BOOK REVIEWS

The Concept of Matrimonial Cruelty, by JOHN M. BIGGS, LL.B., PH.D. (Lond.), S.J.D. (Harvard), (The Athlone Press, University of London, 1962), pp. i-xx, 1-228. Australian price £2 17s. 9d.

This is an excellent work; if there were more legal texts of similar quality, keeping abreast of legal publications would be a pleasanter task. The author was a senior lecturer in law at the Australian National University, to which he came from the U.S.A., and this essay presumably is the thesis he submitted for his S.J.D. from Harvard. He wears his genuine learning gracefully; he writes with distinction; his material is admirably presented; and his analyses acute. He is sensibly aware of the realities behind the judicial process and its response, usually tardy, to irresistible social pressures, and this awareness illumines each chapter of his perceptive essay.

So long as women were subject creatures and marriage was regarded for all practical purposes as indissoluble, matrimonial law was relatively simple. When the proposition that marriage is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life[1] became subject to the qualification that the union was not necessarily for life but could be dissolved in the civil courts upon grounds provided by statute, the courts had to work out doctrines that embodied changed social concepts deriving from new social pressures. The successive generations of judges performing this task have been the products of their times, with the limitations and preconceptions of their upbringing, of their training, legal and otherwise, of their social class and religious adherences, and of their own temperaments. They were males, and usually husbands. In a society tending to lay more and more stress on personal happiness, their approach to the problems of reconciling what seemed to be just individual claims to relief with assumptions regarded as necessary for social stability has reflected those preconceptions and limitations. In the grant of decrees of dissolution, in financial provisions ordered for wives, and in decisions relating to the custody of children, a masculine outlook has been dominant, even where the wife was the injured party, and particularly so where, for the purposes of the record, she was not. Indeed, some of the decisions can be explained only on the basis that errant wives deserve to be punished, or at all events, may rightly be made to suffer through their maternal affections for their lapses. The double standard favouring the male that is discernible in the original statutes and in the cases significantly affected the development of the law relating to cruelty in matrimonial causes. In the canon law at first only a defence to a claim for restitution of conjugal rights, and later a ground for a divorce from bed and board, cruelty found its way in various phrasings as a basis for relief into enactments which

[1] *Cf.* Marriage Act 1961 (Cth), s. 46, and *Hyde v. Hyde* (1866) L.R. 1 P. & D. 130, 133.

were, too, the work of assemblies that were entirely or predominantly male. In Victoria, for example, ' cruelty ' was not specified as a ground for divorce, but repeated assaults and cruel beatings during one year preceding the petition (a gross form of cruelty more likely to be suffered by the female) provided a basis for a decree of dissolution.[2]

Judges are usually remote from most of the issues that come before them in the common run of litigation, and on that account may find it easier to abstain from becoming emotionally involved, but the overwhelming majority of them have had personal experience of the strains and frustrations of marriage as well as its delights and contentments. The law of domestic relations reveals more clearly than any other branch the differing attitudes of judges to ideas that challenge long-accepted notions. It is a fascinating study to examine how these ideas triumph or fail in the highest tribunals, often by a narrow margin. Usually the ideas are simple, but the emotional responses they evoke, for and against, are complex and vigorous. Individual temperament plays a decisive part, and conservatism in general outlook is not necessarily an indication of a reactionary attitude to legal aspects of matrimonial problems. As Lord Chancellor, Lord Halsbury, that ' fine crusted Tory ', as Alfred Deakin described him, was the senior member of the Court of Appeal in the married women's charter, *The Queen v. Jackson*,[3] the case that expunged from the common law Petruchio's doctrine,

> I will be master of what is mine own;
> She is my goods, my chattels; she is my house,
> My household stuff, my field, my barn,
> My horse, my ox, my ass, my any thing.

He was, too, one of the dissenting members of the House of Lords when that august body, in *Russell v. Russell*,[4] divided five to four in deciding that, legally, bodily hurt or injury to health, or a reasonable apprehension of one or other of these, was an essential element of cruelty. Over sixty years ago he and three other Lords of Appeal would have anticipated recent developments by applying the test to the conduct complained of as cruel, do the facts show an absolute impossibility that the duties of the married life can be discharged ?

