not "remember" the incident, but did not deny its occurrence: she was under oath to tell the truth. Under cross-examination, however, she was not in a position to explain that, regardless of what the image seemed to convey, it was not representative of their relationship, that the appearance of harmony was possible alongside a thousand contradictions of it.

¹⁸ *Register*, 23 March, 1904, p.7: *Sweetapple*.

Thus, her professed failure to remember the incident of the planting figures, not as disagreement with Sir Josiah, but as unbecoming contempt of her marriage. If she had said that she remembered the planting, however, her answer would certainly have been used to induce her to admit that such touching displays of intimacy showed that the marriage was a good one. As it was, Mrs Sweetapple's protestations during the hearing that she was *not* a happy wife did nothing to help her cause.

At the opening of his judgment, Sir Samuel Way summarized the general picture of the Sweetapple marriage as happy. Because marital duty, and not marital happiness, was the issue upon which the Sweetapple petition was lost, happiness became incorporated into duty. The theme of happiness introduced by Sir Josiah and taken up by Sir Samuel completed the story of Mrs Sweetapple's error in bringing the charges against her husband in the first place. Not only did she exaggerate her husband's bad behaviour out of all proportion, not only did she ignore the many material comforts offered by her marriage, but she sneered at the personal reward her marriage had bestowed upon her.

The importance of marital happiness was also emphasized in the second Maslin petition, discussed in Chapter Three. The disclosure during the hearing of the first that the petitioner had been guilty of adultery meant that in the hearing of the second, his counsel had to work very hard to establish that Maslin was more sinned against than sinning. The means by which he attempted to do so was to point out how the social differences between husband and wife had resulted in a match which could only bring unhappiness to both of them:

Sir John Downer, in opening, said that the facts were very painful, but at all events they left no shadow of doubt that it was very desirable to grant the decree asked for. Future happiness between the parties was quite impossible; the breakage was hopeless and irretrievable....That it was an ill-assorted marriage His Honor would be able to judge from seeing the parties and reading the letters he would put in.¹⁹

¹⁹ *Register*, 18 December, 1908, p.3: *Maslin*.

Throughout the hearing of the accusations of marital fault on both sides, the theme of the potential for unhappiness in the joining of "a proud, reserved young man" and "an ignorant, impetuous, emotional daughter of a boundary rider"²⁰ is prominent and is echoed in Justice Homburg's findings. Having made it clear that he regarded the wife's wrongs to be greater than the husband's, he returned to Sir John Downer's point, agreeing with him "that it would be in the interest of those two people if their marriage were dissolved".²¹ While it cannot be said that the question of marital happiness eclipsed those of fault and duty, all three aspects of the marriage breakdown were prominent in the hearing. Thus, the issue of marital happiness was accorded a significance which, elsewhere, judges frequently denied that it had. The impact of both the Act's concern with marital fault and judges' admonitions to marital duty are diminished by their occasional consideration of marital happiness.

It is noteworthy that in these two cases where marital happiness was deemed important by the judge in question, the parties involved were from the uppermost social group. If social leaders had a right to happy marriage, then, little wonder that the hearings of the suits of socially insignificant petitioners were punctuated by references to the unhappiness of the parties. One detects a growing revulsion over the period under study on the part of litigants, counsel and court reporters alike toward marriages which fell short of the romantic ideal portrayed in the fictional literature of the time. For instance, the report of the hearing of *Deacon v Deacon*, a petition for dissolution of marriage filed by the wife of an ironmoulder in 1913,²² opened with the petitioner's statement "that respondent had told her he had not married her for love, but only for convenience".²³ Between 1859 and 1918 the degree of marital happiness enjoyed by the parties to a suit was increasingly referred

²⁰ *Ibid.*

²¹ *Register*, 22 December, 1908, p.10: *Maslin*.

²² P.R.O.S.A. G.R.G 36, Series 54, 236 of 1913: *Deacon v Deacon*.

²³ *Register*, 4 September, 1913, p.9: *Deacon*.

to in the implementation of an Act which ignored this aspect of marriage as irrelevant to the legal resolution of marital breakdown.

This incursion of considerations of marital happiness was a mixed blessing, notably for litigants from the uppermost social echelons. Indeed, the *Sweetapple* judgment constitutes a twofold injustice to the petitioner. Mrs Sweetapple deferred to the requirements of the Matrimonial Causes Act by expressing her marital grievances in the legal language of marital fault. She was repaid first, by the rejection of her evidence as insufficient to prove marital fault and second, by the twisting of this evidence to create the imputation that she was happily married. Mrs Sweetapple said she was the victim of marital fault; the judge said she was not. Mrs Sweetapple said she was not happy; the judge said she was. The solid rock of English law appears as shifting sand under the hapless petitioner's feet.

Whether or not Mrs Sweetapple persuaded Chief Justice Way that she was unhappily married probably made little difference in his eyes; the odds were stacked against her from the outset. Yet, if the entry of criteria of marital happiness into judicial decisions was a mixed blessing for litigants, it was equally mixed for the judiciary. While individual members of the ruling *élite* may have suffered for it, a far larger number of couples gained, as seen in the examples cited in Part I of petitioners who revealed in evidence that they cared more about their own interests than their - or their spouse's - marital duty. Unhappy, undutiful couples whose marriages were *not* used to set moral examples entered the divorce court in the Trojan horse of marital fault. And by failing to keep criteria of marital happiness out of decisions such as *Sweetapple*, judges further undermined their already shaky position by contradicting their avowed lack of concern with marital happiness.

