CONCLUSION

Positivism has had a sustained influence on Anglo-Australian jurisprudence. The common law has benefited from its influence to the extent that it prompted a more systematic ordering of the law than had previously existed. However, something was lost in the process, namely the law's capacity to develop in a way that provided it with a sufficiently developed moral dimension - this was particularly detrimental to indigenous people. The law offered little assistance, or aided the process, when injustices where served upon the indigenous people. The law developed a jurisprudence that failed to recognise them as a distinct people of equal standing to non-indigenous people. It also developed a concept of parliamentary sovereignty that paid no regard to the interests of indigenous people.

Natural law influences, which existed at the time of colonial acquisition, re-emerged in the High Court decision of *Mabo*. But the process of articulating and developing the law along natural law influenced lines with its regard to morality is far from complete. The positivist influence remains strong in the post *Mabo* cases of *Coe v Commonwealth (No 2)* and *Walker*. Hopefully, *Mabo* marks the beginning and not the end of a moral based jurisprudence for indigenous people.

*Henry Finlay**

HAPLESS CREATURES AND BEASTLY PROPENSITIES: THE INTRODUCTION OF DIVORCE INTO TASMANIA IN 1860

> For that matter, what is History about? The conclusion I reached was that the real, central theme of History is not what happened, but what people felt about it when it was happening.
>
> GM Young, *Portrait of an Age*

INTRODUCTION

ON 12 April 1858 the Secretary for the Colonies, Lord Stanley, issued a Despatch to the Governor of Tasmania, Sir Henry Fox Young, with a copy of the *Divorce and Matrimonial Causes Act* (UK)[1] which had been enacted in England the previous year. That Act, for the first time in history, made it possible for either party to a marriage to obtain a decree of divorce from the Courts of the Land, conferring upon either party the right to remarry.

The Despatch is a recommendation for the enactment of a similar law in Tasmania. In none of the Australasian Colonies was divorce obtainable at that time[2]. The Despatch said, in part:

> Her Majesty's Government regard this subject as within the general class of internal affairs which the duty and right of

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* B A (Lond), LL B (Tas), Ph D (Monash). This article was first published in (1995) 42 Tas Hist Research Assoc *Papers and Proceedings* 127.

1 Hereinafter, the "Divorce Act".

2 Divorce statutes on the English model were introduced in the Australasian colonies as follows: *Matrimonial Causes Act* (SA) 1858; *Divorce and Matrimonial Causes Act* (Tas) 1860, *Marriage and Matrimonial Causes Act* (Vic) 1861; *Divorce and Matrimonial Causes Act* (WA) 1863; *Matrimonial Causes Jurisdiction Act* (Qld) 1864; *Divorce and Matrimonial Causes Act* (NSW) 1873 and in New Zealand: *Divorce and Matrimonial Causes Act* (NZ) 1867.

> regulating belong to the Colonial Legislatures under Free Institutions.
>
> But they are at the same time fully sensible of the great importance of uniformity of legislation on this head, so far as it can be attained without injury to these principles of Colonial Government, and the danger, as well to public morality as to family interests, which might arise from the Law of the Colonies on the subject of Marriage and Divorce differing materially from that of the Mother Country and of each other.
>
> It is therefore the wish of Her Majesty's Government that you should consult your Council as to the expediency of at once introducing a measure which shall incorporate, as nearly as the circumstances of the Colony will admit, the provisions of the Act recently passed in England.
>
> Some of the minor provisions of the Act may, probably, prove incompatible with the requirement of the Colony, nor is it my wish to prescribe uniformity in such unessential particulars. But the serious questions which might arise from difference of legislation on that portion of the subject which relates to dissolution of Marriage, or Divorce *a vinculo*, - questions possibly affecting the validity of Marriages contracted in one part of the Empire after Divorce in another, and consequent legitimacy of offspring, - render it advisable that, if the Legislature should pass any Act varying to an important degree from the present Law of England in this particular, you should reserve it for the consideration of Her Majesty.
>
> The clause in most Governor's Instructions relating to Divorce Acts has been usually held to apply only to Special Bills for the Divorce of named persons, and you need not consider yourself in any way fettered by its provisions.[3]

Two principles were involved here. One was that matters of internal concern to each Colony were generally to be left to its own government and democratic institutions, to the extent compatible with the scope of self-government so far conferred on the colony.

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3 Tas, Parl, *Papers* LC (1858) Vol III, Paper 14, *Despatch: English Divorce Act.*

The other was the uniformity of laws and institutions within the Empire. This applied particularly to matters of personal status. It was always regarded as axiomatic that there should not be subjects who were regarded as married in one place and not in another within the Empire. The consequential status of children and their legitimacy was intimately linked to that axiom. When divorce eventually became available, the same principle of comity within the Empire was followed with respect to legitimacy as it was with respect to marriage.

The requirement that future enactments respecting these matters be referred to the Queen has often been pointed to as evidencing Victoria's straight-laced aversion to marital disruption - especially in the light of her perception of her own marriage as an ideal one. Be that as it may, it was clearly one of good government in its time, if 'limping marriages' were to be avoided as between one British possession and another.

The above quoted paragraph in the Governor's Instructions needs some further comment. The Instructions issued to the Governor of NSW, Sir William Denison in 1855 illustrate the point:

> *Sixth* - When any bill is presented to you for our assent, of either of the classes hereinafter specified, you shall (unless you shall think proper to withhold our assent from the same) reserve the same for the signification of our pleasure thereon; subject, nevertheless to your discretion, in case you should be of opinion that an urgent necessity exists, requiring that such bill be brought into immediate operation; in which case you are authorised to assent to such bill in our name, transmitting to us by the earliest opportunity the bill so assented to, together with your reasons for assenting thereto; that is to say:-
>
> 1. ...
>
> 2. Any bill for the divorce of persons joined together in holy matrimony.[4]

A discretion was thus vested in the Governor to bring a bill of divorce into immediate operation. The paragraph in the Despatch then provides a gloss upon the Governor's Instructions, limiting their apparent scope. In other

4 There follow another 10 paragraphs. See Clark, *Select Documents in Australian History, 1851-1900* (Angus & Robertson, Sydney 1955) pp362-365.

words, it was evidently intended that the Governor's discretion to authorise a divorce bill in cases of "urgent necessity" without referring it to the Queen applied to *individual* divorce Acts, rather than to any *general* law of divorce. When it is kept in mind that at the time of formulation there was no general law of divorce in England or in the Colonies, but that in England individual divorces by Act of Parliament were possible, the above limitation must follow almost by necessary implication.

DIVORCE IN ENGLAND BEFORE 1857

Thus before 1857, marriage was indissoluble and could not be set aside for any reason whatever. The rigour of that absolute statement was, however, mitigated in two ways in law, and two in practice.

