between the Commonwealth and the individual managers and servants who must of necessity be employed."[2]

Webb J. supports Fullagar J. and adds that "One naturally looks for a clear indication of an intention to do such an unusual thing as to employ a company as a mere servant of the Commonwealth, and I can find no such indication."[3]

Taylor J. measures the independence and balances it with such decisions as *Kirkland's*[4] case and concludes that the company had an independent existence and a wide discretion in functions which are not characteristically governmental.

This decision, it is submitted, is well in keeping with the authorities as they now stand and is a welcome reaffirmation by the High Court that where the Government interferes with the life of the general public by means of a public corporation it should be made liable under the general law existing between subject and subject.

An aspect of the case which would undoubtedly have received much more attention if the company had been held to be a crown agent would have been whether it was in fact bound by the State Prices Regulation. Williams and Taylor JJ. both discussed *Gulson's* case[5] and reaffirmed that the crown is one and indivisible. Of particular interest in this respect at least for Victoria, was the doubt expressed by Fullagar J. as to the correctness of the decision of Lowe J. in *Marks v. Forests Commission.*[6] He does not elaborate upon his view[7] and it is interesting to speculate whether he would fall into line with the criticism of the case which has been made so forcibly by Professor Friedmann.[8]

A. C. CASTLES

[2] *Ibid.* 243. [3] *Ibid.* 238.
[4] *Repatriation Commission v. Kirkland* (1923) 32 C.L.R. 1.
[5] *Minister of Works (W.A.) v. Gulson* (1944) 69 C.L.R. 338.
[6] [1936] V.L.R. 344. [7] [1953] A.L.R. 245.
[8] "Legal Status of Incorporated Public Authorities" 22 *A.L.J.* 7.

DIVORCE—COLLUSION AND ONUS OF PROOF

Gabric v. Gabric[1] and *Heffernan v. Heffernan*[2] are two recently reported decisions by the Supreme Court of Victoria involving a question of collusion. The former was a decision of Sholl J. and the latter was decided by the Full Court consisting of Lowe A.C.J. and Martin and Smith JJ. Their importance lies in the comprehensiveness of the definition of collusion laid down, a definition in which

[1] [1953] V.L.R. 282. [2] [1953] V.L.R. 321.

all four Judges concurred. Both cases, however, reveal a considerable divergence of opinion between the law in Victoria and certain other States.

In *Gabric's* case, the petitioner proceeded for divorce on the ground of the respondent's adultery. It was agreed between the parties that the petitioner would not claim custody of the child of the marriage nor damages from the co-respondent. The respondent agreed not to claim for maintenance of the child. She also agreed to supply her Adelaide address so that the necessary evidence of adultery might be obtained. The co-respondent, for his part, promised to deposit the sum of £300 out of which the costs of the suit and of obtaining evidence of adultery would be paid. On receipt of the £300, it was agreed that the petitioner should commence proceedings which all parties contemplated would be undefended. He instructed his solicitor that if the money was not forthcoming he was not to proceed. Sholl J. found that the respondent had been guilty of adultery with the co-respondent. On these facts, Sholl J. held that:

1. No onus lies upon the petitioner to disprove the existence of collusion. On the contrary, the Court must be affirmatively satisfied of collusion to dismiss the petition. It is not sufficient that a mere suspicion of same is entertained.
2. The agreement referred to was in fact collusive in that (a) the commencement of the suit was brought about by the co-respondent's assurance to deposit the sum of money and (b) the carrying on of the suit was governed by a common undertaking between the parties that the respondent and co-respondent should not defend – it being immaterial that they had no defence, There was also an agreed procedure as to the discovery of the adultery at the address supplied by the respondent.

Before proceeding to elaborate the reasons given by His Honour in support of these conclusions, it is convenient to refer to the second case where similar if not identical problems were raised.

In *Heffernan v. Heffernan,* the wife petitioner filed a petition seeking judicial separation from the respondent on the ground of adultery. An appearance was entered on behalf of the respondent and he later filed an answer denying adultery and further pleading in the alternative conduct by the petitioner conducive to his adultery (if any). Some time later, the petitioner sought leave to amend her petition and substitute a prayer that the marriage of the parties be dissolved. This application was supported by an affidavit which disclosed that the respondent had agreed to transfer to her his equity of redemption in the family home on condition

that she paid him £1,000, assumed liability of the mortgage on the property and sought a dissolution of the marriage.

