

BOOK REVIEWS

Divorce, Society and the Law, edited by H. A. Finlay, Sydney, Butterworth & Co. (Aust.) Ltd., 1969, 127 pp. (\$3.25).

Divorce, Society and the Law contains the texts of six papers delivered at a symposium arranged by the Faculty of Law at Monash University. It includes a Foreword by Professor Waller, the Acting Dean of the Faculty and an Introduction by the editor, H. A. Finlay, Senior Lecturer in Law at Monash University.

As both Professor Waller and Mr. Finlay point out, family law is a subject to which considerable importance is attached at Monash; and the speakers at the symposium were chosen with wise discrimination, for they cover a wide field of expertise in subjects which bear closely on the topic under discussion. The speakers comprised a psychiatrist, a psychologist, who is a full-time marriage guidance officer, a barrister and solicitor, a Justice of the Supreme Court of Victoria, a professor of anthropology and sociology and a social worker. Perhaps a surprising omission was a minister of religion.

Despite the variety of interests represented, each speaker had expert knowledge of a subject which enabled him or her to examine the problems associated with marriage breakdown from a specialized angle. It was inevitable that there was some overlapping but it is significant that most of this overlapping covered the speakers' opinions of the existing divorce laws in Australia. Most of them considered that the Commonwealth Matrimonial Causes Act brought a great improvement in divorce law but that it has not gone nearly far enough.

The question whether divorce should be available only on proof of an arbitrary matrimonial offence or whether proof of irretrievable breakdown of marriage should be all that is required has been keenly debated in recent years. The Commonwealth Act has effected a compromise by including what may be regarded as the traditional matrimonial offences and adding, as grounds for divorce, a period of five years' separation without proof of fault on either side, insanity in certain circumstances and circumstances which raise a presumption of death. Most of the speakers considered that this did not go far enough and called for the abolition of the concept of a matrimonial offence, replacing this by proof of irretrievable breakdown of the marriage. Many favoured the abandonment of the adversary system of litigation in the divorce court, substituting a family court, manned by experts in the appropriate fields who would hold an inquiry rather than a piece of contested litigation. This suggestion has also been the subject of considerable discussion in New South Wales and was the subject of a symposium recently organized by the Sydney University Law Graduates Association.

The psychiatrist, Dr. Geoffrey Goding, discussed the psychology of marriage breakdown. He prepared an interesting table based on an analysis of 641 marriages which had come before the Marriage Guidance Council of Victoria. In this table he listed 32 problems which had arisen in these marriages, showing the rate per 100 marriages in which each problem arose and showing whether those problems had been presented most by either the husband or by the wife. At the top of the list was "lack of communication". At the

bottom was "demanding too much money". Dr. Goding is far too shrewd an observer to suggest that the problems listed were the fundamental cause of the marital disharmony. As in most cases of matrimonial trouble it is usually impossible to point to a single factor as the sole basis of the problem. Often, the observed factor is a symptom of the trouble rather than the cause. Many factors interact with others and what appears to be the cause of the breakdown is itself caused by another factor. But Dr. Goding's analysis is a valuable starting point in the study of the fundamental causes of disharmony. In his paper he traces the development of character traits which, from earliest infancy, can affect the likelihood of a person being able to cope with the problems of married life. He considers the circumstances influencing the choice of a mate and the manner in which persons of differing personalities react to various situations which commonly arise in marriage. In common with most of the speakers at the symposium, he emphasises the need for further research in Australia and makes the interesting observation that knowledge of the failing marriage would gain considerably from a closer study of satisfactory marriages.

Mr. L. V. Harvey spoke on marriage counselling. As a trained psychologist and an officer of the Commonwealth Attorney-General's Department whose duty it is to co-ordinate the activities of approved marriage guidance organizations, he is well qualified to speak on the subject. An important point which he makes in his paper is the suggestion that divorce itself is one of the least of the evils which arise from marital disorganization. He says, further, that available evidence suggests that, in general, second marriages are as stable and enduring as first marriages. He describes the difficulties involved in marriage counselling and makes it clear that this is a task for the trained expert, for the unskilled in this art, by blaming, criticizing or making people feel guilty about their marriage problems may eventually widen the very breach they set out to close. He predicts that the need for marriage counselling services will increase and gives compelling reasons for this prediction.

Mr. T. A. Pearce spoke from his experience as a barrister and solicitor of the Supreme Court of Victoria. He recognizes the necessity for a tribunal which can dissolve a marriage and agrees that the Commonwealth Act has gone some distance towards meeting the changing views of society on divorce. But he raises cogent criticism of its shortcomings and defects. Its reconciliation procedures he regards as a futile waste of time, pointing out that attempts at conciliation, to have any reasonable chance of success, must be taken at an earlier stage than that specified in the Act. His criticisms of the provisions relating to discretion statements and to the prohibition in certain cases, against the institution of proceedings within three years of the marriage without leave of the court are convincing and well-founded. He, too, is in favour of dissolution on the ground that the marriage is broken beyond repair and he favours the setting up of family courts to which reference has already been made. A matter of the utmost importance to which he refers is the dilemma in which a husband, who wishes to defend his wife's charges, is placed. On the one hand, he faces the risk of a false charge being established with the serious consequences for him which may follow. On the other hand, should he defend the case, he runs the risk of being mulct in crippling costs. Mr. Pearce points out the problem confronting a solicitor advising his client in these circumstances.