Conclusion

The judicial use of arguments which referred to the happiness or otherwise of litigants suggests that the courts and the fictional literature were linked by more than their shared commitment to concepts of marital duty. The most substantial

difference between the two now appears to be that, while the novels proclaimed the ascendancy of the companionate marriage (subject to borrowings from time-honoured traditions of marital duty), the judges of the Supreme Court denied it, except where acknowledgment of it could be used to serve their normative ends. Judicial power was unified in a shared set of beliefs about marriage, but the beliefs themselves were divided between adherence to principles of marital duty, and acceptance of the view that marriage should consist of more than duty. The same flaws prevailed in the fictional literature. While the emphasis there on marital love was far greater than that found in the judicial marital values, a similar ambivalence can be found. Marital duty and marital happiness were represented as the essential combination for the ideal marital relationship, but many of the novels' protagonists chose marriages without one or other of these ingredients. The authors of the novels failed to resolve the question of whether marital duty or marital happiness was the more important, leaving a gap easily filled by members of a divorcing society. And although happiness could not survive where duty was abandoned, true love, upon which marital happiness depended, could not die, even where it was not sanctified by the marriage bond.

The two sets of 'anti-divorce' values, then, were not only fraught with contradictions and divisions, they were, ultimately, half-hearted. Their respective positions on marriage between 1859 and 1918 can be visualized in the shape of a diamond. They began at a common point: opposition to the combined effect of the rise of the companionate marriage and the passage of the Matrimonial Causes Act as fostering the spread of the belief that marriage should be dissolvable. From this point they diverged, although they retained some common principles. Following one direction, the Supreme Court judiciary attempted to ignore the companionate marriage, insisting upon a petitioner's proof of marital fault, reinforced by evidence of his or her adherence to legally-defined principles of marital duty. The authors of the fictional literature, however, emphasized the benefits of the companionate marriage through the use of similar concepts of marital duty to those held by the

judiciary, in order to argue that these benefits gave marriage an enduring quality. The advocacy of marital duty by the judiciary and of the companionate marriage in the fictional literature represent the two positions at their furthest point from each other, the blunt corners of the diamond. Although diametrically opposed in some ways, these two sets of values shared a belief, not only in marital duty, but in the bond of affection between husband and wife as a desirable form for marriage to take. The persistence of divorce caused the two positions to converge in defeat, completing the diamond shape. The judiciary's movement away from attempts to set moral examples in marriage was matched by the authors' flagging energy for repeatedly forcing the square peg of marital duty into the round hole of marital happiness. Some diamonds are not forever: the point at which the two sets of beliefs met was their mutual capitulation to the ascendancy of the companionate marriage and the demand for divorce.

One aspect of the claim that judicial opposition to divorce failed remains undefended. For all its flaws, this opposition may nevertheless have managed to forestall divorce, even if it was not successful in eliminating it. We cannot tell what might have been had the judiciary not taken the stand it did. Under a more liberal judicial régime, the divorce court may have been inundated with many times the number of petitions filed in South Australia between 1859 and 1918. Looking at Roderick Phillips's study of divorce in Revolutionary France, where a liberal law was implemented upon principles which facilitated much greater access to divorce than that offered by the English judicial system, this possibility seems very likely. Table 4 on page 280, which compares the crude divorce rate for the last ten years of the period under study with the most recent ten years of no-fault legislation, also suggests as much. In arguing against the view that the law is a monolithic power capable of silencing all dissenting voices, however, the intention has not been to deny distinctions between legal systems. There are harsh laws and liberal ones, systems which severely restrict access to law, and those which facilitate it. In analysing a society with divorce law which was restrictive in both letter and spirit,

Table 4
CRUDE DIVORCE RATES, SOUTH AUSTRALIA

DIVORCES PER 10,000 POPULATION	
Matrimonial Causes Act 1858	Family Law Act 1975
1909: .30	1977: 34.3
1910: .07	1978: 29.3
1911: .48	1979: 29.1
1912: .25	1980: 32.1
1913: .20	1981: 31.3
1914: .45	1982: 34.0
1915: .27	1983: 32.9
1916: .35	1984: 30.2
1917: .46	1985: 30.7
1918: .38	1986: 27.3

Note: Judicial separations awarded in the decade 1909-1918 have not been included as these decrees are not represented in the Family Law Act.

Sources: *Official year book of the Commonwealth of Australia* No.8, p.85; No.9, p.91; No.13, p.81 (Melbourne, 1915, 1916 and 1920); *Year book Australia*, No.63: 1979, p.80 (Canberra, 1979); *South Australian year book*, No.21: 1986, p.193 (Adelaide, 1986); Ms Louise Wilton and Mr John Gale of the Australian Bureau of Statistics, South Australian Office; P.R.O.S.A. G.R.G. Series 36, 54.

the attempt has been to measure the effectiveness of that law relative to its own aims as revealed in the historical records. If the South Australian judiciary did stem the tide of divorce in some small way, it was nevertheless powerless to create effective obstacles to the idea of the dissolvability of the marital bond which was fostered by the passage of the Matrimonial Causes Act.