The initial hearing came before Lowe A.C.J. who was not satisfied that the application for amendment was not collusive and referred the matter to the Full Court. He found as a fact that the respondent had been guilty of a repeated act of adultery. The Court unanimously held: (1) That there was no onus on the petitioner to disprove collusion and concurred with the view of Sholl J. in *Gabric v. Gabric* in this connection. Martin J. added, however, that if there is any evidence which raises a probability of collusion in the mind of the Court, the burden of adducing evidence to displace such a probability shifts to the petitioner. (2) That the agreement between the petitioner and respondent was collusive in that (a) the initiation and conduct of the suit by the petitioner was procured by a material inducement offered to her by the guilty spouse, and (b) because it was an implied term of the agreement that the respondent should make no defence. (3) The fact that the agreement related to a substitution of a petition for divorce for a prayer for judicial separation did not affect its collusive nature.

1. The preliminary problem of whether the onus lies on the petitioner of disproving collusion was considered with some detail in both cases. In *Heffernan v. Heffernan,* it was contended by the Solicitor-General (intervening) that because there is no party in undefended proceedings who has an interest in suggesting collusion, there was good reason why the onus should be on the petitioner. It was also argued that as the petitioner was required to include a denial of collusion in his affidavit this became part of his "case" within the meaning of s. 86 of the Marriage Act 1928 which had to be proved before the Court could pronounce a decree in his favour. Sholl J. adverted to this argument in *Gabric v. Gabric* and rejected it. The petitioner's "case" provided for in s. 86 was that made out in the petition as the statutory ground relied on and there was no reference to collusion in the petition. Ultimately, all judges found their reasons for holding that no onus lay on the petitioner in the construction of s. 82 of the Marriage Act which provides:

"In case the Court finds that a Petition for dissolution of marriage is presented or prosecuted in collusion . . . the Court shall dismiss the Petition." As Lowe A.C.J. put it in *Heffernan's* case, "I cannot think the words 'In any case, the Court finds collusion', can permit of an alternative, 'unless the Court find there is no collusion'." It was thus concluded that the Court must "find" collusion affirmatively and no onus lay upon the petitioner.

2. Having disposed of the initial difficulty as to the onus of proof, their Honours then proceeded to the main question of what conduct by the parties was necessary to constitute collusion. This problem of definition was made more difficult by the existence of two divergent trends in the authorities which were concisely stated by Smith J. in *Heffernan's* case.[3] "There are two main lines of authority. In one the view taken has been that proof of the agreement between the parties and the inducement to the petitioner establish collusion." This view is adopted by Sholl J. in *Gabric v. Gabric* and the Full Court in *Heffernan's* case. The agreement merely has to result in the initiation of the suit or provide in some way for its conduct to be tainted. (This shall hereinafter be referred to as the wide view.) Smith J. then states the second view which is "that collusion is not established unless the Court considers it probable in the particular case that the agreement has caused the giving of false evidence or the withholding of material facts or else collusion is not established where the Court is satisfied nothing of that kind has occurred."

(A). The wide view is based on the oft-quoted statement of the law in *Churchward v. Churchward,*[4] where Sir Francis Jeune said, "If the initiation of the suit can be procured and its conduct (especially if abstention from defence be a term) provided for by agreement, that constitutes collusion although no-one can put his finger on any fact falsely dealt with or withheld."

The first reason suggested for this principle is that if such an agreement exists and even if on the facts the petitioner makes out a good case it is nevertheless impossible for the Court to be sure that all the facts have been truly presented. At least it can have no assurance it is not being misled. The second reason advanced, especially favoured by Sholl J., is that the public as a whole is concerned with the dissolution of the matrimonial state. It is not a matter purely private to the parties. Accordingly there can be no divorce by consent, nor can there be any consensual arrangements as to the main substance of the suit. This broad principle of public policy is to be preferred, in Sholl J.'s view, to the supposed tendency of such agreements to restrict the Court's knowledge of the full facts.

The wide definition of collusion is supported by *Robb v. Robb*[5] and the Queensland decision of *French v. French,*[6] and possibly by dicta of Latham C.J. in the High Court decision of *Hanson v. Hanson,*[7] although Sholl J. conceded that the wide view may not in strictness have been necessary for the decision in this latter case.

[3] At 332. [4] [1895] P. at 30. [5] [1952] V.L.R. 255. [1952] A.L.R. 498.
[6] [1910] St. R. Qd. 190. [7] (1937) 58 C.L.R. 259.