Nullity of Marriage

The first was the doctrine of nullity, under which a marriage was void and could be set aside by the Court if it came within certain defined situations. For example, since under the law of England a bigamous marriage was not recognised, a person who was already married could not validly enter into another marriage while that person's spouse was still alive. Similarly, a marriage to a near relative was a legal nullity. For this purpose, the concept of 'relative' included relationships of 'affinity' (by marriage), as well as of 'consanguinity' (by blood relationship). Before the Reformation, the ecclesiastical lawyers devised very elaborate rules about these prohibited relationships, described by Maitland, as a "calculus of kinship" and "a maze of flighty fancies and misapplied logic".[5] A more recent scholar characterised them as "a mixture of mathematics and mysticism".[6]

The rules of affinity and consanguinity had become a device for evading an irksome yoke. They were cast very wide and an ingenious or inventive lawyer could often find that such a relationship existed in his client's marriage, enabling him or her to cast off the shackles. Under these rules, people who were related by what we should regard as fairly distant relationships, were unable validly to marry. Even a sexual relationship with a near relative of the proposed spouse created a barrier to marriage between them. The ecclesiastical lawyers made the finding of distant

5 Pollock & Maitland, *History of English Law* Vol 2 (CUP, Cambridge, 2nd ed 1911) pp385-89.

6 Jackson, *The Formation and Annulment of Marriage* (Butterworths, London, 2nd ed 1969) p10.

relationships into a fine art, and, in a surprising number of cases, impediments to marriage were found to exist.

Since the preparation of nullity proceedings necessarily required the expenditure of considerable sums of money, it stands to reason that this remedy was, in effect, open only to the rich. King Henry VIII was a classic example of a wealthy married man who was able to find causes for nullity. Thus, he 'remembered' that, among other transgressions before his marriage to Anne Boleyn, he had slept with Anne's sister Mary. This constituted a close relationship between himself and Anne, rendering their marriage incestuous.

Parliamentary Divorce

While a void marriage was deemed never to have existed, a second remedy with respect to existing marriages established itself in the seventeenth century. This was divorce by Act of Parliament. A married person, whose spouse had committed adultery in circumstances within the practice of the House of Lords,[7] could petition the House of Lords for an Act of Parliament dissolving the marriage. The first recorded case was that of Lord Roos in 1669. Another early parliamentary divorce was the one granted to the Earl of Macclesfield in 1697 on the ground, as he put it:

> That it would be a most unreasonable hardship upon him, that the standing law which is designed to do every man right, should, by the rigour of the letter, be to him the cause of the greatest wrong: and that for his wife's fault he should be deprived of the common privilege of every freeman in the world, to have an heir of his own body to inherit what he possessed either of honour or of estate, or that his only brother should lose his claim to both, and have his birthright sacrificed to the Lady Macclesfield's irregular life.[8]

This was very male-centred reasoning. It shows, above all, the dynastic and property-oriented character of divorce. It is evident at once that, in its

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7 See Macqueen, *The Appellate Jurisdiction of the House of Lords and Privy Council, together with the Practice on Parliamentary Divorce* (Maxwell & Son, London 1842) pp465ff.

8 UK, Royal Commission on The Law of Divorce, *First Report* (1853) p9, fn3. For an account of this subject, see McGregor, *Divorce in England* (Heinemann, London 1957) ch1.

origins, divorce was a rich man's device for ensuring an untainted succession for his lineage and the passing of his property to his sons. Because of this, divorce was of considerably less significance to the 'common man'.

In a man's world it is not surprising that, during almost 200 years in which parliamentary divorce was available (1669 to 1857), of the 300 or so divorces involved, only four were granted to women. The sole ground on which such a parliamentary divorce could be granted was adultery. While a man had to prove only a single act of adultery on the part of his wife, a wife had to prove, in addition to her husband's adultery, aggravating circumstances such as bigamy or incest. When the Divorce Act of 1857 made divorce available through the courts of the land, the ground for divorce, as provided there, followed the same rules as those in the House of Lords.

This double standard was based on the possibility of an adulterous wife introducing "spurious offspring" into her husband's family. The legal literature of the nineteenth century abounds in examples that show this spectre of "spurious offspring" to have been a perfect obsession among the ruling or property owning classes. Beyond that, it underlines the property orientation of the law of England and the unequal status of men and women. Parliamentary divorce was based on a double standard, purporting to uphold marriage as an institutionalised means for the transmission of wealth, of which women were but the procreative instrument.

Contemporary opinion did not see this differential treatment of the two sexes as anything out of the ordinary, let alone objectionable. The Lord Chancellor, Lord Cranworth, when speaking in the House of Lords to the Divorce Bill in 1857, expressed the rationale in these terms:

> Without entering into any discussion of the question upon moral or religious grounds, every man must feel that the injury was not the same. A wife might, without any loss of caste, and possibly with reference to the interests of her children, or even of her husband, condone an act of adultery on the part of the husband; but a husband could not condone a similar act on the part of a wife. No one would venture to suggest that a husband could possibly do so, and for this, among other reasons: ... that the adultery of the wife might be the means of palming spurious offspring

> upon the husband, while the adultery of the husband could have no such effect with regard to the wife.[9]

In practice, parliamentary divorce was a man's remedy, and a propertied man's at that. Parliamentary divorce is an example of a legal institution establishing itself in response to a perceived need. It was a remedy that responded to contemporary social conditions in England, meeting the needs only of those who had power and wealth and who, collectively, made and administered the law. Moreover, it created a model for the future. When the remedy of legal divorce took shape in 1857, it was cast practically in the same mould as its parliamentary predecessor.

Wife-Selling

If the remedies of nullity or of parliamentary divorce were in practice not open to the 'common man', that artificial construct was not to be left out of contention but resorted to forms of self-help which satisfied the desire to conform to a pattern that was being practised by his betters. The first was the device of wife-selling.[10] Perhaps the best-known example occurs in Thomas Hardy's *The Mayor of Casterbridge.* The account may be fictitious, but Menefee has collected numerous examples, documenting the origins, where possible.[11] The actual agreements of sale varied considerably, some being drawn up in the form of a proper legal contract, others just by way of a short, informal memorandum and others still, no doubt, with nothing in writing. EP Thompson says that:

> The halter was central to the ritual. The wife was brought to market in a halter, usually around her neck, sometimes around her waist. It was usually of rope and was new (costing about 6d.), but there were silk halters, halters decorated with ribbons, straw plaiting and mere "penny slips".[12]

9 UK, Parl, *Debates* (1857) Vol 145, col 813.

10 Menefee is of the view that the 1857 Divorce Act may not have caused a falling-off of wife-selling: *Wives For Sale: An Ethnographic Study of British Popular Divorce* (Blackwell, Oxford 1981) p60.

11 As above.

12 Thompson, *Customs in Common* (Penguin Books, London 1991) p419.

It seems that the transfer of the rope symbolised the transfer of the wife.[13] After the sale, it was common to repair to a nearby pub where the principals and their friends would "wet the bargain".[14]

It has not been suggested that the transfer of a wife[15] in any effective way affected the legal status of the parties. Pinchbeck recounts a sale which was actually *induced* by the officers of a parish, where a wife and her child had recently become inmates of the workhouse. The governor of the workhouse, who was under a contractual duty to maintain the poor for a fixed sum which did not allow for the newcomers' maintenance, complained to the parish officers. They, in turn, prevailed upon the woman's husband to sell his wife. In order to induce him to do so, they even supplied the price to the purchaser. That transaction came unstuck when, some years later, the purchaser had second thoughts and deserted his wife, having discovered that his 'marriage' to her was illegal (because bigamous).[16] Some of the accounts collected by Menefee also end prematurely, when the constables arrive, or the principals are brought before the magistrates.