Consideration of the limitations of the law returns us to Phillips's objection, raised in Chapter One of this study, that divorce law with narrowly-defined grounds leads the social historian up too many blind alleys in attempting to determine people's true expectations of, and grievances about, their marriages. Regardless of whether a law is strict or lax, the blind alleys are always there, but the social historian with a foot in the legal historians' camp has means by which to turn some of them into avenues. The history of the practice of a law is the study of the ways in which people represent their interests in the legal system. One assumes that laws, whether they constitute a departure from or a consolidation of the dominant values of a society, are framed for use. As we have seen in this study, successful resort to the law is not confined to those whose values coincide with the values represented by a law, or of the officials empowered to enforce it.

The historian hears the voices of men and women who were denied access to the customary means of political expression in a number of ways. Historical evidence of informal marital arrangements or 'self-divorce' presents one instance of the dominance of custom over statutory law. Without accessible divorce, however, power to change the *status quo* of formal marital values was severely limited. The Matrimonial Causes Act, by reducing considerably the need for informal marital arrangements, brought into the public arena the marital values of people who were usually voiceless. If formal divorce had its limitations, new liberties attended it, such as the granting of the status of *femme sole* to judicially separated and deserted wives. The other side of the coin of "rules which may sometimes seem to trammel

and limit us" is their function to "limit the powers of those who would rule us and push us about".²⁴

The reader will remember the assertion in O'Neill's 'safety valve' thesis that divorce was built into the companionate marriage in order to safeguard it against failures caused by the breakdown of affective bonds. This causal sequence assumes that divorce law merely reflected changes which were taking place in marriage at the time. South Australian divorce law suggests a different causal sequence. Its reiteration of marital values connected with the idea of marriage as essentially a property arrangement contradicts the interdependent quality which the safety valve thesis lends to marriage and divorce. Chapter One looked at the antecedents to modern divorce, showing that it persisted, albeit sporadically, despite legislation which prohibited it. South Australian divorce law, and its English parent, represent a continuation of this divergence between statute law and its subjects, rather than a complementarity of marriage and divorce law akin to the "horse and carriage" of the popular song. The image of the safety valve working away at relieving the pressure of the companionate marriage gives way to that of the valveless 'pressure-chamber' of a retrogressive Act implemented by an equally retrogressive judiciary. The resultant 'explosion' of divorce is attributable to this intensification of pressure because it was not divorce, but widespread legal access to it, which occasioned the historical upheaval.

Even if we ignore for the present the many knots into which judges tied themselves in the hearings discussed, the fundamental paradox of judicial emphasis on marital duty remains: the most dutiful husbands and wives were rewarded with the dissolution of their marriages. The underlying premiss is that the good and virtuous *deserved better* than to be tied to the bad and vicious. Divorce, then was a just reward for these good spouses. Even without the other factors which rendered judicial opposition to divorce ineffective, it would have been impossible for the

²⁴ E. P. Thompson, "The State of the Nation", in E. P. Thompson, *Writing by candlelight* (London, 1980), p.230.

judiciary to argue convincingly for long that divorce was a bad thing. The authors of the fictional literature were similarly bound to a conclusion favouring divorce. Despite the 'punishment' of protagonists who did not adhere to the principal duty to remain married, the persistent argument that the absence of love constituted the greatest insult that could be made to the institution of marriage fostered the conclusion that nothing, not even divorce, could be as wrong.

This view may seem to suggest that the advent of accessible divorce caused a massive shift in the thinking of people who would not otherwise have entertained the idea of dissolvable marriage. It was mentioned in Chapter One that the pressure to make divorce more accessible came from the ascendant middle class in England. The inversion of O'Neill's causal sequence does not extend to denying the historical circumstances which brought divorce to the fore of political debate in the nineteenth century. It must be borne in mind, however, that in South Australia, it was not the professionals and wealthy landowners who flocked to the divorce court.²⁵ The social profile of divorce in South Australia thus offers strong grounds for modifying the safety valve thesis. South Australian divorce law was largely used by those who would have been most likely to resort to informal means if formal ones had remained unavailable, suggesting that the pressure of the demand for formal divorce did not achieve full force, in South Australia at least, *until* divorce was on the statute books. O'Neill's point that matrimonial legislation represented concession to the demand for divorce is also debatable when placed in the South Australian context. Concession was not given without a struggle, first with a backward-looking Act, and then by a backward-looking judiciary. No amount of looking backward, however, could alter the consequences of the use of the Matrimonial Causes Act by people whose marital values were least represented by it.

²⁵ Gail Savage, by contrast, finds a considerable proportion of members of the upper middle class in her research into the English Act. G. L. Savage, "The Operation of the 1857 Divorce Act, 1860-1910: A Research Note", *Journal of social history*, (Summer, 1983), p.104.

The power to use the law to personal advantage which was accorded matrimonial litigants was not confined to their appearance in Court with evidence of marital fault. If the Act placed constraints upon this new-found freedom, these constraints were frequently tampered with. Litigants assumed the roles of wronged innocence expected of them or, alternatively, presented their evidence while admitting their own guilt, and were frequently successful when they did so. They plotted to fabricate evidence and paraded acquiescent witnesses. Several who were unsuccessful in their first petitions persevered and gained decrees in their second. It is in this sense that it can be argued that ordinary people achieved a limited mastery over the institution of the law.