Dr Biggs traces concisely and with delightful clarity the transformation of the concept of matrimonial cruelty. The requirement of physical violence was expelled, in *Kelly v. Kelly*[5] by ' a cavalier treatment of supposedly binding authorities ' (page 37). However, intention exhibited troublesome complexities in matrimonial law as it has also in the criminal law. Judges constrained by semantic considerations looked for malice as an element in cruelty, and Henn Collins J. was positive that ' intention or malignity is an essential ingredient in cruelty '.[6] Ten years later this

[2] Marriage Act 1958, s. 72 (1) (d), and see *Gough v. Gough* (1956) 95 C.L.R. 369.
[3] [1891] 1 Q.B. 671.
[4] [1897] A.C. 395.
[5] (1870) L.R. 2 P. & D. 31.
[6] *Astle v. Astle* [1939] P. 415, 420.

was no longer completely so ; the Court of Appeal, in *Squire v. Squire*,[7] held there was no need to establish spiteful or malignant intention. Lord Porter's opinion for the Privy Council in *Lang v. Lang*[8] though ' in parts one of the most obscure in recent years ' (page 87), provided a basis for the idea that all that is necessary to establish intention is foresight of consequences. On the state of the authorities when he wrote, Dr Biggs sensibly embraced this notion. Part II of the essay, called ' Intention in Cruelty ', is a valuable examination of complexities that bedevil other fields of the law, too, when intention is in question. He stresses that bewilderment must follow if there is a failure to distinguish between ' intention as regards conduct and intention as regards the consequences of conduct '. Hence, to describe an act as intentional, ' there should be three elements ; a desire, foresight that a certain act may attain that desire, and voluntary conduct to achieve that desire ' (page 67). *Lang v. Lang*[9] established that ' desire ' may be discarded, which, in Dr Biggs' view, meant that intention in cruelty could be established if the conduct was voluntary and the consequences foreseen. His proposition about insanity necessarily followed: ' Insanity should be on defence to a petition for divorce on the ground of cruelty unless mental derangement prevents conduct from being voluntary, or is of such a nature as to prevent a person realising the material circumstances in which he is acting, or if it prevents him from foreseeing the consequences of his conduct ' (page 124). The *M'Naughten Rules*, in his opinion, should not be applied as a test in divorce or similar proceedings based on cruelty, though he recognised that on the state of the authorities in England only the House of Lords could say so.

Dr Biggs' essay was published in 1962, and in June 1963 the House of Lords[10] delivered judgment in two cases, *Gollins v. Gollins*[11] and *Williams v. Williams*.[12] If the headnote in *Gollins*' case correctly states the effect of the speeches of the majority,[13] the presence of an intention to injure on the part of a spouse alleged to have been guilty of persistent cruelty, or proof that the conduct was aimed at the other spouse, is not an essential requisite for cruelty; if a spouse is reduced to ill-health by the inexcusable conduct of her husband, who knew the damage he was doing, though he did not wish to injure her, but closed his mind to the consequences, he may properly be found to have been guilty of persistent cruelty. In *Williams*' case the same three Lords of Appeal held that the test whether one spouse has treated another with cruelty is wholly objective and, therefore, proof of insanity is not necessarily an answer to the allegation. Lord Morris and Lord Hodson dissented, but all five Lords of Appeal agreed that the *M'Naughten Rules* do not provide a test in cruelty cases.

[7] [1949] P. 51.
[8] [1955] A.C. 402.
[9] *Ibid.*
[10] Lord Reid, Lord Evershed, Lord Morris, Lord Hodson and Lord Pearce.
[11] [1963] 3 W.L.R. 176.
[12] [1963] 3 W.L.R. 215.
[13] Lord Reid, Lord Evershed and Lord Pearce.

In some aspects Dr Biggs successfully predicted the law as it is now declared to be. The exclusion of the *M'Naughten Rules* (which are not tests of insanity but describe the conditions that must have been present before a person who has committed an act which would otherwise be a crime may be held not to be liable to punishment) is rational and is welcome. So, too, is the declaration that insanity is not necessarily an answer to a charge of matrimonial cruelty. The decision that cruelty is to be tested by objective standards and not by reference to the intention of the respondent smacks of Humpty Dumpty's proposition, that a word has the meaning one chooses to give it, but in the light of the development of the concept of matrimonial cruelty, which Dr Biggs presents with impressive lucidity, it is a step which, if not inevitable, was at least one that was highly likely. This is not the occasion to discuss *Gollins* and *Williams* in detail, though it seems to this reviewer that the majority arrived at their conclusion by equating cruelty with ill-treatment. A person may ill-treat another without an intention to be cruel, and if ill-treatment is in question, conduct may fairly be judged objectively. The illustrations given by Lord Pearce in *Gollins*' case, and by Lord Reid and Lord Evershed in *Williams*' case, of harsh behaviour without cruel intent are really instances of ill-treatment and not of cruelty. But it may be said of these decisions, as Sir Owen Dixon said of *Woolmington's* case,[14] that the result is satisfactory, however it was achieved, and we should not enquire too closely whether it was reached by the trodden paths of the law, or, it may be added, of semasiology. They represent the triumph of the approach that it is the effect of the conduct on the suffering spouse in the individual case that is of prime importance; indeed, Lord Reid frankly stated that as the basis of his opinion in the passage: ' If the conduct complained of and its consequences are so bad that the petitioner must have a remedy, then it does not matter what was the state of the respondent's mind.'[15]