Nevertheless, the transaction of wife-selling was popularly believed to be legally valid by analogy with the law of the sale of goods and sale in market overt. Such a sale conferred a legal title without documents. The public notoriety of the transaction, no doubt, was deemed sufficient to bring it to the notice of the public, so that anyone who believed they had a better claim to the goods could come out and claim them openly. The fallacy in that analogy was that marriage was a matter of personal status, not of the sale of goods.

Certainly it was but popular belief that such a sale was a legal transaction. It was sometimes done orally, but sometimes 'contracts' were drawn up, witnessed and sealed. Thompson tells us that:

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13 Phillips points to the significance of the halter since "punishments for adultery in the 17th century included not only whipping and branding with the letters *A* or *AD* but also being forced to wear a halter or noose around the neck": *Putting Asunder: A History of Divorce in Western Society* (CUP, Cambridge 1988) p291. Phillips also points out, plausibly, that where the sale of an adulterous wife, by arrangement, was to her lover as sometimes happened, it could be seen as "the poor man's equivalent of damages for criminal conversation": p292.

14 Menefee, *Wives For Sale*, pp100-103.

15 Menefee also mentions cases of husband-selling but these, apparently, were very rare: *Wives For Sale* pp160-163.

16 Pinchbeck, *Women Workers and the Industrial Revolution, 1750-1850* (Cass, London 1969) p83.

> Such papers were safeguarded, like "marriage lines", as a proof of respectability. Thus a Mrs Dunn of Ripon was quoted in 1881 as saying: "Yes, I was married to another man, but he sold me to Dunn for 25 shillings, and I have it to show in black and white, with a receipt stamp on it, as I did not want people to say I was living in adultery".[17]

In spite of the seemingly strange notion of the *sale of a person*, it seems usually to have been an essentially *consensual* transaction, - a popular method, in the absence of legal divorce, of *renegotiating* a wife's marriage contract by transferring it from husband A to husband B. To give the last word on this subject to EP Thompson:

> It is now clear ... that we must remove the wife sale from the category of brutal chattel purchase and place it within that of divorce and re-marriage. This still may arouse inappropriate expectations, since what is involved is the exchange of a woman between two men in a ritual which humiliates the woman as a beast. Yet the symbolism cannot be read only in that way, for the importance of the publicity of the public market-place and of "delivery" in a halter lay also in the evidence thus provided that all three parties concurred in the exchange. The consent of the wife is a necessary condition for the sale.[18]

Self-Help

Lastly, if all else failed, there was always self-help, such as desertion and bigamy. According to Horstmann:

> Desertion occurred regularly. William Cobbett, farmer, journalist, politician, agitator and Tory Radical, advised this remedy to the cuckold. Divorce records in the late 1850s suggest that the huge emigrations to the United States and Australia in the late 1840s contained large numbers of fleeing husbands, as well as the occasional eloping wife. ... At the lower end of the economic ladder many drew up papers themselves, legally ineffective but

17 Thompson, *Customs in Common* p425, quoting *Notes and Queries,* 6th series, Vol 4 (1881) p133.

18 Thompson, *Customs in Common* pp427-428.

> often believed to be official divorces. Bigamy was not uncommon.[19]

Enough has been said to show that marriage breakdown was a Victorian phenomenon, and that, when legal remedies were unavailable, practices were resorted to that were either dubious, lending themselves to abuse, or elitist, open to only a small, but wealthy and influential section of the population. The time was ripe for a more generally available remedy in the form of the English *Divorce and Matrimonial Causes Act* of 1857.

DIVORCE COMES TO TASMANIA

Parliamentary Divorce

When the Australian Colonies were established, the settlers brought their own laws with them. As these did not include a law for the divorce of married persons, there was here, as in England, no law of divorce.

Neither did parliamentary divorce become an Australian institution, although the framework was presumably envisaged, hence the reference in Lord Stanley's Despatch to "Special Bills for the Divorce of named persons".[20] One attempt seems, however, to have been made in New South Wales in 1853. Broun gives an account of an attempt by WC Wentworth to move the Legislative Council of New South Wales to annul a marriage. The Bill was debated at length by the Council, but was never assented to.[21]

Wife-Selling

There is evidence that wife-selling occurred in Australia. Castles refers to an account in the *Hobart Town Gazette* of 1 March 1817 which says:

> A Hibernian whose finances were rather low, brought his wife to the hammer this morning and, although no way prepossessing in appearance, to the amazement of all present, she was sold and delivered to the settler for one gallon of rum and 20 ewes. From the variety of bidders,

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19 Horstman, *Victorian Divorce* (Croom Helm, London 1985) p41.

20 Tas, Parl, *Papers* LC (1858) Vol III, Paper 14, *Despatch: English Divorce Act.*

21 Broun, "Historical Introduction" in Toose, Watson & Benjafield (eds), *Australian Divorce Law and Practice* (Law Book Co, Sydney 1968) ppxcix-c.

> had there been any more in the market, the sale would have been very brisk.[22]

Other instances are mentioned by Castles and Harris as having occurred both in New South Wales and Van Diemen's Land before 1820.[23] Alford also refers to a mention of the practice: "One female colonist recalled the case of a husband selling his wife to an overseer for £5 and a pair of blankets".[24]

If wife-selling was used as a device for terminating a marriage in the absence of divorce, one would have expected the practice to decline once legal divorce became available, which is indeed what seems to have happened. According to both Menefee[25] and Stone,[26] wife-selling was on the decline from 1840 onwards, though Menefee does note a case occurring as recently as 1972.[27] Certainly, so far as the present account of the introduction of divorce into Tasmania is concerned, the practice appears to have been evidenced by isolated instances; it never assumed the proportions of a significant alternative to legal divorce. No mention of it occurs during the parliamentary debates in the Tasmanian Parliament.

Marriage Breakdown

Neither parliamentary divorce nor the practice of wife-selling as a folk custom ever became prevalent in the Australian Colonies, but that is not to say that marriages did not break down. Indeed, given the conditions of a frontier society, with a considerable surplus of males over females and many of the population under restraint as to their movements, it would have been surprising if marriages had been more stable, or even as stable, as was the case in the mother country. John West points to one of the problems, but this is only one particular instance:

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22 Castles, *An Australian Legal History* (Law Book Co, Sydney 1982) pp141-142.

23 Castles & Harris, *Lawmakers and Wayward Whigs: Government and Law in South Australia, 1836-1986* (Wakefield Press, Adelaide 1987) pp185-186.

24 Alford, *Production or Reproduction? An Economic History of Women in Australia, 1788-1850,* p70, fn48, quoting Dawbin, *Memories of the Past: By a Lady in Australia* (Williams, Melbourne 1873) p80. See also Kercher, *Debt, Seduction & Other Disasters: The Birth of Civil Law Conflict in New South Wales* (Federation Press, Sydney 1996) p66.