Because marriage as a relationship has characteristics which set it apart from other relationships, fault-based divorce law fits somewhat uneasily into the legal system. The observations which have been made in this study regarding the relation of the Matrimonial Causes Act to its users can nevertheless be extended beyond divorce law. The historical circumstances which result in the passage of a piece of legislation may change considerably once that legislation comes into effect. Controls which apply in the framing of it, particularly controls imposed by the fact that only some members of a society will have direct influence over lawmakers, do not apply once a Bill is passed. For all the unequal division of power in a society, laws are available for use by all of its members. The consequence is that a law can be used contrary to the intentions or interests of those who made it. And, as the constraints placed upon South Australia's social *élite* by the judiciary's belief in *noblesse oblige* demonstrate, division of interests can occur within social groupings. The use of *noblesse oblige* against members of the uppermost social group reveal some mistaken assumptions made by the judiciary regarding their social peers on the other side of the Bench. The principal error was in assuming that there existed among this group a commitment to ideals which conflicted with their own immediate interests. Although its members stayed away from the divorce court when they could, they did not do so because they were opposed to divorce in

principle. Rather, they appear to have resolved the breakdown of their marriages in much the same way as they had done before the passage of the Matrimonial Causes Act. Their rare appearances in Court were marked by the use of their influence, not to set moral examples, but to manipulate the law to serve their own ends. The Act thus channelled the interests of both the uppermost and the lowermost into the public domain, ensuring that the best-laid plans of South Australian judges would go awry.

Epilogue to Part III

Although Australia now has a 'no-fault' divorce law which asserts the legal equality of husband and wife, some writers have argued that judicial habits die hard. Anne Riches cites several cases where the grounds for finding fault have merely shifted to other areas of legal dispute, notably those of custody and property.¹ Scutt and Graham cite several more to show how the principle of equality in the division of matrimonial property is often ignored by judges who overlook the wife's contribution to the marital assets.² The cases have a familiar ring to the historian of nineteenth century divorce. Another case which has a familiar ring is one for assault and buggery laid by a member of New South Wales's social *élite* against her former husband, heard in 1985. But while it is comparable in many ways to some examined in this study, it also suggests that marital fault served an extra-legal purpose for litigants as well as judges, and that its absence in current legislation has left a gap which has to be filled in other ways.

Although Katherine Wentworth's divorce appears not to have raised any eyebrows, her subsequent charge arising out of incidents in her marriage deepened pre-existing rifts in the family, with the result that it "suffered horribly. The Establishment was mortified."³ The problem of privacy in divorce remains the same as it was when Florence Sweetapple lost her case. If the marriage had not been a "public" one, the public would not have been interested in the details of its breakdown. Wentworth's courtroom manner in no way recalls the upright Florence Sweetapple, but the two women share their responsibility for dragging a respected name through the mire. Announcing an adjournment, Judge Ward told the jury that summing up would not be necessary "if they came to a view that conviction could

¹ A. Riches, "The Family Law Act: Principle and Practice", in Mackinolty and Radi, *In pursuit of justice*, pp.212-223.

² J. A. Scutt and D. Graham, *For richer, for poorer: money, marriage and property rights* (Ringwood, Vic., 1984), *passim*.

³ L. Crisp, "Ms Kate Wentworth Regrets...(Not Much)", *The national times*, 2-8 August, 1985, p.3.

be unsafe and would unanimously find the accused not guilty."⁴ Not surprisingly, the jury returned its verdict of not guilty directly after the adjournment.

The initial charge appears to have been lost in a fog of embarrassment and outrage. *Plus ça change plus c'est la même chose?* Perhaps, but if the attitudes of judges, lawyers and *élite* families remain the same, so do the divisions of power which made it possible for Wentworth to have her case heard at all, even though she encountered substantial legal opposition in her attempts.⁵ Her eventual defeat raises the same combination of issues that were raised in *Sweetapple*: her high social status was a greater obstacle to success than her sex. The difference is that under the present law, Wentworth was unable to make her charges in a petition for divorce, and had to find some other way to make her grievances known publicly.

I am reminded of the spate of violence against New South Wales Family Court judges and their families between 1980 and 1984.⁶ It indeed appears that Anne Riches is right that some of the changes brought about by Family Law legislation "have been made too quickly for large sectors of the community",⁷ but not in the sense that I take her to mean. It could be that the opportunity that marital fault gave a "wronged" spouse to have partner condemned publicly by a judge gave an outlet for vengeance which is no longer catered for.

To explain this contention, I return to the romanticism of the fictional literature, the logical conclusion of which may extend beyond Frances Hockey's escape to Melbourne with her cab-driving hero. Because romance in the novels examined in this study was posited as life-long, speculation as to how it would end was necessarily absent. In our much-divorcing society there is no need to speculate, and the popular culture of today describes the loss of love as often as the

⁴ *The Sydney morning herald*, 27 July, 1985, p.3.

⁵ Crisp, "Ms Kate Wentworth Regrets", pp.5-6.

⁶ The violence includes the fatal shooting of Justice David Opas outside his home on 23 June, 1980, a bomb attack on the home of Justice Richard Gee on 6 March, 1984, a bomb attack on the Parramatta Family Court Registry in April, 1984 and the murder by explosion of the wife of Justice Ray Watson outside their home on 4 July, 1984. *Sydney morning herald*, 24 July, 1985, p.2.