The consequences of *Gollins*' case have already manifested themselves in Australia. Under the Matrimonial Causes Act 1959, cruelty as a basis for a decree[16] must be habitual during a period of not less than a year.[17] It has now been held, on the faith of *Gollins*' case, that spouses who had no intention of hurting each other, and who have not treated each other with violence, may each obtain a decree based on cruelty if, because of the incompatibility of their natures and temperaments, each has behaved ' by words by actions [and] by gestures ' in a way so hurtful to the other that it was harmful to health.[18] In arriving at this conclusion Mr Justice Selby, of the Supreme Court of New South Wales, recognised that it involves acceptance of what ' is often described in the American courts as mental cruelty '.[19] Opinions may differ upon whether this is a desirable

[14] [1935] A.C. 462.
[15] [1963] 3 W.L.R. 176, 189 and *cf.* [1963] 3 W.L.R. 215, 227.
[16] Though not for a discretionary bar, s. 41 (b).
[17] S. 28 (d).
[18] *Driscoll* v. *Driscoll* (1963) 4 F.L.R. 210.
[19] *Ibid.* 211.

state of affairs, but it is surely inevitable if judges have to find ways within the existing statutory framework to dissolve marriages whose continuance serves no sensible purpose. The will to survive apart, the sexual urge is the most powerful of human drives. In British communities, sexual intercourse is conventionally permissible only between a married couple. Monogamy means no longer a marriage for life, but one legal union at a time. The need to preserve monogamy as an institution essential to social stability has resulted in a variety of devices designed to confine the myriad aspects of the selfishnesses of sexual gratification as stringently as may be, and for long this need was thought to require insistence on the legal continuance of the union even though its reality had gone. Where a marriage has completely broken down, however, the opinion now in the ascendant is that the interests of society are best served by terminating a relationship that has ceased to be socially fruitful and is individually intolerable. Legislators have in the main refused to write this idea into the statute book, though the Matrimonial Causes Act 1959 of the Commonwealth, recognises it by section 28(m), which provides the ground of separation for five years, hedged by the restrictions of section 37 that are carefully and reasonably conceived but sometimes not easy to apply. The judges have been moving in this direction, however, at least since 1917, and it was a potent consideration long before. Broadly speaking, it is the judges, and not the legislatures, that have relaxed the rigidity of the matrimonial law. Dissolution has become a metaphysical concept, a withdrawal not from a place but from a state of things;[20] it may occur though the parties lived during the relevant period under the one roof, regarded by the world as husband and wife.[21] In a recriminatory jurisdiction where the presumption was once against granting a decree to a petitioning spouse himself (or herself) guilty of conduct that would entitle the court to refuse a decree, it is now the rule that a decree should go unless for sound judicial reasons the case is one where the unfettered discretion should be exercised adversely to the petitioner.[22] In *Blunt v. Blunt*[23] the House of Lords expressed the premise that was until then usually inarticulate when their Lordships stated explicitly, as a factor proper to be regarded in the exercise of discretion, 'the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down', and the High Court followed that view in *Henderson v. Henderson.*[24] Previously the attitude had been that a guilty spouse should show a reason for a favourable exercise of discretion because, presumably, social stability required the formal maintenance of such a union. During recent years, it has been in the ultimate appellate tribunal, here as in England, that the breakdown of the marriage as legitimate consideration has received unequivocal recognition. Judges who sit constantly or frequently in the

[20] *Pulford v. Pulford* [1923] P. 18; *Bain v. Bain* (1923) 33 C.L.R. 317, 324.

[21] *Drake v. Drake* (1896) 22 V.L.R. 391; *Potter v. Potter* (1954) 90 C.L.R. 391.