25 Menefee, *Wives For Sale.*

26 Stone, *The Family, Sex and Marriage in England, 1500-1800* (Weidenfeld & Nicolson, London 1977) p41. According to Stone, the practice "died away in the nineteenth [century], the last recorded case being in 1887": p41.

27 Menefee, *Wives For Sale* p47.

> many of these marriages were a disguise for licentiousness, and of a very temporary character. The freed man united to a convict woman could not be detained in the colony; indeed, he was often compelled to leave it, and his wife was not permitted to accompany him. From this cause alone, infinite vice and misery has arisen; and a total disregard of ties so modified by a police regulation; which, while encouraging women to marry, subjects them to lasting desertion.[28]

West also complains that many a marriage in the colonies ended in prostitution.[29] As for the stability of marriage, there were always numerous notices in the newspapers of the time, in which deserted husbands notified all and sundry that their wives had left them and that no credit should be extended to them. In many cases, the reference was to "a mutual separation", which seems to indicate a certain lack of animosity. For example:

> A mutual separation having taken place between me and my wife Mary Donn, all Persons are strictly forbidden giving her CREDIT on my account, as I will not be responsible for any Debts she may contract.
>
> Charles Donn.[30]

More confrontational was the case of constable Joseph Martin in 1818:

> My wife Jane Martin, having withdrawn herself from her home without any just provocation and absconded into the woods with Benjamin Gibbs, an absentee, I do hereby caution any persons whatever giving Trust and Credit to her upon my account, as I will not be responsible for any Debt, or Debts, Charge of Board or any other Charge, Claims, Demand or Debt whatever which she may contract hereafter, or have contracted from the period of her leaving home.

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28 West, *The History of Tasmania* (1852) (Angus & Robertson, Sydney 1971) p511.

29 At p509 in relation to the female factory at Parramatta. See also p510.

30 *Hobart Town Gazette,* 4 October 1817.

Feb 28, 1818 Joseph Martin, Constable.[31]

We can only speculate as to the relationship between Constable Martin and his wife, but on 26 December 1818, Jane had strayed again and he again had to advertise:

> NOTICE. - Whereas my wife, Jane Martin, is again walked away with herself without any Provocation whatever, and I hear has taken with a Fellow who looked after Cattle in the Neighbourhood of the Macquarie River, - This is to give Notice that I will not pay for biter or sup, or for any other thing she may contract on my account to man or mortal; and that I am determined to prosecute with the utmost Rigor the Law will admit, any Person or Persons who may harbour, conceal, or maintain the said Runaway, Jane Martin, after the Publication of this advertisement.
>
> December 26, 1818. Joseph Martin.[32]

This kind of public notice was to be seen until comparatively recent years in modern times and stemmed from one of the obligations arising from marriage, whereby the husband was legally obliged to provide for his wife. If he failed to do so, she could pledge his credit, but only for necessaries. If she was 'guilty of deserting him', his obligation to provide for her ceased, but it was up to him to bring the fact to public notice, as otherwise he could not be heard to deny his obligation.

Of course a separation was not always final and there are notices which indicate an opposite turn of events, such as that of Thomas William Stocker of the Derwent Hotel. First, on Saturday 29 June 1816, we are informed that "On Thursday last, by Special Licence, was married by Rev Robert Knopwood at the Derwent Hotel Thomas William Stocker to Mary Hayes, widow, of the Derwent Hotel, Elizabeth Street *after a tedious courtship* of two years".[33] A fortnight later, we are advised in a Notice by William Thomas Stocker that "all persons holding Promissory Notes issued by Mary Hayes, late widow, are requested to send in the same to me, in order that they may be immediately consolidated".[34] Here, then,

31 *Hobart Town Gazette,* 28 February 1818.
32 *Hobart Town Gazette,* 26 December 1818.
33 *Hobart Town Gazette,* 29 June 1816. Emphasis added.
34 *Hobart Town Gazette,* 27 July 1816.

was a husband willing to meet his wife's expenses, but maybe that was part of their bargain.

THE DIVORCE DEBATES

Given that the incidence of marriage breakdown is not likely to have been any lower in Tasmania than it was in England, it is perhaps surprising that when Lord Stanley's Despatch was received, the colonists did not embrace divorce as an institution with more enthusiasm than was the case. Before looking at the arguments that were used for and against the introduction of divorce, let us first examine the details of the proposed legislation.

By 1850, the absence of a general law of divorce in England had become not only irksome but also a social problem. In 1853, the Royal Commission into the Law of Divorce reported on the shape which such a law should take. Not surprisingly, the provisions were modelled on those of parliamentary divorce. Divorce *a vinculo,* or from the bonds of marriage, was to be granted to a husband for a single act of adultery committed by his wife, but to a wife only for adultery with aggravation by her husband. The English *Divorce and Matrimonial Causes Act,* which was passed in 1857, followed these recommendations. The actual clause governing divorce became s27;[35] its effect was summarised in the Hobart *Mercury* as follows:

> [This] Clause treats of "Dissolution of Marriage", a dissolution which ... makes it "lawful for the respective parties to marry again as if the prior marriage had been dissolved by death". Adultery is to be sufficient ground upon which to present a petition and to obtain a divorce as against a wife; as against a husband adultery *alone* is not sufficient; it must be conjoined with other offences which are therein set forth and defined.[36]

The following clauses also assumed considerable importance in the debates. Section 16 of the English Act provided for a decree of Judicial Separation, either by a husband or a wife, on the grounds of adultery, cruelty or desertion for two years or more.[37] This remedy was a continuation of the old divorce *a mensa et thoro,* divorce from bed and board, which the ecclesiastical courts were able to grant. The difference

35 Section 14 in the Tasmanian Act.
36 *Mercury*, 14 September 1858.
37 Section 3 in the Tasmanian Act.

between this and divorce *a vinculo,* from the chains of marriage, was that a judicial separation did not sever the marriage bond or enable the parties to remarry. The possibility of a reconciliation always remained open, at least in theory. Because the different grounds for a judicial separation were the same for wives and husbands, it was easier for a wife to obtain a judicial separation than a divorce.

For a woman, the main advantage of a judicial separation becomes evident in ss25 and 26.[38] Section 25 provided that she was to "be considered as a *feme sole* with respect to property of every description which she may acquire or which may come to or devolve upon her". This was by contrast with her marital status. On marriage she lost control of any property she owned, including any earnings she might have in her own right. Her property was administered by her husband as if it were his own. Section 26 likewise gave her the rights of a *feme sole* as regards suing or being sued under the law of contract, or in respect of wrongs and injuries and in civil proceedings. The clause also made a husband, who had been ordered to pay her alimony but failed to do so, liable for necessaries supplied to her by others.