⁷ Riches, "The Family Law Act", p.223.

finding of it. But because popular romanticism retains its parent/child structure, loss is accordingly depicted as a return to childlike impotence. Idealized joy seems to imply a comparably larger-than-life rage when essentially immature desires and aims are frustrated. The passions which are so often ignited by the *breakdown* of marriage indeed appear too large to accommodate themselves to the modern legal concept of divorce which does not purport to dignify these passions with judicial censure. A strange state of affairs, when the machinery of justice can be seen as too far in advance of litigants to function smoothly - but the relationship of the law to people's lives has always been a strange state of affairs.

Conclusion

While the consequences of the legal acknowledgment of the dissolubility of marriage were far-reaching, divorce law in South Australia underwent more changes than it effected. The reason why this happened lies in the contradictory nature of the Matrimonial Causes Act, which affirmed the *status quo* of divorce law while constituting a radical departure from it: what amounted to procedural change brought divorce within the reach of so many that a difference of degree in access amounted to a difference in kind. Previous divorce legislation had operated on the principle that matrimonial bonds were indissoluble except under circumstances which were almost entirely dictated by the wealth, gender and furious tenacity of the person seeking dissolution of them. The Matrimonial Causes Act announced a new principle of dissolubility simply by virtue of increased access to divorce. "Modern" divorce appeared on the scene like one of the century's many inventions.

It is when we shift our attention from the legal to the social antecedents of divorce legislation that there seems less cause for the throwing of streamers and the waving of flags. In the absence of viable means formally to dissolve matrimonial bonds, private and informal dissolutions were centuries old, if sporadic. From the historical perspective of the preceding few centuries, in fact, widespread divorce was no more of a novelty than widespread marriage. The "newest" thing that nineteenth century divorce law had to say was, ironically, what it left unsaid. The failure of the Matrimonial Causes Act to acknowledge the companionate marriage, which at the time of its passage had all but replaced property-based arrangements, made it so out of step with the "new" age of divorce that it was used to accommodate the marital values it ignored. Such head-in-the-sand legislation failed to effect a step backward in time and instead marked the first significant steps toward "no fault" divorce and divorce by mutual agreement.

The view of conservative jurists is typically that the cart of the law should not go before the horse of popular opinion. The reiteration of existing principles of

divorce in the Matrimonial Causes Act erred on the safe side to such an extent that the horse galloped away, dragging the cart - its battered old frame sporting the odd shiny bit of new chrome - behind. The attempt to refurbish the old with the new was not, in this instance, testament to the law's flexibility but to its clumsiness. In the implementation of the Matrimonial Causes Act, statute law and common law were often at odds, making the Act readily adaptable to the ends of litigants. While the old cart rattled on in the new Act, the equally old notions of the respective duties of husband and wife kept their place in the common law. Judges had to exert considerable effort in attempting to juggle statutory fault with common law duty and judicial discretion with the need to maintain consistency. What emerged from this exercise was the paradox of marital fault which entailed that the most dutiful spouses were rewarded with decrees of divorce.

The futility of judicial juggling is particularly apparent in their handling of the petitions of the 'moral exemplars'. Judges and *élite* litigants alike had a distaste for the public exposure of marital wrongs committed in polite society, but judicial attempts to elevate this embarrassment to a moral plane only heightened the division between public appearances and private behaviour. The exposure of South Australia's social leaders as exemplars of little other than immorality and the performance of legal hat tricks provide a sharp reminder that there had been good reasons behind the tradition of concealment which had prevailed before the passage of the Act. These reasons could no longer hold, however, under a divorce law which brought private arrangements into the public sphere.

The formalization of divorce meant that judges were caught in a limbo between public and private which even the novels, for all their other contradictions, were not subject to. While the literary works which span the period under study reveal a longing, comparable to the conservatism of judges, for the days before accessible divorce, their themes reflect a greater adaptability to the ascendant form of marriage, to the extent that companionate unions are openly extolled. The values presented in the novels were not hampered by the dichotomy between public

divorce and private morals, even though the novelists maintained a tenacious foothold on their 'anti-divorce' platform. By the early twentieth century the novels, without exception, had shaped their marital values into a view of marriage as an undeniably private affair. This flexibility, too, had a price, which was the fostering of the conclusion that divorce was an acceptable alternative to a marriage that had become a private hell. The hero survived but the concept of a lifelong bond did not.

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The conclusions which this thesis has drawn from the history of divorce law question the truth of some of the characteristics frequently ascribed to the law as a social institution. The history of South Australian divorce law suggests that if the law tends to serve certain ends, it does not necessarily do so. One can accept a view of the law as reinforcing a certain ideology or set of beliefs without rejecting instances to the contrary. Indeed, the flexible and often contradictory aspects of an institution as vast and disparate as the law require theoretical evaluation which is equally flexible.

This flexibility is a far cry from the naïve apologetics with which it can be confused. The charge of naïveté and over-simplification can, however, justifiably be turned against critics whose view of the law is often couched in terms no more complex than those of "'the fuzz' setting about inoffensive demonstrators or cannabis-smokers".¹ Women's legal history in its more ambivalent form is, as I argued in Chapter Seven, a case in point. This ambivalence is expressed both in anger at nineteenth century laws which discriminated against women and in an unwillingness - less frequent nowadays - to concede that some women in the past could direct their own anger against the law. Such women won the occasional battle, if not the entire war. The ambivalent approach is sometimes also marked by

¹ Thompson, *Whigs and hunters*, p.260.

surprise that nineteenth century divorce legislation was actually discriminatory. This surprise is reminiscent of that shown in the South Australian histories discussed in the Introduction. The continual expectation of difference gives rise, paradoxically, to a sameness among historical works. They have not erred in taking certain things for granted, but in taking the wrong things for granted.