(B). The second definition of collusion, which was rejected in *Gabric v. Gabric* and *Heffernan v. Heffernan,* is supported by a number of English cases and the two New South Wales decisions of *Doutrebande v. Doutrebande*[8] and *Cohen v. Cohen.*[9]

In *Scott v. Scott,*[10] collusion was defined as "an improper act done or improper refraining from doing an act for a dishonest purpose." This definition has been repudiated by text-book writers as too narrow and McCardie J. in *Laidler v. Laidler*[11] indicated it must be confined to the facts in the particular case. Although he doubted the definition stated in *Scott v. Scott,* McCardie J. did not seem to dispute the decision arrived at which could not have been reached if the wide view of collusion had been applied.

In *Doutrebande's* case, the Court looked at the effect the agreement had on the evidence before the Court. If the presentation of untrue facts was involved or was probable, the agreement was collusive. Substantially, the same definition was enunciated in *Cohen v. Cohen.* In neither case was the mere fact that the agreement resulted in the initiation of the suit or affected its conduct sufficient to render it collusive.

It is of some interest to examine the view expressed in these cases of the statement quoted from *Churchward v. Churchward.* In *Cohen v. Cohen,* Jordan C.J. after examining *Churchward's* case concludes: "The case is treated as a leading authority; but in my opinion it does not establish that the fact that the petitioner prosecutes the suit as a result of an agreement with the respondent or co-respondent of itself necessarily establishes collusion, so as to preclude the Court from examining the surrounding circumstances to see whether, in the light of them, the agreement is one which is really likely to have led to the falsification or suppression of evidence. His Lordship throughout emphasizes that in the case before him there was an agreement not to defend."

In *Brine v. Brine,*[13] which is also an authority for the narrow definition of collusion, Poole J. expressed doubt as to whether Sir Francis Jeune intended so wide a construction to be placed upon his words. If he did not have such an intention then Poole J. thought that on the weight of authority *Churchward v. Churchward* was incorrect. It was contrary to the opinion expressed in *Harris v. Harris*[14] and the direction to the jury in *Hunt v. Hunt.*[15] Sir Francis Jeune had himself expressed concurrence with the proposition that

[8] (1929) 29 S.R. (N.S.W.) 456.
[9] (1942) 43 S.R. (N.S.W.) 37.
[10] [1913] P. 52.
[11] (1920) 36 T.L.R. 510.
[12] At 52.
[13] [1924] S.A.S.R. 433.
[14] (1862) 31 L.J. P. M. & A. 160.

an agreement to come within the jurisdiction so that the suit might be brought would not constitute collusion.

Both *Gabric v. Gabric* and *Heffernan v. Heffernan* clearly reject the narrow definition laid down in the New South Wales decisions and for the time being they represent the law of Victoria. Ultimately both views are based on differing conceptions of public policy. If the first view is to be preferred, it is respectfully submitted its basis should be founded on the broader principle of public policy that no consensual arrangements should be made as to the substance of the suit. Even if this is so there may be competing social interests to be taken into account. The termination of illicit cohabitation has been held on the highest authority, although in a different context, to be a public policy factor in divorce. (See *Blunt v. Blunt.*[16])

3. In *Heffernan v. Heffernan* the Court also concluded that the change of a prayer for judicial separation to one for a divorce amounts to the "presentation or prosecution of the Petition" within the meaning of s. 82 of the Marriage Act. The Court conceded that if the same ground was relied on in the substituted petition there was little likelihood of falsity in that direction but in relation to possible defences and bars the dangers of falsification and suppression remained the same. *Cohen v. Cohen* and *Doutrebande v. Doutrebande* were thus again rejected. In both cases similar facts were in issue and it was held that such a change had no reference to the initiation of the proceedings since the petition had already been filed nor did it relate to the prosecution of the petition but solely to the form of relief sought. Martin J. commented that it was not merely a change in the form of relief but a request for a new cause. In one case the parties achieve a new status, in the other it remains unaltered.

Smith J. *(Heffernan v. Heffernan)* also held the agreement collusive because he found there was an implied term that the respondent should make no defence to the amended claim. This was especially so since the respondent had filed an answer alleging conduct conducing to the ground alleged. It was hardly likely the petitioner would have changed her petition if she thought the respondent would insist on his defence. In addition inactivity of the respondent's counsel at the hearing was adverted to as evidence of such implied term.

J. H. GREENWELL.

[15] (1877) 47 L.J. P. M. & A. 22. [16] [1943] A.C. 517.