While a woman who had been deserted by her husband could not obtain a divorce, or even a judicial separation, in under two years from the date of desertion, s21 provided that she could "at any time after such desertion" apply to a magistrate or to a court of petty sessions "for an order to protect any money or property she may acquire by her own lawful industry and property which she may become possessed of after such desertion".[39] The section expressly assimilates the position of a deserted wife who has obtained a protection order to that of a wife who has obtained a decree for a judicial separation. This section was important particularly where a judicial separation could not be obtained, because the necessary two years after the desertion had not yet elapsed. It was also to prove of social importance because proceedings in petty sessions were much cheaper than proceedings in the divorce court.

Lastly we must note s45.[40] While clauses 25 and 26 only applied prospectively so as to protect property acquired in the future after a judicial separation, nothing was said there about a wife's previously owned property which, on her marriage, had come under the control of her husband. Section 45 then provided that after a decree of either divorce or

38 Sections 7 and 8 in the Tasmanian Act.
39 Section 9 in the Tasmanian Act.
40 Section 35 in the Tasmanian Act.

judicial separation, the court was empowered to make a settlement of such property on the wife or the children of the marriage. Thus, in such circumstances, she was able to shake off the civil disability to which she had become subject as a result of her marriage.

These were some of the most important provisions of the Act which Lord Stanley had asked the Colonies, including Tasmania, to accept, and we must now turn to the somewhat tortuous course which that legislation was to take.

1858: THE FIRST ATTEMPT

Stanley's Despatch was dated 12 April 1858. Five months later the Governor, Sir Henry Fox Young, in his speech on the opening of Parliament on 8 September 1858, announced the proposed introduction of a law relating to divorce and matrimonial Causes on the lines of the Imperial Act.[41] The Hobart *Mercury* editorial on that day set the tone for the reception of the legislation and foreshadowed the nature of its reception:

> We shall look with the greatest suspicion upon this measure. It is likely, if not cautiously worded, to shake the social framework of society in a Colony like this. Because such an Act has been found to work well in England it does not follow that it would work well here.[42]

The Mercury then carried a synopsis of the Bill,[43] and on 17 September 1858 the measure first came before the Legislative Council. From the outset, the Bill was characterised as having a twofold purpose. One was to provide for divorce, the other, for the protection of the property of married women and that was how the Colonial Secretary, Mr William Henty, introduced it. He said:

> no one could doubt the desirability of a measure being introduced for that purpose, as it was well-known that married women were subjected to great and manifold hardships and wrongs. The present state of the law was a great grievance and required immediate alteration.[44]

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41 *Mercury*, 8 September 1858.
42 As above.
43 *Mercury*, 14 September 1858.
44 *Mercury*, 17 September 1858.

This statement was accompanied by a parenthetical editorial comment that "the hon. gentleman was very imperfectly heard in the gallery".[45]

First reactions were mixed, some speakers being favourable, others against, while yet others wanted more time to consider or, in their own words, read the Bill twice and, consequently, wanted a postponement of the debate. One of the latter, Mr John Helder Wedge, expressed the fear that "if the present Bill became law, their courts would be inundated with applications for divorce".[46] An amendment calling for a postponement, moved by Mr James Whyte and seconded by Mr Thomas Lowes was then duly carried.

The Second Reading was moved by the Colonial Secretary on Wednesday 22 September 1858 and seconded by Mr Weston, a minister without portfolio in the Smith Ministry. In their attitudes to the Bill, members differentiated between its two main objectives: divorce, and the protection of married women's property. This was the gist of Dr Bedford's contribution and also of Mr William Nairn, a later President of the Legislative Council between 1859-68. Dr Bedford's main argument was that:

> Many ... would remember that in the times of the gold fever people recklessly entered into matrimonial engagements, and it would not be doing what was right, not only to the parties themselves, but also to the children, if they allowed too great facilities for obtaining divorce.[47]

Mr Nairn, in particular:

> objected to that part of the Bill that had reference to divorce and permitted the marriage of parties who had been divorced.
>
> The indissolubility of marriage, as had been said by Lord Stowell, was the great protection of society. It involved the interests, not only of the husband and the wife, but also of the children, and to give facilities of divorce, would, in his opinion, be prejudicial to society. When the parties knew that they could not obtain a divorce without considerable

45 As above.
46 As above.
47 *Mercury*, 22 September 1858.

> difficulty, it induced them to bear and forbear, and they would be in a far better position than in many places on the Continent, where great facilities for divorce existed.[48]

The reference to Lord Stowell's dictum was to the case of *Evans v Evans* decided by that well-known ecclesiastical judge in 1790:

> For though in particular cases the repugnance of the law to dissolve the obligations of matrimonial cohabitation may operate with great severity upon individuals, yet it must be carefully remembered that the general happiness of the married life is secured by its indissolubility ... In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good.[49]

These were sentiments of the period that had dominated contemporary thought in the eighteenth century and were slow to be swept away even in England, as is shown in the English divorce debates of 1857. How much slower then in an outpost of Empire like Tasmania? On the other hand, some members were impressed by the other features of the Bill which went to the protection of women. Thus Mr Button saw the positive aspects of the Bill, that while it contained nothing that had not been the law of England for two hundred years (while divorce had been available by Act of Parliament), it contained some humane clause for the protection of married women. He also referred to other countries, such as Germany, Holland and America where liberal laws prevailed on this subject.

This last reference to America drew an interjection from one of the Bill's opponents, Mr Whyte, who asked rhetorically: "In what part of America? In Utah?" The odd reference to Mormonism crops up now and again throughout the debates, when opponents of divorce want to throw in a red herring and create a disingenuous association between legal divorce and bigamy. An echo is found in the New Zealand parliamentary debates in 1872, five years after divorce had become law in that colony. The comment was there made by one Charles O'Neill and goes even beyond the Mormons:

> divorce could now be obtained in the colony just about as easily as it was said it could be in Chicago where, when the great American railway stopped, they could hear shouted

48 As above.
49 *Evans v Evans* (1790) 1 Hag Con 35 at 36; 161 ER 466 at 467.

> out: "There's ten minutes allowed for divorce, and twenty minutes for refreshments".[50]

The Tasmanian debate on this occasion did not last much longer. When it moved into Committee on 1 October 1858,[51] the Bill was subjected to a spirited attack by Mr Whyte who, in support of his arguments, cited the Bible[52] and other authorities of the day, such as Gibbon's *Rise and Fall of the Roman Empire,* Paley's *Moral Philosophy* and Hume's *Essays.* A more balanced view was put by Mr Weston who, while agreeing that divorce would tend to great evils, nevertheless supported the Bill. He said that they ought not to exclude the colony from the benefits of such a law and he pointed out that the Bill would enable the poor to obtain a protection and a benefit, which hitherto had only been within the reach of the wealthy.[53]

One of the strongest and most colourful speeches in opposition to the Bill was delivered by the President of the Legislative Council, Thomas Horne, who at that time was also a judge of the Supreme Court[54]. He made his opposition very clear:

> He, the President, most emphatically denounced the monstrous proposition contained in the clause [ie the one providing for divorce]. He did not care for all the Bishops from Nicene downwards with all their sleeves. ... Had they not called God to witness that they would cherish, support and maintain their wives till death did them part? That was the solemn assertion made there, and he could not find anywhere that a man could not marry again until his wife's brains were knocked out; then, indeed, he might take another wife, but not till then.