The study of the particular law of divorce suggests that terms such as "ideology" and "hegemony" should be used advisedly when dealing with the law in general. The powers of our independent judiciary are inordinate but not infinite. If their independence is sometimes thrown into doubt by the interests they serve, this observation only reiterates what we have known all along about the concentration of power in our society. This thesis has accepted the existence of that concentration and tried to find other forms of power which exist despite it. It has found answers which may yield surprises - for those looking for surprises in South Australian history - as well as different forms of some universal historical problems. The range of interests which find expression in the law, like the range of conflicts in societies in general, resist interpretation with reference to a single ideology or purpose.

Appendix 1

DESCRIPTION OF SOURCES OF MATRIMONIAL PETITIONS AND HEARINGS

The Supreme Court material comprises all petitions filed under the Matrimonial Causes Act between 1859 and 1918 held in the Public Record Office of South Australia in Government Record Group 36, Series 23 and 54. Additional material concerning these petitions was gathered from court reports of their hearings published in *The South Australian Register*, which appears to have been driven by a crusading zeal to let no divorce hearing go unreported. The records held in the two Series mentioned above are incomplete, particularly those of petitions filed between 1859 and 1893, which are held in Series 23 (I was able to ascertain that many petitions were missing because during these years the records of matrimonial writs were separated from those of other Supreme Court civil jurisdictions and numbered consecutively). From 1894 onwards, matrimonial petitions were classified among all other Supreme Court writs, of which they constituted only a small proportion. These were found through a search of the Index held in the Supreme Court Registry, which gives the names of all writs filed, the letter M or the abbreviation "Mat" denoting those which came under Matrimonial jurisdiction.

The gaps left in the 1859-1893 run of the archival material (Series 23) were filled to some extent by the *Register*, a source so rich that I was unable to use all of it. Thus, in addition to the Supreme Court material, the thesis makes limited use (for reasons given in the following paragraph) of a one-in-five-year sample, beginning with the year 1859, of court reports of hearings for which no archival material was extant in Series 23. This *Register* material includes all cases which were heard in the sample year. Cases which were merely set down for hearing in the sample year were not included, but those which were heard as far as the petition for alimony pending litigation, which preceded the hearing of the charges, were.

Cases used in the text were drawn from both the Supreme Court group and the *Register* sample, but I made no attempt there to distinguish the *Register* from the Supreme Court material. To do so would have entailed a cumbersome system of referencing in either the footnotes or the text, without offering any advantages in the discussion of the qualitative material. As the source of each individual reference is cited, there was no need to state whether a particular court report used was an adjunct to a Supreme Court record or part of the *Register* sample.

The two groups combined yielded a total of six hundred and forty-six (646) cases, of which five hundred and ninety-three (593) came from the Supreme Court group and fifty-three (53) from the *Register* sample. There were, however, only six hundred and eighteen (618) marriages in all; twenty-eight (28) of the total number of petitions emanated from marriages which had already been involved in matrimonial proceedings. Twenty-five of these were refilings of petitions by the same spouse; one was filed by the spouse of a previously unsuccessful petitioner and one was an action for damages filed by a successful petitioner against the correspondent in the suit. Material from the *Register* sample was not used to compile Tables 1 to 3, as vast discrepancies between the two groups of cases meant that I could not use quantitative information gained from the *Register* sample without causing misleading distortion. Because the *Register* sample was based on hearings alone, information usually included in Supreme Court petitions was often not mentioned in the *Register*, for example, the grounds upon which and the spouse by whom the petition was filed. In addition, many hearings were held over until after the sample year while some which appeared in the sample year were the result of petitions which had been filed years earlier. It was not possible in many cases to guess, let alone ascertain, the year in which the petition was filed and therefore equally impossible to determine in which of the five-year groups used in the tables to place them.

The Public Record Office also holds another Series in G.R.G. 36, numbered 51, which consists of petitions only (i.e. with no accompanying

information, such as the respondent's answer, transcripts of hearings and so on) filed between 1859 and 1893. The petitions absent from Series 23 are there, but because there is no material other than the petition filed in each case, this material was only used to a limited extent. It nevertheless provides information about cases used in the *Register* sample, in particular that regarding the occupation of the husband in the suit, which was frequently not reported in the *Register*. Information of this kind was added to that in the *Register* sample and used in calculating the social distribution of divorcing couples described in Appendix 2. Further information about occupations was gathered from the Adelaide postal directories. In the matter of the social distribution of divorcing couples, both the Supreme Court material and the *Register* sample were used, but listed separately, in Appendix 2.

The reason for the apparent inconsistency in the use of the various sources is that I wanted to obtain as representative a picture of divorce in South Australia as time and resources allowed, but without sacrificing accuracy where accuracy was needed. The recording of incomplete quantitative information would have resulted in actual inconsistencies in the form of disproportionately large gaps in statistics compiled from a very small data base. Further explanation of the peculiarities of the quantitative material is included in the "Note on Tables 2 and 3" and the "Note on Figures" below.