[22] *Henderson v. Henderson* (1948) 76 C.L.R. 529; *Bretherton v. Bretherton* [1960] V.R. 334, 338.

[23] [1943] A.C. 517.

[24] (1948) 76 C.L.R. 529.

jurisdiction apply it readily, but those who come there only occasionally sometimes fail to realise the perils of righteous indignation, and refuse decrees, even in uncontested proceedings, to petitioners who often have not the means to seek a better result by appeal. In the present climate of opinion, only in the most exceptional case is any useful purpose served by withholding a decree in an uncontested petition, though, of course, that must be done if the case is blatantly synthetic, or is presented so incompetently that no way of granting a decree within the law can be found. Such a realistic approach does not endanger the institution of marriage; indeed, it strengthens it, for in all but an infinitesimal proportion of uncontested petitions the marriage is beyond endurance or repair and its maintenance can do nothing to serve the interests of the community, of either spouse, or of the real sufferers, the children. The real buttress of the institution of monogamy is the public and private sentiment favouring it, which, though it may be ineffective to restrain couples caught up in the intemperance of irresistible passion or fecklessly unresponsive to normal social standards and responsibilities, is an enormously powerful influence upon the stable section of society. Beyond question monogamy, even with its irritating constraints and recurring resentments, and despite its failures, is for the generality of human beings the most successful device for providing a variety of human satisfactions, for promoting virtue and unselfishness, and for ensuring the proper nurture of children. It would be strengthened as an institution if we were to face the realities and to cease paying lip service to notions that were once useful in social settings controlled by vastly different circumstances but are now sterile and ineffective.

In truth, a matrimonial offence is a symptom of the failure of a union of a particular male with a particular female. Adultery, desertion, cruelty, drunkenness, insanity, criminality, and separation provide strong presumptive evidence that the *consortium vitae* has lost the elements that make it individually meaningful and satisfying and socially useful. If in any given case conduct now stigmatized as a matrimonial offence has that result, then, where it is legally possible, it is as a general rule desirable to dissolve the union, doing the best that can be done to protect the welfare of the ostensibly innocent wife and the genuinely innocent children. If there is to be a code of divorce, at least it should be rational, and this, the commonsense of divorce, has powerfully influenced judicial decisions since the First World War. That catastrophe fundamentally altered human living to an extent greater than even those who were mature before 1914 can now realise. It made inevitable the recognition of the social pressures and the changed outlook that had their beginnings in the Renaissance, and it deprived of efficacy many conventional assumptions that had long governed human living. As yet there is little sign of generally accepted substitutes for those assumptions, but how that is to be remedied is another and even more difficult subject. Because what is now the controlling concept is not frankly admitted, however, judges must exercise the utmost ingenuity to preserve the semblance of adherence to outmoded ideas and doctrines which have lost their social utility, and which, when

judicially invoked under the influence of righteous indignation, usually add nothing to human happiness or social stability.

Dr Biggs deals with matrimonial cruelty in its various aspects. Drunkenness; wilful communication of venereal disease; abuse, false accusations and 'nagging'; maltreatment of children; offences against third parties; abnormal marital relations; each receives a separate chapter. Provocation as an excuse for cruel conduct; the effect of estoppel; and cruelty as a discretionary bar, are discussed. By a judicious selection of authorities expressing the general principles underlying the concept which the essay examines, the author provides lawyers and social scientists with a clear statement of the law on each topic considered, and often as well with an indication of his opinion of the sufficiency or otherwise of the reasons advanced for it. In recent years the two most useful books for the inquirer who desires a genuine understanding of the law of divorce and its inadequacies and the way they came about and the reasons why they persist, are O. R. McGregor's *Divorce in England* (1957) and Dr Biggs' *The Concept of Matrimonial Cruelty*. Although the latter is professedly confined to an examination of the ways in which judges have dealt with cruelty in matrimonial law, its relevance is wider, for it describes perceptively an aspect of the halting process whereby judicial decisions have relaxed the rigidities of the law of divorce during the eleven decades, almost, since its administration was committed to the courts. Dr Biggs' book deserves the warmest commendation as the work of a learned and realistic scholar who has lucidly presented the results of his research and his cogitations in an excellently organized and penetrating study. Its importance and utility are not lessened by *Gollins*' case and *Williams*' case; indeed, they are enhanced, for those cases can be rightly understood only in the light of the examination he has made.

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