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50 NZ, Parl, *Debates* HR (1872) Vol XII at 261, quoted in Phillips, *Divorce in New Zealand: A Social History* (OUP, Auckland 1981) p21; see also Phillips, *Putting Asunder: A History of Divorce in Western Society* pp435-436.

51 *Mercury,* 1 October 1858.

52 Matthew 5:37.

53 *Mercury,* 1 October 1858.

54 Briggs & Murphy, "Presidents, Speakers, Ministries, Members and Officers" in Green (ed), *Tasmania: A Century of Responsible Government, 1856-1956* (LG Shea, Hobart 1956). When Horne was elected President, doubts arose as to the constitutionality of a judge being a Member of Parliament. An Act was passed validating his election provided he did not accept any emoluments therefor. Horne resigned from the Council in 1859 as a result of this becoming an issue: p279.

> It had been asserted that a law on the subject had recently been passed in England. Was that any justification of our principles or of those of a large body of her Majesty's subjects? They were passing a law repugnant to the community, and coercive of their consciences, and he should like to know what kind of law that would be? He would say again, that they proposed to legislate in opposition to a solemn sacrament of the church, and he would tell them, that their law would not be worth that! (Snapping his fingers.) ... If such a law was required in England, it was indicative of a lower state of morals than he thought existed.[55]

Mr Button spoke again in support of the Bill, citing "a commission comprising learned and eminent divines" who, after the Reformation, had investigated the matter carefully and allowed divorce.[56] Mr John Walker, member for Hobart also supported the Bill, saying the proposed law was better than an objectionable action for damages. The *Mercury* continues:

> The hon. member adduced the instance in this Colony where a woman had married three husbands and preferred living with the third - the others not being dead - as she was very comfortable and happy.[57]

The last contribution in the debate was that of John Helder Wedge again, who reiterated his objection, saying that it would be a step towards Mormonism. He pointed to the dreadful effect of the passing of this law in England where, since the passing of the Act, (assented to 28 August 1857, ie in thirteen months) from 90 to 100 cases [of divorce] had been disposed of. In the result, the Bill was defeated by 7 to 5 votes.[58] And that, for the moment, was that.

The *Mercury's* editorial comments on this debate on the whole favoured the Bill. In a thoughtful editorial of 21 September headed "The New Law of Divorce", when it was no doubt assumed that the Bill would pass, there is a discussion of the historical background of the circumstances in which

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55 *Mercury*, 1 October 1858.

56 A reference to Archbishop Cranmer's *Reformatio Legum Ecclesiasticarum* (publ by Foxe, 1571).

57 *Mercury*, 1 October 1858.

58 The vote was, in fact, for an amendment by Messrs Whyte and Wedge, that the offending clause be struck out.

the Bill had been passed in England. The editorial concludes by pointing out that the new law would not necessarily lead to a higher incidence of divorce:

> The New Divorce Court may serve as a gauge, in some degree, of the moral feeling which pervades society, but it will not in itself tend to induce laxity of principle or conduct. The Act may indeed be said to have a twofold operation; it will doubtless prevent many breaches of connubial faith, as well as afford redress when they are discovered; and our satirical contemporary, *Punch,* was probably not far wrong in his anticipation of results, when the other day, he made an indignant husband say to his spouse, "You'll please to recollect, mum, divorce is a much easier thing now than it used to be!" This, to many married couples, will be a salutary check, and may make even the morally unscrupulous more careful than formerly, when cases were continually hushed up because so few could afford the cost of procuring the remedy.[59]

When the Bill was subsequently defeated, on the other hand, the *Mercury,* in its editorial of 2nd October 1858 was on the side of the angels. In words dripping with shock and emotion, the *Mercury* did not shed any tears over what was not to be:

> We have brought our minds to the consideration of this Bill with fear and trembling. The proposition to annul marriages is startling enough; but the consequences which would follow this facility for obtaining a divorce are even more startling still. All our preconceived notions with regard to the solemnity of the marriage vows are painfully shocked by the contemplation of a measure that estimates those vows as mere declarations which can be laid aside like a garment to suit our inclinations or gratify our passions.[60]

And in a final comment, readers are told that "the subject is too serious to be lightly legislated upon. There can be no doubt, but that such a measure

59 *Mercury*, 21 September 1858.
60 *Mercury,* 2 October 1858.

would shake our social relations to the foundations, and we might terribly affect the happiness and welfare of our posterity."[61]

Having paid its tribute to the conservative cause as to divorce, the editorial then turns to the question of Judicial Separation. It sees this as an entirely worthwhile social reform, which would have protected the weak: women and children who were often at a serious disadvantage when opposed by a violent or avaricious husband. The editorial paints a picture of the predicaments in which these weaker members of society often found themselves:

> It is but right and just that women when deserted should be protected, and that any property they may acquire by their own lawful industry should be assured against the debts of a drunken or improvident husband. We know that many cases actually exist in which unfortunate wives, striving by the labor of their own hands to secure a home for themselves and worse than fatherless children, are continually exposed to the brutal and selfish demands of their husbands. It is vain for these unhappy women to appeal to the feelings of men whose minds are degraded by habitual intemperance. What is it to such that their wives and children are reduced to starvation and rags so that they can obtain the means by the labor of these hapless creatures of gratifying their beastly propensities?[62]

The Government had indicated that the Bill was a package deal, it stood or fell as an integral legislative document. In the final debate on 1 October, the Colonial Secretary "emphatically declared that if the clause was struck out the Colony would be without a [divorce] law for many years".[63] The *Mercury* deprecated that policy decision, asking "Was this intended as a threat?",[64] and goes on to regard it as a misfortune if the refusal of the Legislative Council to pass the divorce clauses were to prevent the Parliament from adopting those provisions which refer to judicial separation and the protection of deserted wives.

Although the divorce debates do not refer to it, there is perhaps a parallel to be found here to the unique Tasmanian maintenance legislation of

61 As above.
62 As above.
63 *Mercury*, 1 October 1858.
64 As above.

1837.[65] This extended financial protection to women who had been cohabiting with a man without being married to him[66]. This provision has remained a feature of Tasmanian law, through succeeding re-enactments of the maintenance legislation. It may have originated in the difficulty of proving marriage in cases of cohabitation. In the end, it amounted almost to a kind of estoppel.[67] At any rate, the protection of deserted spouses, legal or de facto, was something present to the minds of Tasmania's legislators, whether from altruism, or from enlightened self-interest in order to protect the public purse.

1860: THE SECOND ATTEMPT

With a sense of déja vu we find that on 19 July 1860 the *Mercury* lists very briefly among the matters canvassed in the Governor's Speech on the opening of parliament a Bill "for vesting in the Supreme Court jurisdiction in Divorce and Matrimonial Causes". The matter is discussed at greater length in an editorial on 31 July 1860. After reminding its readers of the fate of the 1858 Bill, the paper condemns the divorce provisions in the Bill as "destroying the sanctity and solemnity of our marriage vows merely that such a handful of ill-assorted men and women might have an opportunity of making alliances more suited to their altered tastes". The provisions would result in an "altered aspect" of marriage itself, which would degenerate from a divine institution to "a mere speculation".