The next paper was given by another lawyer with great experience in the field of divorce — the Honourable Mr. Justice Barber of the Supreme Court of Victoria. His Honour traces the changing pattern of society over the years and the attempts of the legislature and of the judiciary to keep up with these changes. He welcomes the improvements introduced by the

Commonwealth Act, particularly in its setting up of one divorce law for the whole of Australia, its addition of new grounds for divorce and simplification of others, its concern for the welfare of the children of divorced parents and its freeing of the law from some of the unrealistic rules inherited from the ecclesiastical courts. But he sees the need for radical reform rather than a mere tinkering with a system which he regards as hopelessly inadequate for modern conditions. He would like to see the introduction of irretrievable breakdown of a marriage as an additional rather than as the sole ground for divorce. It is interesting to note that the two lawyers who read papers, both judge and counsel, are in agreement as to the inadequacy of the existing reconciliation provisions and as to the need for a specialized family court. Mr. Justice Barber's criticism of the terms of the English Bill proposing radical reform of the English divorce law should be studied by those who may have a hand in the drafting of a reformed Australian law.

Professor M. G. Marwick approaches the matter from a different angle, looking at the problems involved through his deep knowledge of anthropology and sociology. His theme is that, because of the sociological pattern of life in Australia, the divorce rate in this country might reasonably be expected to be higher than it is. He substantiates this argument by analysing the external forces and the internal forces which, in one set of circumstances tend to disrupt a marriage and, in another, tend to produce marital stability and, by comparing conditions in Australia with those prevailing amongst other people whose conditions he has studied, he illustrates the disruptive nature of conditions which prevail in this country. The dangers which he sees in the choice of a mate based on romantic love, a criterion which is calculated to mask incompatibility and lead to an extravagant ideal of married life with its almost inevitable consequence of bitter disillusionment, are recognized by trained marriage guidance counsellors and make a strong case for pre-marital counselling.

Mrs. Concetta Benn approaches the subject from yet another angle. Her approach might fairly be described as the strictly human approach. Whilst recognizing the necessity of basing studies of social problems on available statistics, she gives a timely warning as to the errors into which people may fall by so doing. She emphasises the wide area affected by broken marriages which can have effect, not only on the two parties to the marriage, but on their children and on relatives and friends until, as the circle of disturbance widens, society itself is affected. Referring to Professor Marwick's comments on marriage based on notions of romantic love, Mrs. Benn points to another notion popularised by the mass media — the ideal family — and warns of the dangers inherent in the acceptance of a glamorized picture of this concept as a norm against which a family should be measured. Changed economic and industrial conditions have not led to the family having fewer functions, she says, but different functions in which the emphasis is upon the fulfilment of emotional needs. Relationships within the family thereby tend to become more intense but disintegration of the family is not necessarily more serious because of this, for compensating factors must be taken into account. Mrs. Benn, too, criticises a divorce law based on the concept of a matrimonial offence, pointing out that, as the number of permanently separated and deserted people far outweighs the number of divorced people (an indirect result of the nature of the Australian divorce law) society as a whole, and great numbers of individuals, suffer by reason of *de facto* marriages and unsatisfactory situations into which many people are forced. She describes the unhappy effects which the breakdown of their parents' marriage has upon the children. She refers to the high correlation between the "institutionalization" of children and marriage breakdown of their parents but states that available evidence

does not yet substantiate the common generalization that broken homes are a cause of juvenile delinquency. She calls for a drastic change in the attitude of society to both marriage and divorce and points to the need for a far greater community effort than exists at present for educational programmes on family living and for the extension of community resources to remove the stress which exists in so many marriages. She sums up the philosophy of her paper by stating that man must genuinely aim to become his brother's keeper, and that many human attitudes to relationships must be changed before this happy state is reached.

This brief summary of the papers presented at Monash falls far short of doing justice to any, but several important conclusions emerge. It is most significant that a group of well informed people, all expert in different fields touching the subject under discussion, finds much to criticize in existing divorce laws. A case for drastic reform has been made out. The need for a great deal of careful research has been made clear. The papers delivered at the symposium should provide a valuable basis for that research.

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Matrimonial Causes and Marriage: Law and Practice (5 ed.), by the Hon. P. E. Joske, Sydney, Butterworth & Co. (Aust.) Ltd., 1969, 951 pp. (\$22.50).

This is obviously intended primarily as a practitioner's book. It is crammed full with useful information but it does not purport to do more than summarise the effect of the maximum number of statutory provisions and and judicial decisions in as concise a manner as possible. Very rarely is there an attempt to discuss decided cases. Indeed cases are not usually mentioned in the text; they are relegated to the footnotes. What appears in the text is a dogmatic statement of what the author considers the law to be on the basis of the statutes and cases listed in the footnotes. One of the few exceptions is the valiant attempt at pages 334 and 335 to lay the long-departed ghost of *Fitzgerald v. Fitzgerald*.¹ It is a pity that the learned author did not apply the same energy in the discussion of more recent decisions.

The effect of this approach is a dogmatism which can lead to inconsistency because the author in summarising one case often does not appreciate that it conflicts with his view of a case discussed earlier. Thus, to take an example, at page 349 the learned author states the well-known proposition in relation to desertion that the adoption by a man of a criminal course of conduct which leads to his imprisonment does not of itself afford evidence of intention to desert. On the same page he also states:

A husband, having killed a man whom he had accused of adultery with his wife, was convicted of manslaughter and served four years' imprisonment; it was held that he was guilty of desertion of his wife which was complete at the end of three years from his arrest and removal from the matrimonial home. The basis of this decision was that there was a separation in fact which resulted from premeditated and wrongful conduct on the part of the husband and that, as such separation was the natural and probable result of such conduct, the intention to bring it about should be imputed to him and he must have contemplated that in all probability it would continue for more than the statutory period of desertion.

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¹ (1869) L.R. 1 P. & D. 694.