Note on Tables 2 and 3

Table 2 includes all cases which were or could have been subject to judicial influence. The "Settled by Court" category refers to cases where the petitioner was not awarded the decree sought but obtained lesser relief from the Court. This category does not include instances where a decree of dissolution *or* judicial separation was applied for, because the outcome was one of those for which the petitioner had filed. The categories which refer to cases where the parties reached a settlement out of court or were reconciled during the hearing are used to distinguish

outcomes which could have resulted from judicial direction, but where evidence of this outcome is either not available or in doubt. The cases included in the "No decree after hearing" category are those for which there is no recorded decision. These would have been either dismissed or abandoned, but because they tended to be those adjourned for further evidence or submitted for retrial, I am inclined to suspect abandonment rather than dismissal.

In the distribution of unsuccessful petitions recorded in Table 3, I have not given a breakdown according to the sex of the petitioner because of the small number of cases involved. Cases listed in the "Abandoned before hearing" category are those which announced either the petitioner's intention to withdraw proceedings, or the dismissal of the hearing upon application of the respondent and/or co-respondent. I have also included in this category one case which was struck out because the petitioner failed to appear at the hearing. Although the "Abandoned before hearing" category is considerably smaller than the "No evidence of having reached hearing" one, there are several reasons to believe that many in the second category are also cases which were abandoned before they obtained a hearing. In the material from G.R.G. 36, Series 23 (viz, that covering the years 1859 to 1893), there was no reliable way of finding evidence of a court hearing, as anticipated dates of hearing were not recorded. Although this information was generally included in the archival material for the later years of the period under study, the somewhat haphazard nature of the sources as a whole made me unwilling to assume that, even when hearing dates were set down in the records, the absence of a corresponding report in the *Register* meant that the petition had been abandoned.

Note on Figures

The figures are based on G.R.G. 36, Series 51, which comprises petitions only filed in the Supreme Court Matrimonial Jurisdiction between 1859 and 1893. There is, however, only one petition extant for the year 1893. To counteract an

unrepresentative drop in the figures the calculation of the mean number of petitions filed in the five-year period 1889-1893 used in plotting Figure 1 was achieved by dividing the total for the period by four instead of five. The same technique was applied in determining the percentages calculated in the plotting of Figure 2.

Appendix 2

SOCIAL DISTRIBUTION OF DIVORCING COUPLES

Note on criteria used

In the status distribution, the husband's occupation or social position was taken as the determinant of the couple's social status, both because it is important to adopt the criteria used at the time, and because so little information was given about wives' occupations. This is not to say that I ignored wives completely. I took facts about them into consideration, especially in the more ambiguous cases. They were also given particular attention when determining which couples to place in Group 1, where there was often more emphasis on the social origins of both parties than on the present occupation of the husband. In addition, there were a few instances where the wife was stated to be the breadwinner. These were treated as exceptions whose peculiarities warranted changing the determinant of social status from husband to wife.

The breakdown of the cases is based on the number of marriages which appear in the material, not on the number of petitions filed, so that where the same husband and wife appeared *together* in more than one petition, they were only counted once. However, where a person appeared in more than one petition but with a different spouse, the petitions subsequent to the first were also counted, even though this meant counting an occupation twice if the repeated spouse was a husband. Although this method clearly has some disadvantages, it cannot be avoided without discarding the criterion of seeing every marriage as a distinct social entity, which I held to be an important one. It appeared to be the least problematic alternative, and takes into consideration the possibility of a husband's change of wife influencing his social status. The only petition in which one spouse appeared in the records a second time without the other and was *not* counted is an action for

damages filed by a petitioner against a co-respondent in an earlier petition for divorce.

The marriages in which it is possible to determine the husband's social status are divided into three general categories, consisting of an upper, a "middling" and a lower group. A fourth group of marriages where social status could not be ascertained is also included; some gaps were filled by checking the names in the South Australian postal directories. My guidelines in making the distinctions came from general reading and discussions about Australian status hierarchies. More specifically, I was aided by works by Dirk Van Dissel and W. A. Armstrong.¹ Neither was relied upon very heavily because of their limitations in application to the divorce material and I often followed my own judgment based on my general reading in Australian history. The three-tier arrangement, with an additional group comprising cases with insufficient information included in them to classify them, was chosen as appropriate for a study which does not aim to draw fine distinctions.² Listed below are brief descriptions of the four groups and the criteria used in determining them.

Group 1

Occupations: professionals, large capitalists and pastoralists.

Described by Van Dissel as gentry or prominent non-gentry.

Suggestion of social prestige in case material.

Evidence of property settled on wife.

Information about education, particularly of sons and daughters.

Most of the marriages in Group 1 were considered on the basis of a combination of the above criteria, as there appear to be no absolute standards of

¹ D. Van Dissel, "The Adelaide Gentry 1880-1915". M.A. Thesis (University of Melbourne, 1973) *passim*; W. A. Armstrong, "The Use of Information about Occupation", in E. A. Wrigley (ed.), *Nineteenth century society: essays in the use of quantitative methods for the study of social data* (Cambridge, 1972), pp. 191-310, esp. Part 1, pp.198-225.

² Suggested by Dr I. Davey, Department of Education, University of Adelaide.

social prestige in nineteenth century Australia. This is particularly so with regard to trade; the line between the distaste for "new money" and the acknowledgment of ascendant capitalist power is a thin one. Thus merchants were not automatically excluded from this group, but to be included they had to exhibit at least one other of the characteristics of social prestige.

Group 2

Occupations: manufacturers and large capitalists who filled none of the other Group 1 criteria; clerical, accounting and low-ranking professional workers; small business owners and those engaged in service occupations; artisans, tradesmen and skilled labourers; small farmers.