On the other hand, the *Mercury* again strongly supported the judicial separation clauses. In a passage echoing the editorial of 2 October 1858, this is seen as satisfying a social need:

> There are many instances in this colony in which unfortunate women, striving by honest industry to retain a home for themselves and their worse than fatherless children, are continually exposed to the brutal and selfish demands of their drunken husbands. Of what avail would it

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65 *Wives and Children Act* 1837 (Tas), 8 Will IV, No 9.

66 See Craig & Scott, "The Maintenance of Concubines" (1962) 1 *Tas ULR* 685. The quaint use of the word "concubine" in the title is a direct reference to *Maddock v Beckett* (1961) TasSR 46 which had prompted the discussion. Burbury CJ there deliberately used that term in preference to the "inaccurate euphemistic neologism '*de facto* wife'": at 52. Time has not endorsed that preference.

67 Craig & Scott, as above, discuss the implications at length, including what amounted to almost a kind of statutory form of bigamy where both a legal wife and a 'de facto' one were making claims for maintenance.

> be to appeal to men whose feelings have become blunted by the intense selfishness which is the invariable companion of habitual intemperance? What is it to such degraded minds if their wives and children *are* reduced to beggary and rags so that they can obtain the means, by the labor of these hapless creatures, of gratifying their appetites?
>
> It is absolutely necessary that something should be done in order to protect the earnings of these unfortunate women. We might cite numberless cases, if it were required, to show how unjust and how detrimental to society it is to allow husbands to take away the earnings of their wives as they have now the power of doing. Submitting to her hard destiny a mother will still struggle on to obtain the means of feeding, clothing, and educating her children; and it is a cruel thing to allow her savings to be torn away from her to satisfy the depraved desires of a dissolute husband. Surely the Parliament will throw its protection around these unfortunate women by passing those clauses of this measure which aim at securing this protection for them.[68]

To the modern observer the question at once presents itself whether these unfortunate women would not have been better off if they had been able to cast off the shackles completely and free themselves from their husbands once and for all, with perhaps a chance of trying again and entering into a possibly happier union. But by a curious trick of dissociation, the opponents of divorce always ever seem to contemplate only the case of the dissolute and predatory male whose sole aim is to conquer, and ruin, as many poor "hapless creatures" as possible by ensnaring them in a destructive marriage.

When the House of Assembly went into committee on 30 August 1860, the Attorney-General, Sir Francis Villeneuve Smith, defended the measure in a lengthy, learned and eloquent speech. One of his arguments in particular appealed to the *Mercury*, that in the absence of a divorce law, a man whose wife committed adultery and bigamy would be, in the most cruel way, condemned to perpetual celibacy. But this would in fact mean perpetual immorality, "for celibacy enforced against the consent of the celibate was an absurdity".[69] In an editorial on 4 September the *Mercury*

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68 *Mercury,* 31 July 1860. Emphasis added.
69 *Mercury,* 30 August 1860.

explains its sudden change of front and why it was now supporting the divorce provisions:

> All our prejudices rebel against affording too great facilities for setting aside a contract of so solemn and, as we have been taught to believe, indissoluble a character as marriage. Do what we will, we cannot get rid of a certain repugnance to such a law as this. And yet our reason tells us the Bill ought to pass. The arguments brought forward in support of the measure in the House of Assembly must have carried conviction to every mind the avenues to which were not choked by bigotry. Even the few whose prejudices proved stronger than their reason will admit that those arguments were unanswerable. They will admit, too, and they have admitted, that the provisions of the Bill are in harmony with the revealed will of God; - that it is a monstrous injustice to doom a man to perpetual celibacy, or worse, through the infidelity of another; - and yet, notwithstanding this, they refuse to sanction a measure designed, as this has been, for remedying so great and grievous an evil.[70]

And the editorial finishes on a suitably self-serving note:

> The reasons assigned by the Secretary of State for maintaining a conformity with the laws of England on this important subject are so forcible that we can scarcely believe any honourable member will refuse to give his assent to this Bill. It will be a novelty for Tasmania to be behind in her legislation. We have shot far ahead of our neighbours hitherto, and we hope that our Parliament will not now for the first time, by its rejection of this Bill, manifest its unfitness for retaining the honourable position it has all along held in this respect.[71]

It was all over, bar the shouting. When next the Bill was before the Council, on 6 September 1860 for its Second Reading, there was a last ditch attempt by Mr Wedge to abort it by again moving that the Bill be read that day six months, a parliamentary device for sending a Bill into oblivion. He was able to obtain a seconder, Mr Richard Cleburne, but on the division no one else voted for the amendment and it was thrown out by

70 *Mercury,* 4 September 1860.
71 As above.

10 'Noes'. There follows just a brief note, that the Bill was then read a second time and committed.[72] In committee on the same day, Mr Wedge tried once more to prevent the Bill from progressing further by moving against clause 1 which vested jurisdiction in the Supreme Court, but this motion was negatived, whereupon the clause was passed, as was the remainder of the Bill. Finally the Bill received its third reading and passed, though not without a number of petitions against it having been presented to Parliament. One on 1 September, presented by Mr John Balfe, was from "the Romish Bishop and three clergymen"; another, presented on 6 September by Mr Wedge was from "certain clergymen on the northern side of the island". Against that may be set off two petitions on the same day by Mr Button, one from "certain clergymen at Launceston" and the other from twenty-seven inhabitants of Launceston, all of whom were in favour of the Bill.

Finally, we may notice a valiant attempt by the *Mercury* in an editorial on 8 September 1860 to reconcile the various conflicting opinions. The new law is now being characterised as merely a change in legal administration:

> Yet we find the petitioners who have addressed Parliament against this measure, especially the two Bishops and their Clergy, assuming that it is proposed to effect a change in the principle of the British law, instead of a change merely in the machinery for its administration. The scriptural passages cited by Mr Wedge were not pertinent to the question before the Council - which was not to make divorce legal, but simply to make it obtainable without going to the House of Lords.[73]

The *Divorce and Matrimonial Causes Act* of 1860 was now law.

CONCLUSIONS

The *Divorce Act* came to Tasmania by an edict of the Imperial Government; it was not, in that sense, a home-grown product. If a country's laws are a response to social demands and conditions, what was it that caused this law to be introduced in England, presumably meeting the needs of that country, yet to be initially rejected in Tasmania?

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72 *Mercury*, 6 September 1860.
73 *Mercury*, 8 September 1860.

There was, first, the different composition of the two societies. One of the needs which the divorce and marriage laws were intended to meet were the dynastic and proprietorial wants of the English property owning classes. But there was a totally different society here from that in England.[74] The Industrial Revolution, which in England had generated a capitalist class and a proletariat, both of whom had moulded much of the social network of the nineteenth century, had only found a weak echo in mid-century Tasmania. The manufacturing industries, says Townsley,

> were all in answer to immediate needs and were examples of the self-reliance of the early colonists. They were small in scale and required little capital and were owner-operated. ... The concentration of a substantial part of what was a small population in Hobart and Launceston did provide an adequate labour force, but by and large manufacturing was subsidiary to what was essentially a pastoral economy.[75]

Thus we may perhaps over-generalise by saying that the Tasmanian ruling class, the legislators of 1858, tended to look upon divorce as a destabilising factor in the microcosm of their own middle-class community, which espoused the virtues of a traditional family life.

The other part of the population on the other hand, many of convict origin, came from a tradition in which the availability or unavailability of divorce was not a burning issue, given the informal ways of adjusting marital status without resort to the legal institutions of the land which have been discussed. No doubt there was a good deal of partnering and re-partnering, as we would call it today, among the lower strata of society. Many of these cases were undoubtedly without the blessing of church or chapel. Much of the prevalence of prostitution that keeps cropping up in contemporary writing was nothing more than what today we would call, de facto relationships. Sturma has argued strongly that the word "prostitution" was bandied about rather loosely, and that, both in London and among the convicts in Australia, "the woman labelled a 'prostitute'

74 See the comment of Michael Roe on the strong influence exercised by the working class in moulding the social character of Australia and the absence of a strong middle class in *Quest for Authority in Eastern Australia, 1835-1851* (Melbourne University Press, Parkville 1965) p205.

75 Townsley, *Tasmania, From Colony to Statehood, 1803-1946* (St David's Park Publishing, Hobart 1991) p67.

might be guilty of no more than cohabitation,"[76] or what we today would call 'de facto marriage'.

Again, bigamy occurred, no doubt fairly frequently. Foremost there were, of course, the married convicts who were transported, but whose families were left behind. Apart from the incongruity of a policy which saw no problem in separating families with no practical hope of a reunion, when 'the family' was being extolled as the pillar of Christian society and one of the foremost exemplars of Victorian virtue, bigamy practised by predominantly male convicts who were not content to live a celibate life[77] must have proved an administrative and judicial nightmare, if, indeed, it had not been just swept under the carpet. If nothing else, proof of the offence of bigamy was obviously a major obstacle to enforcement, particularly when the first marriage had taken place in Britain. Peter McDonald, of the Australian Institute of Family Studies, has commented on the marital arrangements of convicts:

> It might also be speculated that some of the convicts did not marry legally because they still had wives in Britain. Robson has estimated that about 25% of the male convicts had wives before they left Britain. It is apparent, at least in this early period, that very few of the convicts' wives were able to follow their husbands to the colony. In fact, King had complained that the few who had been allowed to accompany their husbands were of the 'worst description'. Also, in 1820, the Reverend John Youl stated that there was a general belief amongst the convicts that 'those who had been transported to this country are released from their matrimonial engagements'.
>
> The fact that only 27% of the adult women were reported as married should not, therefore, be seen as a revolt against the institution of marriage, but rather as a result of a number of factors which led the majority of the population to ignore the official or legal form of marriage.[78]

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76 Sturma, "The Eye of the Beholder: The Stereotype of Women Convicts, 1788-1852" (1978) 34 *Labour History* 3 at 6. See Summers, *Damned Whores and God's Police* (Penguin Books, Ringwood 1975) pp267-270; Aveling, "She Only Married to be Free: Or, Cleopatra Vindicated" in Grieve & Grimshaw (eds), *Australian Women: Feminist Perspectives* (OUP, Melbourne 1981) pp119-121.

77 See fn47.

78 McDonald, *Marriage in Australia* (ANU, Canberra 1974) p33.

George Rudé has drawn attention to the case of 25 transported labourers in 1831-36 who appeared on the records as being already married before their transportation and who married in Van Diemen's Land. Although he found one case of a man who was subsequently convicted of bigamy, Rudé speculates that "some presumably got away with bigamy".[79]

Then there were the cases of colonial bigamy, where both the original marriage and the bigamous union took place in the colony. The following extract from the *Mercury* during the period under review of a case in Melbourne, with Tasmanian links, illustrates what was, no doubt, a not infrequent occurrence.

> A singular case of bigamy was investigated at the City Court yesterday. At Oatlands, in Van Diemen's Land, about fourteen years ago, two ticket-of-leave holders, named Jasper Bass and Eliza Lecking, were united in the holy bonds of matrimony. After living together for three years, the ruling passion resumed its sway and by a singular coincidence one day the man was apprehended for pig-stealing and the woman for stealing groceries. The husband was sentenced to seven years' and the wife to twelve months' hard labour.
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> After the expiration of her sentence, Mrs Bass crossed the straits which bore her name, and in the new golden colony of Victoria, endeavoured by an observance of the golden rule to lead a new life. She took up with a man, named Farrell, with whom she lived for some years, till at last, on her representing that her former husband was dead, he married her. This was in 1855. They lived comfortably together till the commencement of 1858, by which time Farrell had amassed considerable property, being the proprietor of a tannery at Richmond, and then an evil genius appeared in the person of a dressmaker, rejoicing in the sounding appellation of Rose Anna Armstrong. Once more was Elizabeth Bass - *nee* Lecking - to lead an unhappy life. The wily needle-woman worked herself into the affections of the tanner, who in the end, for her sake, turned his wife out of doors.

79 Rudé, "Captain Swing and Van Diemen's Land" (1964) 12 Tas Hist Research Assoc *Papers & Proceedings* 17.

Farrell is summoned to the Richmond Police Court for maintenance for his wife, and the magistrates make an order for £2 a week. Some weeks afterwards, probably through the influence of Rose Anna, the order is rescinded, for two or three witnesses - old convicts, fellow laborers of Bass's - swear that Bass is living, and that, consequently, Eliza Farrell has no right to that name at all, and has no claim upon the unfaithful tanner. Acting under this magisterial decision, - that he has no wife, - Farrell determines to take one, and he naturally takes Rose Anna. Is the dictum of the Richmond magistrates sufficient for obtaining a divorce? Mrs Farrell, or Bass, thinks, or her attorney thinks for her that it is not.

Farrell is arrested for bigamy and he appeared on remand at the City Court yesterday to answer that charge. Mrs Farrell that was, is an important witness for the prosecution, and the solicitor for the defence, aware of that fact, has her apprehended on her way to the court for perjury and bigamy. Farrell is committed for trial, and his first wife will be examined at the Richmond Police Court on Wednesday next.

The case of Eliza Farrell, charged with bigamy and perjury, was heard at the Richmond Police Court yesterday. The assignment of perjury was that the defendant had sworn that she had not seen her former husband, one Jasper Bass, since he was transported fourteen years ago. Four witnesses were examined, and their evidence went to show that they had frequently seen Bass within the last five years, and as late as the 1st of April last, at the time he was in company with one Waterloo Smith who, as the witness said, had since "paid his debt".

The Bench did not consider the evidence sufficient for a conviction on the charge, and accordingly dismissed it. The bigamy charge was gone into, the same evidence being taken by consent. This was also dismissed, as the prosecution failed to establish the identity of the Eliza Bass mentioned in the register with the defendant. The decision was received with applause in a crowded court.[80]

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80 *Mercury*, 8 September 1858.