Ownership of property.

Deed of separation executed before matrimonial proceedings undertaken.

Information about level of education.

The spectrum encompassed by this status group is broad, ranging from wealthy capitalists to skilled labourers. Civil servants and large capitalists presented the greatest problems in distinguishing Group 1 from Group 2 marriages, and to be absolutely certain, such husbands could have been put in Group 4 on the ground of insufficient information. To have done so, however, would have gone against the aim of keeping the categories broad and simple in accordance with the nature of the discussion in the thesis.

Group 3

Occupations: unskilled labourers, itinerant workers, drivers, stockmen, hawkers, etc.; farmers who appear not to have owned property and who were habitually engaged in unskilled labour.

The main problem with this group is that most cases had to be decided on the basis of occupation alone. Because of the blurred social distinction between skilled and unskilled labour, a husband could hold a variety of occupations which included skilled labour, unskilled labour and farming. In these cases, where possible, I took into account such factors as whether the couple had a settled or itinerant lifestyle, or I chose as the basis of distinction between Groups 2 and 3 the occupation which the husband seemed to do most. Even where such clues were not available, the fact that the husband had a variety of occupations pointed more to an itinerant lifestyle than a settled one, suggesting that Group 3 was the most appropriate category.

Group 4

Occupation not stated: including husbands described as "returned soldier" or "out of business", with no information given regarding usual occupation.

Occupation stated in vague terms: for example, "railway employee".

Farmers, graziers with no indication of husband's assets or property.

"Gentlemen": evidence indicates that these were often self-styled, so that only cases where the title was clearly warranted were included in Group 1. Cases in which entitlement could not be ascertained were assigned to Group 4.

As regards farmers and graziers whose income and assets were not stated, several were put into this group even though I had strong suspicions that they belonged in Group 2. Where there was little in the way of "hard" evidence to support these suspicions, they remained in Group 4. Another type of suit which increased the size of Group 4 was the application for protection of property on the ground of the husband's desertion. In these cases, the husband's occupation was almost never given. A further difficulty with them is that some were included among Supreme Court material and some were not. Almost all of the protection orders in the *Register* sample failed to appear in any of the Supreme Court record

groups which, when accumulated, are fairly complete. This is probably because, although protection orders were under Supreme Court jurisdiction until 1896, when the Married Women's Protection Act was passed, many were heard in Local Courts. Thus, the *Register* sample has a proportionately higher quota of such cases: cases which the newspapers were interested in reporting but which probably never reached Supreme Court files.

Social distribution of divorcing couples

Group	Supreme Court cases	<i>Register</i> sample	Total	Percentage of total
1	20	1	21	3.4
2	369	30	399	64.6
3	146	9	155	25.1
4	33	10	43	6.9
Total	568	50	618	100.0

Appendix 3

DESCRIPTION OF LITERARY SOURCES

The thesis takes twenty novels published by South Australian women during the period 1859-1918. Not all of these women were born in South Australia or remained there during their literary careers. Thus, the description "South Australian" is a loose one applied to women who were either born in South Australia or made their homes there. The study of fictional literature arose from an interest in women's writing, but not in order to posit a feminine literary subculture in South Australia. While I do not deny that women's writing in general is different in many ways from that of men, the discussion of these differences would necessitate comparison with men's contribution to South Australian culture which is beyond the scope of this study. The choice of novels was made from Paul Depasquale's comprehensive bibliography of South Australian literature;³ the limit in the number of novels set at twenty because of the time and space available, so that some novels which would have been suitable were omitted. Novels deemed suitable were those in which the theme of love and marriage formed a focal point in (although not necessarily the major part of) the text. The novels of Maud Jeanne Franc, for example, which did discuss love and marriage, were nevertheless excluded because their primarily devotional character made them less suitable than others.

The selection was restricted to South Australian novels for reasons which were partly intellectual, partly pragmatic. The discovery of a wealth of novels produced by local women offered the opportunity to combine the interest in women's literary work with an examination of South Australian culture. The

³ P. Depasquale, *A critical history of South Australian literature 1836-1930, with subjectively annotated bibliographies* (Warradale, S. A., 1978), *passim*. N.B. Some of the editions used did not include a publication date. In these cases I used the publication dates provided by Depasquale, which appear in square brackets in the footnotes and bibliography.

restriction to South Australian novels also placed practical limitations on the range from which the selection of novels was to be made. Novels published by English women at the time may have been more widely read in South Australia than local works, but the use of literature in the thesis is as a source of ideas and not as a basis for discussing the impact of these ideas. Nor were the novels chosen on the ground of their literary merit; the survey spans a range of fiction, from popular novels to those of higher literary quality. Again, the themes and ideas presented in the works, not the manner in which they were presented, formed the basis of selection.

Having chosen a novel by one author, I also favoured further works by the same author, in order to give the selection some continuity. I also attempted to gather as representative as possible a sample from a historical period which fell mainly in the nineteenth century. Practical considerations, however, weighed against making a selection which "mirrored" the period under study. There were far more available novels on the themes of love and marriage published in the twentieth century than the nineteenth. To have retained a proportionate sample would have entailed reducing the total number of novels used, which seemed an unnecessary sacrifice, particularly as no attempt to correlate changes over time in the fictional literature with changes in divorce patterns was intended.

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